2005-NMSC-001
106 P.3d 563

STATE of New Mexico, Plaintiff-Respondent,

v.

Rodrigo DOMINGUEZ, Defendant-Petitioner.

No. 28,119.

Supreme Court of New Mexico.

Jan. 27, 2005.

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OPINION

SERNA, Justice.

{1} Following a jury trial, Defendant Rodrigo Dominguez was convicted of voluntary manslaughter, contrary to NMSA 1978, § 30–2–3(A) (1994), aggravated battery, contrary to NMSA 1978, § 30–3–5 (1969), two counts of shooting at or from a motor vehicle, contrary to NMSA 1978, § 30–3–8(B) (1993), and conspiracy to commit tampering with evidence, contrary to NMSA 1978, §§ 30–22–5 (1963, prior to 2003 amendment), –28–2 (1979).[1]

{2} The Court of Appeals affirmed Defendant's convictions in a unanimous memorandum opinion. This Court granted Defendant's petition for writ of certiorari to the Court of Appeals on four issues: (1) whether his convictions of voluntary manslaughter and shooting at or from a motor vehicle violate double jeopardy; (2) whether his convictions of aggravated battery and shooting at or from a motor vehicle violate double jeopardy; (3) whether, in the alternative to the first two arguments, the two convictions of shooting at or from a motor vehicle violate double jeopardy; and (4) whether the Court of Appeals erred in refusing to consider Defendant's argument of an erroneous jury instruction. Defendant has waived the fourth issue raised in his petition. In his brief in chief, Defendant raises a new issue not presented in his petition to this Court or in his arguments to the Court of Appeals: whether giving jury instructions on two of the three theories of first degree murder contained in NMSA 1978, § 30–2–1(A) (1994), without phrasing them in the alternative, constitutes overcharging. *See State v. Reyes*, 2002–NMSC–024, ¶¶ 10–17, 132 N.M. 576, 52 P.3d 948 (rejecting a claim that "convictions under [two] theories of first degree murder resulted from ambiguous jury instructions because the jury was not told that it could not convict

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

1. We note that an apparent oversight is contained in the judgment listing one of Defendant's convictions as tampering with evidence rather than conspiracy to commit tampering with evidence. The signed verdict forms and direct polling of the jurors by the trial judge indicate that the jury found Defendant not guilty of tampering with evidence and guilty of conspiracy to commit tampering with evidence. The district court shall correct this error on remand. *See State v. Soliz*, 79 N.M. 263, 267, 442 P.2d 575, 579 (1968) ("The error in the judgment obviously is a result of inadvertence and is subject to amendment to conform with the verdict."); Rule 5–113(B) NMRA 2005 (discussing the correction of clerical errors and errors due to oversight or omission).

[the defendant] for both deliberate murder and felony murder"); *see also State v. Salazar,* 1997-NMSC-044, ¶¶ 41-42, 123 N.M. 778, 945 P.2d 996 (stating that first degree murder is a single crime, whether supported by a single theory or by multiple theories, and upholding a general verdict of first degree murder under two alternative theories on the basis that there is "no requirement that the jurors . . . unanimously agree on one of the alternative theories presented" and "[u]nanimity was only required with regard to the overall charge of first degree murder").

{3} We reject Defendant's first two arguments because, as this Court has squarely held, the Legislature intended to provide for multiple punishments for these crimes. We also reject Defendant's third point of error because the conduct supporting the two convictions of shooting at or from a vehicle is not unitary. We do not consider the issue raised for the first time in Defendant's brief in chief. *See* Rule 12-502(C)(2) NMRA 2005 ("[O]nly the questions set forth in the petition will be considered by the [Supreme] Court."). We affirm Defendant's convictions.

I. Facts

{4} Defendant's convictions stemmed from an incident in which Defendant and several of his friends went to a convenience store late one night to fight another group of individuals. Each member of Defendant's group was armed with a gun that was supplied by Defendant, while none of the members of the other group had a gun. Both groups arrived in cars, and Defendant was the driver in his group's car. After one member of the other group exited their vehicle with a baseball bat, Defendant's group opened fire. Charles McClaugherty was in Defendant's group. *See generally State v. McClaugherty,* 2003-NMSC-006, 133 N.M. 459, 64 P.3d 486. There was evidence at Defendant's trial that McClaugherty exited the vehicle Defendant was driving, fired numerous times into the other car, and killed the driver, Ricky Solisz. Another shooter hit and wounded the man who exited the other group's car, Vince Martinez. Three witnesses, one from Solisz's group and two from Defendant's group who were in a different car than the one Defendant was driving, testified to seeing numerous flashes of gunfire from the driver's side of Defendant's car, which would have been where Defendant was sitting. Experts linked two separate Glock .40 handguns to the shootings, and the evidence was consistent with each victim being shot with a different Glock .40 handgun. A member of Defendant's group testified that when Defendant and McClaugherty returned to McClaugherty's apartment after the shooting each was carrying a handgun consistent with a Glock .40. This witness testified that Defendant and McClaugherty bragged about the shooting to their friends immediately after the incident.

II. Voluntary Manslaughter and Shooting at or from a Motor Vehicle

{5} Defendant contends that his convictions of voluntary manslaughter and shooting at or from a motor vehicle in relation to the death of Solisz violates the protection against double jeopardy. The Double Jeopardy Clause in the United States Constitution, applicable in New Mexico through the Fourteenth Amendment, provides that a defendant shall not "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This provision protects against multiple prosecutions for the same offense and against multiple punishments for the same offense arising out of a single prosecution. However, for multiple punishments such as Defendant's convictions of voluntary manslaughter and shooting at a motor vehicle, the Double Jeopardy Clause only prevents a court from imposing greater punishment than the Legislature intended. *Swafford v. State,* 112 N.M. 3, 7, 810 P.2d 1223, 1227 (1991). "[T]he sole limitation on multiple punishments is legislative intent." *Id.* at 13, 810 P.2d at 1233. We have adopted a two-part test for determining whether multiple punishments violate the constitutional protection against double jeopardy. *Id.* We ask, first, "whether the conduct underlying the offense is unitary" and, second, "whether the [L]egislature intended to create separately punishable offenses." *Id.*

[redacted] {6} In this case, the parties do not dispute that the convictions of voluntary manslaughter and shooting at or from a motor vehicle are based on the unitary conduct of Defendant aiding and abetting McClaugherty's shooting of Solisz. Our analysis therefore focuses on legislative intent. "If the [L]egislature expressly provides for multiple punishments, the double jeopardy inquiry must cease. Absent a clear expression of legislative intent, a court first must apply the [test established in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932)] to the elements of each statute." *Swafford*, 112 N.M. at 14, 810 P.2d at 1234 (citation omitted). This elements inquiry asks "whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304, 52 S.Ct. 180.

> The rationale underlying the *Blockburger* test is that if each statute requires an element of proof not required by the other, it may be inferred that the [L]egislature intended to authorize separate application of each statute. Conversely, if proving violation of one statute always proves a violation of another (one statute is a lesser included offense of another, *i.e.*, it shares all of its elements with another), then it would appear the [L]egislature was creating alternative bases for prosecution, but only a single offense.

Swafford, 112 N.M. at 9, 810 P.2d at 1229. Based on this rationale, "[i]f that test establishes that one statute is subsumed within the other, the inquiry is over and the statutes are the same for double jeopardy purposes—punishment cannot be had for both." *Id.* at 14, 810 P.2d at 1234. "Conversely, if the elements of the statutes are not subsumed one within the other, then the *Blockburger* test raises only a presumption that the statutes punish distinct offenses. That presumption, however, is not conclusive and it may be overcome by other indicia of legislative intent." *Id.* These other indicia include "the social evils sought to be addressed by each offense" and "the language, structure, and legislative history" of the two provisions. *Id.* at 9, 810 P.2d at 1229.

{7} We have previously applied this double jeopardy analysis in a context closely resembling the present case. In *State v. Gonzales*, 113 N.M. 221, 223–25, 824 P.2d 1023, 1025–27 (1992), the defendant was convicted of first degree murder and shooting into an occupied vehicle based on the same conduct and argued that these convictions violated double jeopardy. We noted that "[t]he question of whether convictions under several statutes constitute the same offense for double jeopardy purposes is a matter of determining the legislative intent." *Id.* at 224, 824 P.2d at 1026. Applying *Blockburger*, we concluded that each crime contained an element that the other did not, thereby raising a presumption that the Legislature intended to create separately punishable offenses. *Id.* at 225, 824 P.2d at 1027.

> Clearly, each statute in question in this appeal requires proof of an element that the other statute does not require. The murder statute requires proof of the unlawful killing of a human being which need not be accomplished by shooting at an occupied motor vehicle. The shooting at an occupied motor vehicle statute requires proof of discharging a firearm at an occupied vehicle but does not require the killing of a human being. Thus, the greater offense—murder—does not subsume the lesser offense—shooting into an occupied vehicle—because each requires proof of an element absent in the other.

Id. at 224–25, 824 P.2d at 1026–27 (citations omitted). We further concluded that "the statutes protect different social interests," with the murder statute directed at preventing unlawful killings and the shooting at a vehicle statute directed at protecting the public from the reckless shooting into a vehicle and possible resulting property damage and bodily injury. *Id.* at 225, 824 P.2d at 1027. "In addition, while the statutes in question here may be violated together, they are not necessarily violated together." *Id.* "Therefore, we find that the [L]egislature intended for separate punishment for unitary conduct that violated both statutes," and thus, there was no double jeopardy violation. *Id.*

{8} *Gonzales* is controlling precedent and is directly on point. As in *Gonzales,* voluntary manslaughter does not require the element of discharging a firearm at or from a motor vehicle, but this is a required element for the crime of shooting at or from a motor vehicle. In addition, voluntary manslaughter contains the same element as the first degree murder conviction at issue in *Gonzales* that distinguishes these crimes from the crime of shooting at or from a vehicle: the element of "the unlawful killing of a human being." Section 30–2–3. Defendant argues that this element is not truly distinct for voluntary manslaughter because the element of great bodily harm for shooting at a motor vehicle may include death. *See State v. Varela,* 1999–NMSC–045, ¶¶ 10–14, 128 N.M. 454, 993 P.2d 1280 (concluding that the element of great bodily harm for the crime of shooting at a dwelling or occupied building under Section 30–3–8(A) may include death). We reject this argument for two reasons.

{9} First, our analysis in *Gonzales* implicitly holds that the element of great bodily harm for shooting at a motor vehicle is distinct from the element of an unlawful killing for first degree murder. In *Gonzales,* the defendant was convicted of both first degree murder and shooting at a motor vehicle in relation to the death of a single victim. 113 N.M. at 223, 824 P.2d at 1025. At that time, the shooting at a motor vehicle statute provided that the crime was a fourth degree felony if it did not result in great bodily harm and a third degree felony if it did result in great bodily harm. 1987 N.M. Laws, ch. 213, § 1. We take judicial notice of the record in *Gonzales* and note that the jury instruction for the crime of shooting at a motor vehicle in that case included the element of the victim suffering great bodily harm as a result of the shooting at a motor vehicle. *See Miller v. Smith,* 59 N.M. 235, 241, 282 P.2d 715, 719 (1955) ("This Court may take judicial notice under proper circumstances of other cases which are, or have been, on its docket. . . ."); *State v. Turner,* 81 N.M. 571, 576, 469 P.2d 720, 725 (Ct.App.1970) (similar). In addition, in *Varela,* our interpretation of Section 30–3–8 relied on NMSA 1978, § 30–1–12(A) (1963), which defines great bodily harm as "an injury to the person which creates a high probability of death; or which causes serious disfigurement; or which results in permanent or protracted loss or impairment of the function of any member or organ of the body." *Varela,* 1999–NMSC–045, ¶ 12, 128 N.M. 454, 993 P.2d 1280. This same statutory definition of great bodily harm was in existence at the time we decided *Gonzales.* Under these circumstances, we believe that our opinion in *Gonzales* implicitly assumes, as we later explicitly held in *Varela,* that evidence of death could support a jury finding on the element of great bodily harm. *See Gonzales,* 113 N.M. at 225, 824 P.2d at 1027 ("[D]eath may occur as a result of shooting into an occupied vehicle . . . ."); *see also Varela,* 1999–NMSC–045, ¶ 14, 128 N.M. 454, 993 P.2d 1280. We nevertheless held in *Gonzales* that the element of an unlawful killing for first degree murder was distinct from the elements of shooting at a motor vehicle, including the element of great bodily harm. Thus, contrary to Defendant's argument, *Varela* does not alter our holding in *Gonzales,* and there has been no change in the elements of the crime of shooting at a motor vehicle to distinguish our analysis in *Gonzales* from the *Blockburger* analysis in the present case.[2]

{10} Second, Defendant's argument that death and great bodily harm are identical elements for purposes of a *Blockburger* test ignores the plain language of the Legislature. The shooting at or from a motor vehicle statute does not require proof of a death or include death as an alternative to great bodily harm. Section 30–3–8(B). Had Solisz survived his wounds, Defendant would still

2. At oral argument, Defendant relied on two cases from the United States Supreme Court, *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Blakely v. Washington,* 542 U.S. 296, ——, 124 S.Ct. 2531, 2536, 159 L.Ed.2d 403 (2004), as establishing a change in the law since we decided *Gonzales* that would require the fact of great bodily harm to be submitted to the jury. However, even prior to these cases, as demonstrated by the jury instructions actually used in *Gonzales,* New Mexico courts treated great bodily harm as an element of shooting at a motor vehicle to be decided by the jury when this alternative of the crime is charged. These federal cases therefore do not modify our elements analysis in *Gonzales.*

have been liable for the same crime of shooting at a motor vehicle resulting in great bodily harm, Section 30–3–8(B), and would still have received the same elements instruction for this crime. *See* UJI 14–344 NMRA 2005. However, in the same factual scenario, Defendant could not have been convicted of voluntary manslaughter because the element of an unlawful killing would be absent. As a result, proving the violation of shooting at a motor vehicle resulting in great bodily harm does not always prove the violation of voluntary manslaughter such that one crime subsumes the other. *See Swafford*, 112 N.M. at 9, 810 P.2d at 1229 ("[I]f each statute requires an element of proof not required by the other, it may be inferred that the [L]egislature intended to authorize separate application of each statute."). These crimes have distinct elements under the *Blockburger* test.

{11} We recognize that we stated in *Varela* that "the Legislature *equated* 'causing death' and 'great bodily harm.'" 1999–NMSC–045, ¶ 14, 128 N.M. 454, 993 P.2d 1280 (emphasis added). It would perhaps have been clearer if we had stated that a rational jury could find the element of great bodily harm beyond a reasonable doubt based on evidence of death. "An injury that causes death, surely often, if not always, causes a high probability of death." *Id.* Factually, evidence that an injury has actually caused death may be used to demonstrate the element of great bodily harm because, consistent with Section 30–1–12(A), it establishes an injury that creates a high probability of death. *See Varela*, 1999–NMSC–045, ¶ 13, 128 N.M. 454, 993 P.2d 1280. However, this evidentiary use of the fact of death does not mean that death, as a statutory term, is interchangeable with great bodily harm for purposes of the Criminal Code.

{12} Comparing the voluntary manslaughter statute with the shooting at or from a motor vehicle statute and the statutory definition of great bodily harm in Section 30–1–12(A), it is clear that the Legislature does not "equate" death with great bodily harm. Otherwise, great bodily harm of any form as defined in Section 30–1–12(A) would be sufficient to prove an unlawful killing within the meaning of the voluntary manslaughter statute, which would be clearly contrary to the Legislature's intent and would be an absurd result. Voluntary manslaughter, like first and second degree murder, requires a death; the second degree felony of shooting at or from a motor vehicle resulting in great bodily harm does not. Thus, while death may be one evidentiary means of proving great bodily harm under Section 30–3–8(B), death is not a statutory element of the crime. For a *Blockburger* same elements test, this distinction is critical. "[T]he proper inquiry focuses upon the elements of the statutes in question—the evidence and proof offered at trial are immaterial." *Swafford*, 112 N.M. at 8, 810 P.2d at 1228; *accord Illinois v. Vitale*, 447 U.S. 410, 416, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980) ("[T]he *Blockburger* test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial."); *Iannelli v. United States*, 420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975) ("[A]pplication of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.").

{13} Because the statutory definition of shooting at or from a motor vehicle resulting in great bodily harm in Section 30–3–8(B) does not include death as an element of the crime, the fact that the State proved the element of great bodily harm with evidence of Solisz's death does not require us to construe Section 30–3–8(B) as a homicide statute. Consistent with the statutory elements, and similar to the jury instructions in *Gonzales*, the jury instructions in this case listed the killing of Solisz as an element of voluntary manslaughter but listed only great bodily harm to Solisz as an element of shooting at or from a motor vehicle. *Compare* UJI 14–220 NMRA 2005 (listing the element of killing the victim for voluntary manslaughter), *with* UJI 14–344 (listing the element of causing great bodily harm for shooting at or from a motor vehicle). The jury also received an instruction defining great bodily harm that mirrors the statutory definition of the term in Section 30–1–12(A). *See* UJI 14–131

NMRA 2005. Therefore, the element of an unlawful killing for voluntary manslaughter is distinct from the elements of the crime of shooting at or from a motor vehicle.

{14} Moreover, voluntary manslaughter has an additional element that differs from the elements of shooting at or from a motor vehicle. The mens rea required for voluntary manslaughter is the same as the mens rea required for second degree murder: objective knowledge that the defendant's acts create a strong probability of death or great bodily harm. NMSA 1978, § 30-2-1(B) (1994) (defining second degree murder); *State v. Brown,* 1996-NMSC-073, ¶¶ 16-17, 122 N.M. 724, 931 P.2d 69 (stating that objective knowledge, rather than subjective knowledge, is required for second degree murder); UJI 14-220 (listing the elements for voluntary manslaughter). By contrast, shooting at or from a motor vehicle requires a reckless disregard, Section 30-3-8(B), which is defined as knowledge that the defendant's "conduct created a substantial and foreseeable risk, that [the defendant] disregarded that risk and that [the defendant] was wholly indifferent to the consequences of [the] conduct and to the welfare and safety of others." UJI 14-1704 NMRA 2005, *incorporated by reference in* UJI 14-344 use note 3. The mens rea for shooting at or from a motor vehicle, although requiring knowledge of a substantial risk and indifference to the safety of others, does not require knowledge of a strong probability of death or great bodily harm. Thus, as the Court of Appeals recently held in affirming separate convictions for second degree murder and shooting at or from a motor vehicle, the mens rea element for voluntary manslaughter is distinct from the elements of shooting at or from a motor vehicle. *State v. Mireles,* 2004-NMCA-100, ¶ 29, 136 N.M. 337, 98 P.3d 727, *cert. denied,* 2004-NMCERT-008, 136 N.M. 491, 100 P.3d 197; *cf. Varela,* 1999-NMSC-045, ¶¶ 16-18, 128 N.M. 454, 993 P.2d 1280 (concluding, based on differing mens rea requirements, that the crime of shooting at a dwelling is not a lesser included offense of second degree murder for purposes of satisfying the strict elements test required for felonies to serve as a predicate for felony murder). Because voluntary manslaughter contains two elements that are not required for shooting at or from a motor vehicle and Section 30-3-8 requires the element of discharging a firearm at or from a motor vehicle, which is not required for voluntary manslaughter, we conclude that voluntary manslaughter and shooting at or from a motor vehicle resulting in great bodily harm have distinct elements under a *Blockburger* test, and there is a presumption that the Legislature intended to punish these crimes separately.

{15} As we concluded in *Gonzales,* other indicia of legislative intent support the presumption of permissible multiple punishments. Most notably, the voluntary manslaughter statute and the shooting at or from a motor vehicle statute serve different legislative purposes and protect against different social evils. *See Gonzales,* 113 N.M. at 225, 824 P.2d at 1027 (describing the different purposes served by the murder statute and the shooting at a motor vehicle statute). Also, "while the statutes in question here may be violated together, they are not necessarily violated together." *Id.; see State v. Sosa,* 1997-NMSC-032, ¶ 36, 123 N.M. 564, 943 P.2d 1017 ("The fact that each statute may be violated independent of the other will also lend support to the imposition of sentences for each offense.").

{16} Despite these persuasive indicia of legislative intent, Defendant contends that the presumption of multiple punishments is rebutted by our prior statement that "one death should result in only one homicide conviction." *State v. Santillanes,* 2001-NMSC-018, ¶ 5, 130 N.M. 464, 27 P.3d 456 (quotation marks and quoted authority omitted). We disagree. We applied this principle in *Santillanes* because, for the applicable alternatives of the statutes at issue, vehicular homicide and child abuse resulting in death, it was "the death of another that the Legislature intended to punish, not the manner in which it was accomplished." *Id.* (quotation marks and quoted authority omitted); *accord State v. House,* 2001-NMCA-011, ¶ 20, 130 N.M. 418, 25 P.3d 257 ("[T]he subject of punishment of vehicular homicide is the killing of another, not the unlawful operation of a motor vehicle."). This common legislative purpose between the two homicide statutes

rebutted the presumption in favor of multiple punishments that had been created by an application of the *Blockburger* test. *Santillanes,* 2001–NMSC–018, ¶ 23. Contrary to this analysis, however, the statutes at issue in the present case do not contain this identity of purpose. As we have just explained, the crime of shooting at or from a motor vehicle has a different purpose than punishing the death of another; it "is more narrowly designed to protect the public from reckless shooting into a vehicle and the possible property damage and bodily injury that may result." *Gonzales,* 113 N.M. at 225, 824 P.2d at 1027; *accord State v. Highfield,* 113 N.M. 606, 608, 830 P.2d 158, 160 (Ct.App.1992) (rejecting the argument that Section 30–3–8 is "addressed to bodily integrity" and stating that, "[i]n enacting Section 30–3–8, we believe the [L]egislature was concerned with conduct typically designed to terrorize or intimidate"). "While death may occur as a result of shooting into an occupied vehicle, we must strictly construe the social purpose protected by each statute." *Gonzales,* 113 N.M. at 225, 824 P.2d at 1027; *accord Swafford,* 112 N.M. at 14–15, 810 P.2d at 1234–35 ("[C]are must be taken in describing the evils sought to be prevented—social evils can be elusive and subject to diverse interpretation. Accordingly, the social evils proscribed by different statutes must be construed narrowly . . . .") (footnote omitted). As a result, the crime of shooting at or from a motor vehicle cannot be construed as a homicide crime within the meaning of *Santillanes.* Voluntary manslaughter is the only homicide conviction Defendant received for Solisz's death, and thus, the double jeopardy principle from *Santillanes* is inapposite. Applying the one death/one homicide conviction rule from *Santillanes* to the conviction of shooting at or from a motor vehicle would frustrate the Legislature's intent to address a different social evil than homicide. We thus apply our holding in *Gonzales* and conclude that the Legislature intended to create separately punishable offenses in enacting these two statutes.

III. Aggravated Battery and Shooting at or from a Motor Vehicle

{17} As with the convictions related to the death of Solisz, Defendant argues that his convictions of both aggravated battery and shooting at or from a motor vehicle for the unitary conduct of shooting Martinez violates double jeopardy. For reasons similar to those expressed above, we reject this argument.

{18} Our analysis of this claim again focuses on legislative intent. Applying the *Blockburger* same elements test, we agree with Defendant's concession that each of these crimes contains an element that the other does not. Aggravated battery requires an intent to injure, which is not an element of shooting at or from a motor vehicle. The crime of shooting at or from a motor vehicle requires the discharge of a firearm at or from a motor vehicle, which is not an element of aggravated battery. Thus, there is a presumption that the Legislature intended to create separately punishable offenses.

{19} Other indicia of legislative intent support this presumption. These two statutes have different social aims. "The aggravated battery statute is directed at preserving the integrity of a person's body against serious injury." *State v. Vallejos,* 2000–NMCA–075, ¶ 18, 129 N.M. 424, 9 P.3d 668. As noted above, the purpose of the shooting at or from a motor vehicle statute is not principally to protect bodily integrity, *Highfield,* 113 N.M. at 608, 830 P.2d at 160; it has a narrower goal of protecting the public from reckless shooting at or from a vehicle. *Gonzales,* 113 N.M. at 225, 824 P.2d at 1027. This crime reflects the Legislature's judgment that traditional homicide and assault and battery crimes are inadequate to respond to the particular dangers involved with motor vehicle shootings. For shootings from a motor vehicle, including drive-by shootings, the Legislature was concerned with the heightened risk of harm to a larger number of people from firing out of a moving object and the ease of escape from use of a vehicle during the commission of the crime. For shooting at a vehicle, the Legislature directed its attention at the substantial dangers associated with firing on an enclosed space that is likely to be occupied by people. Addressing an analogous question, we concluded in *Sosa* that the crimes of aggravated

assault with a deadly weapon and shooting into a vehicle proscribe different social evils. 1997–NMSC–032, ¶ 38, 123 N.M. 564, 943 P.2d 1017; *accord People v. Rivera*, 216 Mich.App. 648, 550 N.W.2d 593, 595 (1996) (allowing convictions for the crimes of assault with intent to commit murder and discharge of a firearm from a vehicle in part because "[t]he social norms protected by the respective statutes differ markedly"). Similarly, in *Highfield*, the Court of Appeals, relying on *Gonzales*, determined that assault with intent to commit a violent felony and shooting at a dwelling protect different social norms and achieve separate legislative policies. 113 N.M. at 608–09, 830 P.2d at 160–61.

{20} As another indicator of legislative intent, it is possible to commit each of these crimes without committing the other. If an individual fires a gun out of a car with reckless disregard but without a specific intent to injure, such as by shooting randomly or in the air, and causes great bodily harm, the individual will have violated Section 30–3–8(B) but will not have committed aggravated battery. There are also, of course, a multitude of ways to commit aggravated battery without the involvement of a motor vehicle.

{21} We conclude that the Legislature intended to create separately punishable offenses by enacting the aggravated battery statute and the shooting at or from a motor vehicle statute. We therefore reject Defendant's claim that these two convictions violate double jeopardy.

IV. Two Convictions for Shooting at or from a Motor Vehicle

{22} As an alternative to his first two double jeopardy arguments, Defendant contends that his two convictions of shooting at or from a motor vehicle violate the protection against double jeopardy. This argument relates to multiple convictions under a single statute, which has been described as a unit of prosecution claim and distinguished from the double description claims addressed above relating to multiple convictions under separate statutes. *See Swafford*, 112 N.M. at 8, 810 P.2d at 1228. For unit of prosecution cases, "[t]he relevant inquiry . . . is whether the [L]egislature intended punishment for the entire course of conduct or for each discrete act." *Id.* In this context, there is "a presumption of lenity that, absent an express indication to the contrary, the [L]egislature did not intend to fragment a course of conduct into separate offenses." *Id.* Before addressing whether the Legislature intended to divide unitary conduct into multiple units of prosecution, however, we must first determine whether the conduct underlying the two convictions is unitary or discrete. "Clearly, if the defendant commits two discrete acts violative of the same statutory offense, but separated by sufficient indicia of distinctness, then a court may impose separate, consecutive punishments for each offense." *Id.* at 13, 810 P.2d at 1233.

{23} We believe that the facts in this case support a conclusion that Defendant's conduct with respect to each conviction under Section 30–3–8 was distinct rather than unitary. In assessing whether conduct is unitary or distinct in a unit of prosecution case, we look to a number of indicia of distinctness. It is firmly established in New Mexico law that the existence of multiple victims is an important factor both in assessing whether conduct is unitary and in determining, in accordance with legislative intent, the appropriate unit of prosecution for crimes of violence. *Herron v. State*, 111 N.M. 357, 361, 805 P.2d 624, 628 (1991) (stating that "multiple victims will likely give rise to multiple offenses"); *State v. Roper*, 2001–NMCA–093, ¶¶ 10–13, 131 N.M. 189, 34 P.3d 133; *State v. Castaneda*, 2001–NMCA–052, ¶¶ 12–14, 130 N.M. 679, 30 P.3d 368; *House*, 2001–NMCA–011, ¶ 24, 130 N.M. 418, 25 P.3d 257; *State v. Morro*, 1999–NMCA–118, ¶ 19, 127 N.M. 763, 987 P.2d 420; *State v. Barr*, 1999–NMCA–081, ¶¶ 17–23, 127 N.M. 504, 984 P.2d 185; *State v. Johnson*, 103 N.M. 364, 374, 707 P.2d 1174, 1184 (Ct.App.1985). In addition to this factor, other indicia of distinctness include the temporal proximity of the acts, the spatial proximity of the acts, the similarity of the acts, the location of the victim at the time of the acts, the identity and number of victims for each act, the identity and number of perpetrators for each act, the existence of any intervening events, the sequence of the acts, and the defendant's

mental state or objective during each act. *See Swafford,* 112 N.M. at 13–14, 810 P.2d at 1233–34; *Herron,* 111 N.M. at 361, 805 P.2d at 628; *Barr,* 1999–NMCA–081, ¶ 16, 127 N.M. 504, 984 P.2d 185.

{24} In *Gonzales* and *Varela,* we determined that the firing of multiple bullets from a single gun without any separation of time and space was a unitary act. *Varela,* 1999–NMSC–045, ¶ 39, 128 N.M. 454, 993 P.2d 1280; *Gonzales,* 113 N.M. at 224, 824 P.2d at 1026. However, in the present case, the evidence of distinctness extends far beyond the firing of multiple bullets. In addition to this fact, this case involves the important factor of multiple victims. The evidence further supported a finding that each victim was shot with a different gun. There were also multiple perpetrators, with a reasonable inference that different principals shot different victims. *Cf. State v. Perez,* 2002–NMCA–040, ¶¶ 31–32, 132 N.M. 84, 44 P.3d 530 (concluding that the defendant's conduct was not unitary because "there were two victims and four perpetrators"). The two victims, as well as the two shooters, were separated by space. *Cf. Mireles,* 2004–NMCA–100, ¶¶ 27–28, 136 N.M. 337, 98 P.3d 727 (concluding that conduct supporting convictions for second degree murder and shooting at or from a motor vehicle was separated by time and space, and thus not unitary, because the defendant initially shot the victim from inside a car and then pursued the victim in order to shoot him again); *Barr,* 1999–NMCA–081, ¶ 20, 127 N.M. 504, 984 P.2d 185 ("[C]ertain of the criminal acts were separated in time and space from each other, they involved separate objectives and effects, and they involved different combinations of the seven juveniles."). Martinez was shot outside of his group's vehicle. As a result, the jury had to find that the shooter was inside a vehicle in order to be a violation of Section 30–3–8. There was eyewitness testimony that flashes of gunfire came from the driver's side of Defendant's vehicle, and Defendant had a Glock .40, which matched the caliber of shell casings at the scene. Thus, the jury could have found that Defendant acted as a principal and shot Martinez. In doing so, Defendant was found guilty of shooting from a motor vehicle. By contrast, Solisz was shot inside his vehicle by the second shooter, who was outside of Defendant's vehicle at the time he fired his weapon. Thus, the evidence supported a jury finding that Defendant was an accessory to shooting at a motor vehicle for Solisz's death. The jury determined that Defendant and his accessory each violated the statute. Defendant may be prosecuted for his own conduct and for the conduct of his accessory. The existence of two victims and the separation in space further supports this conclusion. The jury's conclusion did not violate double jeopardy.

{25} The facts in this case support non-unitary conduct for the two violations of Section 30–3–8. For this reason, we reject Defendant's double jeopardy claim. Because this case involves non-unitary conduct, it is unnecessary for us to determine the appropriate unit of prosecution in Section 30–3–8(B).

V. Conclusion

{26} Based on different statutory elements and purposes, we conclude that the Legislature intended to provide for multiple punishments for the crimes of voluntary manslaughter and shooting at or from a motor vehicle and for the crimes of aggravated battery and shooting at or from a motor vehicle. We also conclude that Defendant's conduct supporting his two convictions for the crime of shooting at or from a motor vehicle was non-unitary. For these reasons, we reject Defendant's double jeopardy claims and affirm the Court of Appeals. We remand to the district court for correction of the judgment in conformity with the verdict.

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

WE CONCUR: PAMELA B. MINZNER, Justice, PETRA JIMENEZ MAES, Justice.

RICHARD C. BOSSON, Chief Justice (concurring in part and dissenting in part).

EDWARD L. CHÁVEZ, Justice (dissenting).

BOSSON, Justice (concurring in part and dissenting in part).

{28} The principle enunciated in *State v. Santillanes,* 2001–NMSC–018, 130 N.M. 464, 27 P.3d 456 expresses a long-standing tenet of our criminal jurisprudence that, for a single death, there can be only one conviction. In my view, the majority opinion seriously erodes this vital principle. It reaffirms *State v. Gonzales,* 113 N.M. 221, 824 P.2d 1023 (1992), while professing continuing loyalty to *Santillanes.* The majority tries to have it both ways. For a single death, Defendant was convicted of both voluntary manslaughter and shooting from a motor vehicle causing that same death. By concluding that Defendant's double jeopardy rights were not violated, the majority walks an invisible line. Respectfully, I am compelled to dissent. I concur with the majority on all remaining issues.

{29} The majority stresses that under the *Swafford/Blockburger* analysis, these two criminal statutes (manslaughter and shooting from a vehicle) do not violate double jeopardy. Using that test, I agree, and easily so. Under *Blockburger,* when comparing the elements of these two criminal statutes, one statute is not subsumed by the other; the elements of each are different. That point, however, proves little. The *Blockburger* analysis only creates a presumption in favor of multiple punishment. The presumption is not conclusive and can be overcome by other indicia of legislative intent. *See State v. Santillanes,* 2000–NMCA–017, ¶ 7, 128 N.M. 752, 998 P.2d 1203 [hereafter *Santillanes I*].

{30} In both the Court of Appeals opinion in *Santillanes* and the opinion of this Court, we acknowledged that the two statutes involved in that particular case, vehicular manslaughter and child abuse resulting in death, punished "distinct offenses." 2001–NMSC–018, ¶ 5, 130 N.M. 464, 27 P.3d 456. As with the present situation, the two criminal statutes created offenses with different elements under the *Blockburger* analysis. Applying only *Blockburger,* double jeopardy did not bar multiple convictions. But that was not the end of the matter. Judge Apodaca, writing for the Court of Appeals in *Santillanes,* concluded that the *Blockburger* presumption "is rebutted by the generally accepted notion that one death should result in only one homicide conviction." *Santillanes I,* 2000–NMCA–017, ¶ 8, 128 N.M. 752, 998 P.2d 1203, *adopted by Santillanes,* 2001 NMSC–018, ¶ 5, 130 N.M. 464, 27 P.3d 456. In other words, it does not matter that the two criminal statutes possess distinctive elements under *Blockburger.* Death is different, we said. For one death, there can only be one death conviction, we said. This is settled law.

{31} Importantly, that "generally accepted notion" is not confined to *Santillanes;* it has been affirmed in several opinions both before and after *Santillanes* was decided. *See State v. Reyes,* 2002–NMSC–024, ¶ 18, 132 N.M. 576, 52 P.3d 948; *State v. Mora,* 1997–NMSC–060, ¶ 64, 124 N.M. 346, 950 P.2d 789; *State v. Cooper,* 1997–NMSC–058, 124 N.M. 277, 949 P.2d 660; *State v. Pierce,* 110 N.M. 76, 85, 792 P.2d 408, 417 (1990); *State v. Crain,* 1997–NMCA–101, ¶ 15, 124 N.M. 84, 946 P.2d 1095; *State v. Landgraf,* 1996–NMCA–024, ¶ 31, 121 N.M. 445, 913 P.2d 252. Several times in the past we have stated that it is "the death of another the legislature intended to punish, not the manner in which it was accomplished." *Santillanes,* 2001–NMSC–018, ¶ 5, 130 N.M. 464, 27 P.3d 456; *see State v. Landgraf,* 1996–NMCA–024, ¶ 31, 121 N.M. 445, 913 P.2d 252. That "notion" is now a mainstay of New Mexico law and merits our respect.

{32} The majority opinion seeks to rationalize its betrayal of *Santillanes* by stating that the shooting from a vehicle statute, Section 30–3–8, is intended only to punish the act of shooting from a motor vehicle, rather than the resulting injury, and therefore there is no double conviction or punishment for the same death. This argument is belied by the very language of the statute. Other than the basic, lesser offense of shooting from a vehicle regardless of consequence (a fourth degree felony), punishment in Defendant's instance is grounded on the harm actually inflicted. Defendant received an enhanced sentence for this harm. Therefore, the statute evinces a specific legislative intent to punish not just the act of shooting from a car, but also the degree of personal injury imposed, in this case death. Clearly,

for the drive-by shooter, the greater the harm inflicted, the greater the punishment. Defendant is living proof of that fact.

{33} Defendant's situation is far from unique; today's opinion has far-reaching implications. There are other, similarly phrased criminal statutes. If shooting from a vehicle causing great bodily harm can be charged simultaneously with homicide for the same resulting death, then this changes the paradigm for other criminal statutes that have a "great bodily injury" or "death" enhancement. Unless we limit the present case to the present statute, these other statutes become fair game for overcharging based on multiple offenses for a single death. *See* NMSA 1978, § 30-3-9 (1989) (battery of school personnel, "great bodily harm or death"); NMSA 1978, § 30-3-9.1 (2001) (battery of sports officials, "death or great bodily harm"); NMSA 1978, § 30-3-16 (1995) (aggravated battery against a household member, "great bodily harm or death"); NMSA 1978, § 30-17-6 (1963) (aggravated arson, "causing a person great bodily harm"); NMSA 1978, § 30-22-17 (1963) (assault by prisoner, "causing or attempting to cause great bodily harm"). Future defendants could be charged under boutique criminal statutes describing the manner in which the person was killed, in addition to the traditional degrees of homicide. As a matter of sound judicial policy, we should avoid any shift in that direction.

{34} The majority opinion attempts to differentiate *Santillanes* from *Gonzales* on the ground that the specific statute, shooting from a vehicle, does not use the word "death" in its enhancement, but only "great bodily harm," unlike *Santillanes*. The majority seeks to draw a strict line of demarcation between "death" and "great bodily harm." In the majority's view, this is not a death statute, and accordingly, there is no conflict with the homicide statutes. But, of course, this Court has previously equated proof of death with proof of great bodily harm. *See State v. Varela*, 1999-NMSC-045, ¶ 14, 128 N.M. 454, 993 P.2d 1280. In this case, Defendant was found guilty of inflicting great bodily harm precisely because he aided in the shooting and killing of the victim. No matter the rationalization, Defendant is being punished twice for the same, single death.

{35} Because of this professed line of demarcation in the majority opinion, it appears that we agree on one point. If the language of this statute had actually contained the word "death," then based on the majority's view, *Santillanes* would preclude prosecution under both the drive-by shooting statute and general homicide. This is an important point because, according to the majority, it means that criminal statutes that enhance for "death" still fall within the "generally accepted notion" of *Santillanes*. Therefore, at least some of the statutes previously mentioned could not be charged in conjunction with a homicide prosecution, such as, Section 30-3-9 (battery of school personnel, "great bodily harm or death"), Section 30-3-9.1 (battery of sports officials, "death or great bodily harm"), and Section 30-3-16 (aggravated battery against a household member, "great bodily harm or death").

{36} The real reason for conflict here is that this Court decided *Gonzales* well before *Santillanes*. When *Santillanes* came down, it sharpened the focus of our double jeopardy analysis. It is clear that *Gonzales* could not have anticipated *Santillanes*, and that *Santillanes* did not discuss *Gonzales*. The circumstances in which the two opinions were decided did not directly address the conflict we now face. Given this conflict, both decisions cannot stand; one must yield to the other. *Gonzales* saw no double jeopardy problem in convicting for both the murder and the drive-by shooting responsible for that murder. *Santillanes* held the opposite. Possibly, *Gonzales* could be limited to the language of the statute as it was then written, which has since been amended. However, I favor reversing outright the portion of *Gonzales* now in conflict, because the principles promulgated in *Santillanes* are so heavily entrenched in our case law. In my view, we have to choose, and for me, the choice is clear.

CHÁVEZ, Justice (dissenting).

{37} Because I do not believe the Legislature intended multiple punishments for the unitary conduct at issue in this case, I dis-

sent. A defendant who kills the victim in a single homicidal act should only be prosecuted under the homicide statutes. I also believe the Legislature intended to punish shooting from or at a vehicle as an elevated form of aggravated battery precluding multiple punishments.

Voluntary Manslaughter and Shooting from or at a Motor Vehicle

{38} After finding that Defendant's accomplice shot and killed Solisz in a single homicidal act, the majority concludes that this unitary conduct could violate both a homicide statute, NMSA 1978, § 30–2–3(A) (1994) (voluntary manslaughter), and a statute that does not have as an element, the death of a victim, NMSA 1978, § 30–3–8(B) (1993) (shooting from or at a motor vehicle). When a defendant's conduct is not unitary, he may be convicted of both murder and shooting from or at a vehicle without violating the double jeopardy clause. *See State v. Mireles,* 2004–NMCA–100, ¶¶ 25–28, 136 N.M. 337, 98 P.3d 727 (finding no double jeopardy violation where defendant shot a victim from inside a car, seriously wounding the victim, then chased after the victim and shot the victim until he died). However, unless there are distinct acts, one resulting in great bodily harm and the other in death, a defendant cannot be punished for great bodily harm when his single homicidal act results in the death of the victim. *See, e.g., State v. Reyes,* 2002–NMSC–024, ¶ 19, 132 N.M. 576, 52 P.3d 948 (upholding, *inter alia,* Defendant's convictions for armed robbery and felony murder after finding substantial evidence that distinct instances of force resulted in the armed robbery and killing). It is also appropriate to use Section 30–3–8(B) as the predicate felony for a felony murder count when a defendant allegedly shoots from or at a vehicle with the requisite mens rea, causing death. *See State v. Varela,* 1999–NMSC–045, ¶¶ 18–21, 128 N.M. 454, 993 P.2d 1280. Where a defendant's conduct is unitary, a defendant's conviction for both felony murder and shooting from or at a vehicle would result in double jeopardy. *See id.* at ¶ 38. Here the jury rejected felony murder with shooting from or at a vehicle as the predicate felony. Instead, the jury found sufficient provocation and found Defendant guilty of voluntary manslaughter.

{39} The majority's reasoning that death may prove great bodily harm leads to punishment that is greater than what I believe the Legislature intended. Under the majority's approach, a defendant who kills a victim in one act of violence could be convicted of murder, aggravated battery, simple battery and assault. After all, if death proves great bodily harm, great bodily harm proves injury, injury proves assault—all technically different harms. Because the Legislature did not include death as an element in Section 30–3–8(B) while enumerating different levels of harm with correspondingly increased levels of punishment, in my opinion the Legislature did not intend Section 30–3–8(B) to apply to unitary conduct resulting in death other than under the felony murder doctrine. *See Swafford v. State,* 112 N.M. 3, 14, 810 P.2d 1223, 1234 (1991) (instructing courts to look to statutory language, history, subject matter and relative punishment as "several guiding, but by no means exclusive, principles for divining legislative intent" to rebut the *Blockburger* presumption). At the very least, given the Legislature's lack of express language to allow both convictions, I believe the rule of lenity applies and the correct presumption is that the Legislature did not intend to pyramid punishments for the unitary conduct at issue in this case. *See id.* at 15, 810 P.2d at 1235; *State v. Landgraf,* 121 N.M. 445, 454–55, 913 P.2d 252, 261–62 (Ct. App.1996) (emphasizing that absent clear legislative intent, doubt should be resolved against turning a single act into multiple offenses). As such, I would vacate the shooting from or at a motor vehicle conviction as it relates to victim Solisz.

Aggravated Battery and Shooting from or at a Motor Vehicle

{40} I would also find double jeopardy with respect to Defendant's convictions of aggravated battery and shooting from or at a motor vehicle. The shooting from or at a motor vehicle statute contains many of the same elements as the base statute of aggravated battery but increases the punishment from a third degree felony to a second de-

gree felony because the same conduct involves shooting from or at a vehicle.[1] § 30–3–8(B); NMSA 1978, § 30–3–5(C) (1969). Under *Swafford* I believe this sentencing structure evinces a legislative intent to punish shooting from or at a vehicle as an elevated form of aggravated battery. *See Swafford,* 112 N.M. at 15, 810 P.2d at 1235 (holding that even if an initial presumption is created that the Legislature intended multiple punishments for the same conduct under *Blockburger,* it may be inferred that the Legislature did not intend punishment under both statutes if "one statutory provision incorporates many of the elements of a base statute, and extracts a greater penalty than the base statute").

{41} Moreover, having concluded it would violate double jeopardy to convict Defendant of both a homicide crime and a non-homicide crime raises a substantial doubt whether the Legislature intended to punish Defendant's unitary act resulting in injury to Martinez as both aggravated battery and shooting from or at a motor vehicle. Otherwise, Defendant would be punished more severely for the injury of one victim than for the death of another victim. I do not believe the Legislature intended such a result. As such, I would vacate the aggravated battery conviction.

{42} For these reasons, I dissent from Parts II and III and need not reach the issue discussed in Part IV.

1. Here we confront differing canons of statutory construction for divining legislative intent: the *Blockburger* analysis on one hand, and the quanta of punishment and rule of lenity on the other. *See Swafford,* 112 N.M. at 15, 810 P.2d at 1235. I recognize that aggravated battery requires an intent to injure the victim, while shooting from or at a vehicle only requires reckless disregard for another. Nevertheless, the similarities between the two statutes, with the elevated punishment for shooting from or at a vehicle, suggest to me that the Legislature intended to punish a single act, if done with at least reckless disregard for another, under only one of the two statutes. *See id.*

2005-NMCA-017

106 P.3d 580

STATE of New Mexico, Plaintiff–Appellee,

v.

Douglas FRAWLEY, Defendant–Appellant.

No. 23758.

Court of Appeals of New Mexico.

Dec. 15, 2004.

Certiorari Denied, No. 29,012, Feb. 3, 2005.

Certiorari Granted, No. 29,011, Feb. 8, 2005.

Patricia A. Madrid, Attorney General, Santa Fe, Joel Jacobsen, Assistant Attorney General, Albuquerque, for Appellee.

John B. Bigelow, Chief Public Defender, Susan Roth, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

SUTIN, J.

{1} This opinion is filed simultaneously with a memorandum opinion also filed in this appeal that addresses Defendant Douglas Frawley's assertions of error in regard to his convictions of various crimes. The basic sentences for the crimes Defendant committed were enhanced under NMSA 1978, § 31–18–15.1 (1993). Defendant argues that *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), makes it clear that a court cannot enhance a sentence pursuant to Section 31–18–15.1 based on facts not found by a jury. We agree.

BACKGROUND

{2} A jury convicted Defendant of two third degree felonies and one misdemeanor in June 2002. Section 31–18–15 enumerates the basic sentences for the different degrees of non-capital felonies. The basic sentence for a third degree felony is three years imprisonment. NMSA 1978, § 31–18–15(A)(7) (2003). The district court sentenced Defendant for the basic sentence of three years for each of the third degree felonies pursuant to Section 31–18–15(A)(7). Section 31–18–15.1 permits alteration of a defendant's basic sentence by up to one-third of the basic sentence if mitigating or aggravating circumstances exist. The court sentenced Defendant to an additional year on each felony based on the court's finding of aggravating circumstances pursuant to Section 31–18–15.1(A). Those

circumstances were Defendant's lack of remorse, the short period between his sentence for a similar offense and the commission of the offense for which he was sentenced, the pain and fear endured by the victims and their families, and Defendant's flight to avoid prosecution and the circumstances surrounding the flight. Defendant appealed for reasons unrelated to sentencing.

{3} After Defendant's appeal was submitted to a panel of this Court for decision, Defendant offered *Blakely* as recent supplemental legal authority under Rule 12–213(D) NMRA on the issue of the constitutionality of the alteration under Section 31–18–15.1 of Defendant's basic sentence imposed under Section 31–18–15. We obtained supplemental briefs from the parties on that issue and now decide whether *Blakely* applies and, if so, how, if at all, it affects *State v. Wilson*, 2001–NMCA–032, ¶ 4, 130 N.M. 319, 24 P.3d 351, which holds that "Sections 31–18–15 and 31–18–15.1 should be read together to provide for a range of sentences, and that sentencing within this range, based on findings made on the record by the trial court, is constitutional."

DISCUSSION

{4} The issue of the constitutionality of state sentence enhancement statutes received a magnified presence in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *Apprendi* held: "Other 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." *Id.* at 490, 120 S.Ct. 2348; *Blakely*, 542 U.S. at ——, 124 S.Ct. at 2536 (quoting the *Apprendi* rule). If such facts are not submitted to the jury and proved beyond a reasonable doubt, then the Sixth Amendment's "guarantee that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" and the Fourteenth Amendment's Due Process Clause are violated. *Apprendi*, 530 U.S. at 476–77, 120 S.Ct. 2348 (internal quotation marks and citation omitted).

{5} In *Wilson*, the majority held the district court's enhancement under Section 31–18–15.1 of the defendant's basic sentence did not run afoul of *Apprendi*. *Wilson*, 2001–NMCA–032, ¶ 4, 130 N.M. 319, 24 P.3d 351. The majority interpreted *Apprendi* to apply to statutory enhancements that "define[ ] an element of a criminal offense," and not to "the trial court's traditional discretion to consider factors relating both to the offense and the offender in imposing a sentence within the range set by statute." *Wilson*, 2001–NMCA–032, ¶ 12, 130 N.M. 319, 24 P.3d 351. Determining that "the findings required by Section 31–18–15.1 appear more like sentencing factors than elements of a crime," the majority concluded that Sections 31–18–15 and 31–18–15.1 read together created "permissible ranges of sentences ... within which sentencing courts could exercise discretion." *Wilson*, 2001–NMCA–032, ¶¶ 13, 15, 17, 130 N.M. 319, 24 P.3d 351; *see Apprendi*, 530 U.S. at 481, 494, 120 S.Ct. 2348 n. 19 (stating "that nothing in [common law] history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute"; and further noting "that the term 'sentencing factor' is [not] devoid of meaning [but can] appropriately describe[ ] a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense").

{6} Reading *Apprendi* differently, the dissent in *Wilson* viewed Section 31–18–15.1 as constitutionally infirm, concluding that the statute permits factual findings allowing enhancement of the basic sentence in Section 31–18–15 "beyond what the jury verdict by itself allows" and "based on facts 'found' under no discernable standard of proof." *Wilson*, 2001–NMCA–032, ¶¶ 52–53, 130 N.M. 319, 24 P.3d 351 (Bustamante, J., concurring in part and dissenting in part); *see Apprendi*, 530 U.S. at 490, 494, 120 S.Ct. 2348 (stating that "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," and indicating that the required finding for enhancement cannot "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict").

{7} The conclusions of the majority and the dissent in *Wilson* were each drawn from language in *Apprendi* that could reasonably give rise to the different interpretations. In *Blakely,* based on a trial court finding that the defendant acted with "deliberate cruelty," the defendant was sentenced under Washington state law beyond what the Supreme Court in *Blakely* labeled a fifty-three-month "statutory maximum" of a "standard range sentence" for the offense committed. 542 U.S. at ——, 124 S.Ct. at 2537. Under Washington state law, the standard range could be increased upwards if the trial court found "substantial and compelling reasons justifying an exceptional sentence." *Id.* 542 U.S. at ——, ——, 124 S.Ct. at 2535, 2537 (internal quotation marks and citation omitted). The Supreme Court held this enhancement to violate the *Apprendi* rule even though another statute provided that no person convicted could be punished by confinement exceeding a term of ten years. *Id.* 542 U.S. at ——, ——, 124 S.Ct. at 2535, 2537. The Washington Court of Appeals had held that the statutory maximum was ten years and that the statutory aggravating factors neither increased the maximum sentence nor defined separate offenses. *State v. Blakely,* 111 Wash.App. 851, 47 P.3d 149, 159 (2002), *rev'd,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. The Washington Court of Appeals therefore concluded that *Apprendi* was not triggered. *Blakely,* 47 P.3d at 159. The Supreme Court in *Blakely* rejected the Washington appellate court's view of its own statutory scheme, interpreting the statutory maximum not to be ten years, but instead to be that in the state's sentencing reform act specifying a "standard range" of sentence of forty-nine to fifty-three months. 542 U.S. at ————, 124 S.Ct. at 2537–38. Significant in *Blakely* was that the state trial court's authority to increase a sentence derived not from the jury's verdict or a plea, but rather solely upon finding some additional fact. *Id.* 542 U.S. at ——, 124 S.Ct. at 2538. The Supreme Court determined that it was the standard range, and not the ten years, that constituted the maximum sentence that could be imposed based on the defendant's plea without having to make additional findings. *Id.* 542 U.S. at ————, 124 S.Ct. at 2537–38. We think it noteworthy that the Washington Court of Appeal's view of its own state sentencing scheme, a scheme not significantly dissimilar to that in New Mexico, was similar to the view taken by this Court in *Wilson* with respect to the New Mexico statutory scheme. *Compare Blakely,* 47 P.3d at 159 (reading statutes together to hold statutory maximum was ten years), *with Wilson,* 2001–NMCA–032, ¶ 4, 130 N.M. 319, 24 P.3d 351 (reading Sections 31–18–15 and –15.1 together to prescribe ranges of allowable sentences).

{8} The *Blakely* Court also rejected cases construing *Apprendi* to say "that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors—no matter how much they may increase the punishment—may be found by the judge." *Blakely,* 542 U.S. at ——, 124 S.Ct. at 2539. For the *Blakely* Court, the issue transcended procedural formality, rising to "a fundamental reservation of power in our constitutional structure." *Id.* 542 U.S. at ————, 124 S.Ct. at 2538–39. For the most part, the major concerns of the dissents in *Blakely* were practical ones. The dissents viewed the majority's decision as one doing serious damage to existing laws and practice and the administration of criminal justice. *See id.* 542 U.S. at ————, 124 S.Ct. at 2543–62 (O'Connor, J., et al., dissenting).

{9} Several federal cases have expressed concerns about whether, and if so to what extent, *Blakely* affects federal sentencing statutes and the federal sentencing guidelines. *See, e.g., United States v. Penaranda,* 375 F.3d 238, 246 (2d Cir.2004) (en banc); *United States v. Booker,* 375 F.3d 508, 511 (majority), 518–19 (dissent) (7th Cir.2004), *cert. granted,* —— U.S. ——, 125 S.Ct. 11, 159 L.Ed.2d 838 (U.S. Aug. 2, 2004); *United States v. Fanfan,* 2004 WL 1723114, at *2–5 (D.Me. June 28, 2004), *cert. granted,* —— U.S. ——, 125 S.Ct. 12, 159 L.Ed.2d 838 (U.S. Aug. 2, 2004). *Booker* and *Fanfan* were argued before the Supreme Court on October 4, 2004, and have not, as of the date of filing this opinion, been decided by the Court. Argument Calendars, *at* http://www.supremecourtus.gov/oral_arguments/argument_calendars.html (last updated Sept. 30, 2004).

{10} In the case at hand, the State criticizes *Apprendi* for using ambiguous, unde-

fined terms, and making incoherent distinctions, defects that have "made *Apprendi* so hard to apply in practice." The State also criticizes *Blakely* for using ambiguous, undefined terms "to state a supposedly universal rule, then rephras[ing] the rule in subtly inconsistent ways." The State argues that we should follow *Wilson* and conclude that Section 31–18–15.1 accords with *Blakely* for the same reasons we determined in *Wilson* the statute accorded with *Apprendi.* Moreover, the State sides with the dissenters in *Blakely,* and warns of threatened "major disruption in the administration of criminal justice in the ... courts—[a] disruption that would be unfair to defendants, to crime victims, to the public, and to judges who must follow applicable constitutional requirements." *Penaranda,* 375 F.3d at 246. *Blakely* cannot be so easily slighted.

{11} *Blakely* states that the Court's precedents made it "clear ... that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely,* 542 U.S. at ——, 124 S.Ct. at 2537. Also, the Court explained,

> the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.

Id. 542 U.S. at ——, 124 S.Ct. at 2537 (citation omitted). Holding the defendant's sentence invalid, *Blakely* stated:

> [w]hether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.

Id. 542 U.S. at ——, 124 S.Ct. at 2538.

{12} We conclude that the Court in *Blakely* was attempting to provide more clarity to *Apprendi* and to clarify the constitutional boundaries for state statutory sentencing schemes, such as ours in New Mexico, that provide for a sentence such as a "basic" or "standard range" sentence which can be decreased or increased depending on circumstances outside of what a jury considers in determining guilt. We read *Blakely* to say: When the jury considers the facts relevant to the elements of an offense in determining guilt or innocence, the criminal sanctions for that offense cannot be increased after the verdict based on facts the jury has not specifically considered in connection with its finding of guilt, whether or not the facts are labeled "sentencing factors," and even if the facts are not material to the statutory elements of the offense.

{13} *Blakely* clarifies and extends *Apprendi* in a manner that requires us to hold that the district court's enhancements under Section 31–18–15.1 of Defendant's basic sentences violated the Sixth Amendment to the United States Constitution. Although it may have been correctly decided under *Apprendi,* under *Blakely* our *Wilson* decision can no longer control or be considered controlling authority.

CONCLUSION

{14} Because Defendant's basic sentences imposed under Section 31–18–15 were increased under Section 31–18–15.1 based on the district court's findings of aggravating circumstances, and not based on a jury's findings and under a burden of proof beyond a reasonable doubt, we invalidate and reverse the Section 31–18–15.1 enhancements to Defendant's basic sentences. We reverse and remand to the district court with instructions to enter a revised judgment and sentence in accordance with this opinion.

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

WECHSLER, C.J. and ROBINSON, J. concur.

2005-NMCA-021

106 P.3d 584

In the Matter of the Petition of Snaphappy Fishsuit MOKILIGON for Change of Name, Petitioner–Appellant.

No. 25,202.

Court of Appeals of New Mexico.

Dec. 22, 2004.

Patricia A. Madrid, Attorney General, Anderson E. Clipper, Assistant Attorney General, Santa Fe, NM, for Appellee.

Snaphappy Fishsuit Mokiligon, Albuquerque, NM, Pro se Appellant.

OPINION

ALARID, Judge.

{1} Petitioner, acting pro se, appeals the district court's order denying his request to change his name from "Snaphappy Fishsuit Mokiligon" to "Variable." The precise basis for denying a request for a name change is a question of first impression for New Mexico, and although this case is assigned to this Court's summary calendar, we are issuing a formal opinion in order to clarify the standard by which the district court grants or denies a request for a name change. Our notice of proposed disposition proposed to reverse the district court's order denying Petitioner's request. Petitioner has filed a brief statement in support of our proposed disposition, and the State, on behalf of the district court, has filed a memorandum in opposition. Unpersuaded by the State's arguments, we reverse the district court's order denying Petitioner's request for a name change.

{2} We review the district court's denial of Petitioner's request for a name change for an abuse of discretion. *See In re Cruchelow,* 926 P.2d 833, 834 (Utah 1996) (stating that "although a trial court normally has wide discretion in matters of this type, the court must show some substantial reason before it is justified in denying a petition for a name change"). "[E]ven when we review for an abuse of discretion, our review of the application of the law to the facts is conducted de novo. Accordingly, we may characterize as an abuse of discretion a discretionary decision that is premised on a misapprehension of the law." *N.M. Right to Choose/NARAL v. Johnson,* 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450 (internal citations, brackets and quotation marks omitted).

{3} Petitioner argued in his docketing statement that NMSA 1978, § 40-8-1 (1989) grants him the right to change his name. Section 40-8-1 reads, in pertinent part, as follows:

> Any resident of this state over the age of fourteen years may, upon petition to the district court of the district in which the petitioner resides and upon filing the notice required with proof of publication, if no sufficient cause is shown to the contrary, have his [or her] name changed or established by order of the court.

We observed in our notice of proposed disposition that some statutes place the burden on the petitioner to show good and sufficient reason for the name change. *See generally* Jane M. Draper, Annotation, *Circumstances Justifying Grant or Denial of Petition to Change Adult's Name,* 79 A.L.R.3d 562 (2004). The language of our statute, howev-

er, places it within the category of name-change statutes that puts the burden of proof to deny a request for a name change on either "the court or interested third parties to prove that there exists a lawful objection which overrides the petitioner's right to a name change." *Id.* at 566.

{4} We stated in our notice of proposed disposition that although it has been held that a court has discretion to deny a name change under statutes similar to ours, it is generally held that denial is limited to a showing of an "unworthy motive, the possibility of fraud on the public, or the choice of a name that is bizarre, unduly lengthy, ridiculous or offensive to common decency and good taste." *See In re Knight,* 36 Colo.App. 187, 537 P.2d 1085, 1086 (1975) (internal quotation marks and citation omitted). As the Colorado Court of Appeals stated, "We do not suggest that a court must grant every petition for change of name; rather, we hold that some substantial reason must exist for denying such petition." *Id.* Similarly, in *In re Cruchelow,* 926 P.2d at 834 the Utah Supreme Court held that "although a trial court normally has wide discretion in matters of this type, the court must show some substantial reason before it is justified in denying a petition for a name change."

{5} As the Utah Supreme Court has recently written, "[a] substantial reason may exist when there is factual proof of an 'unworthy motive, the possibility of fraud on the public, or the choice of a name that is bizarre, unduly lengthy, ridiculous or offensive to common decency and good taste.'" *In re Porter,* 31 P.3d 519, 521 (Utah 2001) (citation omitted). However, "[u]nsupported generalizations and speculation do not constitute a cause shown to deny a change of name." *Id.* (citations omitted). In that case, in which the court reversed the district court's denial of the petitioner's request to change his name to Santa Claus, the court noted that name change statutes "merely provide a codified process to aid an individual's common law right to adopt another name at will." *Id.* And the court emphasized that, "[c]onsequently, applications under the statute should be encouraged and should generally be granted unless sought for a wrongful or fraudulent purpose." *Id.* (internal quotation marks and quoted authority omitted). The Utah Supreme Court was not persuaded that there was factual support for the district court's assertions that the name of Santa Claus would cause confusion or "allow for substantial mischief" or persuaded that it "could cause a substantial chilling effect for persons otherwise entitled to exercise access to the courts but who would be hesitant to sue Santa Claus." *Id.* at 521–22.

{6} In this case, the district court's order found that "[t]he proposed change of name is offensive to even the broadest accepted notions of common decency and good sense, and is otherwise contrary to the public good." The court also found that "Petitioner has previously applied for, and the same has previously been denied, a change of name as requested in the present action." However, the court summarily denied Petitioner's request without providing sufficient factual support for the denial. The district court record is only nine pages long, containing the petition, in which Petitioner requested a hearing, the order denying the petition, Petitioner's notice of appeal, and Petitioner's docketing statement. The docketing statement represented that Petitioner did not receive a hearing, but was informed by mail that his request was denied. Thus, there appears to have been no showing of wrongful or fraudulent purpose, and the name "Variable" does not appear obviously offensive. Based on this record, we proposed to hold that no sufficient cause was shown to deny Petitioner's application for a name change.

{7} In its memorandum in opposition to our proposed disposition, the State informs us that since September 2003, Petitioner has filed seven petitions requesting a name change, all of which have been dismissed. The State specifically requests that we consider the district court's previous denial of Petitioner's request for the same name change, filed on March 30, 2004. The State then argues that Petitioner's request for the same name change is barred under theories of res judicata or collateral estoppel. We remind the State that "[i]t is improper to attach to a brief documents which are not part of the record on appeal." *Jemko, Inc. v.*

Liaghat, 106 N.M. 50, 54, 738 P.2d 922, 927 (Ct.App.1987), and that "[t]his Court will not consider and counsel should not refer to matters not of record in their briefs." *In re matter of Aaron L.,* 2000–NMCA–024, ¶ 27, 128 N.M. 641, 996 P.2d 431.

{8} Moreover, the State does not cite to us any case supporting the proposition that res judicata applies to name changes, but relies generally on *Aguilera v. Palm Harbor Homes, Inc.,* 2004–NMCA–120, 136 N.M. 422, 99 P.3d 672, and *Moffat v. Branch,* 2002–NMCA–067, 132 N.M. 412, 49 P.3d 673 to argue that the petitions were in the same forum, based on the same cause of action and subject matter. In *Moffat,* we repeated the following test for determining when a claim is barred by the doctrine of res judicata:

> Res judicata, or claim preclusion, precludes a party from relitigating a claim, demand, or cause of action when (1) the cause of action is identical in both suits; (2) the same parties are involved; (3) the capacity or character of persons for or against whom the claim is made is the same; and (4) the subject matter is identical.

Id. ¶ 14 (citing *Myers v. Olson,* 100 N.M. 745, 747, 676 P.2d 822, 824 (1984)). We note, first of all, that a petition for a name change does not ask the court to resolve a dispute between parties and, therefore, is not, in the strictest sense, litigation. *See Black's Law Dictionary* 952 (7th ed.2004) (defining litigation as "[t]he process of carrying on a lawsuit"). In addition, it is quite possible that a person could change his or her name several times in the course of subsequent marriages and could petition for the same name on more than one occasion. Section 40–8–1 does not limit the number of times a person can petition to change his or her name, but requires the court to order the name change "if no sufficient cause is shown to the contrary." As we stated in our notice of proposed disposition, a sufficient cause is demonstrated when there is evidence of an "unworthy motive, the possibility of fraud on the public, or the choice of a name that is bizarre, unduly lengthy, ridiculous or offensive to common decency and good taste." *In re Porter,* 31 P.3d at 521 (internal quotation marks and citations omitted); *see also In re Knight,* 537 P.2d at 1086.

{9} The State urges us to affirm the district court's dismissal of Petitioner's request on the ground that Petitioner's actions "can be looked upon as vexatious and tying up valuable resources of the court," and to consider Petitioner's numerous requests for a name change as demonstrating an unworthy motive or the possibility of fraud on the public. As we stated earlier, however, these were not the reasons given by the district court, and nothing in the record supports either basis for affirmance. Under the circumstances of this case, in which Petitioner has had no opportunity to respond to these new grounds, we will not affirm on this basis. *See Meiboom v. Watson,* 2000–NMSC–004, ¶ 20, 128 N.M. 536, 994 P.2d 1154 (stating that an appellate court may affirm the trial court's ruling on a ground not relied upon by the trial court if reliance on the new ground would not be unfair to appellant).

{10} We clarify, however, that Petitioner is restricted to using the word 'variable' as his legal name. The court is not granting him the power to actually vary his legal name at will and he is limited to using 'variable,' unless or until he changes his name again through a recognized legal process. Moreover, if the court views Petitioner's actions as vexatious and tying up the court's resources, there is nothing to prevent the court, in the exercise of controlling its docket, from requiring Petitioner to have his pleadings reviewed before he is allowed to file them to determine whether they have merit. *See Lepiscopo v. Hopwood,* 110 N.M. 30, 32, 791 P.2d 481, 483 (Ct.App.1990) (stating that when there is a pattern of vexatious filings, courts can constitutionally restrict access to the courts).

{11} For the foregoing reasons, we reverse the district court's order denying Petitioner's application for a name change.

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

WE CONCUR: MICHAEL D. BUSTAMANTE and CYNTHIA A. FRY, Judges.

2005-NMCA-022

106 P.3d 1273

Joe CRUTCHFIELD, individually, and Crutchfield Enterprises, Inc., d/b/a Gasearch Energy Intelligence, Plaintiffs–Appellants,

v.

NEW MEXICO DEPARTMENT OF TAXATION AND REVENUE, Defendant–Appellee.

No. 23,550.

Court of Appeals of New Mexico.

Dec. 27, 2004.

Peter J. Gould, Santa Fe, NM, for Appellants.

Peter Breen, Special Assistant Attorney General, Santa Fe, NM, for Appellee.

OPINION

SUTIN, Judge.

{1} This appeal raises an issue of the State's duty under public records statutes to provide an electronic database to a commercial user, butting two statutory policies relating to a citizen's access to public records against one another and requiring this Court to wrestle with whether the State can protect its interests by setting conditions and charging a royalty for use of its electronic database.

{2} Appellants Joe Crutchfield and Crutchfield Enterprises, Inc., d/b/a GA-Search Energy Intelligence (together, Crutchfield) appeal the district court's denial of their petition for a writ of mandamus to enforce provisions of the Inspection of Public Records Act (the IPRA), NMSA 1978, §§ 14–2–1 to –12 (1947, as amended through 2003). Crutchfield sought a writ of mandamus, pursuant to Section 14–2–12 of the IPRA, to obtain certain records relating to severance taxes paid on oil and gas wells located in New Mexico. The key request was for complete electronic copies of the New Mexico Department of Taxation and Revenue's (the Department's) severance tax database and any updates or corrections to that database. With the records requested, Crutchfield intended to create a commercial information database product for purchase and use by the oil and gas industry. The Department would not provide the database.

{3} In denying Crutchfield a writ of mandamus, the district court concluded that Crutchfield's request was governed by NMSA 1978, § 14–3–15.1(C)(1)–(5) (1995) of the Public Records Act (PRA), NMSA 1978, §§ 14–3–1 to –23 (1959, as amended through 2002), and not the IPRA. Section 14–3–15.1(C) essentially provides that a computerized database of a public record may be provided for a commercial purpose under certain conditions, including the user's agreement "to pay a royalty or other consideration to the state as may be agreed upon by the state agency that created the database." § 14–3–15.1(C)(5). We agree with the district court and affirm.

BACKGROUND

{4} Crutchfield operates a business in Texas that provides information on a monthly basis by way of electronic or CD-rom service to paying subscribers in several states. The information consists of oil and gas pricing, well output, taxation, and other information. Following unsuccessful negotiations between Crutchfield and the Department, Crutchfield made an IPRA request for records relating to all oil and gas wells located in New Mexico. *See* § 14–2–8 (setting out procedure under IPRA for requesting records). Certain requests sought electronic copies of the complete severance tax database, including updates and corrections to the database, and sought this data continuously and on a monthly basis.

{5} The Department's response rejected the requests for the database and continuing updates. The Department relied for its rejection on Section 14–3–15.1(C)(1), (2), (4), and (5). Section 14–3–15.1(C) states:

> C. The state agency that has inserted data in a database may authorize a copy to

be made of a computer tape or other medium containing a computerized database of a public record for any person if the person agrees:

(1) not to make unauthorized copies of the database;

(2) not to use the database for any political or commercial purpose unless the purpose and use is approved in writing by the state agency that created the database;

(3) not to use the database for solicitation or advertisement when the database contains the name, address or telephone number of any person unless such use is otherwise specifically authorized by law;

(4) not to allow access to the database by any other person unless the use is approved in writing by the state agency that created the database; and

(5) to pay a royalty or other consideration to the state as may be agreed upon by the state agency that created the database.

In addition, the Department stated: "Rather than seeking to find a commercial vendor for such information, the [Department] elects to keep this information free. Much of the information is already available at our website. We anticipate making more information available there as our budget[ ] allows." The Department's public position was that it sought to provide information it chose to release in an electronic format available, free of charge, on its own website.

{6} Crutchfield was unwilling to pay royalties to the Department and the Department was unwilling to enter into a licensing agreement with Crutchfield. Crutchfield was not satisfied with obtaining information from the Department's website because, from Crutchfield's own search of the website that contained data from the State's ONGARD computer system, Crutchfield concluded that "the website must be searched one Production Unit Number (PUN) at a time and the data processed by the State's software delivers only one PUN at a time." He also concluded that "the ONGARD System website would not allow the user to have comprehensive access to the complete severance tax databases as [Crutchfield] has requested." Further, using the ONGARD system on the website was burdensome in that Crutchfield was able to search only "20 PUNs" at a time, and there were "20,000 PUNs" in New Mexico. The information on the website was less complete than the database that Crutchfield requested. Crutchfield wanted to receive more complete information, much more quickly, by way of electronic transfer of the entire database, thereby making his product saleable in a timely manner.

{7} The district court determined that, while the records requested were public records, the format in which the records were requested and the frequency with which they were requested to be supplied "separate[d] them from the broader application of [the IPRA]." Were Crutchfield to have been satisfied with the information in typed or printed format, the court found, Crutchfield could have received the information upon the payment of a reasonable fee for the service. *See* § 14–3–15.1(A) (providing for release of information contained in information systems databases, in printed or typed format, upon the payment of a reasonable fee for the service). "[Crutchfield], however, specifically requested a computer tape, microdisk, ZIP disk, or CD rom transfer of the database," and, therefore, the court determined that Section 14–3–15.1(C), which authorizes "a copy to be made of . . . a computerized database," applied.

{8} Among its findings, the court noted that Crutchfield and the Department appeared to have been on different tracks up to the time of the hearing on Crutchfield's petition in regard to what Crutchfield was actually requesting. The court thought that the testimony at the hearing indicated there had been confusion about the format of the database requested. According to the court, until the hearing on Crutchfield's petition, the Department thought Crutchfield wanted a collated database which would have required the Department to create a record that did not exist. The court found that apparently, even with the confusion cleared up, the Department was concerned about its cost in providing voluminous records electronically on a continuous monthly basis, estimated at

$20,000 per year for collated data and estimated to be less for uncollated data, which would require several hours each month in computer and employee time. The court further found that the Department "was unwilling to pass the cost onto the taxpayers in order to subsidize [Crutchfield's] business venture."

{9} After concluding that Crutchfield's request was governed by Section 14–3–15.1(C) and its subdivisions, the court further concluded that, pursuant to that section, the Department had "no duty to produce the computer database records in electronic format" as Crutchfield requested because neither party was willing to enter into an agreement as set forth in the statute. The court also concluded that the Department was not in violation of the PRA for failure to produce public records.

{10} The only other issue for the court to decide was related to Crutchfield's request seeking descriptions of the abbreviations and terms used by the Department in categorizing and sorting the severance tax data on its electronic database. The court concluded that the information requested was not a public record and therefore not subject to the application of "the Statute."

{11} Based on its findings and conclusions, the court denied Crutchfield's petition for writ of mandamus. Crutchfield asserts five points for reversal, namely, that the district court erred: (1) in failing to consider the constitutionality of Section 14–3–15.1(C)(1), (2), (4), and (5); (2) in determining that the limitations in that section "trumped the open access provisions of the [IPRA]"; (3) in failing to find that the Department waived its right to impose the conditions in that section on Crutchfield; (4) in refusing to sanction the Department; and (5) in determining that Crutchfield's request for a description of abbreviations and terms was not a records request.

PRELIMINARY MATTERS: The Constitutional Issue

{12} For preservation of the constitutional issue below, Crutchfield cites to the petition and accompanying memorandum of law. Crutchfield's petition asserted that the authority in Section 14–3–15.1(C)(2) to determine allowable commercial uses "must be balanced against a policy of openness . . . and [Crutchfield's] constitutional free speech rights." The petition also stated that the Department's action denied him "his constitutional right to produce a lawful, commercial information product." Crutchfield's memorandum of law states the same, and presents an argument relating to constitutional protection of commercial speech under the First Amendment and under Article II, Section 17 of the New Mexico Constitution. In seeking a writ of mandamus in those court-filed documents, Crutchfield sought court evaluation of the Department's right to limit commercial speech balanced against the underlying policy of the IPRA and Crutchfield's right to engage in lawful commercial speech. In neither document, however, did Crutchfield expressly and directly seek a declaration that the statute was unconstitutional. Nor did Crutchfield raise the constitutionality of the statute at the hearing on whether to grant an alternative writ. Further, at the hearing, Crutchfield did not ask the court to determine application of the statute to be unconstitutional. Moreover, Crutchfield did not raise the constitutional issue or make any mention of the First Amendment or New Mexico's Constitution in his written closing argument or in his requested findings of fact and conclusions of law. Further, in his argument on appeal, while Crutchfield says he "restates" his argument that Section 14–3–15.1(C) is "unconstitutional as applied," he does not show where in the record he invoked a ruling of the court on the issue. The Department asserts that Crutchfield's constitutional argument should be rejected because Crutchfield sought documents solely under the IPRA and cannot use the IPRA as a vehicle for review of Section 14–3–15.1(C), and also because Crutchfield failed below to litigate and make a record on the legality of the Department's discretionary refusal under Section 14–3–15.1(C) to license the database.

{13} The New Mexico Foundation for Open Government (the Foundation) filed an amicus curiae brief in this appeal. In its amicus brief, the Foundation attacks the statute as an unconstitutional prior restraint

and as unconstitutionally vague, in addition to attacking subsection (C)(2) as unconstitutionally infringing on commercial and political speech rights. The Department asks this Court to refuse amicus status to the Foundation or, alternatively, to strike the Foundation's void for vagueness point.

{14} We determine that the constitutionality of Section 14–3–15.1(C) or of any particular subsection of that statute is not an issue we should address in this appeal. Crutchfield did not invoke a ruling of the district court on or otherwise adequately preserve for review the issue of whether Section 14–3–15.1(C) or any of its subsections should be declared unconstitutional on their face or as applied. To preserve error for review, a party must fairly invoke a ruling of the district court on the same grounds argued in this Court. *Woolwine v. Furr's, Inc.*, 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct.App. 1987). Such preservation allows the district court an opportunity to correct error, thereby avoiding the need for appeal, at the same time creating a record from which the appellate court can make an informed decision. *Diversey Corp. v. Chem–Source Corp.*, 1998–NMCA–112, ¶ 38, 125 N.M. 748, 965 P.2d 332. Thus, on appeal, the party must specifically point out where, in the record, the party invoked the court's ruling on the issue. Absent that citation to the record or any obvious preservation, we will not consider the issue. *In re Estate of Heeter*, 113 N.M. 691, 694, 831 P.2d 990, 993 (Ct.App.1992) (stating that this Court will not search the record when a party fails to provide citations).

{15} Further, the Foundation will not be permitted to participate as amicus curiae and its briefs will not be considered. Even were we to stretch and interpret Crutchfield's position before the district court to have raised and invoked a ruling on an issue of the constitutionality of Section 14–3–15.1(C), that issue was not whether the statute is an unconstitutional prior restraint, unconstitutionally vague, or otherwise unconstitutional on its face. The Foundation raised issues that were not raised below even in Crutchfield's petition and memorandum of law. Amicus must accept the case before the reviewing court as it stands on appeal, with the issues as framed by the parties, and foregoing presentation of issues under the deficit of lack of preservation. *See Nall v. Baca*, 95 N.M. 783, 785–86, 626 P.2d 1280, 1282–83 (1980); *State v. Eder*, 103 N.M. 211, 215, 704 P.2d 465, 469 (Ct.App.1985).

DISCUSSION

A. The Application of Section 14–3–15.1

Standard of Review

{16} Crutchfield and the Department each fails to advise us of the applicable standard of review. *See* Rule 12–213(A)(4), (B) NMRA. Crutchfield's database request issue involves statutory interpretation and application of law to facts. Interpretation of statutes and their application to facts require de novo review. *See Cooper v. Chevron U.S.A., Inc.*, 2002–NMSC–020, ¶ 16, 132 N.M. 382, 49 P.3d 61; *Morgan Keegan Mortgage Co. v. Candelaria*, 1998–NMCA–008, ¶ 5, 124 N.M. 405, 951 P.2d 1066.

{17} The court found "[i]t is undisputed that [Crutchfield] is unwilling to pay royalties." In argument, Crutchfield asserts that this finding contains a factual misstatement, which he characterizes as a "critical error in the Court's ruling as it is used to justify the Department's refusal 'to enter into a licensing agreement' with [Crutchfield]." To support his point, Crutchfield states that he has not stated he is "unwilling to pay royalties under any circumstances," but has stated rather that he is "unwilling to [be] singled out for discriminatory treatment." Crutchfield is essentially saying that he may have been willing to pay a royalty but for the discriminatory treatment, and that the court's finding was not a complete recitation of Crutchfield's position. Crutchfield has not launched an appropriate attack on the district court's finding. Crutchfield does not appeal on the ground that any of the court's findings of fact was unsupported by substantial evidence. Nor does he attack any finding under the procedure required in Rule 12–213(A)(4). Crutchfield fails to connect and support his argument with a recitation of all facts material to the issue. Crutchfield fails to assert any substantial evidence standard of review. Where an appellant fails to "in-

clude the substance of all the evidence bearing upon a proposition," this Court will not consider a sufficiency of the evidence challenge. *Martinez v. Southwest Landfills, Inc.,* 115 N.M. 181, 186, 848 P.2d 1108, 1113 (Ct.App.1993). "Unless clearly erroneous or deficient, findings of the trial court will be construed so as to uphold a judgment rather than to reverse it." *Herrera v. Roman Catholic Church,* 112 N.M. 717, 721, 819 P.2d 264, 268 (Ct.App.1991). The court's finding is essentially unchallenged, and it is, therefore binding on appeal. *See Stueber v. Pickard,* 112 N.M. 489, 491, 816 P.2d 1111, 1113 (1991).

The Court Properly Applied Section 14–3–15.1

{18} The IPRA unquestionably sets a policy of citizen entitlement to access to public records. *See* § 14–2–5; *State ex rel. Newsome v. Alarid,* 90 N.M. 790, 795, 568 P.2d 1236, 1241 (1977) (adopting a view that documents coming into official hands should generally be accessible so members of the public can know that the officials are "honestly, faithfully and competently performing their function as public servants" (internal quotation marks and citation omitted)). "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents." *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). Section 14–2–5 essentially codifies this right.

{19} Crutchfield argues that the Legislature did not intend Section 14–3–15.1(C) to modify that common law right of inspection and copying. Crutchfield further argues that Section 14–3–15.1(C) cannot be reconciled with the fundamental common law and IPRA statutory policy of openness and full access to public records, unless Section 14–3–15.1(C) is interpreted to apply only to electronic databases in which the State has manifested a proprietary interest, such as, for example, a unique and commercially valuable software program. In addition, Crutchfield argues that the district court's interpretation of Section 14–3–15.1(C) is unreasonable, placing form over substance, because it makes an arbitrary distinction as to format—an agency must allow access to a record contained on a tape recording, but if the same record is stored as a part of an electronic database, the court's interpretation of the statute would support refusal to provide the record in any format but paper copies. Moreover, disallowing records in electronic format but offering paper copies of the records is, according to Crutchfield, "the functional equivalent of denying effective access to those records."

{20} Crutchfield offers further arguments. He asserts that the court's reading of the statute leads to absurd results, which he describes as follows. The Department provides partial access to its electronic database records of oil and natural gas tax filings to users of the ONGARD system that the Department has on its website, and allows those users to obtain electronic copies of those database records. However, none of the statutory limitations in Section 14–3–15.1(C) are applied by the Department to those users. No fee is being charged when an ONGARD user obtains an electronic copy of a portion of the severance tax database. Yet, Section 14–3–15.1(F) requires the Department to charge a fee every time the database is "searched, manipulated or retrieved or a copy of the database is made for any private or nonpublic use," resulting in a violation by the Department of that statute by allowing ONGARD users free access to portions of the database.

{21} Crutchfield concludes by arguing that "the only reasonable reading of Section 14–3–15.1 is that it was intended to protect a very discreet set of electronic databases, i.e., those in which the State has a proprietary interest." He asserts that the database records containing raw tax data do not implicate that legitimate State interest.

{22} "In interpreting statutes, we seek to give effect to the Legislature's intent." *Key v. Chrysler Motors Corp.,* 121 N.M. 764, 768, 918 P.2d 350, 354 (1996).

> In ascertaining legislative intent, the provisions of a statute must be read together with other statutes in para materia under the presumption that the legislature acted with full knowledge of relevant statutory and common law.... Thus, two statutes

> covering the same subject matter should be harmonized and construed together when possible, in a way that facilitates their operation and the achievement of their goals.

Public Serv. Co. v. Public Util. Comm'n, 1999-NMSC-040, ¶ 23, 128 N.M. 309, 992 P.2d 860 (internal quotation marks, emphasis, and citation omitted).

{23} The Legislature enacted the IPRA in 1947 and amended it thereafter several times. *See, e.g.*, § 14-2-1 (history). The Legislature enacted the PRA in 1959 and amended it also from time to time. *See, e.g.*, § 14-3-2 (history). The IPRA is a statutory scheme of general application, granting with certain exceptions "[e]very person ... a right to inspect public records of this state," and providing that custodians of public records are to "furnish copies of the public records" and "may charge reasonable fees for copying public records, unless a different fee is otherwise prescribed by law." §§ 14-2-1(A), -7(C),-9(B)(1). Section 14-3-15.1(C), on the other hand, is a statute of very specific application relating specifically to copies of computer databases, and specifying conditions for access to and commercial use of the databases. "[W]e presume that the Legislature was informed as to existing law, and that the Legislature did not intend to enact a law inconsistent with any existing law." *Public Serv. Co.*, 1999-NMSC-040, ¶ 25, 128 N.M. 309, 992 P.2d 860 (internal quotation marks and citation omitted). When two statutes deal with the same subject, one general and one specific, the specific statute controls. *Stinbrink v. Farmers Ins. Co.*, 111 N.M. 179, 182, 803 P.2d 664, 667 (1990).

{24} We discern no intent on the part of the Legislature with respect to Section 14-3-15.1(C) than that that statute and the policies underlying it, and not the IPRA and the policies underlying it, apply to a request for "a copy ... of a ... medium containing a computerized database of a public record." § 14-3-15.1(C). Reading and interpreting Section 14-3-15.1(C) and the IPRA in *para materia*, we see no inconsistency or incompatibility in determining that the Legislature, in enacting Section 14-3-15.1(C), intended to permit State agencies to specifically limit public use of a certain type of record, thereby creating an exception to the general public policy underlying the IPRA. The Legislature could reasonably have determined that the copying and commercial use of a State agency's computer database created from public records available under the IPRA should be protected in some manner. The Legislature clearly had serious concerns about the use of databases reflected not only through its enactment of Section 14-3-15.1(C), but also by making certain unauthorized actions in regard to the database a criminal offense. *See* § 14-3-15.1(G). The Department raises what appear to be legitimate concerns the State may have, namely, (1) in regard to what the State describes as "counterparty risk," or "the risk that [one] party to a contract takes that the other party to a contract will default, or otherwise fail to perform"; (2) in regard to assuring that the user is a responsible party; and (3) in regard to recovering the State's cost and the inequity of allowing commercial exploitation of the database without paying a reasonable royalty.

{25} Crutchfield has not provided us any authority either forbidding a state legislature from granting a state protection for its electronic databases or limiting protection solely to instances in which a state can show a specific type of proprietary interest that would remove the database from the policy of access in the IPRA. Nor has Crutchfield supplied any authority that would forbid a state as a condition to supplying a copy of a database from charging a reasonable fee or royalty for its use. Finally, although Crutchfield has argued that, generally, the State may under Section 14-2-1(E) and (F) legitimately safeguard the confidentiality and privacy concerns of the State and its citizens, Crutchfield has supplied no authority or persuasive argument supporting a view that the database he wants should be distinguished from other types of databases that might require greater, more careful protection and were likely intended by our Legislature to receive such protection.

{26} The district court's interpretation and application of Section 14-3-15.1(C) is compatible with the language of the statute and,

absent a constitutional infirmity or contrary to legislative intent, is not incompatible with the IPRA's policy of citizen access to public records. Crutchfield's attack on the court's interpretation and application of Section 14–3–15.1(C) is little more than a veiled constitutional argument that the interpretation and application render the statute unconstitutional as applied, and that the statute can be saved from constitutional invalidity only if it is interpreted narrowly and applied only to what Crutchfield vaguely defines as a proprietary interest. However, the constitutionality of Section 14–3–15.1, in any regard, remains an open question. Our holdings in this opinion as to the database are based on the court's findings of fact, which are not attacked by Crutchfield; on the court's conclusions of law, which appear to be supported by the findings of fact and which are not specifically shown by Crutchfield to be unsupported by the findings; and on our interpretation of Section 14–3–15.1.

{27} Crutchfield's only tenable argument is that, harmonizing Section 14–3–15.1(C) with the provisions of the IPRA, the policies underlying and the requirements of the IPRA control a commercial user's access to and use of computer databases and forbid application of Section 14–3–15.1(C) in this case. We reject that argument under the circumstances of this case and hold that the district court did not err in its interpretation and application of Section 14–3–15.1(C) or in its holding that pursuant to Section 14–3–15.1(C) the Department correctly denied Crutchfield a copy of the electronic database and the continuing updates that Crutchfield requested.

B. The Issue of Waiver

{28} Neither party sets out a standard of review as to Crutchfield's waiver point. Waiver generally involves issues of fact. *See Reinhart v. Rauscher Pierce Sec. Corp.*, 83 N.M. 194, 198, 490 P.2d 240, 244 (Ct.App.1971) ("An intention to waive a right is ordinarily a question of fact."). "In determining whether a trial court's findings of fact are supported by substantial evidence, we view the evidence in the light most favorable to support the finding, and we do not consider any evidence unfavorable to the finding." *Williams v. Williams*, 109 N.M. 92, 95, 781 P.2d 1170, 1173 (Ct.App.1989). "We do not reweigh the evidence or substitute our judgment for the trier of fact." *Id.* "The duty to weigh the credibility of witnesses and to resolve conflicts in the evidence is for the trial court, not this [C]ourt." *Id.* "We liberally construe a trial court's findings in determining whether they support the trial court's judgment." *Id.*

> When a party is challenging a legal conclusion, the standard for review is whether the law correctly was applied to the facts, viewing them 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.

Golden Cone Concepts, Inc., v. Villa Linda Mall, Ltd., 113 N.M. 9, 12, 820 P.2d 1323, 1326 (1991); *cf. Thomas v. City of Santa Fe*, 112 N.M. 456, 459, 816 P.2d 525, 528 (Ct.App. 1991) (stating that even if requested findings were not submitted, appellate court may review district court's findings and conclusions "to determine whether the conclusions . . . appropriately flowed from the findings").

{29} Crutchfield contends that the Department waived its right to impose Section 14–3–15.1 restrictions on him with respect to the database in question because the Department permits requests for and the downloading of portions of the very same records through the Department's website and the ONGARD system. Any other conclusion, Crutchfield argues, "would violate the fundamental notion that similarly situated persons must be treated uniformly under the law." Thus, Crutchfield asserts, "[t]he district court erred in not considering the Department's obligation to treat similarly situated persons in a similar manner."

{30} In more detail, Crutchfield argues that because Section 14–3–15.1(C) by its terms grants an agency discretion, an agency can waive any or all of the statutory conditions. The waiver occurred, according to Crutchfield, by the Department's failure to impose any of the statute's limitations and restrictions on persons requesting and downloading portions of the very same records

that are available on and obtainable from its website. Having determined not to impose the statutory limitations and restrictions on those using the website, Crutchfield argues, the Department cannot treat him differently by imposing the limitations and restrictions because he has requested a copy of the entire database rather than only those portions of which are available on the website. Relying on *Community Public Service Co. v. New Mexico Public Service Commission*, 76 N.M. 314, 316–17, 414 P.2d 675, 676 (1966), which involved a claim of an unconstitutional classification, Crutchfield argues "[t]here is no legal support for the Department['s] insistence that it be allowed to impose the Section 14–3–15.1(C) restrictions on [Crutchfield] while waiving those restrictions for the users of the ONGARD website." As discussed earlier in this opinion, contrary to the district court's finding on the issue, Crutchfield argues that he "[has] not stated [he is] unwilling to pay royalties under any circumstances," but instead "[has] stated [that he is] unwilling to [be] singled out for discriminatory treatment."

{31} The court did not address waiver or discriminatory treatment in its findings of fact or conclusions of law. However, because these issues were raised by Crutchfield's requested "findings and conclusions," we will assume that the district court implicitly determined the issues against Crutchfield. *See Landskroner v. McClure*, 107 N.M. 773, 775, 765 P.2d 189, 191 (1988) (stating that failure of the district court to make a finding of fact is regarded as a finding against the party seeking to establish the affirmative).

{32} We are unpersuaded by Crutchfield's arguments. He asserts waiver but argues discriminatory treatment. Yet he asserts no constitutional or statutory discrimination attack on the Department's manner of allowing access to and use of its database under Section 14–3–15.1(C). Further, Crutchfield fails to persuasively explain or to provide persuasive authority as to why the Department cannot make a decision to place limited portions of the database on its website for the public to download free of charge, yet refuse to supply a particular commercial user or to supply commercial users generally with a copy of the entire database and continuing updates, without an agreement in regard to royalties and use. Other than citing a case setting out a general rule as to waiver, Crutchfield does not provide case or statutory authority that supports his waiver argument. That the Department has decided to provide, free of charge, portions of its database piecemeal on the website while at the same time placing restrictions on or even denying use to persons requesting the entire database for commercial use does not strike us as a circumstance that permits, much less requires, a determination that the Department waived its Section 14–3–15.1(C) rights. We therefore hold that the district court did not err in failing to find that the Department had waived its right to impose the conditions set forth in Section 14–3–15.1(C) on Crutchfield.

C. The Issue of Sanctions

{33} Again, the parties violate the procedural rules by failing to set out a standard of review as to Crutchfield's sanction point. *See* Rule 12–213(A)(4), (B). This issue does not involve disputed facts. We review for abuse of discretion whether a court has erred in not sanctioning a party. *See Gonzales v. N.M. Dep't of Health*, 2000–NMSC–029, ¶¶ 13, 16, 129 N.M. 586, 11 P.3d 550. If in exercising its discretion a court fails to properly interpret a statute or apply the law, our review on that question is de novo. *N.M. Right to Choose/NARAL v. Johnson*, 1999–NMSC–028, ¶ 7, 127 N.M. 654, 986 P.2d 450.

{34} Crutchfield contends that the district court erred in failing to sanction the Department for its response to Crutchfield's request, asserting that Section 14–2–5 declares that providing access to public records is an "essential function" and an "integral part of the routine duties" of public officials. Further, Crutchfield contends that the Department "fail[ed] to provide a careful, reasoned response to [his] records request." More particularly, Crutchfield asserts that the Department failed to provide an explanation for its denial of the electronic database, as required by Section 14–2–11(B) of the

IPRA. He further asserts that the Department failed to forward his request to the General Services Division of the State, the custodian of certain records requested, until more than two and one-half months after the Department received the request. In addition, Crutchfield points to several "mistakes, omissions and oversights by the Department [that] further demonstrate that [his] records request was not handled with the level of care required by the [IPRA]." Crutchfield sought the imposition of sanctions under IPRA Section 14–2–11(C) and asserts court error in failing to impose the sanctions.

{35} The issue before us is one of law. We have determined that the district court did not err in holding that Crutchfield's request was governed by Section 14–3–15.1(C) and in upholding the Department's rejection pursuant to Section 14–3–15.1(C) of Crutchfield's electronic database request. We are unpersuaded that the sanction provisions of the IPRA are applicable to the circumstances in this case. We hold that the district court did not abuse its discretion or otherwise err in refusing to impose sanctions for the alleged violations of procedural requirements of the IPRA.

D. Request Seeking Descriptions of Abbreviations and Terms

{36} Crutchfield contends that the district court erred in determining that his request for records that contained abbreviations and terms used by the Department in categorizing and sorting the severance tax data on its electronic database did not constitute a records request but, rather, was merely a request for information. Having determined that the district court did not err in upholding the Department's rejection pursuant to Section 14–3–15.1(C) of Crutchfield's electronic database request, we see no basis in which Crutchfield is entitled to the records or information he requested. The issue is essentially moot. A reviewing court generally does not decide academic or moot questions. *Srader v. Verant,* 1998–NMSC–025, ¶ 40, 125 N.M. 521, 964 P.2d 82. We therefore do not address whether the request for documents showing abbreviations and terms used in connection with the database falls within the IPRA or the PRA.

E. Crutchfield's Reply Brief and Footnotes

{37} Crutchfield's reply brief failed to set out a table of authorities as required under Rule 12–213(C). His reply brief consisted of approximately one page of introductory comments, and then twenty and one-half pages of argument, including nine footnotes. He did not seek or obtain the permission of this Court to file a reply brief with the argument portion in excess of fifteen pages. *See* Rule 12–213(F). This Court is expressly given authority on its own initiative to sanction a party for failure to comply with the rules. *See* Rule 12–312(D) NMRA. Based on Crutchfield's failures to comply with Rule 12–213(C) and (F), we did not consider the reply brief that was filed. We entered an order requiring Crutchfield's appellate counsel to submit an amended reply brief within five days of the date of the order, one that contained no footnotes and no new argument or authority.

CONCLUSION

{38} We affirm.

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

WE CONCUR: JAMES J. WECHSLER, Chief Judge and A. JOSEPH ALARID, Judge.

2005-NMCA-023

106 P.3d 1283

STATE of New Mexico, Plaintiff–Appellee,

v.

Ellen MERCER, Defendant–Appellant.

No. 23,390.

Court of Appeals of New Mexico.

Dec. 29, 2004.

Certiorari Denied, No. 29,034, Feb. 14, 2005.

Patricia A. Madrid, Attorney General, Ann M. Harvey, Assistant Attorney General, Santa Fe, NM, for Appellee.

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OPINION

WECHSLER, Chief Judge.

{1} Defendant Ellen Mercer appeals her convictions for two counts of fraud and four counts of embezzlement. She argues that: (1) the district court erred in refusing to allow her to introduce the testimony of a satisfied business customer; (2) the district court improperly limited the scope of Defendant's cross-examination of the State's witness, Danny Gamboa, and improperly excluded extrinsic evidence relevant to Gamboa's motive and bias; (3) the district court erred in allowing an amendment to the grand jury indictment to add new charges; (4) the evidence was insufficient to support her convictions; (5) she was erroneously subjected to double jeopardy when convicted and sentenced for both fraud and embezzlement; and (6) cumulative error warrants reversal.

{2} We reverse and remand for a new trial to allow Defendant to introduce the testimony of at least one satisfied customer. We address Defendant's remaining issues only to the extent they either have the potential of affording Defendant greater relief on appeal or they are likely to recur on retrial.

Background

{3} Defendant was the owner and operator of Kitchen 'N Bath Design in Las Cruces, New Mexico. As the owner and operator, Defendant primarily engaged in the design and construction of kitchen and bathroom countertops and cabinets. After receiving advance payments and failing to perform on her contractual obligations, Defendant was indicted on four counts of fraud, or, in the alternative, four counts of embezzlement, for activities arising out of the operation of her business. She was indicted on two counts of fraud over $20,000, or, in the alternative, embezzlement, with respect to transactions involving Danny and Paula Gamboa (the Gamboas) and Scott and Terry Adams (the Adamses). She was also charged with two counts of fraud over $2500, or, in the alternative, embezzlement, with respect to transactions involving the Gamboas and David Loyd and Kimela Miller–Loyd (the Miller–Loyds). After a jury trial, Defendant was convicted on all four counts of embezzlement and two counts of fraud.

Testimony Regarding a Contemporaneous Legitimate Business Transaction

{4} At trial, the State introduced testimony from Kimela Miller–Loyd, the Gamboas, and the Adamses that Defendant had defrauded them by collecting fees from them for goods and services that were never delivered. Defendant sought to introduce testimony from a satisfied customer as evidence of lawful business dealings. The State objected claiming that this testimony was irrelevant. Defendant responded that the testimony was directly relevant to her claim that she never intended to defraud anyone in her business dealings. To refute the State's evidence of Defendant's fraudulent intent, she sought to prove that she ran a legitimate, ongoing business, which regularly and successfully performed on projects similar to those at issue in the criminal proceedings. The State then argued that, if Defendant was allowed to introduce testimony of satisfied customers, the State would seek to bring in other dissatisfied customers. The State also argued that Defendant was improperly trying to introduce extrinsic evidence of Defendant's character.

{5} The district court excluded the evidence on the grounds that it was improper extrinsic evidence of character. *See* Rule 11–404 NMRA. The court observed that, under *State v. McCallum,* 87 N.M. 459, 461, 535 P.2d 1085, 1087 (Ct.App.1975), the State would be entitled to bring in dissatisfied customers to show that Defendant continued to undertake projects which she could not complete. However, the court found that *McCallum* did not authorize Defendant to introduce the testimony of satisfied customers because that testimony would be improper extrinsic evidence of character or reputation.

{6} We analyze this decision of the district court concerning the admission or exclusion of evidence for abuse of discretion and will not disturb the exercise of that discretion absent a clear abuse. *State v. Stanley,* 2001–NMSC–037, ¶ 5, 131 N.M. 368, 37 P.3d 85. "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 [district] 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) (internal quotation marks and citation omitted).

{7} Under Rule 11–404, evidence of other acts may be admissible to prove motive, intent, and absence of mistake. In *McCallum,* 87 N.M. at 461, 535 P.2d at 1087, this Court held that, in a prosecution for fraud against a building contractor, the state could introduce evidence of other instances of uncharged misconduct involving similar failures to complete construction projects. We held that such evidence is admissible on the issue of the defendant's motive or intent to defraud and noted that, in the absence of such evidence, the jury could conclude that "defendant is simply a poor businessman" or mistakenly believed he could complete the contract. *Id.; see State v. Schifani,* 92 N.M. 127, 129, 584 P.2d 174, 176 (Ct.App.1978) (holding that, in a prosecution for fraud and embezzlement, the testimony of witnesses who had dealings with the defendant similar in nature to the victims' dealings with the defendant was admissible as relevant to the issue of the defendant's fraudulent intent).

{8} We are unaware of any New Mexico cases addressing whether Rule 11–404 bars a defendant from offering evidence of prior lawful business dealings to attempt to rebut the state's evidence of fraudulent intent. However, we are persuaded by out-of-state authority addressing this issue that Defendant may introduce such evidence of lawful business dealings to rebut the prosecution's evidence of fraudulent intent under Rule 11–401 NMRA (defining "relevant evidence" as "evidence having any tendency to make the existence of" any consequential fact more or less probable) and Rule 11–402 NMRA (providing that relevant evidence is generally admissible). *See, e.g., United States v. Thomas,* 32 F.3d 418, 421 (9th Cir.1994) (observing that defendants are entitled "to present, within reason, the strongest case they are able to marshal in their defense" which includes testimony of previous lawful behavior to negate fraudulent intent); *United States v. Shavin,* 287 F.2d 647, 654 (7th Cir.1961) (same); *Bogren v. State,* 611 So.2d 547, 550–51 (Fla.Dist.Ct.App.1992) (holding that testimony of satisfied travel agency customers was relevant to the issue of the defendant's intent in accepting advance payments for travel when the travel agency was on the brink of collapse); *State v. Marinos,* 45 Ohio App.2d 312, 345 N.E.2d 76, 79 (1975) (holding that it was prejudicial error to exclude the testimony of satisfied customers during the three-month period when the defendant allegedly engaged in fraud because the excluded testimony would rebut evidence introduced by the state on the question of fraudulent intent).

{9} The State argues that, even if the district court erred in excluding the testimony under Rule 11–404, the testimony was also properly excluded under the balancing requirements of Rule 11–403 NMRA, as cumulative and a waste of time. *See* Rule 11–403 (providing 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, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence"); *State v. Nguyen,* 1997–NMCA–037, ¶ 7, 123 N.M. 290, 939 P.2d 1098 (observing that, even if evidence is admissible under Rule 11–404(B), the court must weigh the probative value of the evidence against its prejudicial effect pursuant to Rule 11–403 before deciding to admit the evidence). We do not agree.

{10} First, we disagree that the testimony of a satisfied customer is cumulative to Defendant's other evidence consisting of her own testimony and that of her accountant. *See State v. Balderama,* 2004–NMSC–008, ¶ 36, 135 N.M. 329, 88 P.3d 845 (holding that the court erred in excluding testimony as a "waste of time" when the testimony was relevant to the essential element of deliberate intent, and it was not cumulative); *Chacon v. State,* 88 N.M. 198, 200, 539 P.2d 218, 220 (Ct.App.1975) (holding that evidence which came from two witnesses who were not connected to the defendant or his family was not

cumulative even if the testimony appeared to be identical to that offered by the defendant); *Thomas,* 32 F.3d at 421 (holding that the customers benefitted by the defendant's actions were entitled to testify and that such testimony was not cumulative "of the abstract expert testimony proffered by the defendant's accountant").

{11} Second, we disagree that the district court, in the exercise of its discretion, could exclude the testimony in order to prevent a "parade of witnesses who had bad and good experiences with defendant." Indeed, the district court may exercise its discretion by limiting the number of satisfied and dissatisfied customers and excluding the testimony of any remaining customers as cumulative. However, the district court's authority to limit the number of witnesses does not alter our holding that the court abused its discretion in this case by refusing to allow Defendant to present the testimony of at least one satisfied customer. We recognize that in some cases fraudulent intent may be implied by the act itself, such as embezzlement by a bookkeeper with access to an employer's funds. *See Bogren,* 611 So.2d at 548. However, in cases such as this one, in which the alleged fraudulent activity involves the acceptance of advance payments from customers while the business is experiencing financial difficulties, the trier of fact must determine whether the defendant's actions were motivated by poor business judgment or by an intent to wrongfully and criminally obtain funds from vulnerable customers. *See Shavin,* 287 F.2d at 654 (observing that, in a close question of whether the defendant acted with fraudulent intent or in good faith, it was error for the district court to refuse to allow the defendant to introduce evidence of other legitimate business transactions); *Bogren,* 611 So.2d at 550.

{12} We therefore hold that the court abused its discretion in excluding the testimony of a satisfied customer as extrinsic evidence of character under Rule 11–404 because its exclusion precluded Defendant from an opportunity to fully develop a major element of her defense. *See Stanley,* 2001–NMSC–037, ¶ 24, 131 N.M. 368, 37 P.3d 85 (holding that the "denial of an opportunity for [d]efendant to develop a major part of his defense was an abuse of discretion"); *see also State v. Saavedra,* 103 N.M. 282, 284, 705 P.2d 1133, 1135 (1985) (holding that the district court abused its discretion in refusing to admit evidence that was highly probative on the issue of defendant's improper identity defense and crucial to the defendant's principal theory of defense). In light of our disposition, we do not reach Defendant's arguments under the United States and New Mexico Constitutions. *See State v. Self,* 88 N.M. 37, 40, 536 P.2d 1093, 1096 (Ct.App. 1975). We reverse and remand for a new trial to allow Defendant to introduce the testimony of at least one satisfied customer.

Sufficiency of the Evidence

{13} Because Defendant would be entitled to dismissal of the charges against her if we were to find in her favor regarding the sufficiency of the evidence, we address this issue. *See State v. Santillanes,* 109 N.M. 781, 782, 790 P.2d 1062, 1063 (Ct.App. 1990). When reviewing a claim of insufficiency of the evidence, we must determine whether substantial evidence, either direct or circumstantial, exists to support a guilty verdict beyond a reasonable doubt for every essential element of the crimes at issue. *See State v. Rojo,* 1999–NMSC–001, ¶ 19, 126 N.M. 438, 971 P.2d 829. We review the evidence in the light most favorable to the verdict, resolving all conflicts and indulging all permissible inferences to uphold the conviction and disregarding all evidence and inferences to the contrary, to ensure that a rational jury could have found each element of the crime established beyond a reasonable doubt. *Id.; see State v. Orgain,* 115 N.M. 123, 126, 847 P.2d 1377, 1380 (Ct.App.1993).

{14} We consider whether the evidence is sufficient to support Defendant's convictions for fraud and embezzlement. "Fraud consists of the intentional misappropriation or taking of anything of value which belongs to another by means of fraudulent conduct, practices or representations." NMSA 1978, § 30–16–6 (1987). "Embezzlement consists of the embezzling or converting to his own use of anything of value, with which he has been entrusted, with fraudulent intent to de-

prive the owner thereof." NMSA 1978, § 30–16–8 (1995).

{15} To convict Defendant of embezzlement, the State had to prove beyond a reasonable doubt that Defendant was entrusted with money that she converted to her own use and, at the time Defendant converted the money, she fraudulently intended to deprive the owner of it. *See* UJI 14–1641 NMRA. " 'Converting something to one's own use' means keeping another's property rather than returning it, or using another's property for one's own purpose [rather than] . . . for the purpose authorized by the owner." *Id.* " 'Fraudulently intended' means intended to deceive or cheat." *Id.*

{16} To convict Defendant of fraud, the State had to prove beyond a reasonable doubt that (1) Defendant, by any words or conduct, made a promise she had no intention of keeping or misrepresented a fact to the victims, intending to deceive or cheat them and, (2) because of the promise or misrepresentation and the victims' reliance on it, Defendant obtained money belonging to someone other than Defendant. *See* UJI 14–1640 NMRA.

{17} Count 1 is directed at the $40,000 paid by the Gamboas for their cabinet package. Count 2 is directed at the money paid by the Gamboas for the granite countertops and kitchen hood. Count 3 is directed at the $6500 paid by the Miller–Loyds, and Count 4 is directed at the $29,726.49 paid by the Adamses.

{18} The State presented evidence at trial that Danny Gamboa paid Defendant an initial deposit of $2000 on October 12, 1998, and another payment of $40,000 on February 19, 1999 to design and build cabinets for the Gamboas' house. Gamboa testified that, on September 24, 1999, he made an advance payment of $10,525.50 to pay one-half of the cost of the granite countertops. He paid an additional $3442 in September 1999 for a hood for the top of his stove. While extending the deadline into October and November 1999, Defendant continued to assure the Gamboas that the cabinets would be forthcoming, but the cabinets failed to arrive. Negotiations continued into December. The Gamboas never received the cabinets, the granite countertops, or the hood, and Defendant never refunded their money. The Gamboas' attorney testified that he attempted to work with Defendant to have the cabinets delivered, but the cabinets were never produced.

{19} Kimela Miller–Loyd testified that she visited Defendant's showroom in October 1999, and Defendant prepared an estimate for the work that Miller–Loyd requested. Miller–Loyd believed that the price was too high. In early December, Defendant sent a flyer offering discounts. Miller–Loyd again met with Defendant who offered additional cost-saving ideas. Defendant offered Miller–Loyd a price of $6500. Defendant informed her that this price, which represented a 10% discount, required Miller–Loyd to pay in advance, in full. Miller–Loyd made full payment. Miller–Loyd testified that Defendant's actions in coming to her house, making drawings, and representing that she was capable of doing the cabinets induced Miller–Loyd to pay the $6500.

{20} In late February 2000, Defendant told Miller–Loyd that she was going out of business but assured her the cabinets would be completed. Over the next month, Miller–Loyd attempted to contact Defendant without success. In September 2000, Miller–Loyd discovered that Defendant had declared bankruptcy and did not list Miller–Loyd as a creditor. Defendant later contacted Miller–Loyd offering to refund her money, but, after Miller–Loyd indicated she would accept the offer, Defendant did not contact her again. Miller–Loyd never received any cabinets in exchange for her $6500 payment.

{21} To the extent Defendant challenges her convictions in Count 4, we review the evidence supporting those convictions as well. There is evidence that Terry Adams met with Defendant on January 19, 2000 about possible cabinetry work. Adams paid Defendant $1500 for plan drawings with the understanding that money would be refunded if Adams decided to purchase the cabinets. The next day, January 21, 2000, Adams agreed to have Defendant build the cabinets and paid Defendant $29,726.49 in advance.

{22} The following Monday, Adams was informed that Defendant's business was having trouble and she called her bank to stop payment on the check. Defendant and Adams spoke, and Defendant tried to assure Adams of her credibility. Adams informed Defendant that she no longer wanted the cabinets but would pay the $1500 for drawings already completed. Adams gave Defendant's daughter a second check for $1500 on Thursday. Defendant admitted that she also deposited the second $1500 check written by Terry Adams.

{23} Defendant never told Adams that she had deposited, and cashed, the $29,726.49 check. Defendant's bank sought reimbursement from the Adamses because Defendant had already withdrawn the funds. After Defendant's bank instituted litigation, the Adamses had to pay the bank $24,000 in settlement. Defendant never provided the Adamses with any cabinets or additional goods and services beyond the initial drawings. Defendant never reimbursed the Adamses.

{24} Defendant claims that her convictions must be reversed because the State failed to introduce direct evidence showing that she had the criminal intent to defraud. We disagree because intent is usually established by circumstantial evidence. *See State v. James,* 109 N.M. 278, 280, 784 P.2d 1021, 1023 (Ct. App.1989) (affirming the defendant's conviction for embezzlement and observing that "[t]he fact that the evidence is circumstantial makes no difference"); *State v. Gallegos,* 109 N.M. 55, 66, 781 P.2d 783, 794 (Ct.App.1989) (stating that intent is usually inferred from the facts of the case, not direct evidence); *State v. Gregg,* 83 N.M. 397, 399, 492 P.2d 1260, 1262 (Ct.App.1972) (holding that there was substantial evidence of the defendant's fraudulent intent even though the evidence was circumstantial). In this case, Defendant's failure to complete the work for the Gamboas, the Miller–Loyds, and the Adamses is circumstantial evidence of fraudulent intent, especially in light of the evidence that Defendant's business was in a precarious financial position as early as March 1997. *See McCallum,* 87 N.M. at 461, 535 P.2d at 1087 (stating that "[t]he fact that defendant entered into many contracts which he failed to complete shows that either he was aware of the risks, that he was aware of his capabilities, or that he could not have believed that he would complete the contracts. The defendant's proceeding to contract in spite of his awareness is evidence of his fraudulent intent"); *cf. McCary v. Commonwealth,* 42 Va.App. 119, 590 S.E.2d 110, 114–15 (2003) (holding that sufficient evidence supported a finding of the defendant's fraudulent intent based upon a showing of the defendant's unfulfilled promises to complete two construction contracts, the lack of communication between the defendant and the homeowners, and the defendant's failure to inform the homeowners of his financial difficulties).

{25} Moreover, additional evidence introduced at trial supports a finding of fraudulent intent by rebutting Defendant's contention that she was a legitimate businesswoman who was, at most, guilty of poor business judgment. The State introduced evidence that Defendant purchased a car for her daughter using business funds in June 1999. Defendant purchased the car from Danny Gamboa for $13,429 by writing a check on a Kitchen N' Bath Design account. Defendant told Gamboa that he could cash the check when the project was complete or destroy the check and take the amount off of the final payment due for the cabinetry work.

{26} Evidence was also introduced that Defendant withdrew large amounts of cash from her business, although she claimed that the money was used for business purposes. Defendant admitted that she occasionally paid herself commission before completing the work even though her business was failing. She also admitted that she purchased a ticket for a trip to Hawaii out of the proceeds of the Adamses' check although she claimed the trip was to interview for a possible job. Finally, Defendant's accountant testified that Defendant did not file a corporate tax return in 1998 or 1999, and there were several tax liens against Defendant's business because Defendant had failed to pay requisite payroll taxes. This evidence, when viewed in the light most favorable to conviction, is sufficient to support the jury's finding that Defendant acted with fraudulent intent.

{27} Defendant also argues that her convictions must be reversed because "uncontroverted evidence" shows that she repeatedly performed on her contracts and that she tried to negotiate a fair settlement with the injured parties. We are unpersuaded because Defendant's alleged efforts to reach a settlement, if believed by the factfinder, do not warrant reversal as a matter of law. *See Schifani*, 92 N.M. at 131–32, 584 P.2d at 178–79 (holding that whether the defendant ultimately repaid the victim is irrelevant to the defendant's conviction for fraud and embezzlement because the crimes are complete when the defendant fraudulently obtains the money or wrongfully converts it to his own use). Furthermore, the issue of whether Defendant made good-faith efforts to fulfill her contractual obligations is one of credibility that must be resolved by the jury as finders of fact and they are free to reject Defendant's version of the events. *James*, 109 N.M. at 280–81, 784 P.2d at 1023–24.

Other Issues for Retrial

{28} Having reviewed the evidence in the light most favorable to the verdict and concluding that there was sufficient evidence to support Defendant's convictions beyond a reasonable doubt, we address the remainder of Defendant's contentions that may arise again on retrial.

Double Jeopardy

{29} Defendant was charged with four counts of fraud and, in the alternative, four counts of embezzlement. On Counts 2 and 4, she was convicted of both the fraud and embezzlement alternatives. The State is authorized to charge in the alternative. *See State v. Pierce*, 110 N.M. 76, 86, 792 P.2d 408, 418 (1990). However, Defendant's convictions for both alternatives violate her right to be free from double jeopardy. *See State v. Cooper*, 1997–NMSC–058, ¶¶ 55, 57, 124 N.M. 277, 949 P.2d 660; *cf. State v. Kenny*, 112 N.M. 642, 651, 818 P.2d 420, 429 (Ct.App. 1991) (affirming the defendant's conviction for one count of aggravated battery because even though the jury found him guilty under two alternatives, the district court corrected any confusion by indicating that the defendant was convicted of only one count of aggravated battery). If, upon retrial, the jury again convicts Defendant of alternatives on any count, one alternative conviction must be vacated. *See Pierce*, 110 N.M. at 86–87, 792 P.2d at 418–19. The double jeopardy violation cannot be cured merely by imposing one sentence for both alternatives because " 'the second conviction, even if it results in no greater sentence, is an impermissible punishment.' "*Id.* (quoting *Ball v. United States*, 470 U.S. 856, 864–65, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985)). As both the fraud and embezzlement offenses are the same degree felonies, we express no opinion as to which alternative conviction would need to be vacated. *Cf. State v. Santillanes*, 2001–NMSC–018, ¶¶ 9, 15, 130 N.M. 464, 27 P.3d 456 (stating that the general rule is to vacate the conviction and any sentence imposed for the lesser offense).

Limitation of Cross–Examination of Danny Gamboa and Exclusion of Extrinsic Evidence on the Issue of Gamboa's Bias

{30} Defendant claims that the district court erred in limiting her cross-examination of Danny Gamboa and in excluding extrinsic evidence as to Gamboa's motive and bias. The admission or exclusion of evidence is within the sound discretion of the district court and we will not overturn its determination absent an abuse of that discretion. *Stanley*, 2001–NMSC–037, ¶ 5, 131 N.M. 368, 37 P.3d 85. We will affirm the ruling unless it is "clearly untenable or not justified by reason." *Woodward*, 121 N.M. at 4, 908 P.2d at 234 (internal quotation marks and citation omitted).

{31} Defendant claims that her cross-examination of Danny Gamboa was unduly restricted because she was not allowed to ask him about a pending criminal investigation or a contract dispute between Gamboa and Urena, who ultimately supplied the cabinets for Gamboa's home. Our review of the record indicates that Defendant never invoked a ruling from the district court on these matters and thus failed to preserve any objection to the court's decision to exclude these lines of questioning. *See State v. Trujillo*, 2002–NMSC–005, ¶ 13, 131 N.M. 709, 42 P.3d 814

(refusing to address the defendant's confrontation clause concerns because he failed to object to the admission of evidence on confrontation grounds); *State v. Varela,* 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280 (holding that a timely and specific objection is necessary to preserve error). To the contrary, the transcript indicates that defense counsel specifically agreed not to ask about the criminal investigation unless it became relevant at some later point. Defendant does not contend that either party raised the issue later during the trial. Defense counsel also initially agreed that the contract dispute between Gamboa and Urena was irrelevant. Later, during cross-examination of Urena, Defendant stated that she might seek to bring in evidence of the contract dispute. However, Defendant made this statement in response to the State's attempt to ask Urena about the amount Gamboa agreed to pay him for the cabinets. The State was attempting to establish the amount Gamboa lost in his dealings with Defendant. Once the court determined that the amount Gamboa paid to Urena was not relevant to the issue of any criminal behavior by Defendant, Defendant no longer sought to introduce any evidence of the contract dispute between Urena and Gamboa. As these issues were not preserved, we do not express an opinion as to whether, on retrial, Defendant should be allowed to introduce evidence of the contract dispute between Urena and Gamboa or any alleged criminal investigation concerning Gamboa. *See State v. Mireles,* 119 N.M. 595, 597, 893 P.2d 491, 493 (Ct.App. 1995) (declining to address objections that were not made to the district court and thus were not preserved).

{32} Defendant also claims that she should have been allowed to question Danny Gamboa about a victim's restitution request form completed by the district attorney's office. Defendant claims that she sought to introduce the restitution form to show Gamboa's direct interest and bias by showing that Gamboa initiated prosecution to obtain reimbursement. The State argued that the form was inadmissible because Gamboa never signed it and it was only for internal use by the district attorney's office.

{33} We hold that the court did not abuse its discretion in excluding the question based upon its finding that any inconsistency between the $80,000 claimed on the restitution request and the $55,000 loss Gamboa asserted at trial was irrelevant to the issue of Gamboa's bias. We also note that the court informed Defendant that she could ask about bias by asking Gamboa, "You're out at least $55,000; you want your money back[?]" Even though invited to do so, defense counsel did not question Gamboa further about any money he wanted to recover from Defendant. Therefore, Defendant waived any objection based upon exclusion of the restitution request sheet. *Cf. State v. Mora,* 1997-NMSC-060, ¶¶ 45-46, 124 N.M. 346, 950 P.2d 789 (holding that the defendant waived his claim that the State's late disclosures prevented him from effectively cross-examining certain witnesses because the defense failed to recall any witness when he was given the opportunity to do so).

{34} Finally, Defendant contends that she was improperly prevented from questioning two other witnesses about Gamboa's intense dislike of Defendant. We disagree as to the first witness—Munoz, because the transcript indicates that Defendant failed to preserve any such objection. The transcript indicates that the court did allow Defendant to ask this witness about excessive demands and changes made by Gamboa which would be evidence of Gamboa's dislike. However, Defendant never asked any further questions about demands or changes once the court permitted this line of questioning.

{35} As to Urena, Defendant claims she should have been able to ask him about a statement made to him by Gamboa that Gamboa was pleased Defendant was arrested. This question might be admissible to establish bias or motive on the part of Gamboa. *See State v. Lovato,* 91 N.M. 712, 714, 580 P.2d 138, 140 (Ct.App.1978). However, the court did not abuse its discretion in disallowing the question because the inquiry appears cumulative of other evidence that Gamboa did not like Defendant and, in light of Gamboa's claim that Defendant defrauded him, it was relatively lacking in probative value. *See* Rule 11-403; *Lovato,* 91 N.M. at 715, 580 P.2d at 141 (observing that extrinsic

evidence showing a witness's bias or motive to testify falsely is admissible but affirming the court's decision to exclude the tendered testimony as cumulative); *cf. State v. Marquez,* 1998–NMCA–010, ¶ 24, 124 N.M. 409, 951 P.2d 1070 (stating that the district court may exclude cumulative evidence).

Amendment of the Indictment

{36} Defendant contends that the court erred in amending the indictment to add new charges and to expand the scope of the charges without notice. We decline to address this issue in light of our decision to reverse Defendant's convictions and remand for a new trial. *See State v. Roman,* 1998–NMCA–132, ¶ 16, 125 N.M. 688, 964 P.2d 852 (stating that this Court will not usually reach out to decide issues unnecessarily).

Conclusion

{37} We hold that Defendant should have been allowed to introduce testimony from at least one satisfied customer. We further hold that Defendant's alternative convictions for fraud and embezzlement violate her right to be free from double jeopardy. Accordingly, we vacate the judgment of the district court. Because the evidence was sufficient to support Defendant's convictions, we remand this case for a new trial to be conducted in a manner consistent with this opinion.

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

WE CONCUR: IRA ROBINSON and MICHAEL E. VIGIL, Judges.

2005-NMCA-016

107 P.3d 1

In the Matter of the Estate of John Salopek, Deceased.

Dacia E. SALOPEK, Petitioner–Appellant,

v.

Elizabeth HOFFMAN, Jim Salopek, Jack Salopek, Patricia Kinney, Stephen Salopek, Christine Brown, and Margaret Walth, Contestants–Appellees.

No. 24018.

Court of Appeals of New Mexico.

Nov. 23, 2004.

Certiorari Denied, No. 29,015, Feb. 1, 2005.

Joleen K. Youngers, Almanzar & Youngers, P.A., Joseph M. Holmes, Joseph M. Holmes, P.A., Las Cruces, for Appellant.

Kevin J. Hanratty, Hanratty Law Firm, Artesia, Patrick L. Westerfield, Westerfield Law Offices, Ltd., for Appellees.

OPINION

BUSTAMANTE, J.

{1} This interlocutory appeal presents two issues: (1) whether the waiver of rights provision of the Uniform Probate Code, NMSA 1978, § 45–2–407 (1995), which became effective July 1, 1995, can be applied retroactively to a post-nuptial agreement entered into by the parties in 1980; and (2) whether language in the post-nuptial agreement waives the family allowance, NMSA 1978, § 45–2–402 (1995), and the personal property allowance, NMSA 1978, § 45–2–403 (1999). We hold that the statutory waiver provision does not apply retroactively. We further hold that the post-nuptial agreement was not a common law contractual waiver. We therefore reverse and remand to the district court.

BACKGROUND

{2} This interlocutory appeal is brought by Dacia E. Salopek (Wife), the surviving spouse of the decedent, John Salopek. Wife and decedent were married twice, the most recent time being from April 24, 1980, until the decedent's death on April 15, 2002. Wife and decedent entered into a "Post–Nuptial Agreement" on June 30, 1980. Following the appointment of a special administrator for the estate, Wife filed a claim against the estate for the statutory family and personal property allowances. The special administrator neither allowed nor disallowed the claims. Wife filed her Petition for Allowance of Claims for Personal Property Allowance and for Family Allowance with the district court, and requested a hearing. Decedent's children filed an objection to the claims, arguing that the claims had been waived by the post-nuptial agreement entered into by Wife and decedent.

{3} The district court conducted a hearing and denied the petitions for the allowances. In so ruling, the district court relied on language in the post-nuptial agreement that provides the agreement "relates to any real or personal property now owned or hereinafter acquired," and that the agreement is "binding on personal representatives." The district court applied the current waiver provision, Section 45–2–407(D), enacted in 1995, and ruled that the language in the post-nuptial agreement met the definition of waiver as defined by the statute.

DISCUSSION

{4} We review issues of statutory interpretation de novo. *Bd. of Comm'rs of Doña Ana County v. Las Cruces Sun–News,* 2003–NMCA–102, ¶ 19, 134 N.M. 283, 76 P.3d 36. Our goal is to ascertain legislative intent, which is primarily indicated by the plain language of the statute. *Id.*

{5} Wife first argues that Section 45–2–407, the waiver of rights provision, cannot be applied retroactively to the 1980 post-nuptial agreement. Wife relies on New Mexico rules of statutory construction which state that statutes, except those dealing with remedial procedures, are presumed to operate prospectively unless there is clear legislative intent to give the statute retroactive effect. *Coleman v. United Eng'rs & Constructors, Inc.,* 118 N.M. 47, 52, 878 P.2d 996, 1001 (1994) (holding that ten-year statute of repose did not operate retroactively in precluding worker's personal injury action against corporation); *Quintana v. Los Alamos Med. Ctr., Inc.,* 119 N.M. 312, 314, 889 P.2d 1234, 1236 (Ct.App.1994). When a law affects a vested or substantive right it should have prospective application only. *Swink v. Fingado,* 115 N.M. 275, 279, 290, 850 P.2d 978, 982, 993 (1993).

{6} Wife points out that when the waiver of rights provision was enacted in 1995, the language of the allowance provisions was

changed so that the waiver and allowance provisions could be read together. Prior to 1995, the family and personal property allowances could be repudiated by the decedent only through a testamentary instrument. After the 1995 changes, the allowances could be renounced or repudiated through a will "or other governing instrument." §§ 45–2–402 and –403. The addition of this language indicates an intent to have the allowance provisions read together with the waiver provisions. The "other governing instrument" language presumably allows a decedent and a surviving spouse to waive the allowances by means of instruments such as the post-nuptial agreement at issue here. This change in language is an indication that the legislature intended the provision to apply prospectively because the language in effect in 1980 did not provide for waiver by a decedent other than through a testamentary instrument. Wife also points out that when New Mexico adopted the Uniform Probate Code in 1975, the legislature did not adopt the waiver provision. Wife contends that this is another indication that the 1995 waiver provision was not intended to apply retroactively.

{7} This Court has declined to apply other provisions of the Probate Code retroactively. *In re Estate of Kerr,* 1996–NMCA–063, ¶ 8, 121 N.M. 854, 918 P.2d 1354. In *Kerr,* we ruled that in determining whether mutual wills existed, the wills did not need to meet the Probate Code requirement for mutuality because the wills were drafted three years before the Probate Code came into effect. *Id.* That is similar to the situation in this case, where the waiver provisions in question were not in effect until fifteen years after the post-nuptial agreement was signed.

{8} Respondents also argue that Wife "knew or should have known as a reasonable college student that she was waiving all rights to decedent['']s property by the contractual language [in the agreement]." Respondents rely on the language in paragraphs two and six of the post-nuptial agreement, which state:

> 2. The wife hereby agrees that she will make no claim to any of the real or personal property now owned or hereafter acquired by the husband, who may take title to any property hereafter acquired as his separate estate, nor will the wife make any claim that community property funds have been used to improve the separate property of the husband. The wife further recognizes and agrees that the husband will be required to execute mortgages on the real property which he owns or security agreements on the personal property which he owns in order to acquire operating funds, and the wife by the terms of this agreement represents that she will make no claim to any of the property, real or personal, now mortgaged or hereafter mortgaged by the husband to any lending institution. The wife further agrees that she will make no claim that any income received by the husband from crops grown on the husband's farm, including any farms that may be operated in a partnership, and that such income shall not be considered as community income, notwithstanding that the husband may have labored in earning such income, it being specifically agreed that the same shall constitute separate income of the husband.
>
> . . . .
>
> 6. This agreement shall inure to and be binding on the parties, their heirs, and estate personal representatives.

Respondent's argument that this language constitutes a common law contractual waiver of the allowances fails as a matter of law.

{9} Common law waiver is an "intentional relinquishment or abandonment of a known right." *J.R. Hale Contracting Co. v. United N.M. Bank,* 110 N.M. 712, 716, 799 P.2d 581, 585 (1990). Respondents do not explain how Wife could have waived her right to allowances that she testified she did not even know existed at the time of the purported waiver. Furthermore, there is no language anywhere in the post-nuptial agreement indicating an intent to waive the statutory allowances. The terms "waiver" or "allowances" do not appear anywhere in the agreement. The post-nuptial agreement states that "the parties desire by this agreement to establish the property rights which shall exist between the parties during their marriage." The agreement further states that "[s]hould either party commence an ac-

tion for divorce or other proceedings affecting the parties' marital rights, then they each agree that this Post–Nuptial Agreement shall be filed in such proceedings." The language of the agreement does not make any reference to the statutory allowances or include mention of any claims Wife might make against the decedent's estate after his death. In sum, the language of the agreement standing by itself cannot meet the common law requirement for a waiver of the statutory allowance.

{10} Our decision is bolstered by the strong public policy underlying the statutory allowance. This Court had occasion to review the intent and policy behind the statutory allowances in *In re Estate of Jewell,* 2001–NMCA–008, 130 N.M. 93, 18 P.3d 334. We held that the family allowance and personal property allowance are not subject to offset or defenses and pass outside the will by operation of law. *Id.* ¶ 9. We found that in adopting the Probate Code, "our legislature supplanted the flexibility of discretionary relief in favor of the certainty of a fixed allowance which is afforded without conditions, in a set amount, and apparently without regard for the size or composition of the estate." *Id.* ¶ 15. The clear policy behind the statutory allowances is to provide a minimum guarantee to the surviving spouse that is insulated from decedent's intent so that a surviving spouse is not left penniless and abandoned. *Id.* ¶ 9. The allowances constitute a statutory entitlement even if it means recovery must be made from a decedent's sole and separate property. *Id.* The policy behind the allowances argues against finding a waiver in the absence of clear explicit language. The terms of this post-nuptial agreement are simply too general and too ambiguous to support a finding of waiver.

CONCLUSION

{11} Consistent with our rules of statutory construction and existing case law in New Mexico, as well as the strong public policy in favor of awarding the allowances, we hold that the 1995 waiver of rights statute cannot be applied retroactively. And, the post-nuptial agreement does not qualify as a common law contractual waiver. We reverse the decision of the district court and remand for further proceedings consistent with this opinion.

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

FRY and CASTILLO, JJ., concur.

2005-NMCA-020

107 P.3d 4

TEAM SPECIALTY PRODUCTS, INC., New Mexico ID No. 02–124490–00–1 Protest to Department's Denial of Application for Technology Jobs Tax Credit for Tax Year 2001, Appellant,

v.

NEW MEXICO TAXATION AND REVENUE DEPARTMENT, Appellee.

No. 24,670.

Court of Appeals of New Mexico.

Dec. 17, 2004.

James Lawrence Sanchez, Rael & Sanchez, Los Lunas, NM, for Appellant.

Patricia A. Madrid, Attorney General, Susanne Roubidoux, Special Assistant Attorney General, Santa Fe, NM, for Appellee.

OPINION

SUTIN, Judge.

{1} The Taxation and Revenue Department of the State of New Mexico (the Department) denied an application by Team Specialty Products, Inc. (Taxpayer) for a tax credit under the Technology Jobs Tax Credit Act (the Technology Act), NMSA 1978, §§ 7–9F–1 to –12 (2000). The Department based the denial on Taxpayer's failure to apply for the tax credit within a statutorily prescribed time period. A Department hearing officer denied Taxpayer's protest of the Department's denial of Taxpayer's application. In this appeal, we are required to determine whether the one-year prescribed period contained in Section 7–9F–9(A) to apply for a tax credit is permissive or mandatory. We hold that the one-year period is mandatory and that the Department properly invoked Section 7–9F–9(A) to bar Taxpayer's application. We therefore affirm the decision and order of the hearing officer denying Taxpayer's protest.

BACKGROUND

{2} The Technology Act grants eligibility to a taxpayer conducting qualified research at a qualified facility and making qualified expenditures, all as defined in the Technology Act, to claim a "basic credit" equal to four percent of qualified expenditures, and to claim an "additional credit" equal to another four percent under certain circumstances.

§§ 7–9F–5, –6. These claims may be pursued after a taxpayer has applied for and been granted approval for the credits. § 7–9F–9(B), (C). Section 7–9F–9(A) states: "A taxpayer may apply for approval of a credit within one year following the end of the calendar year in which the qualified expenditure was made."

{3} In November 2001, Robert and Daniel Sachs (Owners) purchased Taxpayer. Owners retained two employees, Barbara Blanton and her assistant, Jeff Hurley, whose duties were to pay bills, file tax returns, and perform general accounting tasks. Between November 2001 and February 2003, Owners were not aware of the existence of a technology jobs tax credit. During this gap in time and knowledge, the following occurred: For the first six months after the purchase, Blanton maintained that she was unable to provide Owners with financial information because the computer system was being updated, and Owners did not receive their first financial information until May 2002. Blanton resigned in June 2002 with no notice. Although Taxpayer's cash flow was improving, Owners began to receive notices that Taxpayer's vendors were not being paid; and, at the same time, Hurley, who had taken over Blanton's duties, informed Owners that he had lost Taxpayer's credit card and that someone had run up unauthorized charges. Upon investigation, Owners determined that it was Hurley who made the unauthorized charges, whereupon Owners fired Hurley. In reviewing Taxpayer's bookkeeping and accounting records, Owners discovered that bills and taxes had not been paid and that Hurley had forged a company check written to himself in the amount of $67,000.

{4} Upon hiring a certified public accountant to help straighten out Taxpayer's accounting problems, the accountant discovered two letters concerning a tax credit available to Taxpayer under the Technology Act. The first letter was dated December 26, 2001, from Taxpayer's former accounting firm to Blanton reminding her that Taxpayer's application for a tax credit for the months in 2000 during which the credit was available had to be mailed no later than December 31, 2001. The second letter, dated July 29, 2002, was from the Department to Blanton notifying her that Taxpayer's application for the tax credit for 2000 had been approved.

{5} After learning of these letters, Owners determined that neither Blanton nor Hurley had filed an application for the tax credit for the period January through December 2001, which is the time period at issue in this case. In September 2003, Taxpayer's accountant prepared and submitted an application for the basic and additional tax credits for the 2001 calendar year. The Department denied the application on September 19, 2003, on the ground that the application was not filed within one year following the end of the calendar year in which the qualified expenditures were made.

{6} Taxpayer protested this denial. Taxpayer's position before the hearing officer assigned to the protest was that the use of the word "may" in Section 7–9F–9(A) made the time limit in the statute optional rather than mandatory. Also, Taxpayer argued that under the statute the Department had discretion to extend the time within which an application for the tax credit may be filed when the taxpayer had good cause for delay. The hearing officer denied the protest, concluding that "[t]he one-year limitation period set out in [Section] 7–9F–9(A) is mandatory and not discretionary," and further that Taxpayer's untimely application barred the Department from approving the credit.

{7} On appeal, Taxpayer contends that the hearing officer's decision is contrary to law, arbitrary, and capricious because Section 7–9F–9(A) is discretionary and permissive, and that the Department was not barred from accepting the application. Taxpayer also asserts it was denied substantive due process.

DISCUSSION

Standard of Review

{8} We will set aside a decision and order of a hearing officer only if we find them to be "(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with the law." NMSA 1978, § 7–1–25(C) (1989); *Grogan v. N.M. Taxation & Revenue Dep't*, 2003–

NMCA–033, ¶ 10, 133 N.M. 354, 62 P.3d 1236. In the present case, there exist no disputed facts. The hearing officer interpreted Section 7–9F–9(A), and applied that statute to the facts of the case. Our review of an application of the law to facts is de novo. *Id.; Quantum Corp. v. Taxation & Revenue Dep't,* 1998–NMCA–050, ¶ 8, 125 N.M. 49, 956 P.2d 848.

Interpretation of Section 7–9F–9(A) and Right to Extension of Deadline

{9} "[A]ll provisions of a [statutory scheme], together with other statutes in pari materia, must be read together to ascertain legislative intent." *Roth v. Thompson,* 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992). "The rule that statutes in pari materia should be construed together has the greatest probative force in the case of statutes relating to the same subject matter passed at the same session of the Legislature." *State v. Davis,* 2003–NMSC–022, ¶ 12, 134 N.M. 172, 74 P.3d 1064. We are guided by the principle that "[t]ax credits are strictly matters of legislative grace and are to be construed against the taxpayer." *Murphy v. Taxation & Revenue Dep't,* 94 N.M. 90, 93, 607 P.2d 628, 631 (Ct.App.1979).

{10} Taxpayer argues the classic distinction between "shall" and "may" in statutory construction. *See Thriftway Mktg. Corp. v. State,* 114 N.M. 578, 579, 844 P.2d 828, 829 (Ct.App.1992) ("[A] fundamental rule of statutory construction states that in interpreting statutes, the words 'shall' and 'may' should not be used interchangeably but should be given their ordinary meaning"); *Vaughn v. United Nuclear Corp.,* 98 N.M. 481, 486, 650 P.2d 3, 8 (Ct.App.1982) ("[A]n amendment substituting 'may' for 'shall' manifests a clear intent to make the act referred to permissive instead of mandatory."); *see also Chavez v. Am. Life & Cas. Ins. Co.,* 117 N.M. 393, 396, 872 P.2d 366, 369 (1994) ("The legislature is presumed to know the law, including the laws of statutory construction, when it passes legislation."). Taxpayer then argues that if the Legislature intended Section 7–9F–9(A) to be a mandatory statute rather than a permissive one, it could have worded Section 7–9F–9(A) as it did NMSA 1978, § 7–9A–8(A) (1979, as amended through 2000) in the Investment Credit Act, which reads: "A taxpayer shall apply for approval for a credit within one year following the end of the calendar year in which the qualified equipment for the manufacturing operation is purchased or introduced into New Mexico."

{11} Sections 7–9A–8(A) and 7–9F–9(A) are both contained in Chapter 7 of New Mexico's taxation statutes and they both involve tax credits. But Section 7–9A–8, which is in the Investment Credit Act, was enacted in 1979, some twenty years before Section 7–9F–9(A), which is in the Technology Act. We do not glean from these two statutes, or from a review of the taxation statutes in Chapter 7, that the use of "may" in Section 7–9F–9(A) requires the conclusion that the Department must, or under the circumstances of this case has the discretion to, permit filing beyond the one year mentioned in the statute. To the contrary, although it might be considered unusual for the Legislature to use the word "may" rather than "shall" if the Legislature intended the statute to constitute a statute of limitations, we are not persuaded that the Legislature did not intend a one-year limitation period in enacting Section 7–9F–9(A). It would be more unusual for the Legislature in tax legislation to intend by the words "may apply" together with a specific one-year time limitation to offer taxpayers an open-ended time frame within which to apply for approval of a tax credit. Taxpayer does not bring to our attention any tax credit or similar law provision that reads, or has been construed, in a manner that permits the open-ended, unrestricted, or unconditional application time frame that Taxpayer seeks.

{12} The Technology Act itself contains certain time frames. The Department is required in October of each year to report to legislative committees on the fiscal and economic impacts of the Technology Act, using the most recently available data for the two prior fiscal years. § 7–9F–12. The information for impact assessment includes the amounts of basic credits and additional credits received by taxpayers. *Id.* Basic credits are approved based on information as to "qualified expenditures," and additional credits are approved based on information as to

"annual payroll expense," "base payroll expense," and "qualified expenditures," as those terms are defined in the Technology Act. §§ 7–9F–3(B), (C), (F), 7–9F–6. The eligibility provisions for claiming basic and additional credits are the following:

A. A taxpayer conducting qualified research at a qualified facility and making qualified expenditures is eligible to claim the basic credit pursuant to the Technology Jobs Tax Credit Act. [7–9F–1 to 7–9F–12 NMSA 1978].

B. A taxpayer conducting qualified research at a qualified facility and making qualified expenditures is eligible to claim the additional credit pursuant to the Technology Jobs Tax Credit Act if:

(1) the taxpayer increases the taxpayer's annual payroll expense at the qualified facility by at least seventy-five thousand dollars ($75,000) over the base payroll expense of the taxpayer;

(2) the increase in Paragraph (1) of this subsection has not previously been used to meet the requirements of this subsection; and

(3) there is at least a seventy-five thousand dollar ($75,000) increase in the taxpayer's annual payroll expense for every one million dollars ($1,000,000) in qualified expenditures claimed by the taxpayer in a taxable year in the same claim.

§ 7–9F–6. All of the foregoing provisions in Sections 7–9F–3, –6, and –12 indicate a legislative concentration on annual reporting and annual payroll expense. They indicate no intention to provide a taxpayer an open-ended time to apply for a tax credit.

{13} Taxpayer's statutory construction cases, *Thriftway Marketing* and *Vaughn*, involve significantly different statutes and circumstances and do not require the conclusion that "may" in Section 7–9F–9(A) should be interpreted to mean that there exists no one-year limitation or that the Department has discretion under the circumstances here to accept the otherwise untimely application. Reading the foregoing provisions of the Technology Act together with Section 7–9F–9(A)'s statement that "[a] taxpayer may apply for approval of a credit within one year following the end of the calendar year in which the qualified expenditure was made," the apparent intent of the Legislature was to give a taxpayer the opportunity to obtain credits but to bind a taxpayer seeking approval of credits to credits against expenditures made in the taxable year next preceding the year of application for approval of the credits. If a taxpayer chooses to apply for either a basic and/or an additional credit, the taxpayer is required to apply for approval of the credit within one year following the end of that taxable year. The Technology Act does not allow a taxpayer to apply for a tax credit during any other period.

{14} Taxpayer also argues that Section 7–9F–9(A) should have been interpreted as providing the Department with discretion to accept its application after the one-year period because that interpretation would be consistent with the stated purpose of the Technology Act. Taxpayer recites the Technology Act's purpose "to provide a favorable tax climate for technology-based businesses engaging in research, development and experimentation and to promote increased employment and higher wages in those fields in New Mexico." § 7–9F–2. Taxpayer argues that reading the statute as discretionary is in keeping with that purpose. Taxpayer also points to another statute, NMSA 1978, § 7–1–13(E) (1994), which grants the Department's cabinet secretary authority to grant a taxpayer or a class of taxpayers up to twelve additional months to file a return or to pay taxes due to the state with discretion to extend the deadline for filing a return for "good cause." Taxpayer further argues that in enacting Section 7–9F–9(A) the Legislature must not have intended a statute of limitations because the Technology Act requires reporting with "data for the two prior fiscal years" rather than only one prior fiscal year. *See* § 7–9F–12. In support of these arguments, Taxpayer cites *Vaughn*, 98 N.M. at 486–87, 650 P.2d at 8–9, for the proposition that an act remedial in nature should be construed in light of the beneficent purposes of the enactment.

{15} Assuming Section 7–9F–9(A) sets a one-year limitations period, the Technology Act contains no provision granting the Department the authority to grant an extension

of the one-year period. Nor in the Technology Act is there any time limit set for how long an extension may be granted. The Department argues, and in support of its argument cites case law to the effect, that it had no power or authority to extend the application deadline because it has not been given express or implied power or authority to do so by the Legislature. *See In re Application of PNM Elec. Servs.,* 1998–NMSC–017, ¶ 10, 125 N.M. 302, 961 P.2d 147 (stating that because administrative agencies are creatures of statute, their power and authority are limited to that which is expressly granted and necessarily implied by statute); *Maxwell Land Grant Co. v. Jones,* 28 N.M. 427, 429–30, 213 P. 1034, 1035 (1923) ("The state tax commission is a creature of statute, and it has only such powers as are conferred upon or granted to it by the statute under which it assumed to act[.]"); *Chalamidas v. Envtl. Improvement Div.,* 102 N.M. 63, 66, 691 P.2d 64, 67 (Ct.App.1984) ("Administrative bodies are creatures of statute and can act only on those matters which are within the scope of authority delegated to them."); *see also* § 7–1–13(E) (specifically granting the Department's cabinet secretary discretion to grant a taxpayer or class of taxpayers up to twelve additional months to file a return or pay taxes).

{16} Whether the Department, under no circumstance, has authority to extend the application period, and whether a circumstance could arise in which a taxpayer should be permitted to file an application for a credit after the one-year period has elapsed, are not issues we choose to address in this appeal. We are confident that the circumstances in this case do not require the conclusion that the Department's decision to refuse the application as untimely under Section 7–9F–9(A) was arbitrary, capricious, an abuse of discretion, or contrary to law. Even were the Department to have authority under some circumstances to accept a late filing, none of the reasons advanced by Taxpayer convinces us that the Department's and hearing officer's refusals to accept the late filing were arbitrary, capricious, or an abuse of discretion.

{17} Taxpayer filed its application for tax credits for the 2001 calendar year in September 2003, which was nine months following the one-year deadline date of December 31, 2002. Taxpayer does not refer us to evidence in the record showing that Owners performed any due diligence in regard to Taxpayer's eligibility and application for tax credits following their purchase of Taxpayer in November 2001, at the time of Blanton's resignation in June 2002, or even at the time they learned of Hurley's unauthorized purchases. Similarly, Taxpayer does not refer us to evidence in the record indicating that Taxpayer had no opportunity to discover the application failure in time to timely apply for a tax credit, or at the very least, to seek within the deadline an extension of the deadline. Further, we are presented with no record support explaining why Taxpayer did not submit an application until September 2003. We will not search the record to attempt to find factual support for a party's claims. *See In re Estate of Heeter,* 113 N.M. 691, 694, 831 P.2d 990, 993 (Ct.App.1992). Moreover, we are supplied with no case authority supporting Taxpayer's argument that it should not be held responsible under the circumstances for the conduct of its employees. *Cf. El Centro Villa Nursing Ctr. v. Taxation & Revenue Dep't,* 108 N.M. 795, 799, 779 P.2d 982, 986 (Ct.App.1989) ("[E]very person is charged with the reasonable duty to ascertain the possible tax consequences of his action [or inaction]. We are not inclined to hold that the taxpayer can abdicate this responsibility merely by appointing an accountant as its agent in tax matters." (internal quotation marks and citation omitted) (alteration in original)).

Taxpayer's Substantive Due Process Contention

{18} Taxpayer argues that it has been denied substantive due process because the hearing officer found that the failure of Taxpayer to file the application on time was because of the negligence of the former employees and not because of their malfeasance and criminal conduct. Taxpayer sees the hearing officer's decision as an unreasonable exercise in government power, permitting the state "to benefit from the criminal con-

duct of another to the detriment of the victim of the criminal activity."

{19} Taxpayer's sole case authority for its substantive due process argument is that *Mills v. New Mexico Board of Psychologist Examiners*, 1997–NMSC–028, ¶ 14, 123 N.M. 421, 941 P.2d 502, stands for the proposition that substantive due process prohibits an unreasonable exercise of government power. [**BIC** 8] The unreasonable exercise of governmental power argued by Taxpayer appears to be the Department's failure to accept the untimely application because by not accepting the application the State is "permitted to benefit from the criminal conduct of another to the detriment of the victim of the criminal activity." While *Mills* is a substantive due process case, the facts and issues in that case are in no way analogous to the present case. Further, Taxpayer has failed to offer any analysis or authority bearing on how the Department's interpretation of Section 7–9F–9(A) could constitute a denial of substantive due process. *See In re Adoption of Doe*, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (holding that an appellate court can assume that no authority supports a proposition when a party cites no authority to support it). Taxpayer has not even shown that the hearing officer's interpretation of Section 7–9F–9(A) is patently arbitrary, capricious, or an abuse of discretion. *Cf. C & D Trailer Sales v. Taxation & Revenue Dep't*, 93 N.M. 697, 699, 604 P.2d 835, 837 (Ct.App.1979) (stating as to the taxpayer's assertion of an unlawful classification that the "[t]axpayer must show that the taxing statute is patently arbitrary and capricious or void for uncertainty in order to defeat the statute on constitutional grounds").

{20} Taxpayer faults the hearing officer for determining that Taxpayer's failure to apply on time was due to negligence and not to malfeasance and criminal conduct, and by failing to recognize the unique circumstances in this case. The hearing officer determined that while Hurley's acts of embezzlement and forgery were crimes, his failure to file the tax credit application was merely negligent, and Taxpayer, not the Department, had to bear the responsibility for that negligence. Even were there evidence and even were it legally significant that an employee's conduct was criminal in nature and was intended to harm Taxpayer by not timely filing the application, Taxpayer is in no position to attack the hearing officer's finding. Taxpayer does not sustain its burdens under Rule 12–213(A)(3) and (4) NMRA to specifically attack the hearing officer's factual determination, to set out all of the evidence on this issue, or to show that the hearing officer's determination was unsupported by substantial evidence. Nor did Taxpayer satisfy its burden to prove that its employee's failure to file the application or to discuss the status of the application with Taxpayer was criminal in nature and that the employee engaged in the criminal conduct for the purpose of harming Taxpayer. *See Grogan*, 2003–NMCA–033, ¶ 11, 133 N.M. 354, 62 P.3d 1236 (stating that it was the taxpayer's burden to prove her assertion that receipts were not taxable). The hearing officer's determinations of negligence and Taxpayer's inaction stand based on Taxpayer's improper and unsuccessful attack.

{21} Finally, the determinations of the hearing officer of employee negligence, of responsibility on the part of Taxpayer, and of failure of Taxpayer to act on a timely basis do not constitute grounds for a substantive due process claim, even were the Department's interpretation of and action under Section 7–9F–9(A) to somehow come within the concept of substantive due process. *See generally State v. Druktenis*, 2004–NMCA–032, ¶¶ 50–52, 135 N.M. 223, 86 P.3d 1050 (discussing the meaning of substantive due process). Based on Taxpayer's failures to provide persuasive argument, to provide authority, and to sustain its burdens under appellate procedure and on the merits of the issue, we hold that Taxpayer was not denied substantive due process.

CONCLUSION

{22} We affirm the decision and order of the hearing officer denying Taxpayer's protest.

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

WE CONCUR: LYNN PICKARD and IRA ROBINSON, Judges.

2005-NMCA-018

107 P.3d 11

Vickie PIANO, Plaintiff–Appellee,

v.

PREMIER DISTRIBUTING CO., a New Mexico corporation, Defendant–Appellant.

No. 23,907.

Court of Appeals of New Mexico.

Dec. 20, 2004.

Certiorari Denied, No. 29,022, Feb. 3, 2005.

Michael D. Armstrong, Albuquerque, for Appellee.

Jim Dines, Gregory P. Williams, Dines, Gross & Esquivel, P.C., Albuquerque, Christopher C. Hoffman, Donna S. Beltran, Fisher & Phillips, LLP, San Diego, CA, for Appellant.

OPINION

VIGIL, J.

{1} Defendant appeals from a district court order denying its Motion to Compel Arbitration or, in the Alternative, to Dismiss arguing that an Employee Acknowledgment and Agreement (Arbitration Agreement) signed by Plaintiff requires her claims to be submitted to arbitration. We hold that the Arbitration Agreement is illusory and otherwise not supported by consideration. As a result, Plaintiff is not contractually bound to submit her claims to arbitration. We therefore affirm the district court.

BACKGROUND

{2} On October 21, 1986, Plaintiff commenced employment with Defendant, where

she worked as an administrative assistant on an at-will employment basis until her involuntary termination on April 11, 2002. During her employment, Plaintiff was presented with the Arbitration Agreement to sign with the understanding that if she did not sign it, she would be fired. Plaintiff signed the Arbitration Agreement on January 7, 1999. In pertinent part, the Arbitration Agreement states:

> I understand that this handbook represents the current policies, regulations, and benefits, and that except for employment at-will status and the Arbitration Agreement, any and all policies or practices can be changed at any time by the Company. The Company retains the right to add, change or delete wages, benefits, policies and all other working conditions at any time (except the policy of "at-will employment" and Arbitration Agreement, which may not be changed, altered, revised or modified unless in writing and signed by the Owner of the Company).
>
> I also understand that the Company promotes a voluntary system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context. Because of the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide both the Company and myself, I voluntarily agree that any claim, dispute, and/or controversy (including, but not limited to, any claims of discrimination and harassment, whether they be based on the New Mexico Law Against Discrimination, Title VII of the Civil Rights Act of 1964, as amended, as well as all other state or federal laws or regulations) which would otherwise require, or allow resort to, any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise ... will be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the New Mexico Statutes Annotated 44–7–01 et seq.
>
> ....
>
> **I UNDERSTAND THAT BY VOLUNTARILY AGREEING TO THIS BINDING ARBITRATION PROVISION, BOTH I AND THE Company GIVE UP OUR RIGHTS TO TRIAL BY JURY.**

{3} Following her involuntary termination, Plaintiff filed complaints with the New Mexico Human Rights Division and the United States Equal Employment Opportunity Commission. When her administrative remedies were exhausted, Plaintiff filed a complaint in the district court alleging she was wrongfully terminated by Defendant. Defendant responded with its Motion to Compel Arbitration or, in the Alternative, to Dismiss, arguing that Plaintiff is required to submit the claims in her complaint to arbitration pursuant to the Arbitration Agreement. The district court denied the motion after considering the written and oral arguments of the parties. Defendant appeals. We have jurisdiction pursuant to NMSA 1978, § 44–7–19(A)(1) (1971) (stating that an appeal may be taken from an order denying a motion to compel arbitration where the existence of an agreement to arbitrate is disputed). Arbitration agreements made on or after July 1, 2001, are governed by the current Uniform Arbitration Act, NMSA 1978, §§ 44–7A–1 to –32 (2001) which contains a similar provision at Section 44–7A–29(a)(1) ("An appeal may be taken from ... an order denying a motion to compel arbitration.").

STANDARD OF REVIEW

{4} We apply a de novo standard of review to a district court's denial of a motion to compel arbitration. *Heye v. Am. Golf Corp.*, 2003–NMCA–138, ¶ 4, 134 N.M. 558, 80 P.3d 495. Similarly, whether the parties have agreed to arbitrate presents a question of law, and we review the applicability and construction of a contractual provision requiring arbitration de novo. *Santa Fe*

Techs., Inc. v. Argus Networks, Inc., 2002–NMCA–030, ¶ 51, 131 N.M. 772, 42 P.3d 1221.

DISCUSSION

A. Enforcement of Arbitration Agreements

{5} In New Mexico, arbitration is a "highly favored" method of resolving disputes in part because "[i]t promotes both judicial efficiency and conservation of resources by all parties." *Id.* As a result, when parties have agreed to arbitrate, the courts must compel arbitration. *Id.; see also* NMSA 1978, § 44–7–1 (1971) ("[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."); 9 U.S.C. § 2 (2000) ("[A] contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."). However, "a legally enforceable contract is a prerequisite to arbitration; without such a contract, parties will not be forced to arbitrate." *Heye,* 2003–NMCA–138, ¶ 8, 134 N.M. 558, 80 P.3d 495; *see also Salazar v. Citadel Communications Corp.*, 2004–NMSC–013, ¶ 8, 135 N.M. 447, 90 P.3d 466 (interpreting Federal Arbitration Act, 9 U.S.C. § 2). When presented with an arbitration agreement, we interpret its provisions using the rules of contract law. *Heye,* 2003–NMCA–138, ¶ 9, 134 N.M. 558, 80 P.3d 495; *Pueblo of Laguna v. Cillessen & Son, Inc.*, 101 N.M. 341, 343, 682 P.2d 197, 199 (1984).

B. Consideration for Plaintiff's Promise to Submit to Arbitration

{6} A legally enforceable contract requires evidence supporting the existence of "an offer, an acceptance, consideration, and mutual assent." *Heye,* 2003–NMCA–138, ¶ 9, 134 N.M. 558, 80 P.3d 495. This case requires us to determine if Defendant provided consideration for the Arbitration Agreement. "Consideration consists of a promise to do something that a party is under no legal obligation to do or to forbear from doing something he has a legal right to do." *Id.* ¶ 12. Absent evidence of a "bargained-for exchange between the parties," an agreement lacks consideration and is unenforceable. *Smith v. Vill. of Ruidoso,* 1999–NMCA–151, ¶ 33, 128 N.M. 470, 994 P.2d 50. A promise may be consideration for a promise if it is "lawful, definite and possible." *Bd. of Educ. v. James Hamilton Constr. Co.*, 119 N.M. 415, 419, 891 P.2d 556, 560 (internal quotation marks and citation omitted). However, a promise that "puts no constraints on what a party may do in the future—in other words, when a promise, in reality, promises nothing—it is illusory, and it is not consideration." *Heye,* 2003–NMCA–138, ¶ 12, 134 N.M. 558, 80 P.3d 495; *see also* Restatement (Second) of Contracts § 77 cmt. a (1981) (stating "[w]here the apparent assurance of performance is illusory, it is not consideration for a return promise").

{7} Defendant argues that either its continued at-will employment of Plaintiff or its reciprocal promise to submit to arbitration is sufficient consideration to support enforcement of the Arbitration Agreement.

1. Continued At–Will Employment as Consideration

{8} Defendant argues that in exchange for Plaintiff's promise to submit her disputes to binding arbitration it allowed her to retain her job. However, Plaintiff was an at-will employee before she signed the Arbitration Agreement and she remained an at-will employee after she signed the Arbitration Agreement. The implied promise of continued at-will employment placed no constraints on Defendant's future conduct; its decision to continue Plaintiff's at-will employment was entirely discretionary. *See Bd. of Educ.,* 119 N.M. at 420, 891 P.2d at 561; *see also Heye,* 2003–NMCA–138, ¶ 15, 134 N.M. 558, 80 P.3d 495. Therefore, this promise was illusory and not consideration for Plaintiff's promise to submit her claims to arbitration. *See id.* ¶ 16 (stating continued employment is not consideration for an arbitration agreement); *see also Salazar,* 2004–NMSC–013, ¶¶ 3, 16, 135 N.M. 447, 90 P.3d 466

(stating that an arbitration agreement, "made 'in consideration of continued employment and the mutual agreement to arbitrate claims,'" was illusory); *accord Poole v. Incentives Unlimited, Inc.*, 338 S.C. 271, 525 S.E.2d 898, 900 (Ct.App.1999) ("The promise of continued employment was illusory because even though [the employee] signed the covenant, [the employer] retained the right to discharge her at any time."), *aff'd*, 345 S.C. 378, 548 S.E.2d 207 (S.C.2001).

{9} Defendant argues that *Richards v. Allianz Life Ins. Co.*, 2003–NMCA–001, ¶ 20, 133 N.M. 229, 62 P.3d 320 supports its argument that Plaintiff's continued at-will employment constitutes consideration for the Arbitration Agreement. We disagree. In *Richards*, the employee had two existing contracts with the employer's predecessor which employer assumed. *Id.* ¶ 3. The employer then terminated those contracts, and the parties entered into a new contract which contained an arbitration clause. *Id.* ¶¶ 3, 5, 16. Since there was no dispute that the employer had the right to terminate the two pre-existing contracts, and did, the continuation of the relationship between the parties was consideration for the new contract. *Id.* ¶ 20. Moreover, we held in *Richards* that the new contract constituted a substitution of the earlier contracts. *Id.* ¶ 10. In contrast, Plaintiff's employment relationship in this case never changed, and she was an at-will employee before and after the Arbitration Agreement was signed. Therefore, we reject Defendant's argument.

{10} Defendant also relies on *Stieber v. Journal Publ'g Co.*, 120 N.M. 270, 273, 901 P.2d 201, 204 (Ct.App.1995), for the proposition that an employer can prospectively modify the terms of its employee's employment. However, in *Stieber* we did not address the issue of whether continued at-will employment was consideration. Rather, we held that "[n]o breach of contract action may lie where the employer in an at-will employment relationship may prospectively change the conditions of employment at will." *Id.* Therefore, our decision in *Stieber* is likewise not controlling here.

2. Mutual Promise to Arbitrate as Consideration

{11} Defendant also argues that in exchange for Plaintiff's promise to arbitrate her claims it promised to arbitrate its claims and that these mutual promises are consideration to support enforcement of the Arbitration Agreement. Plaintiff counters that Defendant's promise to arbitrate its claims is illusory and is not consideration. We agree with Plaintiff.

{12} The second and third sentences of the Arbitration Agreement state:

> I understand that this handbook represents the current policies, regulations, and benefits, and that except for employment at-will status and the Arbitration Agreement, any and all policies or practices can be changed at any time by the Company. The Company retains the right to add, change or delete wages, benefits, policies and all other working conditions at any time (except the policy of "at-will employment" and Arbitration Agreement, which may not be changed, altered, revised or modified unless in writing and signed by the Owner of the Company).

Although the first excerpted sentence states that Defendant is not free to change the Arbitration Agreement "at any time," the second sentence establishes the circumstances under which the Arbitration Agreement may be modified: changes must be in writing and must be signed by the "Owner of the Company." The most natural reading of these two sentences is that although Defendant cannot modify the terms of the Arbitration Agreement any way or at any time, it may, in its sole discretion, modify the terms of the Arbitration Agreement provided that it complies with the minimal formalities set forth. The Agreement is completely silent with respect to Plaintiff's signature or approval.

{13} Defendant mounts a number of arguments against this most natural reading of the words used and the obvious absence of words not used. It argues that we should construe the Agreement so that it is not illusory because we are supposed to construe contracts to be reasonable, not unreasonable. It also argues that we should so

construe the Agreement because of the strong policy in favor of arbitration. Neither consideration demands such construction. Defendant argues that the term "in writing" in the second excerpted sentence must be read to mean a writing signed by both parties. The agreement, however, does not include the wording Defendant requests we imply. Defendant also argues that its construction would be reasonably understood by an employee because of the distinction between the agreement in *Heye* and that in this case, which is that the apparently conflicting sentences are so close together in this case, whereas they were in different provisions of the agreement in *Heye*. We do not agree with any of Defendant's contentions in this regard. When this Court examines agreements to arbitrate, we will "apply the plain meaning of the language utilized." *Pueblo of Laguna*, 101 N.M. at 343, 682 P.2d at 199. We therefore reject the reading suggested by Defendant. A writing is simply "[a]ny intentional recording of words in a visual form." Black's Law Dictionary 1603 (7th ed.1999). Neither the definition of "writing" nor its use in the Arbitration Agreement supports Defendant's contention that the "writing" must require Plaintiff's signature. Moreover, to the extent there is any ambiguity in the Arbitration Agreement about whether Plaintiff's signature is required on any writing altering its terms, we construe the ambiguity against Defendant. *Salazar*, 2004–NMSC–013, ¶¶ 11, 14, 135 N.M. 447, 90 P.3d 466; *Heye*, 2003–NMCA–138, ¶ 14, 134 N.M. 558, 80 P.3d 495.

{14} The Arbitration Agreement gives Defendant unilateral authority to modify the Arbitration Agreement. The Agreement does not require Defendant to seek Plaintiff's approval before altering the terms of the Arbitration Agreement; Defendant "remains free to selectively abide by its promise to arbitrate." *Heye*, 2003–NMCA–138, ¶ 15, 134 N.M. 558, 80 P.3d 495; *see also Salazar*, 2004–NMSC–013, ¶ 11, 135 N.M. 447, 90 P.3d 466; *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir.2002). Therefore, its promise to arbitrate is illusory and is not consideration for Plaintiff's promise.

C. Severability

{15} The Arbitration Agreement states that if "any term or provision, or portion thereof, be declared void or unenforceable it will be severed and the remainder of this agreement will be enforceable." Pursuant to this provision, Defendant argues that we should strike the second sentence and enforce the remainder of the agreement. In support of its argument, Defendant relies on *Padilla v. State Farm Mutual Automobile Insurance Co.*, 2003–NMSC–011, 133 N.M. 661, 68 P.3d 901. In *Padilla*, our Supreme Court held that a provision in an insurance contract was void as a matter of public policy. *Id.* ¶ 13. In crafting a remedy, the Court expressed the need to ensure that the chosen remedy would "limit the application of the unconscionable term in a manner that avoids the unconscionable result." *Id.* ¶ 18. Therefore, the Court elected to strike the unconscionable provision and enforce the remainder of the agreement. *Id.* However, in *Padilla*, the Supreme Court addressed a provision in a contract whose formation was not contested. In contrast, we are presented with a dispute over whether a contract was ever formed between Plaintiff and Defendant. Because we conclude that the agreement is not supported by consideration, a contract was never formed. *See Smith*, 1999–NMCA–151, ¶ 33, 128 N.M. 470, 994 P.2d 50. Therefore, we decline Defendant's invitation to rewrite the Arbitration Agreement such that it is supported by consideration.

D. Preservation of Issues on Appeal

{16} Defendant argues that Plaintiff has failed to preserve her argument that the Arbitration Agreement was not supported by consideration. In support of its argument, Defendant cites *Wolfley v. Real Estate Commission*, 100 N.M. 187, 189, 668 P.2d 303, 305 (1983), for the proposition that "theories, defenses, or other objections will not be considered when raised for the first time on appeal." *See also* Rule 12–216(A) NMRA. Although Defendant has properly stated the rule, it has misapplied it to Plaintiff's argument. The purposes of the preservation rule are to alert the district court "to

the error so that it is given an opportunity to correct the mistake," and to give the opposing party "a fair opportunity to meet the objection." *Harbison v. Johnston*, 2001–NMCA–051, ¶ 7, 130 N.M. 595, 28 P.3d 1136 (internal quotation marks and citation omitted); *see also Diversey Corp. v. Chem-Source Corp.*, 1998–NMCA–112, ¶ 12, 125 N.M. 748, 965 P.2d 332 (stating "[t]he party claiming error must have raised the issue below clearly, and have invoked a ruling by the court, thereby giving the trial court an opportunity to correct any error") (citation omitted).

{17} Application of the preservation rule is limited to alleged errors by the district court; it is unnecessary for the appellee to preserve arguments that support the district court's decision as long as the arguments are not fact based such that it would be unfair to the appellant to entertain those arguments. *State v. Todisco*, 2000–NMCA–064, ¶ 11, 129 N.M. 310, 6 P.3d 1032. Moreover, we will affirm the district court if its decision was "right for any reason," again as long as "reliance on the new ground would [not] be unfair to appellant." *Meiboom v. Watson*, 2000–NMSC–004, ¶ 20, 128 N.M. 536, 994 P.2d 1154. Because the evidence in the record is sufficient to consider Plaintiff's argument, because we decide the case based on the wording of the agreement subject to a de novo standard of review, and because Defendant does not and cannot dispute the wording of the agreement, we reject Defendant's argument.

E. Other Arguments

{18} Defendant also argues that the district court erroneously denied its motion on a variety of other grounds. Because we conclude that the Arbitration Agreement is not supported by consideration, we need not reach these arguments.

CONCLUSION

{19} We hold that the Arbitration Agreement between Plaintiff and Defendant was not supported by consideration. Continued at-will employment is an illusory promise that cannot be consideration. Similarly, Defendant's promise to arbitrate is illusory because it retained the ability to unilaterally change the Arbitration Agreement. Therefore, no contract was formed between Plaintiff and Defendant and the district court properly denied Defendant's Motion to Compel Arbitration or, in the Alternative, to Dismiss. The order of the district court is affirmed.

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

PICKARD and KENNEDY, JJ., concur.

2005-NMSC-002

107 P.3d 504

James SPENCER, Personal Representative of the Estate of Hope Rigolosi, Plaintiff/Petitioner,

v.

HEALTH FORCE, INC., A New York Corporation doing business in the State of New Mexico, Defendant/Respondent.

No. 28,532.

Supreme Court of New Mexico.

Jan. 31, 2005.

Vigil & Vigil, P.A., Lisa K. Vigil, Jacob G. Vigil, Amalia J. Skogen Lucero, L. Helen Bennett, Albuquerque, NM, for Petitioner.

Madison, Harbour, Mroz & Brennan, P.A., M. Eliza Stewart, Michele U. Estrada, Albuquerque, NM, for Respondent.

Michael B. Browde, Albuquerque, NM, for Amicus Curiae New Mexico Trial Lawyers Association.

OPINION

SERNA, Justice.

{1} Plaintiff–Petitioner James Spencer, the personal representative of the estate of

Hope Rigolosi, filed a wrongful death claim against Defendant–Respondent Health Force, Inc., based on negligent hiring, supervision, training, and retention of a home care worker, Ben Williams. Respondent filed a motion for partial summary judgment, and the district court granted the motion. Petitioner appealed to the Court of Appeals. The Court of Appeals affirmed the district court by unanimous opinion. *Spencer v. Univ. of N.M. Hosp.*, 2004–NMCA–047, ¶ 2, 135 N.M. 554, 91 P.3d 73. The Court concluded that Respondent had no statutory duty to Rigolosi for the failure to perform a background check as required by the version of NMSA 1978, § 29–17–1 (repealed 1998) in effect at the relevant time because strict statutory compliance was not possible; because Respondent's violation of the statute was excusable under a "justifiable violation doctrine;" because Respondent had no common law duty of reasonable care due to the existence of the statute; and because, as a matter of law, Respondent's retention of Williams after he had allegedly stolen three narcotic pills from Rigolosi was not the proximate cause of her death. *Spencer*, 2004–NMCA–047, ¶¶ 16, 17, 23, 25, 135 N.M. 554, 91 P.3d 73. This Court granted Petitioner's petition for writ of certiorari. *See* NMSA 1978, § 34–5–14(B) (1972). We reverse the Court of Appeals and the district court.

I. Facts and Background

{2} Rigolosi, a thirty-six-year-old quadriplegic, died of a drug overdose on April 23, 1998. She required twenty-four-hour long-term care services. Respondent provides long-term home care to disabled individuals. Respondent hired Williams as a care giver on March 20, 1998, and assigned him, along with two other employees, to provide companionship and housekeeping care for Rigolosi in her home. Patricia Pendelton, the owner of Health Force, stated that Williams was hired based on Rigolosi's recommendation. Respondent asserts that it checked all references Williams provided and that the references informed Respondent that he was reliable and dependable. Respondent did not perform a criminal background check on Williams prior to his employment. Respondent contends that, on his employment application, Williams indicated that he had never been convicted of a felony. In fact, Williams had prior convictions for burglary, aggravated assault, armed robbery, credit card fraud, embezzlement, and shoplifting. Respondent recounts that Williams, as its employee, provided home care services to Rigolosi between March 20 and April 1, 1998.

{3} Petitioner presented evidence that Williams allegedly stole three of Rigolosi's narcotic prescription pills while working for Respondent and alleged that Respondent did not investigate or discipline Williams for this action. Kasey Whitley, Williams' Health Force coworker and one of Rigolosi's other care givers, stated that, prior to Rigolosi's admission to the hospital, some of her narcotic medication was missing and that Williams admitted that he took it. On March 31, 1998, Whitley noted on the Health Force log that some of Rigolosi's medication was missing during Williams' shift.

{4} On April 1, Rigolosi was admitted to University of New Mexico Hospital (UNMH) for pneumonia and was set to be discharged on April 23. Although Whitley stated that no one was assigned by Health Force to care for Rigolosi while she was hospitalized, Whitley also described her regular visits to Rigolosi while Rigolosi was hospitalized and stated that Williams also visited Rigolosi regularly during this time. Whitley stated that she believed that she, along with Williams, would again act as health care givers after Rigolosi was to be discharged from the hospital, based on Whitley's conversation with Pendleton. Petitioner presented evidence that UNMH employees identified Williams and Whitley as Rigolosi's care givers. Donna Mentillo, a UNMH employee, stated that Rigolosi introduced Williams to her as Rigolosi's "caregiver" and that Mentillo understood this to mean that he assisted with her home care. Pendelton stated that she was aware that Williams and the other care givers were going to the hospital to visit Rigolosi "at least a couple weeks after" Rigolosi was admitted. On April 23, Williams allegedly took Rigolosi out of her UNMH room and injected her with heroin, resulting in her death.

{5} Respondent contends that Williams resigned from Health Force at the end of March and that his last date of employment was April 18. Pendelton also stated that Health Force had given thirty days' notice to the State of New Mexico, terminating its contract for Rigolosi's care effective April 7. Pendelton stated that she did not inform the staff at UNMH or Rigolosi that the care givers would not be providing services for Rigolosi while she was hospitalized. Respondent argues that, at the time of Rigolosi's death, Williams was not its employee, not subject to its control, and had not received authorization to visit Rigolosi at UNMH. Petitioner argues that Respondent did not terminate Williams' employment prior to Rigolosi's death or warn her of Williams' criminal background, and that Respondent does not have documentation of Williams' resignation. Thus, while it is undisputed that Williams was an employee for Respondent, the parties dispute whether Williams was an employee at the time of Rigolosi's death.

{6} In support of Petitioner's assertion that Williams continued to be Respondent's employee, in addition to the statements of Williams' coworker, Whitley, Petitioner relies on a time-dated voice recording, made approximately eight hours after Rigolosi's death, seized by the Albuquerque Police Department at Williams' residence. On the recording, a voice stated, "Hey Ben, this is Rachel. I just wanted to go over your schedule for this coming weekend. Give me a call when you get a chance, 883–4900. Thanks. Bye-bye." Petitioner notes that this phone number is identical to Respondent's published number. Pendleton confirmed that an individual named "Rachel" was employed by Health Force to handle care givers' work schedules. However, Respondent contends that the recording is not admissible because the message is hearsay and does not meet any exception to the hearsay rule.

II. Discussion

A. Standard of Review

{7} "Summary judgment is proper if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Roth v. Thompson*, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992). "If the facts are not in dispute, and only their legal effects remain to be determined, summary judgment is proper." *Id.* at 335, 825 P.2d at 1245.

> A movant for summary judgment need only make a prima facie showing that there is no genuine issue of material fact, and that on the undisputed material facts, judgment is appropriate as a matter of law; the burden then shifts to the opponent to show at least a reasonable doubt, rather than a slight doubt, as to the existence of a genuine issue of fact.

Ciup v. Chevron U.S.A., Inc., 1996–NMSC–062, ¶ 7, 122 N.M. 537, 928 P.2d 263. "[T]he opponent must come forward and establish with admissible evidence that a genuine issue of fact exists." *Id.* This Court "view[s] the facts in a light most favorable to the party opposing the motion and draw[s] all reasonable inferences in support of a trial on the merits." *Handmaker v. Henney*, 1999–NMSC–043, ¶ 18, 128 N.M. 328, 992 P.2d 879.

B. Duty

{8} This matter presents the central question of whether Respondent owes a duty to the disabled individuals that receive care services from Respondent's employees based on theories of negligent hiring and retention. "The existence of a tort duty is a policy question that is answered by reference to legal precedent, statutes, and other principles of law." *Ruiz v. Garcia*, 115 N.M. 269, 272, 850 P.2d 972, 975 (1993).

{9} The Legislature has recognized that agencies that employ care givers owe a duty to those disabled individuals who receive long-term care services. Section 29–17–1 requires health care agencies to perform a criminal background check on all applicants prior to employment. The statute in effect at the time relevant to the present matter required that employers submit fingerprints of applicants to the Federal Bureau Investigation (FBI) as well as the Department of Public Safety in order to obtain and verify the applicant's potential criminal history. Applicants with prior convictions could not be employed. This statute was enacted and became effective from April of 1997 until May

20, 1998, when it was repealed and a new version was enacted. Respondent contends that, at the time it hired Williams, the Legislature had already repealed the statute but that the new statutory procedure was phased in almost two years after Rigolosi's death, so there was no mechanism for an employer to carry out the specific requirements.

{10} As a matter of common law, "[l]iability for negligent hiring 'flows from a direct duty running from the employer to those members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury as a result of the hiring.' " *Medina v. Graham's Cowboys, Inc.*, 113 N.M. 471, 473, 827 P.2d 859, 861 (Ct.App.1992) (quoting *Valdez v. Warner*, 106 N.M. 305, 307, 742 P.2d 517, 519 (Ct.App.1987)). Thus, New Mexico recognizes both an employer's common law duty for negligently hiring employees to those at risk of injury as a result of the hiring as well as an explicit statutory duty for agencies such as Health Force that provide home care services to the disabled.

{11} The Court of Appeals properly recognized that a duty may be established by statute or common law. *Spencer*, 2004–NMCA–047, ¶ 9, 135 N.M. 554, 91 P.3d 73. The Court of Appeals discussed the statutory duty imposed on health care agencies by the version of Section 28–17–1 in effect and observed that "[i]t failed to identify the agency to receive the FBI information and therefore the FBI would not provide the information." *Id.* ¶ 11. The Court noted that expert opinion indicated that, at the time, "word came out" that the statute was going to be repealed and that the FBI would not accept the fingerprints. *Id.* The Court became "concerned about whether a duty to perform a criminal background check could be fairly based on a statute that required a specific process that could not be followed" and requested supplemental briefs on the issue. *Id.* ¶ 15. The Court of Appeals "conclude[d] that under the limited circumstances of this case, no statutory duty can be based on Health Force's failure to perform the background checks required by the 1997 statute in force when Williams was hired in March 1998 because it was not possible to comply with the statute." *Id.* ¶ 16. The Court of Appeals relied upon treatises and cases from other jurisdictions for the proposition "that an actor is not liable for negligence when violating a legislative enactment if the actor 'is unable after reasonable diligence or care to comply.' Justification for noncompliance exists when compliance was impossible or caused by circumstances over which the actor had no control. . . ." *Id.* (quoted authority omitted).

{12} The Court of Appeals stated, "In addressing whether the 1997 statute provides a standard of care, we view the problem in terms of whether violation of a statute is negligence per se, or whether one can be excused from following the statute in certain circumstances." *Id.* ¶ 17. The Court discussed the justifiable violation doctrine that "recognizes that there are circumstances in which it is unfair to base negligence on the violation of a statute" so that "[a]n excused violation of a statute is not negligence." *Id.* The Court of Appeals further relied on *Jackson v. Southwestern Pub. Serv. Co.*, 66 N.M. 458, 471, 349 P.2d 1029, 1038 (1960), for a similar proposition. *Spencer*, 2004–NMCA–047, ¶ 18, 135 N.M. 554, 91 P.3d 73.

{13} The Court of Appeals rejected Petitioner's argument that the statutory process created a "lack of guidance," and instead characterized the problem as the statute giving "very specific guidance that could not be followed." *Id.* ¶ 19. The Court also rejected Petitioner's argument that Respondent could have complied with its duty to perform a criminal background check by obtaining information from the local police department, as was the case in another location, and thus should not be excused from statutory compliance. *Id.* The Court noted that Petitioner "did not introduce any evidence that the informal process that worked in [another location] would have worked in Albuquerque, where Health Force was located, or anywhere else," and that, "[m]ore significantly," "when the [L]egislature has required compliance with a statute by providing a specific method, one must use that method," because "[s]tatutes are to give fair notice of what is required to enable compliance with the law." *Id.* ¶ 20. The Court of Appeals concluded,

> Members of the public, in conducting their affairs, should be entitled to rely on the requirements expressed in statutes and must meet those requirements unless a valid excuse exists. With fair notice about the requirements of a statute, there is no unfairness in requiring compliance. However, when a statute cannot be followed because it is flawed, it is unfair to impose the statutory requirements as a standard of conduct. Consistent with this principle of fair notice, it would be unfair in this case to impose a statutory duty to perform an act that is not expressed in the statute. When compliance with the mandated method is not possible, one should not be forced to guess at an alternative, at peril of being held liable.

Id. "Negligence cannot be premised on a statute when the undisputed evidence is that the process required by the statute could not be accomplished." *Id.* ¶ 21.

{14} The Court of Appeals then addressed whether Respondent owed Petitioner a common law duty.

> [F]or this Court to examine whether there existed a common law duty, we would be required to speak on the matter of background checks at a time when the [L]egislature had already spoken, and then had spoken a second time, consistently and definitively expressing the manner in which it wanted background checks performed. Against these legislative proclamations, we are unwilling to analyze whether a care provider also had a common law duty to have performed some other type of background check when, as a result of a flawed statute, the care provider could not perform or obtain the check required by the statute. We are not a legislative body. In this case, it is not appropriate for us to declare that some other kind of criminal background investigation should have been conducted. We will not legislate a duty when the [L]egislature has specifically addressed the problem.

Id. ¶ 23.

{15} Finally, the Court of Appeals addressed the issue of proximate cause regarding negligent retention based on Petitioner's claim that Respondent was negligent in retaining Williams following allegations that he took narcotic pills from Rigolosi. Noting that the negligent retention must proximately cause the injury, the Court of Appeals compared the present matter to several other cases and concluded that the connection was too tenuous: "We do not believe that a jury could reasonably find that Health Force's retention of Williams, after he had allegedly stolen three narcotic pills, was the proximate cause of Rigolosi's death over three weeks later." *Spencer*, 2004–NMCA–047, ¶ 25, 135 N.M. 554, 91 P.3d 73.

{16} Petitioner argues that the public policy expressed in the statute in question demonstrates a legislative intent to protect care-dependent vulnerable members of the community that require special protection because they are particularly unable to protect their own interests and are uniquely vulnerable to others. Petitioner contends that the Court of Appeals failed to look to the legislative intent regarding the protection of individuals like Rigolosi, and that the Court of Appeals erred by absolving Respondent of any duty because statutory compliance was not possible. Petitioner also argues that Respondent made no attempt to comply with the statute and that Respondent could have performed a criminal background check on Williams, even if Respondent could not have performed the check exactly as the statute required. Petitioner argues that Respondent must have a duty to at least attempt to comply with the statute before impossibility can be an excuse for noncompliance.

{17} Respondent agrees with the analysis set out by the Court of Appeals. Respondent argues that, because it could not comply with the statutory requirements as set out in the repealed law, it was not required to attempt to determine other methods for a criminal background check other than the procedure set out by the Legislature. Because it could not comply with the statute, Respondent contends that it had no statutory duty to conduct a criminal background investigation on Williams. Respondent also argues, in agreement with the Court of Appeals, that it had no common law duty to conduct a criminal background check.

{18} Focusing first on the question of whether Respondent owed Rigolosi a duty for the actions of its employees based on negligent hiring or retention, we conclude that the Court of Appeals' duty analysis was erroneous. The Court of Appeals appears to have confused or merged the question of the existence of a duty with the question of breach of duty, as also argued by amicus curiae New Mexico Trial Lawyers Association. "[A] negligence claim requires the existence of a duty from a defendant to a plaintiff, breach of that duty, which is typically based upon a standard of reasonable care, and the breach being a proximate cause and cause in fact of the plaintiff's damages." *Herrera v. Quality Pontiac,* 2003–NMSC–018, ¶ 6, 134 N.M. 43, 73 P.3d 181. Although the Court of Appeals noted that the statutory requirement of a criminal background check was a "standard of conduct," it continued to equate this standard with a statutory duty by holding that, if Respondent could not achieve this standard, then Respondent had no duty to Rigolosi. *Spencer,* 2004–NMCA–047, ¶ 20, 135 N.M. 554, 91 P.3d 73.

{19} As noted above, duty is a question of policy based upon statutes, precedent, or other principles of law. The Legislature recognized a public policy in the version of Section 29–17–1 in effect at the time of Rigolosi's death to provide special protection for care-dependent individuals with regard to home care workers. This statutory duty is consistent with the common law duty of employers for liability for negligent hiring to "those members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury as a result of the hiring." *Medina,* 113 N.M. at 473, 827 P.2d at 861 (quoted authority and quotation marks omitted). Rather than preempting the common law duty, the statutory duty is complementary. The common law duty of ordinary care is also consistent with *Jackson,* relied upon by the Court of Appeals: "[T]he correct test is whether the person who has violated a statute has sustained the burden of showing that he [or she] did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." *Jackson,* 66 N.M. at 472, 349 P.2d at 1038 (quoted authority and quotation marks omitted). Thus, Respondent owes a duty, based on statute and common law, to clients or patients who receive care from Respondent's employees.

{20} As noted above, however, because Respondent could not comply with the standard set out in the earlier version of Section 29–17–1, the Court of Appeals concluded that Respondent owed no duty to Petitioner. The questions of duty and the breach of that duty are distinct. The specific requirements of Section 29–17–1with which Respondent and other care providers apparently could not comply would have provided a more specific standard of care than ordinary diligence. However, inability to comply with the specific legislative requirements does not negate the existence of a duty grounded in both statute and common law. As noted above, based on the legislative public policy determination that the disabled warrant special protection, consistent with the common law recognition of a general duty from employers to those placed at risk of injury as a result of hiring employees, Respondent clearly has a duty with regard to hiring and retaining its employees for harm caused to clients such as Rigolosi. Breach of that duty cannot be based on the version of Section 29–17–1 in effect at the time of Rigolosi's death, however, as it was apparently not possible to comply with the requirements. While liability cannot be based on a failure to comply with the requirements in the statute, Respondent is not altogether relieved of its common law duty regarding hiring or retaining employees to those individuals that receive care from its employees. Thus, because the statute in effect at the time of Rigolosi's death could not provide the standard of care, a reasonable diligence standard is appropriate. *See Jackson,* 66 N.M. at 472, 349 P.2d at 1038 (describing a reasonable care standard).

> [T]he responsibility for determining whether the defendant has breached a duty owed to the plaintiff entails a determination of what a reasonably prudent person would foresee, what an unreasonable risk of injury would be, and what would constitute an

> exercise of ordinary care in light of all the surrounding circumstances. This is a factual determination or, perhaps, a mixed determination of law and fact, involving as it does the application of precepts of duty to the historical facts as found by the fact finder.

Bober v. N.M. State Fair, 111 N.M. 644, 650, 808 P.2d 614, 620 (1991).

{21} Respondent, apparently conceding that it had some duty, argues that it acted reasonably with regard to hiring Williams by calling his references and further asserts that Williams was no longer an employee when Rigolosi died. More specifically regarding the negligent retention issue, Respondent argued, and the Court of Appeals concluded, that there is no proximate causation between Williams' alleged theft of medication and Rigolosi's death. Respondent notes that there was no allegation that the missing medication was used by Williams to harm or kill Rigolosi and contends that even if it had notice that Williams stole the medication, the notice does not alert Respondent that Williams may harm or kill Rigolosi. We reject these claims for purposes of the appropriateness of the district court's grant of summary judgment.

{22} "For an employer to be liable for negligent hiring and retention there must be a connection between the employer's business and the injured plaintiff." *Valdez,* 106 N.M. at 307, 742 P.2d at 519; *see Elliott v. Williams,* 347 Ill.App.3d 109, 282 Ill.Dec. 882, 807 N.E.2d 506, 511 (2004) ("[I]n order for there to be a causal connection between the employer's negligence and the plaintiff's injuries, the employment itself must create the situation where the employee's violent propensities harm the third person."); *L.M. ex rel. S.M. v. Karlson,* 646 N.W.2d 537, 545 (Minn.Ct.App.2002) ("Negligent retention occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his [or her] unfitness, and the employer fails to take further action such as investigating, discharge or reassignment."). The questions concerning whether Respondent breached its duty when it contacted Williams' references but did not perform any type of criminal background check, whether Williams was an employee at the time of Riogolsi's death, and whether Respondent negligently retained Williams following his theft of Rigolosi's medication are all disputed factual matters for the jury or factfinder and are not properly disposed of by summary judgment. *See Los Ranchitos v. Tierra Grande, Inc.,* 116 N.M. 222, 228, 861 P.2d 263, 269 (Ct.App.1993) (concluding that "the question of whether [the tortfeasor] was acting as an employee of Defendant at the time of the alleged acts of embezzlement presents a factual issue to be determined by the fact finder").

{23} Although "[a] court may decide questions of negligence and proximate cause, if no facts are presented that could allow a reasonable jury to find proximate cause," *Calkins v. Cox Estates,* 110 N.M. 59, 65 n. 6, 792 P.2d 36, 42 n. 6 (1990), we do not believe the facts of this case foreclose a reasonable jury from finding proximate cause between Respondent's retention of Williams and Rigolosi's death. "Foreseeability does not require that the particular consequence should have been anticipated, but rather that some general harm or consequence be foreseeable." *Pittard v. Four Seasons Motor Inn, Inc.,* 101 N.M. 723, 730–31, 688 P.2d 333, 340–41 (Ct.App. 1984) (concluding that "[n]otice of an employee's alcoholism and tendency toward violent behavior may make sexual assault by that employee foreseeable to the employer"). Petitioner's evidence that Williams stole Rigolosi's medication is sufficient to entitle Petitioner to avoid summary judgment because, as an indication of Williams' lack of fitness for employment, it may very well serve as an indicator to the employer that Williams presented a foreseeable danger to a physically incapacitated client. *See Valdez,* 106 N.M. at 308, 742 P.2d at 520 (relying on *Pittard* for the proposition that the particular consequence is not required to be foreseen and rejecting the defendant's argument that its employee's conduct was not foreseeable because an employer could not anticipate the precise circumstances that occurred based on knowledge of the employee's previous violent behavior).

{24} Although Respondent argues that Petitioner has not demonstrated that Williams was an employee at the time of Rigolosi's death, this Court views the evidence in the light most favorable to the party opposing a summary judgment motion and draws all inferences in favor of a trial on the merits. *See Handmaker*, 1999–NMSC–043, ¶ 18, 128 N.M. 328, 992 P.2d 879. Respondent argues that the phone message is inadmissible and notes that it preserved its objection to the admission of the evidence. However, Respondent does not discuss whether the district court ruled on the admissibility of the evidence, and we find no such ruling. Thus, we will not address admissibility of this evidence for the first time on appeal and instead leave this issue for the district court to resolve on remand. *See State v. Worley*, 100 N.M. 720, 723, 676 P.2d 247, 250 (1984) ("Admission of evidence is entrusted to the discretion of the trial court . . . ."); *cf. Torres v. Plastech Corp.*, 1997–NMSC–053, ¶ 26, 124 N.M. 197, 947 P.2d 154 (concluding that the "initial resolution" of the question of whether a worker is entitled to scheduled injury benefits, a mixed question of law and fact, should be left to the workers' compensation judge based on the principle that this "Court on appeal will not originally determine the questions of fact in a case since such function lies within the province of the trial court") (quotation marks and quoted authority omitted). Further, Petitioner presented evidence in addition to the phone message supporting an inference that Williams was an employee at the time of Rigolosi's death. Whitley, Respondent's former employee, stated that she believed that she and Williams would resume home care services for Rigolosi following her discharge from UNMH. Respondent answers this evidence with the bare assertion that "non-management employees" are not "individuals who are entitled to speak for the company," and that Whitley's testimony "is nothing more [than] supposition and conjecture" without argument or authority. We reject this contention; Whitley's statements regarding her belief as to Rigolosi's future care was based on a conversation Whitley stated she had with Pendleton, Health Force's owner. Petitioner also presented evidence by an employee of UNMH that Rigolosi had introduced Williams as her care giver. Viewed in a light most favorable to a trial on the merits, an inference may be drawn from Petitioner's evidence that Williams continued to be Respondent's employee at the time of Rigolosi's death, which precludes summary judgment.

{25} At trial, Petitioner has the burden of demonstrating every element of the tort claims at issue. Whether Williams was an employee, whether Respondent breached its duty to Rigolosi, and whether Respondent's actions were the cause in fact and proximate cause of Rigolosi's death are disputed issues of material fact that preclude summary judgment.

III. Conclusion

{26} We reverse the Court of Appeals and district court. The Court of Appeals appears to have confused the question of duty with the issue of breach of duty. As recognized by statute and common law, Respondent, an agency which provided home care workers to disabled individuals, owed, at the very least, a duty of ordinary care to those individuals with regard to the actions of the agency's employees, including the hiring and retention of its employees. An inability to comply with specific statutory requirements is relevant to a statutory breach of duty, or negligence per se, but does not negate a general duty recognized by both statute and common law. Genuine issues of material fact in this case preclude summary judgment. We remand this case to the district court for further proceedings consistent with this opinion.

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

WE CONCUR: RICHARD C. BOSSON, Chief Justice, PETRA JIMENEZ MAES, PAMELA B. MINZNER (recused), and EDWARD L. CHAVEZ, Justices.

2005-NMCA-027

107 P.3d 513

STATE of New Mexico, Plaintiff–Appellee,

v.

Eric Patrick MORALES, Defendant–Appellant.

No. 24,061.

Court of Appeals of New Mexico.

Dec. 28, 2004.

Certiorari Granted, No. 29,032, Feb. 21, 2005.

Patricia A. Madrid, Attorney General, Santa Fe, Max Shepherd, Assistant Attorney General, Albuquerque, for Appellee.

John B. Bigelow, Chief Public Defender, Trace L. Rabern, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

CASTILLO, J.

{1} Defendant Eric Patrick Morales appeals from an order denying his motion to suppress evidence of a gun seized from his person by an officer during an investigatory stop. Defendant challenges the constitutionality of the investigatory stop and detention, asserting that the officers lacked reasonable suspicion because the stop was based on an unreliable tip from an anonymous informant. We reverse on the ground that the anonymous tip lacked sufficient indicia of reliability. The investigatory stop was not constitutional, and the search of Defendant's person and seizure of the gun therefore violated Defendant's Fourth Amendment rights.

I. BACKGROUND

{2} The material facts of this case are undisputed. Detective Palos (Detective), of the Las Cruces Police Department, testified that he received an anonymous page on the afternoon of February 28, 2002. The message contained a phone number, which the Detective called; an anonymous informant told him that there were two subjects in a blue vehicle at the corner of Alamo and Utah who were "acting rather suspicious[ly]" and were "possibly armed." The Detective believed that the page may have been the result of his previous assignment to a neighborhood police program, during which time he handed out business cards to encourage the public to contact him and report illegal activity in their neighborhood.

{3} In response to the anonymous tip, the Detective requested assistance, and Officer Rodriguez (Officer) responded. Both officers arrived on the scene, where they saw a blue parked car. Two men were out of the car and leaning against a wall that was inside the property line of the corner house. According to the Detective, the men were acting suspiciously because they were at a corner house, and in his experience, corner houses are common targets for burglaries during the daytime. As both officers approached, they instructed the two men to keep their hands on the wall.

{4} While the Officer talked with the men, the Detective moved past them to check the corner house for signs of burglary, and at this point, he noticed that there was a "large bulge" in Defendant's pants pocket and that Defendant was awkwardly turning his hip toward the wall. The Detective proceeded to check the house, found no signs of burglary, and returned to where the men were standing.

{5} At that time, the Detective indicated to the Officer that they needed to do a pat-down search for officer safety. Before initiating the search, both officers asked the men if they were armed, and Defendant told them that he had a weapon in his pocket. Defendant was then instructed to put his hands on top of his head so that the Detective could safely reach into the pocket and retrieve the weapon. Defendant was carrying a 9 mm gun in a holster. The gun and holster were consistent with the bulge that the Detective observed earlier. Defendant was arrested and charged with the crime of possession of a firearm by a felon.

{6} Defendant moved to suppress evidence of the gun under the exclusionary rule on the ground that the officers did not have reasonable suspicion for the investigatory stop and thus violated Defendant's Fourth Amendment rights. The district court denied the motion to suppress and provided the following rationale for the decision: first, the Detective had experience receiving tips in this manner, and on many occasions, the tips had led to fruitful investigations of crimes; and second, when both officers arrived at the corner, they saw a blue car and two men as described in the tip. The district court viewed this as sufficient reason for the officers to approach the individuals and ask questions. When the officers did so, the Detective observed a bulge in Defendant's pocket, again matching the information provided, and saw Defendant suspiciously leaning against the wall as if he were trying to hide the bulge. In the district court's opinion, the bulge provided reasonable suspicion because it was against the law to carry a

concealed weapon. The district court stated that for safety reasons, the officers are trained to ask if there are weapons and to do a pat-down and that their search did reveal there was a loaded weapon.

{7} Following a denial of his motion to suppress, Defendant pled guilty to the charge and was convicted and sentenced. Additional pertinent facts are set out in our discussion of the issues.

II. DISCUSSION

A. Standard of Review

{8} On appeal from a district court's ruling on a motion to suppress, we determine whether the law was correctly applied to the facts. *State v. Cline,* 1998–NMCA–154, ¶ 6, 126 N.M. 77, 966 P.2d 785. Such a mixed question of law and facts is reviewed de novo, particularly when the question involves predominantly legal conclusions and constitutional rights. *State v. Attaway,* 117 N.M. 141, 145–46, 870 P.2d 103, 107–08 (1994). The reasonableness of a search and seizure under the Fourth Amendment is such a question. *State v. Martinez,* 94 N.M. 436, 440, 612 P.2d 228, 232 (1980). The facts in this case are not in dispute; we therefore review only the legal conclusions of the district court in denying Defendant's motion to suppress.

B. Police–Citizen Encounter

{9} The Fourth Amendment of the United States Constitution protects against unreasonable searches and seizures. U.S. Const. amend. IV. The New Mexico Constitution also protects against unreasonable searches and seizures. N.M. Const. art. II, § 10. However, because Defendant does not argue that the New Mexico Constitution affords him greater protection than the United States Constitution does, we review his appeal only under the Fourth Amendment. *State v. Jason L.,* 2000–NMSC–018, ¶ 9, 129 N.M. 119, 2 P.3d 856 (stating because the "[d]efendant has not argued on appeal that the New Mexico Constitution affords him greater protection than that afforded under the United States Constitution[,]" the court would "review his claim . . . only under the Fourth Amendment").

{10} Generally, there are three categories of stops under the Fourth Amendment:

> First, police may stop a citizen for questioning at any time, so long as that citizen recognizes that he or she is free to leave. Such brief, consensual exchanges need not be supported by any suspicion that the citizen is engaged in wrongdoing, and such stops are not considered seizures. Second, the police may seize citizens for brief, investigatory stops. This class of stops is not consensual, and such stops must be supported by reasonable suspicion. Finally, police stops may be full-scale arrests. These stops, of course, are seizures, and must be supported by probable cause.

Morgan v. Woessner, 997 F.2d 1244, 1252 (9th Cir.1993) (internal quotation marks and citations omitted).

{11} New Mexico recognizes a fourth type of police-citizen encounter, a community caretaking encounter, which may or may not implicate the Fourth Amendment. *State v. Nemeth,* 2001–NMCA–029, ¶ 27, 130 N.M. 261, 23 P.3d 936. Under this doctrine, a Fourth Amendment exception may exist if an officer has a "reasonable and articulable belief, tested objectively, that a person is in need of immediate aid or assistance or protection from serious harm." *Id.* ¶ 37. Defendant argues that the district court erroneously based its decision on the community caretaking doctrine. The record indicates that the district court considered the initial encounter to be a consensual one and did not discuss the community caretaking exception. We will therefore evaluate the encounter to determine when it progressed from a consensual one to an investigatory stop requiring reasonable suspicion.

{12} Our analysis begins with a determination of when the officers "seized" Defendant for purposes of Fourth Amendment analysis. Law enforcement officers are free to "approach an individual, ask questions, and request identification without the encounter becoming a seizure under the Fourth Amendment." *State v. Walters,* 1997–NMCA–013, ¶ 18, 123 N.M. 88, 934 P.2d 282. "A police officer seizes a person for

purposes of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Harris,* 313 F.3d 1228, 1234 (10th Cir.2002) (internal quotation marks and citations omitted).

{13} In the present case, testimony introduced at the suppression hearing showed that both officers approached the subjects and immediately told them to keep their hands on the wall. According to the Detective, this instruction was given for safety purposes because officers are trained to keep a suspect's hands in view always. Nothing in the record indicates that Defendant failed to comply with this order; therefore, we assume that he submitted to the officers' authority. A seizure requires either the "use of physical force" by an officer "or submission by the individual" to the officer's assertion of authority. *Id.* When "a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio,* 392 U.S. 1, 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *see United States v. Person,* 134 F.Supp.2d 517, 523 n. 1 (E.D.N.Y.2001) (emphasizing that asking, no matter how politely, a defendant to raise his hands and stand implicates the Fourth Amendment). A reasonable person would not feel free to leave under the circumstances of this case; thus, Fourth Amendment protections applied at the moment Defendant complied with the officers' order to keep his hands on the wall. *See State v. Richards,* 351 N.J.Super. 289, 798 A.2d 136, 142 n. 6 (Ct.App.Div.2002) (explaining that a field inquiry escalated into a *Terry* stop when a defendant was asked to place his hands on the patrol car).

C. Reasonable Suspicion

{14} Defendant argues that the officers lacked reasonable suspicion to stop and detain him and that under the exclusionary rule, any evidence seized during the illegal search must be suppressed. We agree. The police may make an investigatory stop in circumstances that do not rise to the level of probable cause for an arrest if they have a reasonable suspicion that the law has been or is being violated. *Terry,* 392 U.S. at 21–22, 88 S.Ct. 1868; *State v. Flores,* 1996–NMCA–059, ¶ 7, 122 N.M. 84, 920 P.2d 1038. *Terry* created a two-prong test for the reasonableness of an investigatory detention and weapons search. *United States v. Johnson,* 364 F.3d 1185, 1189 (10th Cir.2004). A court must first decide "whether the detention was 'justified at its inception.' " *Id.* (internal quotation marks and citations omitted). The State " 'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the [sic] intrusion.' " *Id.* (quoting *Terry,* 392 U.S. at 21, 88 S.Ct. 1868); *see Flores,* 1996–NMCA–059, ¶ 7, 122 N.M. 84, 920 P.2d 1038 ("Reasonable suspicion must be based on specific articulable facts and the rational inferences that may be drawn from those facts."). Such facts must show that the defendant has committed or is about to commit a crime. *Johnson,* 364 F.3d at 1189. "Second, the officer's actions must be reasonably related in scope to the circumstances [that] justified the interference in the first place." *Id.* (internal quotation marks and citations omitted). In both prongs, the reasonableness of an officer's suspicion "is judged by an objective standard" that takes into account the totality of the circumstances and all information available to the officer at that time. *Id.* (internal quotation marks and citation omitted).

{15} As discussed above, Defendant was detained, and not free to leave, when he complied with the officers' order to keep his hands on the wall. At that time, the officers' suspicion that he was carrying a weapon was based solely on the information obtained from the anonymous tip. As a general rule, "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." *Alabama v. White,* 496 U.S. 325, 329, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990).

{16} There are, however, situations in which a corroborated anonymous tip can have sufficient indicia of reliability to furnish reasonable suspicion for making an investigatory stop. *See White,* 496 U.S. at 330–31, 110 S.Ct. 2412. In *White,* the U.S. Supreme Court found that an important indicator of

the reliability of an anonymous tip is that it contains a range of details relating to the future actions of third parties that would not ordinarily be easily predictable. *Id.* at 332, 110 S.Ct. 2412. Although the Court described *White* as a "close case," it held that the anonymous tip in that case was reliable because significant aspects of the caller's predictions were corroborated by police investigation and, thus, there was reason to believe that the caller was honest and sufficiently informed to justify the stop. *Id.* Similarly, this Court in *Flores* found an anonymous tip to be reliable when police corroborated significant predictive aspects of the tip, including "the description of the vehicles, the direction of travel, and the time of arrival at the described destination." 1996-NMCA-059, ¶ 9, 122 N.M. 84, 920 P.2d 1038. We described that case as a "close call." *Id.* ¶ 10.

{17} In *State v. Bedolla,* 111 N.M. 448, 451-52, 806 P.2d 588, 591-92 (Ct.App.1991), this Court was persuaded that the balance lay on the other side of the line defined in *White* and *Flores* and held that the lack of corroboration of predictive detail invalidated a stop based on an anonymous tip. In *Bedolla,* the tip alleged that two men were dealing cocaine from a room in a particular motel and described the truck that they were driving. 111 N.M. at 452, 806 P.2d at 592. The police only corroborated that the truck arrived at the motel with three adults and that it later departed with two adults, while two others left in a second truck. *Id.* The tip alleged criminal activity yet lacked predictive detail and was not sufficiently corroborated by the police before the stop for them to form reasonable suspicion. *Id.* at 451, 806 P.2d at 591.

{18} The U.S. Supreme Court has subsequently clarified the level of predictive detail that an anonymous tip must contain to justify reasonable suspicion for a *Terry* stop. *Florida v. J.L.,* 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000). In *J.L.,* the Court analyzed the reliability of an anonymous tip predicting that a young black man would be standing at a particular bus stop, wearing a plaid shirt, and carrying a gun. *Id.* at 268, 120 S.Ct. 1375. The officers arrived at the bus stop and saw three black males "just hanging out[,]" and one of them was wearing a plaid shirt. *Id.* (internal quotation marks and citation omitted). The Court noted that besides the tip, the officers "had no reason to suspect any of the three of illegal conduct." *Id.* The officers did not see a gun, and J.L. did not make any threatening or unusual movements. *Id.* One of the officers told J.L. to put his hands on the bus stop, proceeded to frisk him, and seized a gun from his pocket. *Id.*

{19} The Court, in upholding a lower court decision that the search was invalid, stated that an anonymous tip that a person is carrying a firearm is not in itself sufficient to justify a police officer's stop and frisk of that person. *Id.* at 274, 120 S.Ct. 1375. The Court clarified that under those circumstances, an anonymous tip must have some predictive information to allow the police to verify the informant's knowledge or credibility. *Id.* at 271, 120 S.Ct. 1375. The "unknown, unaccountable informant . . . neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L." *Id.* The fact that a gun was found did not mean that the officers had a "reasonable basis for suspecting J.L. of engaging in unlawful conduct." *Id.*

{20} The tip in *J.L.,* which provided an "accurate description of a subject's readily observable location and appearance[,]" did not "show that the tipster [had] knowledge of concealed criminal activity." *Id.* at 272, 120 S.Ct. 1375. To form the basis of reasonable suspicion, a tip must be "reliable in its assertion of illegality" and not just in its ability to identify a specific person. *Id.* The Court therefore held that when an "officer's authority to make [an] initial stop is at issue[,]" an anonymous tip that lacks sufficient indicia of reliability "does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm." *Id.* at 274, 120 S.Ct. 1375.

{21} Here, Defendant asserts that *J.L.* is the controlling case in this matter and that the facts are more analogous to those in *Bedolla* than to those in *Flores.* This Court recently addressed the *J.L.* holdings in a case where an anonymous caller described a

vehicle that was being driven erratically and thus presented an imminent threat to the public. *State v. Contreras,* 2003–NMCA–129, ¶ 21, 134 N.M. 503, 79 P.3d 1111. The anonymous tipster called 911 and informed the police "of a possible drunk driver who was driving a grey van, towing a red Geo, and driving erratically." *Id.* ¶ 2. The patrol officers found and stopped the vehicle but had not observed the erratic driving themselves prior to the stop. *Id.*

{22} In analyzing the totality of circumstances in *Contreras,* we found that reasonable suspicion existed for the stop. *Id.* ¶ 21. Even in light of *J.L.,* the facts "allow[ed an] inference that the anonymous caller was a reliable concerned motorist; the information given was detailed enough for the deputies to find the vehicle in question and confirm the description; and the caller was an apparent eyewitness to the erratic driving." *Contreras,* 2003–NMCA–129, ¶ 21, 134 N.M. 503, 79 P.3d 1111. We weighed the potential "threat of drunk driving to the safety of the public with [the d]efendant's right to be free from unreasonable seizure." *Id.* ¶ 13. Furthermore, "a moving car on a public roadway present[ed] an exigent circumstance that a possessory crime [did] not." *Id.* ¶ 15 (citing *United States v. Wheat,* 278 F.3d 722, 736–37 (8th Cir.2001) (observing that the critical distinction between gun possession cases and potential drunk driving cases is that in the latter case, an officer cannot initiate a consensual encounter and cannot observe the suspect for a considerable length of time because an erratic and possible drunk driver poses an imminent threat to public safety)). We also observed that the brief stop of a vehicle is "less intrusive than the pat-down search at issue in *J.L.*" *Contreras,* 2003–NMCA–129, ¶ 16, 134 N.M. 503, 79 P.3d 1111.

{23} Applying the principles in *Contreras,* we find that the present case is virtually identical to *J.L.* Here, the anonymous tip provided a location, the color of the car, and a statement that the subjects may possibly be armed. As in *J.L.,* the tip contained no predictive information that would allow the officers to judge the informant's knowledge or credibility. The characteristics that it described were readily observable by anyone, and there was no information as to how the informant might have obtained inside information or knowledge about the gun. In fact, the assertion about the gun was vague at best. The officers failed to establish reasonable suspicion independently before seizing Defendant.

{24} The State argues that *J.L.* is distinguishable because in this case, the subjects were standing on private property in a high crime area, the officers observed a bulge in Defendant's pocket, and Defendant's behavior was suspicious. We are not persuaded that reasonable suspicion was developed from the facts that Defendant was leaning against a wall at a corner house in an area where such houses were often targets for burglary. When the officers arrived at the scene, they had no way of knowing whether the house belonged to Defendant or whether he had permission to be on that property. In fact, testimony indicated that the house may have been owned by a relative of one of the men. When asked why the tipster thought Defendant looked suspicious, the Detective stated, "Why this person said they looked suspicious, I can't say." The Detective also agreed that the stop was initiated based on the suspicion generated from the tip and not from "officer suspicion." With regard to the pocket bulge and Defendant's suspicious behavior, these observations took place after Defendant was seized and thus play no part in determining whether the officers had reasonable suspicion to stop and detain Defendant.

{25} We find that the pat-down search of Defendant on a public corner was an intrusive form of seizure. There was no exigency that precluded the officers from engaging in a consensual encounter that would have allowed time to develop reasonable suspicion. As in *J.L.* and *Bedolla,* the anonymous tip that formed the officers' basis for this investigatory stop lacked sufficient indicia of reliability to form reasonable suspicion. The gun, as evidence seized during an illegal stop, must be excluded. Holding that the initial stop was unwarranted, we do not need to reach Defendant's additional argument that the pat-down was illegal.

III. CONCLUSION

{26} Because the anonymous tip lacked sufficient indicia of reliability and the investigatory stop therefore violated Defendant's constitutional rights, we reverse the district court's denial of the motion to suppress.

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

BUSTAMANTE and ROBINSON, JJ., concur.

2005-NMCA-024

107 P.3d 520

Glen BOGLE d/b/a Bogle Realty and French & French, Inc., a New Mexico Corporation, Plaintiffs–Appellees,

v.

SUMMIT INVESTMENT COMPANY, LLC, and Jeffery W. Potter, Defendants–Appellants.

No. 23,686.

Court of Appeals of New Mexico.

Jan. 5, 2005.

Eric M. Sommer, Sommer, Udall, Hardwick, Ahern & Hyatt, LLP, Santa Fe, NM, for Appellees.

Martin S. Friedlander, Law Offices of Martin S. Friedlander, Los Angeles, CA, Jeffrey L. Baker, Baker Law Firm, Albuquerque, NM, for Appellants.

OPINION

BUSTAMANTE, Judge.

{1} This is a dispute over a commission on the sale of real property. Defendants, Summit Investment Company, LLC (Summit), and Jeffery W. Potter, appeal a judgment, entered after a bench trial, in favor of Plaintiff French & French, Inc. (French). The judgment awarded compensatory and punitive damages and held Summit and Potter jointly and severally liable. Leaving implications of the numerous issues sought to be raised by Defendants to the body of the Opinion, we: (1) affirm the award of compensatory damages against Summit, (2) reverse the judgment against Potter in his individual capacity, and (3) affirm the award of punitive damages against Summit.

BACKGROUND

{2} The district court found the following facts. In early December 1998, Santa Fe Economic Development, Inc. (SFEDI) listed certain property it owned with a real estate broker called Santa Fe Properties (the listing broker). SFEDI agreed to pay the listing broker a 10% real estate commission, plus gross receipts tax, half of which would be paid to any licensed real estate broker who found a buyer for the property. In the fall of 1998, Potter, general manager and sole shareholder of Summit, had enlisted Plaintiff Glen Bogle's services to find property Summit could buy for commercial development. Summit engaged Bogle to represent it in the purchase of the SFEDI property. Bogle never entered into an agency agreement with Summit, Potter, or SFEDI. Thus there was no written agreement obligating anyone to pay Bogle a commission on the transaction. In any event, Bogle was not able to negotiate the purchase, and in mid-December 1998 Summit terminated its business relationship with Bogle.[1]

{3} At the end of December 1998, Summit contacted French to act as a buyer's agent in the purchase of the same property. On behalf of Summit, Potter executed a form "Buyer's Agency" agreement with French. French prepared the form to run from December 1, 1998, until June 1, 1999. Summit attempted by interlineation to limit the term of the agreement to January 31, 1999. The district court found that French did not agree to this limitation, and that the term of the agreement "was not affected by Potter's interlineation." Summit and French also entered into a "Buyer's Agency Disclosure and Compensation Agreement" (Compensation Agreement). The Compensation Agreement required SFEDI, as seller, to authorize the listing broker to pay French a 5% commission, plus gross receipts tax, in the event of a sale. The Compensation Agreement recited that it was to be attached to any purchase agreement covering property that was not listed by French where French was acting as the buyer's broker.

{4} Following signature of the two agreements, French proceeded to facilitate negotiations with SFEDI to produce a purchase agreement. During the last week of negotiations, SFEDI informed Potter and Summit that it would require them to indemnify SFEDI from any claims for compensation

1. Bogle was a Plaintiff at the trial in district court. The district court ruled he was not entitled to any recovery. He did not appeal the ruling and he is not a party here.

that Bogle might make. With the exception of Potter agreeing to personally indemnify SFEDI, all essential terms and conditions of the purchase agreement were agreed to by January 29, 1999. The district court found that SFEDI did not demand that French join in indemnifying it from Bogle's demands. This finding is supported by the testimony of SFEDI's attorney who confirmed that all drafts of the purchase agreement required Summit to indemnify SFEDI while none required French to do so, and that SFEDI never otherwise demanded French indemnify it. There was testimony that Potter and Summit requested that French also indemnify SFEDI. French refused to do so. The district court specifically found that French's refusal to indemnify SFEDI had no material effect on the negotiations between SFEDI and Summit because SFEDI never requested that French indemnify it.

{5} After French refused to indemnify SFEDI, Summit's counsel authorized French to arrange a meeting with Bogle to negotiate a resolution of Bogle's claim to commission. French arranged a meeting with Bogle, but before the meeting occurred, Summit's counsel told French not to meet with Bogle because Potter had agreed to indemnify SFEDI and Summit and SFEDI had signed the purchase agreement. Summit informed French it would not be paid a commission on the sale. Rather, Summit replaced French, was named the buyer's broker in the final purchase agreement, and the commission was paid to Summit.

{6} The district court found that Summit and Potter "interfered with and prevented" French from acting as agent and performing its obligations under the Buyer's Agency agreement "thereby breaching Summit's obligations un [sic] the contract." The district court decided that the Buyer's Agency agreement and the Compensation Agreement constituted a statutorily enforceable agency agreement, and that French was a procuring cause of the sale of the SFEDI property. The district court ruled that Summit was liable to French "for deliberately executing a purchase contract with SFEDI that did not require payment" of a commission to French.

The district court also entered the following findings of fact:

3. Santa Fe Economic Development, Inc. (SFEDI) is a nonprofit New Mexico corporation.
4. Summit Investment Company, LLC (Summit) is a limited liability company.
5. Jeffery W. Potter (Potter) is a resident of Santa Fe County, New Mexico and is a licensed real estate broker under the laws of the State of New Mexico. He is the manager of Summit.
6. Santa Fe Properties, Inc. (Santa Fe Properties) [the listing broker] is engaged in the sale and purchase of real estate under the laws of the state of New Mexico.
7. SFEDI was the owner of approximately 21.44 acres of land located in Santa Fe County, which land is part of the Valdez Center.

. . . .

9. Under the listing agreement, SFEDI agreed to pay Santa Fe Properties [the listing broker] a 10% real estate commission, plus gross receipts tax thereon, of which half (5%) would be paid to any licensed real estate broker who brought a purchaser who purchased the lots at Valdez Center from SFEDI.
10. In the fall of 1998, Potter, in his capacity as General Manager of Summit, enlisted Bogle's services to find Summit real estate could purchase for commercial development.
11. Bogle showed and introduced Potter to various commercial properties, including SFEDI's lots.
12. After being introduced to SFEDI's properties, Potter informed Bogle that Summit wanted to purchase SFEDI's lots.
13. Summit engaged Bogle to represent it in the sale of the Valdez Center lots.
14. On December 3, 1998, Summit, through Potter, asked and authorized Bogle to submit a letter of intent to purchase the SFEDI property, expressly acknowledging that Bogle was

making the offer as Buyer's Agent for Summit.

15. Bogle never entered into a Broker's Agency Agreement with Summit or Potter.

16. No written agency agreement was ever executed between Bogle and SFEDI, wherein SFEDI was obligated to pay Bogle a commission.

DISCUSSION

{7} Defendants raise thirteen issues on appeal, which we have classified into three categories for the purposes of our discussion: contract issues, tort issues, and punitive damages. We address each one in turn.

BREACH OF CONTRACT

{8} Defendants first argue that no contract existed between Summit and French because there was no mutual assent as to the termination date of the contract, and without mutual assent, no contract was ever formed. We deal with this argument summarily because Summit did not raise these issues at trial, and they have not been preserved for appeal. *See Woolwine v. Furr's, Inc.*, 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct.App. 1987) (noting preservation requirements). Defendants actually made the opposite argument below. Defendants requested the following findings of fact:

18. At the end of December 1998, Summit executed a Buyer's Agency Disclosure Statement and Compensation Agreement and Buyer's Agency Right to Represent Buyer Agreement . . . with French, . . .

. . . .

22. The Agreement set forth a termination date of January 31, 1999.

Defendants' argument during trial mirrored their requested findings of fact. Defendants may not change their "theory on appeal" and now claim that no contract existed. *See Azar v. Prudential Ins. Co.*, 2003-NMCA-062, ¶ 24, 133 N.M. 669, 68 P.3d 909 (internal quotation marks and citation omitted).

{9} Defendants next argue that if there was a contract between French and Summit, no breach occurred because the contract expired on January 31, 1999, four days before they entered into a purchase agreement with SFEDI. In the same vein, Defendants argue that the district court erred in allowing parol evidence to be admitted regarding the end date of the contract, and "rewriting" the terms of the contract to make the end date June 1, 1999.

{10} The question whether a contract contains an ambiguity is a matter of law to be determined by the district court. *Mark V, Inc. v. Mellekas*, 114 N.M. 778, 781–82, 845 P.2d 1232, 1235–36 (1993). The meaning of an ambiguous term is a question of fact which we review under a substantial evidence standard. *Id.* Appellate courts are not bound by the district court's conclusions of law, but its findings of fact are reviewed under a substantial evidence standard. *C.R. Anthony Co. v. Loretto Mall Partners*, 112 N.M. 504, 510, 817 P.2d 238, 244 (1991) "[I]n determining whether a term or expression to which the parties have agreed is unclear, a court may hear evidence of the circumstances surrounding the making of the contract and of any relevant usage of trade, course of dealing, and course of performance." *C.R. Anthony Co.*, 112 N.M. at 508–09, 817 P.2d at 242–43 (footnote omitted). In adopting this rule, New Mexico courts have abandoned the "plain-meaning" or "four-corners" standard that required courts to resolve the ambiguity without any outside evidence. *Mark V, Inc.*, 114 N.M. at 781, 845 P.2d at 1235.

{11} Based on our holdings in *C.R. Anthony* and *Mark V, Inc.*, the district court correctly heard evidence surrounding the making of the Buyer's Agency agreement to resolve the ambiguity concerning its term. The district court relied on the testimony of French's agent, who testified it was customary practice for the length of a Buyer's Agency agreement to extend six months to a year, that he did not agree to Potter's handwritten expiration date, and that to do so in a complicated transaction such as this would be unreasonable. The district court also relied on the fact that Summit authorized French to continue to perform under the Buyer's Agency agreement as late as February 4, 1999, after the claimed expiration date. All of these facts support the district court's deci-

sion that the term of the agreement ran through June 1, 1999.

{12} In a rather odd argument, Defendants assert that even if there was a contract in force, Summit as the buyer had no personal obligation according to the terms of the contract to pay French any commission. Rather, Defendants claim, SFEDI as seller had the obligation to pay the broker's commission. We characterize this argument as odd given the basic nature of the arrangement between Summit and French.

{13} French concedes (and says it never argued otherwise) that Summit did not have a direct obligation to pay the commission. French points out that the agreement between it and Summit contained both implied and express promises that the purchase agreement between Summit and SFEDI would assure payment of the commission to French by the listing broker. French argues, and the district court ruled, that Summit breached these promises. As noted above, French and Summit executed two documents. The Buyer's Agency agreement gave French the right and authority to represent Summit in locating and acquiring real property. The Compensation Agreement—executed simultaneously with the Buyer's Agency agreement—was designed to protect, if not insure, payment of the buyer's (Summit) broker's commission. The Compensation Agreement obligated Summit to make the Compensation Agreement an exhibit to any purchase agreement Summit entered into as a buyer. Paragraph 4(b) of the Compensation Agreement required sellers (such as SFEDI) to agree to have the following terms in any purchase agreement:

> b. Seller authorizes and directs Listing Broker to share its commission with Broker, acting as a Licensee, in accordance with the division shown in the listing information offered through MLS or Broker shall be compensated on the following terms: Five percent of sales price plus applicable New Mexico gross receipts tax. Broker shall not receive any undisclosed real estate brokerage commission in this transaction. Payment of said commission to Broker shall not create any agency or subagency relationship between Broker and either Seller or Listing Broker.

Together, the two documents described how French would earn its commission and how it would be paid from the sales proceeds. Thus, Summit's argument that it had no direct obligation to pay the commission is literally beside the point, and we reject it.

{14} Summit's only factual defense of its action was that French in effect bowed out of the transaction when it refused to indemnify SFEDI. Once that defense was rejected as a factual matter, the district court's decision could—and did—rest on a number of legal theories. For example, Summit breached an express term of the agreement when it failed to have the Compensation Agreement attached to the purchase agreement with SFEDI.

{15} In addition, in real estate transactions, the law implies certain promises between a buyer and a broker even if the commission is to be paid by the seller, as in this case. French cites to a number of out-of-state cases for the proposition that a real estate broker has a cause of action against a purchaser who refuses to carry out his contract with the seller, even though the broker has agreed to look to the seller for his commission. *See generally Probst v. Di Giovanni,* 232 La. 811, 95 So.2d 321 (1957); *Blache v. Goodier,* 22 So.2d 82 (La.App.1945); *Tanner Assocs., Inc. v. Ciraldo,* 33 N.J. 51, 161 A.2d 725 (1960); *Duross Co. v. Evans,* 22 A.D.2d 573, 257 N.Y.S.2d 674 (N.Y.App.Div. 1965); *Danciger Oil & Ref. Co. v. Wayman,* 169 Okla. 534, 37 P.2d 976 (1934); and *Livermore v. Crane,* 26 Wash. 529, 67 P. 221 (1901). The general rule derived from these cases is that a purchaser is liable to a broker for breach of an implied promise when the purchaser fails to complete the transaction. Here, the district court found that Summit failed to complete the transaction with French as its broker for no good reason.

{16} Perhaps more familiarly, the district court found a breach of the duty of good faith and fair dealing. "[E]very contract imposes upon the parties a duty of good faith and fair dealing in its performance and enforcement." *Watson Truck & Supply Co. v. Males,* 111 N.M. 57, 60, 801 P.2d 639, 642

(1990); *Gilmore v. Duderstadt*, 1998–NMCA–086, ¶ 24, 125 N.M. 330, 961 P.2d 175. This implied covenant requires that neither party do anything that will injure the rights of the other party to receive the benefit of the agreement. *Bourgeous v. Horizon Healthcare Corp.*, 117 N.M. 434, 438, 872 P.2d 852, 856 (1994). Having found that SFEDI never demanded indemnification from French, the district court clearly decided there was no excuse for Summit's behavior in excluding French from the transaction. The district court implicitly decided that Summit simply tried to force French to accept a risk which was not part of the original arrangement between them. The district court was clearly struck—as are we—by the fact that Summit itself took the commission. All of these circumstances support the district court's ruling.

{17} Finally, Defendants argue that the district court erred by finding Potter individually liable for breach of contract. The short answer is that it did not. The district court's basis for Potter's individual liability was in tort.

TORT CLAIMS

{18} We read the district court's rulings to hold only Potter, and not Summit liable for intentional interference with French's contract and for prima facie tort. Therefore, we do not address any tort liability of Summit under either of these theories. Relying on California and Texas case law, Defendants argue that Potter, as manager for Summit, cannot interfere with Summit's contracts. This Court addressed the issue of a corporate officer interfering with the contracts of his own corporation in *Ettenson v. Burke*, 2001–NMCA–003, 130 N.M. 67, 17 P.3d 440. In *Ettenson*, we rejected the view that "corporate officers are simply surrogates of the corporation, entitled to absolute immunity from suits for tortious interference with contract." *Id.* ¶ 20. We held instead that the privileged immunity of corporate officers is qualified. *Id.* Corporate agents "are privileged to interfere with or induce breach of the corporation's contracts with others as long as their actions are in good faith and for the best interests of the corporation." *Id.* ¶ 18. We recognized in *Ettenson* that the inquiry of whether or not a privilege exists is fact specific, to be determined by the trier of fact. *Id.* ¶¶ 18, 19, 21. In determining whether or not a privilege exists, the district court must look to the motivating forces behind the agent's decision to induce the corporation to breach its contractual obligations. *Id.* ¶ 18. A court cannot say as a matter of law that a corporate agent was not acting in the best interest of the corporation by interfering with its contractual duties simply because, as in this case, the agent may have stood to profit along with the corporation. *Id.* ¶ 21. In addition, under New Mexico's Limited Liability Company Act, NMSA 1978, §§ 53–19–1 to –13 (1993, as amended through 2004) and supporting case law, an agent of a corporation may be held liable for the consequences of his own acts or omissions, including tortious acts. *Kreischer v. Armijo*, 118 N.M. 671, 673, 884 P.2d 827, 829 (Ct.App.1994) (recognizing that an agent may be held individually liable for his own tortious acts, whether or not he was acting for a disclosed principal).

{19} As a matter of law, therefore, it is possible in New Mexico for a corporate agent to wrongfully interfere with his corporation's contracts and to be held personally responsible for his acts. The question then becomes whether or not Potter could be held liable under the facts of this case.

{20} To establish liability, French had the burden of showing that (1) Potter had " 'knowledge of the contract' " between French and Summit, (2) "performance of the contract was refused," (3) Potter " 'played an active and substantial part in causing [French] to lose the benefits of [the] contract,' " (4) "damages flowed from the breached contract," and (5) Potter "induced the breach 'without justification or privilege to do so.' " *Ettenson*, 2001–NMCA–003, ¶ 14, 130 N.M. 67, 17 P.3d 440 (quoting *Wolf v. Perry*, 65 N.M. 457, 461–62, 339 P.2d 679, 681–82 (1959)).

{21} To find Potter individually liable, the facts must show that Potter acted with either an improper motive or by use of improper means. *See Diversey Corp. v.*

Chem-Source Corp., 1998–NMCA–112, ¶ 20, 125 N.M. 748, 965 P.2d 332. Improper means includes not only tortious behavior, but any "predatory" behavior, including behavior that is wrongful based on an established standard of a trade or profession. *Id.* ¶ 21. The district court found Potter's motive in interfering with the contract was for the improper purpose of diverting a commission away from French to himself and Summit. What is lacking, though, is any evidence establishing how Potter's motives were separate from those of Summit. The district court did not find that Potter's improper purpose in diverting the commission was for his own benefit, rather than that of Summit. In this case, Summit profited from the diverted commission. The findings do not support a legal conclusion that Potter acted with an improper personal or individual motive. We hold that the evidence was not sufficient to support a claim for intentional interference with the contract against Potter individually. We therefore reverse the decision of the district court on this issue.

{22} Having determined that the record does not support a claim for intentional interference with contract, we now address the district court's ruling that Potter was "individually liable . . . because his acts and omission satisf[ied] the elements of a prima facie tort." To state a claim for prima facie tort, French had to show (1) "[a]n intentional, lawful act by defendant;" (2) "[a]n intent to injure the plaintiff;" (3) "[i]njury to plaintiff, and" (4) "insufficient justification for the defendant's acts." *Schmitz v. Smentowski*, 109 N.M. 386, 393–94, 785 P.2d 726, 733–34 (1990) (citation omitted). Prima facie tort is intended to provide a remedy for persons harmed by acts that are intentional and malicious, but otherwise lawful, which "fall outside of the rigid traditional intentional tort categories." *Martinez v. N. Rio Arriba Elec. Coop., Inc.*, 2002–NMCA–083, ¶ 24, 132 N.M. 510, 51 P.3d 1164 (internal quotation marks and citation omitted). Prima facie tort should be used to address wrongs that otherwise "escaped categorization," but "should not be used to evade stringent requirements of other established doctrines of law." *Schmitz*, 109 N.M. at 396, 398, 785 P.2d at 736, 738.

{23} New Mexico courts have accepted the view that prima facie tort may be pleaded in the alternative. *See id.* "[H]owever, if at the close of the evidence, plaintiff's proof is susceptible to submission under one of the accepted categories of tort, the action should be submitted . . . on that cause and not under prima facie tort." *Id.* at 396, 785 P.2d at 736. Using this procedure, the theory underlying prima facie tort, (which is to provide a remedy for intentionally committed acts that do not fit within the contours of accepted torts), may be furthered, while remaining consistent with modern pleading practice. *Hagebak v. Stone*, 2003–NMCA–007, ¶ 26, 133 N.M. 75, 61 P.3d 201 (internal quotation marks and citation omitted).

{24} Although French was unable to establish a claim under intentional interference with contract, that was the appropriate tort action in this case. In addition, Plaintiff had a (successful) cause of action under breach of contract. Thus, existing causes of action provided reasonable avenues to a remedy for the asserted wrongful conduct. As such, there was simply no need to resort to prima facie tort. This is a classic case of a plaintiff trying to avoid "stringent requirements of other established doctrines of law" to impose liability in tort. *Schmitz*, 109 N.M. at 398, 785 P.2d at 738. Prima facie tort has no application here.

PUNITIVE DAMAGES

{25} Defendants argue that the district court violated the United States Constitution by holding both Potter and Summit liable for punitive damages. Defendants contend that the district court failed to make several determinations that are required to uphold a finding of punitive damages, including Defendants' reprehensibility, whether the harm was physical or economic, whether the tortious conduct evinced an indifference to or reckless disregard of the health or safety of others, and whether the conduct involved repeated actions or was an isolated incident. We first address the district court's decision to award punitive damages, then the reasonableness of the award.

{26} Plaintiff contends the district court had substantial evidence to conclude that Potter's acts were willful and in reckless disregard of French's right to a commission. Plaintiff further alleges that Potter's stated pretext for taking French out of the sales transaction and stepping in as the buyer's broker predicated on the false claim that SFEDI demanded indemnity from French is evidence of dishonesty or deceit, and will support an award of punitive damages in a case of malicious breach of contract. *Constr. Contracting & Mgmt., Inc. v. McConnell,* 112 N.M. 371, 375, 815 P.2d 1161, 1165 (1991).

{27} Since we have reversed the district court on the issue of Potter's individual tort liability, we also reverse as to any punitive damages awarded against Potter. We only review the punitive damages based on the breach of contract action against Summit.

{28} 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, or fraudulent and in bad faith. *Sanchez v. Clayton,* 117 N.M. 761, 767, 877 P.2d 567, 573 (1994); *Gonzales v. Sansoy,* 103 N.M. 127, 129, 703 P.2d 904, 906 (Ct.App.1984). Contrary to Defendants' contention that punitive damages cannot be awarded in breach of contract cases, our case law clearly establishes that punitive damages may be recovered for breach of contract when the defendant's conduct has been sufficiently malicious, oppressive, fraudulent, or committed recklessly with a wanton disregard for the plaintiff's rights. *Paiz v. State Farm Fire & Cas. Co.,* 118 N.M. 203, 210, 880 P.2d 300, 307 (1994). 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. v. N. River Ins. Co.,* 1999-NMSC-006, ¶ 45, 127 N.M. 1, 976 P.2d 1. "Our rule on punitive damages never was intended to make punitive damages available for every intentional breach of a contract." *Romero v. Mervyn's,* 109 N.M. 249, 256, 784 P.2d 992, 999 (1989). An intentional breach by itself ordinarily cannot form the predicate for punitive damages, not even when the breach is flagrant, that is, when there is no question that the conduct breaches the contract, even if the other party will clearly be injured by the breach. *Cafeteria Operators, L.P. v. Coronado-Santa Fe Assocs., L.P.,* 1998-NMCA-005, ¶ 43, 124 N.M. 440, 952 P.2d 435 (Hartz, C.J., concurring in part and dissenting in part). Circumstances which could make punitive damages appropriate in a breach of contract case include, for example, an intentional breach accompanied by fraud. *See, e.g., Whitehead v. Allen,* 63 N.M. 63, 65-66, 313 P.2d 335, 336 (1957) (affirming a punitive damages award for the falsification of weight records by purchaser of alfalfa).

{29} Also, when the breaching party intends to inflict harm on the non-breaching party or engages in conduct which violates community standards of decency, punitive damages are appropriate. *McConnell,* 112 N.M. at 375, 815 P.2d at 1165. *See Romero v. Mervyn's,* 109 N.M. 249, 258, 784 P.2d 992, 1001 (1989) ("Overreaching, malicious, or wanton conduct" justifying punitive damages "is inconsistent with legitimate business interests, violates community standards of decency, and tends to undermine the stability of expectations essential to contractual relationships."). "Malicious conduct is the intentional doing of a wrongful act with knowledge that the act was wrongful." UJI 13-861, NMRA. *See Romero* at 255-56, 784 P.2d at 998-99 ("[M]alice . . . means the intentional doing of a wrongful act without just cause or excuse. This means that the defendant not only intended to do the act which is ascertained to be wrongful, but that he knew it was wrong when he did it.") (quoting *Loucks v. Albuquerque Nat'l Bank,* 76 N.M. 735, 747, 418 P.2d 191, 199 (1966)); UJI 13-1827, NMRA (giving same definition for malicious conduct in tort cases to justify punitive damages).

{30} Using this analysis, the question is whether Summit's breach of contract with French was sufficiently egregious to merit punitive damages. The district court found Summit had full knowledge that French was entitled to its commission and that it entered into the purchase agreement with SFEDI with the intention of depriving French of its due. The district court also found that Sum-

mit's conduct was not justifiable under all the circumstances and that it was motivated by an improper purpose to divert the commission to itself. The district court did not enter any specific finding that Potter or Summit acted dishonestly or deceitfully.

{31} As discussed above, every intentional breach can be seen as a wrongful act that the breaching party knows will cause financial harm to the other party. Thus, the fact that Summit knew French was entitled to the commission is not enough to support an award of punitive damages.

{32} Do the lack of justification and improper purpose or motive to divert the commission provide the added level of egregiousness sufficient to support punitive damages? We hold that they do. While not strictly dishonest, Summit's actions were, as the district court found, without justification. Summit found itself faced with a potential claim from Bogle. SFEDI demanded protection from Bogle's claim. Summit's potential difficulties with Bogle were none of French's doing or business. Yet Summit purposely took French's commission for itself to cover its own risk. Summit tried to make French pay for business risks which were Summit's alone. This cannot be viewed as a legitimate business reason for an intentional breach. Rather Summit's acts and motive fits the standard for malicious conduct. The basis for punitive damages was established.

{33} The amount of the damages also seems reasonable. The Eighth and Fourteenth Amendments to the federal Constitution prohibit punitive damage awards that are "grossly excessive." *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433–34, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001). We review an award of punitive damages for excessiveness de novo. *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 2002–NMSC–021, ¶ 17, 132 N.M. 401, 49 P.3d 662. Our review must consider three guideposts: "1) the degree of reprehensibility of the defendant's misconduct; 2) the disparity between the harm . . . suffered by the plaintiff and the punitive damages award; and 3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* ¶ 20 (citing *BMW*, 517 U.S. at 574–75, 116 S.Ct. 1589).

{34} An award of punitive damages "should reflect the enormity of [the] offense." *BMW*, 517 U.S. at 575, 116 S.Ct. 1589 (internal quotation marks and citation omitted). To determine the reprehensibility of the defendant's misconduct, we must consider whether

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm Mut. Auto. Ins. Co., 538 U.S. at 419, 123 S.Ct. 1513. Although the presence of any of these factors alone may not be sufficient to support an award of punitive damages, the "absence of all of them renders any award suspect." *Id.* The only factor weighing in favor of an award of punitive damages in this case is the fact that the harm inflicted by Summit was the result of intentional malice. However, we find that this factor is sufficient to support an award of punitive damages. Punitive damages are "intended to punish the defendant and to deter future wrongdoing." *Cooper Indus.*, 532 U.S. at 432, 121 S.Ct. 1678. Absent an award of punitive damages in this case, Summit would have no incentive to refrain from cheating those with whom it does business in the future. Therefore, we find that Summit's conduct was sufficiently reprehensible to support the relatively modest punitive damages award imposed by the district court.

{35} The second *BMW* guidepost requires us to consider whether the "amount of [the] award [is] so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason or justice." *Aken*, 2002–NMSC–021, ¶ 23. This is a somewhat imprecise inquiry; the United States Supreme Court has refused to establish a "bright-line ratio which a punitive damages award cannot exceed." *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 425,

123 S.Ct. 1513. However, the Court has recognized that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* In this case, the district court imposed a relatively modest punitive damage award equal to one and one-half times the compensatory damages award. Based on the general lack of guidance on what constitutes an appropriate ratio between compensatory and punitive damages and the relatively small ratio in this case, we find that the amount of punitive damages awarded by the district court did not violate due process.

{36} The third guidepost requires us to "[compare] the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." *Aken,* 2002–NMSC–021, ¶ 25 (quoting *BMW,* 517 U.S. at 583, 116 S.Ct. 1589). Under the Unfair Practices Act, NMSA 1978, § 57–12–1 to –24 (1967, as amended through 2004), it is unlawful for any person to make a "false or misleading oral or written statement, . . . or other representation of any kind knowingly made in connection with the sale, lease, rental or loan of goods or services . . . which may, tends to or does deceive or mislead any person." §§ 57–12–2(D), –3. Because of the similarity of the conduct prohibited by the Unfair Practices Act and the conduct engaged in by Summit, the remedies afforded under the Unfair Practices Act serve as a meaningful comparison in our determination of the reasonableness of the punitive damages awarded by the district court. Under the Unfair Practices Act, any person who suffers a financial loss as the result of another willfully engaging in an unfair trade practice may recover treble damages. § 57–12–10(B). Because the ratio of punitive damages to compensatory damages awarded by the district court was smaller than the statutory ratio for similar conduct, we find that the award of punitive damages was not excessive under this guidepost.

{37} Because we find that each of the three *BMW* guideposts supports the district court's award of punitive damages, we conclude that the amount of the award did not violate due process. Therefore, we affirm the district court's award of punitive damages.

CONCLUSION

{38} We affirm the award of compensatory and punitive damages against Summit. We hold that the district court erred in finding Potter individually liable, and we reverse the judgment against him.

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

WE CONCUR: RODERICK T. KENNEDY and MICHAEL E. VIGIL, Judges.

2005-NMCA-028

107 P.3d 532

STATE of New Mexico, Plaintiff–Appellee,

v.

James Kyle BOERGADINE, Defendant–Appellant.

Nos. 23,766, 23,767.

Court of Appeals of New Mexico.

Jan. 14, 2005.

Certiorari Denied, No. 29,061, March 2, 2005.

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OPINION

KENNEDY, Judge.

{1} In this case, we hold that Defendant's fraudulent taking of three payments in the course of completing work on one vehicle's transmission justifies convicting him of three counts of fraud pursuant to NMSA 1978, § 30–16–6 (1987). Defendant James Kyle Boergadine appeals his conviction of three counts of fraud. Defendant also appeals the resulting revocation of his probation in another case that is consolidated with this one for purposes of this appeal. Defendant asserts that: (1) the three fraud counts were for one course of conduct, so that his conviction for all three violated double jeopardy; (2) discovery violations and other prosecutorial misconduct warrant reversal on the basis of fundamental error; (3) his trial counsel was ineffective; (4) these errors are cumulative error; and (5) because his fraud convictions should be reversed, they could not be a basis for the revocation of his probation. Defendant's reliance on what he sees as a single course of conduct is misplaced, when it was he who requested further payments and changed the terms of the agreement without performing his obligations. Because we find no error below, we affirm Defendant's convictions for the reasons stated herein.

FACTUAL AND PROCEDURAL BACKGROUND

{2} On February 11, 2002, Cheyenne Redhouse (Redhouse) took her vehicle to Defendant for transmission repairs. Defendant told Redhouse that the repairs would cost $1000. Redhouse did not have this amount, and Defendant told her that she could put $400 down for parts. Defendant told her that she "can just give [him money] little by little." Defendant accepted a check for $350 from Redhouse, but instructed her not to make the check payable to him since he did not have any identification to cash it. The check was made payable to Defendant's fiancee and subsequently cashed.

{3} Redhouse came to see Defendant again on February 17, 2002. Nothing had been done on her car. Defendant told Redhouse that he needed more parts, and Redhouse's husband gave Defendant $300 in cash. De-

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John Bigelow, Chief Public Defender, Cordelia A. Friedman, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

fendant told Redhouse that "he might need some more money if there's other parts that needs [sic] to be done," and that he would contact her.

{4} Almost two months later, Redhouse spoke to Defendant again. Defendant told her that he needed another $1200, but that this amount should "cover the whole thing." On April 18, 2002, Redhouse gave Defendant this amount in cash. Sometime later, when the vehicle repairs had not been done, Redhouse again spoke to Defendant. Defendant told Redhouse that he would not give her the parts she had paid for or repair the vehicle. Defendant took Redhouse's vehicle to a repair shop, which contacted Redhouse to do the repairs. Redhouse later testified that a note had been left in her vehicle saying the money she had paid to Defendant was for storage fees.

{5} In May 2002, Defendant was charged by complaint with only one count of fraud for the $350 check, although the attached affidavit described all three times that Redhouse gave Defendant money. Defendant pled not guilty to a subsequent criminal information containing three counts of fraud.

{6} A number of issues arose pre-trial, including untimely additions to the prosecution's witness list. The prosecution's initial witness list named Redhouse, Detective Wyatt, and Officer Marshall. The prosecution later sought to add five more witnesses, who were barred from testifying at trial.

{7} Defendant also sought production of an N.C.I.C. criminal report on Redhouse "just for credibility purposes." The trial court ordered the prosecution to disclose if Redhouse had any prior criminal convictions and to give Defendant an N.C.I.C. report if the State already had one. The court specifically relieved the prosecution of the need to obtain such a report if it did not already have one in its possession. The court later informed Defendant that a "[r]ap sheet" could be obtained from the sheriff's office, and that it would order one released to Defendant if necessary.

{8} Defendant was unable to obtain a copy of the cancelled check, and it was never produced, despite Defendant moving to compel discovery, sending a subpoena to Redhouse, and obtaining a court order compelling its production. Defendant had only seen a carbon copy of the front of the check, and not any indorsement on its back. Defendant further sought to prevent any mention of the check at trial based only on the non-disclosure of the cancelled check. The trial court allowed Redhouse to testify about the check while ruling that the cancelled check itself could not be introduced if found.

{9} In its opening statement at trial, the prosecution stated that three of the previously excluded witnesses were present, and that one, Redhouse's daughter, could testify "if necessary." The prosecutor also previewed "testimony" that the other excluded witnesses might give. At no point during this opening did Defendant's counsel object.

{10} In Defendant's opening statement, Defendant's counsel challenged whether Redhouse ever wrote the $350 check based on its absence from evidence. He told the jury that they were not going to see the check "because it doesn't exist. It was never written." He would later reiterate this argument in closing statements.

{11} At trial, Officer Marshall, Redhouse, and Detective Wyatt testified. After the State rested, Defendant's counsel moved for a directed verdict, which was denied. Defendant's counsel presented no witnesses, going directly to closing arguments. The court then gave a separate instruction for each count of fraud without objection from Defendant. Each instruction described one of the times that Redhouse had given Defendant money, including the $350 check, the $300 in cash, and the final $1200 cash payment. The jury found Defendant guilty of all three charges of fraud. Defendant now appeals those convictions.

DOUBLE JEOPARDY

Unit of Prosecution

{12} Defendant argues for the first time on appeal that his convictions were in violation of the Double Jeopardy Clauses of the State and Federal Constitutions. This issue may be properly raised for the first time on appeal. *State v. Soto*, 2001–NMCA–098, ¶ 12, 131 N.M. 299, 35 P.3d 304. Double

jeopardy challenges, which raise the issue of the unit of prosecution under a single statute, become questions of statutory construction, and are reviewed de novo. *Id.* ¶ 13. Under this standard, we approach the question of whether, on the facts above, Defendant's three convictions violated double jeopardy.

{13} Although Defendant invokes both the State and Federal Constitutions, we read and analyze these two provisions in the same manner. *State v. Rogers,* 90 N.M. 604, 606, 566 P.2d 1142, 1144 (1977). The Double Jeopardy Clause provides that no one will be "twice put in jeopardy" for the same crime. U.S. Const. amend. V; N.M. Const. art. II, § 15. This clause protects against three distinct dangers. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Swafford v. State,* 112 N.M. 3, 7, 810 P.2d 1223, 1227 (1991) (internal quotation marks and citation omitted). Second prosecution cases are analyzed differently than multiple punishment cases. *Id.*

{14} Multiple punishment cases are further divided into two more categories: multiple convictions under one statute (unit of prosecution cases) and multiple convictions under multiple statutes for the same course of conduct (double description cases). *Id.* at 8, 810 P.2d at 1228; *State v. Barr,* 1999-NMCA-081, ¶ 11, 127 N.M. 504, 984 P.2d 185. For example, *Swafford* is a double description case since the defendant was convicted of both criminal sexual penetration and incest for one incident. *Swafford,* 112 N.M. at 6-7, 810 P.2d at 1226-27. Here, on the other hand, Defendant was convicted of three counts of the same fraud statute. We accordingly treat Defendant's double jeopardy challenge as a unit of prosecution issue. *See Barr,* 1999-NMCA-081, ¶ 11, 127 N.M. 504, 984 P.2d 185.

{15} Unit of prosecution cases use a two-step analysis. *Id.* For these type of cases, we must first ask whether the statute "clearly define[s] the unit of prosecution." *Soto,* 2001-NMCA-098, ¶ 13, 131 N.M. 299, 35 P.3d 304. A unit of prosecution issue, "though essentially constitutional, becomes one of statutory construction." *Barr,* 1999-NMCA-081, ¶ 13, 127 N.M. 504, 984 P.2d 185 (internal quotation marks and citation omitted). The question then becomes "whether the legislature intended punishment for the entire course of conduct or for each discrete act." *State v. Alvarez-Lopez,* 2004-NMSC-030, ¶ 40, 136 N.M. 309, 98 P.3d 699 (internal quotation marks and citation omitted) (alteration in original). If a statute's unit of prosecution is clearly defined, we must look no further than the face of the statute. *Id.; Barr,* 1999-NMCA-081, ¶ 14, 127 N.M. 504, 984 P.2d 185. However, if the statute is ambiguous, we must apply the rule of lenity, where "doubt will be resolved against turning a single transaction into multiple offenses." *Id.* (internal quotation marks and citation omitted). Under the rule of lenity we presume that "the [L]egislature did not intend to fragment a course of conduct into separate offenses." *Alvarez-Lopez,* 2004-NMSC-030, ¶ 40, 136 N.M. 309, 98 P.3d 699 (internal quotation marks and citation omitted) (alteration in original). However, this rule does not apply if the second step of the unit of prosecution test is not satisfied. *Barr,* 1999-NMCA-081, ¶ 15, 127 N.M. 504, 984 P.2d 185. The second step uses a number of factors to determine whether there was a "sufficient showing of distinctness" between a defendant's acts. *Id.* ¶¶ 15-16. We now turn to the facts of this case to apply this test.

{16} The fraud statute reads in relevant part:

> Fraud consists of the intentional misappropriation or taking of anything of value which belongs to another by means of fraudulent conduct, practices or representations.
>
> . . . .
>
> Whoever commits fraud when the value of the property misappropriated or taken is over two hundred fifty dollars ($250) but not more than twenty-five hundred dollars ($2,500) is guilty of a fourth degree felony.

Section 30-16-6. Under this statute, the more valuable the thing misappropriated or taken, the higher the degree of felony with which a defendant may be charged. *Id.*

{17} Defendant argues that this charging scheme shows that the unit of prosecution is clearly defined in the fraud statute as the total value of misappropriations or takings. If correct, then Defendant could only have been convicted of one felony, since the total value of his takings was $1,850. Defendant further asserts that this argument is supported by the similarities between Section 30–16–6 and NMSA 1978, § 30–16–1 (1987) (larceny), NMSA 1978, § 30–16–11 (1987) (receiving stolen property), and NMSA 1978, § 30–16–16 (1987) (falsely obtaining services or accommodations).

{18} With regard to the comparison to Sections 30–16–11 and 30–16–16, Defendant's contention is without further argument or citation to case law. *See In re Adoption of Doe,* 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (declining to review issues where counsel cited no authority in support thereof). Defendant's argument focuses on larceny. We therefore only address that statute.

{19} Our Supreme Court has held that the larceny statute clearly defines the unit of prosecution. *See Alvarez–Lopez,* 2004–NMSC–030, ¶ 41, 136 N.M. 309, 98 P.3d 699. However, the unit of prosecution is not always based on the total value of the things taken. *Id.* The unit of prosecution may be based on the *nature* of the thing taken. *Id.* In *Alvarez–Lopez,* the Court held that the defendant could be charged with both the general larceny provision (larceny over $250) and the specific larceny provision (larceny of a firearm) of Section 30–16–1 without violating double jeopardy. *Id.* It also held that the legislature had intended to specifically target larceny of firearms as opposed to other things, and thereby created separate units of prosecution for different types of items. *Id.* ¶ 42.

{20} The fraud statute does not have such categorical distinctions for the nature of the items taken. It does not clearly define its unit of prosecution. The question then is whether Defendant's acts were sufficiently distinct. *See Barr,* 1999–NMCA–081, ¶ 17, 127 N.M. 504, 984 P.2d 185; *State v. Morro,* 1999–NMCA–118, ¶ 11, 127 N.M. 763, 987 P.2d 420 (stating that when the face of the statute "provides no answer," we apply the distinctiveness test as "a canon of construction").

{21} In the context of a sexual assault case, *Herron v. State,* 111 N.M. 357, 361, 805 P.2d 624,' 111 N.M. 357, 805 P.2d 624, 628 (1991), delineated a six factor test for determining whether a defendant's actions are distinct enough to form the basis of separate crimes. That test has since been widely applied to different kinds of cases, including but not limited to burglary and larceny. *See, e.g., Soto,* 2001–NMCA–098, ¶¶ 12–15, 131 N.M. 299, 35 P.3d 304 (applying the *Herron* test to multiple convictions for burglary); *State v. Brown,* 113 N.M. 631, 632–34, 830 P.2d 183, 184–86 (Ct.App.1992) (applying the *Herron* test to multiple convictions for larceny). The test includes the following factors: "(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; *Morro,* 1999–NMCA–118, ¶ 19, 127 N.M. 763, 987 P.2d 420. As *Herron* stated, "none of these factors alone is a panacea." 111 N.M. at 362, 805 P.2d at 629. We may also consider whether Defendant's acts were "performed independently" of the other acts "in an entirely different manner," or whether such acts were of a "different nature." *Id.* at 361, 805 P.2d at 628. We hold that these considerations may be added to the flexible set of factors set out above.

{22} The first factor we address is the "temporal proximity" of Defendant's three fraudulent acts. *Id.* "[T]he greater the interval between acts the greater the likelihood of separate offenses." *Id.* Here, Defendant first took a $350 check from Redhouse on February 11. Six days later, on February 17, Redhouse gave Defendant $300 in cash. Two months later, on April 16, Defendant requested more money from Redhouse, and on April 18, Defendant received another $1200 in cash. Each time that Defendant took money from Redhouse, he had not done any work on her car. The lengthy stretches of time between these acts and the individual

false requests for additional sums of money for parts supports three separate convictions for Defendant's acts.

{23} The second and fourth factors are location of the victim and sequencing of the acts. These factors are more tailored to sex offenses, emphasizing that "movement or repositioning of the victim between penetrations" and the sequence in which different orifices were penetrated "tend[s] to establish separate offenses." *Id.* While other scenarios might find an application of these factors useful, we do not.

{24} Defendant may have told Redhouse that she could pay "little by little" for the repairs, but that is not what happened. Defendant first told Redhouse that the repairs would cost $1000. However, Redhouse ended up paying him a total of $1,850. The cash payments were not fixed, but in fact were made in direct response to distinct and independent acts of Defendant. Defendant defrauded Redhouse out of each amount on separate occasions. The first cash payment was instigated by Defendant's assertion that Redhouse's car needed more parts. Defendant then told Redhouse, nearly two months later, that $1200 should "cover the whole thing." Each cash transaction was accompanied by different assurances; the first, that he would contact Redhouse, the second, the implication that the $1200 would suffice for the repairs. Here, the sequence of events is less salient than seeing that each act of fraud was distinct and separate from the others by the nature and manner of the transactions, the behavior of Defendant between, and the intervening acts of assurance. The independence, nature, and manner of Defendant's acts is relevant to our consideration of the third factor; whether there were any events that arose between one act and another. *Id.* Under this factor, which overlaps with other factors like Defendant's intent, we may also look at "the behavior of the defendant between" the acts. *Id.* Here, despite Defendant's arguments, he did not just accept the additional cash payments as part of some installment plan. An installment plan is the "arrangement of the payment of a sum of money by fixed portions at fixed times." Oxford English Dictionary 1039 (2d ed.1989).

{25} The "defendant's intent as evidenced by his conduct and utterances" is the fifth factor of our analysis. *Herron,* 111 N.M. at 361, 805 P.2d at 628. Defendant would have us hold this factor dispositive, arguing that Defendant had a "single, unitary intent." Defendant cites *State v. Pedroncelli,* 100 N.M. 678, 681, 675 P.2d 127, 130 (1984), for the proposition that taking the three payments was driven by the same intent to defraud, so Defendant could only be charged with one count of fraud. *Pedroncelli,* however, was decided seven years before *Herron* set out the test we use now, and we hold that the latter is controlling. Yet having ignored the other *Herron* factors, Defendant asks us to place an undue emphasis upon the intent factor. The fact that Defendant specifically requested additional cash payments for different purposes, which he accompanied by various assurances and justifications, supports the jury's finding that on each occasion, he had a separate intent to defraud.

{26} Defendant does not argue that the evidence was insufficient to support these findings. Rather, Defendant appears to rely on the fact that on each occasion his intent was generally the same intent to defraud over a "protracted" period of time. Were we to agree with this analysis, a defendant could never be charged with more than one count of any statute containing one mental element such as getting money from a victim. We reject this reasoning, and consider the last factor of our analysis.

{27} The final factor of the *Herron* analysis asks if each count is for a separate victim, as "multiple victims will likely give rise to multiple offenses." *Herron,* 111 N.M. at 361, 805 P.2d at 628. We note at the outset that the reverse is not always true, and that here, Redhouse is the only described victim. *Herron* itself only dealt with one victim. *Id.* at 362, 805 P.2d at 629. *Herron* found that digital penetration and penile penetration of one victim were "sufficiently distinct" under that case's criteria to support additional counts. *Id.* Accordingly, we hold that in conjunction with our assessment of the factors above, Defendant's acts were distinct enough to support three convictions of fraud,

and hence, the rule of lenity does not apply. *See Barr*, 1999–NMCA–081, ¶ 15, 127 N.M. 504, 984 P.2d 185.

Single Larceny Doctrine

{28} Defendant argues that the single larceny doctrine should be applied to the fraud statute. Defense counsel cites *State v. Rowell*, 121 N.M. 111, 908 P.2d 1379 (1995), only for the proposition that the legislature never intended three punishments for a temporally fragmented misappropriation, absent any evidence of a separate criminal intent. Here, there was evidence that Defendant had a separate intent for each of his convictions. Defense counsel otherwise ignores *Rowell*, except to cite it for a general proposition on legislative intent. Defendant makes an argument identical to the State's contention in *Rowell*, where the prosecution argued that the defendant's conduct was "part of one fraudulent scheme" and that his acts "constitute[d] a single crime because [the defendant] had the same intent in each situation." *Id.* at 116–17, 908 P.2d at 1384–85. Defendant proposes the very arguments that the Court in *Rowell* rejected. Addressing three acts resulting in a single conviction under the computer fraud statute, NMSA 1978, § 30–45–3 (1989), *Rowell* refused to apply the single larceny doctrine where the "single larcenous scheme involves multiple victims, locations, and time periods." *Rowell*, 121 N.M. at 117, 908 P.2d at 1385. These are, essentially, some of the very indicia of distinctiveness we already analyzed under the second prong of the unit of prosecution analysis. *See Morro*, 1999–NMCA–118, ¶ 10, 127 N.M. 763, 987 P.2d 420. Considering that the charging scheme in *Rowell* is nearly identical to the fraud statute, *Rowell* has adequately disposed of this issue.

{29} Under the single larceny doctrine, "[w]hen several articles of property are stolen by the defendant from the same owner," either at one time or in a series of takings, as long as there is only a "single criminal intent," then "only one larceny is committed." *Rowell*, 121 N.M. at 116–17, 908 P.2d at 1384–85 (internal quotation marks and citation omitted) (alteration in original). Defendant argues that we should apply this doctrine to fraud even though our legislature amended the embezzlement statute in direct response to our application of it in *State v. Brooks*, 117 N.M. 751, 752, 877 P.2d 557, 558 (1994). Since the fraud statute does not have such an amendment, Defendant invites us to apply the doctrine our legislature disfavors. We decline to do so. "This amendment evinces the legislature's intent to restrict the single-larceny doctrine. We will not enlarge a doctrine while the legislature works to contract it." *Rowell*, 121 N.M. at 118, 908 P.2d at 1386 (declining to apply the single larceny doctrine to the defendant's three separate acts). We hold the single larceny doctrine inapplicable to the fraud statute until our legislature dictates otherwise.

PROSECUTORIAL MISCONDUCT

Issue Not Preserved

{30} Defendant claims that the failure to disclose the check and an N.C.I.C. report, plus the prosecution's opening statements, were prosecutorial misconduct. Defendant does not state how or where the issue of prosecutorial misconduct was preserved under Rule 12–213(A)(4) NMRA. Without an appropriate cite to the record, we do not comb the record to find whether an issue was properly preserved. *See State v. Rojo*, 1999–NMSC–001, ¶ 44, 126 N.M. 438, 971 P.2d 829. As such, we need not address this contention.

Fundamental Error

{31} Defendant thus asks us to apply the doctrine of fundamental error to the prosecutor's comments during opening statements. Defense counsel did not object to any portion of the prosecution's opening statements when the prosecution referred to the testimony of witnesses who had been excluded. Rule 12–216(B)(2) NMRA allows this Court to consider questions of fundamental error even if the issue was not preserved below. As we noted in *State v. Trujillo*, 2002–NMSC–005, ¶ 52, 131 N.M. 709, 42 P.3d 814:

> Prosecutorial misconduct rises to the level of fundamental error when it is so egregious and had such a persuasive and preju-

> dicial 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.

(internal quotation marks and citation omitted). The prosecution's comments were limited to opening statements and did not give a great amount of detail. The prosecutor noted that several of the excluded witnesses were present. The prosecutor also said that one barred witness had suggested that Redhouse take her car to Defendant, that he and another man had gone to see Defendant about the car, but that no one was there, and that this witness had spoken to Defendant's fiancee, receiving assurances that Defendant was still going to fix Redhouse's car. While intentional and inappropriate, the statements are not sufficiently "egregious" to constitute fundamental error. *See State v. Allen,* 2000–NMSC–002, ¶ 95, 128 N.M. 482, 994 P.2d 728. They are, in fact, an "isolated, minor impropriety" that did not deprive Defendant of a fair trial. *See id.*

INEFFECTIVE ASSISTANCE OF COUNSEL

{32} Rule 12–213(A)(4) requires that counsel set forth the applicable standard of review for claims of ineffective assistance of counsel. Having again failed to do so, which failure is repeated throughout Defendant's brief, we urge Defendant's counsel to review and follow the rules of appellate procedure. We cannot ignore the irony of such a reminder in an argument centered on the errors of counsel below.

{33} The standard of review for claims of ineffective assistance of counsel is de novo. *State v. Joanna V.,* 2003–NMCA–100, ¶ 11, 134 N.M. 232, 75 P.3d 832. Under the guidance of this standard, Defendant must show: "(1) that [ ] counsel's performance fell below that of a reasonably competent attorney, and (2) that [counsel's] deficient performance prejudiced the defense." *State v. Franco,* 2004–NMCA–099, ¶ 14, 136 N.M. 204, 96 P.3d 329, *cert. denied,* 2004–NMCERT–008, 136 N.M. 491, 100 P.3d 197, and *cert. granted,* 2004–NMCERT–008, 136 N.M. 492, 100 P.3d 198. As for competence, Defendant needs to show that no "plausible, rational trial strategy or tactic can explain defense counsel's conduct." *Id.* To show prejudice, Defendant must show that "the allegedly incompetent representation prejudiced the case such that but for counsel's error, there is a reasonable probability that the result of the conviction proceedings would have been different." *State v. Gee,* 2004–NMCA–042, ¶ 22, 135 N.M. 408, 89 P.3d 80 (internal quotation marks and citation omitted). Both prongs place the burden on Defendant. *State v. Hester,* 1999–NMSC–020, ¶ 9, 127 N.M. 218, 979 P.2d 729. Furthermore, "[a]bsent a showing of both incompetence and prejudice, counsel is presumed competent." *Gee,* 2004–NMCA–042, ¶ 22, 135 N.M. 408, 89 P.3d 80 (internal quotation marks and citation omitted). We now apply these rules.

{34} Defendant argues that his counsel was ineffective in: (1) not moving to reduce the number of fraud counts from three to one, (2) his or her handling of the discovery of the cancelled check and N.C.I.C. report, (3) not motioning for dismissal, and (4) not objecting to the prosecutor's references to the testimony of excluded witnesses in opening statements. As Defendant only mentions issues three and four in a heading, but makes no further reference to or argument about these issues, we will not address them. Thus, we first ask whether Defendant made a sufficient showing of incompetence on the first issue.

{35} As we hold above, the record does not support Defendant's contention that the three incidents should have been one count, not three. Failure to make futile motions is not ineffective assistance of counsel. *State v. Chandler,* 119 N.M. 727, 735, 895 P.2d 249, 257 (Ct.App.1995). The testimony of the prosecution's witnesses supported viewing Defendant's acts as separate. Defendant offered no witnesses to rebut such testimony. Having held that Defendant's three convictions were supported by sufficient indicia of separateness, we cannot say that it was incompetent for counsel not to argue otherwise below.

{36} Defendant next argues that his counsel was ineffective in his or her handling of the discovery of the cancelled check and the N.C.I.C. report. As for the N.C.I.C. report, Defendant points to nothing in the record that would indicate that the prosecution ever had such a report. Defendant concedes that he does not know if Redhouse even has any prior convictions subject to mandatory disclosure. *See* Rule 5–501(A)(5) NMRA (mandating disclosure by prosecution of witness's prior convictions). A mere desire to have a report is insufficient to show materiality. *See Trujillo,* 2002–NMSC–005, ¶ 50, 131 N.M. 709, 42 P.3d 814 (stating that materiality requires that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" (internal quotation marks and citation omitted)). Thus, Defendant has not shown that his trial counsel was ineffective in acquiescing to the trial court's refusal to order disclosure of the N.C.I.C. report.

{37} Lastly, Defendant argues that his trial counsel was incompetent in the manner in which the discovery of the cancelled check was handled. Below, Defendant's counsel acquiesced to the trial court's ruling to suppress the check, did not otherwise press the issue, and did not ask for a continuance to obtain the check. Defendant argues that having the check would have supported the theory that he never received the proceeds of the cancelled check. This argument was not posited below. We have stated before that the "[a]rguments of counsel are not evidence" and cannot be used to support proposed facts. *State v. Wacey C.,* 2004–NMCA–029, ¶ 13, 135 N.M. 186, 86 P.3d 611. Instead, trial counsel argued that the check did not exist. As suppression of the check supported trial counsel's theory below, we cannot say that no "plausible, rational trial strategy or tactic can explain defense counsel's conduct." *Franco,* 2004–NMCA–099, ¶ 14, 136 N.M. 204, 96 P.3d 329. Furthermore, Defendant can not explain why, since trial counsel accepted the trial court's ruling as part of this strategy, it was incompetent not to request a continuance to obtain material that trial counsel apparently did not want admitted anyway. This argument is unavailing; Defendant did not receive ineffective assistance of counsel.

CUMULATIVE ERROR

{38} Defendant states that we should apply the doctrine of cumulative error to the actions of his trial counsel. Defendant also suggests that the trial court was responsible for not limiting the errors of trial counsel. "The doctrine of cumulative error requires reversal when a series of lesser improprieties throughout a trial are found, in aggregate, to be so prejudicial that the defendant was deprived of the constitutional right to a fair trial." *State v. Duffy,* 1998–NMSC–014, ¶ 29, 126 N.M. 132, 967 P.2d 807. We believe that few errors occurred below; Defendant was not prejudiced to the point that he did not receive a fair trial.

REVOCATION OF PROBATION

{39} Having affirmed Defendant's convictions for three counts of fraud, we will not disturb Defendant's revocation of probation based upon those convictions.

CONCLUSION

{40} In affirming Defendant's convictions, we hold that: (1) Defendant's acts were sufficiently distinct to support three separate counts of fraud without violating double jeopardy and without implicating the single larceny doctrine; (2) the issues of prosecutorial misconduct were not properly preserved, and were not enough to rise to the level of fundamental error; (3) Defendant did not receive ineffective assistance of counsel; and (4) having affirmed Defendant's convictions, we will not disturb his revocation of probation.

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

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

2005-NMCA-029
107 P.3d 543

Yvonne MARTINEZ, Petitioner–Appellant,

v.

The Hon. Frank SEDILLO, Metropolitan Court Judge, Respondent–Appellee.

No. 24,399.

Court of Appeals of New Mexico.

Jan. 18, 2005.

Patricia A. Madrid, Attorney General, Frank D. Weissbarth, Assistant Attorney General, Santa Fe, NM, for Appellee.

Teresa E. Storch, New Mexico Legal Aid, Inc., Claude Eugene Vance, The Vance Law Firm, P.A., Albuquerque, NM, for Appellant.

OPINION

WECHSLER, Chief Judge.

{1} In this appeal, we address the jurisdiction of the metropolitan court under the Mobile Home Park Act (MHPA), NMSA 1978, §§ 47–10–1 to 47–10–23 (1983, as amended through 1997). Petitioner Yvonne Martinez rented a mobile home lot in a mobile home park in Albuquerque. The landlord brought an action to terminate Petitioner's rental agreement by filing a notice of termination of the rental agreement in metropolitan court. The metropolitan court, through Judge Frank Sedillo, Respondent, concluded that the landlord had not provided Petitioner proper notice to terminate the rental agreement, but without request by the landlord, enjoined Petitioner from having social gath-

erings or guests and from consuming alcoholic beverages on the premises. The metropolitan court based its jurisdiction on both the MHPA and the Uniform Owner–Resident Relations Act (UORRA), NMSA 1978, §§ 47–8–1 to 47–8–52 (1975, as amended through 1999). Petitioner filed a petition for a writ of mandamus in district court to restrict the metropolitan court's order because it lacked jurisdiction to issue an injunction. The district court concluded that the metropolitan court had jurisdiction and denied the petition, also relying on the MHPA and the UORRA. We hold that the metropolitan court has jurisdiction under the MHPA to issue an injunction to enjoin a party to a mobile home lot rental agreement from violating the rental agreement or the MHPA and affirm. We do not address the issue of jurisdiction under the UORRA.

Jurisdiction of the Metropolitan Court in This Case

{2} The issue in the case arises because of the lack of specific language granting jurisdiction to the metropolitan court to issue an injunction. The New Mexico Constitution grants the legislature the authority to create magistrate courts to exercise limited original jurisdiction. N.M. Const. art. VI, §§ 1, 26. The statute conferring civil jurisdiction to magistrate courts includes cases "in which the debt or sum claimed does not exceed ten thousand dollars ($10,000), exclusive of interest and costs." NMSA 1978, § 35–3–3(A) (2001). It specifically denies jurisdiction "to grant writs of injunction, habeas corpus or extraordinary writs." Section 35–3–3(C)(6). The legislature expressly granted the metropolitan court the jurisdiction of magistrate courts, as well as jurisdiction over other matters not pertinent to this case. NMSA 1978, § 34–8A–3(A) (2001). The metropolitan court has jurisdiction over "civil actions in which the debt or sum claimed does not exceed ten thousand dollars ($10,000), exclusive of interest and costs." Section 34–8A–3(A)(2). Thus, to the extent the magistrate court has jurisdiction under the MHPA, the metropolitan court also has jurisdiction. Therefore, our reference to the jurisdiction of the magistrate court in this opinion also includes the jurisdiction of the metropolitan court.

{3} Petitioner argues that the metropolitan court did not have the authority to grant the injunction in this case without a clear expression of legislative intent. She contends that the New Mexico Constitution vests the sole jurisdiction to grant an injunction with the district courts and that the proper way to read any difference in the statutes is to harmonize them such that "litigants who wish to sue for damages which exceed $10,000 or injunctive relief can do so in the district court, and litigants requesting relief which is not prohibited in the courts of limited jurisdiction may do so in either the district or magistrate [or metropolitan] court." We address these arguments, and the issue of the metropolitan court's jurisdiction, as matters of statutory construction, which we review de novo. *See State v. McClendon*, 2001–NMSC–023, ¶ 2, 130 N.M. 551, 28 P.3d 1092 (stating that statutory construction is a pure question of law, which is subject to de novo review).

{4} As a court of limited jurisdiction, the metropolitan court's authority is restricted to authority affirmatively granted by the constitution or statute. *State v. Ramirez*, 97 N.M. 125, 126, 637 P.2d 556, 557 (1981); *State v. Vega*, 91 N.M. 22, 25, 569 P.2d 948, 951 (Ct.App.1977). The constitution affords the legislature the ability to confer jurisdiction upon courts of original limited jurisdiction. N.M. Const. art. VI, §§ 1, 26. The legislature acts affirmatively by enacting a statute. Therefore, the issue before us is whether the legislature intended to confer jurisdiction to the metropolitan court to issue an injunction with the adoption of the MHPA.

{5} In enacting the MHPA, the legislature included a specific provision concerning subject matter jurisdiction. Section 47–10–10(D) reads:

> The management or the resident may bring a civil action for violation of the rental agreement or any violation of the Mobile Home Park Act in the appropriate court of the county in which the mobile home park is located. Either party may

recover actual damages, or, the court may in its discretion award such equitable relief as it deems necessary, including the enjoining of either party from further violations.

{6} To ascertain the intent of the legislature in enacting this provision, we look principally to the plain language of the statute, using the ordinary meaning of the statutory language unless the statute indicates a different intent. *See High Ridge Hinkle Joint Venture v. City of Albuquerque,* 1998–NMSC–050, ¶ 5, 126 N.M. 413, 970 P.2d 599. With Section 47–10–10(D), the legislature created the remedy for violation of the MHPA or of a rental agreement subject to the MHPA and granted the remedy of an injunction to prevent further violation, in addition to other remedies, including damages. It enabled a party to a rental agreement to bring a civil action "in the appropriate court of the county in which the mobile home park is located." *Id.* Although the legislature did not specifically mention a court of limited jurisdiction, its language cannot reasonably be interpreted otherwise. The legislature clearly gave the court in which the action could be brought the authority to issue an injunction. The only courts within a county that have original jurisdiction such that they could be "appropriate" under Section 47–10–10 are the district and magistrate courts. The statutory language "the appropriate court" indicates the availability of more than a single court and does not indicate an intent to limit jurisdiction only to the district court. The only conclusion we can reach from the language of Section 47–10–10(D) is that the legislature intended "the appropriate court" to include the magistrate court and the district court and to be based on the jurisdictional monetary limitations of the magistrate court as a court of limited jurisdiction.

{7} If we were to interpret this language of Section 47–10–10(D) to mean that an action under the MHPA must be brought in the district court, as Petitioner would apparently contend, the plain language of Section 47–10–10(D) would not make sense as written. Such an interpretation would require us to rewrite Section 47–10–10(D) so that either (1) the "appropriate court" would mean only the "district court" as discussed; or (2) the word "court" in the second sentence would not refer to "the appropriate court of the county in which the mobile home park is located" in the first sentence, but would refer only to the "district court of the county in which the mobile home park is located." We will not rewrite a statute. *James v. N.M. Human Servs. Dep't,* 106 N.M. 318, 320, 742 P.2d 530, 532 (Ct.App.1987).

{8} We are mindful that there are times when the plain meaning of a statute may not indicate the true legislative intent because of latent ambiguity or intent indicated by "equity, legislative history, or other sources." *State v. Smith,* 2004–NMSC–032, ¶ 9, 136 N.M. 372, 98 P.3d 1022 (internal quotation marks and citation omitted); *State ex rel. Helman v. Gallegos,* 117 N.M. 346, 354, 871 P.2d 1352, 1360 (1994). Petitioner makes such an argument based on the general grant of authority to magistrate courts in Section 35–3–3, which excludes the authority to grant injunctive relief, as well as Article VI, Section 13, which grants the district courts the power to issue writs of injunction. As we have noted, Petitioner contends that we can harmonize the statutes by interpreting them to allow only the district court to issue injunctive relief under the MHPA.

{9} However, in order to harmonize the statutes as Petitioner suggests, we would have to read Section 47–10–10(D) to restrict the ability to issue an injunction to the district court. Not only does the plain language of Section 47–10–10(D) read to the contrary, but the legislature's expressed intent does not have any latent ambiguity, particularly when read in conjunction with the UORRA. *See Roth v. Thompson,* 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992) ("A fundamental rule of statutory construction is that all provisions of a statute, together with other statutes in pari materia, must be read together to ascertain the legislative intent."). Although the UORRA governs the rights and obligations of owners and residents of "dwelling units," Section 47–8–2, and the MHPA governs tenancy in a "mobile home park," Section 47–10–2(C), the legislature has linked the two acts. *See* § 47–8–52 ("Unless a provision of the [MHPA] directly conflicts with

the provisions of the [UORRA], the provisions of the [UORRA] shall apply to mobile home park owners and residents."). The MHPA provides that an "action for termination shall be commenced and prosecuted in the manner described" in the UORRA. Section 47–10–4(A). Section 47–8–10(A) grants a district or magistrate court personal jurisdiction under the UORRA for claims "with respect to any conduct" governed by the UORRA or "arising from a transaction subject to" the UORRA. The legislature could reasonably have decided to allow a magistrate court, which could decide a termination case under the MHPA and which could decide a case involving monetary damages not exceeding $10,000, exclusive of interest and costs, to also grant injunctive relief in the same case, if the circumstances were appropriate.

{10} With regard to Petitioner's concern about the constitutional grant of injunctive authority to the district courts, even though Article VI, Section 13 grants district courts the power to issue writs of injunction, the constitution does not limit such power to the district courts. Article VI, Section 13 does not preclude the legislature from exercising the constitutional authority under Article VI, Sections 1 and 26 to grant such authority to courts of limited jurisdiction.

{11} As to Petitioner's reading of the grant of magistrate court jurisdiction, although a grant of injunctive authority under the MHPA may appear to be contrary to Section 35–3–3, Section 47–10–10(D) addresses the specific ability of a court of limited jurisdiction to issue an injunction for a violation of the MHPA. Section 35–3–3 is a general statutory provision concerning jurisdiction. As matter of statutory construction, we will give effect to the specific of two conflicting statutes, unless they can be harmonized. *State v. Cleve,* 1999–NMSC–017, ¶ 17, 127 N.M. 240, 980 P.2d 23; *State v. Wilkins,* 88 N.M. 116, 119, 537 P.2d 1012, 1015 (Ct.App. 1975) (stating that "before applying a special statute over a general statute the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy") (internal quotation marks and citation omitted).

{12} As a separate point in her brief in chief, Petitioner argues, based on *State v. Bailey,* 118 N.M. 466, 882 P.2d 57 (Ct.App. 1994), that the metropolitan court did not have jurisdiction to grant an injunction because of the lack of any procedure for it to follow in granting such relief and that the metropolitan court could not issue an injunction on its own, without notice to Petitioner. In *Bailey,* a criminal case, this Court held that a district court did not have the authority to issue an injunction prohibiting a defendant convicted of Motor Vehicle Code violations from operating a motor vehicle until he complied with the licensing and registration provisions of the Code. *Id.* at 467, 882 P.2d at 58. We stated that the Code provided specific language for its enforcement. *Id.* We further stated that the constitutional authority of Article VI, Section 13 did not, in and of itself, provide the authority for the district court to issue the injunction without proper legal process and notice. *Bailey,* 118 N.M. at 467–68, 882 P.2d at 58–59.

{13} *Bailey* does not apply to this case. First, as opposed to the Motor Vehicle Code, the MHPA provides the statutory authority for the court to issue an injunction. Second, the landlord filed a notice of non-compliance with the rental agreement to commence this case. This filing provided Petitioner with notice that the landlord contended that she was violating the rental agreement because she "created disturbances with other tenants in our park." Section 47–10–10(D) specifically addresses violations of a rental agreement. Because it grants discretionary injunctive relief against further violation of an agreement, it provided Petitioner notice of the possibility that the court could issue an injunction. *Cf. State v. Cooley,* 2003–NMCA–149, ¶ 12, 134 N.M. 717, 82 P.3d 84 (stating that enactment of a statute limiting the amount of sentence credit a defendant can receive for good behavior, when he has been convicted of a violent offense, should have put the defendant on notice that it would apply to his case when the statute had been in effect for three years prior to the defendant's conviction).

Conclusion

{14} We conclude that the metropolitan court has the authority to issue an injunction

with regard to a violation of the MHPA or a rental agreement under the MHPA under Section 47–10–10(D). We affirm the order of the district court denying the petition for a writ of mandamus.

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

WE CONCUR: MICHAEL D. BUSTAMANTE and CELIA FOY CASTILLO, Judges.

2005-NMCA-031

107 P.3d 547

STATE of New Mexico, Plaintiff–Appellee,

v.

Adrian GONZALEZ, Defendant–Appellant.

No. 23,711.

Court of Appeals of New Mexico.

Feb. 7, 2005.

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

John Bigelow, Chief Public Defender, Jennifer Byrns, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

VIGIL, Judge.

{1} The issues in this case are (1) whether the crime of bringing contraband into a jail in violation of NMSA 1978, § 30–22–14(B) (1976), is a strict liability offense and (2) whether fundamental error was committed when the district court failed to include a mental state as an essential element of the crime in its instructions to the jury. We hold that an essential element of the crime is knowing possession of the contraband and that failing to include this essential element

in the jury instructions constituted fundamental error. We therefore reverse and remand for a new trial.

BACKGROUND

{2} A criminal information charged that on November 17, 2001, Defendant "did intentionally carry [c]ocaine into the confines of the Otero County Detention Center, a county jail," or in the alternative, that he "did intentionally have in his possession [c]ocaine, a controlled substance, knowing or believing it to be [c]ocaine" in violation of Section 30–22–14(B) and NMSA 1978, § 30–31–23(D) (1990).

{3} The evidence at trial was that Defendant was an inmate at the Otero County Detention Center (Detention Center). On November 17, 2001, Defendant returned to the Detention Center from his work release assignment. As Defendant changed out of his work clothes, a detention officer noticed that he was clutching a clear plastic bag containing a clear liquid. The officer confiscated the bag. Subsequent testing revealed that the liquid in the bag contained cocaine.

{4} Defendant testified he stopped by the home of a relative on his way back to the Detention Center, where he filled up the baggie with water. To the best of his knowledge, the baggie he brought into the Detention Center contained only water. The Detention Center employs a zero tolerance policy with regard to the work release program and anyone on work release is subject to random drug testing. Defendant's plan was to have the baggie of water with him in the locker area or his pod so that if he was selected for a random drug test, he would use it instead of urine.

{5} Defendant felt he needed to do this because he had already been subject to two random drug tests while on work release. The first test was positive for drugs, so Defendant requested a retest be performed by a certified medical officer instead of a regular detention employee. The retest was negative for the presence of drugs. The second random sample also tested positive for drugs, and Defendant again requested a retest by a certified medical officer. However, the second time, the retest was positive for drugs. When Defendant tested positive for drugs the second time, the Detention Center called his employer, and he lost his job. Defendant was worried that if he tested positive for drugs again, he would lose his current job as well and not be able to provide financial support for his family.

{6} The district court instructed the jury that to find Defendant guilty of bringing contraband into the jail, the state was required to prove the following essential elements beyond a reasonable doubt:

> 1. The Defendant carried contraband, to wit: cocaine into the confines of the Otero County Detention Center;
>
> 2. This happened in New Mexico on or about the 17th day of November, 2001.

{7} The jury was also instructed that it had to find Defendant acted with a general intent as follows:

> In addition to the other elements of bringing contraband into a place of imprisonment and possession of cocaine, the [S]tate must prove to your satisfaction beyond a reasonable doubt that [Defendant] acted intentionally when he committed the crime. A person acts intentionally when he purposely does an act which the law declares to be a crime, even though he may not know that his act is unlawful. Whether [Defendant] acted intentionally may be inferred from all of the surrounding circumstances, such as the manner in which he acts, the means used, his conduct, and any statements made by him.

The jury found Defendant guilty of bringing contraband into a place of imprisonment, and he appeals.

DISCUSSION

A. Strict Liability Offense

{8} We review de novo whether Section 30–22–14(B) is a strict liability crime. *See State v. Torres,* 2003–NMCA–101, ¶ 5, 134 N.M. 194, 75 P.3d 410 (stating that analysis of whether unlawful possession of a firearm in a licensed liquor establishment is a strict liability crime involves the construction of a statute, which is reviewed de novo).

{9} A violation of Section 30–22–14(B) is a fourth degree felony. It states, "[b]ringing contraband into a jail consists of carrying

contraband into the confines of a county or municipal jail." *Id.* Section 30–22–14(C)(4) includes cocaine in its definition of "contraband." Defendant argues that commission of the act—bringing contraband into a jail—must be accompanied by a mental state, or mens rea, for the crime to be committed. He further contends that the necessary mental state is knowledge of possession of the contraband. The State responds that Defendant's knowledge is irrelevant, contending that bringing contraband into a jail is a strict liability crime which does not have a mens rea element. For the reasons which follow, we agree with Defendant.

{10} "A crime generally consists of two elements, a physical, wrongful deed (the 'actus reus'), and a guilty mind that produces the act (the 'mens rea')." 21 Am.Jur.2d *Criminal Law* § 126, at 213 (1998); *see State v. Leal,* 104 N.M. 506, 509, 723 P.2d 977, 980 (Ct.App.1986) ("Ordinarily, there are two components to a crime: an intent or mental state plus an overt act."). " 'Mens rea' refers to a mental state ... which expresses the intent necessary for a particular act to constitute a crime." 21 Am.Jur.2d *supra,* at 213; *see State v. Austin,* 80 N.M. 748, 750, 461 P.2d 230, 232 (Ct.App.1969) (stating a "criminal intent ... is a mental state ... [that is] a conscious wrongdoing").

{11} On the other hand, some crimes do not require the existence of a mental state, or mens rea. "A strict liability crime is [a crime] which imposes a criminal sanction for an unlawful act without requiring a showing of criminal intent." *State v. Harrison,* 115 N.M. 73, 77, 846 P.2d 1082, 1086 (Ct.App.1992); *see* Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes,* 78 Cornell L.Rev. 401, 417 (1993) (stating that a strict liability crime is a crime "for which liability is imposed irrespective of the defendant's knowledge or intentions, that is, crimes without a mens rea requirement"). Even "innocent-minded and blameless people" may be convicted of a strict liability crime. 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.5, at 382 (2d ed.2003).

{12} Section 30–22–14(B) is silent with respect to any required mens rea. However, this does not mean it is a strict liability offense. *See Santillanes v. State,* 115 N.M. 215, 218, 849 P.2d 358, 361 (1993) (stating when a criminal statute is silent about whether a mens rea element is required, we do not assume that the legislature intended to create a strict liability crime). Since at least 1917, we have followed the common law that where an act is prohibited and punishable as a crime, it is construed as also requiring the existence of a criminal intent. *State v. Blacklock,* 23 N.M. 251, 254, 167 P. 714, 715 (1917) ("As a general rule, where an act is prohibited and made punishable by statute, the statute is to be construed in the light of the common law and the existence of a criminal intent is essential." (internal quotation marks and citation omitted)). *See, e.g., Santillanes,* 115 N.M. at 218, 849 P.2d at 361 ("[W]e presume criminal intent as an essential element of the crime unless it is clear from the statute that the legislature intended to omit the mens rea element." (emphasis omitted)); *State v. Craig,* 70 N.M. 176, 180, 372 P.2d 128, 130 (1962) (same); *State v. Shedoudy,* 45 N.M. 516, 524, 118 P.2d 280, 285 (1941) ("Generally ... when an act is prohibited and made punishable by statute only, the statute is to be construed in the light of the common law and the existence of a criminal intent is to be regarded as essential, although the terms of the statute do not require it." (citation omitted)); *Torres,* 2003–NMCA–101, ¶ 7, 134 N.M. 194, 75 P.3d 410 ("Generally, criminal intent is an element of every crime. If it is not expressly included as an element, we presume an intent requirement.") (internal quotation marks and citations omitted); *State v. Fuentes,* 85 N.M. 274, 276, 511 P.2d 760, 762 (Ct.App.1973) (same); *Austin,* 80 N.M. at 750, 461 P.2d at 232 (same).

{13} The legislature may create a strict liability crime and provide that a violator is guilty even without a criminal intent; however, the legislative intent to do so must clearly appear. *See Santillanes,* 115 N.M. at 218, 849 P.2d at 361 (stating that "it is well settled that we presume criminal intent ... unless it is clear from the statute that the legislature intended to omit the mens rea

element" (emphasis omitted)); *Craig* 70 N.M. at 180, 372 P.2d at 130 (same); *Shedoudy,* 45 N.M. at 524, 118 P.2d at 285 ("But the legislature may forbid the doing of an act and make its commission criminal, without regard to the intent with which such act is done; but in such case it must clearly appear from the Act (from its language or clear inference) that such was the legislative intent."); *State v. Herrera,* 111 N.M. 560, 563, 807 P.2d 744, 747 (Ct.App.1991) (stating that the legislature may create a strict liability crime and provide that a violator is guilty even without a criminal intent; however, "its intention to do so must be manifest in the statute."); *State v. Lucero,* 87 N.M. 242, 244, 531 P.2d 1215, 1217 (Ct.App.1975) (stating that the "courts of this State have long adhered to the common law tradition that criminal intent is an essential element of every crime unless the Legislature expressly declares otherwise"); *Austin,* 80 N.M. at 750, 461 P.2d at 232 (same).

{14} Strict liability crimes are the exception. They are generally recognized under statutes in the nature of regulatory measures and designed to proscribe conduct which seriously threatens public health or safety. *See Santillanes,* 115 N.M. at 221–22, 849 P.2d at 364–65 (stating that strict liability regulatory measures are generally aimed at achieving a societal good, rather than punishing conduct manifesting moral culpability); *Craig,* 70 N.M. at 181, 372 P.2d at 130 (stating that the rule requiring scienter as proof for every crime was modified for certain statutes in the nature of police regulations which seek to achieve a social objective rather than to punish conduct); *State v. Barber,* 91 N.M. 764, 766, 581 P.2d 27, 29 (Ct.App. 1978) (stating that public policy may require punishment even in the absence of criminal intent in certain cases). Generally, the reasoning underlying a strict liability crime is that "the public interest is so compelling, or the potential harm so great, that the public interest must override the individual's interests." *Harrison,* 115 N.M. at 77, 846 P.2d at 1086. For example, we "have recognized that the public interest in deterring [driving while intoxicated] is compelling enough to make it a strict liability crime." *State v. Hernandez,* 2001–NMCA–057, ¶ 19, 130 N.M. 698, 30 P.3d 387 (internal quotation marks and citation omitted). The offense of bringing contraband into a jail lacks the essential characteristics of a strict liability defense. It is not in the nature of a regulatory measure prescribing conduct which seriously threatens public health or safety.

{15} We determine whether a crime requires a criminal intent on a statute-by-statute basis. *See State v. Powell,* 115 N.M. 188, 190, 848 P.2d 1115, 1117 (Ct.App. 1993) ("[A] determination of the state-of-mind element of an offense must be made on a statute-by-statute basis."). In doing so, we may consider the "mental state ordinarily required for crimes of the same nature." *Id.* (stating that to determine the "presumed intent" we "simply look at the particular mental state ordinarily required for crimes of the same nature"). Ultimately, our task is to ascertain "whether there is a clear legislative intent that the [unlawful] act does not require any degree of mens rea." *Herrera,* 111 N.M. at 563, 807 P.2d at 747.

{16} The offense of bringing contraband into a jail is fundamentally a possessory crime; it criminalizes the possession of contraband by anyone who enters a county or municipal jail. *See* § 30–22–14(B). Our courts have "generally presumed that the mental element for [possessory] crimes is just that the possession be intentional—in other words, that the offender have knowledge of the possession." *Powell,* 115 N.M. at 191, 848 P.2d at 1118. For example, NMSA 1978, § 30–7–3(A) (1999), criminalizes the possession of a firearm in any establishment licensed to serve alcohol. Although the statute is silent with respect to the element of mens rea, we held in *Powell* that the offense requires that the accused have knowledge that the object in his possession is a firearm. 115 N.M. at 191, 848 P.2d at 1118; *see Torres,* 2003–NMCA–101, ¶ 9, 134 N.M. 194, 75 P.3d 410 (holding that the accused must know that he is in possession of a firearm but that he is strictly liable if he enters a licensed liquor establishment). Similarly, NMSA 1978, § 30–7–16(A) (2001), criminalizes the possession of firearms by felons. A conviction under this section requires that the accused

knew that the object in his possession was a firearm. *See State v. Haddenham,* 110 N.M. 149, 156, 793 P.2d 279, 286 (Ct.App.1990). Finally, NMSA 1978, § 30–22–16 (1986), criminalizes the possession of a deadly weapon by a prisoner. Although the statute is silent with respect to the mens rea element, the uniform jury instruction for the crime requires the jury to find that the accused possessed a deadly weapon, which in turn requires knowledge of the deadly weapon. UJI 14–2254 NMRA. The use notes accompanying the instruction state that if possession is contested the instruction on possession at UJI 14–130 NMRA should also be given. This instruction requires the jury to find that the accused knew what the object was, knew that it was "on his person or in his presence," and that he "exercis[ed] control over it." *Id.* Based on the mens rea required for these similar crimes, we conclude that the offense of bringing contraband into a jail also has a mens rea essential element: knowledge of the possession.

{17} Although the State correctly points out that important policies are furthered by excluding contraband from our jails, we are not persuaded that these policies support the proposition that the legislature clearly intended the offense of bringing contraband into a jail to be a strict liability crime. Virtually every court which has considered the question has arrived at the same conclusion. *See, e.g., Williams v. State,* 413 So.2d 1263, 1265 (Fla.Dist.Ct.App.1982) (holding that "the trial court erroneously instructed the jury that appellant did not have to have knowledge that she was in possession of the contraband in order to be found guilty of introducing that contraband into a penal institution"); *State v. Strong,* 294 N.W.2d 319, 320 (Minn.1980) (holding that although the statute criminalizing introducing contraband into a correctional facility does not expressly require intent or knowledge, the legislature did not intend to dispense with the requirement of scienter); *State v. Wolfe,* 288 Or. 521, 605 P.2d 1185, 1188 (1980) (stating statute prohibiting possessing, carrying, or having weapons in one's custody and control in a penal institution not meant to include unknowing acts); *see People v. Farmer,* 165 Ill.2d 194, 209 Ill.Dec. 33, 650 N.E.2d 1006, 1012 (1995) (holding possession of contraband in a penal institution is not an absolute liability offense and the appropriate mental element for the crime is knowledge); *Ennis v. State,* 71 S.W.3d 804, 810 (Tex.Ct.App.2002) (holding that to support a conviction for possession of a deadly weapon in a penal institution, the State must show that the accused possessed the weapon knowingly or intentionally). Even *State v. Converse,* 529 So.2d 459 (La.Ct.App.1988), cited by the State in support of its argument that bringing contraband into a jail should be a strict liability offense, analogizes possession of contraband to possession of a controlled substance and recognizes that "[g]uilty knowledge" is required for a conviction. *Id.* at 464–65.

{18} We hold that bringing contraband into a jail is not a strict liability offense. It requires proof beyond a reasonable doubt that an accused entered a jail knowing he possessed the prohibited contraband.

B. Fundamental Error

{19} Defendant failed to object to the jury instructions as they were given to the jury. Therefore, we review the jury instructions only for fundamental error. *State v. Benally,* 2001–NMSC–033, ¶ 12, 131 N.M. 258, 34 P.3d 1134 (stating where error in jury instructions is not preserved, error is reviewed for fundamental error); *see* Rule 12–216 NMRA (issues not preserved below may be reviewed for fundamental error). We first determine " 'whether a reasonable juror would have been confused or misdirected' by the jury instruction." *Benally,* 2001–NMSC–033, ¶ 12, 131 N.M. 258, 34 P.3d 1134 (quoting *State v. Cunningham,* 2000–NMSC–009, ¶ 14, 128 N.M. 711, 998 P.2d 176). "[J]uror confusion or misdirection may stem . . . from instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law." *Benally,* 2001–NMSC–033, ¶ 12, 131 N.M. 258, 34 P.3d 1134. Secondly, such error in jury instructions is "fundamental" where "it remains uncorrected [by other instructions], thereby allowing juror confusion to persist." *Id.* ¶ 16.

{20} In this case, the district court failed to instruct the jury on the element of knowledge. As a result, the jury was allowed to find Defendant guilty of bringing contraband into a jail without finding an essential element of the crime: knowledge he possessed the cocaine when he entered the Detention Center. The result was unfair to Defendant and constituted fundamental error. *See State v. Castro,* 2002–NMCA–093, ¶¶ 4, 7, 8, 132 N.M. 646, 53 P.3d 413 (holding, in prosecution for driving with a revoked license, that failure to instruct on essential element that defendant knew her license was revoked, was fundamental error); *Benally,* 2001–NMSC–033, ¶¶ 10, 18–20, 131 N.M. 258, 34 P.3d 1134 (holding that omission of unlawfulness from elements instruction for second degree murder was fundamental error).

{21} The State argues that the failure of the district court to instruct the jury on the requisite knowledge element was harmless error. We disagree. In determining whether fundamental error occurred, we review jury instructions "as a whole and a failure to include an essential element in the elements section may be corrected by subsequent proper instructions that adequately addresses the omitted element." *Cunningham,* 2000–NMSC–009, ¶ 21, 128 N.M. 711, 998 P.2d 176.

{22} In *Cunningham,* our Supreme Court held that the omission of an element of unlawfulness in an instruction on deliberate-intent murder was cured by an instruction on self-defense. *Id.* ¶ 22. Therefore, the Court held that fundamental error had not occurred. *Id.* ¶ 31. The State argues that the omission of the knowledge requirement from the instruction on bringing contraband into a jail was cured by the instruction itself. Because the instruction required the jury to find that Defendant carried cocaine into the Detention Center, the State argues that if the jury believed Defendant's testimony that it was just water it would not have convicted him. We agree that the jury was required to find that Defendant possessed cocaine. However, in making this determination, the jury was presented with conflicting testimony. Defendant testified that it was just water, and a forensic chemist testified that the liquid contained cocaine. The jury could have reasonably concluded that the liquid did indeed contain cocaine without reaching the question of whether Defendant had knowledge of the cocaine. *Cunningham* is not applicable.

{23} The instruction on general criminal intent was also not sufficient to cure the absence of an instruction on knowledge. The element of general criminal intent is satisfied if the State can "demonstrate[ ] beyond a reasonable doubt that [the accused] purposely performed the act in question." *In re Shaneace L.,* 2001–NMCA–005, ¶ 13, 130 N.M. 89, 18 P.3d 330; *see* UJI 14–141 NMRA; *accord* LaFave, *supra,* § 5.2(e), at 355 (stating that "general intent is only the intention to make the bodily movement which constitutes the act which the crime requires" (internal quotation marks and citation omitted)). However, "[k]nowledge and intent are separate, not synonymous, elements." *State v. Hargrove,* 108 N.M. 233, 236, 771 P.2d 166, 169 (1989). In *Hargrove,* our Supreme Court held that an instruction on general criminal intent was not "sufficient to instruct the jury that knowledge of the prohibited blood relationship is an essential element of incest." *Id.* Similarly, in this case, the instruction on general criminal intent was not sufficient to instruct the jury that Defendant's knowledge of the cocaine he brought into the Detention Center is an essential element of bringing contraband into a jail. Defendant satisfied the general criminal intent element by intentionally carrying the liquid in the plastic bag into the Detention Center. Therefore, the jury could have concluded that Defendant acted intentionally without reaching the question of whether he knew that the liquid contained cocaine.

{24} Unlike the instructions given in *Cunningham,* the instructions given in this case did not adequately describe the offense for which Defendant was charged; the jury could have found Defendant guilty without considering an essential element of the crime. Therefore, we conclude that neither the instruction given on general criminal intent, nor the instruction given on bringing contraband into a jail were sufficient to cure

the absence of an instruction on the knowledge element of the crime.

{25} The State also argues that Defendant is essentially asking for a mistake of fact instruction for which there was no evidentiary support and that the error, if any, was harmless. We disagree. Defendant is simply asking that the jury instructions accurately reflect the crime with which he was charged. We find no support for the proposition that Defendant is asking for a mistake of fact instruction. The harmless-error argument is made on the basis of Defendant's closing argument, which did not specifically urge on the jury any lack of knowledge. However, inasmuch as the jury was not instructed on the element of knowledge, we would not expect Defendant's argument to focus on that element. Because the evidence supported lack of knowledge, we cannot say the error was harmless.

CONCLUSION

{26} We hold that a conviction for bringing contraband into a jail requires the State to prove that Defendant had knowledge of the contraband he brought into the Detention Center. Further, the district court committed fundamental error by failing to instruct the jury on the knowledge element of the crime. Therefore, we reverse Defendant's conviction and remand for a new trial.

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

WE CONCUR: LYNN PICKARD and IRA ROBINSON, Judges.

2005-NMCA-030
108 P.3d 1

STATE of New Mexico, Plaintiff–Appellee,

v.

Kevin Samuel TARVER, Defendant–Appellant.

No. 24,572.

Court of Appeals of New Mexico.

Jan. 19, 2005.

Patricia A. Madrid, Attorney General, Ann M. Harvey, Assistant Attorney General, Santa Fe, NM, for Appellee.

Brick P. Storts, III, Barton & Storts, P.C., Tucson, AZ, David Norvell, Albuquerque, NM, for Appellant.

OPINION

PICKARD, Judge.

{1} The question for decision in this case is whether New Mexico courts have the authority under the Western Interstate Corrections Compact and accompanying statutes, NMSA 1978, §§ 31–5–4 to –9 (1959, as amended through 1985) (the Compact), to order the transfer of a prisoner from New Mexico to a neighboring state when that prisoner has not alleged any constitutional violations and instead seeks transfer due to a desire to be near his parents and an unproven fear of other prisoners. We hold that the district court correctly ruled that it did not have jurisdiction to order the transfer in this case, and we therefore affirm.

FACTS AND PROCEEDINGS

{2} On June 16, 1997, Defendant was sentenced, upon his plea of guilty, to eighteen years of imprisonment for child abuse resulting in death or great bodily harm. Five years later, he began to seek transfer by

requesting that the prison administration transfer him to Arizona. Finding that he did not present a threat to security or that his own safety was in danger, the prison administration declined his request. He then sought relief by filing a motion in his criminal case in the district court, asking that the district court order the transfer pursuant to the Compact. Upon stipulation of an assistant district attorney, the district court ordered the requested transfer.

{3} That order, however, was vacated, at the request of the Department of Corrections. The matter was thereafter heard by the district court upon motions, memoranda, and exhibits by Defendant and the Department of Corrections and also upon argument at a hearing. The district court concluded that it did not have jurisdiction to order the transfer under the circumstances of the case and ruled that its order vacating the previous transfer order would stand. Defendant appeals.

PRELIMINARY MATTERS

{4} Initially, the State seeks to have this appeal dismissed on the ground that there is no procedure, except perhaps habeas corpus over which this Court does not have jurisdiction, pursuant to which Defendant would be permitted to ask the district court to order a transfer of place of imprisonment. *See* Rules 5–807 and 12–102 NMRA. However, the district courts are courts of general jurisdiction, and this Court has appellate jurisdiction over their decisions except in certain named classes of cases of which this is not one. *See Ottino v. Ottino,* 2001–NMCA–012, ¶¶ 6–8, 14, 130 N.M. 168, 21 P.3d 37; Rule 12–102. Therefore, we will not dismiss the appeal.

{5} Secondly, the State seeks to strike large portions of Defendant's brief in chief because he did not cite to specific pages of the record proper, instead citing to pleadings by name and date of filing, and because the State contends that certain factual representations are not supported by the record. Although we read Rule 12–213 NMRA to contemplate, and we generally require, citation to specific pages of the record proper, because the record is quite small and we have easily been able to find Defendant's references, we have chosen in this case to decline to strike portions or require Defendant to submit another, proper brief. As for the factual assertions, we have found most of them in the parties' memoranda or exhibits below, and the factual assertions were not disputed below. Therefore, we decline as well to strike portions of the brief on this ground. *See* Rule 12–312(D) NMRA (granting discretion in the appellate courts to decide the applicable sanction, if any: "[f]or any failure to comply with [the Rules of Appellate Procedure] . . . the appellate court may . . . take such action as it deems appropriate").

DISCUSSION

{6} We next turn to the issue at hand, which is whether a district court has jurisdiction, absent any constitutional violations, to order the transfer of a prisoner under the Compact upon a prisoner's allegations that (1) he is fearful of other prisoners due to the nature of his crime and one past assault that has not been repeated, perhaps because the prison authorities have taken action to successfully avoid its being repeated and (2) he wishes to be near his parents, who find it difficult to visit him in another state.

{7} Defendant relies on certain language in the Compact that appears to allow courts to issue orders pursuant to it. The Compact states:

> Whenever the duly constituted *judicial* or administrative authorities in a state party to this [C]ompact, and which has entered into a contract pursuant to Article III, shall decide that confinement in, or transfer of an inmate to, an institution within the territory of another party state is necessary in order to provide adequate quarters and care or desirable in order to provide an appropriate program of rehabilitation or treatment, said officials may direct that the confinement be within an institution within the territory of said other party state, the receiving state to act in that regard solely as agent for the sending state.

Section 31–5–4 (Article IV(A) (emphasis added)). Section 31–5–6 also provides:

> The *courts,* departments, agencies and officers of New Mexico and its subdivisions shall enforce this [C]ompact . . . and do all things appropriate to the effectuation of its purposes and intent which may be within their respective jurisdictions including but not limited to the making and submission of reports required by the [C]ompact.

(Emphasis added.)

{8} The State, on the other hand, relies on statutory language indicating that it is the secretary of the Department of Corrections that has primary responsibility for ordering the transfer of prisoners pursuant to the Compact. In particular, Section 31–5–5 provides that "[t]he *secretary of corrections* may commit or transfer an inmate to any institution in or outside New Mexico if New Mexico has entered into a contract or contracts for the confinement of inmates in the institution pursuant to Article III of the Western Interstate Corrections Compact." (Emphasis added.) In addition, NMSA 1978, § 31–20–2(A) (1993) provides, "Persons sentenced to imprisonment for a term of one year or more shall be imprisoned in a corrections facility designated by the corrections department." Section 31–20–2(C)(5) further provides that:

> [t]here is created within the corrections department an "intake and classification center". The intake and classification center shall have the following duties: . . . (5) with the approval of the secretary of corrections, may transfer inmates of the penitentiary to an institution under the control of another state if that state has entered into a corrections control agreement with New Mexico[.]

Finally, NMSA 1978, § 33–1–6 (1981) sets out the duties of the secretary of corrections and includes the following: "act as state administrator, or designate a representative to act as state administrator, for any interstate correctional compacts where another person is not designated by law to act as administrator." Section 31–1–6(E).

{9} When construing statutes, our primary task is to give effect to the intent of the legislature. *Rutherford v. Chaves County,* 2003–NMSC–010, ¶ 11, 133 N.M. 756, 69 P.3d 1199. When statutes are related by subject matter, we read them together and construe them as a harmonious whole. *State v. Smith,* 2004–NMSC–032, ¶ 10, 136 N.M. 372, 98 P.3d 1022. "Interpretation and application of the law are subject to a de novo review." *State v. Gage,* 2002–NMCA–018, ¶ 14, 131 N.M. 581, 40 P.3d 1025 (internal quotation marks and citation omitted).

{10} Our cases have recognized that the task of running prisons, absent constitutional violations, is for the prison administrators in the executive branch, as well as for the legislative branch. *See, e.g., Griffin v. Thomas,* 2004–NMCA–088, ¶¶ 23, 34, 136 N.M. 129, 95 P.3d 1044. Moreover, we have recognized the general rule that courts may not dictate to the Department of Corrections or like agencies where prisoners should serve their sentences. *See, e.g., State v. Neely,* 117 N.M. 707, 711, 876 P.2d 222, 226 (1994).

{11} Thus, when we consider the pertinent statutes in light of our cases, we come to the conclusion that the legislature intended the Department of Corrections, and not the courts, to make the decision about which prisoners ought to be transferred under the Compact. We are not alone in this determination. Our fellow-Compact state of Colorado has made the exact same determination when interpreting its similar version of the Compact under circumstances similar to those in the case at bar. *People v. Brack,* 821 P.2d 928, 930 (Colo.Ct.App.1991).

{12} We recognize that the Compact does state that judicial authorities may implement its provisions. But in light of the rest of the New Mexico statutes on the subject, authorizing the correctional authorities to make prisoner placement decisions, we believe that the inclusion of judicial authorities in the Compact is either for the purpose of accommodating signatory states that might allow judicial authorities to implement the Compact or for the purpose of the unusual case in which a constitutional claim might make judicial authorities the appropriate ones to implement the Compact. Because this case raises no such constitutional claims, we follow the general rules set forth in our statutes and

case law and hold that the district court did not have jurisdiction to order Defendant's transfer.

CONCLUSION

{13} The district court's order is affirmed.

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

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

2005-NMCA-025

108 P.3d 525

Mondy LEIGH and Sylvia Leigh, Plaintiffs–Appellees,

v.

VILLAGE OF LOS LUNAS, Defendant–Appellant.

Nos. 23,674, 23,731.

Court of Appeals of New Mexico.

Aug. 11, 2004.

Nicholas R. Gentry, Law Offices of Nicholas R. Gentry, L.L.C., J. Brent Ricks, Albuquerque, for Appellees.

Stephen S. Hamilton, Montgomery and Andrews, P.A., Santa Fe, Laurence P. Guggino, Jr., Los Lunas, for Appellant.

OPINION

CASTILLO, Judge.

{1} In this case, we are asked to decide if restrictive covenants are considered property for purposes of eminent domain. Specifically, the question before this Court is whether Defendant Village of Los Lunas (Village) must compensate Plaintiffs Mondy Leigh and Sylvia Leigh (Leighs), owners of Tract 2 in a subdivision, based on the Village's construction of a drainage pond on Tract 1 in violation of the restrictive covenants imposed on both properties. The Village additionally argues that the district court erred by admitting an appraiser's report and challenges the sufficiency of the evidence for the damages award. We hold that the government is required to compensate for the diminution in value of the property benefitted by the restrictive covenants. We agree with the Village that the award was unsupported by the evidence; we therefore reverse the district court's judgment and remand for recalculation of damages in accordance with this opinion.

I. BACKGROUND

{2} In 1995, the Leighs purchased Tract 2 for $21,000. Tract 2 is a lot in a subdivi-

sion containing five lots, all of which are subject to covenants restricting use of the land to residential purposes. There is no dispute that the restrictive covenants are valid and run with the land of all lots in the subdivision. The Village acquired Tract 1 for $30,000 for the purpose of constructing a storm drainage pond. The subdivision is located outside the Village, but it is undisputed that the Village may condemn property outside its boundaries "to protect its inhabitants from damage by flood waters." Tract 1 is adjacent to the Leighs' Tract 2. On September 26, 2000, the Village began construction of a storm drainage pond on Tract 1; the pond was substantially completed by February 14, 2001. No part of the storm drainage pond was built on the Leighs' Tract 2.

{3} On January 19, 2001, the Leighs filed an action for damages against the Village, claiming breach of restrictive covenants, inverse condemnation, and trespass. The jury trial was limited to the breach of restrictive covenants and inverse condemnation claims. At the close of the Leighs' case, the Village moved for judgment on the breach of restrictive covenants claim on the ground that inverse condemnation was the Leighs' exclusive remedy; the motion was granted. Following trial, the district court entered judgment against the Village, awarding the Leighs $50,000 in inverse condemnation damages for the diminution in the value of their land caused by the Village's violation of the restrictive covenants. The Village appealed this judgment and filed a motion for judgment notwithstanding verdict (JNOV), remittitur, or new trial. The district court denied the Village's motion, and the Village appealed that order as well. The Village's two appeals were consolidated under case number 23,674.

II. DISCUSSION

{4} This case relates to the power of eminent domain, under which a government may take or damage private property. *City of Sunland Park v. Santa Teresa Servs. Co.*, 2003–NMCA–106, ¶ 43, 134 N.M. 243, 75 P.3d 843. This power is limited by the constitutional requirement that just compensation be paid to the owner of the property. *Id.; see also* N.M. Const. art. II, § 20; NMSA 1978, §§ 42A–1–1 to –33 (1981, as amended through 2001) (setting forth the procedure for condemnation). The usual procedure is for the appropriate governmental entity to condemn property it wishes to put to public use. *See* § 42A–1–2(C). When a property owner believes property has been taken or damaged by the government but no condemnation petition has been filed, the property owner may institute an inverse condemnation action against the condemnor for taking or damaging the property. *See* § 42A–1–29. The Leighs proceeded in their claim against the Village under this inverse condemnation provision.

A. Restrictive Covenant as a Compensable Property Right

{5} Article II, Section 20, of the New Mexico Constitution mandates that "[p]rivate property shall not be taken or damaged for public use without just compensation." Whether the taking of a restrictive covenant falls within the constitution's mandate presents a purely legal issue. As such, we review it de novo on appeal. *See Fed. Express Corp. v. Abeyta*, 2004–NMCA–011, ¶ 2, 135 N.M. 37, 84 P.3d 85 (stating that legal issues are reviewed de novo).

{6} The subdivision in question is known as the "Lands of Jayson Epstein," Epstein being the owner who established and recorded restrictive covenants binding on all purchasers of his land and on their successors in interest. The portion of the covenant at issue specifies that "[n]o lot shall be used except for residential purposes." The Village constructed a storm drainage pond on the lot but nevertheless asserts that the use of property by a public entity in contravention of a restrictive covenant does not result in a compensable taking under the New Mexico Constitution.

{7} Restrictive covenants are sometimes described as equitable easements or negative easements. *Montoya v. Barreras*, 81 N.M. 749, 751, 473 P.2d 363, 365 (1970) (stating that restrictions on the use of land are mutual, reciprocal, equitable easements in the nature of servitudes); Restatement (Third) of Prop.: Servitudes § 1.3 cmt. c, at

25 (2000) (referring to restrictive covenants as negative easements). It is well established in New Mexico that restrictive covenants in a subdivision's general plan convey property rights in the lots burdened by the covenant. *See Cunningham v. Gross,* 102 N.M. 723, 725, 699 P.2d 1075, 1077 (1985) (stating that restrictive covenants "constitute valuable property rights of all lot owners therein"); *Montoya,* 81 N.M. at 751–52, 473 P.2d at 365–66 ("Where the covenants manifest a general plan of restriction to residential purposes, such covenants constitute valuable property rights of the owners of all lots in the tract."); *Gorman v. Boehning,* 55 N.M. 306, 310, 232 P.2d 701, 704 (1951) ("A restrictive covenant is something of value to all lots in a tract . . . ."); *Aragon v. Brown,* 2003–NMCA–126, ¶ 10, 134 N.M. 459, 78 P.3d 913 ("[W]e have repeatedly recognized that reliance on restrictive covenants is a valuable property right."); *Wilcox v. Timberon Protective Ass'n,* 111 N.M. 478, 485, 806 P.2d 1068, 1075 (Ct.App.1990) ("Restrictive covenants . . . constitute valuable property rights for *all* lot owners within the restricted area."). The purpose of a subdivision's general plan of restrictions is "to assure uniformity of development and use of a residential area to give the owners of lots within such an area some degree of environmental stability." *Montoya,* 81 N.M. at 751, 473 P.2d at 365.

{8} Without question, easements constitute valuable property rights, and their taking requires compensation. *See, e.g., Yates Petroleum Corp. v. Kennedy,* 108 N.M. 564, 567–68, 775 P.2d 1281, 1284–85 (1989) (determining proper compensation for the partial condemnation of private property for an easement); 2 Julius L. Sackman, *Nichols on Eminent Domain* § 5.07[2][b], at 5–354–57 (3d ed., rev.vol.2004) [hereinafter Sackman]. Given New Mexico's determination that restrictive covenants, as equitable easements, also constitute property rights, we conclude that the covenants are protected by Article II, Section 20, of our state's constitution. *See S. Cal. Edison Co. v. Bourgerie,* 9 Cal.3d 169, 107 Cal.Rptr. 76, 507 P.2d 964, 965 (1973) (en banc) (concluding that "a building restriction constitutes 'property' within the meaning of [the state constitution's Takings Clause], and compensation must be paid whenever damage to a landowner results from a violation of the restriction"); *Hartford Nat'l Bank & Trust Co. v. Redevelopment Agency of Bristol,* 164 Conn. 337, 321 A.2d 469, 471–72 (1973) (reiterating that restrictive covenants are in the nature of equitable easements in the land restricted and that when the restricted land is taken, "the owner of the property for whose benefit the restriction is imposed is entitled to compensation"); *Dible v. City of Lafayette,* 713 N.E.2d 269, 274 (Ind.1999) (concluding that restrictive covenants are property rights in the lots restricted and that the owners of those property rights must be compensated when the government condemns a restricted lot for public use); *Horst v. Hous. Auth. of Scotts Bluff,* 184 Neb. 215, 166 N.W.2d 119, 121 (1969) (same); *Meredith v. Washoe County Sch. Dist.,* 84 Nev. 15, 435 P.2d 750, 752 (1968) (same); *see also* Restatement (Third) of Prop.: Servitudes § 7.8 cmt. a, at 381 (2000) ("Servitude benefits like other interests in property may be condemned under the power of eminent domain and taken by inverse condemnation.") and reporter's note, at 383 ("[I]n this Restatement, all servitude benefits are treated as property rights and thus should be entitled to the protection of the Takings Clause.").

{9} We recognize that there is a split among jurisdictions on the question of whether restrictive covenants are protected property interests: jurisdictions, including those cited above, that consider restrictive covenants to be equitable easements and compensable property interests reflect the "majority view"; jurisdictions that insist the covenants do not convey property rights, thus refusing compensation, reflect the "minority view." *See* Sackman, *supra* § 5.07[4][a], [b], at 5–378–83 (discussing both views and collecting cases); *see also* Restatement, *supra* § 7.8, reporter's note, at 383 (noting that it is "generally accepted" that the benefits of restrictive covenants are protected property rights, "although there are some jurisdictions that treat covenant benefits as non-compensable interests"); R.E. Barber, Annotation, *Eminent Domain: Restrictive Covenant or Right to Enforcement Thereof as Compensable Property Right,* 4 A.L.R.3d 1137, 1151–60

(1965) (discussing cases permitting compensation for the violation of building restrictions under the power of eminent domain, as well as cases denying such compensation).

{10} The essence of the minority view is (1) that restrictive covenants are not property entitled to eminent domain protection but are merely contractual rights, (2) that it is against public policy to restrict the government's eminent domain power through private agreements, and (3) that to require compensation would create undue financial burden for the public. *See, e.g., United States v. Certain Lands in Jamestown,* 112 F. 622, 628–29 (C.C.D.R.I.1899); *Burma Hills Dev. Co. v. Marr,* 285 Ala. 141, 229 So.2d 776, 781–82 (1969); *Smith v. Clifton Sanitation Dist.,* 134 Colo. 116, 300 P.2d 548, 550 (1956) (en banc); *Bd. of Pub. Instruction v. Town of Bay Harbor Islands,* 81 So.2d 637, 642 (Fla.1955); *Anderson v. Lynch,* 188 Ga. 154, 3 S.E.2d 85, 89 (1939). The Village looks to these minority view jurisdictions for support.

{11} We find the Village's reliance on the minority view cases unpersuasive. First, as we have already stated, restrictive covenants are deemed property interests in New Mexico. Thus, the question of whether the covenants convey mere contract rights has already been decided. *See Montoya,* 81 N.M. at 751–52, 473 P.2d at 365–66. Second, we are unable to conclude that private agreements restrict the government's eminent domain power. The agreements do afford the owners of private property benefitted by restrictive covenants the ability to be compensated for damages when the government exercises its power. But being able to obtain compensation for the government's violation of a restrictive covenant does not entail the ability to enforce the covenant against the government. *See Town of Stamford v. Vuono,* 108 Conn. 359, 143 A. 245, 249 (1928) (pointing out the clear distinction between the rights of the private landowner, who may be restrained from violating the restrictive covenant, and the rights of the government, which may not be restrained but must make compensation for the violation); Richard I. Brickman, *The Compensability of Restrictive Covenants in Eminent Domain,* 13 U. Fla. L.Rev. 147, 163–64 (1960) (stating that the weakness of the minority argument is the minority's inability to make the distinction between obtaining an injunction to prevent the violation of a restrictive covenant and obtaining compensation for the violation).

{12} The minority's third argument concerns costs, particularly pertinent in a large subdivision where restrictive covenants provide all lot owners with property rights in the lot condemned. Minority jurisdictions suggest that compensating these numerous lot owners for the government's violation of the restrictive covenant would be an intolerable burden on the public. *See, e.g., Town of Bay Harbor Islands,* 81 So.2d at 643–44; *Anderson,* 3 S.E.2d at 88–89. As we will now explain, we are not persuaded that an intolerable burden will result.

{13} We stated earlier that restrictive covenants are characterized as equitable easements in the lots burdened by the covenant. *See, e.g., Montoya,* 81 N.M. at 751–52, 473 P.2d at 365–66. Damages for the partial taking of property by an easement are measured as the difference between the fair market value before and after the taking. *See Yates Petroleum Corp.,* 108 N.M. at 567, 775 P.2d at 1284. This measurement is known as the before and after rule. *See Bd. of County Comm'rs v. Harris,* 69 N.M. 315, 318, 366 P.2d 710, 712 (1961) (stating that the before and after rule entitles a property owner "to recover as compensation the amount the fair market value of [the owner's] property is depreciated by the taking"). Similarly, majority jurisdictions use the before and after rule in measuring the value of a restrictive covenant; specifically, the value is the difference between the fair market value of the lot benefitted by the restrictive covenant immediately before the taking and the value of the lot immediately after the taking. *See* Sackman, *supra* § 5.07[4][a], at 5–380 (discussing majority view, citing to *United States v. Certain Land in Augusta,* 220 F.Supp. 696, 701 (S.D.Me.1963), and stating that "[h]olders of the dominant estate are entitled to be compensated for the diminution in the value of their lots as a result of the extinguishment of the equitable servitude"). The purpose of a before and after valuation is to

ensure that just compensation is provided for the diminution in value caused by the taking; the "before" value is calculated as if there were no taking, and the "after" value is calculated as if the taking had already occurred. *City of Albuquerque v. Westland Dev. Co.*, 121 N.M. 144, 148, 909 P.2d 25, 29 (Ct.App.1995).

{14} We emphasize that the before and after rule requires that a claimant prove a decline in the value of the claimant's land caused by the taking. *See id.; Vuono*, 143 A. at 250 (stating that the lot owner is entitled only to the actual depreciation in the value of her property resulting from the loss of the building restriction on adjacent property taken for public use). Consequently, as the *Bourgerie* court observed, the public use to which some condemned lots are put would likely injure only those landowners immediately adjoining or in close proximity to the lot taken; the public use of other condemned lots may result in only negligible damages to other lot owners, regardless of the distance from the condemned lot. *Bourgerie*, 107 Cal. Rptr. 76, 507 P.2d at 968 (remarking that a fire station may result in more damages than a public park, for example); *see also* Brickman, *supra*, at 168 ("As the distance of the claimant's lot from the invaded tract increased, the amount of compensation would rapidly diminish soon to the vanishing point." (internal quotation marks and citation omitted)).

{15} The Village additionally insists that the Leighs are not entitled to eminent domain damages because the Leighs failed to meet the requirement under the damages clause of Article II, Section 20: that a property owner's injury be different in kind from the injury suffered by the general public. *See* N.M. Const. art. II, § 20 (covering property taken "or damaged" for public use); *Estate and Heirs of Sanchez v. County of Bernalillo*, 120 N.M. 395, 399, 902 P.2d 550, 554 (1995) (holding that any damage to the plaintiff from zoning regulations was no different from damage to the general public and was therefore not compensable); *Pub. Serv. Co. of N.M. v. Catron*, 98 N.M. 134, 136, 646 P.2d 561, 563 (1982) (concluding that to be compensable, the damage must affect some right or interest and be "different in kind, not merely in degree, from that suffered by the public in general").

{16} We recognize that both the Leighs and the Village discuss the purchase of Tract 1 and the destruction of the Leighs' property interest in the tract in terms of a damage to property, not a taking. Indeed, the Leighs insist that the requirement for the damages clause was met. Damages from the violation of the covenants, the Leighs state, were different in kind from any damages to the public, since only the lots in the subdivision shared the restrictive covenants. We need not decide whether the Leighs are correct in their statement because we do not agree with the parties that the damages clause of Article II, Section 20, is implicated in this case. When the Village took Tract 1 for public use, it also took the Leighs' property interest in enforcing the restrictive covenants as to that tract. The Leighs' interest was not merely damaged; it was extinguished. Indeed, the jury was instructed that any damage award would result from the Leighs' "inability to enforce their restrictive covenants." Because the Leighs completely lost their property interest in Tract 1, we conclude that the Village took the Leighs' interest. *See Aragon & McCoy v. Albuquerque Nat'l Bank*, 99 N.M. 420, 424, 659 P.2d 306, 310 (1983) (stating that a "taking" occurs when all beneficial use of property is lost).

{17} The Village also claims that the only damages complained of resulted from the Leighs' proximity to the drainage pond and so are not compensable. *See Aguayo v. Village of Chama*, 79 N.M. 729, 730, 449 P.2d 331, 332 (1969) (concluding that the property owners' mere proximity to a sewage treatment plant does not give rise to compensation, unless the plant is a nuisance per se). The Leighs acknowledge that there was a great deal of testimony at trial about the negative characteristics of the drainage pond, which was adjacent to their property; they stress, however, that the evidence was introduced to respond to the Village's position at trial that the pond had, in fact, a residential purpose. The jury, by special verdict, disagreed with the Village's position, and the Village does not challenge that por-

tion of the verdict on appeal. We cannot conclude, as the Village does, that the evidence introduced means that the damages to the Leighs were only based on their proximity to the pond. Indeed, the Village offered no objection to the jury instruction directing the jury that it was "not to consider awarding damages due to the proximity of the ponding area to [the Leighs'] property." We consequently find the Village's claim without merit and turn to the issue of the damage award given.

B. Evidence for the Leighs' Damages Award

{18} We determined above that the proper calculation of damages for the taking of a restrictive covenant is the difference between the fair market value of the property benefitted by the covenant immediately before and immediately after the taking. *See Vuono,* 143 A. at 249. The jury was properly instructed on the before and after rule and was told that the Leighs were "only to be awarded damages, if any, for the diminution in the value of their property" resulting from the drainage pond. The jury awarded the Leighs $50,000 in damages.

{19} The Village disputes the adequacy of the evidence for the award. Specifically, the Village asserts that the district court erred in admitting the report of the Leighs' appraiser because it was not a proper before and after appraisal. The Village also challenges the competency of the Leighs' testimony—which, according to the Village, did not present the fair market value of their property. The standard of review for the admission of evidence is abuse of discretion. *Hourigan v. Cassidy,* 2001-NMCA-085, ¶ 21, 131 N.M. 141, 33 P.3d 891. However, even if erroneously admitted, the evidence complained of must be prejudicial for this Court to reverse. *Id.* Error in admitting evidence is not prejudicial if there is other admissible evidence that substantially supports the verdict. *Stephenson v. Dale Bellamah Land Co.,* 80 N.M. 732, 733, 460 P.2d 807, 808 (1969). We review the competency of evidence under a de novo standard. *See Dick v. City of Portales,* 118 N.M. 541, 544, 883 P.2d 127, 130 (1994).

{20} The Village does not dispute its failure to object to the appraiser's testimony; the only objection was to the admission of the report immediately following the appraiser's testimony. Again, the Village's objection to the report was based on its lack of a before and after appraisal. The Village does contest the Leighs' assertion that any error in the court's admission of the report was cumulative and therefore harmless. *See Leithead v. City of Santa Fe,* 1997-NMCA-041, ¶ 31, 123 N.M. 353, 940 P.2d 459 (reiterating that the erroneous admission of evidence that was merely cumulative of separate, substantial evidence is harmless). The Leighs also challenge the preservation of the Village's objection to their own testimony. We review the Leighs' testimony and the appraiser's testimony to determine if they provide substantive evidence that would render the report cumulative; we therefore need not address the preservation arguments.

{21} We agree with the Village that the court abused its discretion by admitting the report into evidence because the report failed to use the proper method of appraisal: the before and after rule. *See Yates Petroleum Corp.,* 108 N.M. at 567-68, 775 P.2d at 1284-85. The report stated that its purpose was "to determine the current market value of the [Leighs'] property . . . and the effect on marketability the storage pond has on the [Leighs'] property." To that end, the report stated that the appraised value of the property on a single day, June 29, 2001, was $60,000 without the pond and $0 with the pond.

{22} The Leighs suggest that the values of their property " 'without the pond and with the pond' " as opposed to " 'before the pond and after the pond' " appear to be a difference in semantics. The "with and without" terminology used by the Leighs' appraiser is not a serious problem if the method used actually calculated before and after values. *See State v. Doyle,* 735 P.2d 733, 737 (Alaska 1987) (determining that the method used by the appraisers, " 'inside-outside,' " in fact calculated the before and after values of the property).

{23} In this case, however, we cannot conclude that the appraiser used a before and after calculation. Indeed, the appraiser who authored the report testified at trial that she had not done an appraisal of the property before and after the taking. She acknowledged that such an appraisal was required in a condemnation proceeding but said the Leighs had not asked her to do this type of appraisal. Instead, she was asked to determine the market value of the Leighs' lot on the effective date of the appraisal, which was after the installation of the pond, and to determine what effect the pond and the violation of the restrictive covenant had on the lot. Her $60,000 appraisal of the fair market value of the Leighs' property without the pond was based on sales of four comparable properties. Comparable sales may be considered in determining the fair market value of property condemned. *See* UJI 13–717 NMRA 2004; *State ex rel. State Highway Comm'n v. Bassett,* 81 N.M. 345, 346–47, 467 P.2d 11, 12–13 (1970).

{24} The appraisal of the worth of the property after the pond, however, seems to have been based on the health and safety concerns with the presence of the pond, including the pond's attractive nuisance to small children and the possible infestation of flies, mosquitoes, and snakes, as well as the pond's odors. The appraiser quoted the addendum of her report, which states, "It appears that the [$60,000] value of this lot has been negated by the actions of an external party." She interpreted that statement to mean the lot was worth $60,000 without the pond and nothing with the pond. We find no attempt to assess the property's fair market value with the pond. The appraiser did not, for example, compare the value of lots next to drainage ponds. There is no suggestion that such comparables are unobtainable; apparently, at least three of the approximately thirty-eight drainage ponds in thirty-one area subdivisions have standing water on a regular basis. We note that the Village's appraiser, after comparing the market values of similar lots adjoining drainage ponds and those not adjoining drainage ponds, reported that the Leighs' property suffered no diminution in value from the construction of the drainage pond. We disagree, therefore, with the Leighs' assumption on appeal, contrary to their appraiser's own trial testimony, that the report's "with and without" the pond calculation is the same as a before and after valuation. We find the report's admission in error. Since the appraiser testified to the contents of her report, we disagree with the Leighs that the appraiser's trial testimony constituted separate and substantial evidence that would render the inadmissible report cumulative.

{25} The only other testimony offered as to valuation was the Leighs' own testimony. A landowner may offer testimony as to the value of the property. UJI 13–716 NMRA 2004; *State ex rel. State Highway Comm'n v. Chavez,* 80 N.M. 394, 396–97, 456 P.2d 868, 870–71 (1969). However, the testimony must be directed to the fair market value. UJI 13–716. The fair market value is what a willing seller would take and a willing buyer would offer for the property if it were put on the open market. *See* UJI 13–711 NMRA 2004; *see also El Paso Elec. Co. v. Pinkerton,* 96 N.M. 473, 474, 632 P.2d 350, 351 (1981). Our review of the testimony leads us to conclude that the Leighs did not testify as to fair market value; they testified to the lot's value to them personally.

{26} Ms. Leigh testified that the value "to us was about $60,000" and that the land now, as a hazard and nuisance, "is worthless to us." On cross-examination, she explained that the basis for the $60,000 figure was the amount of time the Leighs expended in finding the perfect property and its suitability to them for building a home. In contrast, later in the cross-examination, she acknowledged that the value of the property as an investment was $30,000. Similarly, Mr. Leigh testified that in his opinion, the value of his property prior to the construction of the pond was priceless "[t]o me," and the land after the construction was useless "[t]o me." He stated that he was not a market analyst and would have to depend on the appraisal done in that point of time but was willing to sell the property for $50,000. He also testified that he currently had Tract 2 on the market for $26,000 but would not want to sell it for less than $21,000. He stated that the property did have residual value after the

construction of the pond but that "[its value] depends on what I get out of it in the market." We do not find this sufficient evidence for the verdict.

{27} Neither the Leighs' testimony nor their appraiser's testimony provided sufficient evidence of the before and after fair market values of the property. We therefore find the erroneous admission of the appraiser's report to be reversible error. *See Roberson v. Bd. of Educ. of Santa Fe,* 80 N.M. 672, 676, 459 P.2d 834, 838 (1969) (affirming the district court's reversal of the board's decision for lack of substantial support in the record, absent the inadmissible evidence). We remand for recalculation of the Leighs' property before and after the taking in accordance with this opinion.

{28} We address one other related matter: the apparent dispute over the date of the taking. The parties stipulated that the Village began construction of the pond on September 26, 2000. The Village assumed the Leighs meant for this date to be the date of the taking. On appeal, the Leighs remark that the exact date of the appraisal does not appear to be critical, and they suggest that the stipulated date of the pond's substantial completion, February 14, 2001, is the "more logical date of 'taking or damaging.' "

{29} Section 42A–1–29 requires that the value of property taken under eminent domain be "at the time the property is or was taken." *See State Highway Comm'n v. Grenko,* 80 N.M. 691, 693, 460 P.2d 56, 58 (1969) (stating that real estate values are not constant and that the New Mexico statute in effect at the time, which is similar to Section 42A–1–29, was designed to avoid problems in fluctuating real estate values by setting a fixed time for valuation). The Village did not institute condemnation proceedings, which would have clearly established a date of taking. *See* § 42A–1–24(A) (establishing the date the condemnation petition is filed as the date for calculating damages). The record indicates that Tract 1 was purchased by the Village from its owners, Gary and Zoe Nelson, on April 4, 1998. On that date, the ability of the Leighs to enforce the restrictive covenant on Tract 1 was "effectively prevented." *Townsend v. State ex rel. State Highway Dept.,* 117 N.M. 302, 304–05, 871 P.2d 958, 960–61 (1994) (pointing out that property is taken when it is effectively prevented from being used). However, the purchase of the property did not violate the restrictive covenants. It was not until September 26, 2000, that the Village began construction of the drainage pond, and it was not until this point that the Leighs had notice that Tract 1 would be put to public use. The Leighs had the necessary information to contest the Village's action once construction began. Therefore, the date of taking is September 26, 2000. *See Electro–Jet Tool Mfg. Co. v. City of Albuquerque,* 114 N.M. 676, 678, 845 P.2d 770, 772 (1992) (reiterating that an element of an inverse condemnation claim is the taking of property for public use).

{30} Having reversed the district court's judgment, we need not consider the denial of the Village's motion of JNOV.

III. CONCLUSION

{31} For the reasons stated above, we reverse the district court's judgment awarding the Leighs $50,000 in inverse condemnation damages, and we remand for a calculation of the value of the Leighs' property before and after September 26, 2000.

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

BUSTAMANTE and KENNEDY, JJ., concur.

2005-NMCA-019

108 P.3d 534

STATE of New Mexico, Plaintiff–Appellant,

v.

JADE G., a child, Defendant–Appellee.

No. 23,810.

Court of Appeals of New Mexico.

Nov. 9, 2004.

Certiorari Granted, Nos. 29,016 and 29,017, Feb. 6, 2005.

Patricia A. Madrid, Attorney General, Joel Jacobsen, Assistant Attorney General, Albuquerque, NM, for Appellant.

John B. Bigelow, Chief Public Defender, Trace L. Rabern, Assistant Appellate Defender, Santa Fe, NM, for Appellee.

OPINION

SUTIN, Judge.

{1} The State appeals the suppression of statements and fingerprints of a twelve-year old juvenile facing felony charges in a delinquency proceeding. We affirm the suppression of the statements, and we remand on the suppression of the fingerprints issue with instructions that the facts and arguments on that issue be more fully developed consistent with the concerns expressed in this opinion.

BACKGROUND

{2} Defendant Jade G. (Child) is already in the New Mexico reports. *See In re Jade G.*, 2001-NMCA-058, ¶ 2, 130 N.M. 687, 30 P.3d 376. Child is accused of murdering her father, allegedly shooting him while he slept. Child's defense is that the shooting was accidental. Suspecting that the shooting was intentional, the State intended to use Child's fingerprints and statements in proving its case.

{3} Child's fingerprints were taken pursuant to a search warrant issued by a district court judge. A match of Child's fingerprints to those on the weapon constituted a part of the evidence later used to seek a warrant for Child's arrest. The affidavit for the search warrant listed the people found at the residence, including Child, their dates of birth, and sought to obtain the latent fingerprints of each individual, along with other evidence the officer claimed was "being possessed in a manner which constitutes a criminal offense, is designed or intended for use or which has been used as a means of committing a criminal offense, and would be material evidence in a criminal prosecution." Neither the affidavit for search warrant nor the search warrant mentioned the Children's Code or alleged that Child was a delinquent child.

{4} The law enforcement officer's affidavit for the arrest warrant stated that the officer had reason to believe Child committed murder, and that the act constituted a delinquent act. A delinquency petition was filed charging first degree murder, second degree murder, and manslaughter, and Child was arraigned.

{5} Before and following the shooting, Child made statements to several relatives and neighbors. The State asserted that the statements were important to show inconsistencies between the physical evidence, such as the father's position in bed and the location of the bullet wound, and Child's view of what had occurred.

{6} In addressing Child's motions to suppress the statements and to exclude Child's fingerprints, the children's court examined the basic rights statute in the Delinquency Act, NMSA 1978, § 32A-2-14 (2003), the applicable subsections of which are:

> F. Notwithstanding any other provision to the contrary, no confessions, statements or admissions may be introduced against a child under the age of thirteen years on the allegations of the petition. There is a rebuttable presumption that any confessions, statements or admissions made by a child thirteen or fourteen years old to a person in a position of authority are inadmissible.
>
> I. A child under the age of thirteen alleged or adjudicated to be a delinquent child shall not be fingerprinted or photographed for identification purposes without obtaining a court order.

§ 32A-2-14 (F), (I).

{7} At the hearing on Child's motions, the children's court stated that the search warrant was not an "order" as contemplated under subsection (I), in that an "order" requires a motion. The court viewed issuance of a search warrant as an ex parte investigatory evidence-gathering process before indictment, noting that, when a judge signs a search warrant, the judge "is not saying that everything you collect is admissible," and describing the search warrant process as being distinct from proceedings after indictment where rules must be followed to assure a fair trial. The court viewed Section 32A-2-14(I) as carrying out the Legislature's intent that judges allow fingerprinting of a child "by issuing an order for it," and that "you don't get orders without filing motions." The court also indicated that the State had, but did not take, the opportunity to file a motion to obtain an order under Section 32A-2-14(I), and that while the court "more than likely . . . would have granted the mo-

tion," the court was "not now going to give the State an order allowing the use of [Child's] fingerprints because the defense filed a motion to exclude it." The court stated: "And at the eleventh hour, I am not going to allow it when there was ample opportunity to get this done and it didn't happen." In its order suppressing Child's fingerprints, the court expressly held that the search warrant was "not a court order for purposes of [Section] 32A–2–14(I)."

{8} In regard to Child's statements, the court indicated during the hearing that the plain meaning of Section 32A–2–14(F) was that the statements were not admissible even when made in a noncustodial setting. The court entered an order suppressing Child's statements.

{9} The State asserts on appeal that the court erred (1) in ruling that a warrant is not a court order for the purposes of Section 32A–2–14(I), and (2) in its interpretation of Section 32A–2–14(F). Included in the State's Section 32A–2–14(I) point is an argument that the court abused its discretion in denying the State an opportunity to take a second set of fingerprints.

DISCUSSION

I. Jurisdiction

{10} Child asserts that it is not clear whether this Court has jurisdiction. According to Child, proof of Child's fingerprints is unnecessary since Child admits to accidentally shooting her father, and the statements merely corroborate the defense's case; therefore, Child argues, the order complained of does not practically dispose of the merits of the case. Although Child argues the practical finality-related issue, the only authority she cites is Rule 12–503(E) NMRA (writs of error), and *In re Larry K.*, 1999–NMCA–078, ¶¶ 4, 7–10, 127 N.M. 461, 982 P.2d 1060. *In re Larry K.* discusses, among other procedural and jurisdictional matters, the writ of error doctrine and Rule 12–503 in relation to the propriety of an immediate interlocutory appeal from an order denying a motion to strike a jury demand. *Id.*

{11} In response, the State asserts that it invoked this Court's jurisdiction under our Constitution and various statutes, namely, Article VI, Section 2 of the New Mexico Constitution, NMSA 1978, § 32A–1–17(A) (1999), and NMSA 1978, § 39–3–3(B)(2) (1972), if this case is characterized as a criminal case, and under NMSA 1978, § 39–3–7 (1966), if this case is characterized as a special proceeding.

{12} Article VI, Section 2 provides that an "aggrieved party shall have an absolute right to one appeal." The right is "applicable where the interest is especially strong." *State v. Griego*, 2004–NMCA–107, ¶ 18, 136 N.M. 272, 96 P.3d 1192; *In re Larry K.*, 1999–NMCA–78, ¶ 13. Section 39–3–7 allows interlocutory appeals to aggrieved parties in special proceedings. Section 32A–1–17(A) is in the Children's Code and allows any party to appeal as provided by law. Section 39–3–3(B)(2) allows the State to appeal within ten days from a suppression order upon certification by the district attorney to the district court "that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding." The orders at issue were filed on January 15, 2003. The notice of appeal was filed on January 24, 2003, and was timely under Section 39–3–3(B)(2). The notice of appeal contains the district attorney's certification required under Section 39–3–3(B)(2).

{13} Child having made no issue of jurisdiction under Section 39–3–3(B)(2), statutes on which the State relies, we will proceed to entertain this appeal.

II. Child's Statements

{14} Our review of the application of Section 32A–2–14(F) in connection with the suppression of Child's statements is de novo. *See State v. Rowell*, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995) ("Interpretation of a statute is an issue of law, not a question of fact.").

{15} The parties take considerable space in their briefs setting out various social commentaries and rationalizations, including discussions of juvenile delinquent accountability, of the goals of rehabilitation and a child's free communication with adults, and of the intellectual and emotional development and

maturity level of children. They seek to persuade us of what they believe the Legislature intended in enacting Section 32A–2–14(F), the first sentence of which reads: "Notwithstanding any other provision to the contrary, no confessions, statements or admissions may be introduced against a child under the age of thirteen years on the allegations of the petition." These words of Section 32A–2–14(F) are straightforward and plain. *See State v. Jonathan M.*, 109 N.M. 789, 790, 791 P.2d 64, 65 (1990) (holding former Children's Code Section 32–1–27(F), which also prohibited use of a juvenile's statement "[n]otwithstanding any other provision to the contrary" to be clear and unambiguous (alteration in original)).

{16} The State contends that subsection (F) should be read to apply only to statements made to persons in positions of authority. The first sentence of Section 32A–2–14(F) has no exceptions or limitations. It does not limit exclusion of statements to those made in custodial settings. Nor does it limit exclusion to those made to persons in authority, as does the second sentence of Section 32A–2–14(F). Nothing in the Children's Code, including the basic rights statute, indicates that, for accountability of delinquent children under thirteen years of age, there are instances in which "statements" should be permitted "on the allegations of [a delinquency] petition." *Id.* In particular, the second sentence, which concerns children thirteen or fourteen years old, includes language specifically referring to "confessions, statements or admissions made . . . to a person in a position of authority." *Id.* No such language is in the first sentence which concerns children under thirteen, indicating that the Legislature did not intend to exclude only statements made to persons in a position of authority. *Id.; see City of Santa Rosa v. Jaramillo,* 85 N.M. 747, 749–50, 517 P.2d 69, 71–72 (1973) (determining that "[t]he Legislature did not see fit to include [certain language] in the statute, therefore it is excluded," and stating that "[w]e are not permitted to read into a statute language which is not there, particularly if it makes sense as written" (internal quotation marks and citation omitted)).

{17} The State nevertheless specifically argues that Section 32A–2–14 should be read *in pari materia* with NMSA 1978, § 32A–2–2 (2003). Section 32A–2–2(A) states an intention to "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." The State also argues that the phrase, "[n]otwithstanding any other provision to the contrary" in Section 32A–2–14(F) does not refer to provisions of the Children's Code, but rather means "notwithstanding any other provision of the law of evidence." We are unpersuaded by these arguments. In the absence of any ambiguity in the first sentence of subsection (F) as to whether statements are limited to those made to persons in a position of authority, we also construe the express language "[n]otwithstanding any other provision to the contrary" to eliminate the application of Section 32A–2–2 to show legislative intent to balance accountability with protection of children. Similarly, we construe the language in subsection (F) to eliminate, for example, application of Section 32A–2–14(G), which permits corroborated extrajudicial admissions and confessions.

{18} We can understand the State's position that the exclusion of statements that are made to persons who are not in authority, such as the neighbors and relatives to whom the statements were made in this case, runs counter to the purpose of the law to hold delinquent children accountable while at the same time focusing on rehabilitative care for the child. However, the Legislature presumably weighed these considerations with the protective purposes of the Children's Code, including those underlying the basic rights statute. We have before us a statutory scheme, and a particular statute that plainly forbids admission of the statements of Child, and we see no basis on which we can determine that the Legislature did not mean what it stated.

{19} Furthermore, the State's views (1) that it is "unreasonable for judges to seek to protect children from the judicial system; the law is not the danger[,][t]he object is not to protect children from being adjudged de-

linquent," and (2) that the object is to protect against identifiable abuses such as law enforcement custodial intimidation, are not arguments for judicial ears when the Legislature has addressed the issue clearly and in comprehensive legislation covering the handling of delinquent children. We see nothing in Section 32A–2–14(F) that permits us to search for meanings outside of the direct legislative statement. We see no basis on which to read words into the statute that are not present. We therefore hold that the children's court did not err in suppressing Child's statements.

III. Child's Fingerprints

{20} We must construe Section 32A–2–14(I). Our review is de novo. *Rowell,* 121 N.M. at 114, 908 P.2d at 1382.

{21} Section 32A–2–14(I) reads: "A child under the age of thirteen alleged or adjudicated to be a delinquent child shall not be fingerprinted or photographed for identification purposes without obtaining a court order." The parties' arguments regarding subsection (I) of the statute fall into two categories. The first is whether a search warrant fits within the meaning of the term "court order" as used in the statute. The second category concerns policy reasons behind the statute.

{22} Despite the parties' efforts, we believe their arguments raise more questions than they answer. For the reasons we set out later in this opinion, we are remanding so the parties may, if necessary, introduce more factual evidence, and may argue the legal questions which we raise in this opinion and which, we believe, must be answered before deciding the meaning and proper application of Section 32A–2–14(I).

A. Whether a Search Warrant is a Court Order Under Section 32A–2–14(I)

{23} We agree with the State that a search warrant issued by a court is a form of a court order. *See, e.g., Koller v. Arizona Dep't of Transp.,* 195 Ariz. 343, 988 P.2d 128, 133 (Ariz.Ct.App.1999) ("A search warrant is a court order."); *see also State v. Barreras,* 64 N.M. 300, 303, 328 P.2d 74, 76 (1958) (defining arrest warrant as a "writ or precept issued by a magistrate, justice, or other competent authority, addressed to a sheriff" (internal quotation marks and citation omitted)); *Black's Law Dictionary* 1602 (7th ed.1999) (defining writ as a "court's written order . . . commanding the addressee to do or refrain from doing some specified act"). However, this does not answer the narrower question as to whether the Legislature intended Section 32A–2–14(I) to mean and include a search warrant for the fingerprints of a juvenile, under thirteen years old, issued and executed under the circumstances in this case.

{24} The clear purpose of subsection (I) is to afford greater protection for children under thirteen than to older children and adults in regard to fingerprinting. An obvious purpose of the subsection is to require at some stage a judge's independent review of a request for a juvenile's fingerprints, to balance the accountability and protective purposes of the Delinquency Act with the protection to be afforded children under thirteen. *See* §§ 32A–2–2(A), 32A–2–14(I). The children's court's interpretation of subsection (I) did so by rejecting an ex parte process and requiring that the child have an opportunity through a motion process to oppose fingerprinting. Yet, arguably, it might also be reasonable to construe "order" in subsection (I) to include a warrant signed by a district court judge in circumstances in which the judge was specifically alerted to the child's age and to the application of Section 32A–2–14(I), and the warrant mentioned the child's age and expressly authorized fingerprinting of the child pursuant to that section. Unfortunately, we cannot apply Section 32A–2–14(I) simply by determining whether the statute contemplates a search warrant to come within the meaning of "court order." Other language in the statute complicates our interpretation of the statute and its application in this case. Little progress can be made on this issue until the meaning of "alleged . . . to be a delinquent child" in subsection (I) is understood.

B. What is the meaning of "alleged . . . to be a delinquent child"?

{25} The State argues that if a search warrant is not considered a court order un-

der the statute, the police and prosecution would be in a catch–22 situation: they must obtain fingerprints in order to support probable cause for a formal charge; yet they cannot obtain the fingerprints before a petition alleging delinquency is filed. The State explains that to interpret Section 32A–2–14(I) as the children's court did would not only prevent the gathering of fingerprints before the filing of charges, a process that often exonerates suspects, but would also encourage, if not require, a delinquency petition to be filed before an investigation is complete, a process that is contrary to the best interests of innocent juveniles. In effect, but not expressly or directly, the State is saying that the statute cannot be construed even to apply in this case, since the statute must be construed to bar the fingerprinting without a court order only after the child is "alleged" in a petition under the Delinquency Act to be a delinquent child.

{26} Even were we to agree with the State that the words "court order" in Section 32A–2–14(I) include the search warrant issued in this case, this determination would beg the unanswered question whether Child, at the time of the issuance of the search warrant, was alleged to be a delinquent child. Nor would a determination by us that "court order" does not mean or include the search warrant be particularly useful. If Child was not alleged to be a delinquent child at the time of the search warrant, it would appear that Section 32A–2–14(I) would be inapplicable. If the provision were inapplicable to Child, an issue neither the parties nor the court addressed, the taking of fingerprints pursuant to the search warrant may have been lawful.

{27} Pursuit of the proper construction of the statute first requires a determination of what "alleged ... to be a delinquent child" means. This requires us to further delve into whether these words mean allegations of fact in a law enforcement officer's affidavit for a search or arrest warrant, allegations of fact and delinquency in a complaint, allegations of fact and delinquency in a petition, or perhaps even some other allegations of delinquency, such as, for example, information given to probation services for the purpose of a preliminary inquiry.

{28} The answer is by no means clear due not only to the Children's Code's use of words but also because from the statutory scheme there appears to be a gray area of investigation of a child as a suspect of a crime which may encompass involvement of the children's court. The Children's Code provides for the filing of a petition alleging delinquency in order to initiate proceedings under the Delinquency Act. NMSA 1978, §§ 32A–1–10, 32A–2–8 (1993). It also contemplates that, before the initiation of a petition alleging delinquency, there can or will be a "complaint[ ] alleging delinquency." NMSA 1978, § 32A–2–7(A) (1993) (providing that a complaint alleging delinquency shall "be referred to probation services, which shall conduct a preliminary inquiry to determine the best interests of the child and of the public with regard to any action to be taken"); § 32A–2–7(B) (providing for a process during the preliminary inquiry that might "obviate the necessity for filing a petition"). Under NMSA 1978, §§ 32A–2–5(A) and (B)(1) (2003), juvenile probation has the power and duty to "receive and examine complaints and allegations that a child is a delinquent child for the purpose of considering beginning a proceeding pursuant to the provisions of the Delinquency Act." "Probation services shall notify the children's court attorney of the receipt of any complaint involving an act that constitutes a felony." § 32A–2–7(E). NMSA 1978, § 32A–1–6(B) (1995), states that "the children's court attorney may represent the state in any matter arising under the Children's Code ... when the state is the petitioner or complainant."

{29} In the present case, there is nothing in the record evidencing that any type of a complaint alleging Child's delinquency was filed or made before or at the time the search warrant was issued. However, the record does show that, before the petition against Child was filed, probation services had completed a preliminary inquiry as contemplated under Section 32A–2–7(A).

{30} The Delinquency Act does not define or describe "complaint." The Rules of Criminal Procedure for the District Courts state

that a prosecution may be commenced by the filing of a complaint. Rule 5-201(A) NMRA. Rule 5-201(B) defines a complaint as "a sworn written statement of the facts, the common name of the offense," and if applicable, the specific statute allegedly violated.[1] Notably, the affidavit for a warrant for Child's arrest, which was signed almost two months after the search warrant was issued, and one day before Child was arrested, appears to fit the Rule 5-201(B) description of a complaint: a sworn statement alleging that the affiant had reason to believe Child committed murder or manslaughter in violation of NMSA 1978, §§ 30-2-1, -3 (1994), stating the facts underlying the act, and stating that the act constituted a delinquent act.

{31} Another ambiguity needing clarification is whether there exists a procedure available to law enforcement to seek a court order before a complaint or delinquency petition is filed if a child can be "alleged ... to be a delinquent child" before a complaint or a petition. The children's court rules provide specifically for search and arrest warrants. Rule 10-206 NMRA. There exist children's court forms for affidavits for search warrants, and for search warrants. Forms 10-411, -412 NMRA. However, in various sections in the children's court rules, there are also specific provisions for "orders." *See, e.g.*, Rule 10-110 NMRA (authorizing a written order requiring a person to testify notwithstanding the privilege against self-incrimination); Rule 10-301 NMRA (authorizing ex parte custody orders); Rule 10-306.1 NMRA ("Court ordered diagnostic examinations and evaluations"); Rule 10-325 NMRA (authorizing an initial permanency order); Forms 10-452, -453 NMRA (providing example forms of ex parte custody orders).

{32} The Criminal Procedure Act requires criminal prosecutions to be commenced and conducted in accordance with, and all pleadings, practices, and procedures to be governed by, the Rules of Criminal Procedure. NMSA 1978, § 31-1-3 (1972). The Rules of Criminal Procedure also provide specifically for arrest and search warrants. Rules 5-208, -211 NMRA. There exist criminal forms for such warrants. Forms 9-210, -210A, -214 NMRA. Rule 5-121 NMRA of the Rules of Criminal Procedure specifically covers the preparation and entry of orders. Rule 5-120 NMRA states that "[a]n application to the court for an order shall be by motion."

{33} These, as well as other statutes and rules, show that the delinquency and criminal statutes and procedural rules are meant in part to apply to pre-petition and pre-indictment activities such as the issuance of search and arrest warrants, and detention, as well as to activities after formal charges are filed. They also show that the Legislature and our Supreme Court have addressed "search warrants" and "orders" separately and distinctively. Did the Legislature intend to allow law enforcement officers to seek a court order to obtain fingerprints; and, if so, under what procedure? Or did the Legislature intend that only court-related staff or the children's court attorney could seek a court order?

{34} We believe it is necessary to give the parties the opportunity to introduce additional factual information and to present argument with respect to when a child is "alleged ... to be a delinquent child." This may clarify the issue of what procedures are available to seek a court order, and whether those procedures require an adversarial or allow an ex parte process. In determining what the Legislature meant when it stated "alleged ... to be a delinquent child," the court should look not only to the language of subsection (I), but also to the other subsections in Section 32A-2-14 and to any other statutes for a determination of legislative intent. In particular, and for example, the fact that Section 32A-2-14(C) is worded differently than 32A-2-14(I), in that it forbids interrogation and questioning of a person "alleged or suspected of being a delinquent child" without first advising the person of his or her rights and obtaining a proper waiver, may indicate that in subsection (I), the Legislature meant to distinguish between children suspected of being delinquent and those for-

1. The Rules of Criminal Procedure for the District Courts govern the procedure in instances where the child is alleged to be a "serious youthful offender" and where a notice of intent is filed alleging the child is a "youthful offender." Rule 10-101(A)(2) NMRA.

mally alleged to be delinquent through a complaint or petition process. Further, the fact that Section 32A–2–14(G) states, in relation to the use of extrajudicial statements, confessions, or admissions to support a finding that the child committed "the delinquent acts alleged in the petition," may or may not assist to clarify the meaning of "alleged" used in subsection (I). Finally, we note that the question of whether the Legislature intended to afford children whose fingerprints are sought the protection of the adversarial process may be further elucidated by the purposes of the Children's Code enumerated by the Legislature. One purpose is "to provide judicial and other procedures through which the provisions of the Children's Code are executed and enforced and in which the parties are assured a fair hearing and their constitutional rights and other legal rights are recognized and enforced." NMSA 1978, § 32A–1–3(B) (1999). The children's court should consider whether these, and any other relevant statutes, clarify the meaning of "alleged . . . to be a delinquent child" in subsection (I).

{35} To summarize, among the questions the court should address on remand is whether Section 32A–2–14(I) applies in this case. This requires (1) determining the meaning of "alleged to be a delinquent child," which will entail (a) looking at the Legislature's intent in conjunction with (b) whether procedures exist during the criminal or delinquency investigatory stage which may "allege" delinquency; and (2) determining in this case whether Child was alleged to be a delinquent child at the time the fingerprints were taken.

{36} Further, if Child was not alleged to be a delinquent child at the time of the search warrant then the court should determine whether (1) the Legislature nevertheless intended by this statute to protect children not alleged to be delinquent, in other words, whether the statute nonetheless applies, and (2) if not, whether the fingerprints taken may lawfully be admitted into evidence.

{37} In addition, if the court determines that Child was alleged to be delinquent or if the statute applies even though Child was not alleged to be delinquent, the court must then determine whether the search warrant was the type of court order intended by the Legislature, which will require determining (1) whether the Legislature intended Child to be afforded the opportunity to oppose issuance of the search warrant, (2) if not, whether the search warrant sufficiently alerted the court to balance Child's rights under the Children's Code against the State's reasons for requesting the fingerprints, and (3) if an adversarial process was required, whether there is available any adversarial process before a petition alleging delinquency is filed and what that process is. The children's court should enter findings of fact and conclusions of law on all of the issues it addresses.

C. New Fingerprints

{38} The State questions the children's court's order suppressing the fingerprints when the court could have independently considered upon motion whether fingerprinting should be permitted and then either permit new fingerprinting or, so as not to require a useless act, permit the use of the already existing prints. Although no such motion was on file, the court determined, without explanation, that it was too late in the proceeding for the State to request and obtain new fingerprints.

{39} While we often would defer to the children's court in regard to such rulings, in this case we would prefer the issue be considered along with the other issues we raise in this opinion. Further, in determining that the State should be precluded from seeking new fingerprints, the children's court should explain the reasons for the determination, including at the very least how granting a motion would be prejudicial to Child or otherwise upset a proper balance in regard to the rights and interests of Child and the public. Again, more factual development may assist in answering this question.

CONCLUSION

{40} We affirm the children's court's suppression of Child's statements pursuant to Section 32A–2–14(F). In regard to the children's court's suppression of Child's finger-

prints pursuant to Section 32A–2–14(I) and refusal to permit the State to seek an order allowing new fingerprinting, we remand for the court to hold a further evidentiary or other hearing, as necessary, to fully consider the issues as discussed in and in accordance with this opinion in regard to the application of Section 32A–2–14(I) and to enter findings of fact and conclusions of law as to all addressed issues.

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

WE CONCUR: IRA ROBINSON and RODERICK T. KENNEDY, Judges.

2005-NMCA-026

108 P.3d 543

STATE of New Mexico ex rel. CHILDREN, YOUTH and FAMILIES DEPARTMENT, Petitioner–Appellee,

v.

FRANK G. and Pamela G. Respondents–Appellants.

In the Matter of P.A.G., Child.

Nos. 23,497, 23,787.

Court of Appeals of New Mexico.

Dec. 17, 2004.

Certiorari Granted, No. 29,042, Feb. 21, 2005.

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Jane Bloom Yohalem, Santa Fe, for Appellant Frank G.

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Colene Flynn Robinson, Denver, CO, for Amicus Curiae National Association of Counsel for Children.

OPINION

ROBINSON, J.

{1} Parents Frank G. (Father) and Pamela G. (Mother) appeal from an adjudication by the children's court finding child abuse and neglect of their three-year-old adopted daughter/natural granddaughter (the Child). In an Amended Neglect/Abuse Petition, the Children, Youth and Families Department (CYFD) alleged that Father had sexually abused the Child and that Mother had failed to protect her from that abuse. The children's court found by clear and convincing evidence that the Child was an abused and neglected child as defined in NMSA 1978, § 32A–4–2(B)(3) and (4) (1999) and NMSA 1978, § 32A–4–2(E)(3) (1999). On appeal, Father and Mother contend that the children's court erred when it admitted hearsay statements made by the Child regarding the sexual abuse. We affirm the judgment of the children's court.

I. FACTUAL AND PROCEDURAL BACKGROUND

{2} Initially, CYFD took the Child into physical custody because of the living conditions in Parents' home. A neglect and abuse petition was filed in November 2001, alleging that the Child lived in an "unsafe, unsanitary, and uninhabitable home." The petition stated that the home contained no food, that it was filthy throughout, and that fifteen to twenty dogs and cats lived in the home, resulting in a strong odor of feces and urine. The Child's hair was dirty and badly matted. Her body and clothing were described as being filthy and having the same strong odor as the home.

{3} After a custody hearing in December 2001, the children's court placed legal custody of the Child with CYFD and ordered an evaluation of the four-year-old Child. Parents were represented by their individual attorneys and the Child by a guardian ad litem. Parents were granted visitation with the Child and ordered to undergo psychological, parenting, and substance abuse assessments. An adjudicatory hearing was held in January 2002, and Parents entered pleas of no contest to the allegations of the abuse and neglect petition. In the stipulated judgment and disposition, the children's court found that the Child was abused and neglected, under Section 32A–4–2(B)(4) and Section 32A–4–2(E)(2), and adopted CYFD's treatment plan. The court ordered that legal custody of the Child should remain with CYFD for a period up to two years and that Parents should participate fully in the treatment plan. Parents do not contest the stipulated judgment and disposition which found the Child to be abused and neglected because of the unsafe and unsanitary condition of Parents' home. Rather, they challenge only the adjudication on the amended abuse and neglect petition resulting from the allegations of sexual abuse.

{4} The Child was placed in a foster home in January 2002. On March 8, 2002, she told her foster mother about an occurrence of sexual abuse involving Father. The foster mother immediately reported the disclosure to the CYFD social worker assigned to the Child's case. The social worker came to the home that same day and interviewed the Child. Based on that interview, in which the Child told the social worker about the sexual abuse, the social worker arranged for an interview with a clinical forensic interviewer at the Children's Safe House at All Faiths Receiving Home in Albuquerque, New Mexico, an agency specializing in the treatment of families affected by sexual abuse. In April 2002, the Child had a physical examination with Dr. Ornelas at Para Los Niños. Dr. Ornelas reported a normal vaginal exam but had concerns about anal penetration; her findings were non-specific. The doctor prescribed an oral antibiotic for the treatment of an anal infection. Subsequently, in April

2002, an amended abuse and neglect petition was filed to include the allegations that Father had sexually abused the Child and that Mother had failed to protect her from that abuse. The Child was referred to a program therapist at All Faiths Receiving Home for diagnosis and for therapy.

{5} An adjudication hearing on the new allegations was set for June 2002, and in May 2002, CYFD filed a notice of its intent to offer the Child's statements to the foster mother, the CYFD social worker, the Safe House interviewer, and the All Faiths program therapist as exceptions to the hearsay rule. The notice did not indicate which exceptions to the hearsay rule CYFD would be relying upon, but Rule 11-803(X) NMRA 2004 and Rule 11-804(B)(5) NMRA 2004, the two catchall exceptions to the hearsay rule, require prior notice to an adverse party. *See* Rule 11-803(X)(3); Rule 11-804(B)(5)(c). In response, Father filed a motion in limine to exclude the hearsay statements. He contended that any statements by a "non-competent minor child" would lack the "equivalent circumstantial guarantees of trustworthiness" required by the catchall hearsay exceptions of Rule 11-803(X) and Rule 1-804(B)(5) and would also deny Father his right, under the United States and New Mexico Constitutions, to confront the witnesses against him. Mother concurred in the motion.

{6} At the adjudicatory hearing in June 2002, the children's court reviewed the motion in limine and heard argument of counsel regarding the admissibility of the Child's statements. The children's court ruled that the Child's statements about the sexual abuse would be admitted conditionally, stating to Parents that it would be mindful of their objections as it weighed the credibility of the statements. In opening remarks, both Parents objected to the admission of the statements on the basis of hearsay, the Child's competency as a witness, and the confrontation clause. CYFD presented testimony from the Child's foster mother, the social worker from CYFD, the interviewer from the Children's Safe House, and the program therapist from All Faiths about the Child's hearsay statements concerning sexual abuse. Parents did not testify at the hearing or offer any witnesses, other than recalling the CYFD social worker to testify.

{7} The foster mother, a retired registered nurse, testified that the Child had come to her home in January 2002. When she arrived, the foster mother had gone over some house rules with the Child. Among those rules was the importance of telling the truth, including a discussion of the difference between truth and lies. The foster mother testified that she believed the Child understood the difference between truth and lies and also understood that the consequences in the foster home for lying would be a time-out. The foster mother stated that she had never had a reason to put the Child in a time-out for lying. She also described some behaviors the Child had exhibited when she came to live in the foster home that concerned the foster mother. In the beginning, the Child would attempt to kiss the foster parents with her mouth open and also attempt to thrust her tongue into their mouths at the same time. When the foster parents objected, the Child said, "That's how we kiss at home," and also stated that was how she kissed Mother. Additionally, when she first came to their home, the Child would perform a song and dance which she called her "Oh, I'm so sexy, oh, I'm so cute" dance. The Child told the foster mother that Father had taught her the dance. The foster mother testified that one morning, while the Child was taking a bath with the foster mother in the room, the Child began to sing "I'm so sexy, I'm so cute" and began "sticking a washcloth up her bottom." When the foster mother asked her what she was doing, the Child responded, "I'm sexing myself." The foster mother asked her who had told her about that. When the Child replied, "My Dad," the foster mother clarified that the Child was referring to Father and not to the foster father. The foster mother testified that the Child had explained her behavior with the washcloth by saying, "This is the way [Mother] and [Father] have sex-[Father] sexes [Mother] back here," pointing to her anus. The Child then opened her legs, pointed to her vaginal area, and said, "[Father] sexes [Mother] here too." The foster mother said that the Child went on to say, "And when [Father] was sexing me, I tried to push

him off because he was too heavy, and I kept saying 'No! No!', but he wouldn't get off and I couldn't push him off." The foster mother testified that she then told the Child that "Mommies and Daddies don't touch their kids down there," to which the Child responded "Yes, they do." After the foster mother told her husband what the Child had said, the foster parents called CYFD, and the CYFD social worker came to their home. At the adjudicatory hearing, the foster mother also described a number of other disturbing behaviors exhibited by the Child, which included being short-tempered and easily frustrated, tantrums, hitting, and a number of sexualized behaviors. The sexualized behaviors included frequent masturbating with her hand, with her dolls and stuffed animals, and with the family dog. The Child would masturbate openly in front of her foster parents as well as in front of strangers. She also engaged in aggressive play with her dolls as well as simulating acts of sexual intercourse between the dolls.

{8} The CYFD social worker came to the foster home on the same day that the Child told the foster mother about being "sexed" by Father. She talked to the Child in the privacy of the Child's room in the context of playing with the Child and her toys. The social worker testified that she had been trained in how to interview children and stated that she had asked open-ended questions which were not leading or suggestive when she talked to the Child about the sexual allegations. She testified that before talking to children about any allegations, it was a standard procedure on her part to discuss the difference between truth and lies with them. She stated that she had done so with the Child and was satisfied that she understood the difference and knew that "a lie is something that hasn't happened, the truth has happened." The social worker asked the Child what she had talked to the foster mother about during the bath. The Child said that she had told the foster mother about Father having "sexed" her and that Father had gotten on top of her but he was too big for her to push off. The Child told her that this had happened in Parents' bedroom. The Child said that Mother was in the room and told her "to get out, or get off, and pull up her pants." The social worker testified that the Child had told her that "Father had poked her 'wee-wee' with his 'wee-wee." When the social worker asked her what a "wee-wee" was, the Child pointed to her vaginal area. The social worker testified that, based on her experience, the sexualized behavior exhibited by the Child was atypical for a child her age but it was consistent with victims of sexual abuse. The CYFD social worker described the Child's narration as having been matter-of-fact and that she considered the Child to be fairly verbal for her age. She stated that all the Child's disclosures about the sexual abuse had been consistent as to the location (Parents' home), the parties present (Father and Mother), and the events that occurred.

{9} The CYFD social worker was questioned by Parents about a psychological evaluation prepared for CYFD in January 2002 shortly after the Child was taken into custody. She was asked about the following statement from the evaluation: "While there are no indicators of outright physical or sexual abuse, it does appear that [the Child] grew up in an environment where basic cleanliness, self-respect, and adequate attention were lacking." The social worker responded that the psychologist who prepared the evaluation had not been asked by CYFD to undertake a sexual abuse evaluation of the Child and he had not done so. Parents did not seek to introduce the evaluation into evidence, and the psychologist was not called to testify.

{10} Within two weeks of the initial report of sexual abuse, the Child was taken to the All Faiths Children's Safe House where she was interviewed by a clinical forensic interviewer. The interviewer stated that her job at the Safe House was to interview children and developmentally delayed adults when sexual or physical abuse was suspected. She testified that the interview with the Child was videotaped and that she had explained to the Child that it would be videotaped. The interviewer stated that she was enrolled in a master's degree program and had received extensive on-the-job training in interviewing techniques, particularly with regard to interviewing children. The video-

tape of the interview was introduced into evidence and played at the adjudicatory hearing. On the videotape, the Child again made a number of unsolicited disclosures to the interviewer about sexual abuse by Father occurring in Parents' home. She stated that Father had "poked" her "wee-wee" (again pointing to her genital area) on the skin and her "butt" (pointing to the area between her buttocks) with his "wee-wee" which she described as "a thing that was sticking out" (gesturing outward from the genital area). At two different points in the interview, the Child stated that Mother was in the room and saw Father on top of her. The Child said that Mother told her to "get off," which she finally was able to do, and that she then pulled up her pants. When asked if Father touched anyone else, the Child responded that when she slept with Parents in their bed, she saw them "fucking." She said that Father used the word "fucking" to describe what he and Mother did and also what he and the Child did.

{11} Because of the Child's emotional and behavioral problems, she was referred to a program therapist at All Faiths for an assessment as well as diagnosis and treatment. The program therapist testified at the adjudicatory hearing. She stated that she had a Master's degree in counseling and clinical social work and continues to receive specialized training under a continuing education program. She is licensed by the state as a master social worker, as defined in NMSA 1978, § 61–31–3(H) (1989). As a licensed master social worker, her scope of practice consists of "assessment, diagnosis and treatment, including psychotherapy and counseling." *See* NMSA 1978, § 61–31–6(B)(1) (1996). She testified that she is qualified to diagnose and provide treatment to children and families under the licensing statute. During her two years of employment at All Faiths Receiving Home, she has provided therapy to many parents and children referred to All Faiths because of child abuse and neglect. In the course of treating families, the therapist testified that she had made recommendations about visitation and the potential for reunification. The therapist was then offered as an expert and qualified by the children's court as an expert on treatment. She stated that in providing therapy to victims of sexual abuse, it was essential for her to know the identity of the perpetrator. This knowledge was necessary, she stated, in order to diagnose and treat the emotional impact of the sexual assault because the treatment for intrafamilial child abuse differs from treatment for abuse by a stranger. In her experience, children who have been abused by family members or other caregivers tend to internalize responsibility for the abuse and also need help in dealing with the consequences of disclosing abuse.

{12} The All Faiths program therapist stated that, at the time of the adjudicatory hearing, she had met with the Child for seven counseling sessions. She testified that she had explained to the Child what therapists do and that they would be talking to help the Child deal with her feelings. She testified that she did not ask the Child about the sexual abuse but instead waited for the Child to raise it on her own. At the initial meeting with the foster parents and the Child, the foster parents had told the program therapist, in the Child's presence, about the Child's disclosures while in the bathtub and about the Child's masturbation. During this meeting, the Child also stated that Father had put his "wee" next to her "wee," pointing to her genital area, and then added that when Father got off her, she had seen his "wee." The All Faiths therapist described a later counseling session when just she and the Child were present. In the context of making cookies with clay, the Child had mentioned her Mother. When the therapist asked the Child to tell her about her family, the Child responded, "I don't like it when [Father] fucks me" and that it made Mother mad when he did that. The program therapist testified that the Child's statement had been made spontaneously and was consistent with the Child's earlier statement to her about sexual abuse by Father.

{13} The All Faiths program therapist also described the Child's behavioral difficulties, including the sexualized behavior which she said would typically be a learned activity in a four-year-old child. These behaviors included masturbation with toys, enactment of sexual activity with toys and stuffed ani-

mals, as well as low tolerance to frustration and aggressive behavior that included throwing things and hitting. The Child also suffered from nightmares and sleep disturbances. The therapist testified that, in her opinion, these behaviors were consistent with Post Traumatic Stress Disorder (PTSD): a traumatic event, sexual abuse in this case; re-experiencing the event through masturbation, sexual play with her toys, and nightmares; avoidance of the trauma shown by the Child's reluctance to talk about the event for any extended period; her distractibility; and her anger. The program therapist testified that it was not her role to evaluate the allegations of sexual abuse or to assess the credibility of the Child. She did state that in diagnosing and treating the Child, she does observe whether what the Child is telling her about the sexual abuse is consistent with what she has told others. The program therapist testified that the Child's statements to her had been consistent with the other statements and also consistent with the behaviors the Child was exhibiting.

{14} When asked her opinion as to whether the Child could testify about the abuse in a courtroom under oath, the program therapist responded that it would not be an appropriate setting for a Child that age and would be harmful to the Child's therapy. She stated that being asked to come into a courtroom and answer the questions of strangers would heighten the Child's anxiety. The therapist noted that the Child already had a tendency to be avoidant about the abuse, a characteristic consistent with PTSD. Being asked questions about the abuse by strangers would only increase the stress and anxiety experienced by the Child in discussing the abuse and might lead to an unwillingness on the part of the Child to discuss her feelings about it at all. When asked whether it would be likely that the Child would talk if she was brought into the courtroom with the attorneys and Parents present, the program therapist replied, "No."

{15} At the conclusion of the adjudicatory hearing, CYFD offered the admission of all the testimony under Rule 11-803(X), and also offered the All Faiths therapist's testimony under Rule 11-803(D). The children's court determined that the Child's statements were sufficiently reliable to be admissible as exceptions to the hearsay rule and denied Father's motion in limine. The court then concluded that there was clear and convincing evidence that the Child was an abused and neglected child under Section 32A-4-2(B)(3) and (4) and Section 32A-4-(E)(3), as alleged in the amended petition. *See* NMSA 1978, § 32A-4-20(H) (1999) (requiring clear and convincing evidence to support a finding of neglect and abuse).

II. DISCUSSION

{16} Parents challenge the admission of the Child's hearsay statements concerning sexual abuse, contending that all the statements were inadmissible hearsay. They contend that the statements do not fit any hearsay exceptions. They also assert that the improper admission violated their rights to due process in that it denied them the opportunity to confront the witness against them. Although hearsay testimony is generally inadmissible, *see* Rule 11-802 NMRA 2004, our Rules of Evidence include a number of exceptions to the hearsay prohibition. *See* Rule 11-803; Rule 11-804. CYFD offered the Child's hearsay statements under Rule 11-803(X), the catchall exception, and argued that the testimony by the All Faiths program therapist was also admissible under Rule 11-803(D), the exception for statements for medical diagnosis or treatment.

{17} The admission of evidence as an exception to the hearsay rule is reviewed under an abuse of discretion standard. *In re Esperanza M.*, 1998-NMCA-039, ¶ 7, 124 N.M. 735, 955 P.2d 204; *accord State v. Massengill*, 2003-NMCA-024, ¶ 11, 133 N.M. 263, 62 P.3d 354 (stating, with regard to hearsay admitted under a catchall exception, that "[t]he trial court's ruling concerning the trustworthiness of an out-of-court statement will be upheld unless there has been an abuse of discretion") (alteration in original) (quoted authority and quotation marks omitted). Constitutional claims are reviewed de novo. *State ex rel. Children, Youth & Families Dep't v. Mafin M.*, 2003-NMSC-015, ¶ 17, 133 N.M. 827, 70 P.3d 1266.

A. Rule 11–803(X): Other Exceptions

{18} At the adjudicatory hearing, CYFD argued that all the Child's statements were admissible under Rule 11–803(X). This Rule provides that a statement that is not specifically covered by any of the other hearsay exceptions, but that has the "equivalent circumstantial guarantees of trustworthiness" of the other exceptions, may be admissible under the following circumstances:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (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.

Rule 11–803(X).

{19} When CYFD offered the Child's hearsay statements under Rule 11–803(X), it relied upon *State v. Trujillo,* 2002–NMSC–005, 131 N.M. 709, 42 P.3d 814, for authority, a case in which the New Mexico Supreme Court had upheld the admission of a witness statement under Rule 11–803(X). In so doing, the Supreme Court rejected an approach articulated in *State v. Barela,* 97 N.M. 723, 726, 643 P.2d 287, 290 (Ct.App.1982), that has been used by this Court in the past to analyze the admissibility of statements under Rule 11–803(X). *See, e.g., In re Esperanza M.,* 1998–NMCA–039, ¶ 26, 124 N.M. 735, 955 P.2d 204. In *Trujillo,* the Supreme Court stated that "[t]his narrow interpretation of [Rule 11–803(X)] has been rejected by a majority of circuits, and we decline to adopt it in our jurisdiction." *Trujillo,* 2002–NMSC–005, ¶ 16, 131 N.M. 709, 42 P.3d 814. The Supreme Court concluded that adopting the narrow interpretation of the rule articulated in *Barela* "would deprive [a factfinder] of reliable probative evidence relevant to the [factfinder's] truth-seeking role." *Id.*

{20} Because Rule 11–803(X) is not a firmly rooted hearsay exception, statements offered under this exception must demonstrate sufficient guarantees of trustworthiness. *Massengill,* 2003–NMCA–024, ¶ 14, 133 N.M. 263, 62 P.3d 354. The test for admissibility "under the catch-all rules is whether the out-of-court statement . . . has circumstantial guarantees of trustworthiness." *Trujillo,* 2002–NMSC–005, ¶ 17, 131 N.M. 709, 42 P.3d 814 (quoted authority and quotation marks omitted). In assessing trustworthiness under the catchall exceptions to the hearsay rule, " 'the statement must be inherently reliable at the time it is made.' " *Id.* (quoting *State v. Williams,* 117 N.M. 551, 561, 874 P.2d 12, 22 (1994)). And, as with the firmly rooted exceptions to the hearsay rule, the guarantees of trustworthiness "must likewise be drawn from the totality of circumstances that surround the making of the statement." *Idaho v. Wright,* 497 U.S. 805, 820, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). In *Wright,* a case also involving hearsay statements by a sexually abused child, the Supreme Court "decline[d] to endorse a mechanical test for determining 'particularized guarantees of trustworthiness" ' but did identify several factors that might be assessed in determining whether a child's hearsay statement was trustworthy, including spontaneity, consistent repetition, use of terminology unexpected of a child of similar age, and lack of motive to fabricate. *Id.* at 821–22, 110 S.Ct. 3139.

{21} The Court in *Trujillo* defined the following four primary dangers of hearsay, which might make a statement unreliable:

> (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 [or she] saw.

Trujillo, 2002–NMSC–005, ¶ 17, 131 N.M. 709, 42 P.3d 814. A reviewing court determines trustworthiness by applying these cri-

teria to statements offered under the catchall exception. *Massengill,* 2003–NMCA–024, ¶ 32, 133 N.M. 263, 62 P.3d 354. When CYFD moved the admission of the statements under Rule 11–803(X), it argued that none of the problems described in *Trujillo* was present in the testimony. We agree. In this case, the Child's consistent recounting of the sexual abuse possesses sufficient indicia of reliability to allay concerns about the four dangers. As to the danger of ambiguity, the statements were clear and direct, and the language used by the Child in describing the abuse consisted of terms both appropriate for a young child as well as some unexpected terminology. She related in a forthright manner that Father had put his "wee-wee" next to her "wee-wee" and next to her "butt." *See State v. D.R.,* 109 N.J. 348, 537 A.2d 667, 673 (1988) (observing that "young children . . . do not necessarily regard a sexual encounter as shocking or unpleasant, and frequently relate such incidents to a parent or relative in a matter-of-fact manner"). The Child also demonstrated on her body what actions and which parts of the body she was describing. It is unlikely that the witnesses who heard these graphic, yet child-like, descriptions of the events misinterpreted their meaning. *See Doe v. United States,* 976 F.2d 1071, 1081 (7th Cir.1992) (stating that the consistency and graphic descriptions by the three-year-old victim indicated that the statements were reliable). In the matter of candor, no one has suggested that the Child was lying or had any reason to lie when she made these statements. Although Parents contend on appeal that there were others who had access to the Child after she was removed from the home who could have been responsible for the sexual abuse, the Child has always clearly and consistently identified Father and Mother in her statements. It is improbable that she would have confused her Parents with another perpetrator. Further, when the Child first disclosed the abuse, the foster mother carefully asked the Child to distinguish between Father and the foster father, and the Child identified Father as the perpetrator. Parents also suggest that the Child might have imagined sex with Father because the Child stated that she had seen Parents engaged in sexual activity. However, the Child's statements distinguish between Parents' sexual acts that she had observed from those acts involving Father and the Child. Her spontaneous statements to the foster mother and to the professionals with whom she spoke about sexual abuse were consistent in their description of the abuse and in their identification of Father as the assailant and Mother as being in the room. *See Doe,* 976 F.2d at 1081 (five-year-old's statements spontaneous when "she explained what had occurred with little prompting") (citation omitted). As the CYFD social worker observed in her testimony, all the Child's disclosures have been consistent as to the location, to the events that happened, and to the parties present. *See U.S. v. Harrison,* 296 F.3d 994, 1004 (10th Cir.2002) (concluding that the consistency of the victim's three statements was "a strong indicator of the trustworthiness" of the statements). Finally, it is unlikely that the Child misperceived what happened to her; her statements and her demonstrations of Father's actions provided clear descriptions of sexual assault.

{22} In addition to the requirement of circumstantial guarantees of trustworthiness, the catchall exceptions provide that a hearsay statement must also meet the following conditions to be admissible:

> (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.

Rule 11–803(X); Rule 11–804(B)(5). In this case, the Child's hearsay statements were evidence of material facts-the occurrence of sexual abuse, the nature of the abuse, and the identity of the perpetrator. Parents do not contest that the statements were "offered as evidence of a material fact." Rule 11–803(X)(1). On appeal, Father asserts that testimony by the Child would have been more probative than the Child's hearsay statements. Several courts have held to the contrary in responding to similar assertions.

In *United States v. Nick*, 604 F.2d 1199, 1204 (9th Cir.1979), for example, the Court, in discussing the hearsay statement of a three-year-old child who had been sexually assaulted, found the statement to be "unquestionably material" and probative as to the identity of the assailant. The Court concluded that "[t]he declaration to his mother at the time of the event was more, rather than less probative than testimony that he might have been able to give months after the event even if the district court would have found him competent." *Id. See State v. Loughton*, 747 P.2d 426, 429 (Utah 1987) (observing that out-of-court statements made by child victims of sexual abuse regarding the incidents provide more accurate accounts of the incident because they are "made nearer to the time of the incident and removed from the pressure of a courtroom situation"). In this case, the Child's statements were more probative on the issue of sexual abuse than any other evidence CYFD could procure through reasonable efforts; the only individuals involved were Father, Mother, and the Child. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 60, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) (recognizing that "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim"). Finally, the interests of justice were served by admitting the statements of the Child. She had been the victim of sexual abuse, she was the only one who could identify the perpetrator, and her statements provided the only available account of the abuse.

{23} We affirm the children's court admission of the Child's hearsay statements. In admitting the statements, the children's court considered the content of the statements and the circumstances in which they were made. The court found that the statements were inherently reliable, noting in particular the age of the Child, the manner in which the issue was raised, the nature of the utterances, and the consistency of her statements. These findings are supported by the record. We conclude that the Child's hearsay statements are supported by guarantees of trustworthiness equivalent to those which sustain the other enumerated exceptions to the hearsay rule. The children's court did not abuse its discretion in admitting the Child's hearsay statements through the testimony of the foster mother, the CYFD social worker, the Safe House interviewer, and the All Faiths program therapist.

{24} Parents also assert that the children's court erred when it permitted CYFD's witnesses to testify without first determining whether the Child was unavailable and whether the Child was competent. They argue that the children's court was required to determine whether or not the Child would have been competent to testify as a witness before admitting the hearsay statements. Mother also appears to contend that the Child would have to be found competent before the hearsay statements could ever be admitted. However, neither Parent has cited to any authority that supports their contention. *See* Rule 12–213(A)(4) NMRA 2004; *see also Wolford v. Lasater*, 1999–NMCA–024, ¶ 18, 126 N.M. 614, 973 P.2d 866 (stating that issues raised but unsupported by cited authority will not be reviewed on appeal). The cases that Parents do rely upon are not helpful. The cases are factually distinct from this case, and Parents' argument was not addressed by the cases. *See City of Sunland Park v. Paseo Del Norte Ltd. P'ship*, 1999–NMCA–124, ¶ 7, 128 N.M. 163, 990 P.2d 1286 (stating that an opinion should not be used as authority for a proposition not explicitly addressed in the opinion).

{25} Nevertheless, this contention was addressed in *State v. C.J.*, 148 Wash.2d 672, 63 P.3d 765 (2003) (en banc), in a manner which we find to be persuasive. The Court distinguished between the two concepts as follows:

> The different standards for determining testimonial competency and the reliability of an out of court statement are justifiably tailored to satisfy different purposes. The trial setting requires that a witness give reliable testimony and fully participate in cross examination, thus the witness' ability to distinguish truthful statements from false statements, and knowledge of his sworn obligation to tell the truth, is paramount. On the other hand, hearsay exceptions necessarily contemplate that the

> declarant's perception, memory, and credibility will not be explored through the use of cross examination. Instead, the trial court must find that the circumstances surrounding the making of the statement render the statement inherently trustworthy.

Id. at 771, 63 P.3d 765. We are in agreement with the Court in *C.J.* that a determination that a child witness is incompetent to testify at the time of trial would not "resolve the question whether an out of court statement by a child is admissible if the statement is reliable." *Id.* at 770, 63 P.3d 765. Admissibility would not "depend on whether the child is competent to take the witness stand, but on whether the comments and circumstances surrounding the statement indicate it is reliable." *Id.* at 771, 63 P.3d 765. In this case, the children's court found that the circumstances surrounding the Child's statements made them trustworthy.

{26} Moreover, in this case, the Child's statements regarding sexual abuse were offered under Rule 11–803(X), and neither Parent objected at the adjudicatory hearing to the use of Rule 11–803(X). Under Rule 11–803, unavailability of the declarant is immaterial to the introduction of evidence under exceptions to the rule against hearsay. Statements that meet the requirements of the hearsay exceptions are not excluded by the hearsay rule, even though the declarant is available as a witness. *See generally* 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 807 (Joseph M. McLaughlin ed., 2d ed.2004) (discussing Fed.R.Evid. 807 which combined the former federal catchall exceptions, Rule 803(24) (availability of declarant immaterial) and Rule 804(b)(5) (declarant unavailable) and which now permits trustworthy statements, regardless of the availability of the declarant); *see also Tartaglia v. Hodges,* 2000–NMCA–080, ¶ 9, 129 N.M. 497, 10 P.3d 176 (stating that because the declarants were deceased, the appropriate hearsay rule for admitting their testimony was Rule 11–804(B)(5) rather than Rule 11–803(X), but recognizing that the point was inconsequential because the requirements of the catchall exceptions are identical).

{27} A similar argument was addressed by the United States Supreme Court in *Wright,* in which the Court noted that it had previously refused to create a rule barring the admission of prior hearsay statements made by a declarant "who is unable to communicate to the jury at the time of trial." 497 U.S. at 825, 110 S.Ct. 3139. The Supreme Court observed that "[a]lthough such inability might be relevant to whether the earlier hearsay statements possessed particularized guarantees of trustworthiness, a *per se* rule of exclusion would not only frustrate the truth-seeking purpose of the Confrontation Clause, but would also hinder States in their own 'enlightened development in the law of evidence.'" *Id.* (citation omitted). The Supreme Court concluded that "[o]ut-of-court statements made by children regarding sexual abuse arise in a wide variety of circumstances, and we do not believe the Constitution imposes a fixed set of procedural prerequisites to the admission of such statements at trial." *Id.* at 818, 110 S.Ct. 3139. We find no error on the part of the children's court.

B. Rule 11–803(D): Statements for Medical Diagnosis or Treatment

{28} The testimony of the licensed All Faiths program therapist who was providing therapy to the Child was also offered under Rule 11–803(D) which deals with statements made for purposes of medical diagnosis or treatment. As a preliminary matter, we note that the only objection raised by Parents at the adjudicatory hearing went to the application of the Rule. Parents argued that a medical expert should not be allowed to identify the perpetrator of the abuse. On appeal, Parents raise for the first time a number of additional objections to the admission of the program therapist's statement under Rule 11–803(D). Because these objections were not raised below, they were not preserved, and, accordingly, we do not consider them. *See* Rule 1–046 NMRA 2004; *Madrid v. Roybal,* 112 N.M. 354, 356, 815 P.2d 650, 652 (Ct.App.1991) (stating that the primary purpose of the preservation rule is to alert the district court to the claimed error so that the court has an opportunity to correct it).

{29} Rule 11–803(D) provides for the admission of statements made for purposes of medical diagnosis or treatment under the following circumstances:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

{30} In *State v. Altgilbers,* this Court adopted an approach that had been articulated by Justice Powell in *Morgan v. Foretich,* 846 F.2d 941, 950–53 (4th Cir.1988) (Powell, J., concurring in part and dissenting in part), writing about Federal Rule of Evidence 803(4) which is identical to our Rule 11–803(D). *Altgilbers,* 109 N.M. 453, 458, 786 P.2d 680, 685 (Ct.App.1989). Under that approach the hearsay exception for statements made for medical diagnosis or treatment would apply " 'so long as the statements made by an individual were relied on by the physician in formulating his opinion.' " *Id.* at 458–59, 786 P.2d at 685–86 (quoting *Morgan,* 846 F.2d at 952). In *Altgilbers,* this Court upheld the admission of the sexual abuse victim's statement to medical personnel identifying the perpetrator because the identification was important to diagnosis and treatment. *Id.* at 457–60, 786 P.2d at 684–87. "In dealing with child sexual abuse . . . disclosure of the perpetrator may be essential to diagnosis and treatment." *Id.* at 459, 786 P.2d at 686. "Statements revealing the identity of the child abuser are 'reasonably pertinent' to treatment because the physician must be attentive to treating the child's emotional and psychological injuries, the exact nature and extent of which often depend on the identity of the abuser." *United States v. Joe,* 8 F.3d 1488, 1494 (10th Cir.1993). In another case involving child sexual abuse, *United States v. Renville,* 779 F.2d 430, 437–38 (8th. Cir.1985), the Eighth Circuit noted two reasons why the identity of a perpetrator is pertinent to diagnosis in a child sexual abuse case. First, a proper diagnosis of a child's psychological problems resulting from sexual abuse or rape will often depend on the identity of the abuser. Second, information that a child sexual abuser is a member of the patient's household is reasonably pertinent to a course of treatment that includes removing the child from the home. *Id.* at 438.

{31} This Court has previously held that in a civil children's court action, "if the State establishes a foundation that the identity of the perpetrator was 'reasonably pertinent' for medical diagnosis or treatment, the children's court may admit hearsay testimony identifying a perpetrator under Rule 11–803(D)." *In re Esperanza M.,* 1998–NMCA–039, ¶ 15, 124 N.M. 735, 955 P.2d 204. In this case, the program therapist from All Faiths testified to the importance of the identity of the perpetrator. She stated that the purpose of her therapy sessions with the Child was for diagnosis and treatment and that, in order to properly treat a child sexual abuse victim, it was essential to know the identity of the abuser. The Child's statements about the sexual abuse were of the type upon which medical personnel reasonably rely in treatment or diagnosis and meet the standards for admission set forth in Rule 11–803(D). The children's court did not abuse its discretion in admitting the Child's statements to the All Faiths program therapist.

{32} In *In re Esperanza M.,* this Court observed that "[t]here is support for the broadening of [Rule 11–803(D)] in child abuse cases to embrace statements identifying abusers and describing their acts because such cases involve abuse victims who talk to psychologists and social workers." 1998–NMCA–039, ¶ 20, 124 N.M. 735, 955 P.2d 204 (quoted authority and quotation marks omitted). This Court did not reach the decision of whether Rule 11–803(D) would apply to the testimony of social workers because, in that case, a proper foundation for the admission of the social worker's testimony on that basis had not been laid. *Id.* In this case, however, the requisite foundation has been established: the program therapist, who is a licensed master social worker, was accepted as an expert on treatment, and she testified

that the identity of the perpetrator was pertinent to her treatment of the Child. We believe that recognition of the role licensed social workers play in providing treatment to victims of child abuse and neglect, as well as to others, would be consistent with the Legislature's recognition of the professional nature of their services. *See* NMSA 1978, § 61–31–1 (1989); NMSA 1978, § 61–31–24 (1989). As the United States Supreme Court recognized:

> Today, social workers provide a significant amount of mental health treatment. Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, but whose counseling sessions serve the same public goals. Perhaps in recognition of these circumstances, the vast majority of States explicitly extend a testimonial privilege to licensed social workers.... Drawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose.

Jaffee v. Redmond, 518 U.S. 1, 15–17, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996) (quoted authority and quotation marks omitted). We conclude that the children's court properly admitted the testimony of the licensed social worker under Rule 11–803(D).

C. Due Process

{33} Parents contend that the admission of the Child's hearsay statements violated their due process rights. At the adjudicatory hearing, they relied upon the confrontation clause to argue that admission of the Child's hearsay statements would violate their constitutional right to confront the witness against them. *See* U.S. Const. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...."). On appeal, Parents acknowledge that the confrontation clause does not apply in civil cases. *See In re Esperanza M.,* 1998–NMCA–039, ¶ 15, 124 N.M. 735, 955 P.2d 204 (observing that in civil cases, Rule 11–803 provides the threshold requirements for the admission of hearsay but that in criminal cases, admissibility is also subject to the limits of the Confrontation Clause); *accord Altgilbers,* 109 N.M. at 460, 786 P.2d at 687 (distinguishing between admission of statements under Rule 11–803(D) in civil and criminal cases). They now contend instead that the admission of the Child's statements violated their right to due process under both the federal and state constitutions because they were not able to confront the witness against them, the Child. Although Father mentioned the New Mexico Constitution in the motion in limine to the children's court, neither Parent has argued on appeal that the New Mexico Constitution provides greater protection than the United States Constitution. *See State v. Gomez,* 1997–NMSC–006, ¶¶ 22–23, 122 N.M. 777, 932 P.2d 1 (discussing the standard for preserving state constitutional claims for appellate review). We therefore review these claims under the federal constitution.

{34} In *Mathews v. Eldridge,* 424 U.S. 319, 334–35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the United States Supreme Court adopted a flexible balancing test to determine whether an individual has been afforded due process. *See also Mafin M.,* 2003–NMSC–015, ¶ 19, 133 N.M. 827, 70 P.3d 1266; *State ex rel. Children, Youth and Families Dep't v. Anne McD.,* 2000–NMCA–020, ¶ 18, 128 N.M. 618, 995 P.2d 1060. The three factors to be weighed in the balancing test are (1) the private interest; (2) whether the procedures used increased the risk of an erroneous deprivation of that interest and whether additional safeguards would lower that risk; and (3) the government's interest. *Mathews,* 424 U.S. at 335, 96 S.Ct. 893. In an abuse and neglect case, the parents' interest in the relationship with their child is the private interest. As to the government's interest, "[t]he State has an equally significant interest in protecting the welfare of children." *Mafin M.,* 2003–NMSC–015, ¶ 20, 133 N.M. 827, 70 P.3d 1266. In balancing the parents' interests and the government's interest, the second prong of the *Mathews* test is frequently the determinative factor. *Id.*

{35} On appeal, Parents contend that there was a high risk of error in the

proceedings because the Child did not testify at the adjudicatory hearing. Notwithstanding, at the adjudicatory hearing neither Parent called for the Child to testify or requested the children's court to explore alternative procedures for the Child's testimony. Parents now assert that having the Child testify in a less formal setting than that of the courtroom might have decreased any risk of error. Under *Mathews*, the purpose of any additional procedures is to reduce the risk of an erroneous decision. 424 U.S. at 335, 96 S.Ct. 893. It is not clear from the record that having the Child testify would have increased the reliability of the outcome. The Child's therapist expressed serious reservations about the prospect and also stated that it was questionable whether the Child would talk about the abuse in such a setting. *See D.R.*, 537 A.2d at 673 (concluding that "a child victim's spontaneous out-of-court account of an act of sexual abuse may be highly credible because of its content and the surrounding circumstances" and noting that, in contrast, "the reliability of in-court testimony of a young child victimized by a sexual assault is often affected by the stress of the courtroom experience, the presence of the defendant, and the prosecutor's need to resort to leading questions").

{36} Rule 11–803(D) and Rule 11–803(X) require hearsay statements to have guarantees of reliability before they can be admitted. The exceptions to the hearsay rules themselves "are designed to facilitate the admission of probative evidence and, at the same time, to minimize the risks of unreliability." *Nick*, 604 F.2d at 1203. As the *Wright* Court stated in discussing the relationship of hearsay statements and the confrontation clause, "if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial." *Wright*, 497 U.S. at 820, 110 S.Ct. 3139.

{37} After reviewing the procedures used at the adjudicatory hearing, we conclude that Parents' rights to procedural due process were not violated. Parents received proper notice of CYFD's intent to use the Child's statements. They were each represented by able attorneys who argued vigorously on their behalf and carefully cross-examined CYFD's witnesses about the reliability and credibility of the Child's statements, and a guardian ad litem had been appointed for the Child. The children's court, aware of Parent's objections, initially admitted the witnesses' testimony about the hearsay statements conditionally. At the close of evidence, the court was satisfied that the statements were reliable and admitted them. The children's court concluded the hearsay statements possessed the required reliability, and we have affirmed the court's decision to admit the statements. Finally, the children's court determined that there was clear and convincing evidence to support the amended petition before it held that the Child was abused and neglected under Section 32A–4–2(B)(3) and (4) and Section 32A–4–2(E)(3). The admission of the Child's statements did not violate Parents' constitutional rights to due process.

D. Sufficiency of the Evidence

{38} Mother also contends that there was insufficient evidence to support the children's court determination that the Child was a neglected child under Section 32A–4–2(E)(3). This section of the children's code defines a neglected child as one who was physically or sexually abused "when the child's parent ... knew or should have known of the abuse and failed to take reasonable steps to protect the child from further harm[.]" Section 32A–4–2(E)(3). Mother bases part of her sufficiency claim on the assumption that the children's court erred in admitting the Child's hearsay statements. Because we have determined that the children's court did not err in admitting the statements, we do not consider this aspect of her claim. Mother also appears to argue that even if the Child's hearsay statements were properly admitted, the statements, as the sole evidence presented of sexual abuse, would still be insufficient to support the conclusion of the children's court. We disagree with Mother's assessment of the merits of the hearsay statements and also note that the hearsay statements were not the only evidence presented. The children's court heard non-hearsay testimony about the

Child's sexualized and aggressive behavior as well testimony that those behaviors were consistent with PTSD. The remaining part of Mother's insufficiency claim is based on an attempt to shift responsibility for the sexual abuse from Father and Mother to "someone in one of [the Child's] foster placements." She asserts that "there are two absolutely equal inferences" to be drawn from the Child's statements. Even if we were to credit this blame-shifting assertion, which we do not, Mother's argument is inapt. On appeal, this Court does not reweigh the evidence but rather views the evidence in the light most favorable to the decision below in reviewing whether there was clear and convincing evidence. *In re Termination of Parental Rights of Eventyr J.*, 120 N.M. 463, 466, 902 P.2d 1066, 1069 (Ct.App.1995). "An appellate court does not evaluate the evidence to determine whether some hypothesis could be designed which is consistent with a finding of innocence." *State v. Sutphin*, 107 N.M. 126, 130–31, 753 P.2d 1314, 1318–19 (1988). The record in this case supports the children's court determination that the Child had been sexually abused by Father and that Mother had failed to protect her from that abuse. *See* Section 32A4–2(B)(3), (4); Section 32A–4–2(E)(3).

E. Jurisdiction

{39} Although both parties in this case operate under the assumption that we have jurisdiction over what is a final order, we feel compelled to discuss the issue. After this case was assigned to the general calendar, the Court assigned a number of other abuse and neglect cases to the general calendar and directed those parties to brief two questions in addition to the issues being raised by the parties. The questions raised by the Court were (1) whether a judgment adjudicating a child as being abused and neglected is a final order for purposes of appeal and (2) what effect an appeal in a abuse and neglect case has on the jurisdiction of the children's court to proceed with the case below. Although the parties to this appeal were not asked to address these questions, we nevertheless take this opportunity to resolve the questions because this Court would not have jurisdiction to hear an appeal from a non-final order. *Collier v. Pennington*, 2003–NMCA–064, ¶ 7, 133 N.M. 728, 69 P.3d 238. We conclude that because an adjudication of abuse and neglect finds the factual predicates for further action by CYFD and for orders by the children's court as the case progresses through subsequent stages, it is a sufficiently final order for purposes of appeal to this Court. We also determine that the children's court has jurisdiction to proceed with the case while the abuse and neglect adjudication is on appeal.

{40} The general rule in New Mexico for determining the finality of a judgment is whether "all issues of law and fact have been determined and the case disposed of by the trial court to the fullest extent possible." *Kelly Inn No. 102, Inc. v. Kapnison*, 113 N.M. 231, 236, 824 P.2d 1033, 1038 (1992) (quoted authority and quotation marks omitted). Although *Kelly Inn* was not dealing with this kind of case, we believe the questions presented in that case were sufficiently analogous for us to rely upon the principles expressed by our Supreme Court for guidance in resolving the questions presented to this Court. In determining finality for purposes of appeal, we are to look to the substance of the judgment, *id.*, keeping in mind a policy of facilitating meaningful and efficient appellate review of issues that affect important rights, *id.* at 240, 824 P.2d at 1042.

{41} The Abuse and Neglect Act, NMSA 1978, §§ 32A–4–1 to –4–33 (1993, as amended through 2003), provides a comprehensive structure for dealing with the circumstances in which a parent may have abused and/or neglected a child. An abuse and neglect action begins when CYFD files a petition with the children's court containing the factual basis of the action. NMSA 1978, § 32A–1–11 (1993). At the adjudicatory hearing on the petition, the court must determine if the allegations in the petition are admitted or denied. Section 32A–4–20(G) (1999). If the allegations are denied, the court conducts a full evidentiary hearing and then makes findings as to whether the child is an abused and/or neglected child. *Id.* Within the structure of the Children's Code, by the conclusion of the adjudication hearing, the court has resolved all issues of law and fact before it to the fullest extent possible. It is evident that the adjudication affects important rights-an abuse and neglect case must bal-

ance the parents' interest in their relationship with the child and the State's equally significant interest in protecting the welfare of children. *See Mafin M.*, 2003–NMSC–015, ¶ 20, 133 N.M. 827, 70 P.3d 1266. Additionally, the general provisions of the Children's Code provide for appeals from a judgment of the children's court to this Court. *See* Section 32A–1–17. The statute states that "[i]f the order appealed from grants the legal custody of the child to or withholds it from one or more of the parties to the appeal, the appeal shall be heard at the earliest practicable time." Section 32A–1–17(B). We thus conclude that an abuse and neglect adjudication is a final, appealable order.

{42} While an appeal of an abuse and neglect adjudication is pending, the children's court has jurisdiction to take further action in the case under Section 32A–1–17(B) which states that an appeal to this Court "does not stay the judgment appealed from." The Abuse and Neglect Act provides for additional services by CYFD and further hearings by the court to monitor the actions of CYFD, the well-being of the child, and the progress of the parent. *See, e.g.*, § 32A–4–20; § 32A–4–21; § 32A–4–25. We are in agreement with the briefs presented to the Court that the further hearings conducted by the children's court after the adjudicatory hearing are essential to protect both the rights of the parent and the child.

III. CONCLUSION

{43} We conclude that this Court has jurisdiction to hear this appeal. The children's court did not abuse its discretion when it found that the Child's hearsay statements possessed equivalent guarantees of trustworthiness and admitted them under Rule 11–803(D) and Rule 11–803(X). The admission of this evidence did not violate Parents' due process rights. Accordingly, we affirm the judgment of the children's court.

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

WECHSLER, C.J. and KENNEDY, J., concur.

2005-NMCA-032

108 P.3d 558

Darryl LEWIS, Petitioner–Appellant,

v.

The CITY OF SANTA FE, and Wal–Mart Stores, Inc., Respondents–Appellees.

No. 23,849.

Court of Appeals of New Mexico.

Jan. 27, 2005.

Barry Green, Santa Fe, NM, for Appellant.

Bruce Thompson, City Attorney, Santa Fe, NM, for Appellee City of Santa Fe.

Frank T. Herdman, Brenden J. Murphy, Rubin Katz Law Firm, P.C., Santa Fe, NM, for Appellee Wal–Mart Stores, Inc.

OPINION

KENNEDY, Judge.

{1} Petitioner Darryl Lewis filed an appeal with the district court seeking review of an administrative action of the City of Santa Fe (the City), by which Wal–Mart Stores, Inc., (Wal–Mart) was authorized to develop a gasoline filling station on one of its existing properties. The district court dismissed the appeal on grounds that it constituted an impermissible collateral attack on a preexisting judgment. We granted Petitioner's petition for writ of certiorari. We reverse and remand for further proceedings.

BACKGROUND

{2} Wal–Mart operates a Sam's Club store in Santa Fe. In February 2001, Wal–Mart sought permission from the City to increase the intensity of use at that location by erecting an unmanned gasoline filling station in the parking lot to serve its members. After gathering information from a variety of sources, the City's Planning Commission denied the application. Wal–Mart then appealed to the City Council. The City Council reviewed the recommendations of the Planning Commission, conducted a public hearing, and denied Wal–Mart's appeal in October 2001.

{3} Dissatisfied with the City's decision, Wal–Mart appealed to the district court. Shortly thereafter, the City and Wal–Mart reached a settlement of the suit in which the City agreed to approve the gasoline filling station, subject to certain conditions. In an executive session without a public hearing and without public comment, the City Council then voted to approve the settlement agreement and the proposed development on February 27, 2002. Petitioner filed a timely appeal with the district court alleging in part that while the development was first disapproved after a public hearing at which he spoke against it, "[t]here was no public meeting" and "[n]o public comment was allowed" when the City subsequently approved the development on February 27, 2002, although "there was no significant change in the application." Petitioner therefore alleged in his appeal that the City's approval of the development was arbitrary, capricious, not in accordance with law, and not supported by substantial evidence. *See* NMSA 1978, § 3–21–9 (1999) (providing for an appeal by a person aggrieved by a decision of the zoning authority); NMSA 1978, § 39–3–1.1 (2004) (setting forth the procedure for such an appeal).

{4} After Petitioner filed the foregoing appeal, the district court entered a stipulated order of dismissal in Wal–Mart's appeal on March 18, 2002. It recites that the City and Wal–Mart have resolved and settled Wal–Mart's appeal pursuant to a settlement agreement and then orders, "that this matter be, and hereby is, dismissed pursuant and subject to the terms and provisions of the [Settlement] Agreement."

{5} Shortly after the stipulated dismissal was entered, Wal–Mart intervened in Petitioner's administrative appeal to the district court. Wal–Mart then filed a motion to strike Petitioner's appeal, and the City filed a similar motion to dismiss. After a hearing, the district court granted the motions and dismissed Petitioner's appeal on the specific, limited ground that Petitioner's appeal constituted an impermissible collateral attack on the order of March 18, 2002. Petitioner timely filed a petition for writ of certiorari with this Court, seeking review of the district court's ruling.

STANDARD OF REVIEW

{6} This Court reviews district court decisions in administrative appeals under an administrative standard of review. *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n,* 2003–NMSC–005, ¶¶ 16–17, 133 N.M. 97, 61 P.3d 806. Generally speaking, we "conduct the same review of an administrative order as the district court sitting in its appellate capacity, while at the same time determining whether the district court erred in the first appeal." *Id.* ¶ 16. In this case, we apply the latter portion of this standard, insofar as we are called upon to

review the district court's dismissal of the appeal. "A decision to grant summary judgment on preclusion principles is reviewed under a de novo standard." *Apodaca v. AAA Gas Co.*, 2003–NMCA–085, ¶ 76, 134 N.M. 77, 73 P.3d 215.

DISCUSSION

Preclusive Effect of the Stipulated Dismissal and Settlement Agreement

{7} The order of dismissal that we review here is premised on the district court's determination that Petitioner's administrative appeal should be characterized as an impermissible collateral attack on the March 18, 2002, order. This is the exclusive subject of our review. *See Vill. of Angel Fire v. Wheeler*, 2003–NMCA–041, ¶ 9, 133 N.M. 421, 63 P.3d 524 (observing that in the context of administrative appeals, it is generally inappropriate for this Court to rule on issues that the district court has not passed upon).

{8} Petitioner's pleadings, including the notice of administrative appeal and the statement of appellate issues, make clear that Petitioner seeks to challenge the City's official decision on February 27, 2002, to approve the development of a filling station at the Sam's Club location. This constitutes a statutorily authorized, direct attack on a land use decision by the City under Section 31–2–9. *See also* § 3–19–8; § 3–21–9; § 39–3–1.1 (providing for an appeal to the district court by any person in interest dissatisfied with an order or determination of a planning commission after review of the order or determination by the governing body of the municipality). Although the City, Wal–Mart, and the dissent assert that Petitioner was required to intervene in the litigation between them in order to protect his right to challenge the development, they cite no New Mexico authority to support this position, and we decline any invitation to create such authority here. We fail to see how Petitioner's statutory right to seek review of the City's land use decision should be defeated by the subsequent execution of a private settlement agreement and the entry of a stipulated order of dismissal.

The Dismissal Based Upon the Settlement Agreement is Not an Order Entitled to Preclusive Effect

{9} The City and Wal–Mart contend that Petitioner's appeal should be regarded as an impermissible collateral attack on the order of the district court by which Wal–Mart's lawsuit against the City was dismissed because the order specifically references the settlement, and because the settlement contains the terms of the very development agreement that Petitioner seeks to overturn. We are unpersuaded for several reasons.

{10} First, we do not regard Petitioner's administrative appeal as a collateral attack. A collateral attack is "an attempt to avoid, defeat, or evade [a judgment], or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking" the judgment. *Lucus v. Ruckman*, 59 N.M. 504, 509, 287 P.2d 68, 72 (1955) (internal quotation marks and citation omitted), *overruled on other grounds by Kalosha v. Novick*, 84 N.M. 502, 504, 505 P.2d 845, 847 (1973). In this case, all that is at issue is a stipulated order of dismissal. Petitioner's appeal from the development decision of the City Council does not in any way seek to "avoid, defeat, or evade" the stipulated order of dismissal. Instead, it seeks review of the substantive acts undertaken by the City making a zoning decision to secure the dismissal.

{11} The City and Wal–Mart urge that Petitioner's appeal represents a collateral attack on the settlement between them, insofar as Petitioner seeks a reversal of the development agreement contained therein. The jurisprudence pertaining to collateral attacks pertains to judgments and other adjudications. *See, e.g., Hanratty v. Middle Rio Grande Conservancy Dist.*, 82 N.M. 275, 276, 480 P.2d 165, 166 (1970) (holding that a party could not collaterally attack a default judgment obtained against him in a foreclosure action); *City of Socorro v. Cook*, 24 N.M. 202, 212, 173 P. 682, 685 (1918) (holding that a judgment as to the title in a prior litigation was not subject to collateral attack); *Dugan v. Montoya*, 24 N.M. 102, 115, 173 P. 118, 122 (1918) (observing that judgments evidenced

by patents are immune from collateral attack); *VanderVossen v. City of Espanola*, 2001–NMCA–016, ¶¶ 17–21, 130 N.M. 287, 24 P.3d 319 (applying the bar against collateral attacks in regard to a municipal authority's final zoning decision); *Sanders v. Estate of Sanders*, 122 N.M. 468, 469, 927 P.2d 23, 24 (Ct.App.1996) (holding that an attempt to set aside a divorce decree constituted an impermissible collateral attack); *Royal Int'l Optical Co. v. Tex. State Optical Co.*, 92 N.M. 237, 241, 586 P.2d 318, 322 (Ct.App.1978) (holding that a judgment establishing a party's exclusive right to use a trade name was not subject to collateral attack). It has no application to contractual relationships. It is well established in this state that settlements and judgments entered by the consent of the litigants essentially represent contractual agreements. *See Owen v. Burn Const. Co.*, 90 N.M. 297, 299, 563 P.2d 91, 93 (1977) (observing that "a stipulated judgment is not considered to be a judicial determination; rather it is a contract between the parties") (internal quotation marks and citation omitted); *Pope v. The Gap, Inc.*, 1998–NMCA–103, ¶ 18, 125 N.M. 376, 961 P.2d 1283 (holding that a consent judgment is essentially a contract).

{12} Had the stipulated dismissal meaningfully incorporated the settlement, Petitioner's appeal might have constituted an indirect attack on the district court's order. *See, e.g., Sanders*, 122 N.M. at 469, 927 P.2d at 24 (addressing an attempt "to set aside a property settlement agreement that was merged into a divorce decree"). However, the district court's order merely references the settlement agreement. Nothing in the order suggests that the district court independently evaluated the validity of the settlement agreement or passed upon the propriety of the City's development decision. *Cf. State ex rel. Martinez v. Kerr–McGee Corp.*, 120 N.M. 118, 122, 898 P.2d 1256, 1260 (Ct. App.1995) (observing that it would be "unfair to presume prior determination of an issue from the mere fact of settlement when the contrary may more likely be true"). We regard this seemingly technical distinction as something of substantive import.

{13} As an approval of no more than a stipulation to dismiss because of a settlement agreement, the district court order does not represent an adjudication of rights that is entitled to preclusive effect. *Cf. Sanchez v. Saylor*, 2000–NMCA–099, ¶¶ 24–25, 129 N.M. 742, 13 P.3d 960 (holding that a bankruptcy court's approval of sale did not bar a subsequent action for conversion; because the matter under consideration was not actually litigated in the bankruptcy proceedings, the action for conversion did not constitute an impermissible collateral attack on a federal judgment). In other words, the nature of Wal–Mart's suit was to appeal the City's zoning decision against it. The subsequent stipulated order of dismissal did not determine the rights of the parties with regard to the substance of that underlying dispute.

{14} Finally, even if we were to assume that the stipulated dismissal meaningfully incorporated the settlement agreement, such that Petitioner's appeal represented a collateral attack on an adjudication, our authorities indicate that Petitioner's action still would not be barred. Our review of the published case law has revealed that in the past, judgments entered by the consent of the parties and upon stipulations have only been regarded as immune from collateral attack by the parties themselves, or those in privity with them. *See Myers v. Olson*, 100 N.M. 745, 748, 676 P.2d 822, 825 (1984) ("Properly authorized and acknowledged consent judgments and judgments rendered on stipulations are conclusive of all claims determined therein and may not be collaterally attacked by the parties thereto."); *Johnson v. Aztec Well Servicing Co.*, 117 N.M. 697, 700, 875 P.2d 1128, 1131 (Ct.App.1994) (observing that a judgment entered by consent pursuant to a settlement "is not subject to collateral attack by a party or a person in privity, and it bars a second suit on the same claim or cause of action") (internal quotation marks and citation omitted).

{15} Accordingly, to the extent that Petitioner's administrative appeal could be characterized as a collateral attack on the stipulated dismissal and settlement, the propriety or impropriety of the attack would turn upon Petitioner's status as a party to

the litigation or a person in privity with a party. It is undisputed that Petitioner was not a party to the litigation between the City and Wal-Mart. "A person in privity with another is a person so identified in interest with another that he represents the same legal right." *Bentz v. Peterson*, 107 N.M. 597, 600, 762 P.2d 259, 262 (Ct.App.1988). Generally speaking, governmental agencies are only said to be in privity with private individuals to the extent that the entity "acts on behalf of an individual claimant and seeks individual relief." *Rex, Inc. v. Manufactured Hous. Comm.*, 119 N.M. 500, 509, 892 P.2d 947, 956 (1995). In this case, the City's involvement in the prior litigation with Wal-Mart could not be characterized as action on behalf of any individual. Had the City stood by its initial decisions to reject Wal-Mart's development plan, it might have been "identified in interest" with Petitioner, who has consistently registered opposition to the proposed development. However, in the brief course of the litigation with Wal-Mart, the City reversed its position. This position had resulted from full administrative consideration by its Planning Council. When Wal-Mart appealed, the City Council also gave it due consideration before it denied Wal-Mart's appeal. By settling the case and opting to permit Wal-Mart to move forward with the development in order to obtain a rapid resolution on terms that it came to find acceptable, the City made another zoning decision without this full process. Because the City could not be said to have acted on Petitioner's behalf, and because Petitioner's interests have proven demonstrably dissimilar from the City's, we conclude that Petitioner was not in privity with the City.

{16} We reiterate that Petitioner had the statutory right to appeal a zoning decision pursuant to Section 3-19-8, which states: "Any person in interest dissatisfied with an order or determination of the planning commission, after review of the order or determination by the governing body of the municipality, may commence an appeal in the district court pursuant to the provisions of Section 39-3-1.1." By reversing its course, the City determined an issue, and Petitioner had the right to appeal its decision.

{17} In summary therefore, we conclude that the district court erred in ruling that Petitioner's administrative appeal constitutes an impermissible collateral attack on the stipulated order of dismissal.

Alternative Bases for Affirmance Also Fail

{18} The City and Wal-Mart urge this Court to consider alternative bases for affirmance. First, we address their contention that the challenged action is essentially legislative in nature rather than quasi-judicial, such that it should not be subject to administrative review. As the preceding analysis suggests, we reject this characterization. Although the approval of a settlement agreement is superficially at issue, Petitioner's challenge is directed at the underlying decision to permit the proposed development to proceed. Both the minutes of the February 27, 2002, City Council meeting and the settlement agreement clearly reflect that a development decision pertaining to the Sam's Club property was made. Such site-specific development determinations are properly classified as quasi-judicial in nature. *See W. Old Town Neighborhood Ass'n v. City of Albuquerque*, 1996-NMCA-107, ¶ 11, 122 N.M. 495, 927 P.2d 529 (holding that a zoning decision pertaining to a specific property is not a legislative act, but is rather quasi-judicial in nature). The fact that the City's quasi-judicial development decision is embedded in a settlement agreement does not immunize it from review.

{19} The City and Wal-Mart further contend that Petitioner lacks standing to pursue an administrative appeal. However, the district court did not dismiss on this basis, nor did it pass upon the matter. As a result, the question of standing is not properly before us. *See Mitchell v. City of Santa Fe*, 99 N.M. 505, 507-08, 660 P.2d 595, 597-98 (1983).

{20} Finally, the City and Wal-Mart argue that Petitioner should be prevented from proceeding with an administrative appeal under Rule 1-074 NMRA because the record is inadequate, and because they will be prevented from marshalling and present-

ing pertinent evidence. However, we are aware of no authority for the proposition that an appeal should be denied altogether because one of the parties regards the procedures to be unduly limiting. In any event, should it prove helpful, the district court is at liberty to remand for the purpose of creating a record that is adequate for review. *See Martinez v. N.M. Tax. & Rev. Dep't,* 117 N.M. 588, 589, 874 P.2d 796, 797 (Ct.App. 1994); *Littlefield v. State ex rel. Tax. & Rev. Dep't.,* 114 N.M. 390, 394, 839 P.2d 134, 138 (Ct.App.1992). In this regard, we note two germane points. First, the district court's review of the City's decision pursuant to statute is governed in its scope by Section 39–3–1.1, which plainly delineates the factors a district court may properly consider in such an appeal. *See Hart v. City of Albuquerque,* 1999–NMCA–043, ¶ 15, 126 N.M. 753, 975 P.2d 366 ("The procedure for district court review of zoning decisions under both Section 3–21–9 and Section 3–19–8 ... now follow [Section 39–3–1.1] for obtaining court review of an agency's decision."). Second, if the record is insufficient to consider these factors, (i.e., whether the municipality acted fraudulently, arbitrarily or capriciously, without substantial evidence, or in accordance with the law) it could well be related to the City's decision to handle discussion of the settlement agreement in an executive session. In such a case, the district court, as we mentioned above, can remand for creation of an adequate record.

Advisory Issues

{21} Petitioner invites this Court to issue rulings on a number of additional questions, including: (1) whether the record on appeal should include the record of all proceedings pertaining to the proposed gasoline filling station; (2) whether Petitioner's due process rights were violated; (3) whether the City engaged in impermissible contract zoning; and (4) whether the City's decision was arbitrary, capricious, unsupported by substantial evidence, not in accordance with law, or beyond the scope of its authority. We decline the invitation to rule on these issues, on grounds that the district court did not pass upon any of them. *See Ramirez v. City of Santa Fe,* 115 N.M. 417, 418–19, 852 P.2d 690, 691–92 (Ct.App.1993) (declining to address a number of issues presented in a zoning case, on grounds that the district court had not passed upon them, and on grounds that the courts do not issue advisory opinions).

{22} Likewise, we do not consider this case to have much to do with the price of gas in Santa Fe. As Councilor Martinez stated when the City Council voted, "[t]he misconception is that anybody can buy gas [at Sam's Club], but they won't be able to if they don't ... belong to Sam's Club."

CONCLUSION

{23} For the foregoing reasons, we conclude that the district court erred in determining that Petitioner's administrative appeal constitutes an impermissible collateral attack on a prior judgment. We therefore reverse and remand for further proceedings.

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

I CONCUR: MICHAEL E. VIGIL, Judge.

IRA ROBINSON, Judge (dissenting).

{25} My pursuit of justice takes me in a different direction than the majority in this case. I am, therefore, compelled to dissent.

{26} I would affirm the decision of the district court dismissing Petitioner's administrative appeal on the ground that it constituted an impermissible collateral attack on the stipulated order of dismissal in the previous case involving only the City and Wal–Mart. That previous case was dismissed in recognition of a settlement agreement reached between the City and Wal–Mart, which resolved and settled the issues in Wal–Mart's appeal. The majority says that the stipulated judgment is just a private contractual agreement such that the appeal is not a collateral attack upon an adjudication. I disagree. Furthermore, the majority admits that if "the stipulated dismissal [had] meaningfully incorporated the settlement, Petitioner's appeal might have constituted an indirect attack on the district court's order." The judgment or order of dismissal recited that the litigation was terminated "pursuant and subject to the terms and provisions of

the [Settlement] Agreement." The court waited three weeks after the City Council voted on February 24, 2002, to approve the settlement agreement. I am satisfied that there is little or no difference between the language in this judgment or order and those which "adopt" or "incorporate" a settlement agreement.

{27} The majority defines a collateral attack as "an attempt to avoid, defeat, or evade [a judgment], or deny its force and effect." *Lucus,* 59 N.M. at 509, 287 P.2d at 72 (internal quotation marks and citation omitted). The majority then contends that Petitioner's appeal from the development decision of the City Council does not in any way seek to "avoid, defeat, or evade" that dismissal. *Id.* I say, of course it does. That is precisely what Petitioner seeks to do. Furthermore, Petitioner certainly seeks to deny the "force and effect" of this dismissal pursuant to the settlement agreement. *Id.* That makes it an impermissible collateral attack.

{28} If Petitioner cared about this situation, he should have intervened in the previous case when Wal-Mart appealed it to the district court in Santa Fe. He was aware of it, but did nothing until he filed a second case—an administrative appeal—rather than join in the Wal-Mart/City appeal in district court. *Callaway v. Ryan,* 67 N.M. 283, 287, 354 P.2d 999, 1002 (1960) (stating piecemeal litigation is not favored by the courts and is the function of the trial court to rule on such matters initially); *see also M & G Engines v. Mroch,* 631 P.2d 1177, 1178 (Colo.Ct.App. 1981) (stating that separate action by third party was impermissible challenge to the disposition of a prior action where the third party had an opportunity to intervene).

{29} *Sanders v. Estate of Sanders,* 1996-NMCA-102, 122 N.M. 468, 927 P.2d 23, explains that recourse to collateral attack through an independent action is considered " 'a last ditch remedy' " and is "reserved for 'exceptional circumstances.' " *Id.* ¶ 16.

{30} Petitioner filed his administrative appeal with knowledge of the previous case and before the previous case had been dismissed. Rather than seeking to intervene, he filed an entirely separate action in which he was objecting to the manner in which the prior action was eventually settled. I do not assert that he was required to intervene. I say that he could have intervened.

{31} While I realize that under Section 3-19-8 "[a]ny person in interest dissatisfied with an order or determination of the planning commission . . . may commence an appeal," that is only part of what happened here. Petitioner is not just filing an appeal of a planning commission or City Council ruling. He is attacking another judgment of another court in another case. That is what makes it a collateral attack and the court was correct in dismissing it as improper and impermissible.

{32} Once the matter was appealed in the previous lawsuit by Wal-Mart, the City, as a party to the lawsuit, had the right to reach a settlement. It should not be any different than any other lawsuit. Public policy favors enforcement of settlement agreements. *Bd. of Educ. v. N.M. State Dep't of Pub. Educ.,* 1999-NMCA-156, ¶ 14, 128 N.M. 398, 993 P.2d 112; *Gonzales v. Atnip,* 102 N.M. 194, 195, 692 P.2d 1343, 1344 (Ct.App.1984).

{33} I reject Petitioner's contention that Wal-Mart requested rezoning. Article 14-3.5(A)(1) of the Santa Fe Land Development Code defines a "rezoning" as an "amendment to the zoning map." Santa Fe, N.M., Land Development Code art. 14, § 3.5(A)(1). Wal-Mart did not request an "amendment to the zoning map." *Id.* A gasoline station is a lawful use under the zoning that Wal-Mart already had.

{34} Nor does Article 14-3.5(D), § 3.5(A)(1) of the Santa Fe Land Development Code have any relevance as Petitioner suggests. That article deals with the possible rescission of a zoning map change (or "rezoning") if the property owner has failed to take certain steps to develop the property, such as development plan approval, applying for building permits, etc., within two years of the rezoning. *Id.* Wal-Mart requested an amendment to their existing development plan—not a zoning change—at their Sam's Club location to allow gas pumps.

{35} Petitioner also assumes, without explanation or citation to legal authority, that this Court can or should scrutinize the City

Council's reasons for approving the settlement agreement. In particular, Petitioner argues that "the Councilor's only concerns were the price of gasoline."

{36} The City Council could reasonably have concluded that there is a community good to be achieved by breaking the monopoly on inflated gasoline prices in Santa Fe, which has kept Santa Fe gasoline prices considerably higher than those in Albuquerque and other cities for a long time.

{37} The majority seems overly impressed with the fact that only Wal-Mart's Sam's Club members will be able to take advantage of lower gas prices at Sam's Club gas pumps. The reality is that there are lots of Sam's Club members in Santa Fe. That is the reason some people claimed to be concerned with an increase in traffic at the site.

{38} At present, all those Sam's Club members shop for gas at high-priced Santa Fe stations. It is unreasonable to believe that once Sam's Club lowers gas prices, the other stations will keep their prices high and not reduce them to be competitive. I am convinced that the City Council already figured out that this is the way to end unreasonably high gas prices in Santa Fe.

{39} The majority states that "[w]e do not consider this case to have much to do with the price of gas in Santa Fe." I think that is exactly what it is all about.

{40} The people of Santa Fe are entitled to the relief that the City Council proposes to give them.

{41} I respectfully dissent.

2005-NMSC-006

108 P.3d 1019

Jerry ARCHULETA, Petitioner–Respondent,

v.

SANTA FE POLICE DEPARTMENT, ex rel., CITY OF SANTA FE, Joanne Vigil Quintana, John Whitbeck, and Danielle Wilson, in their capacity as members of the Grievance Review Board of the City of Santa Fe, and The Grievance Review Board, Respondents–Petitioners.

No. 28,630.

Supreme Court of New Mexico.

Feb. 24, 2005.

Bruce T. Thompson, City Attorney, Mark L. Allen, Assistant City Attorney, Miller Stratvert, P.A., Paula G. Maynes, Santa Fe, NM, for Petitioners.

Comeau, Maldegen, Templeman & Indall, L.L.P., Joseph E. Manges, Santa Fe, NM, for Respondent.

Patricia A. Madrid, Attorney General, Albert Roland Fugere, Special Assistant Attorney General, John W. Wheeler II, Special Assistant Attorney General, Santa Fe, NM, for Amicus Curiae, New Mexico Department of Public Safety.

Serra, Garrity & Masiowski, L.L.C., Diane M. Garrity, Santa Fe, NM, for Amicus Curiae, New Mexico Association of Counties.

Michael Schwarz, Santa Fe, NM, for Amicus Curiae, New Mexico National Employment Lawyers' Association.

OPINION

MINZNER, Justice.

{1} The City of Santa Fe, on behalf of the Santa Fe Police Department (SFPD), appeals from a memorandum opinion issued by the Court of Appeals in which the court reversed the demotion of Jerry Archuleta, a Department employee, on grounds that he was denied due process in the administrative proceedings. *Archuleta v. Santa Fe Police Dep't.*, No. 23,445, —— P.3d —— (N.M.Ct. App. Apr. 5, 2004) (unpublished). The sole issue on appeal is whether it was error to deny Archuleta access to the disciplinary records of fellow police officers in his post-demotion hearing before the City's Grievance Review Board. We conclude that the denial of discovery was reasonable and did not deny Archuleta due process. We reverse the Court of Appeals and affirm the Board's decision.

I.

{2} Archuleta was hired by the SFPD in 1991 and promoted to lieutenant in October, 1999. On June 7, 2000, he was the highest ranking officer in charge of the "grave-yard" shift at the North Side Division. One of his officers who was on duty that night was Issac Valerio. At 11:03 p.m. Valerio was flagged down by Evelyn Romero who reported that her seven year-old son, Robbie Romero, had been missing since 5:00 p.m.[1] Valerio entered the child's information into a national registry but never issued a bulletin or advisory notice; he then searched for the child throughout most of the night without success until his shift ended at 6:30 a.m. Although Valerio searched for the child for nearly seven hours, Archuleta never asked him about the case, provided additional resources, or notified an on-call detective as required by the SFPD's regulations. Archuleta claimed he was not aware that the case involved a missing seven year-old until 4:30 a.m. on June 8, although there was evidence that this information was available to him at least twice during the night. Once he was aware of the situation, he did not take any action, even though a seven year-old had been missing for nearly twelve hours. Robbie was never found.

A.

{3} Two supervisors, Captains Leroy Lucero and Andrew Leyba, requested that Internal Affairs investigate whether Archuleta and Valerio had complied with SFPD regulations. On September 20, 2000, after conducting a taped interview with Valerio and Archuleta and reviewing dispatch tapes, one of the investigators issued a report, in which he found that Archuleta violated two SFPD regulations: Patrol Investigative Procedure 13.G—failing to notify a CID commander of the missing seven year-old child upon being made aware of the case; and Administrative Order A–25.1—failing to "adequately supervise and direct the activities of personnel assigned to him and properly inspect their work for effectiveness, efficiency and adherence to established policies and procedure." Valerio was not faulted for failing to issue a bulletin or notice, because he was never given a copy of SFPD directives and Archuleta did not have a copy available for his team office. Valerio was exonerated on the charge that he failed to notify Archuleta about the missing child; dispatch tapes verified that at 11:03 he advised dispatch that he was flagged down about a missing person, at 11:39 he told dispatch that he was searching for the "seven year-old," and at 1:52 a.m. he asked Archuleta permission to travel outside the jurisdiction to La Cienega to search for the "seven year-old."

{4} Captains Lucero and Leyba then recommended that Archuleta be demoted to the rank of sergeant and attend "first line supervisor training" as an appropriate disciplinary action. Archuleta received notice of his predetermination hearing, which was held and recorded on September 28. Archuleta, who was represented by counsel, testified and questioned witnesses at this hearing. The next day, Chief Denko notified Archuleta

1. Officer Valerio wrote in the incident report that the child was reported missing since 7:00 p.m. but testified that Mrs. Romero actually told him her son had been missing since 5:00 p.m.

that he was approving the disciplinary action and of his right to appeal that decision. Archuleta provided a written response to the Personnel Director and the City Manager indicating that the action was excessive and unfair in light of SFPD's progressive discipline policy, and he described three cases in which he alleged other officers received lesser or equal punishment for more serious infractions. Both officials notified Archuleta that, after reviewing his information, they concurred with the recommendation that he be demoted, effective November 25, 2000.

B.

{5} Archuleta appealed the action to the Board. A hearing officer was assigned to preside at the appeal hearing and issue recommendations to the Board. The hearing officer issued a letter setting forth the procedures for the hearing. Both parties would exchange witness and exhibit lists, submit position statements, and, as agreed by the parties, make witnesses available for brief, informal interviews and two depositions per side. The City bore the burden to prove, by a preponderance of the evidence, the basis for its discipline and the appropriateness of the discipline. Each side would be allowed to make opening and closing statements, call and cross-examine witnesses, introduce evidence, and invoke the rule allowing for the exclusion of witnesses from the hearing. Although the rules of evidence would not apply, the hearing officer reserved the right to exclude any evidence that was irrelevant, unduly burdensome, repetitive, harassing, or involving multiple hearsay.

{6} On May 17, 2001, five days before the hearing was initially set to begin, Archuleta moved for a continuance and to compel discovery from the City for "all prior cases involving the suspension, demotion or termination of an SFPD officer (of any rank) in the last five years, e.g. from 1996 to present." The City opposed the motion on the basis that the information was confidential, that the probative value was de minimis, and that it was irrelevant, overly broad, and unduly burdensome. A telephonic hearing was held off the record, after which the hearing officer denied the motion without explanation. The parties submitted their position statements and objections to proposed exhibits.

{7} A hearing on the record was held on July 11, 12 and 13, 2001, during which the following evidence was elicited. As commander, Archuleta was required to direct and supervise all of the officers under his command, monitor their activity on the radio, allocate resources, review reports, and gather more information on pending cases, if necessary. Although Valerio had experience as a police officer, he was a recent-hire at SFPD and had been on his own for only three weeks. After responding to the Romero call on June 7, 2000, at 11:03 p.m., Valerio called in a "missing person" report to dispatch, reported that he would be searching for a "seven year-old," and entered the information into the national registry. Valerio searched for Robbie for about an hour-and-a-half until he took another call. He resumed his search for Robbie at 1:21 a.m.; by that time dispatch had changed the code for his report so that it indicated a runaway or a child in need of supervision, which had a lower priority. At 1:52 a.m., Valerio contacted Archuleta for permission to travel outside the jurisdiction to search for Robbie. The radio transmission indicates that Archuleta was told that Valerio was working on a case involving a runaway or a child in need of supervision and the "seven year old . . . may be in La Cienega . . . with a suspect in a case [involving the Romeros' daughter]." Archuleta told Valerio to take another officer with him; he did not inquire into the circumstances, apparently, because he did not hear the information about the seven year-old or that a possible suspect was involved in the disappearance. Valerio's search in La Cienega was unsuccessful, and he returned to Santa Fe at 3:06 a.m. for a meal break. He turned in his report to Archuleta at 4:27 a.m. Although Valerio was with Archuleta for twenty minutes, Archuleta made only a few minor spelling corrections to the report; he did not discuss the report, which clearly indicated that Valerio had been searching throughout the night for a seven year-old, or address several deficiencies in it. Valerio resumed his search from 4:49 to 6:30 a.m. Archuleta rejected Valerio's offer to continue his search until he was due in court at 9:00

a.m. and told him he would have another officer take over the investigation.

{8} For five and a half hours, from the time Robbie's disappearance was reported until Valerio turned in his report, Archuleta never asked Valerio about the incident or why he was spending so much time on it. Archuleta explained that he thought he was dealing with a runaway, which he considered a low priority. He testified that he first realized that Valerio had been searching for a missing seven year-old child at about 4:30 a.m., although he admitted that this information was relayed to him earlier—once by dispatch, which he was supposed to be monitoring, and once directly. After he discovered this information, he dismissed Valerio's requests to contact the media and search and rescue or canvass the neighborhood; his explanation was that he did not want to risk officer safety knocking on doors at 4:30 a.m. to look for a missing child, a circumstance he did not consider a "major case." He was unaware that SFPD regulations required him to notify an on-duty commander about any missing person or runaway report. At the end of his shift at 6:00 a.m., he left a "hot sheet" for the relieving shift lieutenant relaying information about several cases, including this case, rather than advising him about it when he spoke to the lieutenant by radio earlier in the morning or waiting to discuss it personally with him since the lieutenant was late for work. Archuleta testified that this was the way shift changes were handled and how lieutenants were notified of missing persons or runaways. He anticipated turning the report over for investigation later that morning when he returned to the station at 7:30 a.m. He simply did not see it as an urgent matter at 4:30 a.m.

{9} Archuleta testified that the shift that night was busy, although he admitted that he and other officers were available for large periods of time. He also testified about the manner in which other missing persons and runaway cases had been handled by SFPD and compared the handling of those cases with how the Romero case had been handled. He cross-examined witnesses about how two runaway cases were handled, one of which took place that same night. He expressed his opinion that other officers received lesser discipline for more egregious conduct, and he submitted a detailed description of three such instances.[2] He explained in detail other disciplinary actions against him by SFPD, as well as retaliatory actions that Captain Leyba allegedly had taken against him in the past. He testified that he was being unfairly blamed by SFPD for a possible murder, even though he felt nothing he could have done would have changed the outcome. On the other hand, he testified that if he had known that a seven year-old was missing at 2:00 a.m. or if he had asked Valerio about his investigation he would have done things differently. Archuleta admitted that he was to blame for the two-and-one-half-hour delay in handling this matter once he became aware of it.

{10} The hearing officer submitted his findings and recommendation to the Board on July 25, 2001, indicating that just cause existed for Archuleta's demotion and additional training. Shortly after, Archuleta submitted a detailed letter to the Board expressing his intent to "fully present his case and ... be available for questions" at the Board hearing and detailing his position that the demotion was not supported by just cause and violated SFPD's progressive discipline policy; he also contended it was error to exclude evidence of discipline levied against other SFPD officers. In a letter issued November 5, the Board stated that after meeting twice to review the exhibits and transcripts of the hearing, it found that the demotion and additional training were justified.

C.

{11} Archuleta sought certiorari review of the Board's decision in the district court,

2. The record indicates that the hearing officer did not admit the summary of these three incidents into evidence, although it remained part of the record as exhibit 14. As mentioned elsewhere, Archuleta also submitted the summary in a letter to the Board after the hearing to support his argument that his discipline was excessive and in his Statement of the Case that was submitted to the hearing officer before the hearing. A redacted version was in his letter to the City Personnel Director.

arguing for the first time that the denial of discovery and exclusion of evidence pertaining to the discipline of other officers deprived him of due process and violated the Peace Officer's Employer–Employee Relations Act, NMSA 1978, § 29–14–6 (1991) (Peace Officer's Act). He further argued that the demotion was excessive, arbitrary, and capricious in that the City failed to follow its progressive discipline policy and the discipline was without just cause. The district court affirmed the Board's decision, holding that the demotion was based on substantial evidence. The court also held that ample due process was afforded Archuleta as he was allowed to call and cross examine witnesses at the hearing; the hearing officer did not violate due process in ruling that the discipline records of other officers were irrelevant and thus inadmissible. The court found that other issues were not supported by the facts or law.

{12} Archuleta raised the same issues in petitioning the Court of Appeals for certiorari review. The Court of Appeals held that Archuleta did not preserve the issue of whether the Peace Officer's Act was violated, and it did not reach the issue of whether his demotion was improper in light of the progressive discipline policy. *Archuleta,* No. 23,445, slip op. at 4, 10. Instead, the Court of Appeals reversed the district court and remanded the matter for further proceedings. Applying the constitutional due process balancing test, *see Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the court held that Archuleta's due process rights were violated when the board denied him "access to information concerning the discipline of other officers who had committed similar infractions of departmental policies and procedures." *Archuleta,* No. 23,445, slip. op. at 10. Consequently, "Archuleta was not afforded a fair opportunity to invoke the discretion of the Board on the appropriateness or the necessity of his demotion." *Id.* at 8–9.

{13} Judge Pickard dissented, pointing out that the request "sought masses of information," most of which was irrelevant to the extent that Archuleta sought to compare dissimilar violations for a wide-ranging proportionality review. *Id.* at 12–13. In her view, the narrower issue was whether the hearing officer abused his discretion in refusing this request. *Id.* at 13. She concluded that the denial was reasonable, suggesting that the hearing officer properly balanced the need and relevance against the oppressiveness, breadth, and confidentiality of the request. *Id.* As for progressive discipline, she found that an employer ought to have a right to discipline by demotion employees who are charged with violating their supervisory duties. *Id.* at 14.

{14} The City petitioned this Court for certiorari, asking us to review whether the Court of Appeals erred in rewriting the discovery request, applying the *Mathews* test sua sponte, and holding that the denial of discovery violated Archuleta's due process rights. We address the City's request in two parts. We first consider whether the denial of discovery was arbitrary and capricious. We next consider whether Archuleta was denied due process. We conclude the district court correctly determined the Board's decision was neither arbitrary and capricious nor a violation of due process. We initially address, however, the appropriate standard of review.

II.

{15} In limiting its analysis to Archuleta's due process rights, the Court of Appeals granted certiorari to correct a misapplication of the law. We granted certiorari to review that determination. The determination raises an issue of substantial public interest with respect to our review of administrative decisions. Rule 12–502(C)(4)(d) NMRA 2005. In determining whether the district court erred in the first appeal, we apply the same administrative standard of review as the district court sitting in its appellate capacity. *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n,* 2003–NMSC–005, ¶ 16, 133 N.M. 97, 61 P.3d 806. "[W]e thus review the [Board's] order to determine if it is arbitrary, capricious, or an abuse of discretion; not supported by substantial evidence in the record; or, otherwise not in accordance with law." *Id.* ¶ 17;

see NMSA 1978, § 39-3-1.1(D) (1999); Rule 1-075(Q) NMRA 2005.

{16} The standard of review of an administrative order denying discovery seems to be a matter of first impression. There is a sound basis to afford substantial deference to an agency's ruling on such an order and reverse the ruling only for an abuse of discretion that is arbitrary or capricious or contrary to law. In judicial proceedings, we review discovery orders by a district court for an abuse of discretion. *Hartman v. Texaco Inc.,* 1997-NMCA-032, ¶ 20, 123 N.M. 220, 937 P.2d 979. Since administrative agency hearings are less formal than court proceedings, and agencies are ordinarily entrusted with judging the conduct and extent of discovery in the first place, courts generally review such determinations with extreme deference. *See Hi-Tech Furnace Sys., Inc. v. FCC,* 224 F.3d 781, 789 (D.C.Cir. 2000); *cf. Daniels v. Police Bd.,* 338 Ill. App.3d 851, 273 Ill.Dec. 524, 789 N.E.2d 424, 433 (2003), *appeal denied,* 205 Ill.2d 578, 281 Ill.Dec. 76, 803 N.E.2d 480 (2003) (discussing deferential review of a decision to consolidate disciplinary proceedings). *See generally* 16A Eugene McQuillin, *The Law of Municipal Corporations,* § 45.83, at 502 (3d ed., rev.vol. 2002) (discussing deferential review of administrative decisions for substantial evidence). We conclude the appropriate standard of review of the ruling on discovery is for an abuse of discretion. Since agency rulings must also be in accordance with the law, however, we believe the question of whether Archuleta was denied due process is a different issue and one for which a different standard of review is appropriate.

{17} "A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record." *Rio Grande Chapter of the Sierra Club,* 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806. In viewing the whole record, and in evaluating the reasonableness of an action, we may take into account an agency's expertise. *See Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers,* 1998-NMSC-020, ¶ 17, 125 N.M. 401, 962 P.2d 1236. We must be careful not to substitute our own judgment for that of the agency, when we are reviewing for arbitrary and capricious action. *Rio Grande Chapter of the Sierra Club,* 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806. Generally, courts "should not attempt to 'supply a reasoned basis' " for an agency's decision, but "may 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.' " *Id.* ¶¶ 12-13 (quoting *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)) (quotation marks and additional quoted authority omitted).

{18} We review de novo whether a ruling by an administrative agency is in accordance with the law. *Clark v. N.M. Children, Youth & Families Dep't,* 1999-NMCA-114, ¶ 7, 128 N.M. 18, 988 P.2d 888. Although the Court is not bound by the agency's ruling on a matter of law, we nevertheless may take into account the nature of the agency and the scope of its power to determine fundamental policy. *See Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n,* 120 N.M. 579, 583, 904 P.2d 28, 32 (1995). We should reverse the ruling if the agency unreasonably or unlawfully misinterprets or misapplies the law, but we may recognize agency expertise. *Id.*

{19} In this case, we first determine whether the denial of discovery was an abuse of discretion. Our inquiry is whether the decision was reasonable. In analyzing the Board's action, we recognize the City was legally authorized to determine and enforce disciplinary actions against its employees. Santa Fe, N.M., City Code § 19-3.4 (1998) ("It is the responsibility and exclusive prerogative of the city to direct its employees to take disciplinary action for proper cause . . . and to determine the methods, means and personnel by which the city's operations are to be conducted."). We next review de novo whether due process required a different result. Again, but this time for a different reason, we take into account the City's interest in appropriate discipline.

A.

{20} The Santa Fe Municipal Code and the SFPD Rules and Regulations are

silent on whether employees are entitled to discovery in an administrative disciplinary proceeding. Section 29–14–6 of the Police Officers Act simply provides that "any peace officer ... under investigation for an administrative matter, ... shall be permitted to produce any relevant documents, witnesses or other evidence to support his case." [3] Therefore, in initially determining whether the denial of discovery was proper, we must determine whether the ruling was reasonable.

{21} The technical rules of evidence and procedure often do not apply in an administrative hearing. *See, e.g., Gallagher v. Nat'l Transp. Safety Bd.*, 953 F.2d 1214, 1218 (10th Cir.1992) (citing the Administrative Procedures Act, 5 U.S.C. § 556(d) (2000)); *see also* NMSA 1978, § 10–9–18(A), (C) (1999) (providing that the rules of evidence do not apply to the termination, demotion, or suspension of state employees under the Personnel Act); NMSA 1978, § 12–8–11(A) (1969) (relaxing the rules of evidence under the New Mexico APA). The broad discretion accorded to an agency in conducting its hearings, however, "must be exercised judiciously and not arbitrarily." *Daniels*, 273 Ill.Dec. 524, 789 N.E.2d at 433. Although the federal and New Mexico Administrative Procedures Acts are not applicable, these acts are instructive on the issue of whether the denial of discovery in this case was reasonable. The rules of evidence are inapplicable or relaxed under both acts and certain otherwise objectionable evidence may be admitted, but both acts require the exclusion of irrelevant and immaterial evidence. *See Gallagher*, 953 F.2d at 1218; *see also* § 12–8–11(A). The rules of evidence are inapplicable in order to facilitate rather than hinder discovery and to allow a full opportunity to prepare. *Redman v. Bd. of Regents of the N.M. Sch. for the Visually Handicapped*, 102 N.M. 234, 238, 693 P.2d 1266, 1270 (Ct.App.1984). The exclusion of irrelevant and immaterial evidence is not inconsistent with relaxation of the rules of evidence.

{22} The hearing officer did not explain his decision denying the discovery Archuleta requested. The hearing was not recorded. Both the district court order and Archuleta's arguments, however, indicate that the decision was based on relevancy. We believe we can discern a reasonable basis for the ruling.

{23} Archuleta sought the discovery of "all prior cases involving the suspension, demotion or termination of any SFPD officer (of any rank) in the last five years." Thus, he was required to show how any discipline of any other employee under any other circumstances was relevant to his defense. *See State v. Roybal*, 115 N.M. 27, 30, 846 P.2d 333, 336 (Ct.App.1992) (holding that defendant failed to show information in internal affairs files was material to his defense). Archuleta has explained that evidence of other employees receiving less discipline for more egregious conduct would show that his demotion was excessive and contrary to a progressive discipline policy, which requires a minimum discipline before more serious sanctions are employed, i.e. oral reprimand, written reprimand, training, suspension, demotion, and then termination. Archuleta's request, however, was overly broad. *Cf. Horizon Holdings, L.L.C. v. Genmar Holdings, Inc.*, 209 F.R.D. 208, 214–15 (D.Kan.2002) (holding overly broad a request for " '[a]ny and all documents identifying all personnel hired and terminated at the [Genmar Kansas] plant between January 1999 to the present' " to show that similarly situated employees were treated differently than plaintiff) (alteration in original). "[A] party will not be required to respond to an overly broad discovery request unless adequate guidance exists as to what extent the request is not objectionable." *Id.* at 215. Even if the hearing officer knew what Archuleta actually sought to prove, the officer was not required to redraft the request. *See Sempier v. Johnson & Higgins*, 45 F.3d 724, 735–36 (3d Cir.1995) (stating that the district court can refuse to compel answers where the interrogatories are unsatisfactorily drafted or sug-

3. To the extent that Archuleta claims there is a statutory right to discovery, the Court of Appeals held that he failed to preserve this argument below. A review of the record supports that determination. Any reference to the Peace Officer's Act in this Opinion is not intended to be inconsistent.

gest the proper manner in which they should be asked, but it may not rewrite the discovery request). Further, the request gave the hearing officer no guidance in determining which cases were similar or more egregious. As Judge Pickard noted in her dissent, the City should not be subjected to a wholesale proportionality review of its disciplinary actions.

{24} Because the request was overly broad, it would have been reasonable for the hearing officer to conclude that the requested material had minimal if any probative value. This is a case of rather unique and serious circumstances involving a high ranking officer. Only truly analogous conditions with respect to performance, qualifications, and conduct would have been more than marginally relevant to the defense. *See Snipes v. Ill. Dep't of Corr.*, 291 F.3d 460, 463 (7th Cir.2002) (discussing a claim of retaliatory discharge and upholding the exclusion of evidence of disciplinary action against differently situated employees); *Archuleta*, slip op. at 6. For example, officers of "any rank" are not similarly situated to Archuleta, who was the sole commanding lieutenant in charge of an entire division of the SFPD graveyard shift. *See Kennedy v. Marion Corr. Inst.*, 69 Ohio St.3d 20, 630 N.E.2d 324, 328 (1994) (holding evidence of disparate treatment was inadmissible where officers under the disciplined supervisor's command were clearly not similarly situated). The reasons for "any suspension, demotion, or termination" would not necessarily be analogous to the circumstances in this case. *Cf. State v. Pohl*, 89 N.M. 523, 524, 554 P.2d 984, 985 (Ct.App. 1976) (compelling discovery of "all records of internal affairs investigations concerning allegations of police brutality or excessive use of force which have been filed against the arresting officer" where defendant's guilt or innocence hinged on whether the jury believed the arresting officer was the aggressor). Even similarly situated employees may be disciplined differently depending on the severity of the conduct and the consequences, the disciplinary history of the employee, and aggravating or mitigating factors. Further, a progressive discipline policy relates to the progression of discipline as it applies to the individual officer. A comparison of how other officers were disciplined does not appear to be more than marginally relevant.

{25} The hearing officer also could reasonably find that the requested material had no relevance in this matter. The record indicates the City was entitled to deviate from its progressive discipline policy if the misconduct justified more than the minimum applicable sanction. *See generally N.M. Regulation & Licensing Dep't v. Lujan*, 1999-NMCA-059, ¶ 19, 127 N.M. 233, 979 P.2d 744 (agreeing "that the State Personnel Board Rules require progressive discipline prior to dismissing an employee unless the employee is dismissed for just cause"). "[T]he State Personnel Board Rules acknowledge that there are instances where dismissal is appropriate prior to progressive discipline." *Id.* ¶ 15. SFPD's rules specify that just cause exists for "suspension or demotion or termination" when an officer demonstrates an inability to perform job requirements or whose actions reflect poorly on the integrity of the City. The rules also contemplate "individualized imposition of disciplinary action" and allow for the consideration of the "seriousness of the act or omission" in addition to the minimum applicable sanction. Thus, as in *Lujan*, the rules themselves appear to allow for deviation from progressive discipline depending on the surrounding circumstances of the misconduct. Based on our whole record review, we agree that there was sufficient evidence to support a deviation from the progressive discipline policy and thus to support demotion and additional training. *Regents of the Univ. of N.M.*, 1998-NMSC-020, ¶ 17, 125 N.M. 401, 962 P.2d 1236 (stating that when the court reviews an agency's findings, we look at evidence that is favorable to the decision and also unfavorable evidence when it would be unreasonable to ignore it; however, we must affirm the decision if it is supported by substantial evidence). On this basis we also conclude the hearing officer could have determined the requested material had no relevance.

{26} Archuleta was demoted because he failed to adequately supervise or respond in any way to a case involving a missing seven year-old who was never found and because he failed to notify an on-duty

detective commander about it. The hearing officer found that Archuleta never issued a bulletin; never personally looked for Robbie during the entire graveyard shift, even though he was available; never called for assistance or utilized the officers under his command in searching for the child; and never notified anyone in his chain of command about the missing child, so that his supervisors learned about it only from a "Hot Sheet," even though he was adequately informed by his subordinates and was responsible for knowing the significant and material facts. The hearing officer further found that, as the commander in charge, Archuleta failed to give sufficient attention to the case. He failed to react decisively, quickly, and appropriately in supervising and employing the resources available to him to conduct an investigation and search, in calling in additional resources if necessary, and in following Department policy, while exercising sound judgment and common sense. The evidence supports these findings.

{27} These facts demonstrated to the City that Archuleta lacked the experience, skill, and knowledge to be a watch commander and that he demonstrated poor judgment in handling a missing child report during the first critical hours of the case. The City considered alternative disciplines available under the rules. The City concluded that demotion and training were more appropriate than suspension because of the seriousness of the case, the manner in which it was handled, and the liability of the City if Archuleta remained in his position. The City chose not to terminate him, because there were no aggravating circumstances, and his employment record justified retention. The City's action was neither arbitrary nor capricious; it was not contrary to law. The evidence supports the hearing officer's conclusion that demotion and additional training were appropriate under SFPD rules.

{28} "Administrative agencies have considerable latitude to shape their penalties within the scope of their statutory authority, especially where a statute expressly authorizes the agency to require that such action be taken as will effectuate the purposes of the act being administered." 2 Am.Jur.2d *Admin. Law* § 453, at 388 (2004); *see Fibreboard Paper Prods. Corp. v. NLRB,* 379 U.S. 203, 216, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964). "The relation of penalty to policy is peculiarly one for the administrative agency and its special competence. . . ." Am.Jur.2d, *supra,* § 453, at 388; *accord Gen. Protective Comm. for Holders of Option Warrants of United Corp. v. Sec. & Exch. Comm'n,* 346 U.S. 521, 534, 74 S.Ct. 261, 98 L.Ed. 261 (1954). "The propriety of a disciplinary measure meted out by [an agency] is a matter of internal administration with which a court should not interfere absent a clear abuse of authority." *Long v. City of Wichita Falls,* 749 S.W.2d 268, 270 (Tex.App.1988).

{29} For these reasons, we conclude the hearing officer did not abuse its discretion in denying the discovery request. The request was overly broad and it sought material that had little or no relevance. We now turn to the due process analysis of the Court of Appeals.

B.

{30} The City argues that there is no constitutional right to discovery under federal or New Mexico law, and the unduly burdensome and costly result of such a rule would defeat even the most simple disciplinary proceeding. It also contends that it was unfair to apply *Mathews; Mathews* had not been raised earlier, and there was no record of the probable administrative burden and cost of such a broad, open-ended discovery order. Under these circumstances, the City contends the Court of Appeals did not give its interest in resisting discovery adequate weight. Archuleta claims that the City did not preserve its argument that there is no constitutional or other right to discovery in an administrative hearing. He also contends that the City has waived the issue since it agreed to allow some discovery below.[4] Nevertheless, he agrees with the Court of Appeals' due process analysis and argues that

4. We reject this argument. The agreement for discovery was limited to informal witness interviews and two depositions per side. This does not constitute a waiver of a right to resist other discovery.

the City adequately raised the alleged problems regarding administrative burden and costs.

{31} Neither party's preservation arguments have merit. Since the due process question is an issue of law, appellate courts review the issue de novo. *Cordova v. LeMaster*, 2004–NMSC–026, ¶ 10, 136 N.M. 217, 96 P.3d 778. This means that appellate courts can and must apply the appropriate law. The *Mathews* test is the appropriate analytical framework for a due process issue. *City of Albuquerque v. Chavez*, 1998–NMSC–033, ¶ 13, 125 N.M. 809, 965 P.2d 928. Additionally, the City has suffered no harm; it has argued the administrative burden and costs issue in this appeal. We agree with the City that there is no constitutional right to pre-trial discovery in administrative hearings. *Lopez v. United States*, 129 F.Supp.2d 1284, 1289 (D.N.M.2000), *aff'd mem.*, No. 01–2090 (10th Cir. Nov. 15, 2001); *accord Dente v. State Taxation and Revenue Dep't*, 1997–NMCA–099, ¶ 6, 124 N.M. 93, 946 P.2d 1104, *overruled on other grounds by State Taxation & Revenue Dep't v. Bargas*, 2000–NMCA–103, 129 N.M. 800, 14 P.3d 538. This general rule, however, is not dispositive. *See Dente*, 1997–NMCA–099, ¶ 8, 124 N.M. 93, 946 P.2d 1104 ("[I]n some cases, due process might require that depositions be allowed in order to afford a party a meaningful opportunity to prepare."). Administrative hearings that affect a property or liberty interest must comply with due process. The *Mathews* test determines what process is due in a particular hearing. *Chavez*, 1998–NMSC–033, ¶ 13, 125 N.M. 809, 965 P.2d 928. " 'Due process is flexible and calls for such procedural protections as the particular situation demands.' " *Mathews*, 424 U.S. at 334, 96 S.Ct. 893 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)) (alteration omitted).

{32} "[C]onstitutional due process does not require an agency to afford a petitioner all elements of a traditional judicial proceeding." *Miller v. County of Santa Cruz*, 796 F.Supp. 1316, 1319 (N.D.Cal.1992), *aff'd*, 39 F.3d 1030 (9th Cir.1994). "In general, the right to due process in administrative proceedings contemplates only notice of the opposing party's claims and a *reasonable* opportunity to meet them." *Dente*, 1997–NMCA–099, ¶ 4, 124 N.M. 93, 946 P.2d 1104 (emphasis added). The importance of the individual's and administrative body's interests, together with "the risk of an erroneous deprivation of such [private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," dictates what additional process, if any, is due in an administrative proceeding. *Chavez*, 1998–NMSC–033, ¶ 14, 125 N.M. 809, 965 P.2d 928 (quoting *Mathews*, 424 U.S. at 335, 96 S.Ct. 893) (emphasis omitted).

{33} SFPD rules expressly create a "property right" that entitles the employee to an appeal and a hearing in any disciplinary action. The Court of Appeals concluded that Archuleta had a "weighty interest" in his "expectation of continued employment with [SFPD], in good standing and in the capacity of a lieutenant." *Archuleta*, No. 23,445, slip op. at 5. Other jurisdictions, however, do not attribute as much weight to the individual's interest with respect to a demotion as compared to a termination. *DelSignore v. DiCenzo*, 767 F.Supp. 423, 427 (D.R.I.1991); *Williams v. City of Seattle*, 607 F.Supp. 714, 720 (W.D.Wash.1985). From a property standpoint, an employee who has been demoted suffers a loss in pay or benefits. *Williams*, 607 F.Supp. at 720. Although a decrease in pay or benefits is of significance, it may be relatively insubstantial and is a less compelling deprivation than a termination. *DelSignore*, 767 F.Supp. at 427. We conclude that Archuleta's interest was less compelling than the Court of Appeals indicated.

{34} The Court of Appeals also concluded that the risk of an erroneous deprivation was great because the materials were critical to his defense, and the probable value of compelling discovery was high. *Archuleta*, No. 23,445, slip op. at 5–7. The court relied on several cases in which our courts have considered evidence of disparate discipline in their review for substantial evidence. These cases are distinguishable. For example, in one case there was no evidence to support a finding of just cause for termination, and evidence of disparate treatment in directly analogous cases simply supported that deter-

mination. *See Kibbe v. Elida Sch. Dist. (In re Termination of Kibbe),* 2000–NMSC–006, ¶¶ 14–17, 128 N.M. 629, 996 P.2d 419. In another, there was no meaningful standard by which to review the just cause determination, and similarly situated employees had not been terminated. *N.M. State Bd. of Educ. v. Stoudt,* 91 N.M. 183, 186–87, 571 P.2d 1186, 1189–90 (1977) (per curiam). The evidence was relevant but not "critical" in these cases.[5] The relevancy of "all prior cases involving the suspension, demotion or termination of any SFPD officer (of any rank) in the last five years" is not so apparent. We have noted in the past that a "board's decision not to impose disciplinary action against an employee for certain conduct does not foreclose disciplinary action against a different employee in the future for similar conduct." *In re Termination of Kibbe,* 2000–NMSC–006, ¶ 17, 128 N.M. 629, 996 P.2d 419.

{35} The Court of Appeals opinion also gives too little weight to the extent of the City's efforts to determine the facts of the incident in question, as well as the extent to which Archuleta availed himself of the procedures that were in place to prevent bias or pretext from entering into the decision-making process. *See Chavez,* 1998–NMSC–033, ¶ 14, 125 N.M. 809, 965 P.2d 928 ("[A]ssessing the risk of such error requires us to consider the pre—and post-termination proceedings as a whole."). Two supervisors requested Internal Affairs to investigate Archuleta's conduct; the investigation was completed, and both supervisors recommended demotion and training. A predetermination hearing was held in which Archuleta was represented by counsel, allowed to testify, introduce evidence, and cross examine witnesses. The recommendation was approved by the Chief, the Personnel Director, and the City Manager only after they reviewed all of that evidence. Archuleta appealed their decision to the Grievance Board and an impartial hearing officer was assigned to the case. Archuleta was afforded a full post-determination hearing on the record, with counsel, and he had a reasonable opportunity to present his case. He was given all the materials that were used against him and he was allowed to conduct informal interviews, as well as two depositions. Archuleta vigorously argued his position at both hearings, including his personal history with Captain Leyba and the disparate treatment he perceived, including three cases that he brought to the Board's attention. The Board carefully reviewed all of this material and affirmed the demotion and training. Archuleta then obtained judicial review in district court, which affirmed the decision. In light of the foregoing, the probable value of the requested materials was minimal, and Archuleta cannot claim any specific prejudice from the denial of discovery in this case. *See Dente,* 1997–NMCA–099, ¶ 8, 124 N.M. 93, 946 P.2d 1104 (finding plaintiff had ample opportunity to cross-examine and alleged no specific prejudice from the lack of an opportunity to take depositions prior to his administrative hearing).

{36} Finally, the Court of Appeals held that the City's interest in confidentiality was not sufficiently substantial, because the files could have been reviewed in camera and private information redacted. *Archuleta,* No. 23,445, slip op. at 7–8. Nevertheless, the City has a substantial and compelling interest in managing the internal affairs of its police department "to maintain the discipline, morale, and effectiveness of the department." *Williams,* 607 F.Supp. at 720. That interest is illustrated by the facts of this case. The City had an interest in removing a police officer from a supervisory position to prevent him from engaging in future negligent conduct and dereliction of duty where public safety and the City's liability would be at risk. This interest is sufficiently compelling to shield the City from an overly broad discovery request that would be of little or no probative value. We note, as well, the City's interest in "the fiscal and administrative burdens that the additional or substitute proce-

5. In one other case, the court evaluated disparate treatment for the same misconduct arising out of the same incident where there was no evidence to support such treatment. *Gallegos v. N.M. State Corr. Dep't,* 115 N.M. 797, 802, 858 P.2d 1276, 1281 (Ct.App.1992). Here, Officer Valerio was exonerated.

dural requirement would entail." *Mathews*, 424 U.S. at 335, 96 S.Ct. 893.

III.

{37} For these reasons, we reverse the Court of Appeals decision that Archuleta was entitled to discovery in this case. The deprivation was not so compelling and the risk of error so grave or the probable value of the material so substantial that it outweighed the City's very substantial interests in effectively and efficiently disciplining its employees. The hearing officer acted reasonably in denying the request for discovery, and the district court did not err in concluding the Board had not acted arbitrarily or capriciously. We do not remand Archuleta's remaining claim that the City violated its progressive discipline policy because that issue has been necessarily decided in our resolution of the questions presented on certiorari. *Cf. State v. Javier M.*, 2001–NMSC–030, ¶ 10, 131 N.M. 1, 33 P.3d 1. We affirm the order of the district court upholding the Board's decision.

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

WE CONCUR: RICHARD C. BOSSON, Chief Justice, PATRICIO M. SERNA, and EDWARD L. CHÁVEZ, Justices.

Justice PETRA JIMENEZ MAES recused.

2005-NMSC-005

108 P.3d 1032

STATE of New Mexico, Plaintiff–Petitioner,

v.

Patrick Clark RYON, Defendant–Respondent.

No. 28,462.

Supreme Court of New Mexico.

March 3, 2005.

[redacted]

[redacted]

[redacted]

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

James R. Lally, Alameda, NM, Dane Eric Hannum, Albuquerque, NM, for Respondent.

OPINION

MINZNER, Justice.

{1} The State has appealed from a decision of the district court granting Defendant's motion to suppress evidence discovered in his home during a warrantless, nonconsensual search by police. The State appealed pursuant to NMSA 1978, Section 39-3-3(B)(2) (1972). The district court suppressed the evidence on the ground that the community

caretaker exception to the warrant requirement was not applicable. The Court of Appeals affirmed the district court in a Memorandum Opinion. *See State v. Ryon,* No. 23,318 (N.M.Ct.App. Jan. 6, 2004). Both courts relied on *State v. Nemeth,* 2001-NMCA-029, 130 N.M. 261, 23 P.3d 936. We granted certiorari to determine whether the community caretaker exception permits police to enter a dwelling without a warrant or consent during a criminal investigation. We hold that in narrowly limited circumstances police may enter a home without a warrant or consent during a criminal investigation under the emergency assistance doctrine. To the extent that it may be read to preclude an emergency entry during a criminal investigation, we overrule *Nemeth.* We also clarify the scope of the community caretaker exception. We affirm the district court's decision to suppress evidence, because the police lacked the objective reasonableness required to enter and search Defendant's home.

I.

{2} The facts are taken from testimony at the suppression hearing and are mostly undisputed. At approximately 8:20 p.m. on January 18, 2002, Deputy Sanchez and Deputy Benavidez of the Bernalillo County Sheriff's Department responded to a dispatch to 128 Alameda N.W. in Albuquerque, New Mexico for a "911 call welfare check" with a "possible stabbing victim." When she arrived, Sanchez saw a man and a woman outside the home. The man, Isaac Atencio, was bleeding heavily from the head, and the woman, Barbara Hoover, was crying and yelling. Sanchez noticed that there was blood all over, but that Atencio was conscious and walking. As she was checking his stab wounds, both Atencio and Hoover told the deputy that Defendant, Hoover's boyfriend, was responsible for the stabbing and that he lived down the street at 9047 Fourth Street. Sergeant Sanchez and a field investigator arrived at the scene within minutes to assist the deputies. While the deputy was helping Atencio and trying to calm Hoover, the sergeant and Benavidez checked the home to ensure that there were no other victims inside and that Defendant was no longer present. Rescue personnel arrived within about five minutes and transported Atencio to the hospital.

{3} As Deputy Sanchez approached the field investigator, a man who was covered in blood approached, identified himself as Defendant, and stated that he wanted to tell her what happened. He was immediately handcuffed, frisked, and Mirandized. He told her that he and Hoover were fighting, and when Atencio tried to intervene, he withdrew his knife and stabbed Atencio. No weapons were found on Defendant. It was about 8:45–8:50 p.m. when Defendant returned to the crime scene.[1]

{4} Shortly after deputies arrived at the crime scene on Alameda, Deputies Pepin, Neel, and Hampsten, who were in separate patrol cars and heard the first dispatch, responded to a second dispatch to locate the suspect whom they were told might be en route to his home at 9047 Fourth Street. As they were driving to that location, a third dispatcher informed them that the suspect might have a head or face injury, although the source of this information was not given.[2] The State estimates that deputies arrived at Defendant's home, which was one of two residences on the property, between 8:25 and 8:30 p.m. Hampsten was to watch the side and back of the home, while Pepin and Neel tried to contact Defendant inside. Both Pepin and Neel testified that the front door was ajar, and the lights were on. Pepin recalled that the door was open "six, seven inches to a foot," while Neel said it was just barely cracked open, about "an inch to an inch and a half." The deputies knocked and announced, called inside, but received no response. Both deputies testified that they went to the home

1. Defendant's mother testified that she and her husband saw Defendant walking away from his home at about 8:30 p.m. when they were returning to their home, which is on the same property as Defendant's home. At about 9:00 p.m., she saw police at her son's home. Defendant agreed that it takes about 15 minutes to walk from his house to Hoover's house on Alameda where he was arrested.

2. Sanchez testified that the sergeant most likely relayed any information to dispatch.

looking for the suspect. Thinking it was odd for the door to be open with no one answering, and knowing that he "may have sustained a head wound of some sort," Pepin testified that they decided to enter the home to see if anybody was injured inside, and that it was "pretty cold outside." On cross examination, he admitted that he went into the home looking for the suspect, but then clarified on redirect, that he entered the home looking for a person with a "possible head injury." Neel testified that they entered the home to look for the suspect and to see if he needed medical attention: "My job there was to make sure that no one else in that house needed aid fast.... My job was to locate the suspect."

{5} According to the deputies, the home was small; to the left of the front door was a hall that led to a bathroom and bedroom, and to the right was a living room with a kitchen in it. After walking down the hall, from room to room, and finding no one inside, they returned to the front of the house. On the way out, they noticed in the kitchen sink a "folding-type knife" that appeared to be stained with blood. Without touching anything, the deputies secured the home and obtained a search warrant.

{6} Defendant filed two motions to suppress evidence "seized or observed" by deputies during the warrantless search of his home and from a search warrant that was executed later that night. Both motions alleged that the evidence was obtained in violation of the Fourth Amendment of the United States Constitution and Article II, Section 10 of the New Mexico Constitution.[3] In response to the first motion, the State argued that the warrantless search of the home was reasonable under the community caretaker exception. It did not argue that the officers had probable cause together with exigent circumstances to enter Defendant's home without a warrant. Deputies Sanchez, Pepin, and Neel testified at the suppression hearing, and an offer of proof was made on behalf of Defendant and his mother to establish the relevant time frames.

{7} After the hearing, the district court applied the community caretaker exception articulated in *Nemeth* and found the search was unlawful. 2001–NMCA–029, ¶¶ 37–38, 130 N.M. 261, 23 P.3d 936. The court noted that under *Nemeth,* the exception "can be invoked only 'when the police are not engaged in crime-solving activities.' " *See id.* ¶ 38 (quoting *People v. Davis,* 442 Mich. 1, 497 N.W.2d 910, 920 (1993)). Applying the law to the facts, the court concluded:

> The Officers were clearly responding to the Defendant's home to locate a criminal suspect. At least in substantial part they were engaged in crime-solving activities. The facts within their knowledge were lacking any indication about source of the information, the likelihood that an injury occurred, the nature or severity of the injury, if any, how it occurred and when it might have occurred in relation to their response. Much of this information (known to fellow officers a short distance away) would have been important to formation of a reasonable belief that the Defendant was in need of immediate medical attention. In summary, the facts within the entering officers' knowledge were not sufficient to elevate their primary role to that of community caretaking.
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> . . .
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> . . . It appears to this Court that the officers were acting with good intentions and good faith belief that their entry into the Defendant's residence was permissible to determine whether the Defendant whom they sought was inside and injured.

{8} In affirming the district court decision to suppress the evidence, the Court of Appeals concluded that entry into a private home without a warrant is reasonable only if the State establishes that entry was necessitated by exigent circumstances, an emergency situation, or articulable public safety reasons, and that the officer was acting without reasonable suspicion of criminal activity as a community caretaker. *Ryon,* No. 23,318,

3. While Defendant indicated that the New Mexico constitution was violated by these searches, he did not argue that our state constitution offered more protection than the federal constitution. We limit our discussion to a Fourth Amendment analysis. *State v. Gomez,* 1997–NMSC–006, ¶¶ 22–23, 122 N.M. 777, 932 P.2d 1.

slip. op. at 5. The Court of Appeals concluded that the community caretaker exception was not applicable because the deputies in this case were investigating a crime in which Defendant was a suspect. *Id.* at 6–7. Applying a deferential standard of review, the court held that there was substantial evidence to support the district court finding that the entering deputies did not have enough information to form a reasonable belief that Defendant was in immediate need of medical attention. *Id.* We granted the State's petition for certiorari. *See* Rule 12–502 NMRA 2004.

{9} On appeal to this Court the State argues that the Court of Appeals should have reviewed the reasonableness issue de novo and that both courts misstated the law by relying on *Nemeth* and applying a "strict, no investigative purpose test." The State contends that the community caretaker exception applies to this case. The State acknowledges that some courts distinguish the exception from a principle sometimes described as the emergency assistance doctrine but contends that the entry was lawful under either the exception or the doctrine. In his answer brief, Defendant argues that the State did not show facts sufficient to satisfy the community caretaker exception. At oral argument, however, he argued that a warrantless entry into the home is lawful only in an emergency. We believe that both parties agree that the proper test for this case was established in *People v. Mitchell,* 39 N.Y.2d 173, 383 N.Y.S.2d 246, 347 N.E.2d 607 (1976). The parties disagree on the application of that test.

{10} The State advocates the *Nemeth* "good faith" standard, i.e. that the entry must not have been a pretext to find evidence or arrest a suspect. The State notes the district court found that the deputies were acting in good faith. Defendant advocates the *Mitchell* "primary motivation" standard and notes the district court found that the deputies were primarily engaged in crime-solving activities. The State contends that the facts and circumstances in this case require a conclusion that an emergency entry was objectively reasonable. Defendant contends, on the other hand, that the State failed to show an objectively reasonable entry, because it was unclear to the officers whether Defendant was injured. We address the community caretaker exception, the emergency assistance doctrine, the relationship of one to the other, and clarify the test to be applied. We then apply that test.

II.

{11} Appellate courts review a district court's decision to suppress evidence based on the legality of a search as a mixed question of fact and law. *State v. Vandenberg,* 2003–NMSC–030, ¶ 17, 134 N.M. 566, 81 P.3d 19. We view the facts in the light most favorable to the prevailing party and defer to the district court's findings of historical facts and witness credibility when supported by substantial evidence. *State v. Urioste,* 2002–NMSC–023, ¶ 6, 132 N.M. 592, 52 P.3d 964; *State v. Jason L.,* 2000–NMSC–018, ¶ 10, 129 N.M. 119, 2 P.3d 856. The legality of a search, however, ultimately turns on the question of reasonableness. *Id.* Although our inquiry is necessarily fact-based it compels a careful balancing of constitutional values, which extends beyond fact-finding, "to shape the parameters of police conduct by placing the constitutional requirement of reasonableness in factual context. . . ." *Vandenberg,* 2003–NMSC–030, ¶ 19, 134 N.M. 566, 81 P.3d 19 (quoting *State v. Attaway,* 117 N.M. 141, 145, 870 P.2d 103, 107 (1994)). We thus review the determination of reasonableness de novo. *Id.* In light of the arguments and decisions below, we take this opportunity to clarify the scope of the community caretaker exception. Our analysis necessarily begins with a review of the development of that exception.

A.

{12} The community caretaker exception was first recognized by the United States Supreme Court in *Cady v. Dombrowski,* 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). The defendant, a police officer from Chicago, was involved in a one-car accident in his rental car near a small Wisconsin town, and later was arrested for DWI. *Id.* at 435–36, 93 S.Ct. 2523. The car was towed to a

yard several miles away where it was left unguarded. *Id.* at 436, 93 S.Ct. 2523. The next day, an officer searched the car and its trunk to retrieve the defendant's service revolver based on his belief that Chicago police were required to carry their revolvers at all times and a public safety concern that the unattended vehicle might be vandalized and the gun stolen. *Id.* at 437, 93 S.Ct. 2523. He discovered several blood-stained articles; that discovery led to the discovery of more incriminating evidence and ultimately to the defendant's murder conviction. *Id.* at 434, 437–39, 93 S.Ct. 2523. The United States Supreme Court held that the initial warrantless search of the trunk was lawful under the Fourth Amendment. "[T]he justification [for the warrantless search] ... was [an] immediate and constitutionally reasonable ... concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle." *Id.* at 447, 93 S.Ct. 2523.

{13} In *Cady* the Court announced two important principles. It recognized that police have dual roles as criminal investigators and community caretakers. They function as community caretakers, for example, in assisting those whose vehicles are disabled. This function is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* at 441, 93 S.Ct. 2523. The Court also recognized that there is a "constitutional difference between searches of and seizures from houses ... and from vehicles [that] stems both from the ambulatory character of the latter and from the fact that extensive, and often noncriminal contact with automobiles will bring local officials in 'plain view' of evidence ... of a crime...." *Id.* at 442, 93 S.Ct. 2523.

{14} The United States Supreme Court has never applied the community caretaker exception to a police-citizen encounter in the home, but it has approved in dicta an emergency assistance doctrine that would permit officers to search a home without a warrant, even if they were engaged in crime-solving activities. *Mincey v. Arizona,* 437 U.S. 385, 392, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *see Thompson v. Louisiana,* 469 U.S. 17, 21, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984) (per curiam); *McDonald v. United States,* 335 U.S. 451, 454, 69 S.Ct. 191, 93 L.Ed. 153 (1948) ("This is not a case where the officers, passing on the street, hear a shot and a cry for help and demand entrance in the name of the law."). In *Mincey,* an officer was shot while undercover agents were executing a narcotics raid at the defendant's apartment. *Id.* at 387, 98 S.Ct. 2408. The agents conducted a quick sweep of the apartment for additional victims, locating two wounded victims and the defendant. *Id.* After summoning medical help and securing the residence, they waited, without searching any further, for additional officers to take over the investigation. *Id.* at 388, 98 S.Ct. 2408. Homicide detectives, who arrived shortly after, embarked on a four-day "exhaustive and intrusive" search of the home without a warrant, which led to the defendant's murder conviction. *Id.* at 388–89, 98 S.Ct. 2408.

{15} The United States Supreme Court addressed the issue of whether a warrant is required when police confront an emergency situation presented by a possible homicide. *Id.* at 392, 98 S.Ct. 2408. Although it declined to find that there were any exigent circumstances present to justify the four-day search, the Court recognized an emergency assistance doctrine and described the circumstances that would make a warrantless entry and search of a home reasonable under the Fourth Amendment. *Id.* at 392–94, 98 S.Ct. 2408.

> We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid.... "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *Wayne v. United States,* 115 U.S.App. D.C. 234, 241, 318 F.2d 205, 212, [1963] (opinion of Burger, J.). And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities.

> But a warrantless search must be "strictly circumscribed by the exigencies which justify its initiation." *Terry v. Ohio,* 392 U.S. [1,] 25–26 [88 S.Ct. 1868, 20 L.Ed.2d 889] [1968].

Id. at 392–93, 98 S.Ct. 2408 (footnotes and citations other than quoted authorities omitted). The Court cautioned that "warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement *so compelling* that the warrantless search is objectively reasonable under the Fourth Amendment." *Id.* at 393–94, 98 S.Ct. 2408 (quoting *McDonald,* 335 U.S. at 456, 69 S.Ct. 191) (emphasis added).

{16} In New Mexico we have recognized that officers may stop a vehicle on a public road without probable cause or reasonable suspicion on the basis of a "specific, articulable safety concern" in their capacity as community caretakers. *State v. Reynolds,* 117 N.M. 23, 25, 868 P.2d 668, 670 (Ct.App.1993), *rev'd on other grounds,* 119 N.M. 383, 890 P.2d 1315 (1995). On appeal, this Court noted that " '[i]n a community caretaker case, reasonableness is determined by balancing the public need and interest furthered by the police conduct against the degree of and nature of the intrusion upon the privacy of the citizen.' " *Reynolds,* 119 N.M. at 388, 890 P.2d at 1320 (alteration in original) (quoting *State v. Ellenbecker,* 159 Wis.2d 91, 464 N.W.2d 427, 429 (Ct.App.1990)). We had no occasion in *Reynolds,* however, to examine the parameters of this doctrine, since the lawfulness of the stop was uncontroverted. *Id.* at 384, 890 P.2d at 1316.

{17} Until recently, use of the community caretaker exception in New Mexico has been limited to the "public servant" function of police, under *Cady,* in their encounters with citizens and vehicles on public roads. *See generally State v. Walters,* 1997–NMCA–013, 123 N.M. 88, 934 P.2d 282; *Apodaca v. State Taxation and Revenue Dep't,* 118 N.M. 624, 884 P.2d 515 (Ct.App.1994); *see also Reynolds,* 117 N.M. at 25, 868 P.2d at 670. We have viewed community caretaking as a principle outside the scope of the Fourth Amendment, reasoning that the initial police-citizen encounter was consensual and motivated by a concern for public safety, rather than a criminal investigation. *Jason L.,* 2000–NMSC–018, ¶ 14, 129 N.M. 119, 2 P.3d 856 ("[C]ommunity caretaking encounters are consensual, beyond the scope of the Fourth Amendment." Thus, "police do not need any justification to approach a person and ask that individual questions. . . .").

B.

{18} *Nemeth* was a departure from our earlier application of the community caretaker exception. In *Nemeth,* the Court of Appeals broadly extended the exception to justify a forceful entry into the home by police without a warrant, provided they enter solely out of concern for the person's welfare. 2001–NMCA–029, ¶¶ 21, 38, 130 N.M. 261, 23 P.3d 936. In *Nemeth,* police were investigating a possible suicide attempt and were told by dispatch that defendant had threatened to hurt herself during an argument over the telephone with her boyfriend. *Id.* ¶ 3. When they arrived the home was dark, there were no signs of activity, and there were keys on the front porch with a note that they belonged to "Mike Wells." *Id.* ¶ 5. The officers knocked at the front door, and when she did not respond, they walked around the home knocking on windows and doors. *Id.* ¶¶ 5–6. When she finally opened the door, the defendant was crying and appeared to be very distraught and emotional. *Id.* ¶ 6. Her agitation level escalated as she twice demanded they leave, assured them that she was not a danger to herself or anyone, and attempted to close the door. *Id.* ¶¶ 6–7. Concerned for her welfare, the officers forced their way into her home. *Id.* ¶¶ 7–8. Once inside, she grew more agitated, and finally shoved her identification cards into one officer's mouth. *Id.* ¶ 13.

{19} In *Nemeth,* the Court of Appeals made two important observations with which we agree. First, the Court recognized that in some cases the community caretaker exception might apply to a nonconsensual police-citizen encounter implicating the Fourth Amendment. *Id.* ¶¶ 26–27. Next, it emphasized an intrusion into the privacy and sanctity of the home must be guarded with "careful vigilance" and permitted "only in carefully

thought-through and clearly justifiable circumstances." *Id.* ¶ 30. We agree with both observations.

{20} In *Jason L.*, we cited *State v. Walters*, 1997–NMCA–013, 123 N.M. 88, 934 P.2d 282, for the basic premise that, "community caretaking encounters are consensual, beyond the scope of the Fourth Amendment," although we did not decide that case under the community caretaker exception. 2000–NMSC–018, ¶¶ 14, 22, 129 N.M. 119, 2 P.3d 856. We acknowledge that our description of community caretaking encounters was wrong. *Walters* involved a voluntary roadside encounter between an officer and defendant that led to reasonable suspicion for defendant's arrest for driving while intoxicated; the court upheld the encounter as lawful under the community caretaker exception. *Id.* ¶¶ 25–26. Relying on *State v. Lopez*, 109 N.M. 169, 171, 783 P.2d 479, 481 (Ct.App. 1989), the court characterized the community caretaker exception as a voluntary police-citizen encounter that fell outside the Fourth Amendment. *Id.* ¶ 10. Characterization of the exception as a voluntary or consensual encounter was wrong. *Lopez* was not a community caretaker encounter case; the three types of police-citizen encounters it described (consensual encounters, investigatory detentions, and arrests) occur when police are investigating a crime or a suspected crime. Consent is an exception to the Fourth Amendment probable cause and reasonable suspicion requirements that police often rely on to investigate suspected criminal activity. *See, e.g., State v. Gutierrez*, 2004–NMCA–081, ¶ 6, 136 N.M. 18, 94 P.3d 18 (recognizing consensual searches and seizures are one exception to the warrant requirement). When police act as community caretakers, however, the existence of reasonable suspicion or grounds for probable cause are not appropriate inquiries. *Davis*, 497 N.W.2d at 919 (citing *Cady*, 413 U.S. at 441, 93 S.Ct. 2523). The reasonableness of such conduct depends on whether the legal standards that justify the community caretaker exception are satisfied, which as the Court of Appeals has observed, depends on particular facts, which may or may not involve a consensual encounter. *Nemeth*, 2001–NMCA–029, ¶ 26, 130 N.M. 261, 23 P.3d 936. *Jason L.* and *Walters* ought not be viewed as limiting the community caretaker exception to voluntary or consensual police-citizen encounters. *Nemeth* was correct to question our characterization of the exception.

{21} *Nemeth* was also correct to emphasize the constitutional significance of a warrantless intrusion into a home. *Id.* ¶ 30. Yet we are concerned *Nemeth* does not convey the urgency required to make a warrantless intrusion into a home, even to provide emergency assistance, reasonable. In its analysis, the court concluded that the terms "community caretaker," "emergency aid or assistance," and "exigent circumstances" doctrines are basically different descriptions of the same community caretaker function. *Id.* ¶¶ 32–36. Although the court seemed to analyze the case under the emergency assistance doctrine, it ultimately held that when police enter a home in response to a suicide, they are performing a more generic community caretaker function, the primary characteristic of which is the absence of concern by police about violations of the law. *Id.* ¶¶ 34–40. No warrant was required, because the entry was a welfare check or a "public service" that fit squarely within the community caretaker doctrine, since the officers reasonably believed defendant was suicidal, in need of immediate assistance, and they limited the intrusion by only trying to ascertain whether they could assist her. *Id.* ¶ 40.

{22} We agree with *Nemeth* to the extent it holds that police are constitutionally permitted to enter a home without a warrant or consent in some situations. We disagree with *Nemeth* that all three terms are simply different descriptions of a general community caretaker function. Although there are similarities, there are also differences. Each term is unique; each term reflects a particular search or seizure; each term has become associated with a different test, one that enables a court to assess its applicability to a particular search and seizure. The decision in *Nemeth* to conflate the emergency assistance doctrine with the broader community caretaker exception and hold that officers were merely performing a welfare check or "public service" is understandable, but we are not persuaded the decision is appropri-

ate. *Cf. Laney,* 117 S.W.3d at 860 (observing that the existence of various titles for "the different doctrines setting forth exceptions to the warrant requirements of the Fourth Amendment" result "in confusion over the proper application of the correct doctrine"). We conclude the relevant test for the emergency assistance doctrine is unique; a search within a home raises unique concerns. The facts of this case require analysis under the test appropriate to the emergency assistance doctrine.

C.

{23} The touchstone of search and seizure analysis is whether a person has a constitutionally recognized expectation of privacy. *See Katz v. United States,* 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J. concurring). The constitutional distinction between vehicles and homes turns on this privacy expectation. A lesser expectation of privacy attaches to a vehicle. *See Cady,* 413 U.S. at 442, 93 S.Ct. 2523; *Gomez,* 1997–NMSC–006, ¶ 34, 122 N.M. 777, 932 P.2d 1; *Davis,* 497 N.W.2d at 921. Warrantless searches and seizures inside a home are presumptively unreasonable, subject only to a few specific, narrowly defined exceptions. *Flippo v. West Virginia,* 528 U.S. 11, 13, 120 S.Ct. 7, 145 L.Ed.2d 16 (1999) (per curiam); *accord Mincey,* 437 U.S. at 390, 98 S.Ct. 2408; *Chavez v. Bd. of County Comm'rs,* 2001–NMCA–065, ¶ 21, 130 N.M. 753, 31 P.3d 1027.

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton v. New York, 445 U.S. 573, 589–90, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) (alteration in original) (citation omitted); *accord State v. Snedeker,* 99 N.M. 286, 288, 657 P.2d 613, 615 (1982); *State v. Halpern,* 2001–NMCA–049, ¶ 14, 130 N.M. 694, 30 P.3d 383. New Mexico "consistently has expressed a strong preference for warrants" for all searches. *Gomez,* 1997–NMSC–006, ¶ 36, 122 N.M. 777, 932 P.2d 1; *Campos v. State,* 117 N.M. 155, 159, 870 P.2d 117, 121 (1994).

{24} The community caretaker exception recognizes that warrants, probable cause, and reasonable suspicion are not required when police are engaged in activities that are unrelated to crime-solving. *See Davis,* 497 N.W.2d at 919–20. However, police perform a variety of activities as community caretakers. *See Cady,* 413 U.S. at 441, 93 S.Ct. 2523; *People v. Ray,* 21 Cal.4th 464, 88 Cal.Rptr.2d 1, 981 P.2d 928, 933–34 (1999); *Davis,* 497 N.W.2d at 919–20. Although a number of activities fall within the community caretaker exception, not every intrusion that results from one of these activities should be analyzed by the same standard. *Davis,* 497 N.W.2d at 920–21. When determining whether a warrantless search or seizure is reasonable on the basis of the community caretaker exception, we must measure " 'the public need and interest furthered by the police conduct against the degree of and nature of the intrusion upon the privacy of the citizen.' " *Reynolds,* 119 N.M. at 388, 890 P.2d at 1320 (quoting *Ellenbecker,* 464 N.W.2d at 429).

{25} In balancing these interests, three distinct doctrines under the community caretaker exception have emerged: "1) the emergency aid doctrine, established in *Mincey;* 2) the automobile impoundment and inventory doctrine, first conceived in *Cady,* and later expanded upon in [*South Dakota v. Opperman,* 428 U.S. 364, 366, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976)]; and, 3) the community caretaking doctrine, or public servant doctrine, established in *Cady* . . . ." *Laney v. State,* 117 S.W.3d 854, 860 (Tex.Crim.App.

2003). *See generally* Mary E. Naumann, Note, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception,* 26 Am. J.Crim. L. 325, 330–31 (1999) (defining the community caretaker exception as "broad" and encompassing three versions, each requiring a different test). The common characteristic of these doctrines is that the intrusion upon privacy occurs while police are acting as community caretakers; their actions are motivated by "a desire to aid victims rather than investigate criminals." *State v. Mountford,* 171 Vt. 487, 769 A.2d 639, 645 (2000); *Laney,* 117 S.W.3d at 860–61. Although each of these doctrines has evolved in recognition of the important "community caretaker function" law enforcement officers provide, "it does not follow that all searches resulting from such activities should be judged by the same standard." *Davis,* 497 N.W.2d at 920. As the privacy expectation increases, the caretaker functions that justify an intrusion by police must be judged by a different standard. *Id.* at 921.

> {26} [W]hile both [the community caretaker or public servant doctrine and the emergency aid doctrine] are based on an officer's reasonable belief in the need to act pursuant to his or her "community caretaking functions," the emergency doctrine is limited to the functions of protecting or preserving life or avoiding serious injury.

Laney, 117 S.W.3d at 861. The emergency doctrine applies to, but is not limited to, warrantless intrusions into "personal residences." *Id.* The *Cady* community caretaker or public servant doctrine "deals primarily with warrantless searches and seizures of automobiles," *id.,* and " 'the officer might or might not believe there is a difficulty requiring his general assistance.' " *Id.* (quoting Naumann, *supra* at 333–34). Since there is a lesser privacy expectation in a vehicle on a public highway, an involuntary search or seizure there is judged by a lower standard of reasonableness: a specific and articulable concern for public safety requiring the officer's general assistance. *See Apodaca,* 118 N.M. at 626, 884 P.2d at 517; *Reynolds,* 117 N.M. at 25, 868 P.2d at 670. The emergency assistance doctrine, which may justify more intrusive searches of the home or person, must be assessed separately by a distinct test. 3 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 6.6(a) n. 5, at 390 (3d ed.1996); *see also Davis,* 497 N.W.2d at 920–21 (noting the need for standards specific to emergency entries). Since the privacy expectation is strongest in the home only a genuine emergency will justify entering and searching a home without a warrant and without consent or knowledge. *See Mincey,* 437 U.S. at 392, 98 S.Ct. 2408.[4]

{27} We conclude that police officers may enter a home without a warrant or consent under the emergency assistance doctrine. We recognize that the district court and the Court of Appeals based their decisions on the statement in *Nemeth* that "[t]he Fourth Amendment exception permitting warrantless entry into a home in the performance of community caretaking functions can be invoked only 'when the police are not engaged in crime-solving activities.' " 2001–NMCA–029, ¶ 38, 130 N.M. 261, 23 P.3d 936 (quoting *Davis,* 497 N.W.2d at 920). We do not construe *Nemeth* to mean that officers may never respond to an emergency when they are investigating a crime or attempting to arrest a suspect. *See Mincey,* 437 U.S. 385, 98 S.Ct. 2408 (addressing an emergency that arose during a drug raid). Rather, we conclude that the motivation for the entry

4. We note a distinction between the emergency assistance doctrine and the exception for exigent circumstances that also excuses a warrant. *Davis,* 497 N.W.2d at 920. Both require a compelling and immediate need for police to take swift action to prevent imminent danger to life or serious injury which exceeds an individual's privacy expectation in the home. *Compare Ray,* 88 Cal.Rptr.2d 1, 981 P.2d at 934, *with Gomez,* 1997–NMSC–006 ¶ 39, 122 N.M. 777, 932 P.2d 1. Nonetheless, they are separate doctrines. The exception for exigent circumstances applies when police are engaged in crime-solving activities, searching for evidence or suspects. *Davis,* 497 N.W.2d at 920. For entry into the home to be lawful, officers must have probable cause in addition to exigent circumstances. *State v. Aragon,* 1997–NMCA–087, ¶ 17, 123 N.M. 803, 945 P.2d 1021. The emergency assistance doctrine applies when police are acting not as crime-solvers, but rather acting in their capacity as community caretakers. *Ray,* 88 Cal.Rptr.2d 1, 981 P.2d at 933. Police may enter a home without probable cause to respond to an emergency situation. *Id.*

without a warrant or probable cause must be a strong sense of an emergency. *See Mitchell,* 383 N.Y.S.2d 246, 347 N.E.2d at 610 (stating police may not enter with an accompanying intent to arrest or gather evidence); *Walters,* 1997–NMCA–013, ¶ 25, 123 N.M. 88, 934 P.2d 282 (agreeing the initial encounter was as a caretaker rather than as an investigator).

{28} Our reading is consistent with the dual policies of encouraging police to perform caretaking functions and to obtain warrants to arrest or search. *Compare Gomez,* 1997–NMSC–006, ¶ 36, 122 N.M. 777, 932 P.2d 1 (stressing the importance of obtaining a warrant), *with Walters,* 1997–NMCA–013, ¶ 22, 123 N.M. 88, 934 P.2d 282 (refusing to discourage police officers from performing community caretaker stops). It is clear that individual privacy expectations must at times yield to a paramount interest in protecting and preserving life. *Mitchell,* 383 N.Y.S.2d 246, 347 N.E.2d at 611; *see also Warden v. Hayden,* 387 U.S. 294, 298–99, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967) ("The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others."). Police need not ignore an emergency simply because they are conducting a criminal investigation. We overrule *Nemeth* to the extent that it might be construed otherwise.

D.

{29} Having determined that police may enter a home without a warrant to respond to a strong sense of an emergency, we now address the standards that confine the emergency assistance doctrine. The Court in *Mincey* indicated that a warrantless entry and search of the home would pass constitutional muster under an objective test: whether police reasonably believed that a person within was in need of immediate aid to protect or preserve life or avoid serious injury, and the scope of the search was strictly limited to that purpose. 437 U.S. at 392–93, 98 S.Ct. 2408. Since then, some courts have adopted a purely objective test. *See, e.g., State v. Blades,* 225 Conn. 609, 626 A.2d 273, 280 & n. 7 (1993); *State v. Carlson,* 548 N.W.2d 138, 141–42 (Iowa 1996). Most courts, however, have accepted the requirements laid out in *Mitchell* or some variation of it. *Mountford,* 769 A.2d at 644; *see generally* LaFave, *supra* § 6.6(a), at 392–93. For the emergency assistance doctrine to apply under *Mitchell,* the state has the burden to establish three elements. First, "[t]he police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property." *Mitchell,* 383 N.Y.S.2d 246, 347 N.E.2d at 609. Second, "[t]he search must not be primarily motivated by intent to arrest and seize evidence." *Id.* Third, "[t]here must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched." *Id.* The test stated in *Nemeth* is similar to *Mitchell.* The officer must have "a reasonable and articulable belief, tested objectively, that a person is in need of immediate aid or assistance or protection from serious harm." *Nemeth,* 2001–NMCA–029, ¶ 37, 130 N.M. 261, 23 P.3d 936. The officer's actions must be in good faith; the entry must be made for a purpose consistent with community caretaking, rather than as a pretext for investigating criminal activity or searching for incriminating evidence. *Id.* ¶ 38. " '[T]he entry must be limited to the justification therefor, and the officer may not do more than is reasonably necessary to determine whether a person is in need of assistance, and to provide that assistance.' " 2001–NMCA–029 ¶ 38, 130 N.M. 261, 23 P.3d 936 (quoting *Davis,* 497 N.W.2d at 921). We address each part of this three-part inquiry and adopt the *Mitchell* test.

{30} The objective test is familiar to our search and seizure analysis. The constitutional requirement of reasonableness is tested objectively under the totality of the circumstances. *Vandenberg,* 2003–NMSC–030, ¶ 19, 134 N.M. 566, 81 P.3d 19. "This rule of law is best served by the application of certain objective criteria" based on the facts and circumstances of each case. *Attaway,* 117 N.M. at 149, 870 P.2d at 111. Our community caretaker cases also employ an objective test to determine whether a vehicle stop is based on a reasonable concern for

public safety. *Apodaca*, 118 N.M. at 626, 884 P.2d at 517.

{31} The objective standard for a warrantless and non-consensual entry into a home, however, requires a higher degree of urgency than the *Nemeth* decision may have conveyed. The emergency assistance doctrine applies specifically to warrantless intrusions into the home. The emergency assistance doctrine requires an emergency, a strong perception that action is required to protect against imminent danger to life or limb, an emergency that is sufficiently compelling to make a warrantless entry into the home objectively reasonable under the Fourth Amendment. *Compare Mincey*, 437 U.S. at 394, 98 S.Ct. 2408, *with Gomez*, 1997–NMSC–006, ¶ 39, 122 N.M. 777, 932 P.2d 1 ("[E]xigent circumstances [includes] 'an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property . . . .' ") (quoting *State v. Copeland*, 105 N.M. 27, 31, 727 P.2d 1342 (Ct.App.1986)).

{32} Some of the factors that the court should consider are the purpose and nature of the dispatch, the exigency of the situation based on the known facts, and "the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished." *State v. Ferguson*, 244 Wis.2d 17, 629 N.W.2d 788, 792 (Ct.App.2001) (quoted authority omitted); *cf. State v. Alexander*, 124 Md.App. 258, 721 A.2d 275, 279 (Ct.Spec.App.1998) (noting that reasonableness is a function of context). The fact that a different course of action would have been reasonable does not necessarily mean the officer's actions are unreasonable. *Gomez*, 1997–NMSC–006, ¶ 43, 122 N.M. 777, 932 P.2d 1. However, "their failure to take additional [or an alternative] action must be viewed in the totality of the circumstances to determine the ultimate reasonableness of their intrusion." *Ray*, 88 Cal.Rptr.2d 1, 981 P.2d at 938; *see, e.g., Davis*, 497 N.W.2d at 921–22 (suggesting that further investigation would have been necessary to justify the warrantless entry of the motel room when the only information officers had was a radio report with little detail that came from a questionable source). *But see, Alexander*, 721 A.2d at 287 (seeing no need for additional investigation when officers personally verified an anonymous tip by their own observations).

{33} The second part of the three-part *Mitchell* test is more controversial. Federal and state courts, including New Mexico, usually do not consider the subjective intent of an officer in a search and seizure analysis. *See Whren v. United States*, 517 U.S. 806, 812, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (stating that it has repeatedly held and asserted that an officer's motive does not invalidate objectively reasonable conduct under the Fourth Amendment); *United States v. Cervantes*, 219 F.3d 882, 889–90 (9th Cir. 2000); *Mountford*, 769 A.2d at 644; *Gomez*, 1997–NMSC–006, ¶ 40, 122 N.M. 777, 932 P.2d 1 (stating that an objective, not subjective, test determines whether exigent circumstances made a warrantless search of a vehicle lawful); *Attaway*, 117 N.M. at 148–49, 870 P.2d at 110–111 (indicating that objective criteria, rather than the subjective belief of an officer, determines whether noncompliance with the warrant requirement was lawful). While many courts have adopted the *Mitchell* test in its entirety, only a few have offered a rationale for permitting an inquiry into subjective motives.

{34} The primary rationale arises from the absence of a probable cause requirement in the emergency assistance doctrine. Some courts believe that subjective motives are still relevant when police do not have to show probable cause in order to ensure that such searches are not a pretext for criminal investigation. *Cervantes*, 219 F.3d at 890; *Mountford*, 769 A.2d at 645; *see* 1 LaFave, *supra* § 1.4 (commenting that pretext claims may still be viable when police action does not require probable cause). These courts cite *Whren* in support of this rationale. In declining to determine that an officer's ulterior motives would invalidate a lawful traffic stop, the Supreme Court distinguished between criminal investigations where probable cause and exigent circumstances are required to search from inventory and administrative searches where the probable cause requirement is excepted:

> [O]nly an undiscerning reader would regard these [inventory and administrative search] cases as endorsing the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred. In each case we were addressing the validity of a search conducted in the *absence* of probable cause. Our quoted statements simply explain that the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes.

Whren, 517 U.S. at 811–12, 116 S.Ct. 1769. Drawing from this statement, courts conclude that a pretext claim is viable when police justify a warrantless search under the community caretaker exception, as well as the emergency assistance doctrine. *Cervantes,* 219 F.3d at 889–90; *Mountford,* 769 A.2d at 644–45. A subjective test addresses the chief concern raised by a warrantless search purportedly justified by the community caretaker exception or emergency assistance doctrine: the possibility that the police will use the doctrine as a subterfuge or pretext when the real purpose of the search is to arrest a suspect or gather evidence without probable cause. *Ray,* 88 Cal.Rptr.2d 1, 981 P.2d at 937–38.

{35} Nevertheless, we recognize that emergency situations can occur during a criminal investigation. *See Davis,* 497 N.W.2d at 918; *Mitchell,* 383 N.Y.S.2d 246, 347 N.E.2d at 610. We also recognize that community caretaking encounters save lives and prevent serious injury; the police provide an important public service during such encounters. "Constitutional guarantees of privacy and sanctions against their transgression do not exist in a vacuum but must yield to paramount concerns for human life and the legitimate need of society to protect and preserve life." *Mitchell,* 383 N.Y.S.2d 246, 347 N.E.2d at 611. The emergency assistance doctrine is not applicable, however, unless the entry is motivated by the perceived need to act immediately in order to save a life. *State v. Prober,* 98 Wis.2d 345, 297 N.W.2d 1, 10–11 (1980), *overruled on other grounds, State v. Weide,* 155 Wis.2d 537, 455 N.W.2d 899 (1990).

{36} While we do not believe it is realistic for officers to completely abandon their investigative function, we adopt the "primary motivation" standard set out in *Mitchell.* "[T]he protection of human life or property in imminent danger *must be the motivation* for the [initial decision to enter the home] rather than the desire to apprehend a suspect or gather evidence for use in a criminal proceeding." *Mitchell,* 383 N.Y.S.2d 246, 347 N.E.2d at 610 (emphasis added). While the question of pretext or subterfuge is one factor that must be considered, it is not the end of the inquiry. The ultimate issue is whether officers had a reasonable concern that an individual's health would be endangered by a delay, and in fact were motivated by a need to address that concern. *Id.* The primary motivation must not be criminal investigation.

{37} "[C]onditioning the availability of the emergency doctrine exception on the searching officer's motivation is mandated by the doctrine's rationale that the preservation of human life is paramount to the right of privacy protected by the Fourth Amendment." *Prober,* 297 N.W.2d at 11. *But see Carlson,* 548 N.W.2d at 141 (rejecting a subjective test, because it is not satisfactorily subject to proof or disproof and sheds little light on the reasonableness inquiry). By adopting a primary motivation standard, we acknowledge the strong interest in protecting or preserving human life or avoiding serious injury exists even when police are investigating a crime. Nevertheless, we permit the trial court to examine motivation because, in the absence of a warrant, a neutral magistrate has not provided a preliminary review. "[The emergency assistance] exception is a narrow one, [and] courts must closely scrutinize the actions and motives of the police in order to determine whether the exception applies. This test is a means of subjecting police actions to that scrutiny." *Davis,* 497 N.W.2d at 918.

{38} The third part of the three-part test stated in *Mitchell* also is a common

aspect of an objective analysis in search and seizure and community caretaker cases. *See Apodaca,* 118 N.M. at 626, 884 P.2d at 517 ("The scope of any intrusion following the stop must be limited to those actions necessary to carry out the purposes of the stop. . . ."). Officers do not have "carte blanche to rummage for evidence if they believe a crime has been committed. There must be a direct relationship between the area to be searched and the emergency." *Mitchell,* 383 N.Y.S.2d 246, 347 N.E.2d at 610. The search must be " 'strictly circumscribed by the exigencies which justify its initiation.' " *Mincey,* 437 U.S. at 393, 98 S.Ct. 2408 (quoting *Terry v. Ohio,* 392 U.S. 1, 25–26, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). Police " 'may do no more than is reasonably necessary to ascertain whether someone is in need of assistance . . . and to provide that assistance. . . .' " *Ray,* 88 Cal.Rptr.2d 1, 981 P.2d at 937 (quoting LaFave, *supra* 6.6(a), at 401). Once they are lawfully inside, officers may expand the scope of the intrusion, if probable cause or reasonable suspicion arises. *Apodaca,* 118 N.M. at 626, 884 P.2d at 517. Officers may also seize evidence of a crime that is in plain view or arrest a suspect if there is probable cause. *Mincey,* 437 U.S. at 393, 98 S.Ct. 2408; *Apodaca,* 118 N.M. at 626, 884 P.2d at 517. Otherwise, the scope of the search is limited by its purpose. Officers may not conduct a general exploratory search, unless otherwise warranted. *Blades,* 626 A.2d at 278.

{39} We adopt the *Mitchell* three-part inquiry as the relevant analysis in determining whether the emergency assistance doctrine applies to a warrantless, nonconsensual entry into the home. Police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property; the search must not be primarily motivated by an intent to arrest a suspect or to seize evidence. Although the police need not be totally unconcerned with the apprehension of suspects or the collection of evidence, the motivation for the intrusion must be a strong sense of an emergency; and there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. We now apply this analysis.

E.

[redacted] {40} The facts known to the entering officers in this case are as follows. The deputies knew that the suspect in a stabbing incident might be headed to his home from the crime scene only a short distance away, and they were directed to his home to locate him. A second dispatcher told them that he might have sustained a wound to his head or his face. When they arrived, the door was slightly ajar, a light was on inside, it was a cold January night, and no one answered their knocks or calls. In summary, there was substantial evidence for the district court's finding that, "the Officers entered the Defendant's residence based on dispatch information that the Defendant *might* have been injured (possibly a head injury), their own observations that his door was slightly ajar in the wintertime, and there was no response to their knocks."

{41} These facts do not compel a conclusion that swift action was necessary to protect life or avoid serious injury. While these circumstances might suggest something is amiss, they do not add very much to the relevant inquiry. Many people purposely leave on a light even when they are away. An open door ought not be viewed as a general invitation to enter. *See Ray,* 88 Cal.Rptr.2d 1, 981 P.2d at 937. Moreover, unlike the facts in several of the cases relied on by the State, the residence entered was not the scene of a reported incident of violence, burglary, or other crime; the incident reported had occurred at another location. *See, e.g., Mincey,* 437 U.S. 385, 98 S.Ct. 2408 (searching home for additional victims after deadly confrontation between officers and occupant); *Alexander,* 124 Md.App. 258, 721 A.2d 275 (responding to breaking and entering); *State v. Johnson,* 104 Wash.App. 409, 16 P.3d 680 (2001) (searching home for victims in response to domestic violence in progress); *State v. Menz,* 75 Wash.App. 351, 880 P.2d 48 (1994) (investigating domestic violence in progress); *Ferguson,* 244 Wis.2d 17, 629 N.W.2d 788 (responding to 911 call regarding a fight). A reasonable explanation

was that Defendant, as a fugitive, had fled or was inside hiding.

{42} To justify the warrantless intrusion into a private residence under the emergency assistance doctrine, officers must have credible and specific information that a victim is very likely to be located at a particular place and in need of immediate aid to avoid great bodily harm or death. In *Mitchell,* for example, the police were called to a hotel to investigate a possible kidnaping. 383 N.Y.S.2d 246, 347 N.E.2d at 610. Hotel residents searched but were unable to locate the hotel maid who had been missing for several hours. *Id.* 383 N.Y.S.2d 246, 347 N.E.2d at 608. Under the facts and circumstances known to the officers, it was highly probable that she was somewhere in the hotel and that she had met some grave misfortune, either due to an illness, an accident, or a crime: the maid was last seen leaving an elevator on the sixth floor where she had been assigned to clean rooms, and her partially eaten lunch and street clothes were observed on the sixth floor. *Id.* 383 N.Y.S.2d 246, 347 N.E.2d at 610. After searching the entire hotel, alleyways, and adjoining restaurant, the police conducted a room-by-room search, eventually locating her body inside a closet in the defendant's room on the sixth floor. *Id.* 383 N.Y.S.2d 246, 347 N.E.2d at 609–10. The court concluded that the officers had valid reasons, grounded in empirical facts, to believe that an emergency existed. *Id.* 383 N.Y.S.2d 246, 347 N.E.2d at 610.

{43} Unlike *Mitchell,* the officers in this case had only generalized, nonspecific information that Defendant might be inside and that he might have sustained a head or face injury. They did not know the nature or extent of the injury. They did not even know whether he was injured. There was no evidence that Defendant was at home. In light of what little the deputies actually knew, it would have been more reasonable to conduct some minimal investigation to corroborate their suspicions, rather than immediately entering the home. To better evaluate the situation, the officers easily could have contacted deputies at the scene only a short distance away. They also could have walked around the home, looked in windows, or contacted the occupants of the home on the same property. *Cf. Nemeth,* 2001–NMCA–029, ¶¶ 5–6, 130 N.M. 261, 23 P.3d 936.

{44} Neither do we think it too much of a burden for the police to corroborate generalized information before they risk intruding into a home. In the absence of an obvious life-threatening emergency, corroboration will either confirm the need for immediate emergency action, or dispel it altogether. Accordingly, considering all the circumstances known and otherwise knowable to the officers in this case, we conclude that the emergency assistance doctrine does not support their entrance into Defendant's home without a warrant.

{45} We further conclude that even if the deputies had a good-faith generalized concern for Defendant's welfare, there was substantial evidence to support the trial court's finding that, "the facts within the entering officers' knowledge were not sufficient to elevate their primary role to that of community caretaking." Both deputies testified that they went to the home to locate a suspect. Although they thought the circumstances that they observed at the home were odd, at least one officer testified that he entered Defendant's home to look for the suspect *and* to check on his welfare. They lacked sufficient information to compel their actions. "[T]he protection of human life or property in imminent danger must be the motivation for the search rather than the desire to apprehend a suspect or gather evidence for use in a criminal proceeding." *Mitchell,* 383 N.Y.S.2d 246, 347 N.E.2d at 610. For these reasons, we conclude that the officers in substantial part were engaged in crime-solving activities rather than responding to an emergency.

III.

{46} We hold that a police officer or officers may enter a home without a warrant or consent pursuant to the emergency assistance doctrine as articulated in *Mitchell.*

Applying *Mitchell*, we conclude that the information available to the officers did not justify the warrantless intrusion into Defendant's home. We affirm the Court of Appeals and the trial court. The decision to suppress the evidence was appropriate under *Mitchell*.

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

WE CONCUR: RICHARD C. BOSSON, Chief Justice, PATRICIO M. SERNA, PETRA JIMENEZ MAES, and EDWARD L. CHÁVEZ, Justices.

2005-NMSC-003

109 P.3d 280

Don GORMLEY, Plaintiff–Petitioner,

v.

COCA–COLA ENTERPRISES, Defendant–Respondent.

No. 28,441.

Supreme Court of New Mexico.

Feb. 28, 2005.

Martin & Lara, W.T. Martin, Jr., Carlsbad, NM, for Petitioner.

Huffaker & Conway, P.C., Anne Marie Turner, Albuquerque, NM, Miller & Martin, P.L.L.C., T. Harold Pinkley, Nashville, TN, for Respondent.

OPINION

BOSSON, Chief Justice.

{1} In this employment dispute involving a claim of constructive discharge, the Court of Appeals affirmed summary judgment in favor of the employer, Coca–Cola Enterprises (Defendant). On certiorari, we conclude, as a question of first impression in New Mexico, that Don Gormley (Plaintiff) has not shown that his working conditions rose to the level necessary to support a claim of constructive discharge. Accordingly, we affirm the grant of summary judgment regarding Plaintiff's constructive discharge claim.

BACKGROUND

{2} We take the following background from the allegations leveled by the parties on summary judgment. Starting in 1983, Plaintiff was employed by Southwest Coca–Cola (Southwest) as a driver and deliveryman. The job involved heavy manual labor, including the requirement that he lift substantial weight. In 1994, when Plaintiff was 58, management at Southwest moved Plaintiff to a warehouse position with lighter duties and less hourly pay. Plaintiff's warehouse duties included stacking containers, janitorial work, running errands, filling out paperwork, and cleaning truck trailers. The record indicates that Plaintiff's supervisors, Robert Bolin and Ronnie Hill, initiated the move from the route to the warehouse out of concern for Plaintiff's health and safety. They feared that the workload may have rendered Plaintiff more vulnerable to an accident or injury. Upon Plaintiff's reassignment to the warehouse, he was told that he would now work a fifty-five-hour work week to maintain the same income he had received as a route driver.

{3} In 1998, Defendant acquired Southwest by merger. Soon after the acquisition, Plaintiff's new supervisor, Ruben Cardona, cut Plaintiff's fifty-five-hour work week, first by five hours and then by another five hours, and his warehouse duties were changed to include heavy lifting. At the time of the cuts, management was implementing a policy to reduce overtime hours for all employees. Plaintiff was assigned some route duties involving heavy lifting. Former supervisor Bo-

lin advised Cardona that Plaintiff had been promised a fifty-five-hour work week and lighter duties, and that Plaintiff was risking injury by performing the more physically demanding duties assigned by Cardona. Despite Bolin's protest, Cardona expressed indifference, and Plaintiff's working conditions did not improve.

{4} Plaintiff never personally protested the changes in his schedule and duties, nor did he file a complaint with his employer. Plaintiff acknowledges that two younger workers did the heavy lifting in the warehouse for him. Plaintiff alleges Cardona would complain to Plaintiff's immediate supervisor about the quality of his work. However, Plaintiff was never reprimanded or otherwise disciplined for his job performance. In 1999, roughly fifteen months after Defendant's acquisition of Southwest, Plaintiff tendered his resignation giving a month's notice.

{5} In May 2000, Plaintiff initiated the present litigation, claiming breach of implied employment contract based on the promise of wages and hours, wrongful termination, age discrimination, constructive discharge, and in an amended complaint, disability discrimination. Defendant responded with a motion for summary judgment on all claims, which the district court ultimately granted.

{6} The Court of Appeals reversed the award of summary judgment on the breach of implied contract, from which Defendant has not appealed, and in a divided opinion, the court affirmed the district court on all other counts. *Gormley v. Coca-Cola Enters.*, 2004-NMCA-021, 135 N.M. 128, 85 P.3d 252. We granted certiorari to review solely the summary judgment against Plaintiff's claim of constructive discharge which was the focal point of disagreement among the members of the Court of Appeals panel.

{7} Regardless of what we decide today, Plaintiff's breach of implied contract claim, based on the alleged promise of a certain level of hours and wages, will proceed to trial. The question on certiorari is whether that trial will include Plaintiff's claim for constructive discharge, which, according to the parties' explanation at oral argument, would allow Plaintiff to claim consequential damages for breach of implied contract beyond the time of his resignation.

DISCUSSION

Summary Judgment

{8} Summary judgment is proper when "there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582 (citation omitted). We look at whether, as a matter of law, the defendant is entitled to summary judgment. *Id.* These legal questions are reviewed de novo. *Id.* "When reviewing a trial court's grant of summary judgment, we view the facts in the light most favorable to the party opposing summary judgment, drawing all inferences in favor of that party." *Stieber v. Journal Publ'g Co.*, 120 N.M. 270, 271-72, 901 P.2d 201, 202-03 (Ct.App.1995).

Constructive Discharge

{9} Constructive discharge is not an independent cause of action, such as a tort or a breach of contract. Instead, constructive discharge is a doctrine that permits an employee to recast a resignation as a de facto firing, depending on the circumstances surrounding the employment relationship and the employee's departure. *See Turner v. Anheuser-Busch, Inc.*, 7 Cal.4th 1238, 32 Cal. Rptr.2d 223, 876 P.2d 1022, 1030 (1994) ("Even after establishing constructive discharge, an employee must independently prove a breach of contract or tort in connection with employment termination in order to obtain damages for wrongful discharge."). An employee who resigns from employment must prove constructive discharge as part of establishing a wrongful termination. *Pollard v. High's of Baltimore, Inc.*, 281 F.3d 462, 472 (4th Cir.2002). Plaintiff, in the case before us, must establish a constructive discharge if he wants to pursue compensatory damages for breach of contract beyond the time of his resignation.

{10} Although no New Mexico opinion sets forth the elements necessary to prove constructive discharge, numerous federal opinions from the Tenth Circuit discuss that standard. An employee must allege

facts sufficient to find that the employer made working conditions so intolerable, when viewed objectively, that a reasonable person would be compelled to resign. *See Derr v. Gulf Oil Corp.*, 796 F.2d 340, 344 (10th Cir. 1986). "Essentially, a plaintiff must show that she had no other choice but to quit." *Yearous v. Niobrara County Mem'l Hosp.*, 128 F.3d 1351, 1356 (10th Cir.1997) (quoted authority omitted). "The bar is quite high" for proving constructive discharge. *Garrett v. Hewlett–Packard Co.*, 305 F.3d 1210, 1221 (10th Cir.2002).

{11} Examples of adverse employment actions that rise to the level of constructive discharge include "a humiliating demotion, extreme cut in pay, or transfer to a position in which [the employee] would face unbearable working conditions." *Pennsylvania State Police v. Suders*, 542 U.S. 129, 124 S.Ct. 2342, 2347, 159 L.Ed.2d 204 (2004). Other examples include: an employer's threat of being fired; overt pressure to resign and accept early retirement; dramatic cut in pay; and retaliatory measures (e.g., discrimination, unreasonable criticism, involuntary transfer). *See Douglas v. Orkin Exterminating Co.*, No. 98–8076, 2000 WL 667982, at *4, 215 F.3d 1336 (10th Cir. May 23, 2000) (unpublished opinion)[1] (holding that evidence of a demotion and lower pay supported reversal of summary judgment); *Keller v. Bd. of Educ.*, 182 F.Supp.2d 1148, 1157 (D.N.M.2001) (holding that constructive discharge claim was supported by the record and justified denial of summary judgment when employee was reassigned to a job without a job title and description, her office was in a supply closet, and her salary was cut by more than one-half, amounting to less than her retirement benefit); *Gower v. IKON Office Solutions, Inc.*, 177 F.Supp.2d 1224, 1233 (D.Kan.2001) (holding claim of constructive discharge was supported by evidence that the worker was given twenty-four hours to sign a new contract limiting the number of accounts he could service, reducing his commission in one account from $8,000 to $3,000 per month, and changing his reporting requirements); *Goodwin–Haulmark v. Menninger Clinic, Inc.*, 76 F.Supp.2d 1235, 1239 (D.Kan.1999) (concluding that overt pressure to resign raised genuine issues of material fact to justify denial of summary judgment regarding constructive discharge); *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 993 (10th Cir.1994) (finding that systematic threats and pressure to retire constituted constructive discharge).

{12} The specific facts of the employment condition, and the severity of its impact upon the employee, are pivotal in determining whether the claim rises to the level of constructive discharge. In many cases, the circumstances surrounding resignation are not egregious enough to support a claim. *See Gioia v. Pinkerton's, Inc.*, 194 F.Supp.2d 1207, 1228 (D.N.M.2002) (stating that plaintiff's change in duties and pay reduction of approximately 9.1% did not constitute constructive discharge); *Garrett*, 305 F.3d at 1221 (intimidating behavior by supervisors resulting in lower performance evaluations and repeated denial of requests to transfer did not amount to constructive discharge); *Baker v. Perfection Hy–Test*, No. 95–6091, 1996 WL 1162, *9–11, 74 F.3d 1248 (10th Cir. Jan. 16, 1996) (unpublished opinion) (holding a demotion, a ten percent reduction in pay and jokes by co-workers directed at plaintiff did not amount to constructive discharge); *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 858 (10th Cir.2000) (holding that change in location of desk, monitoring of telephone calls, ostracism by fellow employees, and suggestion by supervisor to transfer did not amount to constructive discharge); *Williams v. Giant Food Inc.*, 370 F.3d 423, 434 (4th Cir.2004) (stating that "dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign") (quoted authority omitted).

1. It is the practice of this Court not to cite unpublished opinions. However, since this is a case of first impression in New Mexico, we are including two federal unpublished opinions to provide additional factual examples of what courts have determined to constitute or not to constitute constructive discharge. These opinions are cited for the limited purpose of illustration. It continues to be the practice of this Court to only rely on published cases as precedent.

{13} Plaintiff bases his claim for constructive discharge on four factors: criticism of Plaintiff's job performance, the loss of his guaranteed fifty-five-hour work week, a reduction in pay, and the loss of assignment to lighter duties. In each case, the record on summary judgment does not demonstrate employment conditions so severe that a reasonable person in Plaintiff's situation would have felt compelled to resign.

{14} Clearly, the reduction in Plaintiff's fifty-five-hour work week to a forty-five-hour work week is not sufficient to amount to constructive discharge. The loss of overtime hours did not reduce Plaintiff's base pay. Though he was earning less than he had been before, the change in pay was not such a material change that, when viewed objectively, would force him to leave. *See Gioia,* 194 F.Supp.2d at 1228; *see also King v. AC & R Adver.,* 65 F.3d 764, 767–68 (9th Cir. 1995) (holding that compensation reduction from $235,000 to $175,000 was insufficient as a matter of law to cause constructive discharge); *McCann v. Litton Sys., Inc.,* 986 F.2d 946, 952 (5th Cir.1993) (ruling that 12% decrease in pay plus loss of some supervisory responsibilities was not a constructive discharge).

{15} Plaintiff also lost some overtime hours but did not suffer a substantial cut in pay. A cut in pay must be an extreme change in pay to support a constructive discharge claim. *Pennsylvania State Police,* 124 S.Ct. at 2347. Plaintiff still retained some of his overtime hours and was not paid less for the hours he worked. Management at the facility was instructed to reduce the number of overtime hours for all employees and was not focused just on Plaintiff. Employers are not required to continue to provide overtime hours.

{16} Plaintiff argues he was subjected to a "barrage of criticism." He alleges that he was exposed to continuous criticism such that he felt constant pressure and discomfort. However, during Plaintiff's deposition when asked about criticism from his new manager, he stated, "whenever he talked to me, to my face he was real nice and everything." Plaintiff testified Cardona would then complain to Plaintiff's immediate supervisor, criticizing the quality of Plaintiff's work. Even assuming the truth of the allegations, they hardly rise to the level of conditions that would leave Plaintiff no choice but to quit. "An objectively reasonable person would expect one's supervisor to criticize what he perceived as his employee's poor performance. . . ." *Smith v. Aaron's Inc.,* 325 F.Supp.2d 716, 727 (E.D.La.2004). Additionally, Plaintiff never received any written warnings or reprimands. Such generalized claims of criticism are not enough to amount to constructive discharge. *See Aikens v. Banana Republic, Inc.,* 877 F.Supp. 1031, 1039 (S.D.Tex.1995) ("[T]he mere fact that [plaintiff] experienced 'pressure' or was 'nitpicked' does not establish such intolerable working conditions as to give rise to a constructive discharge.").

{17} Analytically, Plaintiff's claim that the loss of lighter duties jeopardized his safety is sound, but unfortunately the claim is not sufficiently supported in the record. Although Plaintiff was removed from the easier cashier and warehouse duties and assigned jobs involving some heavy lifting, two of the younger workers in the warehouse were available to help him. There was no evidence presented on summary judgment that Plaintiff actually had to perform heavy lifting, or that he was placed in a situation where that was likely to happen. Plaintiff did not suffer any injuries resulting from the change in duties, and he made no showing that his health was endangered. Mere speculation about what could possibly happen is not sufficient.

{18} Plaintiff's change in duties, though perhaps improvident or even insensitive on the part of his employer, do not rise to the level of constructive discharge. *Yearous,* 128 F.3d at 1356–57 ("[A] series of questionable judgments leading to difficult working conditions does not alone support a claim of constructive discharge. . . ."). We acknowledge that there are circumstances in which a change of duties endangering an employee's safety might well rise to the level of constructive discharge. Plaintiff simply never presented such a case on summary judgment. Additionally, Plaintiff never directly claimed

that safety concerns caused him to leave. Plaintiff never established a sufficient nexus between those concerns and his resignation.

{19} Other factors may be considered to determine whether the worker's resignation was voluntary or de facto compulsory. For example, some courts require that the employee notify the employer of the problem, and afford the employer a sufficient opportunity to resolve it before leaving. As an example, in *Woodward v. City of Worland*, 977 F.2d 1392, 1402 (10th Cir.1992), the Tenth Circuit suggested that a reasonable person would have filed a formal complaint in response to sexual harassment prior to resigning and barred the worker's claim as a matter of law.

> Here, [the employee] apparently was able to work under these circumstances for several years, and there was no showing either that the situation got substantially worse just before she quit or that requesting disciplinary action against [the employer] would have been ineffective. Hence, on this record, [the employee] failed to establish a genuine dispute as to whether a reasonable person would have believed that there was no reasonable alternative to resignation.

Id.

{20} Defendant also points to the fact that, even after these changes occurred, Plaintiff remained on the job for over a year. Plaintiff investigated his social security benefits for early retirement. When Plaintiff submitted his letter of resignation he did so by giving a full month's notice. Plaintiff was asked by Cardona to reconsider and stay on the job, but refused and resigned.

{21} Defendant asks that we issue a bright-line rule requiring prior notice in all instances, and stipulating a time within which an employee must leave to complain of constructive discharge. We decline to do so. Notice is one factor out of many for the fact-finder to consider when looking at the specific circumstances of each case. The same is true with respect to the circumstances surrounding how long the employee remains on the job and continues to suffer from onerous conditions. In the case before us, we affirm summary judgment not because of any one factor, but because Plaintiff did not create a genuine issue of material fact to support his constructive discharge claim.

CONCLUSION

{22} As a matter of law, Plaintiff did not create a genuine issue of material fact to support his constructive discharge claim. Therefore, we affirm the opinion of the Court of Appeals affirming summary judgment for Defendant.

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

WE CONCUR: PAMELA B. MINZNER, PATRICIO M. SERNA, PETRA JIMENEZ MAES, and EDWARD L. CHAVEZ, Justices.

2005-NMSC-004

109 P.3d 285

STATE of New Mexico, Plaintiff–Petitioner,

v.

Antonio GRAHAM, Defendant–Respondent.

No. 28,286.

Supreme Court of New Mexico.

March 1, 2005.

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

John Bigelow, Chief Public Defender, William A. O'Connell, Assistant Appellate Defender, Santa Fe, NM, for Respondent.

OPINION

SERNA, Justice.

{1} Following a jury trial, Defendant Antonio Graham was convicted of, among other charges, child abuse, contrary to NMSA 1978, § 30–6–1 (2001). On appeal, the Court of Appeals affirmed Defendant's other convictions but reversed his conviction of child abuse on the basis of insufficient evidence. *State v. Graham,* 2003–NMCA–127, ¶ 3, 134 N.M. 613, 81 P.3d 556. This Court granted the State's petition for writ of certiorari to the Court of Appeals, and we now reverse.

I. Facts

{2} Defendant lived at the residence of his girlfriend, Amanda Kelly, with their two children, ages one and three. On September 1, 2000, police sought to execute an arrest warrant for Defendant at Kelly's house. Police officers apprehended Defendant outside the house in a truck. With the consent of the owner of the truck, the officers found crack cocaine in a search of the truck. At that point, Kelly stepped out of the house and asked what was happening. The officers smelled a strong odor of burnt marijuana emanating from the house. They obtained a search warrant for the house. Inside, the officers found additional crack cocaine, several plastic bags with marijuana, a marijuana pipe, and a hanging scale in a dresser drawer in the master bedroom. The officers also noticed rolling papers and marijuana residue, including seeds and stems, on top of a different dresser. Additionally, the officers found a marijuana roach on the living-room floor in front of the sofa and a marijuana bud in a crib in the master bedroom. The officers also recovered a plastic sandwich bag with a small amount of marijuana just inside the front door on a table next to a fish tank. The officers saw two infants in the house and noticed that they were in diapers. The house was dirty and untidy, with soiled clothes on the floor throughout the house and unwashed dishes with old food on them. Along with various drug charges, the State charged Defendant with child abuse.

{3} At trial, Officer Lee Wilder testified that the bud is the most desirable part of the marijuana plant that people generally smoke. It is the part of the plant containing a high concentration of tetrahydrocannabinols. Officer Dusty Collins explained that marijuana dries in buds that are broken up and put in bowls or cigarettes to smoke. The bud found in the crib was in one solid piece with the stem.

{4} Kelly testified that she was unaware of the marijuana on the floor of the living room and in the crib. She stated that if the children had ingested the marijuana she believed that they would have become sick. Kelly testified that Defendant told her that the presence of the marijuana on the living room floor and in the baby's crib was his fault and that he was sorry. In response to a question about whether drugs were more important to Defendant than his children, Kelly recited Defendant's statement that his only thoughts were about drinking, smoking dope, selling drugs, and running the streets.

{5} Two witnesses testified that they were inside Kelly's house immediately before Defendant's arrest on September 1, 2000. These witnesses testified that while they were in the living room they saw Kelly's two children running around the house and playing. Officer Collins testified that the marijuana in the living room was accessible to the children. In addition, a photograph of the bud inside the crib was admitted as an exhibit.

II. Standard of Review

{6} "[T]he test to determine the sufficiency of evidence in New Mexico ... is 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). We have explained that this test involves two separate parts. *State v. Coffin,* 1999-NMSC-038, ¶ 73, 128 N.M. 192, 991 P.2d 477; *State v. Sanders,* 117 N.M. 452, 456, 872 P.2d 870, 874 (1994). First, "[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." *Sutphin,* 107 N.M. at 131, 753 P.2d at 1319. Second, an appellate court "determines whether the evidence, *viewed in this manner,* could justify a finding by *any* rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt." *Sanders,* 117 N.M. at 456, 872 P.2d at 874 (emphases added).

{7} In setting out the standard for reviewing sufficiency of the evidence, the Court of Appeals stated that "the evidence and inferences drawn from that evidence must be sufficiently compelling so that a hypothetical reasonable factfinder could have reached 'a subjective state of near certitude of the guilt of the accused.' " *Graham,* 2003-NMCA-127, ¶ 12, 134 N.M. 613, 81 P.3d 556 (quoted authority omitted). It is indeed true that the standard of beyond a reasonable doubt has been described as "a subjective state of near certitude of the guilt of the accused." *Jackson v. Virginia,* 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). This standard has also been described as being beyond "a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life." UJI 14-5060 NMRA 2005. However, in articulating the reasonable doubt standard referenced by the Court of Appeals, the United States Supreme Court emphasized that an appellate court reviewing for sufficiency does not

> ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution.

Id. at 318-19, 99 S.Ct. 2781 (citation, quotation marks, and quoted authority omitted). We have used similar cautionary language: "A reviewing court may neither reweigh the evidence nor substitute its judgment for that of the jury." *Sutphin,* 107 N.M. at 131, 753 P.2d at 1319. Thus, the question is not whether this Court is convinced of Defendant's guilt beyond "a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life." UJI 14-5060. Rather, the question is whether, viewing all of the evidence in a light most favorable to upholding the jury's verdict, there is substantial evidence in the record to support *any* rational trier of fact being so convinced. "[S]ubstantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...." *State v. Lujan,* 103 N.M. 667, 669, 712 P.2d 13, 15 (Ct.App. 1985), *quoted in State v. Salgado,* 1999-NMSC-008, ¶ 25, 126 N.M. 691, 974 P.2d 661.

III. Sufficiency of the Evidence

{8} We begin our review of the sufficiency of evidence to support Defendant's conviction with the elements of child abuse. For the form of the crime with which Defendant was charged, the State had the burden of proving beyond a reasonable doubt that

Defendant caused a child or children under the age of eighteen to be placed in a situation that may have endangered their life or health and did so with a reckless disregard. Section 30-6-1(A)(3), (D)(1). A reckless disregard requires that Defendant "knew or should have known [his] conduct created a substantial and foreseeable risk, [he] disregarded that risk and . . . was wholly indifferent to the consequences of the conduct and to the welfare and safety" of the child or children. UJI 14-604 NMRA 2005.

{9} By including endangerment in Section 30-6-1, the Legislature expressed its intent to extend the crime of child abuse to certain conduct even if the child has not suffered physical harm. *State v. Ungarten,* 115 N.M. 607, 609, 856 P.2d 569, 571 (Ct.App. 1993). "The [L]egislature's decision to criminalize the conduct described by the statute reflects a compelling public interest in protecting defenseless children." *Lujan,* 103 N.M. at 671, 712 P.2d at 17; *accord Santillanes v. State,* 115 N.M. 215, 219, 849 P.2d 358, 362 (1993). "[C]hildren, who are often times defenseless, are in need of greater protection than adults." *State v. Lucero,* 87 N.M. 242, 245, 531 P.2d 1215, 1218 (Ct.App. 1975). However, in designating the crime as, at a minimum, a third degree felony, Section 30-6-1(E), the Legislature did not intend to criminalize conduct creating "a mere possibility, however remote, that harm may result" to a child. *Ungarten,* 115 N.M. at 609, 856 P.2d at 571; *accord State v. Coe,* 92 N.M. 320, 321, 587 P.2d 973, 974 (Ct.App.1978) (rejecting the argument "that because of its negligence requirement the statute covers any and all harm that might befall the child"), *overruled on other grounds by Santillanes,* 115 N.M. at 225 & n. 7, 849 P.2d at 368 & n. 7. "There must be 'a reasonable probability or possibility that the child will be endangered.' " *State v. McGruder,* 1997-NMSC-023, ¶ 37, 123 N.M. 302, 940 P.2d 150 (quoting *Ungarten,* 115 N.M. at 609, 856 P.2d at 571) (quotation marks omitted).

{10} In reviewing the evidence relevant to the charge of child abuse, the Court of Appeals stated that there was "no direct evidence that the two children were ever close to the drugs that were found and no direct or circumstantial evidence that the presence of the drugs posed a direct and imminent threat of danger to them." *Graham,* 2003-NMCA-127, ¶ 26, 134 N.M. 613, 81 P.3d 556. We first note that direct evidence is not required. *State v. Bell,* 90 N.M. 134, 137, 560 P.2d 925, 928 (1977). We also disagree with this assessment of the evidence. With respect to proximity, two witnesses testified that, while in the living room, they observed the children running around the house immediately before the arrest and search. Officer Collins testified that the marijuana on the floor in front of the sofa was accessible to the children. In addition, a whole marijuana bud was found in a crib, a piece of furniture that functions as a sleeping area for an infant. We believe that this evidence supports a reasonable inference that the children were in the immediate vicinity of the marijuana, that it was accessible to them, and that there was a reasonable possibility that they would come in contact with the controlled substance. *See State v. Romero,* 79 N.M. 522, 524, 445 P.2d 587, 589 (Ct.App.1968) ("An inference is merely a logical deduction from facts and evidence.") (quoting *State v. Jones,* 39 N.M. 395, 401, 48 P.2d 403, 406 (1935)). The Court of Appeals indicated that there was no evidence that the crib was used for either child. *Graham,* 2003-NMCA-127, ¶ 21, 134 N.M. 613, 81 P.3d 556. However, the State introduced a photograph depicting the contents and state of the crib at the time of the incident. Two police officers testified that the crib was in the master bedroom and that the bud in the crib was found underneath a teddy bear. This evidence, as well as the inherent purpose of this piece of furniture and the ages of the children, supports a reasonable inference that the crib was being used as a sleeping area for at least one of the children. From the testimony that the officers did not see the bud until they picked up the teddy bear, and from the absence of any evidence suggesting that the marijuana had just been put in the crib, a reasonable inference could also be drawn that the bud had been in the crib while the child slept.

{11} With respect to the danger to the children, the Court of Appeals discounted

the testimony of Kelly. Noting that no objection had been made to Kelly's testimony, the Court nonetheless determined that Kelly's testimony was inadmissible and "that inadmissible testimony to which no objection is made has only such probative value as its rational persuasive power." *Graham*, 2003–NMCA–127, ¶ 21, 134 N.M. 613, 81 P.3d 556. Irrespective of its admissibility, we believe that the Court of Appeals applied an incorrect standard in reviewing Kelly's testimony. For the proposition that it could weigh Kelly's testimony, the Court of Appeals relied on *State v. Vigil*, 97 N.M. 749, 752, 643 P.2d 618, 621 (Ct.App.1982). We believe the Court of Appeals' reliance on *Vigil* is misplaced. In *Vigil*, the testimony at issue was hearsay, and it was admissible, despite the existence of an objection by the defendant, because, as a probation revocation, the proceeding was not governed by the Rules of Evidence. *Id.* at 750–51, 643 P.2d at 619–20. The question on appeal was whether hearsay alone could establish a probation violation. *Id.* at 751, 643 P.2d at 620. Under these circumstances, the Court assessed the rational persuasive power of the testimony. *Id.* at 752, 643 P.2d at 621. This evaluation of the weight of testimony has similarly been restricted to hearsay serving as the sole evidence supporting a verdict in other cases. *See State v. Romero*, 67 N.M. 82, 86, 352 P.2d 781, 783 (1960) (noting that "hearsay, admitted without objection, is to be considered along with other evidence in determining whether there is substantial evidence to sustain a verdict on appeal"). Outside this limited context, and for non-hearsay such as Kelly's testimony, we follow the rule that

> [w]e do not ... substitute our judgment for that of the factfinder concerning the credibility of witnesses or the weight to be given their testimony. Testimony by a witness whom the factfinder has believed may be rejected by an appellate court only if there is a physical impossibility that the statements are true or the falsity of the statement is apparent without resort to inferences or deductions.

Sanders, 117 N.M. at 457, 872 P.2d at 875 (citation omitted).

{12} In addition to Kelly's testimony, Officer Wilder testified that the bud is the part of the marijuana plant containing the highest concentration of tetrahydrocannabinols. We also note that the Legislature has designated marijuana as a Schedule I controlled substance under NMSA 1978, § 30–31–6(C)(10) (1978), together with LSD, heroin, and numerous other drugs. Moreover, the Legislature has increased the penalties available for distributing controlled substances, specifically including marijuana, to minors as opposed to adults, NMSA 1978, § 30–31–21 (1987), and has increased penalties for distributing controlled substances in the vicinity of minors by creating drug-free school zones, NMSA 1978, § 30–31–22(C) (1990). From these statutes, the Legislature has indicated its determination that marijuana is a dangerous substance, particularly for minors. It is also common knowledge that the same amount of an intoxicant can have a more profound impact on infants and toddlers than on adults or even older children. The Court of Appeals, as an example of the inadequacy of the record in the present case, cited to a case in which an expert testified about the extremely large quantity of marijuana necessary for a lethal dose. *Graham*, 2003–NMCA–127, ¶ 24, 134 N.M. 613, 81 P.3d 556. However, Section 30–6–1(D)(1) proscribes conduct that may endanger the health, as well as the life, of a child. It was thus unnecessary for the State to show that the amount of marijuana accessible to the children could have been fatal. Given the illegality of the substance and the Legislature's determination that the substance is particularly dangerous to minors, we believe it was within the jurors' experience to decide whether the amount of accessible marijuana endangered the health of a three-year-old child and a one-year-old child.

{13} Contrary to the applicable standard of review, it appears that the Court of Appeals parsed the testimony and viewed the verdict only in light of the probative value of individual pieces of evidence. The Court of Appeals stated that "Kelly's testimony takes on significance far beyond what it should," *Graham*, 2003–NMCA–127, ¶ 26, 134 N.M. 613, 81 P.3d 556, that "[t]he rational persuasive power of ... Kelly's testimony

is minimal," *id.* ¶ 21, that "[w]e do not know if the children had access to the marijuana or their proximity to the drugs or drug users," *id.* ¶ 25, and that "[w]e do not know where the children were in relation to the others in the house, or whether the 'roach' that was found resulted from this or earlier smoking." *Id.* This divide-and-conquer approach is not contemplated in appellate review for sufficiency of the evidence. *Cf. United States v. Arvizu,* 534 U.S. 266, 274, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002) (noting that a totality of the circumstances review for reasonable suspicion supporting an investigative stop is inconsistent with a "divide-and-conquer analysis" that looks at individual facts in isolation). We view the evidence as a whole and indulge all reasonable inferences in favor of the jury's verdict. "An appellate court does not evaluate the evidence to determine whether some hypothesis could be designed which is consistent with a finding of innocence." *Sutphin,* 107 N.M. at 130–31, 753 P.2d at 1318–19. Appellate courts "faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson,* 443 U.S. at 326, 99 S.Ct. 2781. We do not search for inferences supporting a contrary verdict or reweigh the evidence because this type of analysis would substitute an appellate court's judgment for that of the jury.

{14} From the evidence in the record, a rational jury could draw reasonable inferences that the marijuana was accessible to the children, that there was a reasonable possibility that the children would come in contact with the marijuana, and that there was a reasonable possibility of danger to the very young children from ingesting the marijuana. In conjunction with this evidence, the jury heard testimony that Defendant trafficked in crack cocaine in close proximity to the children and that Defendant kept a substantial quantity of crack cocaine and marijuana in various places around the house. Defendant also admitted to being responsible for leaving the marijuana in places that the jury could infer were easily accessible to the children. Viewing all of the evidence in the record in a light most favorable to the verdict, we determine that a rational jury could find each element of child abuse, including a reasonable possibility of danger to the health of the children, beyond a reasonable doubt.

IV. Conclusion

{15} We conclude that Defendant's conviction of child abuse is supported by sufficient evidence in the record. We reverse the Court of Appeals and affirm the conviction.

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

WE CONCUR: PETRA JIMENEZ MAES, Justice, EDWARD L. CHÁVEZ, Justice (specially concurring), RICHARD C. BOSSON, Chief Justice (dissenting), and PAMELA B. MINZNER, Justice (dissenting).

CHÁVEZ, Justice (specially concurring).

{17} I concur with the opinion authored by Justice Serna. I write separately to address some of the concerns raised in the dissenting opinion.

{18} In order to prove the offense of child abuse under Section 30–6–1(C)(1), the State must prove beyond a reasonable doubt that Defendant knowingly, intentionally or negligently, and without justifiable cause, permitted a child to be placed in a situation that may endanger the child's life or health. NMSA 1978, § 30–6–1(D) (2001). In child abuse cases, we have held that the Legislature intended the phrase "may endanger" to constitute "a reasonable probability or possibility" that the child will be endangered. *State v. Ungarten,* 115 N.M. 607, 609, 856 P.2d 569, 571 (Ct.App.1993). In this case the jury was instructed that the State had the burden of proving beyond a reasonable doubt that Defendant caused a child or children to be placed in a situation which endangered their life or health. UJI 14–604 NMRA 2005.

{19} In my opinion, although this is a close case, the evidence was sufficient to support the conviction. I do not agree with the dissent that by sustaining this conviction we make bad parenting a crime. This is not simply a case of bad parenting or a "mistake"

as characterized by the dissent. In this case two children, ages one and three, were running around the house while adults smoked marijuana rolled in cigar paper. A marijuana cigarette bud was left on the floor where the children were playing. An open bag with marijuana residue was left sitting on a table. Marijuana seeds and stems were left on a dresser in the room where the baby crib was located. In the baby crib was a marijuana bud, which, according to expert testimony, is the most potent part of the marijuana plant. The case would have been much stronger had a witness testified that the children were chewing the marijuana left within their reach and had a toxicologist testified regarding the toxicity of marijuana. However, in this case the law does not require such direct evidence. *See State v. McGruder*, 1997-NMSC-023, 123 N.M. 302, 940 P.2d 150. Given the jury's reasonable inference in this case that the marijuana bud, a particularly potent and illegal substance, could harm a child if ingested, I believe the evidence of marijuana left in the baby's crib and the areas where the children were playing is sufficient to support a finding of a reasonable probability or possibility that the children would be endangered.

{20} I am also not persuaded by the concern expressed in the dissent that the Court's holding criminalizes leaving household products accessible to children. Each of the products to which the dissent refers is legal. I do not read Justice Serna's opinion as prohibiting legitimate acts. Additionally, toxic household products have child resistant caps. The Defendant in this case left the marijuana accessible to children without taking any steps whatsoever to eliminate or minimize the risk that the children would ingest the marijuana. A reasonable fact finder could find that such an act constitutes child abuse as defined by the Legislature.

{21} Finally, the dissent relies on *State v. Trujillo* as support for the proposition that a child must be directly in harm's way to support a conviction of child abuse. Much like the dissent in this case, *Trujillo* seems to require proof of actual injury beyond all doubt. In *Trujillo* the Court of Appeals reversed a jury finding of child abuse, holding there was insufficient evidence that a child who witnessed the beating of her mother faced a "substantial risk" to her emotional or physical health. 2002-NMCA-100, ¶¶ 20-21, 132 N.M. 649, 53 P.3d 909. In that case, the drunken father came home late one night, and, as the children slept, he began to beat his wife. The beating was loud enough to awaken the couple's eight-year-old child, who went to the room to see what was happening. The child testified that she saw her dad beating her mother as the mother asked him to stop. When the child appeared at the door the father stopped beating the child's mother and said to the child, "Get your little f___-ing ass back to bed because I don't want to have you see me kill your mother." *Id.* ¶ 5. The Court of Appeals held there was insufficient evidence for a jury to find a "reasonable probability or possibility" that the daughter's emotional health was endangered, *id.* ¶ 20, despite testimony from the child and the mother that the child was scared and saddened by what she witnessed, and that for some time the child lived in fear that she would be "taken away," or that her father would injure her or kill her mother, to the extent that she missed many days of school. *Id.* ¶¶ 11-12. The dissent in this case underscores the lack of evidence of direct, physical harm to the child in *Trujillo*, emphasizing that "the father ordered his child to leave the room just so she would *not* be in the direct line of his anger." ¶ 31. In my opinion, requiring this type of evidence to sustain a jury finding of child abuse goes well beyond requiring the prosecution to prove each element of a crime beyond a reasonable doubt.

{22} Justice is a community project in which individuals participate directly when serving on a jury. While it is certainly appropriate in some cases to reverse a jury conviction based on insufficient evidence, this is not the case. The jury was instructed in such a way that what may be a vague and overbroad statute—requiring only a showing that a child was negligently placed in a situation that may have endangered the child—in fact required a showing that the child was placed in a situation which endangered the child's life. For the reasons previously stated, I believe a reasonable jury could find the

defendant guilty based on the direct and circumstantial evidence presented to the jury and the reasonable inferences that could be drawn from such evidence.

{23} If our interpretation of legislative intent is incorrect as it relates to child abuse, let us err on the side of the safety of children. If the Legislature did not intend for the child abuse definition to reach the circumstance in which illegal drugs are placed within reach of children, the Legislature should revise the definition and tighten up what may be a vague and overbroad statute.

{24} For the foregoing reasons, I concur in affirming Defendant's conviction for child abuse.

BOSSON, Chief Justice (dissenting).

{25} I do not believe the State provided sufficient evidence at trial that the children were actually in danger of ingesting marijuana, and therefore I respectfully dissent. To establish a claim of child abuse, the State must demonstrate that the defendant caused the children "to be placed in a situation which endangered [their] life or health." UJI 14–604 NMRA 2005. The State must first show that marijuana is a potentially dangerous substance, and then that the children were actually in danger from it.

{26} Because most of the trial focused on the other charges arising from Defendant's drug dealing, the one count dealing with child abuse received little attention at trial from either side. The State presented only one theory for the charge in its opening statement: that Defendant committed child abuse by leaving the marijuana in areas accessible to children. *State v. Graham,* 2003–NMCA–127, ¶ 19, 134 N.M. 613, 81 P.3d 556. But it has never been a crime, before now, to leave a potentially toxic chemical in an area where there is only a mere possibility, however remote, that a child might come in contact with it. This cannot be what the legislature had in mind when it made criminal child abuse a third degree felony. Otherwise, we risk criminalizing huge territories of benign, though perhaps careless, conduct which up to now has been the province of the abuse and neglect statutes or the law of civil negligence. *See* NMSA 1978, § 30–6–1 (2004). We risk making a criminal act out of merely being a bad parent.

{27} I agree with our Court of Appeals that the State presented an anemic case in support of the child abuse charge. Despite the testimony of a police officer formally trained in the identification and handling of marijuana, and a forensic chemist from the state crime lab, the State failed to elicit any expert testimony describing the toxicity of the two small pieces of marijuana or directly linking such a small amount to its potential effects upon small children. Presumably, the State could have done so without undue inconvenience, and the jury would have had the kind of evidence it deserved to make an informed decision.

{28} However, this satisfies only half the State's burden. Beyond proving the degree of risk to the child's health from marijuana generally, the State had to prove proximity: that a child was actually placed in a direct, physical line to that danger.[1] The danger to this particular child must be more than merely theoretical. Although the law does not require that a child suffer actual injury, it does require that the hazard be greater than a "mere possibility." *State v. Ungarten,* 115 N.M. 607, 856 P.2d 569 (Ct.App.1993). The risk of harm has to be substantial; the legislature did not intend to criminalize every harm that might possibly come a child's way. *State v. Massengill,* 2003–NMCA–024, ¶¶ 43–47, 133 N.M. 263, 62 P.3d 354. Our courts have previously lent such a reasonable interpretation to the child abuse statute, and I believe we should do so here. "In making this offense a third degree felony, the legislature intended to address conduct with potentially serious consequences to the life or health of a child. The coupling in the statute of the word 'health' with the word 'life' suggests to us that the legislature intended to address situations in which children are exposed to a substantial risk to their health." *State v. Trujillo,* 2002–NMCA–100, ¶ 21, 132 N.M. 649, 53 P.3d 909.

1. Even with the presumed toxicity of marijuana, and fully recognizing its illegality, the State nonetheless had the burden of producing evidence of proximity.

{29} With this caution in mind, I would point out what is self-evident about modern households. They contain a wide assortment of commonly used agents, potentially toxic to children, such as detergents, paint products, cleansers and bleaches, insecticides, herbicides, and even alcoholic beverages and cigarettes. Most of the time, these toxic agents are not under lock and key. Sensibly, as a society we place a considerable degree of trust and discretion in parents; we trust them to undertake reasonable precautions to keep these toxic agents away from children. We do not make a criminal act out of merely making a mistake; after all, none of us is a perfect parent.

{30} In interpreting the child abuse statute, our courts have recognized the distinction between imminent danger and danger which is more remote. For example, we have upheld child abuse convictions when the violent behavior of adults places children physically proximate to that violence and directly in harm's way. *See State v. McGruder,* 1997–NMSC–023, ¶ 38, 123 N.M. 302, 940 P.2d 150 (upholding child abuse conviction despite the lack of any physical harm when defendant aimed a gun at a woman and threatened to kill her while her daughter was standing behind her); *Ungarten,* 115 N.M. at 609–10, 856 P.2d at 571–72 (upholding child abuse conviction when defendant's knife thrusts at a child's parent came close to the child). In these cases, the evidence demonstrated that children were physically close to an inherently dangerous situation.

{31} On the other hand, our courts have reversed child abuse convictions when a child may be in the general area of a potentially dangerous situation, but the child is not placed directly in harm's way. For example, in *State v. Roybal,* 115 N.M. 27, 29, 846 P.2d 333, 335 (Ct.App.1992), a father sold illegal drugs, itself a dangerous proposition, while his daughter waited in the car about ten to fifteen feet away. On appeal from a conviction for child abuse, the court reversed, finding insufficient evidence that the child's mere presence in the car put her sufficiently at risk to constitute criminal child abuse. *Id.* at 34, 846 P.2d at 340. Similarly, in *Trujillo,* 2002–NMCA–100, ¶ 7, 132 N.M. 649, 53 P.3d 909, a father was convicted of child abuse after his daughter witnessed the father's attack upon her mother from the bedroom doorway out of the direct line of danger. Oddly, the father ordered his child to leave the room just so she would *not* be in the direct line of his anger. *Id.* ¶ 5. Again, the court reversed, finding that any risk of danger was physically remote. *Id.* ¶ 19.[2]

{32} Defendant's case is similar to both *Trujillo* and *Roybal.* Even though Defendant introduced a potentially dangerous, illegal substance into the house, Defendant has already been convicted of possession and trafficking. With respect to the separate offense of child abuse, the State failed to demonstrate that either child was ever close enough to the marijuana to be seriously at risk.[3] At trial, the State presented no evidence that these children were ever in the crib with the marijuana bud or even in the same bedroom. In fact, there was very little evidence linking either piece of marijuana to the physical location of the children. The only indication from the record regarding the children's whereabouts is that they were running around the house, not in the bedroom with the crib, at approximately 5:30 p.m., shortly before Defendant's arrest. When the house was secured and officers awaited a search warrant, the children were most likely outside the house with their mother. For all we know, Defendant placed the marijuana bud in the crib earlier in the day, and we have no idea if the children were ever actually in the crib at the same time as the contraband.

2. The special concurrence implies a certain dissatisfaction with the Court of Appeals opinion in *Trujillo.* Yet *Trujillo* was and is the law of this State. This Court had the opportunity to review it on certiorari, yet declined, to do so. The present majority opinion makes no change in *Trujillo.*

3. As the majority opinion correctly states, Defendant took full responsibility for the presence of the marijuana in the house and its location. However, Defendant never conceded its proximity to the children, nor was there any other direct evidence of its actual proximity to the children in terms of place and time.

{33} Importantly, there was no evidence that the children were ever left unsupervised by their mother. In fact, to make one of these children physically proximate to the marijuana in the crib, an adult would have to pick up the child, place the child in the crib, and then leave the child unsupervised in the crib with the marijuana bud. But the mother, not Defendant, was the parent in the house with her children, and there is no evidence that she would likely have been so careless. This does not absolve Defendant of blame or otherwise excuse his reprehensible behavior toward these children. But it does absolve Defendant of guilt under this particular child abuse statute, because the evidence does not prove the elements of the crime established by our legislature.

{34} More significantly, I fear the implications of this opinion with respect to what the legislature has defined as criminal child abuse. If we are going to convict based on nothing more than speculation as to what might have happened if certain events had occurred in the future, then there are almost no limits to what a jury might conclude is child abuse. But juries do not define crimes; the legislature does. And our legislature required evidence of "endangerment," which, under our existing case law, means something more than "what might have been."

{35} Under its broad reading of the statute, the majority is effectively allowing the jury to usurp the role of the legislature in determining what constitutes child abuse. I cannot agree to such a standard-less, open-ended reading, especially of a criminal statute. I especially fear the due process implications to which we give rise with such an unprecedented reading of our child abuse law. Accordingly, with respect, I am compelled to dissent.

I CONCUR. PAMELA B. MINZNER, Justice.

2005-NMCA-033
109 P.3d 295

Nancy L. EDENS, Petitioner/Appellee/Cross–Appellant,

v.

Walter A. EDENS, Jr., Respondent/Appellant/Cross–Appellee.

Nos. 24,342, 24,597.

Court of Appeals of New Mexico.

Jan. 13, 2005.

Certiorari Denied, No. 29,055, March 2, 2005.

L. Helen Bennett, L. Helen Bennett, P.C., Albuquerque, NM for Appellee/Cross–Appellant.

Jenise Flowers, Denver, CO, for Appellant/Cross–Appellee.

OPINION

FRY, Judge.

{1} This is a post-dissolution of marriage case in which Walter Edens (Husband) appeals the trial court's order denying his motion to set aside the alimony provisions of the marital settlement agreement (MSA) that was incorporated into a final decree of divorce. Husband also appeals the trial court's reconsideration of its initial denial of attorney fees and costs to Nancy Edens (Wife). Wife cross-appeals the trial court's initial refusal to award her attorney fees and costs. We affirm the trial court's decision refusing to set aside the lump sum alimony provision of the MSA incorporated into the divorce decree. We further hold that the trial court lost jurisdiction to reconsider its denial of an award for attorney fees and costs in this case because Husband had already filed a notice of appeal at the time Wife's motions to reconsider were filed in the trial court. As a result of this determination, we hold the trial court's order on Wife's motions for reconsideration is void. Because the trial court's initial order denying Wife's request for fees and costs was entered without the trial court first considering argument, and because the court did not make findings of fact and conclusions of law on the issue, we remand to the trial court to revisit the issue.

BACKGROUND

{2} After approximately twenty-eight years of marriage, Wife filed a petition for dissolution of marriage and the parties filed the MSA. On the same day, the trial court approved and filed the final decree of dissolution of marriage, which incorporated the MSA.

{3} Although Husband and Wife proceeded pro se in the divorce proceedings, in the months leading up to entry of the final decree both Husband and Wife were advised by independent counsel. The parties conferred in January 2001 and resolved issues concerning, among other things, division of their community and separate property and liabilities. They then agreed to obtain the assistance of a mediator experienced in family law to resolve the issue of alimony.

{4} At the time of mediation, the parties acknowledged there was a disparity in their incomes. Husband historically earned an income considerably larger than Wife's income. Husband worked as a sales engineer for the last eleven years of the marriage. Wife worked approximately half-time as a physical therapist during the last ten years of the marriage. During the years immediately preceding the divorce, Husband was earning approximately $180,000–$240,000 per year, while Wife was earning less than $30,000 per year.

{5} At the first mediation session, the parties discussed the concept of mediation, signed a mediation contract, and exchanged general financial information. Husband informed Wife that he planned to leave his job and move to Colorado to build a home. He planned to seek work in Colorado in the fall of 2001. Wife informed Husband that she earned between $1200 and $1500 per month, but the parties did not discuss whether this was net or gross income. Wife also stated that she would be unable to work full-time due to a medical condition that Husband was aware of, but that she was looking to increase her work hours to thirty-two hours per week. During this session and the following two mediation sessions, Husband did not dispute Wife's neck and arm pain stemming from her medical condition, and he did not question her inability to work full-time. The mediator asked the parties to prepare budgets to be used at the next mediation session.

{6} During the second mediation session, Wife informed Husband that she thought she could increase her income to $2000 per month by working thirty-two hours per week. Again, there was no discussion of whether this was gross or net income. Wife in fact received a pay raise of $1.00 per hour that first appeared in her late March 2001 paycheck, but she apparently did not report this during mediation. Husband stated that he

expected to earn approximately $137,000–$165,000 per year when he began to work again in Colorado. If he did not meet his expectations, his fall-back position was to earn somewhere between $70,000 and $100,000 per year. The mediator discussed alimony but did not advise the parties how they should treat the issue. He explained that numerous factors are considered when a court makes an alimony determination and suggested that the parties seek legal advice concerning this issue. The mediator also suggested that Husband seek advice from an accountant. Husband proposed a lump sum alimony award during this session, but the parties did not agree on any specific terms. Wife proposed that Husband pay her $1500 per month in alimony; Husband did not respond to this offer at the second session.

{7} At the third and final mediation session, Wife reported that her employer agreed to increase her work hours gradually to thirty-two hours per week and that she would be earning $34,725 per year by August 2001. The parties focused on reaching an amount to be paid to Wife as alimony. Husband had consulted with an accountant and his attorney about the issue of alimony. Ultimately, at Husband's suggestion, the parties agreed to a nonmodifiable lump sum alimony amount to be paid at $2000 per month for the first six months after divorce and then $1500 per month thereafter until Wife turned sixty-two.

{8} Based on the agreement reached between Husband and Wife during mediation, the mediator drafted the MSA and final decree of divorce. The documents went through three drafts, and the parties reviewed, revised, and executed them during the approximately three months after the final mediation session. The MSA contained not only the alimony provisions, which set forth the terms of a nonmodifiable lump sum alimony payment, but also the property settlement and liability issues that the parties had agreed to prior to mediation. The trial court incorporated the MSA into the final decree of divorce as a final judgment.

{9} One year after the stipulated final divorce decree documents were filed in the trial court, Husband filed a motion to set aside the final judgment and alimony provisions of the MSA pursuant to Rule 1–060(B) NMRA. Husband argued that the provisions of the MSA concerning alimony should be set aside "on the grounds of misrepresentation, mistake, that it is no longer equitable that the judgment should have prospective application and/or because the contract provisions for alimony as written are so inequitable that it is unconscionable to enforce the decree incorporating the [MSA]." Husband maintained that Wife misrepresented her potential income, earning capacity, budget, and medical condition during mediation, and that the alimony provisions of the MSA should be set aside because the lump sum alimony agreement was based on Wife's misrepresentations. Husband further argued that the MSA was ambiguous and inequitable and should be set aside based on those grounds.

{10} When Husband filed his motion, the financial circumstances of the parties had changed to some extent. At the time of the mediation sessions and before the entry of the final decree, Husband projected that he would be earning between $70,000 and $165,000 per year. But after the divorce and his move to Colorado, he had actually earned between $56,000 and $64,000 annually. Since the divorce, Wife had earned between $33,000 and $42,000 per year.

{11} After a trial on the merits during July 2003, the trial court filed its findings of fact and conclusions of law denying Husband's motion to set aside the alimony provisions of the MSA incorporated into the final divorce decree. In that same order, without hearing argument on the issue, the trial court also denied Wife's request for an award of attorney fees and costs incurred in defending against Husband's motion; it ordered each party to bear his or her own fees and costs.

{12} Husband filed a notice of appeal on September 10, 2003, from the trial court's order denying his motion to set aside the MSA alimony provision in the final judgment. On September 11, 2003, Wife filed a motion to reconsider the denial of attorney fees and a motion to reconsider the denial of her application for costs. Husband moved to strike the motions to reconsider for lack of jurisdiction because his notice of appeal was

filed prior to Wife's motions. On September 19, 2003, Wife filed a notice of cross-appeal pertaining to the initial denial of the attorney fees and costs. After a hearing and briefing on Husband's motion to strike, the trial court entered an order reserving its right to rule on the motions for reconsideration of attorney fees and costs if the court found it had jurisdiction. The trial court then filed a memorandum order granting Wife's motions for reconsideration and awarding Wife a portion of the fees and costs she requested. Husband filed a second notice of appeal from that order, and we consolidated that appeal with his earlier appeal on the issue of setting aside the alimony provisions of the MSA.

DISCUSSION

The Trial Court Correctly Denied Husband's Motion Under Rule 1-060(B)

{13} We generally review the trial court's ruling under Rule 1-060(B) for an abuse of discretion "except in those instances where the issue is one of pure law." *Martinez v. Friede,* 2004-NMSC-006, ¶ 19, 135 N.M. 171, 86 P.3d 596. Here the trial court was concerned with factual issues, such as whether Wife had misrepresented facts during the mediation, so we will review for abuse of discretion the trial court's decision refusing to set aside the MSA. To reverse the trial court under an abuse-of-discretion standard, "it must be shown that the court's ruling exceeds the bounds of all reason . . . or that the judicial action taken is arbitrary, fanciful, or unreasonable." *Meiboom v. Watson,* 2000-NMSC-004, ¶ 29, 128 N.M. 536, 994 P.2d 1154 (internal quotation marks and citation omitted) (omission in original); *see also Talley v. Talley,* 115 N.M. 89, 92, 847 P.2d 323, 326 (Ct.App.1993) ("When there exist reasons both supporting and detracting from a trial court decision, there is no abuse of discretion."). "Where the court's discretion is fact-based, we must look at the facts relied on by the trial court as a basis for the exercise of its discretion, to determine if these facts are supported by substantial evidence." *Apodaca v. AAA Gas Co.,* 2003-NMCA-085, ¶ 60, 134 N.M. 77, 73 P.3d 215 (internal quotation marks and citation omitted).

{14} Husband moved to set aside the final judgment and the alimony provisions of the MSA under Rule 1-060(B)(1), (3), (5), and (6). Under the provisions of Rule 1-060(B) upon which Husband relies, a court may relieve a party from a final judgment, order, or proceeding for the following reasons:

> (1) mistake, inadvertence, surprise or excusable neglect;
>
> . . . .
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party;
>
> . . . .
>
> (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from the operation of the judgment.

Rule 1-060(B).

{15} Before analyzing Husband's arguments under Rule 1-060(B), we first review the pertinent provisions of the MSA. The MSA provided that "Husband shall pay support and maintenance to Wife . . . [t]he sum of Two Hundred Twenty Thousand Five Hundred and No/100 Dollars ($220,500.00) to be paid to [Wife] until paid in full or until [Wife's] death, whichever occurs first." The MSA further stated that Husband shall pay Wife $2000 per month for the first six months and then pay $1500 per month until the obligation is paid in full or until Wife's death. The alimony provision provided that "[p]ayments stop should [Wife] die before July 2013, but are otherwise *nonmodifiable* by the parties and the Court." (Emphasis added.) In addition, the alimony provision stated that "[t]he alimony as set forth constitutes deductible, lump sum alimony paid in installments pursuant to Sections 40-4-7(B)(1)(d) and 40-4-7(B)(2)(b) NMSA 1995."

Rule 1-060(A)

{16} Husband argues that the MSA was ambiguous and should have been set aside under Rule 1-060(A), which permits a

court to correct clerical mistakes in judgments, or under Rule 1–060(B)(1). This argument has no merit. *See generally Mark V, Inc. v. Mellekas,* 114 N.M. 778, 781, 845 P.2d 1232, 1235 (1993) (discussing how a court determines whether an agreement is ambiguous). The MSA is clear that the lump sum alimony is nonmodifiable. Husband suggested an agreement for nonmodifiable lump sum alimony, and Husband understood that Wife could not move to modify the nonmodifiable amount of alimony. This was entirely consistent with Husband's desire that Wife not be able to seek more alimony if Husband's income increased. The MSA itself and the intentions of the parties support the trial court's conclusion that the alimony provision of the MSA is not ambiguous.

Rule 1–060(B)(3)

{17} Relief under Rule 1–060(B)(3) is available where the trial court determines that misconduct of the opposing party substantially impeded the movant's full and fair preparation of its case. *Rios v. Danuser Machine Co.,* 110 N.M. 87, 93, 792 P.2d 419, 425 (Ct.App.1990). There was substantial evidence presented to the trial court to support its conclusion that Husband was not impeded in the preparation and presentation of his case.

{18} It is undisputed that Husband had no job at the time the MSA was executed and that the alimony award was based on his previous salary and his hope of projected similar future earnings, and on Wife's predicted income. Husband attested that during mediation between January and June 2001, when the MSA was finally signed, he did not know Wife's hourly wage or work hours. Husband contends that he relied on Wife's misrepresentations made during mediation that she earned between $1200 and $1500 per month and that she could not support herself on this income. Husband further claims that his attorney advised him to make a lump sum award based on Wife's medical condition, which he claims he later learned was exaggerated, and her inaccurate statements about her income.

{19} The evidence reveals that Wife projected she could make approximately $2000 per month working thirty-two hours per week. Then, at the third and final mediation session, Wife reported a projected yearly income of at least $34,725 beginning August 2001. Husband denies being present to hear Wife state this estimated figure, but the mediator testified that Husband was present when Wife made the statement.

{20} The evidence supports the determination that Husband did not rely on Wife's representations regarding her earning capacity or her medical condition when he agreed on the lump sum alimony provision, and that Wife's income and budget were not substantial considerations for him. Husband's counsel testified that Husband arrived at a lump sum, nonmodifiable calculation based on his own concept of reasonableness, and that he did not make a mistake in relying on Wife's representations about her income or budget. Husband wanted to make sure Wife was comfortable, and he wanted to protect his future earnings from a motion for an upward modification by Wife if he made substantially more money in the future or if she declined in health. There was also testimony that Husband wanted to avoid litigation fees and that he sought to reach an agreement quickly because he planned to move to Colorado in order to get on with his life. Husband obtained the advice of both an attorney and an accountant, and he knew that budget and income were only some of the factors a court considers when it determines a lump sum award. Yet he proposed to pay Wife nonmodifiable lump sum alimony anyway because he thought it would best serve his needs and protect his future earnings.

{21} Therefore, while Husband contends that Wife misrepresented her earning potential, the evidence establishes that each party trusted the other to predict future earning potential. As it turned out, Wife may have underestimated her future income, while Husband overestimated his. These inaccurate predictions do not amount to fraud or misrepresentation. There was no showing that Wife knowingly misrepresented what her income would be. While Husband contends that he thought the parties were discussing gross income, Husband has not shown that Wife made representations dur-

ing mediation about whether her income was gross or net income. While she did not report her $1.00 per hour raise, this failure on Wife's part was harmless considering that she did report during the final mediation session that she expected to earn at least $34,725 per year. With respect to Wife's medical condition, testimony established that Husband chose not to delve into Wife's medical records or question Wife's medical condition even though these records were available for his inspection.

{22} In short, the record indicates that Husband made a free and conscious choice when he suggested lump sum alimony. Husband and Wife were entitled to enter into a voluntary settlement agreement. "If equitable, a stipulated agreement should not be vacated merely because an award may have been unwise or unfortunate in light of subsequent events." *Harkins v. Harkins,* 101 N.M. 296, 297, 681 P.2d 722, 723 (1984). "Rule 60(b) is not to be invoked to give relief to a party who has chosen a course of action which in retrospect appears unfortunate." *Benavidez v. Benavidez,* 99 N.M. 535, 539, 660 P.2d 1017, 1021 (1983) (internal quotation marks and citation omitted). Further, "Rule 60(b) cannot be used to relieve a party from the duty to take legal steps to protect his interests." *Id.* Husband took a calculated risk that turned out badly for him, but this fact provides no basis for relief under Rule 1–060(B)(3).

Rule 1–060(B)(5)

{23} Husband argues that the alimony provision should be set aside under Rule 1–060(B)(5) because, in light of the parties' changed circumstances, it is no longer equitable that the provision be given prospective application. This argument is without merit. Husband's voluntary unemployment and life choices that have changed his ability to pay the alimony do not justify a modification in support. *See generally Henderson v. Lekvold,* 95 N.M. 288, 292, 621 P.2d 505, 509 (1980) (holding that in a child support case where a parent's "salary has increased and the increased burden on his finances is the result of an obligation he incurred voluntarily, it was an abuse of discretion for the trial court to reduce his child support obligations to such an extent" (emphasis omitted)); *Barnes v. Shoemaker,* 117 N.M. 59, 67, 868 P.2d 1284, 1292 (Ct.App. 1993) (concluding that "when a judgment is founded on a prediction that takes into account various contingencies, equity does not require modification of the judgment simply because events did not evolve in accordance with the prediction"); *Wolcott v.Wolcott,* 105 N.M. 608, 609–10, 735 P.2d 326, 327–28 (Ct. App.1987) (holding that the trial court did not abuse its discretion when it decided to continue the wife's alimony after the husband's voluntary change of employment). The law favors finality and "[t]he public policy of this state discourages repeated attempts to reopen support decrees." *Cherpelis v. Cherpelis,* 1996–NMCA–037, ¶ 20, 121 N.M. 500, 914 P.2d 637. Husband's miscalculation of his future income is not a basis to set aside the alimony provision under Rule 1–060(B)(5). *See Benavidez,* 99 N.M. at 539, 660 P.2d at 1021.

Rule 1–060(B)(6)

{24} Husband argues that the trial court should have set aside the alimony provisions of the divorce decree under Rule 1–060(B)(6) because the provision was unconscionable and violated the Thirteenth Amendment's prohibition against involuntary servitude. We are not persuaded. The evidence in this case does not establish the existence of exceptional circumstances contemplated by the rule. "Rule 1–060(B)(6) is designed to apply only to exceptional circumstances, which, in the sound discretion of the trial judge, require an exercise of a reservoir of equitable power to assure that justice is done." *Stein v. Alpine Sports, Inc.,* 1998–NMSC–040, ¶ 17, 126 N.M. 258, 968 P.2d 769 (internal quotation marks and citations omitted); *see also Wehrle v. Robison,* 92 N.M. 485, 487, 590 P.2d 633, 635 (1979) (stating that "[a]n individual must establish the existence of exceptional circumstances to obtain relief under Rule 60(b)(6)" and that one "cannot claim relief under Rule 60(b)(1) and (3) and also claim relief under subsection (6)").

{25} First, the MSA was not unconscionable. Husband and Wife mutually

agreed on the terms of the MSA, and it was Husband who suggested the nonmodifiable lump sum alimony provision after consultation with an attorney and an accountant. Second, enforcement of the voluntary MSA does not amount to involuntary servitude that violates the Thirteenth Amendment to the United States Constitution. Husband freely entered into the terms of the MSA, and he has not been made a "slave" to Wife. "Alimony ... is support for one spouse by another as a substitute for the statutory right to marital support during coverture." *Brister v. Brister*, 92 N.M. 711, 715, 594 P.2d 1167, 1171 (1979). Alimony "is not intended as a penalty against a husband." *Id.*

The Trial Court Properly Denied Husband's Motion for Summary Judgment

{26} Husband contends the trial court should have granted his motion for summary judgment, which argued that (1) the trial court should exercise its inherent or continuing jurisdiction to modify or terminate the MSA's alimony provision pursuant to Section 40–4–7(F), and (2) the MSA's provision for nonmodifiable alimony was unenforceable pursuant to NMSA 1978, § 40–2–8 (1907). We do not agree.

{27} At issue is the interpretation of statutes, which is a question of law subject to de novo review. *Cooper v. Chevron U.S.A., Inc.*, 2002–NMSC–020, ¶ 16, 132 N.M. 382, 49 P.3d 61. Looking first at Section 40–4–7(F), we conclude the statute does not apply to the type of nonmodifiable lump sum alimony agreement in this case. It applies to periodic payments. Section 40–4–7(B)(2)(a) plainly limits the support awards subject to modification. It states that a trial court may "modify and change any order in respect to spousal support awarded pursuant to the provisions of Subparagraph (a), (b) or (c) of Paragraph (1) of this subsection whenever the circumstances render such change proper[.]" § 40–4–7(B)(2)(a). The referenced sections permit awards of rehabilitative spousal support, § 40–4–7(B)(1)(a), transitional support, § 40–4–7(B)(1)(b), and support for an indefinite duration, § 40–4–7(B)(1)(c). But the statute's provision permitting modification does not apply to lump sum awards under § 40–4–7(B)(1)(d) ("a single sum to be paid in one or more installments that specifies definite amounts, subject only to the death of the receiving spouse") and § 40–4–7(B)(1)(e) ("a single sum to be paid in one or more installments that specifies definite amounts, not subject to any contingencies, including the death of the receiving spouse"). Thus, when Section 40–4–7(F) refers to a court's continuing jurisdiction "over proceedings involving periodic spousal support payments" it is referencing the support payment provisions in Sections 40–4–7(B)(1)(a), (b), and (c).

{28} Turning next to Section 40–2–8, Husband subjects the statute to a strained reading. That statute provides:

> A husband and wife cannot by any contract with each other alter their legal relations, except of their property, and except that they may agree in writing, to an immediate separation, and may make provisions for the support of either of them and of their children *during their separation.*

§ 40–2–8 (emphasis added). Focusing on the emphasized language, Husband reads this to mean that spouses are prohibited from entering into agreements providing for post-divorce support. This interpretation is unreasonable. Section 40–2–8 governs how spouses may alter by contract their legal relationship during marriage; here, by contrast, the parties entered into an agreement applicable to their relationship after dissolution of their marriage. Section 40–2–8 has nothing to do with the MSA.

The Trial Court Properly Denied Husband's Motion for Protective Order

{29} Husband contends the trial court erred in granting a protective order denying him the right to discover and/or establish Wife's infidelity. He maintains Wife's infidelity was relevant to whether it was equitable to terminate or modify the alimony judgment and whether Wife was a credible witness. Again, this argument has no merit. A trial court has discretion to limit discovery. *See Hartman v. Texaco Inc.*, 1997–NMCA–032, ¶ 20, 123 N.M. 220, 937 P.2d 979. The trial court did not abuse its discretion in this case. Proof of Wife's al-

leged extramarital affair was immaterial and irrelevant to the trial court's consideration of Husband's motion to set aside the alimony provision of the MSA. The trial court was not determining the amount of alimony; that had already been decided and agreed upon by the parties in the MSA. The trial court was considering whether the MSA should be set aside under Rule 1–060(B), and the allegations of an affair were irrelevant to that determination.

The Trial Court Did Not Have Jurisdiction to Grant Wife's Motions for Reconsideration of Attorney Fees and Costs

{30} Husband maintains that the trial court's November 13, 2003, order awarding attorney fees and costs to Wife is void and must be vacated because the trial court lost jurisdiction to hear Wife's motions for reconsideration on attorney fees and costs once Husband filed a notice of appeal in this Court. We agree.

{31} The day after Husband filed his notice of appeal from the trial court's denial of his Rule 1–060(B) motion, Wife filed motions asking the court to reconsider its previous denial of Wife's motions for attorney fees and costs. Approximately two months later, the trial court filed an order granting Wife's motions for reconsideration, finding that under *Kelly Inn No. 102, Inc. v. Kapnison,* 113 N.M. 231, 824 P.2d 1033 (1992), the court "retains jurisdiction to address the issues of fees and costs (collateral matters) even after the notice of appeal is filed." The trial court found that it had erred when it denied Wife's fees and costs without any findings and conclusions to justify its ruling. Therefore, the court decided it must reconsider its ruling and awarded Wife a portion of the fees and costs she requested.

{32} A pending appeal divests a trial court of jurisdiction to take further action that would affect the judgment on appeal. *Kelly Inn,* 113 N.M. at 241, 824 P.2d at 1043; *see Luboyeski v. Hill,* 117 N.M. 380, 382, 872 P.2d 353, 355 (1994) (holding that notice of appeal divested trial court of jurisdiction to grant pending motion to amend complaint). This case does not fall within the *Kelly Inn* exception to this rule, where a trial court retains jurisdiction to consider unresolved matters collateral to the underlying controversy. Here, the decision appealed from fully disposed of the Rule 1–060(B) motion and the issue of attorney fees and costs. In addition, the trial court's decision contains decretal language consistent with a final, appealable order. *See Khalsa v. Levinson,* 1998–NMCA–110, ¶ 17, 125 N.M. 680, 964 P.2d 844 ("In a dissolution proceeding, there is no final order unless and until an order is entered that contains decretal language and resolves all the matters raised in the initial petition."). The trial court specifically denied attorney fees and costs when it ordered that each party bear his or her own fees and costs. There was no issue left open on this matter to decide. Because the trial court lost jurisdiction over this case when Husband filed his initial notice of appeal, its subsequent order granting Wife's motions for reconsideration and awarding attorney fees and costs to Wife is void.

Wife's Cross–Appeal Concerning Attorney Fees and Costs

{33} Because we conclude the trial court's order awarding Wife attorney fees and costs is void, we now consider Wife's cross-appeal challenging the trial court's initial order of August 28, 2003, refusing to award her attorney fees and costs. Wife argues she was entitled to an award of attorney fees and costs, and she notes that the trial court denied the requested award without a hearing and without entering findings of fact and conclusions of law on the issue. We agree that the trial court abused its discretion by ruling on Wife's motion for fees and costs without considering the argument of counsel on the issue and without entering findings and conclusions. *See Monsanto v. Monsanto,* 119 N.M. 678, 680–82, 894 P.2d 1034, 1036–38 (Ct.App.1995) (explaining that a grant or denial of an award of attorney fees in a domestic relations case must be supported by substantial evidence and the trial court is required to enter findings of fact and conclusions of law on the issue). The trial court must assess a number of considerations, including the parties' economic disparity. *Id.; see also Gomez v. Gomez,* 119

N.M. 755, 759, 895 P.2d 277, 281 (Ct.App. 1995) (listing factors to be considered in determining whether to award attorney fees). Therefore, the initial denial of fees and costs is reversed, and the matter is remanded to the trial court to make findings in support of its decision on Wife's request for an award of fees and costs for Wife.

CONCLUSION

{34} For the foregoing reasons, we affirm the trial court's order refusing to set aside the alimony provision of the parties' MSA incorporated into the final decree of divorce. We reverse the trial court's November 13, 2003, order awarding attorney fees and costs to Wife as void for lack of jurisdiction. Finally, we reverse the trial court's initial decision to deny attorney fees and costs and remand for entry of findings and conclusions on that issue.

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

WE CONCUR: A. JOSEPH ALARID and CELIA FOY CASTILLO, Judges.

2005-NMCA-036

109 P.3d 305

EL DORADO UTILITIES, INC., a New Mexico corporation, Utilities, Inc., an Illinois corporation, Utilities, Inc. of New Mexico, a New Mexico corporation, Sarah Heon, as Personal Representative of the Estate of Larry Heon, Stacy L. Crossingham, Richard G. Kurman, Stephen Mee, and Pamela Mee, Plaintiffs–Appellants,

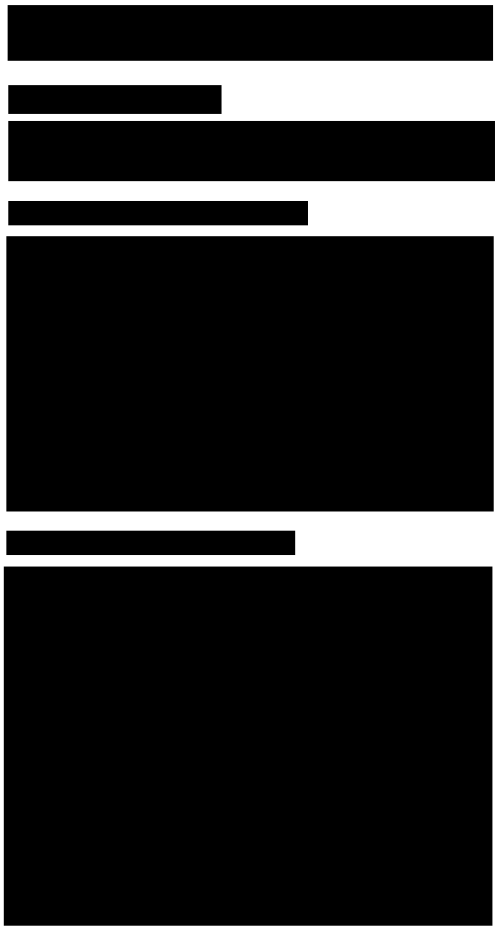
v.

The ELDORADO AREA WATER AND SANITATION DISTRICT, Defendant–Appellee.

No. 24,276.

Court of Appeals of New Mexico.

March 22, 2005.



William E. Sundstrom, Robert C. Brannan, David F. Chester, Rose, Sundstrom & Bentley, LLP, Tallahassee, FL, John P. Salazar, Leslie McCarthy Apodaca, Alan Hall, Edward Ricco, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, NM, for Appellants.

Frank R. Coppler, John L. Appel, Coppler & Mannick, P.C., Santa Fe, NM, for Appellee.

OPINION

BUSTAMANTE, Chief Judge.

{1} This matter came on for hearing on Appellee's Motion for Expedited Remand or, in the Alternative, for Amendment of Opinion Sua Sponte. The motion as presented is denied. However, in light of the motion and Appellant's response to it, the Court has decided to revise the opinion. Therefore, the opinion filed February 18, 2005, is hereby withdrawn and the following substituted.

{2} This appeal involves an ongoing dispute over control of the water utility serving the Eldorado area of Santa Fe County. Plaintiffs challenge the lawfulness of the procedures and tactics used by the Eldorado Area Water and Sanitation District (the District) in its efforts to condemn El Dorado Utilities, Inc. (EDU). Plaintiffs argue that the bond issue undertaken by the District to finance the condemnation did not comply with legal requirements, that the District lacked authority to condemn because it acted abusively and in bad faith, and that the District interfered with EDU's attempt to sell the utility. The district court dismissed the complaint for failure to state a claim upon which relief could be granted, and Plaintiffs appeal. We reverse and remand on the issue of the bond resolution and affirm the dismissal of the other claims.

BACKGROUND

{3} The District is a water and sanitation district created pursuant to the Water and Sanitation District Act, NMSA 1978, §§ 73–21–1 to –54 (1943, as amended through 2003). The District is a quasi-municipal governmental entity governed by a board of three directors elected by the residents of the District. *See* § 73–21–9(H), (I).

{4} Plaintiff EDU is a public water utility company regulated by the New Mexico Public Regulation Commission (the PRC). EDU owns and operates the water utility system at issue in this case. Plaintiff Utilities, Inc. (UI) is a privately owned water and wastewater company based in Illinois. Utilities, Inc. of New Mexico (UINM) is a wholly owned subsidiary of UI. The individual Plaintiffs are residents and taxpayers of the District. We refer to all plaintiffs collectively as "Plaintiffs," and EDU, UI, and UINM collectively as "utility Plaintiffs."

{5} In September 2001, EDU entered into a purchase agreement with UI/UINM for the sale of the utility. In December 2001, EDU filed a transfer application with the PRC pursuant to NMSA 1978, § 62–6–12 (1989) requesting approval of the sale of the utility to UI, and requesting approval for UINM to

own and operate the utility. The District intervened in the PRC proceeding, predicated upon its interest in protecting the "health, safety, prosperity, security and general welfare" of the residents by monitoring the "continuing availability of a safe, dependable water supply at an affordable cost." The District also asserted an interest in the policies regarding line extension to new customers given the limited availability of water resources in the area. The District's motion to intervene in the PRC proceeding was unopposed. The PRC held its proceedings in abeyance pending the outcome of this and other related litigation.

{6} In June and July 2002, the District adopted resolutions scheduling an election to determine whether the District's "voters supported its acquisition of EDU by purchase or condemnation to be financed through general obligation bonds and revenue bonds." The election held in August 2002 approved the issuance of general obligation bonds.

{7} After the election, the District adopted a resolution authorizing the issuance of approximately $7.9 million in general obligation bonds to finance the condemnation of the utility. The resolution authorized the District to levy property taxes as necessary to pay the bonds "notwithstanding any limitations on the rate or amount of such taxes."

{8} Within a month after the bond resolution was adopted, Plaintiffs filed suit requesting an injunction to prevent the issuance of the bonds on the grounds that allowing a levy of taxes without limitation contravenes the tax limitation section of the Community Service District Act, NMSA 1978, § 4–54–1 to –5 (1965, as amended through 1986), rendering the bond resolution invalid. Plaintiffs also requested a declaratory judgment that the District lacks authority to condemn EDU's utility because the District acted in bad faith and abused any condemnation power it possessed. EDU also requested damages caused by the District's interference with EDU's contractual relations with UI/UINM, and by its efforts to reduce the value of EDU's assets.

{9} Plaintiffs alleged that the District's intervention before the PRC was pretextual, caused delay in the transfer of the utility, attempted to defeat the approval, and reduced the value of EDU's real and personal property for the District's sole benefit. Plaintiffs claimed that the District's purpose for intervention was to "defeat the sale on the basis that a condemnation proceeding against UI/UINM would be more costly than one against the current owner, EDU." In addition, Plaintiffs' Second Amended Complaint alleged the following:

> 18. [B]y intervening and testifying regarding the merits of the proposed condemnation, . . . Defendant has stepped outside the bounds of its role as "public guardian" and is using the PRC proceedings as a mechanism for stopping or stalling approval of the purchase and reducing the value of EDU's property, and thereby the potential condemnation price. In fact, Defendant concedes that it is seeking denial of the transfer because it believes that the utility's price would be higher in a condemnation action against UI/UINM than against the current owner.
>
> . . . .
>
> 90. Defendant's arguing the merits of the condemnation before the PRC solely for the purpose of thwarting the sale, restricting Utility Plaintiffs' rights to alienate and acquire, and reducing the market value of EDU's assets was, and is, an unlawful use of its governmental power.
>
> 91. Defendant's illegal use of the police power to further its proposed condemnation removes Defendant from the position of a neutral arbiter of the public good in that the actions described herein are designed to thwart the sale, restrict Utility Plaintiffs' protected rights to alienate and acquire private property, and lower the value of EDU's assets purely for Defendant's own benefit.
>
> . . . .
>
> 101. Defendant's intentional and improper actions before the PRC described above have prevented Utility Plaintiffs from fulfilling their existing contractual relationship.

{10} Subsequent to the filing of this appeal, the District informed the district court it had completed the bond issue and sold the

bonds to a private purchaser. With funding in place, the District filed a petition to condemn EDU's utility. The condemnation proceeding is currently pending in the district court. Also, after the appeal was filed, EDU and UI/UINM terminated their purchase agreement.

DISCUSSION

{11} On appeal, Plaintiffs argue that the complaint states a claim upon which relief can be granted based on: (1) the invalidity of the District's bond resolution, (2) the District's improper actions to devalue EDU's utility and interference with the sale of the utility, and (3) the District's lack of authority to condemn EDU's utility. We address each issue in turn, affirm the district court's granting of the motion to dismiss as to claims (2) and (3), and reverse and remand on the bond issue.

Standard of Review

{12} This Court reviews a dismissal of a complaint under Rule 1-012(B)(6) NMRA de novo, as a question of law. *Valles v. Silverman*, 2004-NMCA-019, ¶ 6, 135 N.M. 91, 84 P.3d 1056. We test the sufficiency of a complaint, assuming that all well-pleaded facts therein are true. *Grover v. Stechel*, 2002-NMCA-049, ¶ 8, 132 N.M. 140, 45 P.3d 80. "A motion to dismiss for failure to state a claim should be granted only if it appears that plaintiff cannot recover, or be entitled to relief, under any state of facts provable under the complaint." *Noriega v. Stahmann Farms, Inc.*, 113 N.M. 441, 442, 827 P.2d 156, 157 (Ct.App.1992). The assertion that the district court erred in interpreting the statutes governing the District's general obligation bond issue presents a question of law which we also review de novo. *See Bajart v. Univ. of N.M.*, 1999-NMCA-064, ¶ 7, 127 N.M. 311, 980 P.2d 94.[1]

1. The Validity of the District's Bond Resolution

{13} Plaintiffs urge this Court to find that the complaint states a claim for relief as to the validity of the District's bond resolution. The bond resolution states in pertinent part:

> The ... Bonds shall constitute the general obligation indebtedness of the District, payable from ad valorem taxes which shall be levied at a rate which shall not exceed $10 per $1000 of net taxable value ... of property within the District ...; except that if the moneys produced from such levies, together with other revenues of the District, are insufficient to pay the annual principal of and interest on the ... Bonds, additional levies may be imposed as may be necessary for such purposes until the ... Bonds are fully paid.

According to Plaintiffs, the bond resolution does not limit the District's power to levy property taxes as required by Section 4-54-4, and it is therefore invalid. The Community Service District Act Section 4-54-4 provides: "The aggregate total of all taxes levied by a community service district for all purposes shall not exceed a rate of ten dollars ($10.00) ... on each one thousand dollars ($1,000) of net taxable value ... of taxable property within this community service district."

{14} Sections 73-21-17 to -19 of the Water and Sanitation District Act provide for the levy and collection of taxes by a district. Section 73-21-17 states in relevant part that water and sanitation districts "shall have power and authority to levy and collect ad valorem taxes on and against all taxable property within the district." Section 73-21-18 provides that a district should levy and collect taxes each year, determining the amount of money necessary to be raised by taxation, taking into account a variety of factors, including the funds needed to pay all principal and interest due on any bonds issued by the district. Section 73-21-19 provides:

1. We note that there are three types of Plaintiffs in this action, and that all of the Plaintiffs may not have standing as to each issue on appeal. *See City of Sunland Park v. Santa Teresa Servs. Co.*, 2003-NMCA-106, ¶ 39, 134 N.M. 243, 75 P.3d 843 (noting that a party's standing "depends on its factual and legal connection to the issue it wishes to litigate"). Because we are affirming the district court's dismissal of all claims except the bond issue, we need not explore the standing of each party in detail.

The board in certifying annual levies as herein provided, shall take into account the maturing indebtedness for the ensuing year as provided in its contracts, maturing bonds and interest on bonds, and deficiencies and defaults of prior years, and shall make ample provision for the payment thereof. In case the moneys produced from such levies, together with other revenues of the district, are not sufficient punctually to pay the annual installments on its contracts and bonds, and interest thereon, and to pay defaults and deficiencies, then the board shall make such additional levies of taxes as may be necessary for such purposes, and not withstanding any limitations, such taxes shall be made and continue to be levied until the indebtedness of the district shall be fully paid.

{15} Plaintiffs argue that there is a conflict between the tax limitation provision of the Community Service District Act, Section 4–54–4, and the Water and Sanitation District's Act provision on levies to cover defaults and deficiencies, Section 73–21–19. When statutes are in "conflict, they must be construed, if possible, to give effect to each. If the conflict is irreconcilable, the later-enacted statute governs." NMSA 1978, § 12–2A–10(A) (1997); *see also State v. Valdez,* 59 N.M. 112, 118, 279 P.2d 868, 872 (1955) (noting that later statute repeals an earlier statute to extent of repugnancy). A careful reading of Section 73–21–19 makes it clear that the legislature intended to incorporate the limiting provisions of Section 4–54–4 into the Water and Sanitation District Act.

{16} Sections 73–21–17 to –19 of the Water and Sanitation District Act were first enacted in 1943. Section 4–54–4 of the Community Service District Act was originally enacted in 1965. Section 73–21–27, incorporating Section 4–54–4 to bear on water and sanitation districts, was enacted in 1977. 1977 N.M. Laws, ch. 345, § 9. Section 73–21–27 provides: "With respect to the issuance of any negotiable securities representing an indebtedness of the water and sanitation district, the provisions and procedures set forth in the Community Service District Act [4–54–1 to 4–54–5 NMSA 1978] shall apply." This is an explicit and clear statement of legislative intent. The limiting provisions of Section 4–54–4 apply to the issuance of bonds by entities such as the District.

{17} We note that Section 73–21–27 was enacted by the same Chapter law in which the legislature amended Section 73–21–26, which describes the type of bond that water and sanitation districts may issue. The combination of the two provisions in the same law emphasizes the point that the legislature knew and understood it was limiting the power of such districts to impose taxes on property within their boundaries.

{18} A court should "construe all the provisions [of a statute] together and attempt to view them as a harmonious whole." *Cummings v. X-Ray Assocs. of N.M.,* 1996–NMSC–035, ¶ 45, 121 N.M. 821, 918 P.2d 1321; *see also Roberts v. Southwest Cmty. Health Servs.,* 114 N.M. 248, 251, 837 P.2d 442, 445 (1992) ("[W]e will give effect to each portion of the statute, if possible."). Sections 73–21–17 to –19 give the District the power to determine and impose annual tax levies as needed to meet its obligations, subject to the limitations of Section 4–54–4. The power to tax granted by the Water and Sanitation District Act is constrained by the Community Service District Act. To construe the statutes otherwise would nullify the limits contained in Section 4–54–4 as to water and sanitation districts. This result would be contrary to the express language of the statutes. Such a result would also be contrary to the legislative commandment that "[t]he Community Service District Act [4–54–1 to 4–54–5 NMSA 1978] shall be liberally construed to protect the interests and rights of the owners of the taxable property within the community service district." Section 4–54–5.

{19} We note that the definition of a "community service district" in the Community Service District Act is broad enough to encompass water and sanitation districts. Section 4–54–2(A) provides:

A. "community service district" means any single or multipurpose special district organized as a local public body of this state for the purpose of constructing and furnishing any urban-oriented service which another political subdivision of this state is authorized to perform, including

> but not limited to the services of water for domestic, commercial or industrial uses, sewage, garbage, refuse collection and recreation, but not including the function [functions] or services of drainage, irrigation, reclamation, soil and water conservation or flood control[.]

The District is a "special district organized as a local public body . . . for the purpose of . . . furnishing [an] urban-oriented service," i.e., "water for domestic . . . uses." Section 4–54–2(A). Thus, even without the explicit incorporating language of Section 73–21–27, it could be argued that the limitation of taxing power found in Section 4–54–4 would apply to the District. Given the wholesale incorporation of the Community Service District Act into the Water and Sanitation District Act, its application is undeniable.

{20} The District contends that the language in the bond resolution is not only permissible, but mandated. The District argues that Section 73–21–19, which states that "the board shall make such additional levies of taxes as may be necessary for such purposes, [ ] not withstanding any limitations . . ." requires it to levy taxes sufficient to pay its debts, even if those taxes exceed the limitations of Section 4–54–4, whether or not the language is contained in the resolution. The District argues that the State and its political subdivisions, such as itself, must be able to pledge their full faith and credit to ensure repayment of general obligation bonds that have been issued. For example, if property values plummet, a higher tax rate would be necessary to meet the District's obligations. To do so may, hypothetically, require imposition of taxes beyond the ten mill limitation. The District also argues that there is no actual conflict between the Community Service District Act and the Water and Sanitation District Act in this case because no taxes have been levied yet; there is only the possibility of a conflict at some time in the future.

{21} We are not persuaded. To accept the District's arguments would require us to ignore everything the legislature did in enacting Section 73–21–27. This we cannot do. The language of the statutes is clear. The District can only levy taxes to pay indebtedness within the limits of Section 4–54–4. The District cannot issue bonds pursuant to a bond resolution that authorizes the levy of taxes beyond what Section 4–54–4 allows. The resolution provides that "additional levies may be imposed as may be necessary for such purposes until the . . . Bonds are fully paid." This provision fails to limit the District's ability to levy taxes as required by Section 4–54–4 to ten dollars ($10.00) per thousand dollars ($1,000) of net taxable value of taxable property within the district, and is therefore invalid. Further, it is not necessary for the District to actually levy the taxes in excess of the ten mill limit for there to be an actual conflict.

{22} The language of the bond resolution itself is invalid, and that is sufficient for Plaintiffs to state a claim upon which relief can be granted. Plaintiffs originally requested injunctive relief on the issuance of the bonds. That request is now moot because the bonds have been issued and sold. On remand, the parties and the district court will no doubt be engaged in fashioning appropriate relief. The district court may fashion a remedy it deems appropriate consistent with our ruling.

2. The Alleged Improper Actions to Devalue EDU's Utility and Interfere with the Sale of the Utility

{23} The utility Plaintiffs argue that they stated a valid claim based on the District's improper actions to devalue EDU's assets and to interfere with the sale of the utility. The complaint alleges that the District intentionally intervened in the PRC proceedings concerning approval of the sale of the utility from EDU to UI/UINM for the improper purpose of delaying and defeating the sale in order to devalue the utility and thus reducing the compensation it would have to pay for the anticipated taking. Plaintiffs assert they have stated claims under the tort of intentional interference with contract and under the theory that the District abused its power in order to depress the value of the utility.

{24} New Mexico recognizes a cause of action for tortious interference with contractual relations. *Kelly v. St. Vincent Hosp.*, 102 N.M. 201, 207, 692 P.2d 1350, 1356

(Ct.App.1984); *M & M Rental Tools, Inc. v. Milchem, Inc.*, 94 N.M. 449, 452–55, 612 P.2d 241, 244–47 (Ct.App.1980). To establish a claim for intentional interference with contract, Plaintiffs must allege facts sufficient to show that the District improperly interfered with EDU and UI/UINM's contractual relations, "either through improper means or improper motive." *See Diversey Corp. v. Chem–Source Corp.*, 1998–NMCA–112, ¶ 20, 125 N.M. 748, 965 P.2d 332. Plaintiffs contend they have met this burden by alleging that the District intervened pretextually in the PRC proceedings for the improper purpose of reducing the cost of condemnation.

{25} Plaintiffs claim fails, however, because under the Tort Claims Act, NMSA 1978, §§ 41–4–1 to –27 (1976, as amended through 2004), a governmental entity may not be held liable for damages resulting from such a tort. Section 41–4–4(A) of the Torts Claim Act provides: "A governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived by the New Mexico Religious Freedom Restoration Act and by Sections 41–4–5 through 41–4–12 NMSA 1978." A governmental entity includes the state and all of its political subdivisions. NMSA 1978, § 41–4–3(B), (C) (2003). A water and sanitation district, once established, is "a governmental subdivision of the state" and "[e]very district shall be a body corporate with all the powers of a public or quasi-municipal corporation." § 73–21–9(I); *see also Yarger v. Timberon Water & Sanitation Dist.*, 2002–NMCA–055, ¶ 8, 132 N.M. 270, 46 P.3d 1270 ("Water and sanitation districts are special districts described by statutes and the courts as governmental subdivisions of the state with quasi-municipal powers. They are also quasi-governmental corporations."). The District and its board, as a quasi-municipal governmental body, falls within this definition of governmental entity, and is therefore granted immunity from tort actions such as this.

{26} In their reply brief, Plaintiffs argue that the Tort Claims Act does not bar their claim for damages because the District's conduct in devaluing the utility violates EDU's constitutional due process rights. Plaintiffs correctly note that the Tort Claims Act does not exclude a Section 1983 remedy for such violations. *Wittkowski v. State Corrections Dep't*, 103 N.M. 526, 531, 710 P.2d 93, 98 (Ct.App.1985), *overruled on other grounds by Silva v. State*, 106 N.M. 472, 477, 745 P.2d 380, 385 (1987). However, Plaintiffs did not raise a claim for damages under 42 U.S.C. § 1983 below, and may not raise it for the first time on appeal. *See Woolwine v. Furr's, Inc.*, 106 N.M. 492, 496–97, 745 P.2d 717, 721–22 (Ct.App.1987). We do not address the current viability of such a claim.

{27} We next turn to Plaintiffs' argument that they have stated a claim based on the District's improper actions to devalue the utility by intervening in the PRC proceeding. Plaintiffs cite to 4 Julius L. Sackman, *Nichols on Eminent Domain* § 12C.03 [1] (rev.3d ed.2001), for the proposition that any governmental action "which depresses value or inhibits increase in value" of the condemned property "is deemed an abuse of governmental power." Plaintiffs also rely on the following cases in support of their claim. *See Wash. Metro. Area Transit Auth. v. One Parcel of Land*, 413 F.Supp. 102, 106 (D.Md. 1976) (stating that government could not use its refusal to allow abandonment of unused road easement, on ground that subsequent condemnation of land for another purpose would be made more costly, as factor in determining property value in condemnation proceeding; "[s]uch action would be an abuse of governmental authority, resulting in a denial of due process"), *aff'd on other grounds*, 548 F.2d 1130 (4th Cir.1977); *see also United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 636, 81 S.Ct. 784, 5 L.Ed.2d 838 (1961) (stating that in determining damages for taking of landowner's property, diminution in value resulting from government's committing to prospective taking must be excluded; allowing public body to reduce property value by threatening condemnation and then take advantage of lower price when property is condemned would be "manifestly unjust" (internal quotation marks and citation omitted)); *Robertson v. City of Salem*, 191 F.Supp. 604, 611–612 (D.Or.1961) (stating that ordinance could not constitutionally be applied to land owner where evidence established that city adopted restrictive land use

ordinance in response to request of state government in order to depress land value prior to exercise of eminent domain by state); *United States v. 222.0 Acres of Land,* 324 F.Supp. 1170, 1180 (D.Md.1971) (stating that condemning authority could not directly or indirectly interfere with property owner's right to use land and then take advantage of resulting reduction in value to reduce price paid in condemnation where actions by state, induced by federal government prior to federal condemnation, restricted land usage and diminished property value); *Bd. of Comm'rs v. Tallahassee Bank & Trust Co.,* 108 So.2d 74, 85 (Fla.Dist.Ct.App.1958) (refusing to permit "an arbitrary exercise of the police power by one branch of government in order to pave the way for a less expensive exercise of the power of eminent domain by another branch" where state agency requested city to implement restrictive zoning in area of planned redevelopment by agency; stating that evidence of value of property prior to restriction was admissible to determine damages for condemnation).

{28} Plaintiffs' alternative approach is of no avail. To the extent Plaintiffs seek compensatory damages based on the District's alleged tortious conduct, the Tort Claims Act bars such a claim, as discussed above. The Tort Claims Act would not bar a claim for injunctive relief. NMSA 1978, § 41–4–17(A) (1982) ("Nothing in this section shall be construed to prohibit any proceedings for mandamus, prohibition, habeas corpus, certiorari, injunction or quo warranto."). However, Plaintiffs' claim again fails because an injunction generally will not lie if there is an adequate remedy at law. *See Amkco, Co. v. Welborn,* 2001–NMSC–012, ¶ 9, 130 N.M. 155, 21 P.3d 24 (noting that "injunctions are granted to prevent irreparable injury for which there is no adequate and complete remedy at law" (internal quotation marks and citation omitted)); *Insure New Mexico, LLC v. McGonigle,* 2000–NMCA–018, ¶ 7, 128 N.M. 611, 995 P.2d 1053 ("Injunctions are harsh and drastic remedies [that] should issue only in extreme cases of pressing necessity and only where there is no adequate . . . remedy at law." (internal quotation marks and citation omitted)). The District has filed a petition to condemn EDU's utility, and that case is proceeding independent of this appeal. The condemnation proceeding provides an adequate venue for resolving all issues as to the value of the condemned property.

3. The District's Authority to Condemn

{29} There is no dispute that the District has the authority to condemn the utility pursuant to Section 73–21–16(J). Plaintiffs argue, however, that the District should be prevented from exercising its authority to condemn EDU's utility as a consequence of its abusive, bad faith conduct in connection with the condemnation. Plaintiffs cite to *North v. Public Service Co.,* 101 N.M. 222, 229–30, 680 P.2d 603, 610–611 (Ct.App. 1983), for the proposition that even if an entity possesses the power of eminent domain, it may exceed its authority to condemn by acting abusively or in bad faith, and may be liable for damages in tort if it carries out the condemnation in such a manner.

{30} As discussed previously, the District is a quasi-municipality immune from suit under the Tort Claims Act. To the extent Plaintiffs rely on *North* for the proposition that the District is liable in tort for any possible bad faith or abusive conduct, such action is barred by the Tort Claims Act. Furthermore, the Court in *North* stated that a public utility with the right to condemn "cannot be held liable for bad faith in exercising a lawful right granted by the legislature." 101 N.M. at 228, 680 P.2d at 609. The District's intervention in the PRC proceedings was a lawful act. There is nothing unlawful about the District taking a position in the PRC proceedings against the sale of EDU to UI/UINM. The District was no more than a litigant in the PRC proceeding, and as the district court reasoned,

> It is true that the exercise of governmental power which depresses the value for condemnation purposes can constitute an abuse; but, in this case, the District did not have any decision making authority over the claimed actions that resulted in

damages. The authority of those decisions rests exclusively with the PRC. So, to the extent that the District takes the position which either is or is not adopted by the PRC, the District does not exercise the kind of power that would lead to some basis for a damage claim or injunctive relief.

{31} Additionally, as discussed in the previous section, any claim EDU has regarding valuation or condemnation should be brought in the condemnation proceeding, which provides an adequate remedy at law.

CONCLUSION

{32} We reverse and remand on the issue of the bond resolution and affirm the remainder of the district court's order.

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

WE CONCUR: JONATHAN B. SUTIN, and RODERICK T. KENNEDY, Judges.

2005-NMSC-007
109 P.3d 765

Caroline C. ROBERTS, Plaintiff–Appellant,

v.

Bill RICHARDSON, Governor of the State of New Mexico, Defendant–Appellee.

No. 28,599.

Supreme Court of New Mexico.

March 10, 2005.

Tax, Estate & Business Law, N.A., L.L.C., Thomas Smidt, II, Thomas Smidt, III, Albuquerque, NM, for Appellant.

Office of the Governor, Eugene I. Zamora, Hilary Chandler Tompkins, Santa Fe, NM, for Appellee.

OPINION

CHÁVEZ, Justice.

{1} In this case, Appellant Caroline Roberts appeals the district court's Order upholding Governor Bill Richardson's decision to replace her on the New Mexico Public Accountancy Board ("Accountancy Board").[1] We affirm the district court on this point because Appellant's term on the Accountancy Board expired December 31, 2002, making Appellant a "holdover" appointee until her successor was duly appointed and qualified. *See* NMSA 1978, § 61–28B–4(B) (2003). Appellant also challenges the district court's denial of her Motion for Order Compelling Clerk to Process Excusal, contending that her peremptory excusal was timely filed. We affirm the district court on this point because Appellant filed her peremptory election to excuse more than ten days after the filing of her complaint, the point at which Appellant was first notified of the judge assigned to hear her case.

1. Appellant filed an appeal with the Court of Appeals, which certified the matter to this Court as involving a matter of substantial public interest under NMSA 1978, Section 34–5–14(C)(2) (1972).

Appellant's Notice of Excusal of Judge Conway was Not Timely

{2} The procedure for a party plaintiff to file a peremptory excusal of a district court judge is governed by Rule 1–088.1 NMRA 2005. Subsection (B) provides in relevant part:

> The peremptory election to excuse must be:
>
> (1) signed by a party plaintiff or that party's attorney and filed within ten (10) days after the latter of:
>
> (a) the filing of the complaint; or
>
> (b) mailing by the clerk of notice of assignment or reassignment of the case to a judge[.]

{3} Appellant filed her complaint on March 14, 2003, at which time the clerk stamped the summons with the name of Judge Susan Conway, indicating Judge Conway was the judge assigned to hear the case. Appellant filed her Notice of Excusal of Judge Conway on April 15, 2003. The Court Clerk refused to honor the Notice of Excusal and wrote at the bottom, "not processed, untimely." On May 13, 2003, Appellant filed a Motion for Order Compelling Clerk to Process Excusal.

{4} In her motion and on appeal, Appellant claims the notice was timely because at the time she filed her Notice of Excusal, the Court Clerk had not mailed a notice of judge assignment as contemplated by Rule 1–088.1(B)(1). Appellant contends the rule provides that a plaintiff has until the latter of the filing of the complaint or mailing by the clerk of a notice of judge assignment in which to file a peremptory excusal of a judge. According to Appellant, because the Clerk had not mailed a notice of judge assignment at the time Appellant filed her Notice of Excusal, the Notice fulfilled the Rule 1–088.1(B)(1) time requirements, and it was not relevant that the Notice was filed more than ten days after filing the complaint. Appellant's argument is without merit.

{5} "Rules of statutory construction are applied when construing rules of procedure adopted by the Supreme Court." *Walker v. Walton*, 2003–NMSC–014, ¶ 8, 133 N.M. 766, 70 P.3d 756. The procedural rules must "be construed and administered to secure the just, speedy and inexpensive determination of every action." Rule 1–001NMRA 2005. In interpreting procedural rules, courts are to give each word meaning, as the courts are presumed not to have used any surplus words in the rules. *See State v. Doe*, 90 N.M. 776, 777, 568 P.2d 612, 613 (Ct.App.1977).

{6} The interpretation of Rule 1–088.1(B)(1) as argued by Appellant would render Rule 1–088.1(B)(1)(a) (time of filing a complaint) meaningless. Appellant conceded during oral argument there are no circumstances in which mailing a notice of judge assignment would precede the filing of a complaint. However, Appellant contends that to limit the ten-day rule from the time of filing the complaint would render Rule 1–088.1(B)(1)(b) (mailing by the clerk of notice of assignment) meaningless. We disagree. There are various circumstances that would require a court clerk to mail the parties a notice of judge assignment after a complaint has been filed. For example, the division to which the case was assigned could be vacant due to the resignation of a judge, or the case could be assigned to a pro tem judge who had not yet received an official appointment to the bench. Under such circumstances, the summons and/or complaint could not be stamped with the name of the judge to whom the case was assigned and the clerk would have to follow up with a notice of judge assignment. Rule 1–088.1(B)(1)(b) (mailing by the clerk of notice of assignment) would therefore not be meaningless.

{7} Additionally, there was no need in this case for the Clerk to mail additional notice since the judge had been assigned to the case on March 14, 2003 (the day the complaint was filed), and the parties received notice of this assignment via the summons on that same date. To construe Rule 1–088.1(B) as requiring a clerk to mail notice of the assignment of a judge even when the summons and/or complaint are stamped with the name of the judge to whom the case is assigned would be neither speedy nor inexpensive. Such a construction would contravene the purpose of Rule 1–001. Because Appellant was notified that Judge Conway was as-

signed to hear the case at the time the complaint was filed, Appellant had ten days from the filing in which to exercise her statutory right to file a peremptory election to excuse Judge Conway. Having filed more than ten days later, Appellant did not file a timely notice.

{8} We thank Appellant for bringing a possible ambiguity in Rule 1–088.1 to our attention. This issue will be submitted to the Committee overseeing the Rules of Civil Procedure for the District Courts so they may examine Rule 1–088.1 in light of the concerns expressed by Appellant. We request that the Committee make any recommendations it deems appropriate in light of this Opinion.

Appellant was Not Improperly Removed from the Accountancy Board

{9} The Accountancy Board consists of seven members appointed by the Governor. NMSA 1978, § 61–28B–4(A) (2003). The terms are for three years and are to be staggered in such a manner that the terms of not more than three members expire on January 1 of each year. § 61–28B–4(B). The Governor may remove a member of the Accountancy Board for neglect of duty or other just cause. *Id.*

{10} Appellant was appointed to the Accountancy Board by then-Governor Gary Johnson on January 24, 2002, to fill an unexpired term. In his appointment letter, Governor Johnson stated that Appellant's appointment expired December 31, 2002. On October 10, 2002, Governor Johnson again wrote to Appellant notifying her that he was appointing her to the Accountancy Board for a three-year term to begin on December 31, 2002, notwithstanding the statutory language mandating that terms expire on January 1 of each year. *See id.* Governor Johnson left office on December 31, 2002.

{11} Bill Richardson assumed the office of Governor on January 1, 2003. On January 28, 2003, Governor Richardson wrote to Appellant advising her that he was removing her from the Accountancy Board for "sufficient cause." Appellant requested that Governor Richardson provide the specifics for her removal, which the Governor declined to do.

{12} Appellant contends that Governor Richardson could not remove her for just cause unless he specified the reasons giving rise to the just cause. Governor Richardson counters that he is not required to specify the basis for just cause and, in any event, as Appellant's term expired January 1, 2003, he had authority to appoint Appellant's successor to the Accountancy Board.

{13} Appellant was a "holdover," an appointee who continues her "tenure" in office beyond the official expiration of her "term." *Denish v. Johnson,* 1996–NMSC–005, ¶¶ 24, 46–49, 121 N.M. 280, 910 P.2d 914. In *Denish,* then-Governor Bruce King filled two mid-term vacancies on the Board of Regents for the New Mexico Institute of Mining and Technology. *Id.* ¶¶ 1–5. Governor King attempted to grant both appointees five-year terms, even though each term was constitutionally required to expire earlier under that Board's system of staggered terms. *See Id.* ¶¶ 5–6, 41 (construing N.M. Const. art. XII, § 13 and N.M. Const. art. XX, § 5). We held that the Governor's appointees could only serve for the remainder of time established for the unexpired terms. *Id.* ¶ 41.

{14} Similarly, Appellant could serve on the Accountancy Board only for the remainder of the unexpired term to which she was appointed. Governor Johnson did not have authority to appoint Appellant to a term beyond December 31, 2002. Therefore, Governor Richardson had authority to appoint Appellant's successor. Because we conclude that Appellant's term had expired and that Governor Richardson had authority to appoint her successor, we do not need to determine whether a governor must specify the basis for a "just cause" removal of a board member.

CONCLUSION

{15} Appellant's Notice of Excusal was not valid because it was filed more than ten days after the filing of the complaint, the point at which she received notice of the judge assignment in this case. As Appellant's term on the Accountancy Board had expired, Governor Richardson was lawfully entitled to

appoint her successor. We therefore affirm the district court.

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

WE CONCUR: RICHARD C. BOSSON, Chief Justice, PAMELA B. MINZNER, PATRICIO M. SERNA, and PETRA JIMENEZ MAES, Justices.

2005-NMCA-035

109 P.3d 768

Beatrice C. ROMERO and Michael Ferree, on behalf of themselves and all others similarly situated, Plaintiffs–Appellees,

v.

PHILIP MORRIS INCORPORATED, R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., Lorillard Tobacco Co., Liggett Group, Inc., and Brooke Group, Ltd., Defendants–Appellants.

No. 24,034.

Court of Appeals of New Mexico.

Feb. 8, 2005.

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Patricia G. Williams, Wiggins, Williams & Wiggins, P.C., Albuquerque, NM, for Appellants Liggett Group, Inc. and Brooke Group Holding, Inc.

OPINION

SUTIN, Judge.

{1} We have here first impression issues for New Mexico relating to certification of an indirect (consumer) purchaser antitrust (price-fixing) class action. Defendant cigarette manufacturers appeal from an order certifying a statewide class of all consumers who bought Defendants' cigarettes during an approximate seven-year period.

{2} Plaintiffs allege Defendants violated the New Mexico Antitrust Act, NMSA 1978, §§ 57–1–1 to –17 (1979, as amended through 1987), by entering into a conspiracy to inflate their cigarette list price increases to wholesalers and distributors. Plaintiffs claim injury and damages from the pass-on of overcharges down the chain of distribution. We affirm, holding that under the requirements for class certification in Rule 1–023(B)(3) NMRA, the methodologies Plaintiffs presented to prove antitrust injury and damages are sufficient for class certification. Questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and the class action is superior to other available methods for the fair and efficient adjudication of the controversy.

{3} As Background (¶¶ 4–34 *infra*), we generally discuss: (1) the Antitrust Act; (2) New Mexico's class certification rule, Rule 1–023; followed by (3) and (4) Plaintiffs' and Defendants' proofs and positions; and (5) the district court's determinations and Defendants' points on appeal. In our Discussion, we: (1) set out our general approach to Rule 1–023 (¶¶ 35–39); (2) identify the standard of review (¶¶ 40); then, (3) we discuss Rule 1–023(B)(3)'s predominance standards for injury and damages; and (4) the superiority (manageability) standard (¶¶ 41–55); following which, (5) we analyze the cases supporting certification using classwide injury and damages through generalized proof (¶¶ 56–67); (6) we analyze the cases supporting denial of certification because of the need to prove individual injury and individualized damages (¶¶ 68–77); and (7) we analyze the Antitrust Act's "damages actually sustained" language (¶¶ 78–83). We close the opinion with a summary and the result (¶¶ 84–98).

BACKGROUND

1. The Antitrust Act: Indirect–Purchaser Standing and Elements of Claim

{4} In *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728–29, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), the United States Supreme Court held that indirect purchasers of a product from a manufacturer did not have standing to sue under the federal antitrust law for overcharges that were "passed on" to the indirect purchasers. The Court's decision built on its previous ruling in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 489, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), that antitrust defendants could not use the defense that overcharges were not absorbed by direct purchasers but were "passed on" to indirect purchasers, adopting the reasoning that to allow indirect purchaser lawsuits would unnecessarily complicate matters given "the economic uncertainties and complexities involved in proving pass-on." *Illinois Brick*, 431 U.S. at 725 & n. 3, 97 S.Ct. 2061. In his dissenting opinion in *Illinois Brick*, Justice Brennan preferred to limit the *Hanover Shoe* rule to prohibiting the use of a pass-on defense, thus permitting indirect purchasers to prove overcharges. *Illinois Brick*, 431 U.S. at 753, 97 S.Ct. 2061 (Brennan, J., dissenting).

{5} In response to *Illinois Brick*, many states enacted provisions allowing indirect purchaser lawsuits under their antitrust law. The viability of these state provisions was confirmed when the United States Supreme Court limited *Illinois Brick* to construing federal antitrust policy and not "defining the interrelationship between the federal and state antitrust laws." *California v. ARC Am. Corp.*, 490 U.S. 93, 103, 105, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989). New Mexico's

indirect purchaser provision is contained in Section 57–1–3(A) of the Antitrust Act.

{6} Section 57–1–3(A) reads:

> All contracts and agreements in violation of Section 57–1–1 or 57–1–2 NMSA 1978 shall be void, and any person threatened with injury or injured in his business or property, directly or indirectly, by a violation of Section 57–1–1 or 57–1–2 NMSA 1978 may bring an action for appropriate injunctive relief, up to threefold the damages sustained and costs and reasonable attorneys' fees. If the trier of fact finds that the facts so justify, damages may be awarded in an amount less than that requested, but not less than the damages actually sustained.

Commensurate with the grant of standing to indirect purchasers, the Antitrust Act allows defendants to assert as a defense that the plaintiffs "passed on all or any part of [an] overcharge . . . to another purchaser or seller in [the distribution] chain." § 57–1–3(C).

{7} To recover antitrust damages under federal law, a plaintiff must prove: (1) an antitrust violation; (2) that the violation caused damage to the plaintiff's business or property, characterized in antitrust cases as "injury," or "fact of damage," or "impact," hereinafter referred to as "injury"; and (3) the amount of damages sustained. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 & n. 9, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969) (distinguishing the injury element establishing causation, which requires proof of "some" damage from a conspiracy, from the damages element that measures the extent of damage); *Bell Atl. Corp. v. AT & T Corp.*, 339 F.3d 294, 302 & n. 12 (5th Cir.2003); *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 67 (4th Cir.1977) (involving allegations by tobacco growers of tobacco company price-fixing). "Antitrust injury, causation, and damages all are necessary parts of the proof because 'Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.'" *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1055 (8th Cir.2000) (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262–63 n. 14, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972)). We interpret the Antitrust Act in harmony with federal antitrust laws when, as here, we have no New Mexico authority on point to guide us. *Griffin v. Guadalupe Med. Ctr., Inc.*, 1997–NMCA–012, ¶ 9, 123 N.M. 60, 933 P.2d 859. We determine, and the parties do not disagree, that the same three elements, i.e., a violation, causing injury, resulting in damages, must be proven under the Antitrust Act. *See Ren v. Philip Morris Inc.*, No. 00–004035–CZ, 2002 WL 1839983, slip op. at *2 (Mich. Cir. Ct. June 11, 2002) (involving state antitrust allegations by consumers against manufacturers); *Keating v. Philip Morris, Inc.*, 417 N.W.2d 132, 137 (Minn.Ct. App.1987) (involving state antitrust allegations by retailers against tobacco manufacturers).

2. Class Certification Rule

{8} Under Rule 1–023(A), to be certified as a class, New Mexico plaintiffs must satisfy the prerequisites commonly referred to as numerality, commonality, typicality, and adequacy. These prerequisites are not at issue in this appeal. The district court may only certify a class action for the recovery of damages if plaintiffs establish and the court finds these further prerequisites exist:

> [T]he questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
>
> (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
>
> (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
>
> (d) the difficulties likely to be encountered in the management of a class action.

Rule 1–023(B)(3); *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 614–16, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

{9} These Rule 1–023(B)(3) prerequisites are commonly referred to as the predominance and superiority requirements, *see Amchem Products,* 521 U.S. at 615, 117 S.Ct. 2231 and they are directly at issue in this appeal. As we shall discuss, the predominance requirement brings into primary focus the plaintiffs' proposed methods of proof at trial of the elements of an antitrust claim. And the primary focus of the superiority requirement is the suitability of the class action for management of the litigation. In the present case, the parties' evidence focused on whether common factual issues predominated over individual ones and on difficulties likely to be encountered in the management of the litigation. Predominance of legal issues is not at issue.

3. Plaintiffs' Proof and Positions

{10} Plaintiffs allege a seven-year, Antitrust Act price-fixing conspiracy among Defendants who controlled over ninety percent of the United States market for cigarettes.[1] The primary evidence for class certification consisted of affidavits of an economist, Robert E. McCormick, Ph.D., Professor and Scholar, Department of Economics, Clemson University, together with materials and data he relied on. Dr. McCormick estimated that approximately 292,500 New Mexicans were damaged by approximately $132.3 to $216.3 million for purchasing the products during the time involved in this action. Relying on publicly available sales and market data, information as to pricing practices within the cigarette industry, and certain economic theories and statistical models, Dr. McCormick's view was that a conspiracy to raise prices would necessarily produce a common, classwide injury in the form of an embedded overcharge passed on through wholesalers, distributors, retailers, and jobbers to indirect purchasers.

{11} Dr. McCormick's methodologies for determining classwide injury and damages included (1) a "benchmark price" analysis to determine the amount of overcharge, (2) a "tax incidence theory" to determine the amount of pass-on of overcharge to indirect purchasers, and (3) a "correlation analysis" to determine the fact of antitrust injury, that is, the facts of embedded overcharging and the pass-on of those overcharges to consumers. Dr. McCormick's correlation analysis consisted of a statistical measurement of the average tendency of two sets of prices, the list price and the retail price, to move together over time.

{12} More particularly, Dr. McCormick analyzed the overall markets for cigarettes in the United States and in New Mexico, the market structure and distribution mechanism for cigarettes nationally and in New Mexico, manufacturer list prices nationally and in New Mexico, and retail scanner pricing data in New Mexico. As well, Dr. McCormick inquired into relevant supply and demand factors regarding cigarettes, and analyzed pricing policies of cigarette manufacturers nationally and analyzed certain economic literature. He further analyzed the rate of pass-on of manufacturer list prices to retail consumers and empirical retail data submitted by Defendants.

{13} In regard to classwide injury, Dr. McCormick concluded through his correlation analysis that Defendants' list prices and corresponding retail prices moved together consistently. He further concluded that "no amount of shopping by any smoker in New Mexico could escape a conspiratorial overcharge." According to Dr. McCormick's analysis, ninety-eight percent of the retail prices of the brands sampled moved with the manufacturers' prices, with a level of only five or less percent for error in the statistical conclusion. Thus, Plaintiffs assert, a conspiracy to raise prices will be felt by the consumer even if the retailer sells below its cost

1. Price-fixing conspiracy claims were the subject of several federal nationwide antitrust class actions filed by direct purchasers of cigarettes. These actions were consolidated and transferred to the United States District Court for the Northern District of Georgia. The district court granted summary judgment for the defendants on the issue of conspiracy to fix prices, and the Court of Appeals for the Eleventh Circuit affirmed. *See Williamson Oil Co. v. Philip Morris USA,* 346 F.3d 1287, 1291 (11th Cir.2003).

since, if the conspiratorial list price increase had not occurred, the retailer would have been selling below a lower list price.

{14} Based on Dr. McCormick's analyses and opinions, Plaintiffs further argued below that once a price-fixing conspiracy is proven to have existed during the period alleged, every indirect purchaser of Defendants' products during that period in New Mexico was injured because every one of them was deprived of access to a competitive market. According to Plaintiffs, deprivation of a competitive market is the real common issue, and the fact that some purchasers might have at one time paid less was not material. Purchasers do not make a one-time purchase, because, Plaintiffs argued, sooner or later, when enough packs are purchased, if this conspiracy is out there, the purchaser is going to be injured. Plaintiffs point out that Dr. McCormick had the benefit of extensive pricing data and economic analysis tools not available as late as the late 1980s. They contend that Dr. McCormick's analyses satisfied their burden to show that common issues regarding antitrust injury predominated over individual issues regarding injury.

{15} Plaintiffs further contend that once they show wide-spread injury to the class on a classwide basis through common evidence, an estimate of aggregate damages is sufficient to carry Plaintiffs to certification even if they fail to transform their theories to real numbers. Plaintiffs argue that the concerns of complexity do not outweigh the importance of providing Plaintiffs an opportunity to try and prove damages resulting from the alleged conduct.

{16} More particularly, although nowhere specifically recited in Plaintiffs' answer brief, in estimating aggregate damages, Dr. McCormick considered information that measured retail sales of cigarettes in New Mexico and overcharges at the manufacturer level adjusted by a rate of pass-on through the claim of distribution that takes into consideration the behavior of entities along that chain. Dr. McCormick used a "general formula" pursuant to which damages would be apportioned by multiplying the manufacturer's sales by the overcharge percentage for direct purchasers, and then multiplying that product by the rate of pass-on of overcharge by retailers. Plaintiffs acknowledge that Dr. McCormick is estimating the amount of overcharge that was passed on to indirect purchasers. He arrived at a range of damages for indirect purchasers based on minimum overcharge and maximum overcharge amounts.

{17} After setting out his range of estimated damages, Dr. McCormick set out alternatives as to how he would apportion damages to individual class members. Again, not specifically discussed in Plaintiffs' answer brief, one of Dr. McCormick's alternatives was to award each class member with the damages to the average member of the class by dividing aggregate classwide damages by the number of class members. Another alternative was to collect smoking histories and behavior of individual class members during a claims process and, using the information in conjunction with per-pack overcharges already calculated, provide an estimate of actual damages to each individual class member. While acknowledging that individualized damages to indirect purchasers are concededly difficult to show, Plaintiffs assert that Defendants should not be free to violate antitrust laws by raising difficulty and uncertainty of proof.

4. Defendants' Proof and Positions

{18} In opposition to class certification, Defendants presented an affidavit of their economic expert, Dr. Edward A. Snyder, an economist and Dean of the University of Chicago Graduate School of Business, along with various retailers' affidavits, one Plaintiff's deposition, and other documentary evidence. Defendants' evidence essentially consisted of details relating to the actual process of the distribution of cigarettes from Defendants to consumers, actual variations in retail pricing, and market and consumer behavior.

{19} During the alleged class period, Defendants sold about eighty different brands of cigarettes to about eight to twelve distributors and wholesalers in New Mexico who, in turn, sold to retailers. Retailers included convenience stores, cigarette outlets, mass merchandisers, supermarkets, grocery

stores, drug stores, liquor stores, gas stations, and bars.

{20} Defendants did not set retail prices. Retailers independently determined their prices. Different retailers, and different types of retailers, pursued differing strategies with respect to cigarette pricing. For example, cigarette outlets generally offered lower prices than other retailers. Native American stores charged the lowest prices. Grocery stores typically charged higher prices than other retailers. In regard to strategies, some retailers used standardized pricing, while others varied their prices depending on location or local competition. Some retailers set their prices so that the prices ended in either "0" or "5," and some ran cigarette promotions to build customer traffic.

{21} Consumers paid different prices for cigarettes depending upon, among other things, the brand, the retail outlet, and whether the purchaser availed himself or herself of any discounts or promotions. At some time during the class period, many members quit smoking, started smoking, or changed which, how often, and where they bought cigarettes. As an example, Defendants show that during the class period one Plaintiff, Beatrice Romero, bought Marlboros, a Philip Morris premium brand, at a grocery store where she shopped, five years later she switched to Misty, a Brown & Williamson discount brand, which she purchased at a discount cigarette store, and later she started smoking mostly "Native" brand cigarettes, a very low-priced brand that she purchased at a Native American store. Mrs. Romero had no records showing her purchases or the prices she paid during the class period.

{22} According to Defendants, retail price data collected from a sample of twenty-five stores between 1996 and 2000 showed that retail cigarette prices for the same brand varied as much as seventy-five percent from one New Mexico retail outlet to another. Variations in pricing resulted from discounts and promotions effective at both the wholesale level and the retail level. Different wholesalers paid different prices due to manufacturers' promotional and incentive programs and discounts for prompt payment and assistance in promoting a particular brand. These wholesalers then charged different prices to retailers. Retailers sometimes switched wholesalers in order to obtain better prices.

{23} Defendants argued below that there were a variety of discounts and promotions offered by particular manufacturers directly to retailers, which changed from time to time and lowered retail prices. These included: (1) "buy downs," where a manufacturer paid a retailer directly to reduce the retail price for a particular brand or for particular brands; (2) display agreements in which a manufacturer paid retailers for product placement and display space, payments the retailers could use to lower prices; and (3) "buy some get some" promotions, such as buy one get one free, which lowered the per-pack price paid by the consumer. The multitude of retail discounts and promotions in effect at any given time resulted in price variations from one geographic area to another, from one store to another, and even within a single store among competing brands.

{24} Pursuant to Defendants' expert, cigarette prices in some stores did not increase in the weeks following manufacturer list price increases, indicating that some retailers absorbed those increases, and that others passed on some or all of the increase to consumers. For example, during the class period for which data was available, the data showed that six weeks after each of ten list price increases over forty percent of retailers had not raised prices on one or more major brands, and further showed instances in which nearly all retailers did not pass on list price increases for at least one major cigarette brand for two months. Some retailers did not increase prices in order to keep prices under certain pre-set levels. Others raised or lowered prices for reasons unrelated to manufacturer list price increases. Some retailers did not always increase their prices when list prices went up, or, alternatively, did not increase their prices at the same time or in the same amounts.

{25} Defendants assert on appeal that this "empirical data" shows that retail prices "did

not increase in the wake of increases in list prices in any common or predictable fashion," stating that Dr. Snyder studied the "actual cigarette prices charged by New Mexico retailers to determine whether those prices uniformly increased following increases in list prices" and that "[t]he data incontrovertibly show[ed] that they did not." (Emphasis omitted.) Defendants further find it significant that Dr. Snyder's analysis "showed that over 40% of New Mexico cigarette retailers had not raised prices on one or more major brands fully six weeks after each list price increase had taken effect."

{26} Defendants attack Dr. McCormick's conclusion of classwide injury as insufficient, arguing that only methodologies that would prove specific injury to individual class members were appropriate. They specifically attack Dr. McCormick's correlation analysis on the ground that it said nothing about the specific amounts of the movements of list price and retail price, and, further, that because correlation analysis is only capable of measuring the average tendency of list and retail prices to move together over time and does not measure the amount by which retail prices changed, the correlation analysis could not detect the numerous instances where retailers did not pass on all or portions of list price increases. Thus, according to Defendants, the correlation analysis failed to demonstrate that any particular consumer was injured from a higher retail price at any specific point in time, thereby failing to prove injury to individual class members.

{27} Defendants attack Dr. McCormick's damages methodology and calculations on the ground they are merely an estimate or average that would result in class members receiving damages awards different from the damages they actually sustained. Defendants argue that Dr. McCormick failed to show how the aggregate classwide damages calculations could be reduced to an amount of damage actually suffered by any one consumer. Thus, Defendants argue, distribution of damages will result in class members recovering amounts different from the loss actually sustained.

{28} Defendants go on to assert that most class members do not have records that would show their purchases or the prices paid. In support of this assertion, Defendants cite Dr. McCormick's deposition testimony in which he acknowledged that "[i]t's not likely that [in a claims process] there are going to be substantial records associated with who bought from whom[,] what[,] when." He further acknowledged that cigarettes are "a consumable product usually purchased in small quantities on a repetitive basis where records are not usually kept by consumers." In addition, in acknowledging a distinction between stock and airline ticket purchaser cases as opposed to cigarette purchaser cases, Dr. McCormick stated that "cigarettes are different from—it's not a product where detailed records pairing buyer and seller are recorded in a systematic fashion." Defendants note cases, which we discuss later in this opinion, that have rejected class certification for class members who generally do not have or keep documented proof of their purchases. Plaintiffs are silent in regard to the documented—proof concern, apparently considering it immaterial at the class certification stage.

5. The District Court's Determinations and Defendants' Points on Appeal

{29} During argument on the issue of class certification, the district court indicated that it was difficult not to think that wholesale prices did not affect retail prices: "It's always been my view that in general terms, at least, wholesale prices affect resale prices." Further, the court's questions showed concerns about requiring individuals to bring individual lawsuits because such suits did not constitute a practical avenue for individuals to obtain relief, and because of the likelihood of inconsistent results. The court also indicated during argument that there was little reason not to certify the class to at least determine whether a price-fixing conspiracy existed.

{30} The district court certified the class, determining first that Plaintiffs met their burden under Rule 1–023(A) of establishing the core requirements of commonality, numerosity, typicality, and adequacy. The court then moved to the issues of predominance and superiority under subpart (B)(3),

first determining that common issues predominated as to the issue of whether a price-fixing conspiracy existed, and then determining that Plaintiffs satisfied the other requirements of subpart (B)(3)—those that are at issue in this appeal, namely, that common issues regarding classwide antitrust injury and damages predominate over issues regarding individual injury and the calculation of individual damages.

{31} The court delivered its opinion orally from the bench following argument, and that opinion was placed verbatim in a written order. The court began its discussion with the forecast that it would "look at Rule 23 quite broadly to effectuate ... legislative intent." As to predominance on the issue of antitrust injury, virtually all the court stated was its conclusion that "the methodology that's been proposed here meets what I view as the fairly low standard of plausibility." The court also concluded that a plausible method had been presented for determination of aggregate damages, even though "[t]hat's well below what must be proved at trial." The court stated that, "once [injury] is shown, ... New Mexico law will not require the amount of damages to be proven at this stage[,]" and, therefore, "the issue of the amount of damages need not be addressed here at this stage." However, the court added that, "[a]lternatively, I would conclude ... that if it is required that some reasonable method be addressed for purposes of the amount of damages, that has been established, and I base that on a fairly broad view of what our Courts will look for in terms of class certification."

{32} The court then moved to superiority, concluding: "there is no other method of adjudication that can reasonably be brought to address the issue of whether a conspiracy existed. It is simply impractical to believe that any individual smoker could raise this as a lawsuit and pursue it [through] to verdict." In the court's view, this was "consistent with the legislative intent in adopting a statutory scheme which permits indirect purchasers to pursue actions for violation of the Antitrust Act," an Act through which, the court felt, the Legislature "expressed a strong desire to discourage behavior which violates the Act" and intended "to provide for recovery, a remedy, to persons who have been affected, either directly or indirectly." The court believed that the appellate courts would interpret the Antitrust Act broadly to implement that legislative intent through Rule 1–023.

{33} The court closed its order by offering its views that "the class action mechanism really is the perfect mechanism to determine the existence of a conspiracy in this type of a situation," and that it is a "terrific mechanism ... for the Defendants ... to rebut ... the Plaintiff[s'] contention that there was a conspiracy and to have a final resolution that's binding not just on one consumer, but on all members of the class." When the district court decided the certification motion in this case, we had not yet let it be known that we consider findings and conclusions to be very beneficial for review of class action cases. *See Brooks v. Norwest Corp.*, 2004–NMCA–134, ¶ 36, 136 N.M. 599, 103 P.3d 39, *cert. denied*, No. 28,870, 136 N.M. 665, 103 P.3d 1097 (Dec. 7, 2004); *Berry v. Fed. Kemper Life Assurance Co.*, 2004–NMCA–116, ¶ 19 n. 1, 136 N.M. 454, 99 P.3d 1166, *cert. denied*, No. 28,850, 136 N.M. 515, 100 P.3d 672 (Sept. 17, 2004). We reiterate for future class certification cases that district courts should provide findings of fact and conclusions of law.

{34} Defendants raise three points of error on appeal, each of which focuses on the district court's interpretation of the standards to use in application of the Rule 1–023(B)(3) requirements. First, Defendants contend that the certification standards the district court used in scrutinizing Plaintiffs' methodologies were too lenient, and also that the court bypassed its duty to vigorously analyze Plaintiffs' methodologies and failed to require any showing by Plaintiffs of how, through common proof, they would show individual injury and individualized damages at trial. Second, Defendants contend that the district court erred in not addressing damages or, alternatively, in accepting Plaintiffs' theory of aggregating damages to the class as a whole despite the inability to determine actual damages for individual class members, thereby relieving class members of having to prove any actual damages. As part of this conten-

tion, Defendants assert that the court failed to require a damages methodology by which Plaintiffs would adhere to the Antitrust Act's proof requirement of "damages actually sustained." Third, Defendants contend that the district court erred in its interpretation and application of the superiority requirement by entirely ignoring manageability and approving the class solely because the court believed that individual lawsuits would be impractical.

DISCUSSION

1. General Approach to Rule 1–023

{35} Rule 1–023(B)(3) is essentially identical to its federal counterpart, Rule 23(b) of the Federal Rules of Civil Procedure. We may look to federal law for guidance in determining the appropriate legal standards to apply under these rules. *See Benavidez v. Benavidez,* 99 N.M. 535, 539, 660 P.2d 1017, 1021 (1983) (stating that it was appropriate for the district court to look to federal law construing Rule 1–060(B) NMRA); *Eastham v. Pub. Employees Ret. Ass'n Bd.,* 89 N.M. 399, 402–03, 553 P.2d 679, 682–83 (1976) (relying on federal interpretations of Fed.R.Civ.P. 23); *Ridley v. First Nat'l Bank in Albuquerque,* 87 N.M. 184, 185–86, 531 P.2d 607, 608–09 (Ct.App.1974) (same). Nonetheless, we must be analytically careful when looking at federal antitrust class action cases because they do not involve actions by indirect (consumer) purchasers. *See Execu–Tech Bus. Sys., Inc. v. Appleton Papers Inc.,* 743 So.2d 19, 22 (Fla.Dist.Ct. App.1999) (stating that the presumption of injury in an anti-competitive market "should not arise in indirect purchaser cases due to the evidentiary complexities and uncertainties noted in *Illinois Brick* "); *Ren,* 2002 WL 1839983, at *5 (stating that "[t]he presumption engaged in by some courts regarding injury to direct purchasers is not available in an indirect purchaser case").

{36} We enter into our analysis of the issues before us recognizing that class actions play a significant role in obtaining remedies for small claim holders against defendants who violate antitrust laws. *See Amchem Prods.,* 521 U.S. at 617, 117 S.Ct. 2231 (indicating that the class action process solves the problem of lack of incentive to seek redress for an antitrust violation by aggregating small potential recoveries into a matter worth pursuing, including an attorney's labor). Rule 1–023 is a device to save court and party resources and promote litigation economy by litigating common questions of law and fact at one time. *Gen. Tel. Co. v. Falcon,* 457 U.S. 147, 155, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) (majority opinion and Burger, C.J., concurring and dissenting). The predominance and superiority requirements seek to assure avenues exist through which treatment as a class action can achieve economy and promote uniformity of decision. *Amchem Prods.,* 521 U.S. at 615, 117 S.Ct. 2231; *see* Fed.R.Civ.P. 23(b)(3) advisory comm. notes (concluding that the additional requirements sought to cover cases "in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results"). Rule 1–023 is a remedial procedural device, and we will interpret it liberally. *See In re NASDAQ Market–Makers Antitrust Litig.,* 169 F.R.D. 493, 504 (S.D.N.Y.1996) [hereinafter *In re NASDAQ*]; *In re Sugar Indus. Antitrust Litig.,* 73 F.R.D. 322, 357–58 (E.D.Pa.1976) [hereinafter *In re Sugar*]. We also recognize that a dominant policy behind the class action procedure is the "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Amchem Prods.,* 521 U.S. at 617, 117 S.Ct. 2231 (internal quotation marks and citation omitted). Through class actions, injured persons with small claims are given an avenue to "overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Id.* (internal quotation marks and citation omitted).

{37} Yet we are aware that Rule 1–023 was not "intended to permit a redress for all wrongs committed under the antitrust laws." *City of Philadelphia v. Am. Oil Co.,* 53 F.R.D. 45, 73 (D.N.J.1971) (acknowledging the plaintiffs' argument of class action superiority on the ground the defendants should

not be permitted to profit by their conspiracy, and the unfortunate consequences of not certifying the class, but determining nevertheless that the basic requirement of manageability was not met). Furthermore, although Section 57–1–3(A) confers standing to New Mexico indirect purchasers to bring a civil action for damages, we see no indication that the Legislature intended the Antitrust Act to single out indirect purchasers for any different or more favorable class action treatment than was intended for other persons seeking relief from a violation of the Act. *See Peridot, Inc. v. Kimberly–Clark Corp.*, No. MC 98–012686, 2000 WL 673933, at *2 (Minn. Dist.Ct. Feb.7, 2000) (holding that state indirect purchaser provision makes "no special allowance for such suits to be brought as class actions-suits filed under the antitrust chapter as class actions still must meet all requirements for class certification"); *Melnick v. Microsoft Corp.*, Nos. CV–99–709, CV–99–752, 2001 WL 1012261, at *6 n. 7 (Me.Super.Ct. Aug. 24, 2001) ("The enactment of [Maine's indirect purchaser statute] does not change the plaintiffs' burden of proof on a motion for class certification."); *Derzon v. Appleton Papers, Inc.*, No. 96–CV–3678, 1998 WL 1031504, at *4 (Wis.Cir.Ct. July 7, 1998) ("[S]imply because Wisconsin sought to provide a remedy to indirect purchasers ... does not signify that such a remedy is necessarily appropriate for a class action[.]").

{38} While recognizing the useful purpose of Rule 1–023, we are mindful that courts must nevertheless conduct a rigorous analysis into whether the prerequisites of the rule are met before certifying a class. *Gen. Tel. Co.*, 457 U.S. at 161, 102 S.Ct. 2364; *Bell Atl. Corp. v. AT & T Corp.*, 339 F.3d 294, 301 (5th Cir.2003); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 303 (E.D.Mich.2001) [hereinafter *In re Cardizem*]. The party seeking certification has the burden of showing that each prerequisite of Rule 1–023 is met. *Amchem Prods.*, 521 U.S. at 614, 117 S.Ct. 2231; *Bell Atl. Corp.*, 339 F.3d at 301; *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 64 n. 6 (4th Cir.1977). The district court's rigorous analysis often "involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) (internal quotation marks, citation, and emphasis omitted). Thus, the court may "probe behind the pleadings before coming to rest on the certification question." *Gen. Tel. Co.*, 457 U.S. at 160, 102 S.Ct. 2364. In fact, we have held that "it is essential for the court to understand the substantive law, proof elements of, and defenses to the asserted cause of action to properly assess whether the certification criteria are met." *Brooks*, 2004–NMCA–134, ¶ 31, 136 N.M. 599, 103 P.3d 39.

{39} A class may not be certified unless the district court is satisfied that the Rule 1–023(B)(3) requirements are actually satisfied; and the court may not simply presume conformance with Rule 1–023. *See Gen. Tel. Co.*, 457 U.S. at 160, 102 S.Ct. 2364; *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 677 (7th Cir.2001) (rejecting "the 'across-the-board' rule jettisoned by *Gen. Tel. Co.*" and holding that district courts were required to find actual, not presumed, conformance with Rule 23(b)); *Sample v. Monsanto Co.*, 218 F.R.D. 644, 650 (E.D.Mo.2003) (rejecting the plaintiffs' assertion of predominance of common issues as to injury based on expert testimony where the plaintiffs presumed classwide injury without any consideration whether a price-fixing conspiracy or markets "actually operated in ... a manner so as to justify that presumption"); *Execu–Tech Bus. Sys.*, 743 So.2d at 22 (refusing in indirect purchaser cases to apply a presumption of anticompetitive market injury). We have noted that the abundant literature regarding class action litigation "indicates that the courts have grown more cautious over the years about the class action vehicle." *Berry*, 2004–NMCA–116, ¶ 34, 136 N.M. 454, 99 P.3d 1166. Although the wisdom or form of class certification can be reconsidered after a class has been certified, *see* Rule 1–023(C)(1), courts should be careful not to postpone rigorous analysis into satisfaction of the prerequisites until after certification. *See Berry*, 2004–NMCA–116, ¶¶ 33–37, 136 N.M. 454, 99 P.3d 1166.

2. Standard of Review

{40} We review the grant of class certification for abuse of discretion as set out in *Berry*, 2004–NMCA–116, ¶¶ 25–26, 136 N.M. 454, 99 P.3d 1166.

3. The Predominance Standards for Injury and Damages

{41} "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods.*, 521 U.S. at 623, 117 S.Ct. 2231. "Stated broadly, Plaintiffs' burden under [Rule] 23(b)(3) is to establish that common or 'generalized proof' will predominate at trial with respect to the essential elements of their antitrust claim." *In re Polypropylene Carpet Antitrust Litig.*, 996 F.Supp. 18, 22 (N.D.Ga.1997) (order) [hereinafter *In re Polypropylene Carpet*]. The validity of the methodologies that pass certification scrutiny will be determined when they are tested at trial. *See In re NASDAQ*, 169 F.R.D. at 521.

{42} In the present case, no predominance issue exists as to whether Defendants violated the Antitrust Act. Defendants concede that, in price-fixing cases brought by indirect purchasers, the question whether there was a conspiracy is typically a common one. As to antitrust injury, "[t]o proceed as a class, Plaintiffs must show they plan to use common evidence that reveals impact as to each member of the proposed class without resorting to lengthy individualized examinations." *In re Polypropylene Carpet*, 996 F.Supp. at 22. As to antitrust damages, Plaintiffs "must show they will compute damages through the use of common proof." *Id.* at 29 (internal quotation marks and citation omitted).

{43} It is not difficult to stage the debate on the overriding predominance issue in the present case. On one side is whether the methodologies advanced by Plaintiffs at the certification stage to prove injury and damages at trial must, as Defendants assert, be sufficient to establish at trial specific individual injury and individualized damages with respect to each class member. The other side is whether those methodologies need only, as Plaintiffs assert, constitute a "threshold showing" from which injury and damages can reasonably be inferred on a classwide basis, leaving for trial the sufficiency of those generalized methodologies to satisfy Plaintiffs' burden of proof. Plaintiffs contend the burden does not include having to show a specific individual injury and a specific amount of individualized damages with respect to each individual class member.

{44} In Plaintiffs' view, their methodologies are "plausible," "viable," and "sound" methods for demonstrating classwide injury and damages. The substantive quality of the injury methodology that meets the threshold necessary for certification has been characterized in various ways, including " 'logically probative of a loss attributable' to the alleged conspiracy." *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 692 (N.D.Ga.1991) [hereinafter *In re Domestic Air*] (quoting *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454 (3d Cir.1977)). Plaintiffs must "have demonstrated at least a 'colorable method' of proving [common injury] at trial." *In re Visa Check*, 280 F.3d at 135 (internal quotation marks and citation omitted) (alteration in original). Damages methodologies have been held sufficient to meet the required threshold and permit class certification if they are "not so insubstantial and illusory as to amount to no method at all." *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 697 (D.Minn.1995) [hereinafter *In re Potash*]; *In re Catfish Antitrust Litig.*, 826 F.Supp. 1019, 1042 (N.D.Miss.1993) [hereinafter *In re Catfish*] (stating that "[t]he court's role at the class certification stage in assessing the proposed methods of proving damages is quite limited," namely, inquiring "whether or not the proposed methods are so insubstantial that they amount to no method at all").

{45} In Defendants' view, the court applied too low a standard, i.e., a mere plausibility standard that falls below what courts require for certification of a class action and what amounts to no method at all. As we discuss more fully later in this opinion, courts disagree on whether a class can be certified based on a generalized methodology from

which classwide injury may be inferred, as opposed to requiring the plaintiffs to show a common method to prove specific individual injury. Furthermore, differences exist in case law as to the predominance standard on the question of antitrust damages.

{46} The difficult task of determining whether to certify a class stems not only from the different legal approaches taken in various courts as to how relaxed the predominance standards may be, but also in no small part from the use of economic experts. Drs. McCormick and Snyder submitted extensive affidavits with their analyses and supporting materials and data. These experts appear to be qualified and competent, and each, at least in part, based their opinions on some empirical data.

{47} Dr. McCormick's analyses and opinions lend themselves to the approach advanced by Plaintiffs that individualized proof of injury and damages is not required beyond the use of general methodologies from which common injury can reasonably be inferred and only aggregate damages need be proven at trial. Dr. Snyder's analyses and opinions lend themselves to the approach advanced by Defendants that the real world facts regarding the cigarette industry, as opposed to economic theory based on no or insufficient real world facts, show that when injury and damages are seen on an individualized basis the results are varied and Dr. McCormick's theories and methodologies cannot reasonably predict injury or an individual purchaser's damages. Each expert attacks the other's analyses and conclusions.

{48} The complexity of the issues when economic theorists take over the subject matter has caused courts to avoid attempting to resolve the "familiar 'battle of the experts' " at the class certification stage, particularly as to the issue of predominance as it relates to injury. *In re Potash,* 159 F.R.D. at 694, 697; *In re Visa Check,* 280 F.3d at 135 (holding a district court at the class certification stage "may not weigh conflicting expert evidence or engage in statistical dueling of experts" (internal quotation marks and citation omitted)). Rather, these cases hold that it is for the jury to determine whether Plaintiffs' expert is correct in his assessment of injury, and all that Plaintiffs must present at the certification stage is a threshold showing that the proof at trial will be sufficiently generalized to make the class action approach worth the effort. *In re Potash,* 159 F.R.D. at 697; *see also In re Catfish,* 826 F.Supp. at 1042 ("Whether or not [the expert] is correct in his assessment of common impact/injury is for the trier of fact to decide at the proper time."); *In re Domestic Air,* 137 F.R.D. at 692 (stating the "[t]he weight to be given [the expert's] testimony and its effect is for the fact finder in assessing the merits of plaintiffs' claims at a later date").

{49} Despite the need in many cases to postpone critical analysis of an expert's methodologies, in assessing whether the certification requirements are met and in fulfilling its rigorous-analysis duty, the district court "must undertake an analysis of the issues and the nature of required proof at trial to determine whether the matters in dispute and the nature of plaintiffs' proofs are principally individual in nature or are susceptible of common proof equally applicable to all class members." *In re Cardizem,* 200 F.R.D. at 303; *In re Potash,* 159 F.R.D. at 693 (stating the court must evaluate the substantive allegations of the complaint); *In re Catfish,* 826 F.Supp. at 1039 (concluding that the suitability for certification of an antitrust class action is a fact-sensitive process); *Execu-Tech Bus. Sys.,* 743 So.2d at 20–21 (stating the focus of the evidentiary hearing on predominance and manageability is "whether [plaintiffs] had developed or could develop a methodology to show through generalized, class-wide proof that the price fixing impacted each individual class member"); *Nissan Motor Co. v. Fry,* 27 S.W.3d 573, 592 (Tex.App.2000) (understanding of the claims, defenses, relevant facts, and applicable substantive law is essential to the predominance inquiry).

{50} There exist no bright lines to determine whether common questions predominate. *In re Potash,* 159 F.R.D. at 693. "There is no precise test governing the determination of whether common questions predominate over individual claims. Rather, a pragmatic assessment of the entire action and all of the issues is involved in making the

determination." *Howe v. Microsoft Corp.*, 656 N.W.2d 285, 289 (N.D.2003). Nevertheless, while rigorous factual analysis is necessary and can be critical to the predominance determination, there is more than a kernel of truth in the view that in some complex cases "[d]ecisions as to whether class action status should be allowed seem to rest, more than many other judicial determinations, on judicial philosophy, rather than on precedent or statutory language." *Id.* at 288. It has been said that "[w]hen there is a question as to whether certification is appropriate, the Court should give the benefit of the doubt to approving the class." *In re Workers' Comp.*, 130 F.R.D. 99, 103 (D.Minn.1990).

4. The Superiority (Manageability) Standard

{51} Rule 1-023(B)(3) requires class members to demonstrate that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The rule sets out in four subparagraphs "[t]he matters pertinent to the findings," the fourth and only relevant one for this case being "the difficulties likely to be encountered in the management of a class action." Rule 1-023(B)(3)(d). Predominance and superiority are often peas in the same pod when management of a class action is at issue. *See Elliott v. ITT Corp.*, 150 F.R.D. 569, 577 (N.D.Ill.1992) ("[R]esolution of the predominance question tends to focus on the form trial on the issues would take, with consideration of whether the action would be manageable."). That is, the management issue is relevant to both predominance and superiority. *Brooks*, 2004-NMCA-134, ¶ 33, 136 N.M. 599, 103 P.3d 39; *Berry*, 2004-NMCA-116, ¶ 96, 136 N.M. 454, 99 P.3d 1166 (stating the manageability issue is "intertwined with the issue of predominance"). Still, Plaintiffs must distinctly prove both of the elements, predominance and superiority. *Brooks*, 2004-NMCA-134, ¶ 30, 136 N.M. 599, 103 P.3d 39. The Rule 23(b)(3)(D) factor, "[c]ommonly referred to as 'manageability,' ... encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

{52} There appears to be little question and few cases appear to disagree as a general proposition that, from a manageability perspective, a class action is a superior procedure to handle thousands of class members' small claims when common issues of fact and law predominate and common methods of proving those claims exist. *See, e.g., In re NASDAQ*, 169 F.R.D. at 527-29 (discussing reasons why the class action is superior to other methods of adjudication because it can be the most efficient, convenient, and fair method to resolve a controversy); *In re Sugar*, 73 F.R.D. at 358 ("It is manifest that the maintenance of class actions is superior to the institution of a multitude of individual lawsuits."). But that general statement begs questions that are at the heart of the present case, namely, the extent, if any, to which the ultimate proof at trial must consist of evidence showing specific, individual injury and specific, individualized damages; whether factual development requires individual evidentiary adjudications for each of the class members due to significant, material factual differences; and whether management of the factual adjudications would be so extensive or difficult as to be intolerable or cause insurmountable problems in the management of the action. *See In re NASDAQ*, 169 F.R.D. at 528 (stating, in regard to manageability, that the court "foresees no insurmountable problems in the management of this lawsuit"). As we discuss later in this opinion, there exist cases, including price-fixing cases, in which such manageability concerns have been thought to overshadow the beneficial use of a class action to adjudicate small claims.

{53} In addition to management concerns arising from injury and damages determinations, management of the action can pose significant problems if members of the class are not identifiable. *See In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 214 F.R.D. 614, 617 (W.D.Wash.2003) (order) [hereinafter *In re Phenylpropanolamine*] ("If the members of the class are not identifiable, [management] of the action may pose insurmountable problems." (internal quota-

tion marks and citation omitted)). Cases involving indirect consumer purchasers have been concerned about the absence of written proof of purchase and vagaries of memory. *See id.* at 617–18 & n. 5 (discussing various cases addressing lack of documentary or physical proof of purchase).

> Because the vast majority of putative class members are unlikely to possess proof of purchase, and given the purportedly immense size of this class, the individualized inquiries surrounding class identification would be prodigious and would defy the court's ability to effectively and efficiently manage the litigation.

Id. at 619–20; *City of Philadelphia,* 53 F.R.D. at 71–72 (determining potential class of consumers who "by and large ... made cash purchases [of gasoline] at many different stations, at many different times, at many different prices," where few, if any records would exist on which to base an award, to be unmanageable, in part, because "[i]t would be almost impossible ... to compile a list of the members of this class"); *see also Sias v. Edge Communications, Inc.,* 8 P.3d 182, 185 (Okla.Civ.App.2000) (upholding finding that identification of class of prepaid calling card purchasers would be very difficult and class adjudication unduly burdensome where class size would be very substantial, defendant produced several different designs of calling cards, and purchasers generally discarded cards after use). The use of sworn affidavits is not necessarily an appropriate substitute for an individualized hearing. *See In re Phenylpropanolamine,* 214 F.R.D. at 618–19; *see also Sias,* 8 P.3d at 186 (stating that the record failed to indicate that any class members could be identified through reasonable efforts since potential class members "likely do not possess any proof of their qualification as class members because the [calling] cards are intended to be discarded").

{54} All said, the most important focus and most salient question to ask in terms of manageability should remain that based on the language of Rule 1–023(B)(3), namely, even with significant management concerns, is the class action superior to whatever other methods are available for the fair and efficient administration of the controversy? " 'Manageability problems are significant only if they create a situation that is less fair and efficient than other available techniques.' " *In re NASDAQ,* 169 F.R.D. at 528 (quoting *In re Sugar,* 73 F.R.D. at 358). There appears to be no want of cases holding, as did the court in *In re Catfish,* that "individual questions of damages are often encountered in antitrust actions, and they are rarely a barrier to certification." 826 F.Supp. at 1043. In antitrust price-fixing cases, the general mindset, at least in the federal courts, appears to be that refusal to certify on the sole ground that the action is not manageable is disfavored and should be the exception rather than the rule. *See, e.g., In re Visa Check,* 280 F.3d at 140; *In re Workers' Comp.,* 130 F.R.D. at 110 (stating that "dismissal for management reasons is never favored"). *But see In re Hotel Tel. Charges,* 500 F.2d 86, 90, 92 (9th Cir.1974) ("[T]he desirability of allowing small claimants a forum to recover for largescale antitrust violations does not eclipse the problem of unmanageability."); *Barreras Ruiz v. Am. Tobacco Co.,* 180 F.R.D. 194, 199 (D.P.R. 1998) (stating that although it is difficult to ignore the reality that a class action is the only viable remedy for the plaintiffs given the enormous burden of pursuing independent litigation, it is not a sufficient reason to "headlong plunge into an unmanageable and interminable litigation process").

{55} The foregoing general discussion in Parts 3 (¶¶ 41–50) and 4 (¶¶ 51–54) of this opinion of predominance and superiority standards leads us into a more detailed discussion of the cases relied on by the parties to support their respective positions. The cases do not by any means provide a definitive path for resolution of the issues in the present case. We first discuss federal and state antitrust cases supporting certification based on proof of classwide injury and damages through generalized methodologies in Part 5 (¶¶ 56–67). We next discuss federal and state cases that do not support certification based on such proof and methodologies in Part 6 (¶¶ 68–77). Following these discussions, we address Defendants' position that the Antitrust Act itself requires proof of each

class member's actual damages in Part 7 (¶¶ 78–83).

5. Cases Supporting Classwide Injury and Damages Through Generalized Proof

{56} For their methodologies to pass certification scrutiny, Plaintiffs rely for the most part on several often-cited federal direct purchaser cases favoring classwide proof under the Rule 23(b)(3) proof requirements. *See, e.g., In re Cardizem,* 200 F.R.D. at 321; *In re NASDAQ,* 169 F.R.D. at 520–24; *In re Potash,* 159 F.R.D. at 697. We discuss these three not insignificant, mainstay cases in order to see the rationales for Plaintiffs' approach.

{57} *In re Cardizem* was an antitrust action by direct purchasers of the drug Cardizem CD from the drug manufacturers to recover higher, artificially inflated prices for the drug purchases. 200 F.R.D. at 300–01. The court's analysis centered on the relationship between manufacturers and direct purchasers (wholesalers, chain pharmacies, food and drug stores, hospitals, clinics, long-term care facilities, mail order pharmacies, and governmental agencies) who could likely prove documented purchases. *Id.* at 300 n. 1, 323, 326.

{58} The court in *In re Cardizem* determined that the formal, standardized, structured, established, and predictable criteria and framework involved in pricing, discounts, rebates, and individual negotiations supplied sufficient common evidence "to prove that all class members suffered at least some injury." *Id.* at 318–20. As to quantum of damages, the court determined that the plaintiffs "proffered several reasonable damage methodologies for measuring class-wide damages on an aggregate basis and for calculating damages for individual class members." *Id.* at 322. After a detailed analysis of the methodologies, the court appears to have been convinced that the plaintiffs' experts could devise for use at trial a likely method to determine damages using actual market data as well as forecasts and models, and based on a "market [that] is in fact highly structured with prices set according to pre-set criteria enumerated in company pricing manuals." *Id.* at 324–25.

{59} However, the court in *In re Cardizem* did not view the measure of damages in direct purchaser-antitrust overcharge cases to be actual harm, but, rather, "a surrogate-the full overcharge." *Id.* at 316 (internal quotation marks and citation omitted). Further, the court did not require "an exactness on a direct purchaser's overcharge damage award," in terms of requiring direct purchasers to net out their damages by proving that part of the overcharge was passed on to consumers. *Id. In re Cardizem* also rejected the concern that an overcharge-damage theory might result in a windfall to the plaintiffs. *Id.* at 317. The court agreed with the view that in assigning a full right to recover to direct purchasers, *Illinois Brick* established a policy that " '[t]he standard of individual net harm yields to a standard of net social harm in order to accommodate the limitations of the legal system.' " *In re Cardizem,* 200 F.R.D. at 316 (quoting Roger D. Blair & William H. Page, *"Speculative" Antitrust Damages,* 70 Wash. L.Rev. 423, 434 (1995)). Finally, the court in *In re Cardizem* had no difficulty rejecting the defendants' arguments that the class action was not a superior method to adjudicate the controversy. *Id.* at 325.

{60} *In re NASDAQ* was an action by individual buyers of securities and the State of Louisiana in its *parens patriae* capacity against market-makers, alleging an unlawful price-fixing scheme by the market-makers. 169 F.R.D. at 498–99. The court certified the class under Rule 23(b)(3) based on (1) the plaintiffs' intention "to prove the effectiveness of Defendants' conspiracy by using economic theory, academic studies, data sources, and statistical techniques—all designed to demonstrate that Nasdaq spreads were actually widened as a result of the conspiracy—that are common to the entire class"; and (2) methodologies by which the plaintiffs proposed "to prove the existence and measure of damages," including comparing several different "spreads (and resulting revenues)" as to actual securities traded, and comparing profits from spreads, methodologies "widely accepted [as] means of measur-

ing damages in antitrust cases." *In re NASDAQ*, 169 F.R.D. at 520–21. Further, the court cited *In re Potash* in noting that it had judicial methods available to resolve individual damages issues, and further noted that "[c]ourts have allowed the plaintiffs to establish the measure of damages at trial, and this measure is then applied to the individual transactions (typically in a second[,] bifurcated proceeding following trial on the common issues)." *In re NASDAQ*, 169 F.R.D. at 522. Aggregate damages of the class as a whole was thought to be "susceptible to determination in a single trial along with the issue of liability," *id.* at 524, and the court determined that damages could be determined on a classwide, or aggregate basis, "where the computerized records of the particular industry, supplemented by claims forms, provide a means to distribute damages to injured class members in the amount of their respective damages." *Id.* at 526. On the issue of superiority, the court foresaw "no insurmountable problems in the management of th[e] lawsuit." *Id.* at 528.

{61} *In re Potash* involved an action by wholesaler direct purchasers for conspiracy to fix the wholesale price of potash. 159 F.R.D. at 687–88. In regard to injury, the court employed a presumption that price fixing impacts "all purchasers of a price-fixed product in a conspiratorially affected market" and ultimately determined that the clash of expert analyses and opinions on such impact was to be resolved at trial. *Id.* at 695–97. The plaintiffs, the court held, need only make "a threshold showing that what proof they will offer will be sufficiently generalized in nature that . . . the class action will provide a tremendous savings of time and effort." *Id.* at 697 (internal quotation marks and citation omitted) (alteration in original).

{62} As to amount of damages, the court in *In re Potash* adopted what it called a "relaxed standard," which was that "the Court's inquiry [into predominance as to damages] is limited to whether or not the proposed methods are so insubstantial as to amount to no method at all." *Id.* The court frankly stated that this "relaxed standard flow[ed] from the equitable notion that the wrongdoer should not be able to profit by insistence on an unattainable standard of proof." *Id.* Although recognizing that, typically, the amount of damages in antitrust actions largely involves individualized questions, the court in *In re Potash* nevertheless determined that this did not preclude certification. *Id.* The plaintiffs' expert's opinion was based on three methods of computing overcharge that, according to the expert, permitted damages suffered by class members to be determined "with a substantial degree of precision, by means of a formula." *Id.* In the court's view, these methods were not "so insubstantial as to amount to no method at all." *Id.* The court set out the "various judicial methods . . . available [to the court] to resolve individual damage issues without precluding class certification," including among others, "appointing special masters or magistrates to preside over individual damage proceedings," and "using the defendants' transactional records to compute individual damages." *Id.* at 698. In regard to manageability, the court held that the class action was "the most efficient and convenient method to resolve th[e] controversy." *Id.* at 699.

{63} Plaintiffs also cite cases supporting the view that variations in damages amounts in antitrust actions will not defeat certification on predominance or superiority grounds once they show conspiracy and injury. This position is exemplified by the following language in *In re Workers' Compensation:*

> Individual questions of damages are often a problem encountered in an antitrust action and are rarely a barrier to certification.
>
> Separate mini-trials, a special master, later stratification of the class, or a magistrate may be available to resolve such issues. In this action[,] plaintiffs must demonstrate a conspiracy and its impact, not necessarily on an individual basis; those questions predominate over any secondary and individual questions of damages.
>
> . . . .
>
> . . . If the plaintiffs' claims are substantiated, a question as to which the Court presently has no opinion, the class action mechanism is clearly the most efficient means of resolving the many claims which

> may be asserted. The Court is confident that stated classes or subclasses will make the case comfortably—if not easily—manageable. If the case were not handled as a class, thousands of small claims would be either brought or unjustly abandoned. The first possibility would be a flood of cases, the second would involve individual claims abandoned because of cost.
>
> The Court is mindful that dismissal for management reasons is never favored. The vehicle of class action is meant to permit plaintiffs with small claims and little money to pursue a claim otherwise unavailable. A contrary rule would essentially preclude class treatment whenever separate issues had to be tried.

130 F.R.D. at 110 (internal quotation marks and citations omitted); *see also In re Catfish,* 826 F.Supp. at 1042–43 (stating relaxed standard of whether "the proposed methods are so insubstantial that they amount to no method at all," and "it is generally recognized that some relaxation of the plaintiff's burden of proving damages is tolerated once an antitrust violation and resulting damages have been established" and stating further that the determination of damages amounts, although individualized, are rarely a barrier to certification); *In re Polypropylene Carpet,* 996 F.Supp. at 29–30 (holding sufficient for class certification the plaintiffs' intention to use such techniques as (1) multiplying "the amount of any price increase estimated by [a] regression analysis by the number of products purchased by the class members," or (2) multiplying "the estimated price increase by the total dollar purchases made by the class members").

{64} We also note several federal decisions Plaintiffs cite specifically in support of their position that class damages may be proven in the aggregate. *See Bigelow v. RKO Radio Pictures, Inc.,* 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946); *Brown v. Pro Football, Inc.,* 146 F.R.D. 1 (D.D.C.1992); *In re Brand Name Prescription Drugs Antitrust Litig.,* Nos. 94 C897, MDL 997, 1994 WL 663590 (N.D.Ill. Nov.18, 1994) (mem.); *In re Alcoholic Beverages Litig.,* 95 F.R.D. 321 (E.D.N.Y.1982). Plaintiffs also draw on *Newberg on Class Actions,* which contains an entire section devoted to "Proof and Distribution of Aggregate Class Damages," *see* 3 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions,* ch. 10 (4th ed.2002), and whose overall disposition (based solely on federal case law) tends to be supportive of not precluding certification or trial if only aggregate damages is proven with a per-capita or average formula for distribution of the damages award. *See, e.g., Newberg, supra,* §§ 10:2 to 10:7, 10:12.

{65} Plaintiffs further rely on several state court Microsoft antitrust cases permitting class certification based on a showing of classwide injury and a lenient standard in regard to damages. *See Coordination Proceedings Special Title Rule 1550(b) Microsoft I–V Cases,* No. 4106, slip op. (Cal. Super Ct. Aug. 29, 2000); *Gordon v. Microsoft Corp.,* No. 00–5994, 2001 WL 366432, at *13 (D.Minn. Mar. 30, 2001); *In re N.M. Indirect Purchasers Microsoft Corp. Antitrust Litig.,* No. D–0101–CV–2000–1697, slip op. at 5 (N.M.Dist.Ct. Oct. 2, 2002); *Howe,* 656 N.W.2d at 298; *In re S.D. Microsoft Antitrust Litig.,* 657 N.W.2d 668, 677–79 (S.D. 2003). *But see Melnick v. Microsoft Corp.,* Nos. CV–99–709, CV–99–752, 2001 WL 1012261, at *16 (Me.Super.Ct. Aug. 24, 2001) (holding plaintiffs' methodologies to be too general to constitute a means to prove damages on a classwide basis); *A & M Supply Co. v. Microsoft Corp.,* 252 Mich.App. 580, 654 N.W.2d 572, 598, 600 (2002) (reading state law to require proof of actual damages and rejecting figures that were "general in nature" to prove the actual damages the class members sustained).

{66} Plaintiffs also see two Tennessee cases as particularly important. They are *Meighan v. U.S. Sprint Communications Co.,* 924 S.W.2d 632 (Tenn.1996), and *Sherwood v. Microsoft Corp.,* No. 99C–3562, 2004 WL 2468846 (Cir.Ct.Tenn. Dec. 20, 2002) (mem. and order). *Meighan* is a trespass and taking action for damages for cables installed over land, in which the court states that trial courts may determine an aggregate amount for the class as a whole, and then to either divide the award among class members, or allow each class member to individually prove his or her claim against the entire

judgment. 924 S.W.2d at 635, 638. In certifying an antitrust class action, the court in *Sherwood* turned primarily to Tennessee law and *Meighan* and rejected *A & M Supply Co.* and *Melnick* which required individualized damages determinations. *Sherwood,* at 5–6, 18, 21.

{67} Plaintiffs assert, based on the foregoing cases, among others, that they needed only to come forward with their generalized threshold showings by which they intend to prove classwide injury and damages. It is Dr. McCormick's theoretical analyses and aggregation of damages from which, according to Plaintiffs, it can be reasonably anticipated that common, classwide injury to most, if not all class members, and classwide damages, can be proven. Plaintiffs assert that the superiority requirement has been satisfied based not only on the fact that it would be impractical for the individual consumers to pursue these claims, but that this class action is superior to individual actions within the meaning of Rule 1–023 in regard to the fair and efficient adjudication of claims.

6. Cases Supporting the Need to Prove Individual Injury and Individualized Damages Through Common Proof

{68} The generalized, and as the district court in the present case characterized it, "plausible," methodology approach of Plaintiffs has not been adopted in several cases, some of which are quite similar to the present case. Several indirect tobacco purchaser, price-fixing cases fall in this group of cases. For example, in a cigarette retailer action in Minnesota and in cases parallel to the present case brought by consumer purchasers in Minnesota and Michigan in which the plaintiffs presented the same experts' theories as those in the present case, the courts denied certification. *See Ren v. Philip Morris Inc.,* No. 00–004035–CZ, 2002 WL 1839983, slip op. at *18 (Mich. Cir. Ct. June 11, 2002) (indirect purchaser); *Ludke v. Philip Morris Cos.,* No. MC 00–1954, 2001 WL 1673791, at *4 (Minn.Dist.Ct. Nov.21, 2001) (mem.) (indirect purchaser); *Keating v. Philip Morris, Inc.,* 417 N.W.2d 132, 138 (Minn.Ct.App.1987) (retailer). *But see Smith v. Phillip Morris Cos.,* No. 00–CV–26 (Kan.Dist.Ct. Nov. 15, 2001) (journal entry of decision) (certifying class of indirect purchasers of cigarettes, stating that a single price-fixing conspiracy "affects all of the proposed class members equally," and that the plaintiffs were bound only to show that "damage was inflicted upon the class by the price fixing conspiracy" and to "present a logical, reasonable method for determining the damages of the entire class"). We discuss these cases at the outset.

{69} *Ren* was a price-fixing antitrust case brought by indirect consumer purchasers of cigarettes. In regard to antitrust injury, *Ren* determined that the indirect purchasers could not establish injury "through the use of the presumptions or inferences that might otherwise prevail in direct purchaser federal antitrust cases." 2002 WL 1839983, at *5. *Ren* quoted with approval the following analysis in *Melnick,* in which the court determined that:

> the presumption engaged in by some courts regarding injury to direct purchasers is not available in an indirect purchaser case:
>
> > Because indirect purchasers must demonstrate that any overcharges resulting from the illegal action of the defendants have been passed on to them, an entirely separate level of evidence and proof is injected into litigation of indirect purchaser claims. Proof of antitrust conspiracy may logically lead to a conclusion that the subject of the conspiracy, the retailers, have each been harmed. No such conclusion logically follows without specific proof tracing that overcharge on to consumers.

Melnick, 2001 WL 1012261, at *7 (internal quotation marks and citation omitted). The court in *Ren* nevertheless concluded that Dr. McCormick's correlation analysis was "a method based on common proofs from which it could be concluded that there was class wide injury or impact" and that the plaintiffs thereby met their predominance burden as to injury. *Ren,* 2002 WL 1839983, at **11–12.

{70} On the other hand, in regard to damages, the court in *Ren* determined that Dr. McCormick's mere aggregation of damages showing classwide damages, with no indication of "the quantum of damages to any one

individual," *id.* at *14, was insufficient to meet the plaintiffs' predominance burden as to damages. *Id.* at *16. The court expressly rejected Dr. McCormick's proposed aggregate class damages approach, finding it inadequate as a matter of law. *Id.* at *17.

{71} More particularly, the court in *Ren* held that Dr. McCormick's proposal to simply divide estimated aggregate classwide damages among class members "amount[ed] to 'no method' at all since it necessarily permits an award of something other than actual damages." *Id.* Without a method for proving each individual class member's actual damages through a formula or other common proof, the plaintiffs failed to show that common issues would predominate. *Id.* at **16–17. The court found it unlikely that "any sort of ascertainment of individual damages can be made under some systematic or formulaic basis that avoids the necessity of individualized proofs regarding the brands of cigarettes purchased, and the particular retail prices paid," *id.* at *16, and determined that, upon resolution of any common issues, the court would still "be faced with potentially an indefinite number of mini-trials to ascertain a class member's actual damages," and further determined that these considerations made a class action unmanageable. *Id.* at *17–18.

{72} In *Ludke,* the court determined that "it would be nearly impossible to determine what amount any particular consumer was damaged by the conspiracy or whether the particular consumer was damaged at all." 2001 WL 1673791, at *3 (emphasis omitted). In particular, the court in *Ludke* noted that because class members "do not generally keep receipts or any other proof of purchase ... [and] may well not know how many cigarettes they consume," certifying the class "would be an invitation for fraud." *Id.* at *3. Further, *Ludke* quoted with approval the following from *Windham v. Am. Brands, Inc.,* 565 F.2d 59, 68 (4th Cir.1977):

> Thus in cases where the fact of injury and damage breaks down in what may be characterized as "virtually a mechanical task," "capable of mathematical or formula calculation," the existence of individualized claims for damages seems to offer no barrier to class certification on grounds of manageability. On the other hand, where the issue of damages and impact does not lend itself to such a mechanical calculation, but "requires separate mini-trial[s]," of an overwhelming large number of individual claims, courts have found that the "staggering problems of logistics" thus created "make the damage aspect of case predominate," and render the case unmanageable as a class action.

Ludke, 2001 WL 1673791, at *2 (alteration in original). *Ludke* also turned to the denial of class certification to cigarette retailers in *Keating* stating: "Clearly, if the [*Keating*] Court found that an individualized claims process for a class composed of cigarette retailers would be daunting, an individualized claims process would be a nightmare to administer for the hundreds of thousands of claims likely to be generated by a class action composed of end-users of cigarettes." *Ludke,* 2001 WL 1673791, at *4. The court in *Ludke* was troubled "not so much ... by the calculation of aggregate damages, as ... by the impossible task of dispersing these aggregate damages to individual claimants." *Id.* at *3.

{73} *Keating* was a price-fixing antitrust case brought by cigarette retailers. 417 N.W.2d at 133–34. The court affirmed the denial of certification of a statewide class of cigarette retailers. *Id.* at 137–38. The court held that evidence of the distribution and pricing of cigarettes required proof of injury and damages on an individualized basis. *Id.* at 134, 137. More particularly, in discussing the wholesale cigarette market, the court was concerned that each retailer would have to establish the price paid on each purchase under circumstances of widespread wholesaler use of nonuniform, as well as non-cash discounts. *Id.* at 137. The court noted the trial court's determination that "[a]ny determination of fact or amount of individual damage will require thousands of factual examinations done on a retailer by retailer basis, and a transaction by transaction basis. The class action would quickly degenerate into thousands and thousands of individual trials." *Id.* (internal quotation marks omitted). The court determined that the trial court did not

abuse its discretion in denying certification on both predominance and superiority (specifically, manageability) grounds. *Id.* at 136–38; *see also Windham,* 565 F.2d at 66 (involving tobacco growers' claims of a price-fixing conspiracy by cigarette manufacturers, in which the court stated, "[w]hile [an antitrust] case may present a common question of violation, the issues of injury and damage remain the critical issues in such a case and are always strictly individualized").

{74} State courts in pharmaceutical cases have arrived at similar results. In *Wood v. Abbott Laboratories,* No. 96–512561–CZ, 1997 WL 824019 (Mich.Cir.Ct. Sept.11, 1997) (unpublished opinion and order), a pharmaceutical price-fixing case, the court denied certification to indirect consumer purchasers of drugs. Citing Michigan's statute permitting an indirect purchaser to recover only actual damages, the court held that the plaintiffs failed to "provide a method for calculating each class member's actual damages and thus calculation of injury and actual damages would require examination of the drugs each class member purchased ... rendering the class unmanageable." *Id.* at *2. As to the plaintiffs' expert's methodologies and opinion, and rejecting those theories that provided "at best ... a method for calculating the existence of injury and damage on a class-wide basis," the court continued:

> [the expert's] theories do not provide a method for calculating each class member's actual damages and thus calculation of injury and actual damages would require examination of the drugs each class member purchased from which retailer, the discounts applicable to each retailer for each drug at the time of purchase, and other relevant factors, resulting in thousands of mini-trials and rendering the class unmanageable. For this reason, other jurisdictions to consider this issue have denied certification to the class of indirect purchasers of brand name prescription drugs.

Id. The court found "that individual questions of fact as to both injury and damages predominate over the one theory common to the class, that being the existence of the alleged conspiracy, and that these individual questions render the case unmanageable as a class action." *Id.* at *3. Several other Abbot Laboratories state court cases have denied class certification. *See McCarter v. Abbott Labs., Inc.,* No. CV 91–050, at 7, 1993 WL 13011463 (Ala.Cir.Ct. Apr. 9, 1993) (order) (determining individual questions in regard to each purchase of infant formula were varied fact questions that had to be answered separately to determine injury and damages); *Karofsky v. Abbott Labs.,* No. CV–95–1009, at 31 (Me.Super.Ct. Oct. 16, 1997) (decision and order) (denying class certification and concluding "that there are so many individual issues [of] retail pricing strategies, market forces, profit margins, geography, individual drugs, and circumstances of purchase, that the presentation of plaintiffs' claims as a class action would simply be unmanageable"); *Kerr v. Abbott Labs.,* No. 96–002837, 1997 WL 314419, at **2, 4 (Minn.Dist.Ct. Feb.19, 1997) (mem.) ("Tracing individualized transactions through the complex distribution network of the brand-name prescription drug industry would clearly cause individual questions of fact to predominate over questions common to the proposed class."); *Fischenich v. Abbott Labs., Inc.,* MC 94–6868, at 8–9 (Minn.Dist.Ct. May 26, 1995) (order) ("It is also unlikely that proposed class members will have any records indicating where the formula was purchased, when it was purchased, and how much was purchased. This leads to the question of how damages will be verified unless defendants are given an opportunity to cross-examine the individual purchasers."); *see also In re Methionine Antitrust Litig.,* 204 F.R.D. 161, 163 (N.D.Cal. 2001) (holding, in action involving state antitrust law, that "the amount of damage suffered by each class member will not be determined on a class-wide basis[,]" but that "[c]ourts have uniformly held ... that the existence of such an individual question is not a sufficient reason for denying certification").

{75} In the federal realm, *In re Phenylpropanolamine* involved a proposed class of consumers seeking refunds for purchases of over-the-counter medications. 214 F.R.D. at 618. The court concluded that the likely lack of class member proof of purchases, as evidenced by the testimony of several named plaintiffs, made the case unmanageable. *Id.*

at 619–20 & n. 8. The court's major concern was verification of purchase, stating:

> Unlike cases involving substantial purchases for which proof of purchase would be readily available or prescription medication verifiable by medical and pharmacy records, the process of simply identifying who rightfully belongs within the proposed class would entail a host of mini-trials.... Because the vast majority of putative class members are unlikely to possess proof of purchase, and given the purportedly immense size of this class, the individualized inquiries surrounding class identification would be prodigious and would defy the court's ability to effectively and efficiently manage the litigation.

Id. at 619–20. The court further noted that adopting an aggregate approach to damages "would not serve to lesson [sic] the manageability problems plaguing the proposed class" because the court still would face "the daunting task of determining who could claim those damages in the first place." *Id.* at 620.

{76} Turning away from cigarette and drug-related cases, other significant federal decisions have similarly denied certification. In *Bell Atlantic Corp. v. AT & T Corp.*, the plaintiffs sought to certify a class alleging antitrust (monopoly) violations and proposed to prove damages using a formula to calculate damages based on averages developed from national labor cost data. 339 F.3d 294, 304 (5th Cir.2003). As to injury, the court stated that "where [injury] cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance." *Id.* at 302. Further, in noting that the federal courts have "rejected claims where the plaintiff's proposed method of calculating damages failed to reasonably approximate actual economic losses," the court upheld the district court's denial of certification, holding the plaintiffs' averaging technique was not an "adequate approximation of any single class member's damages, let alone a just and reasonable estimate of the damages of every class member." *Id.* at 303, 304, 308.

{77} The court in *Bell Atlantic Corp.* was critical of the plaintiffs' methodology, in that "[n]umerous factors that would have affected the amount of damages, *if any,* suffered by any given class member ... [were] not accounted for in the proposed formula." *Id.* at 304. The court indicated that "[c]lass treatment ... may not be suitable where the calculation of damages is not susceptible to a mathematical or formulaic calculation, or where the formula by which the parties propose to calculate individual damages is clearly inadequate." *Id.* at 307; *see also Sample v. Monsanto Co.*, 218 F.R.D. 644, 650–51 (E.D.Mo.2003) (refusing to presume class-wide impact without any consideration of whether the markets or the alleged conspiracy at issue actually operated in a manner to justify that presumption, and determining that accepting a generalized theory would be an improper dereliction of its duty to rigorously analyze the proposed class certification proofs against the record facts); *Ralston v. Volkswagenwerk, A.G.*, 61 F.R.D. 427, 432–33 (W.D.Mo.1973) ("[Damages] should not be based on speculation or a system of averaging. Rather, the compensation due each individual member of the class must necessarily reflect the damages actually suffered by that party."); *City of Philadelphia v. Am. Oil Co.*, 53 F.R.D. 45, 48–49, 72 (D.N.J.1971) (stating, in connection with its concern about cash purchases of gasoline at many different stations, at many different times, and at many different prices, that, "no matter how easy it is to establish damages on a class level, if it is extremely difficult or almost impossible to distribute these sums to their rightful recipients, the class is unmanageable"); *and see A & M Supply,* 654 N.W.2d at 603 (a state court decision stating "a plaintiff's burden [is] to articulat[e] a method or formula by which a court could determine that the defendant's conduct caused each member of the proposed class actual damages").

7. The Antitrust Act's "Damages Actually Sustained" Language

{78} Defendants assert that the Antitrust Act's express use of the words "damages actually sustained" in Section 57–1–3(A) helps answer the dispute as to what must be shown at the class certification stage. After

permitting indirect purchasers who are injured to sue for up to threefold "the damages sustained," Section 57–1–3(A) permits the finder of fact, where the facts justify it, to award damages "in an amount less than that requested, but not less than the damages actually sustained." § 57–1–3(A). Thus, the finder of fact can award damages above those "actually sustained," but cannot drop below "damages actually sustained." *Id.*

{79} Based on this language, Defendants argue that permitting an aggregate damages award at trial, with no proof of the individualized damages of class members, would be contrary to the clear wording of the statute. Defendants point to *Ren,* in which actual damages language in the state antitrust statute caused the court to reject a distribution of an aggregate award unless each class member received a damages award representing only his or her actual loss. *See Ren,* 2002 WL 1839983, at **2, 17 (construing a Michigan statute stating that a person injured directly or indirectly may bring an action for actual damages sustained in relation to whether the court could use a fluid recovery fund to avoid problems with ascertaining individual assessment of damages and denying resorting to a fluid recovery fund theory, and holding that "[i]t necessarily follows . . . that a defendant is only liable to a plaintiff for the 'actual damages' sustained by that plaintiff as the result of a violation of the [Michigan statute]").

{80} Plaintiffs, by brief footnote only, argue that the wording in Section 57–1–3(A) should be read only in the context that, while "exemplary" damages can be reduced if there exists evidence of lack of willfulness, such justification cannot also be used to reduce any damages actually sustained. Plaintiffs also argue that the Antitrust Act is meant to be a " 'full consideration' statute, entitling the injured person to recovery of the full amount paid, which obviates the need to individually calculate the amount of overcharge in each transaction."

{81} We doubt Section 57–1–3(A), enacted in substantially its present form in 1891, was worded with class certification predominance and superiority requirements in mind, or, more particularly, with any focus on whether an aggregate recovery would suffice instead of requiring each class member to prove his or her actual, individualized damages, in order to recover under the Antitrust Act. The phrase "damages actually sustained" appears to us to have been inserted in order to set a floor for damages below which the trier of fact cannot go in awarding damages. For these reasons, although the wording of the statute does reflect a legislative requirement that the trier of fact assess actual damages sustained, we are unpersuaded that these words in the statute were specifically intended to set a particular standard under Rule 1–023(B)(3) for class certification or for determining whether aggregate damages would be a proper award, and whether distribution of a lump sum award on a per-capita or average basis would be proper, in a class action. We therefore determine that Defendants' view of the Antitrust Act does not control the question whether, if a class is certified under Rule 1–023(B)(3), individualized damages need not be proven at trial.

{82} Defendants mingle with their Antitrust Act actual damages argument, namely, that an aggregate damages recovery would violate New Mexico's enabling act, NMSA 1978, § 38–1–1(A) (1966). This section provides that rules of procedure promulgated by the New Mexico Supreme Court "shall not abridge, enlarge or modify the substantive rights of any litigant." *Id.* Defendants argue that this act forbids what the district court did, namely, permit Plaintiffs to pursue an aggregate damages remedy when the Antitrust Act does not permit it. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 592, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (stating that the court must be "mindful that Rule 23's requirements must be interpreted in keeping with . . . the [federal] Rules Enabling Act[ ]"); *Windham,* 565 F.2d at 66 (stating that generalized classwide proof of damages would contravene the mandate of the Rules Enabling Act, 28 U.S.C. § 2072(b), that Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right" (internal quotation marks omitted)); *see also Bell Atl. Corp.,* 339 F.3d at 302 (stating antitrust proof requirements cannot be "lessened by reason of being raised in the

context of a class action"); *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 327 (5th Cir. 1978) (recognizing that a class action procedure cannot "in any way alter the substantive proof required to prove up a claim for relief"). Plaintiffs' response is that Rule 1–023 is a procedural rule and "[p]rocedural provisions do not 'abridge, enlarge or modify the substantive rights of any litigant,'" relying on *In re Daniel H.*, 2003–NMCA–063, ¶ 18, 133 N.M. 630, 68 P.3d 176.

{83} Rule 1–023 does not, as written, abridge a defendant's substantive rights under the Antitrust Act. Defendants' concern is the district court's interpretation of Rule 1–023, not the mere existence of the rule. Defendants argue that by interpreting the rule to allow an award of aggregate and not individualized damages the court lessens and alters the substantive proof of actual damages sustained required under the Antitrust Act. We are unpersuaded. To the extent Section 57–1–3(A) requires the assessment of actual damages sustained by reason of a violation of the Antitrust Act, it does not necessarily follow that an aggregate award cannot consist of actual damages, or that the distribution made to each individual class member from a lump sum award consisting of actual damages must correspond to each class member's actual loss.

SUMMARY AND RESULT

1. Summary of Positions

{84} That common issues predominate over individual issues as to antitrust conspiracy is not in question in this appeal. It is clear that the means for proving a conspiracy will be common to the class. *See, e.g., Ren*, 2002 WL 1839983, at *3 (determining that proof of whether manufacturers conspired to fix prices "will not differ between class members").

{85} As to antitrust injury and amount of damages, the ends of the spectrum are plainly presented. Plaintiffs present generalized methodologies to prove classwide injury and damages. They present no common proof by which, at trial, they expect to prove the individual injury to and the individualized damages of each class member. The question is whether to open the class certification door under these circumstances. To do so, assuming Plaintiffs prove a price-fixing conspiracy, would allow each class member who purportedly is able to show a purchase of cigarettes during the class period to recover damages without Plaintiffs having to specifically prove the class member's actual payment of an overcharge and without having to specifically prove the amount of each class member's individual loss for which the member is entitled to damages.

{86} Plaintiffs' injury-related evidence consists of methodologies from which, according to Plaintiffs, it can reasonably be inferred that a very high percentage of those purchasing cigarettes were necessarily injured by the overcharges. Plaintiffs' damages-related evidence builds on their injury-related evidence but goes no further than estimating the aggregate damages, dividing that number by the number of class members, and distributing the lump sum under an averaging formula. There exists no indication in Plaintiffs' brief that they intend any individual adjudications as to what overcharge any individual class member actually paid, or as to the particular amount any individual class member was actually damaged, even if that amount need only be reasonably estimated.

{87} The bottom line rationale for Plaintiffs is that the intent of the Legislature in enacting the indirect purchaser provision in the Antitrust Act together with the underlying remedial purpose of Rule 1–023 is that indirect consumer purchasers with small claims be able, through the class action procedure, to recover damages through classwide proof of injury and damages, without Plaintiffs having to prove each class member's individual injury or individualized damages. To deny certification on either predominance or superiority grounds would effectively deny the class members, consisting of indirect consumer purchasers, access to the court for recovery of damages, leaving class members to fare for themselves in separate, independent, and uneconomical actions to establish small claims. Equally important, Plaintiffs contend that manufacturers who violate the Antitrust Act should not be permitted to escape liability through a rigid reading of Rule 1–023(B)(3). Thus, according to Plaintiffs, Defendants should be

subject to a lump sum[2] restitution award, to be divided under an averaging formula.

{88} Defendants contend Plaintiffs' approach denudes Rule 1–023(B)(3) to the point that the predominance and superiority requirements of the rule are meaningless. They point out that the vast majority of prospective class members likely have no record of when or where they purchased cigarettes, what brands they purchased, or how much they paid for the cigarettes. They feel due caution requires a court to have a deep concern that the process can be fraught with poor memory or, worse, with fraud. They also argue that any overcharge must be ascertained and can only be ascertained by factual development of actual pricing from an individual manufacturer through an individual retailer on any given day or week. Defendants assert that neither the Antitrust Act, nor Rule 1–023(B)(3), requires or even contemplates class recovery without common proof predominating to establish each class member's individual injury and individualized damages. Defendants also assert that the manageability problems necessarily arising because individual injury and individualized damages must be proven should make it clear a class action is not a superior process for adjudication of the claims.

{89} The tensions between these views are not insignificant. A class action is permissible if, among other prerequisites, joinder is impracticable due to numerosity. *See* Rule 1–023(A)(1). A beneficial and primary purpose of the Rule 1–023 procedure is to address class members' claims in one proceeding where joinder outside of the class action setting is impracticable. If a class action were unavailable, the many small claimants will not file an action, not have the funds to prosecute the action, or not benefit financially when costs are set against recovery. Yet a tension is created by the circumstance of the impracticability of individualized proof as to each of the thousands of class members' injuries and losses. There no doubt also exist instances in which the class action process may not be superior because of severe manageability problems in regard to the adjudication of such claims. This case magnifies the tension between competing views about class recovery when proof of individualized damages is impracticable and, if required, can present substantial manageability problems. The tug between proof requirements is heightened by the many and varied decisions condoning, as well as condemning, aggregate or generalized proofs. Cases vary in context, facts, and philosophy. To a large extent, differences seem to reflect different attitudes as well as degrees of the fears of courts as to "the unmanageability and untested limits of class actions under the amended Rule 23." *Newberg, supra,* § 10:5, at 484.

2. Result: Antitrust Injury

{90} In regard to antitrust injury, we hold that Plaintiffs have satisfied the predominance standard under Rule 1–023(B)(3). Plaintiffs have presented common, generalized, logically probative methodologies to prove antitrust injury to class members, methodologies that are at the very least superficially acceptable to meet the predominance threshold. We are in line with the thinking, for example, in *Ren,* where the court agreed that Dr. McCormick's analyses relating to injury were sufficient for class certification purposes. *See Ren,* 2002 WL 1839983, at **2, 4–9. In *Ren,* the plaintiffs attempted to use common proof, specifically including economic theory and correlation analysis, to show injury. *Id.* at *6. The court determined that the correlation analysis which showed that the overcharge was passed on to the consumer ninety-six percent of the time was sufficient to show injury. *Id.* at **11–12. The court noted that at the class certification stage, the plaintiffs were not required to show that every single member of the class was injured where the plaintiffs could show widespread injury to the class. *Id.*

2. An antitrust treatise makes this sweeping comment in regard to lump sum judgments: "Interestingly, there has never been an antitrust class action in which a lump-sum judgment was entered following a trial of common issues holding a defendant liable for an aggregate amount to the entire class." 2 *Antitrust Adviser* § 10.46, at 10–103 (Irving Scher, 4th ed.1995).

{91} In the present case, where Plaintiffs' expert has shown through methodologies, including correlation analysis, that the overcharge, or at least some portion of it, was passed on to the consumer ninety-eight percent of the time, we conclude that the district court did not abuse its discretion in determining that Plaintiffs met their burden. This conclusion is in accord with the well-analyzed price-fixing cases and makes good sense when addressing injury in an anti-competitive market in which it is likely that a large number of consumers, such as people who purchase cigarettes on an ongoing basis, over time will be affected by price fixing. "As a rule of thumb, a price fixing antitrust conspiracy model is generally regarded as well suited for class treatment." *In re Catfish Antitrust Litig.*, 826 F.Supp. 1019, 1039 (N.D.Miss.1993). Although the foregoing adage comes from a direct purchaser/price-fixing case, we think it adaptable as well, to indirect purchaser/price-fixing cases.

{92} Although a tie-leasing and not a price-fixing case, what the court in *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir.1977), stated in regard to injury is apropos:

> There is absolutely no requirement that the loss be personal or unique to plaintiff, so long as the plaintiff has suffered loss in his business or property, for as we have noted, this second aspect of fact of damage is not concerned with any policy of limiting liability. Thus, when an antitrust violation impacts upon a class of persons who do have standing, there is no reason in doctrine why proof of the impact cannot be made on a common basis so long as the common proof adequately demonstrates some damage to each individual.

Id. at 454. In regard to a conspiracy resulting in "increase[d] prices to a class of plaintiffs beyond the prices which would obtain in a competitive regime," the court in *Bogosian* further stated that "an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price." *Id.* at 455.

{93} We caution, however, that it is one thing at the class certification stage to allow certification based on what appear to be logically probative general methodologies, and another thing to prove at trial that a high percentage of indirect purchasers were injured by their purchases of products in an anti-competitive market. Once past certification, Defendants will still be permitted to attack Plaintiffs' methodologies at trial as to scientific reliability and as to sufficiency of proof of antitrust injury. *Cf. Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056–57 (8th Cir.2000) (determining expert's "model to construct a hypothetical market which was not grounded in the economic reality of the ... market," which "ignored inconvenient evidence," and which failed to account for market events that were unrelated to any anti-competitive conduct, to lack sufficient foundation to prove damages, resulting in conclusions that were mere speculation, and to require reversal because admission of the opinion affected the defendants' substantial rights). The following cautionary guideline highlights the point:

> [T]he fact that a case is proceeding as a class action does not in any way alter the substantive proof required to prove up a claim for relief. The holding is also a recognition that "impact" is a question unique to each particular plaintiff and one that must be proved with certainty. That does not mean of course that cases do not exist wherein this requirement of certainty cannot be established by some sort of classwide proof. But it does mean that cases do exist wherein generalized proof of impact would be improper.

Blue Bird Body Co., 573 F.2d at 327 (footnote omitted). *Blue Bird Body Co.* also noted the "great importance" the Fifth Circuit Court of Appeals placed "on the 'impact' element of an antitrust cause of action." *Id.*

3. Result: Antitrust Damages and Manageability

{94} While issues relating to proof of purchase are ever-present in this case, we agree with what appears to have been the district court's view, namely, that certification in this case hinges on the sufficiency for certification of Plaintiffs' classwide injury methodologies and not on Plaintiffs' damages methodologies. If there exists classwide injury, it fol-

lows that class members who were injured suffered some damages. In our view, this logical step provides the common proof necessary to overcome Defendants' predominance objections as to damages. *See In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 523, 524 (S.D.N.Y.1996) (indicating agreement with the view that "the predominance requirement of Rule 23(b)(3) is satisfied with respect to proof of injury, even though individualized inquiry may be necessary on the quantum of damages," and further that individual damages questions are not a barrier to certification but are to be reserved "to be litigated in a subsequent set of proceedings"); *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 691–92 (N.D.Ga.1991) (noting that once price fixing and injury have been established, a plaintiff "need only introduce evidence sufficient for a jury to estimate the amount of damages" through a "formulaic approach[ ] to calculation of damages [that] permit[s] the calculation of a minimum overcharge applicable to all members of the class," and determining that the plaintiffs' methodologies that evidenced common injury also permitted formulaic calculation of damages).[3]

{95} Although fairly formidable, Defendants' case law does not persuade us that in price-fixing cases we must ignore the methodological classwide injury umbrella that paves the way for a logically probative general methodology to prove damages. Nor do Defendants' cases and arguments persuade us that, as a matter of law, an aggregate damages methodology with a certain amount of individualized proof cannot produce a fair result if, in fact, a price-fixing conspiracy has been proven.[4] The following language from *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946), has not yet gone out of style:

> [T]he jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances juries are allowed to act on probable and inferential as well as (upon) direct and positive proof. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain.
>
> Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.
>
> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.

Id. at 264–65, 66 S.Ct. 574 (internal quotation marks and citations omitted). Even the dissent in *Bigelow* established the "difficulty in ascertaining the exact amount of damage [as] a risk properly cast upon the wrong-doing defendant" in federal antitrust law. *Id.* at 267–68, 66 S.Ct. 574 (Frankfurter, J., dissenting). "Antitrust plaintiffs have a limited burden with respect to showing that individual damages issues do not predominate." *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 697 (D.Minn.1995). "[I]t is generally recognized that some relaxation of the plaintiff's burden of proving damages is tolerated once an antitrust violation and resulting damages have been established." *In re Catfish*, 826 F.Supp. at 1042. There is a willingness to accept some measure of uncertainty, not only because of the difficulty in ascertaining the damages, but also because of the "simple, equitable notion that the wrongdoer should not be allowed to profit by an insistence upon

3. One antitrust treatise observes that "[t]he overwhelming majority of antitrust class actions fall under [Rule 23(b)(3)'s predominance requirements]," and that "[i]n antitrust cases, courts are more likely to consider the critical issue to be whether common liability issues predominate and to disregard individual damages (although not impact) questions." 8 Julian von Kalinowski et al., *Antitrust Laws and Trade Regulation* §§ 166.03[3], at 166–44; 166.03[3][a][i], at 166–46 (2d ed.2003).

4. In *Newberg's* view, it is settled law that classwide proof of the measure of damages in price-fixing cases is proper, followed by a second stage of litigation to determine amounts of damages for each class member based on an aggregate damages verdict. *See Newberg, supra,* §§ 10:5, at 486–87; 10:6, at 488; 10:7 n. 1, at 489.

an unattainable standard of proof." *Id.* at 1042–43.

{96} It seems obvious, though, that proof of damages will necessitate at the very least some acceptable proof of purchase of the product in question during the time in question, and may well necessitate more proof than that. Certainly, some minimum amount of individualized proof will be at the very least required for class members to receive any amount of damages. However, while manageability issues will likely arise under any proof of damages, we do not see problems of such an intolerable or insurmountable character to cause us to pause at this stage and prevent certification on manageability grounds. As several price-fixing cases have indicated, it must be the rare case where certification should be precluded where the predominance requirements have been satisfied.

{97} It is not without significance that the district court in the present case obviously feels comfortable proceeding to the merits, leaving it with the court and the jury to wrestle with issues of claims and proof. Determination of manageability is usually left to the discretion of the district court. *See Windham,* 565 F.2d at 65; *Link v. Mercedes-Benz of N. Am., Inc.,* 550 F.2d 860, 864 (3d Cir.1977). As long as neither we nor the district court sees virtually insurmountable obstacles lying in wait as to such proof, we see no reason to hold that the district court abused its discretion in certifying the class over Defendants' superiority objections and cases. *See In re NASDAQ,* 169 F.R.D. at 528–29 (stating that the court did not foresee any insurmountable problem in the management of the lawsuit; that "[c]ourts are generally loath to deny class certification based on speculative problems with case management"; and determining that class action treatment was superior to any other available method for the "fair" and "efficient" adjudication of the case); *see also In re Catfish,* 826 F.Supp. at 1043 ("The difficulties or challenges which may face the court in the damages phase of this litigation, should it proceed that far, are frail obstacles to certification when measured against the substantial benefits of judicial economy achieved by class treatment of the predominating, common issues.").

{98} We do not determine, nor do we intend to pre-determine, how the district court should procedurally handle the class or any divisions of the class, the management and processing and or adjudication of the claims of individual class members, and the proofs of the elements of their antitrust claims. The court has numerous management tools at hand. *See In re Visa Check/Mastermoney Antitrust Litig.,* 280 F.3d 124, 141 (2d Cir.2001). If the court has second thoughts on any issue, it can reconsider and either decertify or modify certification if the manageability of damages adjudication or distribution proves to be an intolerable burden on the judicial system or otherwise proves to create a situation that is less fair and efficient than other available techniques. *See Link,* 550 F.2d at 864; *In re Sugar Indus. Antitrust Litig.,* 73 F.R.D. 322, 355, 358 (E.D.Pa.1976); *Hayna v. Arby's, Inc.,* 99 Ill.App.3d 700, 55 Ill.Dec. 1, 425 N.E.2d 1174, 1184 (1981) (stating that courts will allow certification anticipating that "as the case proceeds to trial on the merits, . . . evidence will be adduced to alleviate the difficulties perceived in the identification of class members, the computation of damages as well as the administration of those damages"); *cf. In re Cardizem CD Antitrust Litig.,* 200 F.R.D. 297, 326 (E.D.Mich.2001) (noting that the plaintiffs contended that purchase data was readily available to ascertain individual damage amounts, and that if complications in calculating damages become evident, the court could "alter or amend its class certification order before a decision [was] rendered on the merits").

CONCLUSION

{99} The Antitrust Act allowance of indirect purchaser access to the court for recovery of damages and the remedial purposes underlying Rule 1–023 are advanced, not diminished, by allowing the price-fixing claims to proceed as a class action.

{100} We affirm the district court's Rule 1–023 certification of a class.

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Chief Judge, and A. JOSEPH ALARID, Judge.

2005-NMSC-008

110 P.3d 66

STATE OF NEW MEXICO, ex rel., Kari E. BRANDENBURG, District Attorney for the Second Judicial District, Petitioner,

v.

Hon. James F. BLACKMER, District Judge, Second Judicial District, State of New Mexico, Respondent,

and

Marco Antonio Brizuela, Real Party in Interest.

No. 29,014.

Supreme Court of New Mexico.

April 7, 2005.

OPINION

MINZNER, Justice.

{1} The District Attorney for the Second Judicial District has petitioned this Court for a writ of superintending control, pursuant to Article VI, Section 3 of the New Mexico Constitution and Rule 12–504 NMRA 2005. The petition addresses a district court order compelling discovery of statements made to a victim advocate in connection with charges against Defendant Marco Brizuela. The Attorney General's Office declined to participate in this proceeding, and the matter has been briefed and argued by Defendant as the real party in interest and by Petitioner.

{2} Petitioner relies on the work product doctrine. *See Hartman v. Texaco, Inc.*, 1997–NMCA–032, ¶ 19, 123 N.M. 220, 937 P.2d 979. Petitioner contends that a victim's advocate is part of the prosecution team and that the district court's order compels discovery of material the doctrine protects. Defendant relies on the terms of Rule 5–501 NMRA 2005, which requires a prosecutor to disclose "the names and addresses of all witnesses which the prosecutor intends to call at the trial, together with any statement made by the witness." Rule 5–501(A)(5). We hold that the work product doctrine applies in criminal actions and that a victim advocate employed by a district attorney's office is part of the prosecution team. Nevertheless, we agree with Defendant that the district court's order is consistent with the disclosure required by Rule 5–501. Our reasons are as follows.

I

{3} Defendant was charged on May 4, 2004, with crimes against Dolores Iacobellis. On November 2, 2004, Defendant moved pursuant to Rule 5–501 to compel discovery of "all notes, annotations, and recordings of any kind of conversations between the D.A.'s victim advocates and Dolores Iacobellis." Opposing the motion, the State argued that Angela Valdez, the victim advocate who spoke with Iacobellis, was part of the prosecution team and that any statements by Iacobellis to Valdez were protected by the work product doctrine.

Kari Brandenburg, District Attorney, Chris G. Lackmann, Assistant District Attorney, David L. Waymire, Assistant District Attorney, Albuquerque, NM, for Petitioner.

Patricia A. Madrid, Attorney General, David K. Thomson, Assistant Attorney General, Albuquerque, NM, for Respondent.

Sophie Cooper, Albuquerque, NM, for Real Party in Interest.

{4} The district court granted the motion. As amended, the order requires disclosure of Valdez's "notes, statements, reports or documentation . . . regarding any oral or written statements or assertions Dolores Iacobellis made regarding" (1) events six months before, during, and after the alleged crime that are related to the charges; (2) her relationship with Defendant; and (3) any bias, prejudice, or anger against Defendant. It authorizes an interview of Valdez regarding "any oral and/or written statements or assertions" Iacobellis made regarding the same three items. The court rejected the State's work product argument. The court reasoned that Valdez was not part of the prosecution team because she was not a paralegal, investigator, or attorney. Emphasizing that Defendant was due only Iacobellis' statements, the court stated that Valdez need not divulge information she provided to Iacobellis, advice Valdez gave to the prosecution team, or Iacobellis' questions about the criminal case. The court invited the State to invoke this Court's original jurisdiction. The petition for a writ of superintending control also requested a stay. On January 6, 2005, we granted the stay and requested a response from Defendant. We subsequently set the matter for oral argument.

{5} Petitioner asks this Court to determine that Valdez's notes from the interview with Iacobellis are work product and that the work product doctrine applies in criminal cases. Petitioner suggests that Valdez took notes as part of the prosecution team and the doctrine protects those notes whether they should be viewed as containing matters of opinion or fact. Defendant seems to agree that the doctrine protects matters of opinion. He suggests that the district court's order only compels disclosure of what Rule 5–501 requires a prosecutor to disclose. The State must disclose witnesses and their statements pursuant to Rule 5–501(A)(5). A statement includes "notes which are in substance recitals of an oral statement." Rule 5–501(G)(3). Defendant concedes that the work product doctrine applies in criminal cases, but he argues that a defendant need not show good cause to obtain work product that the rule requires the State to disclose.

{6} There are three issues before us: whether the work product doctrine applies in criminal cases; whether the doctrine extends to a victim advocate's work; and whether the district court's order is consistent with the definition of "statement" in Rule 5–501. Before turning to these issues, we determine whether it is appropriate to consider them in a proceeding invoking our original jurisdiction.

II

{7} Petitioner asserts that extraordinary relief is warranted because if the district court's order is enforced, then protection pursuant to the work product doctrine will be irrevocably lost. Under similar circumstances we have considered important legal issues. *See Chappell v. Cosgrove,* 1996–NMSC–020, ¶ 6, 121 N.M. 636, 916 P.2d 836 (considering a writ of superintending control when the district court disqualified counsel because if the case proceeded a party would be deprived of counsel of choice). Under similar circumstances, courts in other jurisdictions have entertained petitions for extraordinary relief. *See People v. District Court,* 790 P.2d 332, 334 (Colo.1990) (concluding discretionary orders and related disqualification orders might be reviewed in a proceeding pursuant to original jurisdiction); *Commonwealth v. Liang,* 434 Mass. 131, 747 N.E.2d 112, 115 (2001) (concluding that a discovery order was reviewable as an exercise of superintending control). Further, Petitioner may have no other avenue of appeal. If Defendant is found guilty, Petitioner likely would not be an aggrieved party, and thus would not have the right to appeal. If Defendant was acquitted, then double jeopardy would bar a second trial and appeal.

{8} Defendant does not oppose the exercise of our original jurisdiction. Respondent invited a review of its order pursuant to our original jurisdiction on the ground that the issues raised were of statewide interest and importance.

{9} At oral argument the parties appeared to agree that Valdez's notes do not contain statements by Iacobellis. Nevertheless, we are not persuaded the issues are moot, and we do believe the issues are of statewide

interest and importance. The issue is capable of repetition yet may evade review. *Mourer v. Rusk*, 95 N.M. 48, 51, 618 P.2d 886, 889 (1980).

{10} For these reasons, we conclude that Petitioner has appropriately invoked our original jurisdiction. We now turn to whether the work product doctrine applies in criminal actions, beginning with a description of the doctrine in civil actions.

III

{11} In general, work product is material prepared in anticipation of civil litigation by a party, a party's attorney, and other people employed by a party. "The work product rule is not a privilege, but an immunity protecting from discovery documents and tangible things prepared by a party or its representative in anticipation of litigation." *Hartman*, 1997-NMCA-032, ¶ 19, 123 N.M. 220, 937 P.2d 979. There are two types of work product: opinion and non-opinion, or ordinary, work product. *See* 4 Wayne R. LaFave et al., *Criminal Procedure* § 20.3(j), at 876-77 (2d ed.1999) (distinguishing ordinary or "fact" work product from opinion work product); *Hartman*, 1997-NMCA-032, ¶ 19, 123 N.M. 220, 937 P.2d 979 (defining "opinion" work product and distinguishing all other "non-opinion" work product).

{12} In civil actions opinion work product enjoys "nearly absolute immunity." *Hartman*, 1997-NMCA-032, ¶ 19, 123 N.M. 220, 937 P.2d 979. "In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." Rule 1-026(B)(4) NMRA 2005. Opinion work product includes "documents which reflect an attorney's mental impressions, conclusions, opinions or legal theories." *Hartman*, 1997-NMCA-032, ¶ 19, 123 N.M. 220, 937 P.2d 979. Ordinary, or non-opinion, work product enjoys "qualified immunity." *Id.* Ordinary work product is discoverable when the requesting party has substantial need for the material and is unable to obtain its substantial equivalent without undue hardship. Rule 1-026(B)(4).

{13} The New Mexico Rules for Criminal Procedure contain different discovery rules than the New Mexico Rules for Civil Procedure. The criminal procedure rules contain no general rule protecting discovery of work product. Under the criminal procedure rules, the parties are required to disclose information without request from the other party, including witnesses to be called at trial and their statements. *See* Rules 5-501(A)(5); 5-502(A)(3) NMRA 2005. Excluded from the State's disclosure requirement are materials that would expose a confidential informer or risk physical harm or other adverse consequences to a person. Rule 5-501(F). Excluded from a defendant's disclosure requirement are statements by the defendant to counsel, and "reports, memoranda or other internal defense documents made by the defendant, his attorneys or agents, in connection with the investigation or defense of the case." Rule 5-502(C)(1) & (2). The criminal procedure rules expressly protect some defense counsel work product but do not expressly protect a prosecutor's work product.

{14} Petitioner suggests that the work product doctrine applies similarly in both civil and criminal proceedings. Defendant suggests that we should construe the work product doctrine as curtailed by the criminal procedure rules. Several New Mexico appellate courts have referred to the applicability of the work product doctrine in criminal proceedings. *See State v. Jackson*, 97 N.M. 467, 468, 641 P.2d 498, 499 (1982); *State v. Jackson*, 2004-NMCA-057, ¶ 5, 135 N.M. 689, 92 P.3d 1263, *cert. quashed*, 2005-NMCERT-001, 137 N.M. 17, 106 P.3d 579; *State v. Turner*, 97 N.M. 575, 582, 642 P.2d 178, 185 (Ct.App.1981). None have squarely considered the issues presented by the parties.

{15} In this proceeding and in the district court, the parties referred to various jurisdictions that have held the work product doctrine applies in criminal cases. *United States v. Nobles*, 422 U.S. 225, 238, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975) ("Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of

the criminal justice system is even more vital."); *Liang,* 747 N.E.2d at 118 ("[I]nformation contained in the notes of [the prosecution team] is protected as work product."); *District Court,* 790 P.2d at 335 ("The work product doctrine ... applies with equal, if not greater, force in criminal prosecutions."). We note that these jurisdictions differ in their recognition and application of the work product doctrine in criminal proceedings. As a result, these broad statements require tempering.

{16} Colorado and Massachusetts, for example, exempt from discovery in criminal proceedings work product as defined in their rules of criminal procedure. *See District Court,* 790 P.2d at 335; *Liang,* 747 N.E.2d at 118. Colorado and Massachusetts rules of criminal procedure appear to protect only opinion work product. *Id.* The federal rules governing criminal procedure protect ordinary as well as opinion work product. Fed. R.Crim.P. 16(a)(2). The rules of criminal procedure in Colorado and Massachusetts require pretrial disclosure of some or all witness statements, Colo. R.Crim. P. 16(I)(a); Mass. R.Crim. P. 14(a)(1), while federal law bars production of witness statements until the witness testifies. 18 U.S.C. § 3500 (2000); *see also* Fed.R.Crim.P. 16(a).

{17} "American jurisdictions can be divided into three groups in their treatment of pretrial disclosure of the written and recorded statements of prosecution witnesses." 4 LaFave et al., *supra* § 20.3(i), at 870. Some require disclosure; some prohibit disclosure; others authorize disclosure at the trial court's discretion. *Id.* "Jurisdictions with provisions patterned after the ABA Standards generally include witness statements among the required items of disclosure." *Id.* at 872. There is some variation among these jurisdictions in the scope of the term "statements" and in the class whose statements are subject to disclosure. *Id.* Because of these variations, it is difficult to extract general principles from rules and cases governing disclosure and discovery in other jurisdictions. It appears, however, that in general jurisdictions requiring prosecutors to disclose witness statements usually protect work product, particularly opinion work product. 4 LaFave et al., *supra* § 20.3(j), at 877–78.

{18} We believe prior New Mexico cases appropriately referred to the work product doctrine as applicable in criminal cases. Applying the work product doctrine in criminal actions should help ensure that counsel will thoroughly prepare and should tend to promote reliable results. *Nobles,* 422 U.S. at 238, 95 S.Ct. 2160. Within an adversarial system, counsel should have wide latitude to develop a theory of the case and prepare strong support for that theory. 4 LaFave et al., *supra* § 20.3(j). For these reasons, we hold that the work product doctrine applies in criminal actions.

{19} Nevertheless, our Rules of Criminal Procedure make clear that the doctrine is not the same as in civil actions. Material which the rules require the State to disclose is not protected by the work product doctrine, but rather Rule 5–501(A) generally requires disclosure while Rule 5–501(F) limits the requirement. Similarly, material which the defendant must disclose is governed by Rule 5–502(A), and Rule 5–502(C) limits the requirement. We conclude material that is opinion work product should have the same protection as in civil actions; that material enjoys nearly absolute immunity.

IV

{20} We next turn to whether victim advocates are part of the prosecution team. If they are, then their work is protected by the work product doctrine. The Victims of Crime Act, *see* 1978 NMSA § 31–26–1 (1994), requires district attorneys to communicate with victims, providing information about victim's rights, the usual course of a criminal action, and notice of proceedings. *See, e.g.,* §§ 31–26–4, –9, –10. Petitioner's office employs victim advocates to accomplish these duties. The statutory duties do not include investigation, and Petitioner conceded at oral argument that investigation is not a part of victim advocate duties. If a victim advocate engaged in limited communication with victims, for instance by form letter, we would be hard-pressed to consider an advocate part of the prosecution team.

{21} We believe a different conclusion is appropriate. We are not aware of a statute or rule that prohibits victim advocates from accomplishing tasks beyond those expressed as statutory requirements of the district attorneys. Duties assigned a victim advocate may make that advocate part of the prosecution team. The parties have indicated that victim advocates are in close contact with victims and that their duties are complex. A victim advocate often meets with a victim in person, discussing the victim's role in testifying, the possible impact on the victim of testifying, and the victim's past and future medical and psychological needs. Given this contact, it seems reasonable that details about the alleged crime and the parties would be shared.

{22} Victim advocates are excluded from the definition of "victim counselor" in the Victim Counselor Confidentiality Act, NMSA 1978, § 31–25–2(E) (1987), but this exclusion indicates the possibility that their work otherwise might be viewed as counseling. Further, given that the victim advocate is employed by the district attorney, and works with prosecutors, it seems reasonable that the victim advocate would communicate details and opinions to prosecutors. Because victim advocates perform many tasks similar to those of other members of the prosecution team, even if some of their duties differ, we conclude that victim advocates are part of the prosecution team and that the relevant rules of attorney-client confidentiality and State disclosure are applicable. *See Liang,* 747 N.E.2d at 115–16.

V

{23} Finally, we turn to the district court's order in the criminal action from which this proceeding arose and the definition of "statement" in Rule 5–501(G). The order required disclosure of Valdez's "notes, statements, reports, or documentation ... regarding any oral or written statements or assertions Dolores Iacobellis made regarding" (1) events six months before, during, and after the alleged crime that are related to the alleged crime; (2) her relationship with Defendant; and (3) any bias, prejudice, or anger against Defendant. It authorizes a follow-up interview of Valdez to clarify Iacobellis' statements or assertions made regarding the same three items. The court emphasized that Defendant is due only Iacobellis' statements, as defined in Rule 5–501(G)(3), and that Valdez is not required to divulge information she provided to Iacobellis, advice Valdez gave to the prosecution team, or Iacobellis' questions about the criminal case.

{24} We begin by noting that the order is consistent with this opinion, notwithstanding the district court's conclusion that Valdez was not part of the prosecution team. The order requires production of material which Rule 5–501 requires the State to disclose, and it adequately protects opinion work product. *Cf. Liang,* 747 N.E.2d at 119 (concluding that "unless advocates' notes contain exculpatory evidence or 'statements' of witnesses, their notes are protected as work product under" the rules of criminal procedure). At oral argument, it became clear that the parties disagreed about the breadth of the definition of the word "statement." The definition is broad. The definition includes a written statement signed, adopted, or approved by the person making the statement; the definition includes a recording or transcription of an oral statement; and the definition includes written statements or notes "which are in substance recitals of an oral statement." Rule 5–501(G)(1)–(3). Despite the breadth of the definition, we think there are limits on the state's duty to disclose witness' statements. We note that an undocumented statement is not within the definition. Defendant is not seeking such statements.

{25} We are concerned that the definition might be overly broad. We are uneasy with a rule that requires disclosure of all notes, when some notes may be cryptic, consisting solely of a word or phrase jotted down in the course of an extensive interview and not easily interpreted by someone who was not present. The rule might be improved by a requirement that notes are not discoverable unless the witness has signed, adopted, or approved the notes. We need not address this issue because the parties appear to agree that Valdez's notes do not contain statements by Iacobellis, and no party has

argued that Valdez's notes would be hard to review for statements. Second, it is unclear whether under the rule the statement has to be relevant to the alleged crime or the criminal proceeding. At oral argument Defendant argued that nearly any statement by a witness, particularly a complaining witness, had to be disclosed. Because defense counsel may depose any person, Rule 5–503 NMRA 2005, we do not think that counsel is entitled to every statement. The essence of the disclosure rule is to ensure fairness and due process. The rule requires the disclosure of more than exculpatory evidence, but disclosure is not a replacement for discovery. Again, we need not reach this issue because the order limits disclosure of material to three areas relevant to the criminal action.

{26} By means of this published opinion, we ask our Committee charged with recommending revisions to the Rules of Criminal Procedure for the District Courts to examine Rule 5–501(G) in light of these concerns and make any recommendations that seem appropriate. We note that Massachusetts, for example, also places a definition of statement within its criminal procedure rule governing disclosure and recently revised its definition. *See* Mass. R.Crim. P. Rule 14(d). We believe, as did the district court in this case, that relevancy is an implicit requirement. *See* 4 LaFave et al., *supra* § 20.3(i), at 872. We also believe that discoverable notes of an oral statement ought to be a substantially verbatim recital of an oral statement, rather than a few words that do not convey sufficient context or substance to be considered a "witness statement." *See* Mass. R.Crim. P. Rule 14(a). We note that Rule 5–501's definition of "statement" includes notes that are "in substance recitals of an oral statement." Rule 5–501(G)(3).

VI

{27} The district court's order requires disclosure and authorizes an interview of Valdez concerning "statements or assertions" by Iacobellis. Rule 5–501(G)(3) requires disclosure of statements and defines statements. The portion of the order requiring disclosure links notes and statements in such a way that we construe the order as encompassing only documented assertions. The court may have considered assertions to be a synonym of statements in drafting the interview portion of the order, but we think the inclusion of undocumented verbal assertions as within the scope of the authorized interview goes beyond the rule. The district court should modify the portion of the order authorizing an interview to delete the phrase "or assertions."

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

WE CONCUR: PETRA JIMENEZ MAES and EDWARD L. CHÁVEZ, Justices.

[redacted]

2005-NMCA-041

110 P.3d 76

ELDORADO UTILITIES, INC., Plaintiff–Appellant,

v.

STATE of New Mexico ex rel. John D'ANTONIO, P.E., State Engineer, Defendant–Appellee.

No. 24,424.

Court of Appeals of New Mexico.

Feb. 23, 2005.

Certiorari Denied, No. 29,129, April 12, 2005.

Peter B. Shoenfeld, Peter B. Shoenfeld, P.A., Santa Fe, NM, for Appellant.

DL Sanders, Chief Counsel, Randall W. Childress, Special Assistant Attorney General, Office of the State Engineer, Santa Fe, NM, for Appellee.

OPINION

PICKARD, Judge.

{1} This case involves NMSA 1978, § 72–12–5 (1931), which provides that claimants of a vested water right from underground sources may file declarations of their claims with the State Engineer and further provides that such declarations are prima facie evidence of the claims. *See also* NMSA 1978, § 72–1–3 (1961) (providing for declarations of surface water rights in similar terms). The question we address in this case is whether there are any circumstances under which the State Engineer may refuse to file such declarations. We hold that the narrow facts of this case, which involved amended declarations and in which the records of the State Engineer indicated that the right claimed was not vested, provide one example of the limited circumstances in which the State Engineer has discretion to refuse to file declarations.

{2} Eldorado Utilities, Inc. (Eldorado), appeals from a judgment of the district court, which held that the State Engineer has discretion to refuse to accept its amended declarations of water rights. On appeal, Eldorado argues that (1) the State Engineer is statutorily mandated to accept the amended declarations that Eldorado attempted to file; (2) the State Engineer, by not accepting the amended declarations, attempted to adjudicate Eldorado's water rights; and (3) the district court erred in finding facts that were not stipulated to by the parties. We hold that the State Engineer does have discretion to refuse to accept Eldorado's amended declarations. We also conclude that the State Engineer did not attempt to adjudicate Eldorado's water rights when the State Engineer refused to accept the amended declarations, and that there was substantial evidence to support the district court's findings of fact. Accordingly, we affirm.

FACTS AND BACKGROUND

{3} This case concerns two wells owned by Eldorado. The wells were in various states of completion when, in 1970, the State Engineer extended the Rio Grande Underground Water Basin to cover the well sites. In March 1971, Eldorado filed declarations for the two wells, claiming 4.8 acre feet per year of water for each well, with a capacity of three gallons per minute. In July 1971, Eldorado filed amended declarations with the State Engineer that claimed that the two wells were not new wells, but had been in place since 1969. However, the amended declarations did not alter the original declarations' claim that the wells had a capacity of three gallons per minute, which allowed each well to divert 4.8 acre feet of water per year. The State Engineer accepted both the original and amended declarations. A disagreement between Eldorado and the State Engineer arose regarding the water rights associated with the two wells at issue, which led the State Engineer to bring suit against Eldorado. In December 1972, the Santa Fe District Court entered a judgment, which stated that Eldorado had the right to divert an amount of water equal to the capacity each well had on or before December 31, 1970, and to use water from the wells for domestic, municipal, industrial, recreational, and construction purposes. At the time the district court entered its judgment, the declaration on file was the amended declaration that had been filed in July 1971.

{4} Eldorado claims that in 1997 it discovered that certain facts reflected in the origi-

nal and amended declarations filed in 1971 were inaccurate. Eldorado claims that an inspection of the wells showed that the casing of the wells was actually more than two times larger than was declared in 1971, which allowed the wells to have a capacity of up to 150 gallons per minute. Subsequently, Eldorado attempted to file amended declarations for each well. The amended declarations claimed that the increased capacity of the wells allowed each well to beneficially use up to 242 acre feet of water per year. Furthermore, the amended declarations used different words to describe the uses to which the water would be put from that allowed by the 1972 judgment by declaring that the water would be used for subdivision and water utility purposes. The State Engineer refused to file the amended declarations. The State Engineer found that amended declarations were inconsistent with the original declarations filed in March 1971 and the amended declarations filed in July 1971. Furthermore, the State Engineer found that the amended declarations violated the district court's 1972 judgment.

{5} Eldorado requested a hearing before the State Engineer. Prior to the hearing, Eldorado filed a summary judgment motion in which Eldorado challenged the jurisdiction of the State Engineer to decline to receive amended declarations. Eldorado based its motion on Section 72–12–5, which states:

> Any person, firm or corporation claiming to be the owner of a vested water right from any of the underground sources in this act [72–12–1 to 72–12–10 NMSA 1978] described, by application of waters therefrom to beneficial use, may make and file in the office of the state engineer a declaration in a form to be prescribed by the state engineer setting forth the beneficial use to which said water has been applied, the date of first application to beneficial use, the continuity thereof, the location of the well and if such water has been used for irrigation purposes, the description of the land upon which such water has been so used and the name of the owner thereof. Such declaration shall be verified but if the declarant cannot verify the same of his own personal knowledge he may do so on information and belief. Such declarations so filed shall be recorded at length in the office of the state engineer and may also be recorded in the office of the county clerk of the county wherein the well therein described is located. Such records or copies thereof officially certified shall be prima facie evidence of the truth of their contents.

Eldorado claims that, because the statute states that declarations "shall be recorded at length," the legislature has expressly limited the State Engineer's discretion in refusing to file declarations tendered pursuant to Section 72–12–5. After a hearing on the summary judgment motion was held, the State Engineer's hearing officers found that the State Engineer did have discretion to refuse to accept the amended declarations. Eldorado then filed an appeal with the Santa Fe district court.

{6} At the district court level, the State Engineer and Eldorado stipulated that the sole issue to be decided by the court was whether the State Engineer has the power or jurisdiction to refuse to receive the amended declarations that Eldorado attempted to file in 1997. Both parties also stipulated to the facts and exhibits that the district court could rely on in reaching its decision. After conducting a de novo review, the district court ruled that the State Engineer has the authority to refuse to accept Eldorado's amended declarations because Section 72–12–5 does not address the issue of amended declarations, and Eldorado's water rights are not vested rights. Furthermore, the court determined that the amended declarations are inconsistent with the 1971 declarations filed by Eldorado, which were relied on by the district court in issuing its judgment in 1972. Eldorado appeals from the district court's judgment.

DISCUSSION

{7} We will begin by discussing whether the State Engineer has discretion to refuse to receive the amended declarations tendered by Eldorado. We will then proceed to analyze whether the State Engineer attempted to adjudicate Eldorado's water rights when the State Engineer refused to file the amended declarations. Finally, we will discuss

whether there was substantial evidence to support the district court's findings of fact.

ISSUE ONE: The district court did not err when it determined that the State Engineer has the authority to refuse to accept Eldorado's amended declarations.

{8} Eldorado asserts that the district court erred when it concluded that the State Engineer has the authority, as a matter of law, to refuse to accept Eldorado's amended declarations. Specifically, Eldorado challenges the district court's conclusion that Section 72–12–5 does not require the State Engineer to accept amended declarations. We review the question of whether the district court properly interpreted the applicable law de novo. *See Gallegos v. State Bd. of Educ.*, 1997–NMCA–040, ¶ 11, 123 N.M. 362, 940 P.2d 468 (holding that this Court is "not bound by the conclusions of law reached by the trial court, and the applicable standard of review for such issues is de novo").

{9} We begin our analysis by disputing the beguiling simplicity of Eldorado's argument concerning the purpose of the statute. Eldorado contends that the State Engineer has no discretion in any case to refuse to accept any original or amended declaration because the "intent of the statute is merely to provide a vehicle for water rights claimants to make their assertions of water rights known to the State Engineer," and it therefore "makes no sense for the State Engineer to be able to reject such knowledge." To be sure, apprising the State Engineer of claims is an obvious purpose of the statute. But the statute has another purpose and effect—that of making the declaration prima facie evidence of the claim. Because of the dual purposes and effects of the statute, we cannot rely solely on the knowledge aspect in deciding this case.

{10} We next turn to a discussion of whether Eldorado's water rights are vested rights. Our Courts have held that a water right becomes vested when the water is placed to beneficial use. *Cartwright v. Pub. Serv. Co. of N.M.*, 66 N.M. 64, 114, 343 P.2d 654, 689 (1958) (holding that "[n]o water right becomes vested until it has been applied to beneficial use to the full extent of its right"), *overruled on other grounds by State ex rel. Martinez v. City of Las Vegas*, 2004–NMSC–009, ¶ 1, 135 N.M. 375, 89 P.3d 47; *State ex rel. Martinez v. McDermett*, 120 N.M. 327, 331–32, 901 P.2d 745, 749–50 (Ct. App.1995) (concluding that water rights cannot vest when water is not placed to beneficial use). In *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 362 P.2d 998 (1961), our Supreme Court reiterated the rule that a water right does not vest until water is placed to beneficial use. *Id.* at 470, 362 P.2d at 1001. The Court in *Mendenhall* held that "[t]he rights of an appropriator of water do not become absolute until the appropriation is completed by the actual application of the water to the use designed." *Id.* (internal quotation marks and citation omitted). In this case, Eldorado admitted below that the additional water claimed by the amended declarations had not been placed to beneficial use and does not claim to the contrary on appeal.

{11} What Eldorado does claim is that the concept of vesting by putting to beneficial use has nothing to do with the amount of water to which it claims a right. Eldorado relies on *State ex rel. Reynolds v. Rio Rancho Estates, Inc.*, 95 N.M. 560, 562–64, 624 P.2d 502, 504–06 (1981), which superficially supports its proposition. However, that case was decided in a different context, and we have frequently said that cases are not authority for propositions not considered. *See, e.g., Quality Chiropractic, PC v. Farmers Ins. Co.*, 2002–NMCA–080, ¶ 17, 132 N.M. 518, 51 P.3d 1172; *In re Estate of DeLara*, 2002–NMCA–004, ¶ 12, 131 N.M. 430, 38 P.3d 198. Moreover, we have recently reaffirmed the concept of beneficial use as being of critical importance in the law of water rights. *See Hanson v. Turney*, 2004–NMCA–069, ¶¶ 12–13, 136 N.M. 1, 94 P.3d 1. Thus, we rule that the right to additional water claimed within the amended declarations is not a vested right.

{12} Eldorado argues that even if we do not conclude that its water rights are vested, we should still hold that the State Engineer has no discretion to refuse to file the amended declarations because the State

Engineer has interpreted vested rights to mean any "existing water right." Eldorado cites to 19.27.1.8 NMAC (2001), in which the State Engineer has ruled that declarations of "existing water rights" may be filed pursuant to Section 72–12–5. Our Supreme Court has ruled that the legislature has granted the State Engineer "broad powers to implement and enforce the water laws administered by him." *State ex rel. Reynolds v. Aamodt*, 111 N.M. 4, 5, 800 P.2d 1061, 1062 (1990). Here, Section 72–12–5 statutorily mandates the State Engineer to accept and file declarations that claim water rights that are vested. But the statute goes further and requires the declaration to contain information about the water's application to beneficial use. The statute does not expressly preclude the State Engineer from filing declarations of water rights that he has reason to believe, from the information in his own files, are not vested. Yet, due to the broad power granted to the State Engineer by the legislature, and the legislature's silence regarding the filing of declarations of water rights that are not vested, we hold that the State Engineer has the discretion to file or not file declarations claiming non-vested water rights.

{13} That discretion, however, is not an unbridled or free-ranging discretion by any means. Instead, that discretion must be based on some knowledge that the State Engineer possesses concerning whether the rights shown by the declaration are vested. In this case, the State Engineer's own records gave him a sufficient basis of knowledge from which to conclude, for the purpose of declining to file the amended declarations, that the rights asserted therein were not vested, as contemplated by Section 72–12–5.

{14} Our review of the record also leads us to conclude that records of the State Engineer showed that the amended declarations conflict with the 1972 judgment, which both parties agree is binding and which was part of the State Engineer's records. The district court's judgment in 1972 specifically held that water from the wells could be used for "domestic, municipal, industrial, recreational, and construction purposes." The amended declarations claim a right to use the water for subdivision and water utility purposes, which are not the same words used in the 1972 judgment and therefore raise the possibility that the water is intended to be used for purposes not allowed for in the 1972 judgment. Although we do not decide whether subdivision and utility purposes are the same as domestic, municipal, and construction purposes, we note that it was Eldorado who filed the declaration using the different terminology.

{15} Additionally, the amended declarations attempt to increase the water right of Eldorado from 4.8 acre feet per year, which is the water right claimed in the declarations filed in 1971, to up to 242 acre feet per year. Eldorado claims that the 1972 judgment does not limit the water rights to the amount Eldorado had claimed in the declarations filed in 1971. Eldorado correctly asserts that the judgment states that Eldorado may divert water to the capacity each well had on or before December 31, 1970. Yet, the 1972 court expressly stated that it relied upon the facts alleged and admitted in the pleadings in reaching its judgment, and one such admission was made by Eldorado when it answered:

> Before December 31, 1970, Defendant had either completed or substantially initiated construction upon eighty four (84) of the aforesaid wells, thereby entitling it to either divert waters of the Rio Grande Underground Water Basin by means of said wells or to complete the construction of said wells by deepening and enlarging them and then divert the waters of the Rio Grande [Underground] Water Basin by means thereof *to the extent of their capacities as declared.*

(Emphasis added.) To the extent that Eldorado contends that this fact in its own pleading was not a fact "alleged and admitted" because it was simply alleged by Eldorado and not admitted by the State Engineer, who filed no responsive pleading to it, we believe that Eldorado is relying on technicalities. Eldorado's own assertions in 1972 are judicial admissions, at least for the purpose of allowing the State Engineer to preliminarily rely on them in order to refuse to file the 1997 amended declaration. *S. Union Exploration Co. v. Wynn Exploration Co.*, 95 N.M.

594, 598, 624 P.2d 536, 540 (Ct.App.1981) (indicating that an admission in a pleading is sufficient to support a finding, but is not conclusive and is subject to being considered together with other evidence). At the time of the 1972 case, the capacities declared by the declarations were three gallons per minute. Eldorado's 1997 amended declarations increased the claimed capacity to up to 150 gallons per minute. Thus, we conclude that the 1972 judgment was a fact that the State Engineer could consider in determining whether to file the 1997 amended declarations that conflict with that judgment.

{16} Finally, we note that Eldorado was offered the opportunity for an evidentiary hearing, both before the State Engineer and before the district court on appeal. These hearings would have provided an opportunity for Eldorado to challenge the facts in the State Engineer's records upon which he relied to make a preliminary determination that the rights contained in the amended declaration were not vested such as was required to give the State Engineer a mandatory duty to file the amended declarations. Instead, Eldorado filed a motion challenging jurisdiction before the State Engineer and appealed from that decision, foregoing any hearing, and then agreed to have the district court decide the legal question solely, contending that the State Engineer had to file its amended declarations.

{17} For all the foregoing reasons, we hold that the district court did not err in determining that the State Engineer had discretion to refuse to accept Eldorado's amended declarations because those declarations conflicted with the records on file with the State Engineer, particularly the records surrounding the 1972 judgment, which showed that the claimed water rights were not vested, which is a requirement of Section 72–12–5.

ISSUE TWO: The State Engineer did not attempt to adjudicate Eldorado's water rights when he refused to accept the amended declarations.

{18} Eldorado argues that the State Engineer declined to accept the amended declarations only to prevent Eldorado from declaring an increased amount of water, which is an attempt on the part of the State Engineer to adjudicate Eldorado's water rights. Eldorado argues that the State Engineer has no right to adjudicate water rights and directs our attention to *State ex rel. Reynolds v. Lewis,* 84 N.M. 768, 772, 508 P.2d 577, 581 (1973), in which our Supreme Court has held that the adjudication of water rights is an exclusively judicial function. We agree that only courts have the power and authority to adjudicate water rights. Yet, we disagree with Eldorado's assertion that the State Engineer's refusal to accept the amended declarations was an adjudication of Eldorado's water rights.

{19} Adjudications of water rights are governed by several statutory sections, among which are those that require hydrographic surveys and that all claimants of waters in the stream system be made parties, NMSA 1978, § 72–4–17 (1965), and that require adjudicatory decrees, containing detailed information about the rights adjudicated, NMSA 1978, § 72–4–19 (1907). In this case, no such procedures were followed.

{20} Yet, Eldorado contends that the effect of the State Engineer's actions was tantamount to an adjudication because they took from Eldorado the right to the prima facie proof aspect of Section 72–12–5. Be that as it may, the State Engineer had two legitimate reasons, as discussed above, to refuse to accept the amended declarations—because the declarations conflicted with the 1972 judgment that is binding on both parties, and because the amended declarations covered rights that were not vested. Declarations are only prima facie proof until they are rebutted. *See State ex rel. Martinez v. Lewis,* 118 N.M. 446, 449, 882 P.2d 37, 40 (Ct.App.1994). When the State Engineer's own records contain information rebutting what appear to be outlandish claims, we do not believe that the State Engineer is required to file declarations containing those claims. The fact that a later adjudication might take a different course does not mean that the State Engineer has adjudicated any water rights. He has simply utilized his regulatory power to disallow the filing of amended declarations that conflicted with the judgment and statute. Therefore, we hold

that the State Engineer did not attempt to adjudicate Eldorado's water rights when he refused to file the amended declarations.

ISSUE THREE: The district court only entered findings of facts that were based on stipulated facts and exhibits and the findings of facts were supported by substantial evidence.

{21} Eldorado argues that the district court erred when it made findings of facts that were not stipulated to by the parties. Eldorado claims that since no evidence was entered at the hearing before the State Engineer or at the district court, the court could only find facts that were stipulated to by the parties. Yet, both parties also agreed to allow the district court to consider three exhibits, which were (1) the entire file from the 1972 proceeding, (2) a letter to Eldorado from Paul Saavedra, Chief of the Water Rights Division of the Office of the State Engineer, and (3) the record of the Water Rights Division on file with the district court. Eldorado claims that the district court's findings of fact that were not stipulated to by the parties are not supported by substantial evidence. Thus, we will review the district court's findings of fact to determine if those findings could have been made based on the stipulated facts and exhibits that the parties agreed to submit to the court and whether those findings are supported by substantial evidence. *Rauscher, Pierce, Refsnes, Inc. v. Tax & Rev. Dep't*, 2002–NMSC–013, ¶ 26, 132 N.M. 226, 46 P.3d 687.

{22} Here, findings number eight, nine, and ten, arise from the file of the 1972 proceedings. Finding number eight is an answer that was given by Eldorado during the 1972 proceedings, finding number nine is a list of facts that Eldorado stipulated to in that case, and finding number ten is the order from 1972 regarding the water rights associated with the wells. Finding number twelve is based on a letter sent to Eldorado by Paul Saavedra, Chief of the Water Rights Division for the State Engineer. Thus, we hold that the district court did not enter findings of fact that went beyond the stipulated facts and exhibits, which the parties agreed that the court could consider. We also conclude, therefore, that the district court's findings were supported by substantial evidence. *Landavazo v. Sanchez*, 111 N.M. 137, 138, 802 P.2d 1283, 1284 (1990) (holding that substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion); *Alexander v. Anderson*, 1999–NMCA–021, ¶ 23, 126 N.M. 632, 973 P.2d 884 (stating that the whole record is considered).

CONCLUSION

{23} For the foregoing reasons, we affirm the district court's judgment.

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Chief Judge, and MICHAEL E. VIGIL, Judge.

2005-NMSC-010
110 P.3d 491

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff-Appellee,

v.

Russell FENNEMA, Defendant-Appellant.

No. 28,626.

Supreme Court of New Mexico.

March 28, 2005.

Collins Law Office, Robert Bruce Collins, Donald C. Clifford, Albuquerque, NM, for Appellant.

Guebert, Bruckner & Bootes, P.C., Donald G. Bruckner, Jr., Albuquerque, NM, Rowley Law Firm, P.C., Richard F. Rowley, III, Clovis, NM, for Appellee.

OPINION

CHÁVEZ, Justice.

{1} Appellant Russell Fennema appeals a district court summary judgment in favor of State Farm Mutual Automobile Insurance Company[1]. The district court held that State Farm was not liable for underinsured motorist benefits to Fennema because Fennema breached a contract provision requiring Fennema to obtain the written consent of State Farm before settling his claim with the tortfeasor and her insurance carrier (consent-to-settle provision). Fennema argues that despite his breach of contract, recent developments in New Mexico insurance law require State Farm to show that it was substantially prejudiced by the breach before it can escape liability.

{2} For the first time we consider whether an insurance company must demonstrate substantial prejudice from the breach of a consent-to-settle provision before it can be relieved from paying underinsured motorist benefits. We answer this question in the affirmative. Consistent with the approach outlined in *Roberts Oil Co. v. Transamerica Ins. Co.,* 113 N.M. 745, 833 P.2d 222 (1992), we hold that for an insurer to justify foreclosing an insured's right to underinsured motorist benefits, the insurer must demonstrate it was substantially prejudiced by the insured's breach of the consent-to-settle provision. Although the insurer has the ultimate burden of persuasion, proof that the insured breached the consent-to-settle provision creates a presumption of substantial prejudice. *See id.* at 755, 833 P.2d at 232. In this case no genuine issues of material fact exist and State Farm is still entitled to summary judgment because Fennema did not offer evidence that could meet or rebut the presumption of substantial prejudice.

Facts

{3} Defendant Moses (tortfeasor) negligently struck the rear of the vehicle driven by Fennema, causing serious injuries to Fennema. The tortfeasor had a $25,000 liability policy. Fennema paid premiums for three $25,000 uninsured/underinsured motorist policies issued by State Farm. The parties seem to agree that these policies could be stacked, affording Fennema $75,000 in uninsured/underinsured motorist coverage. Assuming tortfeasor's negligence proximately caused at least $75,000 in damages to Fennema, Fennema would be entitled to $50,000 from State Farm for underinsured motorist benefits having already collected $25,000 directly from the tortfeasor's insurer.

{4} However, the consent-to-settle provision in the State Farm policy denies unin-

1. We accepted certification from the Court of Appeals pursuant to NMSA 1978, § 34–5–14(C) (1972) because we believe the issue before us is one of substantial public interest.

sured/underinsured motorist coverage "for any ***insured*** who, without [State Farm's] written consent, settles with any ***person*** or organization who may be liable for the ***bodily injury*** or ***property damage.***" (Emphasis added.) Fennema settled with the tortfeasor, accepting $25,000 from the tortfeasor's insurer and as consideration gave a complete release of liability to the tortfeasor and her insurer. Fennema admits he breached the consent-to-settle provision of the policy because he did not obtain the written consent of State Farm to settle his claim against the tortfeasor.

Insurer Must Demonstrate Substantial Prejudice from Breach of Consent–to–Settle Provision

{5} In 1965 this Court held it was "well established" that if an insured, without the knowledge of his insurer, effectively releases a wrongdoer from liability, the insured destroys any right of subrogation the insurer may have against the wrongdoer and is, thereafter, precluded from recovering from his insurer. *Armijo v. Foundation Reserve Ins. Co.,* 75 N.M. 592, 596, 408 P.2d 750, 752 (1965). This principle of law was applied to underinsured motorist claims in *March v. Mountain States Mutual Casualty Co.,* 101 N.M. 689, 687 P.2d 1040 (1984) (upholding a consent-to-settle provision in an underinsured motorist policy, and holding an insured's breach of such a provision precluded the insured from collecting underinsured motorist benefits). However, we subsequently held in *Roberts Oil* that when the insured breached a "voluntary payment" provision in the policy, the insurer was required to show "substantial prejudice" before voiding the policy. 113 N.M. 745, 833 P.2d 222 (clarifying for the first time that the substantial evidence rule could apply to claims involving injury to an insured rather than simply innocent third parties). The court of appeals, in *Eldin v. Farmers Alliance Mut. Co.,* 119 N.M. 370, 890 P.2d 823 (Ct.App.1994), extended the substantial prejudice rule in *Roberts Oil* to cover an insured's breach of misrepresentation and concealment provisions.

{6} Fennema argues that the court of appeals' adoption of the substantial prejudice rule in *Eldin* requires that *March* be modified or overruled. While we disagree that *March* must be overruled, we do agree it must be modified. In *March,* we considered the limited question of whether a consent-to-settle provision in an underinsurance policy was valid and enforceable. *See March,* 101 N.M. at 690, 687 P.2d at 1041. Although both *Roberts Oil* and *Eldin* contained broad discussions of contract law and public policy that are certainly relevant to the consent-to-settle provisions at issue here and in *March,* neither case mentioned *March* or questioned its holding. Thus, we believe the basic holding of *March* is still good law, although we modify its holding in light of the adoption of the substantial prejudice rule in both *Roberts Oil* and *Eldin.*

{7} The substantial prejudice rule provides that an insurer "must demonstrate substantial prejudice as a result of a material breach of the insurance policy by the insured before it will be relieved of its obligations under a policy." *Foundation Reserve Ins. Co. v. Esquibel,* 94 N.M. 132, 134, 607 P.2d 1150, 1152 (1980). The rationale for the rule is that failure by an insurer to show substantial prejudice by an insured's breach will frustrate the insured's reasonable expectation that coverage will not be denied arbitrarily. *Roberts Oil,* 113 N.M. at 751–52, 833 P.2d at 228–29. "[T]he rule implements a fundamental characteristic of all, or nearly all, insurance contracts-namely, the essential nature of the contract as a promise by the insurer to indemnify and defend the insured against certain risks, in exchange for the insured's payment of the premium." *Id.* at 751, 833 P.2d at 228. Although an insurer must demonstrate substantial prejudice, a presumption of substantial prejudice arises upon proof of a breach of a policy provision. *Id.* at 755, 833 P.2d at 232. The ultimate issue of substantial prejudice is, in most cases, a question for a jury. *Eldin,* 119 N.M. at 375, 890 P.2d at 828.

{8} We believe it is consistent with the purpose of our uninsured motorist statute to require a showing of substantial prejudice before allowing an insurer to void an underinsured motorist policy when an insured breaches a consent-to-settle provision. The

uninsured motorist statute was intended to expand insurance coverage to protect an insured against financially irresponsible motorists, thereby indemnifying the insured when the tortfeasor fails to do so. *Romero v. Dairyland,* 111 N.M. 154, 156, 803 P.2d 243, 245 (1990); *see Sorensen v. Farmers Ins. Exch.,* 279 Mont. 291, 927 P.2d 1002, 1005 (1996). This is accomplished by assuring that, in the event of an accident with an underinsured motorist, an insured motorist will receive at least the sum certain in underinsurance coverage purchased for his or her benefit. *See Fasulo v. State Farm Mut. Auto. Ins.,* 108 N.M. 807, 811, 780 P.2d 633, 637 (1989).

{9} On the other hand, the purpose of a consent-to-settle provision is to allow the insurer an opportunity to protect its subrogation interest. *March,* 101 N.M. at 692, 687 P.2d at 1043. Consent-to-settle provisions also protect insurers from collusion between an insured and a tortfeasor. *Roberts Oil,* 113 N.M. at 752, 833 P.2d at 229 (internal citation omitted). The insurer determines how to best protect this interest by investigating the merits of the liability case against the tortfeasor, the extent of damages suffered by its insured, the estimated expense of litigating against the tortfeasor and whether the tortfeasor has sufficient assets to give the insurer a realistic possibility of collecting a judgment against the tortfeasor. If the insurer elects to withhold consent to settle, it may tender the amount of the tortfeasor's liability coverage that was offered to its insured. *See* 18 A.L.R.4th 249, § 11 (supp.2004) (citing *Lambert v. State Farm Mut. Auto. Ins. Co.,* 576 So.2d 160 (Ala.1991)). This allows the insurer to preserve its subrogated interest while placing its insured in the same position he or she would have been in, had the insured been authorized to settle with the tortfeasor.

{10} In reconciling these two policy concerns, it would be inconsistent with the purpose of the underinsured motorist statute to deny an insured indemnification when the insured's breach of a consent-to-settle provision has no real effect on the insurer's ability to recover from an insolvent tortfeasor through subrogation. *See Sorensen v. Farmers Ins. Exch.,* 927 P.2d at 1005. Rather, requiring an insurer to demonstrate substantial prejudice strikes a proper balance between protecting the insurer's subrogation interest and avoiding forfeiture of an insured's coverage when an insurer has not been injured. *See State Farm Mut. Auto. Ins. Co. v. Green,* 89 P.3d 97, 104 (Utah 2003). To hold otherwise would frustrate a consumer's reasonable expectation that coverage will not be denied arbitrarily. *See Roberts Oil,* 113 N.M. at 752, 833 P.2d at 229.

{11} Our holding today is consistent with the approach increasingly used in New Mexico as well as nationally. Our courts have applied the substantial prejudice rule to cooperation provisions, voluntary payment provisions, and misrepresentation and concealment provisions. *See Foundation Reserve Ins. Co. v. Esquibel,* 94 N.M. 132, 607 P.2d 1150; *Roberts Oil,* 113 N.M. 745, 833 P.2d 222; *Eldin,* 119 N.M. 370, 890 P.2d 823. We see no reason not to apply the rule to consent-to-settle provisions as well, which embody similar policy concerns of avoiding prejudice to the insured's right to protect its contractual interests. *See Roberts Oil,* 113 N.M. at 752, 833 P.2d at 229 (analogizing the policy concerns of cooperation provisions and voluntary payment provisions). In addition, growing numbers of jurisdictions apply the substantial prejudice rule to consent-to-settle provisions. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Green,* 89 P.3d at 103–04; *Ferrando v. Auto-Owners Mut. Ins. Co.,* 98 Ohio St.3d 186, 781 N.E.2d 927, 945–47 (2002); *Taylor v. Gov't Employees Ins. Co.,* 90 Hawai'i 302, 978 P.2d 740, 748–49 (1999); *Greenvall v. Maine Mut. Fire Ins. Co.,* 715 A.2d 949, 954 (Me.1998); *Sorensen v. Farmers Ins. Exch.,* 927 P.2d at 1005; *see also* 3 Alan I. Widiss, *Uninsured and Underinsured Motorist Insurance* § 43.5 (2d ed. 1998) ("There is now a significant body of judicial precedents for the proposition that in order to justify foreclosing an insured's right to indemnification from an otherwise applicable underinsured motorist insurance coverage, an insurer must show that it was prejudiced by the settlement of the tort claim."). Requiring an insurer to establish substantial prejudice protects the "fundamental characteristic" of insurance contracts, the indemni-

fication of the insured in exchange for the payment of premiums. *Roberts Oil,* 113 N.M. at 751, 833 P.2d at 228.

{12} We do not believe that requiring an insurer to prove substantial prejudice in this context is an unreasonable burden. An insurer is subject to a common law and statutory duty of good faith. *See* NMSA 1978, § 59A–16–20(E) (1997); *Dairyland Ins. Co. v. Herman,* 1998–NMSC–005, ¶ 12, 124 N.M. 624, 954 P.2d 56. The insurer must act reasonably under the circumstances to investigate a claim and to evaluate whether to consent to a settlement between its insured and the tortfeasor. *See Sloan v. State Farm Mut. Auto. Ins. Co.,* 2004–NMSC–004, ¶¶ 3, 19, 135 N.M. 106, 85 P.3d 230. In light of its duty to make a timely and fair investigation, the insurer's decision of whether to pursue subrogation is made relatively quickly, despite the fact that a judgment in New Mexico is valid and enforceable for fourteen years. NMSA 1978, § 37–1–2 (1983). By requiring an insurer to show it will be substantially prejudiced by an insured's breach of a consent-to-settle provision, i.e., by demonstrating the tortfeasor was unlikely to be judgment-proof, we are not requiring an insurer to provide any more evidence than it would already have obtained through its ordinary investigation.

{13} Moreover, although the insurer shall have the ultimate burden of persuasion to demonstrate substantial prejudice, a presumption of substantial prejudice arises from proof that an insured has breached a consent-to-settle provision. *See Eldin,* 119 N.M. at 375, 890 P.2d at 828. That presumption permits the fact finder to infer that the insurer was in fact substantially prejudiced, although the presumption is rebuttable. *See Roberts Oil,* 113 N.M. at 756, 833 P.2d at 233. The presumption may be met or rebutted by the insured by presenting evidence that the insurer was not substantially prejudiced. *See, e.g., Rafferty v. Progressive American Insur. Co.,* 558 So.2d 432 (Fla.Dist.Ct.App. 1990); *Roberts Oil,* 113 N.M. at 756, 833 P.2d at 234. The insurer can attempt to meet its ultimate burden of persuasion by presenting evidence that the tortfeasor did have resources with which to pay a tort judgment.

{14} In this case, it is undisputed that Fennema breached the consent-to-settle provision of the policy. Therefore a presumption of substantial prejudice was created. Fennema attempted to meet or rebut the presumption by attaching answers to interrogatories that he obtained from the tortfeasor to his Brief in Opposition to the Motion for Summary Judgment. Viewed in a light most favorable to Fennema, *see Rummel v. St. Paul Surplus Lines Ins. Co.,* 1997–NMSC–042, ¶ 9, 123 N.M. 767, 945 P.2d 985, the tortfeasor's answers establish that at the time of answering the interrogatories, the tortfeasor was a graduate assistant at the University of New Mexico Psychology Department.

{15} Without more, this evidence does not, as a matter of law, meet or rebut the presumption of substantial prejudice. State Farm may have had a realistic possibility of recovering from the tortfeasor, who, as a graduate student in psychology, was likely to be gainfully employed in the near future. Judgments in New Mexico may be enforced in the state for fourteen years by, among other things, attaching real estate or garnishing wages. *See* NMSA 1978, §§ 39–4–1 through –3 (1953); § 37–1–2. Fennema failed to present any evidence to demonstrate that State Farm would be unlikely to collect from tortfeasor within this period as a matter of law.

{16} Although underinsured motorist benefits are designed to protect the insured against financially irresponsible motorists, enforcement of an insurer's subrogation right has the equally important policy objective of holding wrongdoers accountable for irresponsible conduct that results in injury. Underinsured motorist benefits are not for the benefit of the tortfeasor, and when there exists a realistic potential for the insurer to recover from the tortfeasor, courts must carefully preserve the right of subrogation and enforce consent-to-settle provisions.

Conclusion

{17} We modify *March* to conform to the concerns in *Roberts Oil* and *Eldin.* An insurer must demonstrate it was substantially

prejudiced by an insured's breach of a consent-to-settle provision before avoiding liability for paying underinsured motorist benefits. Proof that the insured breached the consent-to-settle provision creates a presumption of substantial prejudice. Here, Fennema failed to meet or rebut this presumption. Consequently we affirm the summary judgment in State Farm's favor.

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

WE CONCUR: RICHARD C. BOSSON, Chief Justice, PAMELA B. MINZNER, PATRICIO M. SERNA, and PETRA JIMENEZ MAES, Justices.

2005-NMSC-012

110 P.3d 496

Gerald L. SMITH, Plaintiff–Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS, COUNTY OF BERNALILLO, Defendant–Respondent,

and

Henry R. Westrich, et al., Intervenors–Respondents.

No. 28,374.

Supreme Court of New Mexico.

April 1, 2005.

Rodey, Dickason, Sloan, Akin & Robb, P.A., Edward Ricco, Albuquerque, for Petitioner.

Tito D. Chavez, County Attorney, Patrick F. Trujillo, Assistant County Attorney, Albuquerque, for Respondent.

Carter Law Firm, P.C., Carroll D. Carter, III, Albuquerque, Booth, Freret, Imlay & Tepper, P.C., Christopher D. Imlay, Silver Spring, MD, for Amicus Curiae American Radio Relay League, Incorporated.

Rhodes & Salmon, P.C., Hazen H. Hammel, Albuquerque, for Amicus Curiae Peter Naumburg.

OPINION

BOSSON, Chief Justice.

{1} Plaintiff Gerald Smith applied for and received a permit to build two 130-foot amateur radio towers on his residential property in the East Mountain area of Bernalillo County, New Mexico. The zoning ordinance did not expressly prohibit or restrict construction of the towers in that location, and supplementary regulations specifically exempted radio towers from height restrictions. After neighbors complained, the County changed its mind, tried unsuccessfully to stop the construction, and devised new reasons why Plaintiff's radio towers should not be allowed. The district court agreed with the County's rationale but also adopted another reason for prohibiting the towers. On appeal, the Court of Appeals rejected the first rationale but sided with the County on the second. *Smith v. Bd. of County Comm'rs*, 2004-NMCA-001, 134 N.M. 737, 82 P.3d 547. We granted certiorari and reverse.

BACKGROUND

{2} Plaintiff is a federally licensed amateur radio operator who has engaged in "ham" radio as a hobby for more than forty years. In 1998, Plaintiff moved to New Mexico primarily to find a piece of residential property suitable for the construction of an

amateur radio antenna system. He wanted to build a system capable of achieving a strong signal so that he could communicate across the world, assist with local emergency operations, and participate in amateur radio contests. Plaintiff conducted extensive research looking for property with the right terrain and not subject to covenants or zoning restrictions that would limit the height of amateur radio antenna towers.

{3} After finding a five-acre parcel with a home in the East Mountain area of Bernalillo County that was zoned A–2 (rural residential), Plaintiff consulted several Bernalillo County zoning employees and officials, including the zoning director, about his desire to build two 130–foot towers. The County assured him that amateur radio towers were permitted on A–2 zoned property and that a regulation specifically exempted them from height restrictions. Plaintiff was told he only needed to apply for a building permit

{4} To confirm the County's interpretation, Plaintiff and his attorney both studied the Bernalillo County zoning code. According to the code, the A–2 zone includes as permissive uses one dwelling for every two acres and any accessory building or structure "customarily incidental" to "rural residential activities." *See* Bernalillo County, N.M., Zoning Ordinance §§ 7(B)(1)(a), (d), 8(B)(1)(a) (1996). The ordinance restricts the height of structures in the A–2 zone to twenty-six feet, except as provided in the supplementary height regulations. *Id.* § 8(C). The supplementary regulations expressly exempt from the height limitation a number of structures, including amateur radio towers. *Id.* § 22(B)(1) (stating that height regulations shall not apply to amateur radio towers). The ordinance does not further define "permissive use" or "customarily incidental," nor does it provide standards for determining whether something is a permissive use or is customarily incidental. The ordinance does, however, define "incidental use" as "[a] use which is appropriate, subordinate, and customarily incidental to the main use of the lot." *Id.* § 5.

{5} Plaintiff also reviewed amendments to the zoning ordinance that went into effect in June 1999. Designated Ordinance 1999–6, the amendments were passed to regulate commercial cellular towers in Bernalillo County. *See* Bernalillo County, N.M., Zoning Ordinance 1999–6 (1999). Prior to the amendments, the County allowed an "antenna" up to sixty-five feet as a permissive use in an office and institutional zone (O–1). *See* Zoning Ordinance § 12(B)(1)(a)(1). The supplementary height regulations, however, provided that amateur radio antennas were exempt from height restrictions, which left them unregulated in the O–1 zone. *See id.* § 22(B)(1)(a). The 1999 amendments clarified that amateur radio antennas were now subject to the same height restrictions that apply to other towers in the O–1 zone. *See* Ordinance 1999–6 § 12 (allowing "antenna *amateur radio*" up to sixty-five feet as a permissive use, or up to 100 feet as a conditional use) (emphasis added). However, Ordinance 1999–6 only made changes to language in the O–1 zone. The supplementary height regulations were not amended, nor were changes made to the residential zones. Specifically, the language in Ordinance 1999–6 did not amend or modify the A–2 zone in which Plaintiff was interested for his prospective home. Accordingly, Plaintiff and his attorney concluded that, even after the amendments, the ordinance imposed no height restrictions on amateur radio towers in the A–2 zone.

{6} Based on the County's representation and his own research, Plaintiff bought the property and applied for a building permit for the two towers. He submitted a site plan that was prepared by a licensed professional engineer. The plan called for two 130–foot towers with ten-foot masts, which would support multiple antennas and be secured by guy wires. The County approved the plan and issued a building permit in August 1999, which Plaintiff posted on his property. In October 1999, county employees twice inspected the construction and told Plaintiff he was in compliance with the site plan.

{7} In late November 1999, some of Plaintiff's neighbors began to complain to County officials about the height of the towers under construction. At first, the County told the neighbors that the building permit

was in order and the time to appeal had expired, fifteen days after the permit was issued. On December 8, 1999, however, County officials arrived at Plaintiff's house with a stop work notice. The notice did not specify the nature of the problem but simply stated that the construction "does not comply with zoning ordinance." According to Plaintiff, the officials were not able to elaborate on the nature of the violation, but said they had received complaints from neighbors and needed some time.

{8} Plaintiff hired a land-use attorney who wrote two letters to the County demanding a legal reason for the stop work notice. Although County officials spoke with Plaintiff several times, it was not until January 28, 2000, that Plaintiff received a written response from the County explaining its position. In the letter, the county attorney stated that, due to the amendments made to the O–1 non-residential zone in June 1999 (Ordinance 1999–6), amateur radio towers were no longer a permissive or conditional use on Plaintiff's property. Thus, the permit, which was approved six weeks *after* those amendments became law, was now supposedly issued in error.

{9} Sanford Fish, the director of the zoning, building and planning department, testified that when he first spoke with Plaintiff about his plans he told Plaintiff that amateur radio towers were allowed as permissive or incidental uses and that language in the ordinance exempted towers from height restrictions. Fish admitted that he knew about the 1999 amendments when he first advised Plaintiff about his towers. It was not until Plaintiff's neighbors complained in phone calls, e-mails, and letters that the County decided to reassess the ordinance in light of the amendments "to make sure that we weren't missing anything." Fish testified that after a detailed review he "realized" the effect of the amendments in the O–1 zone on amateur radio towers in the A–2 zone. Now that amateur radio antennas were expressly enumerated as a permissive or conditional use in the non-residential zones, he said, such towers could no longer be considered incidental uses in the residential zones. It was now his opinion that a use expressly listed in the O–1 zone could not be a customarily incidental use in the lower A–2 zone. This was the first time Fish came to such an opinion, and it led to a result directly contrary to the position the County had previously taken.

{10} In response to the stop work notice, Plaintiff filed an administrative appeal. Interpreting the appeal as triggering a stay of the notice under the county building code, Plaintiff continued building his towers. The County issued a second stop work notice "under emergency conditions," which Plaintiff also appealed. Neither appeal was ever heard. To force Plaintiff to stop building his towers, the County requested a temporary restraining order, which the district court denied.

{11} Meanwhile, Plaintiff sought a declaratory judgment in district court that would uphold the permit and withdraw the stop work notices. In Plaintiff's view, which was previously the County's view as well, amateur radio towers are customarily incidental to residential use because they are used in conjunction with a home-based hobby. Thus, amateur radio towers qualify as a permissive use in the A–2 zone and are not subject to height restrictions in the A–2 zone. To Plaintiff, the express exclusion of amateur radio towers from height restrictions reinforced the intent that towers are considered permissive uses. Otherwise, towers would not be listed.

{12} The district court denied Plaintiff's motion for summary judgment, then remanded the matter to the Bernalillo County Planning Commission to develop a factual record regarding the County's prior interpretation of "customarily incidental" as used in the ordinance. Noting that the term was not defined, the district court directed the Planning Commission to consider whether Plaintiff's amateur radio antenna towers were "customarily incidental" to the residential use, and therefore a permissive use within the meaning of the zoning ordinance.

{13} As noted above, the County conceded that prior to 1999 it had considered amateur radio antennas as a permissive use under the ordinance but argued that Ordinance 1999–6 changed all that. The Planning Commission took the position that the

1999 amendment to the O–1 zone eliminated amateur radio antennas as incidental uses in the A–2 zone. Thus, the Planning Commission concurred with the County's administrative decision to halt construction of the towers and adopted all of the findings proposed by the planning department. But the Planning Commission also adopted three new findings:

9. A–2 zoning requires a higher standard of preservation of natural and scenic values than some other zones.
10. The federal guidelines speak in terms of reasonableness in height considerations.
11. The height of these towers is unreasonable for an A–2 rural zone as customarily incidental.

These findings were necessary to respond to another question on remand: whether the zoning ordinance made reasonable accommodation for amateur radio towers, as required by federal law. (The issue of whether federal laws protecting amateur radio towers preempt the local zoning regulations is not before as on certiorari.)

{14} Back at the district court, however, the unreasonable height of the towers in general, and not as related to federal preemption, became a new, alternative basis for the County to reject Plaintiff's plans. The district court accepted the Planning Commission's first rationale, concluding that because the O–1 zone limits antennas to sixty-five feet, it would be inconsistent with the language of the ordinance to allow antennas more than twice that height in an A–2 zone, which requires a higher standard of preservation of natural and scenic values. The district court did find that, until Plaintiff's case, the County generally had treated amateur radio towers as customarily incidental to residential activities in the A–2 zone. The court concluded, however, that even if there had been no amendments to the ordinance the County has the right to determine that certain towers were too tall, and thus unreasonable, to be considered customarily incidental to residential use. The district court entered judgment in favor of the County.

{15} Plaintiff appealed. The Court of Appeals agreed with Plaintiff, contrary to the district court, that the adoption of the 1999 amending language did *not* automatically remove amateur radio towers as a permissive use in the A–2 zone. *See Smith*, 2004–NMCA–001, ¶¶ 15–16, 134 N.M. 737, 82 P.3d 547 (stating that if the County "intended to limit uses in the A–2 zone, it could have expressly amended the A–2 zone or amended the supplemental language exempting amateur radio towers from height restrictions"). The County has not challenged that holding on certiorari, and it is not before us. However, the Court of Appeals did affirm the district court by holding that, even though amateur radio towers are expressly exempted from the height regulations, height restrictions may still apply. *Id.* ¶ 18. The court reasoned that an independent inquiry remains as to whether a particular structure is "reasonable" in a particular zone. *Id.* ¶ 19. Therefore, the County could bar an otherwise permissive use that had been expressly exempted from height regulation on the ground that the height was "unreasonable" as a customarily incidental use in a rural residential zone.

{16} We granted certiorari. On appeal, Plaintiff contends that the Court of Appeals' interpretation of the zoning ordinance is unprecedented and contrary to law because it allows county zoning officials unfettered discretion. Zoning officials now can determine whether a particular land use that otherwise complies with all zoning restrictions can nonetheless be denied solely because it is "unreasonable." This kind of boundless discretion, Plaintiff argues, opens the door to arbitrary and ad hoc decision-making by governmental officials who are supposed to make decisions according to standards and precedent. He further contends that accepting this interpretation permits the County to devise a post hoc, or after-the-fact, rationale for its decisions. In this case, Plaintiff argues, the County justified reversing its position regarding whether the towers were a permissive use based on a rationale that had never been used and had never even been articulated before Plaintiff's towers were well along in construction.

{17} The sole issue we now address is whether the County could properly grant a

permit to build amateur radio towers and later determine without ascertainable standards that the use was "unreasonable," when the County had previously interpreted the zoning ordinance to allow such structures as a permissive use without height restrictions.

DISCUSSION

Standard of Review

{18} Interpretation of a zoning ordinance is a matter of law that we review de novo using the same rules of construction that apply to statutes. *See High Ridge Hinkle Joint Venture v. City of Albuquerque,* 1998–NMSC–050, ¶ 4, 126 N.M. 413, 970 P.2d 599 (*Hinkle II*); *Rutherford v. City of Albuquerque,* 113 N.M. 573, 574, 829 P.2d 652, 653 (1992). In its review of the Planning Commission's interpretation of the "customarily incidental" provision of the zoning ordinance, as accepted by the district court, the Court of Appeals relied on three rules of statutory construction. *See Smith,* 2004–NMCA–001, ¶ 11, 134 N.M. 737, 82 P.3d 547 (citing *Hinkle II,* 1998–NMSC–050, ¶ 5, 126 N.M. 413, 970 P.2d 599). First, the "plain language of a statute is the primary indicator of legislative intent." *Id.* Second, a reviewing court should "give persuasive weight to long-standing administrative constructions of statutes by the agency charged with administering them." *Id.* Third, when "several sections of a statute are involved, they must be read together so that all parts are given effect." *Id.* In our view, these same rules of statutory construction lead to a conclusion significantly different from that of the Court of Appeals.

Plain terms of ordinance indicate amateur radio towers are exempt from height restrictions

{19} We begin by looking at the language of the ordinance itself. *Cf. State v. Johnson,* 2001–NMSC–001, ¶ 6, 130 N.M. 6, 15 P.3d 1233 ("When a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation.")(quoted authority omitted). In interpreting an ordinance, courts give words their ordinary meaning, without adding terms the enacting body did not include, unless a different intent is indicated. *See Hinkle II,* 1998–NMSC–050, ¶ 5, 126 N.M. 413, 970 P.2d 599.

{20} Plaintiff argues that under a straightforward interpretation of the zoning ordinance, amateur radio towers are a permissive use without height limitation in the A–2 zone. In his view, amateur radio towers are permitted in A–2 zones because operating a ham radio is a hobby "customarily incidental" to rural residential activity. *See* Zoning Ordinance §§ 7(B)(1)(a), (d), 8(B)(1)(a). The ordinance does not expressly enumerate amateur radio towers as a permissive use, but it does expressly exclude them, along with a number of other structures, from the height limitation of twenty-six feet. *Id.* § 22(B)(1) (providing in the supplemental regulations that height restrictions shall not apply to amateur radio towers and other structures such as belfries, chimneys, flagpoles, smokestacks, silos, water towers, and windmills). Under the plain meaning of the words used in the ordinance, Plaintiff contends, this express exemption tends to indicate that the County contemplated amateur radio towers as permitted structures in the A–2 zone, and viewed them as customarily incidental to residential use.

{21} The Court of Appeals, on the other hand, concluded that the ordinance was ambiguous because it did not define "customarily incidental." *See Smith,* 2004–NMCA–001, ¶ 17, 134 N.M. 737, 82 P.3d 547. Rather than interpret the supplemental regulations as a blanket exemption from height restrictions, the Court of Appeals read Section 22 as simply meaning structures such as amateur radio towers were not subject to the twenty-six-foot height limitation. *Id.* ¶ 18. The court found that an independent inquiry remains as to whether the particular structure constitutes a "customarily incidental" use under the zoning ordinance, an inquiry that takes place in context, considering the physical characteristics of the structure and the nature of the site. *Id.* ¶ 19.

> In other words, a structure that may be customarily incidental to a residential use at some level of scale may no longer satisfy the ordinance if it is oversized in the context of the stated purpose of the zone.

> The larger scale may not be reasonable as a customarily incidental use.

Id. Thus, even though the ordinance specifies no height limit at all, the County could determine on a case-by-case basis what height limit should apply.

{22} Unlike the Court of Appeals, we are reluctant to make a legal conclusion that "reasonableness" can be read into the ordinance as a consideration in determining "customarily incidental" use. The court cites no authority for doing so, and the ordinance says no such thing. "A court may not legislate in the guise of construction by inserting matter in a zoning regulation not included by the legislative body." 8 Eugene McQuillin, *The Law of Municipal Corporations* § 25.71, at 223 (3d ed., rev.vol.2000). In our view, the Court of Appeals added terms to the ordinance that were not there. *See Burroughs v. Bd. of County Comm'rs,* 88 N.M. 303, 306, 540 P.2d 233, 236 (1975) (stating that we follow the plain language of an ordinance, and will not read language into it if it makes sense as written).

{23} Rather than remain silent, the County directly addressed amateur radio towers in the ordinance by exempting such structures from height restrictions. If the County intended to limit customarily incidental uses in the A–2 zone, or to limit the height of amateur radio towers and other structures, it could easily have done so in express terms. The County knew how to impose height restrictions in other zones. *See* Ordinance 1999–6; *cf. Smith,* 2004–NMCA–001, ¶ 16, 134 N.M. 737, 82 P.3d 547 (offering the same rationale to explain why the 1996 amendments to the O–1 zone did *not* automatically change height restrictions in the A–2 zone). Instead, the ordinance expressly exempted amateur radio towers from all height restrictions.

{24} We observe that the Planning Commission was not unaware of this potential problem. During the hearing on remand from the district court, the commissioners recalled that several years prior to Plaintiff's case the County zoning staff was asked to develop amendments to the ordinance addressing height regulations for amateur radio antennas above sixty-five to seventy-five feet. No action was taken. While we agree that the Planning Commission could pass regulations to restrict the height of amateur radio towers as a customarily incidental use, the Planning Commission has not done so. We will not read a reasonableness requirement into the ordinance to alleviate a problem that easily could have been avoided some time ago, particularly when the Court of Appeals cites no authority for doing so.[1]

{25} Our review of cases from other states supports Plaintiff's belief that amateur radio antennas are generally considered customarily incidental to residential use without adding a reasonableness inquiry. *See, e.g., Town of Paradise Valley v. Lindberg,* 27 Ariz.App. 70, 551 P.2d 60, 61–62 (1976)(holding that the erection of a ninety-foot amateur radio tower in conjunction with a homeowner's hobby as a ham radio operator is a permissible accessory or incidental use); *Skinner v. Zoning Bd. of Adjustment,* 80 N.J.Super. 380, 193 A.2d 861, 863–64 (Ct.App.Div.1963)(upholding a 100–foot radio antenna tower used as a hobby as an accessory use customarily incidental to the enjoyment of a residential property); *Dettmar v. County Bd. of Zoning Appeals,* 28 Ohio Misc. 35, 273 N.E.2d 921, 922 (Ct.Com.Pl.1971) (finding that even an unusual customarily incidental use is permissible unless specifically excluded by a zoning restriction). Only two states require an independent inquiry into the degree of use. *See Marchand v. Town of Hudson,* 147 N.H. 380, 788 A.2d 250, 253 (2001)(finding scale relevant in determining that three 100–foot amateur ham radio antenna towers were not an accessory use); *Presnell v. Leslie,* 3 N.Y.2d 384, 165 N.Y.S.2d 488, 144 N.E.2d 381, 383 (1957)(observing that scope of amateur radio operator's hobby may carry it beyond what is customary or permissible).

1. *See Smith,* 2004–NMCA–001, ¶¶ 21–22, 134 N.M. 737, 82 P.3d 547 (rejecting both parties' reference to cases from other jurisdictions because they are "specific to the language of the ordinance in question" and "do not involve the site-specific inquiry that we believe is contemplated by the stated purpose of the A–2 zone").

{26} Based on the plain language of the ordinance and the judicial treatment of the term "customarily incidental" in other jurisdictions, we are not convinced that the ordinance, in leaving "customarily incidental" undefined, implicitly requires or justifies an independent determination of reasonableness. Without adding any words, the ordinance appears to allow amateur radio towers as customarily incidental to residential use and, in express terms, specifically exempts them from height restrictions. Apparently, County zoning officials once read the ordinance that way, and a diligent citizen was induced to rely reasonably on that same interpretation. As we shall see, this is persuasive evidence that the ordinance ought to be construed by the County in a similar manner so as to permit the towers.

County previously interpreted amateur radio antennas as customarily incidental

{27} Of greater importance to our inquiry than the plain language of the ordinance is the result we reach when we apply the rule of construction regarding deference to long-standing administrative interpretations. The Court of Appeals concluded that this rule did not apply "because the County has not had a long-standing interpretation of the zoning ordinance as applied to amateur radio antennas." *See Smith,* 2004–NMCA–001, ¶ 11, 134 N.M. 737, 82 P.3d 547. We disagree.

{28} First, the record contradicts this conclusion. The County conceded that, until the passage of Ordinance 1999–6, amateur radio antennas had been considered customarily incidental to a permissive residential use. Indeed, by informing Plaintiff that amateur radio towers were allowed, and granting the permit, the County construed the ordinance in a way that was consistent with a permissive use. As we noted in *Hinkle II,* an administrative interpretation of even ambiguous language might bind an agency over time to a particular construction of the ordinance. *See* 1998–NMSC–050, ¶ 9, 126 N.M. 413, 970 P.2d 599. We find this principle at play here because we can find no evidence to suggest that a finding of reasonableness was ever required with any other permit for an amateur radio tower.

{29} Before remanding Plaintiff's case to the Planning Commission, the district court explained that it was "trying to understand whether this customarily incidental definition was really used by the county before this." Nothing that occurred at the hearing before the Planning Commission indicated that reasonableness had ever been a consideration in deciding if something was customarily incidental. In fact, the record suggests the opposite. At one point, a commissioner asked the County's zoning director what would happen if a property owner wanted to build a ninety-foot chimney on a house. A chimney is one of the structures, like amateur radio towers, excluded from height regulations. The director testified that if a structure fell within a permissive use category, and was expressly exempted from height restrictions, "we couldn't really limit it from a height standpoint."

{30} It was only after neighbors complained that the County concluded that the towers did not comply with the zoning ordinance. These facts strongly suggest that the County was implementing a new policy. Under these circumstances, deference is not appropriate. *See High Ridge Hinkle Joint Venture v. City of Albuquerque,* 119 N.M. 29, 42, 888 P.2d 475, 488 (Ct.App.1994) (*Hinkle I*)("Courts generally show little deference to an agency's interpretation of its own statute when the interpretation is an unexplained reversal of a previous interpretation or consistent practice.").

{31} We faced a similar situation in *Hinkle II,* 1998–NMSC–050, 126 N.M. 413, 970 P.2d 599. In *Hinkle II,* the Albuquerque city council rejected a property owner's plans to build a miniature golf course and arcade with go-carts and bumper boats, which zoning officials had approved as a conditional use. *Id.* ¶ 2. The city council interpreted a phrase in the ordinance so that the planned activities would not be allowed. *Id.* ¶ 3. On appeal, this Court found that, even though the city council had never construed the ordinance until that case, city zoning officials had previously construed the ordinance to allow outside activities with conditional use approv-

al. Thus, the city council impermissibly applied a new construction to the property owner's particular request. *Id.* ¶ 7.

{32} As we found in *Hinkle II,* an initial interpretation of an ordinance by an administrative agency constitutes a de facto policy that would be improper for local officials to change non-legislatively. *Id.* ¶ 9. The County zoning director admitted that prior to the 1999 amendments amateur radio towers were permitted as a customarily incidental use. This amounts to a de facto policy that the County attempted to change non-legislatively by reinterpreting its ordinance after neighbors complained. Similarly, we find no evidence that the County had ever evaluated structures such as amateur radio towers to see if they met the definition of "incidental uses" as a "use which is appropriate, subordinate, and customarily incidental to the main use of the lot." Even though the County tries to argue that no one had ever tried to build a tower this high, it cannot create a new rule in Plaintiff's particular situation. *See id.* ("We do not believe that the mere fact that the City Council itself had never interpreted the section in question means that landowners could not justifiably rely on the interpretation it was being given by 'those responsible for its implementation,' i.e., zoning agency officials."). This kind of result-oriented reinterpretation of zoning rules engaged in by the County is exactly what we condemned in *Hinkle II.*

{33} We agree with Plaintiff that this newly created reasonableness standard removes the essential characteristics of uniformity and predictability from the land use regulation process. *See Miller v. City of Albuquerque,* 89 N.M. 503, 506, 554 P.2d 665, 668 (1976) (noting importance of promoting "the desirable stability of zoning classifications upon which the property owner has a right to rely"). With a reasonableness requirement read into the ordinance, zoning officials would be invited to make highly discretionary decisions on a strictly ad hoc basis. Landowners would be burdened by not knowing what uses are allowed on their property. Owners have a right to use their property as they see fit, within the law, unless restricted by regulations that are clear, fair, and apply equally to all. Ad hoc, standard-less regulation that depends on no more than a zoning official's discretion would seriously erode basic freedoms that inure to every property owner.

Purpose to preserve scenic values does not provide adequate standard

{34} In an attempt to read the zoning ordinance as a whole, the Court of Appeals relied on the general purpose of the ordinance as an adequate standard for determining what is reasonable in the A–2 zone. *Smith,* 2004–NMCA–001, ¶ 19, 134 N.M. 737, 82 P.3d 547. Given the ordinance's purpose to preserve scenic and recreation values, the Court of Appeals concluded that there was substantial evidence in the record for the Planning Commission to find the height of the towers was unreasonable as a customarily incidental use in the A–2 zone. *Id.* ¶ 24.

{35} In some instances, relying on the broader purpose of a statute or ordinance may be a reasonable way to realize the intent of the enacting body. It is doubtless true that a fairly general expression of legislative guidance will suffice to control administrative discretion where it would be impractical and unreasonable to set out more precise standards "without impairing the underlying public purpose." *See City of Santa Fe v. Gamble–Skogmo, Inc.,* 73 N.M. 410, 417–18, 389 P.2d 13, 18–19 (1964).

{36} In this case, however, the County could easily have adopted a specific standard to preserve scenic values in terms of a reasonable height restriction. *See State ex rel. Holmes v. State Bd. of Fin.,* 69 N.M. 430, 441–42, 367 P.2d 925, 933 (1961)(noting the failure to provide detailed standards to guide administrative officials may only be excused where it is difficult or impractical to lay down a definite, comprehensive rule or some discretion is necessary to protect public morals, health, safety and general welfare); *see also Gen. Outdoor Adver. Co. v. Goodman,* 128 Colo. 344, 262 P.2d 261, 262–63 (1953)(en banc)(holding that ordinance requiring signs to be approved by zoning authorities was invalid where no standards were provided and could easily have been prescribed); *Colyer v. City of Somerset,* 306 Ky. 797, 208

S.W.2d 976, 977 (1947)(holding ordinance invalid that allowed zoning body to determine appropriate setback without any standards). For that reason, we find the Court of Appeals erred in concluding that the general purpose language of the A–2 zone supplies county officials with adequate guidance in applying the standard of reasonableness to determine whether a proposed use should be considered customarily incidental.

{37} The results of this case may be unfortunate for the neighbors who understandably regard Plaintiff's radio towers as an eyesore. But Plaintiff fairly relied on the express language of the ordinance and the assurances of the county zoning officials in buying his property. After the County granted Plaintiff a permit, he complied with its terms in the construction of his radio antenna towers. If the County wanted to prevent towers on this scale, the problem could easily have been avoided by doing exactly what has been done since: expressly amending the ordinance with specific height limitations. *See* Bernalillo County, N.M., Ordinance 2004–1 (adopted Jan. 27, 2004)(amending the zoning ordinance to provide for amateur radio towers as permissive uses up to sixty-five feet or conditional uses up to 100 feet). The County has every right and responsibility to regulate structures such as amateur radio towers, but it did not do so explicitly and in fact exempted such antenna towers from height restrictions. The County cannot after the fact come up with a new legal rationale to block an unpopular activity, which was previously permitted, to the detriment of a property owner who did everything in his power to follow the rules.

CONCLUSION

{38} We reverse the decision of the Court of Appeals affirming the district court. We hold that Plaintiff is entitled to a declaratory judgment that the building permit for his antenna towers was properly issued and that the County's stop work notices are invalid.

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

SERNA, MAES, CHAVEZ, Justices and VIGIL, J., New Mexico Court of Appeals (sitting by designation), concur.

2005-NMCA-034

110 P.3d 509

Glen ALEXANDER and Doris Alexander, individually, and as trustees of the Glen & Doris Alexander Revocable Trust, Plaintiffs–Appellants,

v.

CALTON & ASSOCIATES, INC., Stephen Blake Murchison, and Southwest Securities, Inc., Defendants–Appellees.

No. 23,398.

Court of Appeals of New Mexico.

Feb. 8, 2005.

Clinton W. Marrs, Vogel, Campbell & Blueher, P.C., Albuquerque, New Mexico, for Appellants.

Robert M. Strumor, Hughes & Strumor, Ltd. Co., James C. Compton, The Business Law Firm, Albuquerque, New Mexico, for Appellees.

OPINION

ROBINSON, Judge.

{1} Appellants appeal the district court's decision ordering arbitration. Appellants simultaneously filed a complaint in district court and filed a statement of claim for arbitration against Appellees. On appeal, Appellants contend that (1) the district court order compelling arbitration must be reversed because it failed to determine the existence of a pre-dispute arbitration agreement, and (2) the mere filing of a claim for arbitration does not waive their right to challenge arbitrability. We reverse and remand.

BACKGROUND

{2} The following is a summary of the allegations contained in the complaint of Mr. and Mrs. Alexander (Appellants). Appellants are retired and were dependant on their fixed income investment portfolio maintained with Calton & Associates (Appellees) to generate income. Between June 1995 and April 2000, the portfolio at issue was invested

in high-quality corporate and municipal bonds.

{3} Without Appellants' knowledge, Appellees opened a margin account, and from time-to-time, Stephen Murchison and Southwest Securities (Appellees) purchased bonds in the account on margin. Appellees were not authorized to use margins in Appellants' account and never subsequently obtained Appellants' agreement to the use of a margin account to purchase securities on credit.

{4} Beginning in or about April 2000, Stephen Murchison, an agent of Calton & Associates (Appellee), solicited Appellants' consent to invest a portion of their portfolio's assets in option securities. Appellants did not understand the options market and resisted the solicitation. After Appellees expressed they would not invest more than $15,000 in the options market and that they would pursue the option investment strategy for only a short time, Appellants relented.

{5} Beginning in April 2000, Appellees began to sell "put" options in Appellants' account. These options subjected their account to a risk of loss of principal far in excess of $15,000. Without Appellants' knowledge, Appellees used Appellants' corporate and municipal bonds as collateral to buy the put options in the event the option holders exercised the options.

{6} Thereafter, in or about June 2000, Appellees, without Appellants' consent, began increasing their use of margins extended by Southwest Securities to facilitate the option strategy. These additional options were written on highly volatile stocks. In January 2001, holders of these options exercised the options. The exercise of these options obligated Appellees to purchase the underlying securities in Appellants' portfolio. As the market value of these margined stocks declined further, the account became subject to calls by Southwest Securities for additional collateral to secure the margin balance. Appellants' portfolio lost almost all its value, declining from a balance over $514,000 in the summer of 2000 to approximately $75,000 by the spring of 2001.

{7} On April 23 and July 31, 2001, Appellants requested from Appellees confirmation of whether they had entered into a pre-dispute arbitration agreement. Appellees did not respond to either request. Based on the above, on July 30, 2001, Appellants filed a claim in district court against Appellees, alleging securities fraud and breach of fiduciary duty. On the same day, Appellants also filed a statement of claim for arbitration with the National Association of Securities Dealers (NASD). Appellants' simultaneous filings were to protect them from the possibility of the expiration of the statute of limitations while they attempted to determine if a pre-dispute arbitration agreement existed. On March 8, 2002, Appellees moved for an order compelling arbitration, and the district court granted that motion without determining whether a pre-dispute arbitration agreement existed. On April 18, 2002, a pre-hearing conference was held before the NASD arbitration panel, where no issues on the merits were heard, and there have been no additional arbitration hearings. Appellants still do not know whether a pre-dispute arbitration agreement exists.

I. *STANDARD OF REVIEW*

{8} The appropriate standard of review for a district court's grant of a motion to compel arbitration is *de novo*. *Santa Fe Techs., Inc. v. Argus Networks, Inc.*, 2002–NMCA–030, ¶ 51, 131 N.M. 772, 42 P.3d 1221.

II. *DISCUSSION*

A. Whether an Enforceable Agreement to Arbitrate Exists

{9} Under the New Mexico Arbitration Act, NMSA 1978, §§ 44–7A–1 to –32 (1971, as amended through 2004), the district court is compelled to order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate. § 44–7A–8(a)(2). Furthermore, "[i]f the court finds that there is no enforceable agreement, it may not . . . order the parties to arbitrate." § 44–7A–8(c). *See also McMillan v. Allstate Indem. Co.*, 2004–NMSC–002, ¶ 8, 135 N.M. 17, 84 P.3d 65.

{10} In *McMillan*, two automobile insurance policyholders (insureds) challenged the

validity of a clause in Allstate's standard uninsured motorist (UM) insurance endorsement that provided for arbitration of UM claims only upon the consent of both Allstate and the insured. After Allstate disputed the extent of their respective claims, insureds each demanded arbitration. Allstate declined, choosing instead to litigate the underlying disputes in court. Insureds then brought actions against Allstate to compel arbitration.

{11} On appeal, our Supreme Court first considered whether there was an agreement to arbitrate. *Id.* ¶ 2. The Court held that "the UAA [Uniform Arbitration Act] provides no basis for concluding that the Legislature intended to compel arbitration where there was no agreement to arbitrate." *Id.* ¶ 8. The Court reasoned that "[g]iven the UAA's prohibition against compelling arbitration where there was no agreement to arbitrate, it would be inconsistent to hold that the public policy underlying the UAA requires binding arbitration of all UM claims. Where, as here, there was no agreement to arbitrate, the UAA neither compels parties to arbitrate, nor does it permit a court to grant a motion to compel arbitration." *Id.* These principles apply similarity to this case.

{12} In this case, the district court did not determine if an agreement to arbitrate existed, nor did Appellees produce evidence of a pre-dispute arbitration agreement. After a brief hearing, the district court ordered the parties to arbitration without determining whether a pre-dispute arbitration agreement existed. As in *McMillan,* the district court may not compel arbitration absent an arbitration agreement. 2004–NMSC–002, ¶ 8, 135 N.M. 17, 84 P.3d 65.

B. Waiver

{13} Appellees contend that the existence of a pre-dispute agreement would be irrelevant because Appellants subsequently filed a claim with NASD for arbitration, thus waiving their right to object to arbitration. After considering Appellees' contentions, we are not persuaded.

{14} We read New Mexico law to require more than a claim filing to waive one's right to object or challenge arbitrability. In *Eagle Laundry v. Fireman's Fund Ins. Co.,* we first addressed the question of whether there was an agreement to arbitrate. 2002–NMCA–056, ¶ 18, 132 N.M. 276, 46 P.3d 1276. We added: "Even if a written agreement were required, Eagle waived its right to object to the absence of such an agreement by fully participating in the arbitration without objection." *Id.* ¶ 16. Furthermore, this Court held that "by proceeding to arbitration after the trial court entered an order compelling arbitration without any appeal of the order, the parties 'forfeited their ability to challenge not only the order itself, but also the loss of the opportunity to try their case to a jury.' " *Id.* (quoting *Lyman v. Kern,* 2000–NMCA–013, ¶ 17, 128 N.M. 582, 995 P.2d 504).

{15} Even though Section 44–7A–24(5) of the Uniform Arbitration Act deals with a hearing that has been completed on its merits, and in our case it has not, we can draw support for our holding from it. Section 44–7A–24(5) allows a party to request that a court vacate an award made in an arbitration proceeding if "there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section 16(c) not later than the beginning of the arbitration hearing." § 44–7A–24(5). Under this provision of the statute, a party may continue to argue that there is no agreement to arbitrate even after the arbitration is completed, so long as he preserves his objections before the hearing begins. Allowing a finding that a party has waived this argument based solely on a request for arbitration would be contrary to this provision of the Uniform Arbitration Act. We hold as a matter of law that a mere request for arbitration cannot by itself be sufficient to waive the right to contest arbitration and require proof of the existence of an arbitration agreement in court.

CONCLUSION

{16} We reverse the district court's order and remand with instructions to the district

court to hold a hearing to determine whether an arbitration agreement exists.

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Chief Judge and CELIA FOY CASTILLO, Judge.

2005-NMCA-038

110 P.3d 512

STATE of New Mexico, Plaintiff–Appellee,

v.

Hugh LACKEY, Defendant–Appellant.

No. 24,355.

Court of Appeals of New Mexico.

Feb. 9, 2005.

Certiorari Granted, No. 29,110, April 4, 2005.

Patricia A. Madrid, Attorney General, Santa Fe, NM, Max Shepherd, Assistant Attorney General, Albuquerque, NM, for Appellee.

Richard A. Hawthorne, Richard A. Hawthorne, P.A., Ruidoso, NM, for Appellant.

OPINION

VIGIL, Judge.

{1} Defendant contends there was no reasonable suspicion to stop the vehicle in which he was a passenger. We agree. Therefore, we reverse the district court's denial of his motion to suppress.

FACTS

{2} On June 5, 2002, Officer Laurence Kauz of the New Mexico State Police was dispatched to investigate a one-vehicle accident on Cedar Creek Drive near the Village of Ruidoso. Tim Harvey, a sergeant with the New Mexico State Police, also responded to the accident in his own vehicle. When they arrived, they found that a 1985 Chevrolet truck had run off the road, gone through the safety barrier, and landed in a ditch. It appeared that the right front suspension was wrecked. The driver of the vehicle was not present and there were no witnesses to the accident. The State Police officers were joined by an officer of the Ruidoso Police Department who came in a third police vehicle.

{3} Shortly after the State Police officers began their investigation, a pickup truck with two passengers slowly drove by the accident scene. The truck continued for 200 or 300 yards down the hill, turned around, and drove by the accident scene again. According to Sergeant Harvey, the passenger was "rubbernecking" each time the truck passed the scene of the accident. Sergeant Harvey ordered the truck to be stopped because something was "suspicious." When asked why he was "suspicious," he said that in fifteen years of training and experience "it has become knowledge I guess you might call it that a subject that has been involved in a crash that is under the influence will leave the scene in order to attempt from being arrested for the DWI." Officer Kauz added, "[i]t seemed they had more than a casual interest in the accident. So, we thought they knew something about the accident." If the truck had not stopped when it was ordered to do so it would have been pursued and forced to stop.

{4} Officer Kauz questioned the occupants after the truck was stopped, and he determined that the truck was being driven by Richard Malone, a neighbor of Defendant. In response to subsequent questioning from Officer Kauz, Defendant admitted the 1985 Chevrolet truck was his and that he was driving it at the time of the accident. Officer Kauz noted that Defendant had bloodshot, watery eyes and smelled of alcohol. In response to further questions, Defendant admitted to Officer Kauz that he had consumed three or four beers earlier in the evening. After field sobriety tests were administered, Defendant was arrested at 10:30 p.m. Analysis of blood drawn from Defendant at 12:05 a.m. the following morning showed that his blood alcohol concentration exceeded the legal limit. *See* NMSA 1978, § 66-8-102(C)(1) (2004) ("It is unlawful for . . . a person who has an alcohol concentration of eight one hundredths or more in his blood or breath to drive a vehicle within this state.").

{5} Defendant argued during trial that reasonable suspicion to stop the vehicle was lacking, and on this basis, moved to suppress all evidence obtained as a result of the stop. The motion was denied, and Defendant was convicted of driving while intoxicated. Defendant appeals.

STANDARD OF REVIEW

{6} Whether the district court correctly ruled on Defendant's motion to suppress is a question we review "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. However, when the facts "are not in dispute, we review only the legal conclusions of the trial court." *State v. Contreras,* 2003–NMCA–129, ¶ 4, 134 N.M. 503, 79 P.3d 1111. Whether the officers had reasonable suspicion to stop the vehicle Defendant was riding in is a legal question we review de novo. *State v. Urioste,* 2002–NMSC–023, ¶ 6, 132 N.M. 592, 52 P.3d 964.

DISCUSSION

{7} The Fourth Amendment of the United States Constitution protects the people of the United States against unreasonable searches and seizures by the government. U.S. Const. amend. IV. The New Mexico Constitution also protects the people against unreasonable searches and seizures. N.M. Const. art. II, § 10. However, because Defendant has not argued that the New Mexico Constitution affords him greater protection than the United States Constitution, we review his appeal only under the Fourth Amendment. *See State v. Jason L.,* 2000–NMSC–018, ¶ 9, 129 N.M. 119, 2 P.3d 856; *State v. Walters,* 1997–NMCA–013, ¶ 9, 123 N.M. 88, 934 P.2d 282 (stating that because the defendant "advances no separate analysis under the New Mexico Constitution, nor does he argue that the state constitution affords any greater protection in this respect than the United States Constitution" the court will "limit [its] analysis to the Fourth Amendment").

{8} "The Fourth Amendment applies to seizures of the person, including brief investigatory stops such as the stop of [a] vehicle." *United States v. Cortez,* 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). Therefore, before a "police officer may stop a vehicle . . . he [must have] reasonable suspicion that a law has been or is being violated." *State v. Pallor,* 1996–NMCA–083, ¶ 12, 122 N.M. 232, 923 P.2d 599; *see Cortez,* 449 U.S. at 417, 101 S.Ct. 690. A police officer has reasonable suspicion to stop a vehicle when he becomes "aware of specific articulable facts that, judged objectively, would lead a reasonable person to believe criminal activity occurred or was occurring." *Urioste,* 2002–NMSC–023, ¶ 6, 132 N.M. 592, 52 P.3d 964 (internal quotation marks and citation omitted). To determine whether a police officer has reasonable suspicion, we must consider the "totality of the circumstances." *Id.* ¶ 6.

{9} The circumstances in this case simply do not amount to reasonable suspicion to stop the truck occupied by Defendant. Neither Sergeant Harvey nor Officer Kauz testified that they believed that Defendant or Mr. Malone was committing or had committed a criminal act. Sergeant Harvey's testimony regarding the fact that DWI suspects frequently leave the scene of an accident is unavailing. He observed Defendant returning to the scene not leaving the scene; no evidence was presented to suggest that Defendant's return to the scene was consistent with someone who had previously been driving while intoxicated. *Cf. State v. Guzman,* 118 N.M. 113, 115, 879 P.2d 114, 116 (Ct.App.1994) (holding that stop was lawful, in part, because of the officer's knowledge "that deodorants are often used to mask the odor of illegal drugs or substances"). Due to the absence of specific, articulable facts that Defendant was engaged or had been engaged in wrongdoing, Sergeant Harvey did not have reasonable suspicion to order the vehicle in which Defendant was riding to be stopped. *See Urioste,* 2002–NMSC–023, ¶ 6, 132 N.M. 592, 52 P.3d 964.

{10} In support of its argument that the officers had reasonable suspicion, the State refers us to *People v. Hobson,* 117 Ill.App.3d 191, 72 Ill.Dec. 518, 452 N.E.2d 771 (1983). In *Hobson,* three sheriff's reserve officers

were dispatched to keep the curious away from a gravel pit and dumping area where two dead bodies had been discovered. *Id.* at 774. At about 11:30 p.m., the officers noticed a small pickup truck drive slowly by the gravel road that led to the dumping area. *Id.* Fifteen minutes later, the officers observed the pickup pass slowly by again, this time in the opposite direction. *Id.* Approximately forty-five minutes later, the pickup drove slowly by the gravel pit a third time. *Id.* After the vehicle's third pass, one of the officers stopped the vehicle. *Id.* The driver of the vehicle was subsequently identified as a suspect in the death of the persons whose bodies had been found in the gravel pit. *Id.* at 775–76. The Illinois Court of Appeals held that the stop of the defendant was a proper investigative stop. *Id.* at 779.

{11} The circumstances surrounding Sergeant Harvey's order to stop the vehicle in this case differ significantly from the circumstances in *Hobson.* The defendant in *Hobson* drove by three times "late at night when the ordinary individual would have no legitimate reason to visit the dump." *Id.* Neither Sergeant Harvey nor Officer Kauz testified that it was unusual for a car to be driving on Cedar Creek Road when they first observed Defendant. Further, there were three police cars with their lights flashing at the scene of the accident. Officer Kauz admitted that slowing down to gawk or rubberneck at an accident scene is a common behavior among drivers and was not, by itself, suspicious. His own suspicion was not aroused until the vehicle made a second pass. A second pass of the scene may have indicated any number of things ranging from knowledge about the accident, familiarity with the vehicle, or just plain curiosity.

{12} On similar facts, the Idaho Supreme Court, in *State v. Wixom,* 130 Idaho 752, 947 P.2d 1000, 1002 (1997), and the Arizona Supreme Court, in *State v. Richcreek,* 187 Ariz. 501, 930 P.2d 1304, 1308 (1997) (en banc), have also concluded that the police did not have reasonable suspicion to stop a defendant. In *Wixom,* 947 P.2d at 1001, police responded to a report of a single-car accident. The car had struck a mailbox, gone through a fence, and come to a stop in a field. *Id.* When officers arrived at the scene, the driver was no longer there. *Id.* As the officers began to investigate, they noticed a pickup truck drive slowly by the scene of the accident. *Id.* One of the officers stopped the truck to determine if its occupants could provide any information about the accident. *Id.* The defendant, who was the passenger in the pickup, admitted to driving the car found in the field and was subsequently arrested for driving under the influence. *Id.* The Idaho Supreme Court upheld the district court's grant of the defendant's motion to suppress, in part, because the police "did not have a reasonable suspicion that the persons in the pickup were involved in any criminal activity." *Id.* at 1002.

{13} Similarly, in *Richcreek,* police also responded to a single-car accident. 930 P.2d at 1305. When the police arrived at the scene, the driver of the car was not there. *Id.* The police began to search for injured passengers and otherwise investigate the scene. *Id.* As they did so, the officers noticed a car approach the scene, slow almost to a stop, and pull over to the side of the road before driving away. *Id.* One of the officers at the scene thought that the driver of the car could have been the absent driver of the wrecked car or someone who knew the driver. *Id.* Therefore, the officer stopped the car. *Id.* Following the stop of the car, the police learned that the car was stolen and arrested the driver. *Id.* at 1306. The Arizona Supreme Court held that the evidence obtained pursuant to the stop should be suppressed because "the forced stop of an automobile without the least articulable suspicion of criminal activity is an unconstitutional seizure under the Fourth Amendment." *Id.* at 1308.

{14} The only significant factual difference between the case before us and *Wixom* and *Richcreek* is that Defendant passed by the scene of the accident twice. The Idaho and Arizona Supreme Courts held that passing slowly by the scene of an accident once is not enough for reasonable suspicion of criminal activity because the bare fact of an accident does not indicate that the accident was caused by criminal activity. We agree with their conclusions and do not believe that a

second pass of the scene alone is sufficiently indicative of criminal activity to support a finding of reasonable suspicion. While a second pass might indicate, as the officers testified, more than a casual interest in the accident, that does not mean that the accident was criminally caused, such as would allow the officers to intrude on Defendant by stopping him.

{15} The State also argues that the stop of the vehicle Defendant was riding in was justified under the community caretaking exception to the warrant requirement. Because the police were entitled to search the abandoned 1985 Chevrolet to determine the identity of its owner, the State argues that it could also stop Defendant to determine if he was the owner of the vehicle. We are unpersuaded.

{16} A "police officer may stop a vehicle for a specific, articulable safety concern, even in the absence of reasonable suspicion that a violation of law has occurred or is occurring." *Apodaca v. State ex rel. Taxation and Revenue Dep't,* 118 N.M. 624, 626, 884 P.2d 515, 517 (Ct.App.1994); *see State v. Reynolds,* 117 N.M. 23, 25, 868 P.2d 668, 670 (Ct.App.1993), *rev'd on other grounds,* 119 N.M. 383, 890 P.2d 1315 (1995). For example, in *Apodaca,* we held that, under the community caretaker exception, a police officer had lawfully stopped a motorcycle that he had observed weaving in its lane of traffic. *Id.* at 626, 884 P.2d at 517. Although the driver of the motorcycle had not violated any traffic laws, "[w]eaving like that described by the officer could well result from a driver's attempting to retain control of his motorcycle, or to resist the effects of drowsiness, illness, or a similar problem." *Id.* Therefore, we held that the officer had not violated the constitutional rights of the driver by stopping him "to ascertain whether he needed assistance." *Id.* Similarly, in *Reynolds,* a police officer stopped a pickup truck that was carrying three passengers on its tailgate. 117 N.M. at 25–26, 868 P.2d at 670–71. We held that the officer could lawfully stop the pickup truck to inform the driver that the passengers riding on the tailgate of the truck needed to be seated in the bed of the truck with the tailgate closed. *Id.* Unlike the police officers in *Apodaca* and *Reynolds,* neither Sergeant Harvey nor Officer Kauz testified that they were concerned about the safety or well-being of Defendant or Mr. Malone. Therefore, we find, as did the Idaho court, that the stop of the vehicle Defendant was riding in does not fall within the community caretaker exception to the warrant requirement. *See Wixom,* 947 P.2d at 1002.

{17} Further, the State's attempt to analogize the stop to opening the glove box of the vehicle to determine the identity of its owner is unpersuasive. Even if we accept the State's assertion Sergeant Harvey and Officer Kauz could have lawfully searched the wrecked 1985 Chevrolet, stopping Defendant implicates substantially different interests than opening the glove box of an abandoned and wrecked 1985 Chevrolet. And because Sergeant Harvey and Officer Kauz did not have a specific, articulable safety concern about Defendant or the vehicle in which he was riding, they could not lawfully stop the vehicle under the community caretaker exception.

CONCLUSION

{18} We hold that Sergeant Harvey did not have a reasonable suspicion to order a stop of the vehicle Defendant was riding in. As a result, the stop was an unlawful seizure under the Fourth Amendment. Therefore, we reverse the district court's denial of Defendant's motion to suppress. We remand with instructions to grant the motion to suppress and for such further proceedings as may be warranted.

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

WE CONCUR: LYNN PICKARD and JAMES J. WECHSLER, Judges.

2005-NMCA-039
110 P.3d 517

STATE of New Mexico,
Plaintiff–Appellee,

v.

Leroy ZAMORA, Defendant–Appellant.

No. 23,436.

Court of Appeals of New Mexico.

Feb. 11, 2005.

Certiorari Granted, No. 29,117,
April 4, 2005.

Patricia A. Madrid, Attorney General, Margaret McLean, Assistant Attorney General, Santa Fe, NM, for Appellee.

John Bigelow, Chief Public Defender, Steven J. Potter, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

VIGIL, Judge.

{1} Appellee State of New Mexico's motion for rehearing is denied. The opinion filed in this case on January 13, 2005, is withdrawn and this opinion is substituted in its place.

{2} Defendant was convicted of trafficking by possession with intent to distribute cocaine, conspiracy, possession of drug paraphernalia, and concealing identity following the search of a motel room. The dispositive issues are whether Defendant has standing to challenge the search of the motel room and whether a warrantless search of the medicine cabinet in the bathroom of the motel room can be justified as a protective sweep. We hold that Defendant has standing to challenge the search and that the search of the medicine cabinet went beyond the parameters of a protective sweep. We reverse and remand for a new trial.

FACTS

{3} Defendant filed a motion to suppress three days before the trial date, arguing that evidence discovered during the search of a motel room should be suppressed as resulting from an unlawful, warrantless search of the motel room. Noting that the motion was untimely, the trial court ruled that it would not hold a separate hearing on the motion, but would entertain it during the trial. The following is the material evidence that is pertinent to the issues.

{4} Sergeant Depies of the Albuquerque Police Department responded to a call from the dispatcher that an individual was trespassing on the premises of the Economy Inn. Sergeant Depies identified the trespasser who admitted he had been smoking crack cocaine. The trespasser subsequently identified Room 244 in the motel as the place where he purchased the crack cocaine. Sergeant Depies then told the motel clerk what he had learned, and the clerk said the room had been rented two days earlier by Thomas Henderson and his mother Erica, according to the registration. Sergeant Depies called other officers for assistance to continue the investigation.

{5} Defendant, his cousin Manuel Hernandez, and Defendant's aunt were in Room 244 at the Economy Inn when police officers knocked on the door. Defendant testified that prior to going to the motel, he had alternated between living on the street and staying at his mother's house. He saw Her-

nandez at a Walgreen's and Hernandez said that he had a motel room that his mother was also using and he invited Defendant to stay with them in the motel room. Hernandez had rented the room two days earlier, on October 12, 2000, under the aliases of Thomas and Erica Henderson. Defendant testified he called his mother to bring him some clothes when they arrived at the motel. Defendant understood he was invited to spend the night in the motel room. After receiving clean clothes sent by his mother, Defendant said he took a shower, combed his hair, put clean clothes on, and got into the only bed in the room. Defendant testified that he had an expectation of privacy in the room "[b]ecause [his] family was there" and because he was going to spend the night there.

{6} Sergeant Depies went to Room 244, accompanied by Officers Leveling and Melton, wearing his uniform. As Sergeant Depies approached the room, "a subject peeked out around the drapes" at the officers "and then ran back into the room." Sergeant Depies also heard "running" from inside the room which made him suspicious. Sergeant Depies knocked on the door, announced, "Police," and either ordered or requested the occupant to come to the door. Hernandez opened the door. Sergeant Depies asked whose room it was and Hernandez answered it belonged to him and his mother. Sergeant Depies asked Hernandez if he could "step into his room, talk about an allegation of drug dealing from that room and he nodded yes." Sergeant Depies added, "[he] might have muttered yes or something, opened the door, walked in and left the door open." The officers walked in the room. Present in the room were Hernandez, Defendant, and Defendant's aunt. Sergeant Depies saw pieces of crack cocaine, a long razor blade, and a crack pipe on a table in the corner of the room. Sergeant Depies asked Hernandez if the substance he observed would test positive for cocaine and Hernandez responded, "yeah, because my mom smokes crack." Sergeant Depies then handcuffed Hernandez and instructed the officers to handcuff Defendant and his aunt. Shortly after Officer Melton handcuffed Hernandez, he began a protective sweep of the room, described as follows by Sergeant Depies:

> A protective sweep would just encompass going through, looking for bodies, making sure live people, making sure there isn't a person in there that could possibly pose a threat to us while we're doing the investigation. What we would do, anyone hiding in the bathroom, hiding in the tub, hiding in the closet here, there where people can be found and that's what Officer Melton—he was doing. He was looking that these were the only three people inside the motel room.

{7} Officer Melton testified that Hernandez "nodded, [and] walked into the room" when Sergeant Depies asked if the officers could come into the room. Officer Melton testified, "[m]y main responsibility was to come in, make sure for Sergeant Depies' safety as he conducted an investigation." He described how he performed the protective sweep as follows:

> I went into the back bathroom, when you walk in I wanted to look inside, make sure no one else was also hiding inside the bathroom. I noticed that the window was open and so I looked outside. I had been on several calls before where people had thrown things out the window where they didn't want us to find. I look outside, I didn't find anything. I look back towards where the bath tub was, shower area was, I notice that the vanity, the medicine cabinet, was opened approximately two or three inches. I looked and I could see . . . inside there. I notice a plastic bag, just a light plastic bag. Several times that I arrested people I have found narcotics in plastic bags, so I opened the vanity and I found two plastic bags containing a large amount of what I thought at the time was crack cocaine and which was later determined to be by Officer Chavez that came and field tested it for us.

STANDARD OF REVIEW

{8} "In reviewing a suppression order, this Court reviews the facts under a substantial evidence standard and reviews the district court's application of the law to those facts de novo." *State v. Cassola*, 2001-NMCA-072, ¶ 2, 130 N.M. 791, 32 P.3d 800.

The district court made no findings of fact. "This is a regular occurrence when we review decisions on motions to suppress evidence in criminal cases." *State v. Jason L.*, 2000-NMSC-018, ¶ 11, 129 N.M. 119, 2 P.3d 856 (quoting *State v. Gonzales*, 1999-NMCA-027, ¶ 11, 126 N.M. 742, 975 P.2d 355). In such a circumstance, where the district court made no findings of fact, "our practice has been to . . . employ presumptions [and as] a general rule, we will indulge in all reasonable presumptions in support of the district court's ruling." *Id.* (internal quotation marks and citation omitted). However, "[o]ne constraint upon that practice is that without an indication on the record that the district court rejected the uncontradicted evidence, we presume the court believed all uncontradicted evidence." *Id.* Here, the district court did state on the record, "I do find that Defendant's testimony is a little bit questionable in certain areas," and found there was no standing. However, this alone is insufficient. Unless the district court makes findings of fact, or rejects specific uncontradicted testimony with reasons on the record, we presume the district court believed the uncontradicted evidence. We determine whether the law was correctly applied to the undisputed facts. *See State v. Pierce*, 2003-NMCA-117, ¶ 10, 134 N.M. 388, 77 P.3d 292 (stating that when the facts are not in dispute on a motion to suppress, we determine whether the law was correctly applied to those facts); *see also State v. Pena*, 108 N.M. 760, 767, 779 P.2d 538, 545 (1989) (reversing motion to suppress when evidence that search was beyond the scope of consent was "without conflict").

A. Standing

{9} The trial court orally ruled that Defendant had no standing to challenge the search of the room. No formal written order was filed. Defendant argues this ruling was incorrect. We agree.

{10} Defendant's standing to challenge a search as violative of the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution depends on whether he has a reasonable expectation of privacy in the place searched. *State v. Leyba*, 1997-NMCA-023, ¶ 9, 123 N.M. 159, 935 P.2d 1171. Whether a defendant has standing involves two inquiries: (1) whether the defendant had an actual, subjective expectation of privacy in the premises searched; and (2) whether the defendant's "subjective expectation [is] one that society is prepared to recognize as reasonable." *State v. Esguerra*, 113 N.M. 310, 313, 825 P.2d 243, 246 (Ct.App. 1991) (internal quotation marks and citation omitted); *accord Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979).

{11} Defendant's testimony establishes that he had an actual and subjective expectation of privacy in the motel room. He testified that he had an expectation of privacy in the room because his "family" was there and because he was going to spend the night there. The real issue raised by this case is whether Defendant's subjective expectation of privacy is one that society is prepared to recognize as reasonable. We hold that it is.

{12} In *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990), the Supreme Court held that a defendant who was an overnight guest in a home had a reasonable expectation of privacy in the home. *Id.* at 97-98, 100, 110 S.Ct. 1684. He therefore had standing to challenge his warrantless arrest in that home. The Court said:

> To hold an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes that the everyday expectations of privacy that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home.

> From the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside. We are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings. It is for this reason that, although we may spend all day in public places, when we cannot sleep in our own home we seek out another private place to sleep, whether it be a hotel room, or the home of a friend.

Id. at 98–99, 110 S.Ct. 1684. One authority concludes that *Olson* amounts to a per se rule that one's "status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." 6 Wayne R. LaFave, *Search & Seizure* § 11.3(b), at 148 (4th ed.2004) (internal quotation marks omitted).

{13} The reasoning and holding of *Olson* is applicable to a hotel room. In *Stoner v. California,* 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964), the Supreme Court held that a defendant had standing to challenge the search of his hotel room. *Id.* at 490, 84 S.Ct. 889. We have also held on two prior occasions that a motel room is the equivalent of a dwelling for Fourth Amendment purposes and that as a registered guest, the occupant is "entitled to the same rights he would have possessed had his private residence been searched rather than his hotel room." *Esguerra,* 113 N.M. at 313–14, 825 P.2d at 246–47; *accord State v. Copeland,* 105 N.M. 27, 31, 727 P.2d 1342, 1346 (Ct.App. 1986). Moreover, houseguests who do not stay overnight but nonetheless are permitted by the owner or occupant of the property to use a private part of the residence have standing to challenge a search of the premises. *State v. Wright,* 119 N.M. 559, 563, 893 P.2d 455, 459 (Ct.App.1995); *see also Leyba,* 1997–NMCA–023, ¶ 17, 123 N.M. 159, 935 P.2d 1171 (stating a person may have standing "if he is a houseguest on the searched premises with the owner's permission and has a possessory interest in an item seized there").

{14} The foregoing authorities lead to the inescapable conclusion that Defendant's subjective expectation of privacy in the motel room is one that society is prepared to recognize as reasonable in this case. *See United States v. Wilson,* 36 F.3d 1298, 1303 (5th Cir.1994) (stating defendant had standing to contest search and seizure of checkbook from his friend's hotel room in which defendant was staying as an overnight guest). We hold that Defendant has standing to assert that the search of the motel room violated his rights under the Fourth Amendment and Article II, Section 10 of the New Mexico Constitution under the circumstances present here.

B. The Protective Sweep

{15} The search of the bathroom was conducted by Officer Melton without a search warrant.

> Once a defendant has established that law enforcement officers have entered the premises of another and conducted a warrantless search and seizure in an area wherein the defendant has a reasonable expectation of privacy, the state has the burden of coming forward with evidence to show that the search and seizure came within a valid exception to the search warrant requirements imposed by the State and United States Constitutions.

Wright, 119 N.M. at 562, 893 P.2d at 458. The State has a heavy burden to justify a warrantless search. *Id.* A properly justified and conducted protective sweep is a permissible warrantless search under the Fourth Amendment. *State v. Valdez,* 111 N.M. 438, 440, 806 P.2d 578, 580 (Ct.App.1990).

{16} We assume that the evidence supports a finding that the police officers entered the motel room after securing a valid consent from Hernandez to do so. *See Wright,* 119 N.M. at 562, 893 P.2d at 458 ("Where the state asserts that the search and seizure conducted by law enforcement officers were consensual, the burden is on the state to show by clear and positive evidence that consent was given without duress, coercion, or other factors which would vitiate the voluntary nature of the consent.") (internal quotation marks and citation omitted).

We also assume that the protective sweep was performed after Defendant and the others inside the room were arrested. *See Valdez,* 111 N.M. at 440, 806 P.2d at 580 ("A protective sweep is only allowed incident to a lawful arrest."). Finally, we assume that under the circumstances, a protective sweep search was appropriate. *See id.* ("[A] protective sweep may be undertaken if the searching officers possess a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[s] the officer in believing that the area swept harbored an individual posing a danger to the officer or others.") (citations omitted) (quoting *Maryland v. Buie,* 494 U.S. 325, 328, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990)). What we determine is whether the scope of the search conducted by Officer Melton was within the constitutional parameters of a protective sweep. Defendant argues that the scope of Officer Melton's protective sweep of the bathroom, exceeded "a cursory inspection of those spaces where a person may be found." *Id.* at 335, 110 S.Ct. 1093. We agree.

{17} In *Buie,* the Supreme Court recognized a protective sweep as an exception to the warrant requirement of the Fourth Amendment. 494 U.S. at 336, 110 S.Ct. 1093. In doing so, it described a protective sweep as, "a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Id.* at 327, 110 S.Ct. 1093. The Supreme Court emphasized that the police officer must have a "reasonable belief" that "the area swept harbored an individual posing a danger to the officer or others," *id.* and that a protective sweep is "not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found." *Id.* at 335, 110 S.Ct. 1093. These limiting parameters on a protective sweep have been recognized and followed by our own Supreme Court. *State v. Jacobs,* 2000–NMSC–026, ¶ 35, 129 N.M. 448, 10 P.3d 127. If the police do not conduct a protective sweep commensurate with the rationale that excludes such a search from the warrant requirement, the search violates the Fourth Amendment, and it is unconstitutional. *See State v. Nemeth,* 2001–NMCA–029, ¶ 38, 130 N.M. 261, 23 P.3d 936 (stating that entry into home to perform community caretaking function must be suitably circumscribed to serve the exigency which prompted the entry); *State v. Ledbetter,* 88 N.M. 344, 346, 540 P.2d 824, 825 (Ct.App.1975) ("The scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement.").

{18} Sergeant Depies testified that Officer Melton's role was to determine if any other people were in the motel room that could pose a threat to the officers' safety. However, Officer Melton's testimony shows he was looking for evidence, not people. After entering the bathroom, Officer Melton proceeded to look outside the open window to determine if there was any *evidence* outside the window. Then, seeing "just a light plastic bag" inside the partially opened medicine cabinet, Officer Melton decided to look inside the medicine cabinet. A drawing and photographs of the motel room and bathroom show a traditional medicine cabinet hanging over the sink. It has a mirror on the door which opens to a small storage space for personal toiletries. It is obvious by looking at the medicine cabinet that it is too small for a person to hide inside it. Nevertheless, Officer Melton decided to look inside it because, "[s]everal times that I arrested people I have found narcotics in plastic bags." By his own admission, Officer Melton was looking for *evidence* inside the medicine cabinet, not people who might be threats to the officers. Searching inside the medicine cabinet cannot be justified as a protective sweep exception to the warrant requirement of the Fourth Amendment. *Buie,* 494 U.S. at 327, 110 S.Ct. 1093; *see Wilson,* 36 F.3d at 1306 (stating the seizure of a checkbook from a wastebasket in the bathroom of a motel room "was not justified as a protective sweep because it was not within the narrow ambit of a cursory visual inspection of a place where a person could be hiding").

{19} The State argues that the seizure of the plastic bag was proper because it was in plain view while Officer Melton was in the bathroom. We reject this argument. "Under the plain view exception to the warrant requirement, items may be seized without a warrant if the police officer was lawfully positioned when the evidence was observed, and the incriminating nature of the evidence was immediately apparent, such that the officer had probable cause to believe that the article seized was evidence of a crime." *State v. Ochoa,* 2004–NMSC–023, ¶ 9, 135 N.M. 781, 93 P.3d 1286. The context of the incident, coupled with Officer Melton's experience and training are properly considered in determining whether he identified drug paraphernalia or drug packaging within a reasonable degree of probability sufficient for probable cause. *Id.* ¶¶ 13, 15. In *Ochoa,* the police officer saw a vial protruding from the defendant's pocket while he conducted a protective frisk. He testified he was able to identify it as drug paraphernalia based on his experience. *Id.* ¶¶ 3, 13, 17. In *State v. Miles,* 108 N.M. 556, 557, 775 P.2d 758, 759 (Ct.App.1989), the police officer saw a brown wooden box that was distinctive in appearance lying on the seat in defendant's car after he stopped the defendant for speeding. *Id.* He recognized the box as being drug paraphernalia with a place for a pipe and a compartment for marijuana. *Id.* Again, this was based on his law enforcement experience. *Id.* Here, however, Officer Melton never testified there was anything about the plastic bag when he first saw it which, based upon his law enforcement experience, caused him to believe it was drug paraphernalia or packaging. He only testified that there were times when he made arrests that he found narcotics in plastic bags. This was not sufficient to establish probable cause to open the medicine chest. *See State v. Miyasato,* 805 So.2d 818, 821 (Fla.Dist.Ct.App.2001) ("Even though the officer claimed he saw the corner of a plastic baggie sticking out of [the defendant's] pocket and knew marijuana was often carried in plastic baggies, these facts would give rise to, at most, a mere suspicion that it contained marijuana, which was not enough to seize it.") (internal quotation marks omitted).

{20} All Officer Melton saw before he opened the medicine cabinet was "a plastic bag, just a light plastic bag." There was no evidence that "a plastic bag, just a light plastic bag" in the medicine cabinet was being used for an illegal purpose. Stated another way, the "incriminating nature" of the plastic bag which Officer Melton saw was not "immediately apparent." *See Commonwealth v. Garcia,* 34 Mass.App.Ct. 645, 614 N.E.2d 1031, 1034 (1993) ("Here there was no evidence from the trooper that there was some characteristic of this baggie itself, that would have indicated it was being used for an illegal purpose."). Officer Melton opened the medicine cabinet on the mere suspicion the plastic bag he saw might contain drugs. "[A]n officer's mere suspicion about an ordinary object, which has common, non-criminal uses, will not support probable cause for its seizure." *Ochoa,* 2004–NMSC–023, ¶ 14, 135 N.M. 781, 93 P.3d 1286. The reasons for this rule are apparent:

> Benign objects such as [plastic bags], spoons, mirrors, and straws are often used in the narcotic trade. To allow police officers, experienced in narcotics investigations, to conduct a warrantless search whenever they observe one of the above items, and nothing more, would permit random searches, which are condemned by the Fourth Amendment[.]

Garcia, 614 N.E.2d at 1035.

{21} The search of the medicine cabinet cannot be upheld as a protective sweep. Accordingly, Defendant's motion to suppress the contents of the medicine cabinet and all the fruits of the search of the medicine cabinet should have been granted.

C. Remaining Issues

{22} We address Defendant's argument that the evidence was insufficient to sustain a conviction for Count 1, trafficking by possession with intent to distribute cocaine; Count 2 for conspiracy to commit trafficking by possession with intent to distribute cocaine; and Count 3, for possession of drug paraphernalia. We do so because Defendant would be entitled to a dismissal of these charges if we were to find in his favor on this

issue. *See State v. Santillanes,* 109 N.M. 781, 782, 790 P.2d 1062, 1063 (Ct.App.1990).

{23} In reviewing a claim of insufficiency of the evidence, we determine whether substantial evidence, either direct or circumstantial, exists to support a guilty verdict beyond a reasonable doubt for every essential element of the crimes. *See State v. Rojo,* 1999–NMSC–001, ¶ 19, 126 N.M. 438, 971 P.2d 829. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Wildgrube,* 2003–NMCA–108, ¶ 3, 134 N.M. 262, 75 P.3d 862 (internal quotation marks and citation omitted). We review the evidence in the light most favorable to the verdict, and resolve all conflicts in the evidence and indulge all permissible inferences to uphold the conviction. *See State v. Tollardo,* 2003–NMCA–122, ¶ 24, 134 N.M. 430, 77 P.3d 1023; *State v. Phillips,* 2000–NMCA–028, ¶ 7, 128 N.M. 777, 999 P.2d 421.

{24} To convict Defendant of Count 1, trafficking by possession with intent to distribute cocaine, "the State was required to prove that Defendant had the cocaine in [his] possession, was aware that it was cocaine, and intended to transfer it to another." *State v. Chandler,* 119 N.M. 727, 730, 895 P.2d 249, 252 (Ct.App.1995); *accord* NMSA 1978, § 30–31–20(A)(3) (1990). Constructive possession is sufficient. *See Phillips,* 2000–NMCA–028, ¶¶ 7–8, 128 N.M. 777, 999 P.2d 421. We have carefully reviewed the evidence, and although no drugs, weapons, or drug paraphernalia were found on Defendant's person, the evidence was sufficient to establish a logical connection between Defendant and the drugs found. *See id.* ¶¶ 8–9 (discussing constructive possession). We agree with the State that the following substantial evidence supports a conviction for trafficking cocaine with intent to distribute: (1) Hernandez's testimony that people came to the door asking for Defendant, (2) the presence of a digital scale and razor blade indicating that cocaine was being cut and weighed for distribution, (3) evidence that a portion of the crack cocaine was ready for sale while another bundle was not yet cut in the bathroom, (4) Defendant's presence in the bathroom area, and (5) the testimony of one of the detectives that the quantity seized and the drug paraphernalia were consistent with trafficking. *See State v. Muniz,* 110 N.M. 799, 800, 800 P.2d 734, 735 (Ct.App. 1990) (showing evidence sufficient to find the defendant guilty of intent to distribute).

{25} Defendant argues that the evidence was insufficient to support his conviction for conspiracy to commit trafficking by possession with intent to distribute cocaine as charged in Count 2 because the evidence does not support a finding of who the alleged co-conspirator was. Again, we disagree. The question here is whether the circumstances, taken together, show that Defendant and another party united to accomplish an illegal scheme. *See State v. Hernandez,* 1997–NMCA–006, ¶ 41, 122 N.M. 809, 932 P.2d 499. The agreement is generally a matter of inference from the facts and circumstances of the case. *See State v. Reyes,* 2002–NMSC–024, ¶ 20, 132 N.M. 576, 52 P.3d 948.

{26} Based upon the evidence, the jury could properly conclude that a conspiracy agreement was reached between Defendant and Hernandez. The agreement involved the use of Room 244 to sell cocaine and that Hernandez would guard the door and allow entry to those persons seeking out Defendant to purchase crack cocaine.

{27} Finally, we conclude that the evidence was sufficient to support a conviction for possession of drug paraphernalia as charged in Count 3. The drug paraphernalia consisted of the digital scale found in the search of the motel room. "Proof of possession may be established by evidence of the conduct and actions of a defendant, and by circumstantial evidence connecting defendant with the crime." *State v. Donaldson,* 100 N.M. 111, 119, 666 P.2d 1258, 1266 (Ct.App. 1983) (citation omitted). Sufficient circumstantial evidence connects Defendant with possession of the digital scale in the motel room.

{28} The remaining issues raised by Defendant may or may not arise on the retrial. We therefore do not consider them. *See State v. Herrod,* 84 N.M. 418, 420, 504 P.2d

26, 28 (Ct.App.1972) ("Appellate courts do not give advisory opinions.")

D. Conclusion

{29} The cause is remanded to the district court for a new trial excluding the unlawfully obtained evidence.

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

WE CONCUR: JONATHAN B. SUTIN and RODERICK T. KENNEDY, Judges.

2005-NMCA-040

110 P.3d 526

STARKO, INC., et al., Plaintiffs–Appellees,

v.

CIMARRON HEALTH PLAN, INC., Lovelace Health Systems, Inc., and Presbyterian Health Plan, Inc., Defendants–Appellants.

No. 24,344.

Court of Appeals of New Mexico.

Feb. 16, 2005.

Certiorari Denied, No. 29,120, April 12, 2005.

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Lisa Mann, Jennifer A. Noya, Modrall, Sperling, Roehl, Harris & Sisk, P.A. Albuquerque, NM, for Appellants Cimarron Health Plan, Inc.

John A. Bannerman, Bannerman & Williams, P.A., Albuquerque, NM for Appellants Lovelace Health Systems, Inc.

John B. Pound, Herrera, Long, Pound & Komer, P.A., Santa Fe, NM, for Appellants Presbyterian Health Plan, Inc.

OPINION

BUSTAMANTE, Chief Judge.

{1} This is an appeal brought on behalf of three managed care organizations, Cimarron Health Plan, Inc., Lovelace Health Systems, Inc., and Presbyterian Health Plan, Inc. (MCOs). The MCOs appeal the district court's "new class certification order" filed September 24, 2003.

{2} The specific issue we address is whether an appeal of a grant or denial of class certification under Rule 1–023(F) NMRA is available in a class action where the rule became effective after the original suit was filed, but before the appealing defendants became parties in the case. Because Article IV, Section 34 of the New Mexico Constitution bars the application of a new court rule to a pending case, we hold that Rule 1–023(F) is not available to Defendants, and we dismiss.

FACTS AND PROCEDURAL HISTORY

{3} Plaintiffs are a class of pharmacists/pharmacies participating in the New Mexico Medicaid program. Plaintiffs filed a class action lawsuit in 1997 against the Human Services Department and other state actors alleging that pharmacies were not being properly reimbursed for filling Medicaid recipients' prescriptions under the Public Assistance Act, NMSA 1978, § 27–2–16(B) (1984). After a hearing on Plaintiffs' motion to certify the class, the district court granted class certification. The court filed the original class certification on October 20, 1999. In June 2000, the district court granted Plaintiffs' motion for partial summary judgment, finding, among other things, that Section 27–2–16(B) was a mandatory provision that could not be contracted away; it applied to Medicaid managed care; and the state defendants must set up the Medicaid managed care system so that the MCOs comply with the statute.

{4} Following a status conference in October 2000, the district court directed Plaintiffs to add the MCOs as indispensable parties. Plaintiffs filed their Second Amended Complaint naming the MCOs as Defendants in February 2001. In December 2000, Rule 1–023(F) (allowing discretionary appeals of class certification decisions) became effective. In August 2002, each MCO filed a motion to decertify the class. After briefing and argument on the motions, the district court entered a letter ruling in June 2003 denying the decertification motions. The parties were unable to agree on a form of order and a presentment hearing was held in July 2003. At that time, the district court denied the MCOs' request to make findings as required by NMSA 1978, § 39–3–4 (1999) to allow for an interlocutory appeal. The district court further clarified that the order at issue was a denial of the MCOs' motions to decertify, and under these unique circumstances may be construed as a new class certification as to the MCO defendants. The district court entered its order denying the decertification motions on September 24, 2003, and the MCOs appealed.

ANALYSIS

{5} The MCOs raise three issues on appeal. The MCOs contend that (1) the September 24, 2003, new class certification order from which this appeal is taken, meets the criteria for appellate review pursuant to Rule 1–023(F); (2) the district court's new certification order violates the MCOs' constitutional rights; and (3) the Plaintiffs cannot satisfy the requirements for class certification under Rule 1–023 as to the MCOs. Because we find that this Court does not have jurisdiction

under Rule 1-023(F), we address only the application of Article IV, Section 34 of the New Mexico Constitution to Rule 1-023(F) as applied to this case, and dismiss. Because our decision to dismiss is based solely on the interpretation and applicability of a procedural rule, we leave unanswered other issues raised by the MCOs that may, at a later time, come before this Court.

Standard of Review

{6} Interpretation of the applicability of Article IV, Section 34 of our state constitution to a supreme court rule is a question of law, which we review de novo. *Hyden v. N.M. Human Servs. Dep't,* 2000-NMCA-002, ¶ 12, 128 N.M. 423, 993 P.2d 740.

Discussion

{7} We begin by reviewing the relevant provision of the constitution and case law interpreting it. Article IV, Section 34 of the New Mexico Constitution provides that "[n]o 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." This constitutional provision applies to court rules as well. *See Marquez v. Wylie,* 78 N.M. 544, 546, 434 P.2d 69, 71 (1967) (stating that "the rules of court had no different effect than statutes enacted by the legislature, and that art. IV, § 34, be considered applicable to rules as well as statutes"). The Supreme Court in *Stockard v. Hamilton,* 25 N.M. 240, 245, 180 P. 294, 295 (1919), summarized the purpose of the provision and the meaning of "pending case" as follows:

> It has been held that a case is pending from the time it is instituted until the judgment has been satisfied; that a case is pending, although it has been stricken from the docket; that a case is pending until finally disposed of, and in a divorce action it is pending as long as the parties thereto survive.... The definitions of a pending case vary with the construction of each particular statute. We have been unable to find a constitutional provision like our own. The word "pending," according to Webster and Century Dictionary, means "depending," "remaining undecided," "not terminated," and this meaning of the word should be adopted in this connection. The evident intention of the Constitution is to prevent legislati[ve] interference with matters of evidence and procedure in cases that are in the process or course of litigation in the various courts of the state, and which have not been concluded, finished, or determined by a final judgment.

(Internal citations omitted).

{8} Since *Stockard* was decided, our courts have had occasion to interpret the meaning of whether or not a case was "pending" under Article IV, Section 34. For example, in *Marquez,* the Court held that a rule change extending the time for filing a motion for a new trial from ten to twelve days did not apply to a case that was originally filed prior to the enactment date of the new rule, even though the rule was in effect at the time of filing the motion for a new trial. 78 N.M. at 546, 434 P.2d at 71. In *DiMatteo v. County of Dona Ana,* 109 N.M. 374, 376-77, 785 P.2d 285, 287-88 (Ct.App.1989), this Court addressed the issue of jurisdiction of the Workers' Compensation Division to hear claims being reopened for increased benefits, that were originally filed prior to the Division's creation. Applying Article IV, Section 34, the Court held that the provision that all workers' compensation claims were to be filed with the Workers' Compensation Division only applied to claims filed for the first time after the Division was created, and not to claims being reopened to adjust benefits. *Id.* at 377, 785 P.2d at 288. This Court addressed the issue again in *Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ.,* 115 N.M. 229, 236, 849 P.2d 372, 379 (Ct.App.1993), holding that the case was pending from the time the original complaint was filed, even after state court jurisdiction was suspended following removal to federal court. Thus, even when state court jurisdiction was temporarily suspended, the case was still considered "pending." *See also Gray v. Armijo,* 70 N.M. 245, 253, 372 P.2d 821, 827 (1962) (holding that case filed after enactment of statute was not pending, even though triggering event occurred prior to enactment of statute); *Brown v. Bd. of*

Educ., 81 N.M. 460, 461, 468 P.2d 431, 432 (Ct.App.1970) (holding that where original filing of case preceded enactment of statute that changed appeal procedure, an old statute in effect at the time the case was filed governs because case was pending when a new statute was enacted).

{9} There is no discussion in the case law about the pendency of a case being dependent upon when parties entered a lawsuit. The general rule derived from the case law is that a case is pending once it is filed, or where the district court or administrative agency retains jurisdiction, but is no longer pending once a final decision is entered in a case and the court or agency no longer has jurisdiction, regardless of who the parties are or when they joined the litigation.

{10} With this understanding of Article IV, Section 34, we now turn to the rule allowing appeals from class certification decisions. Rule 1-023(F) provides that: "The Court of Appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten (10) days after entry of the order." The rule became effective in December 2000, after the original lawsuit was filed in this case, but before the MCOs were added as Defendants.

{11} The MCOs advance several arguments in support of their position that Rule 1-023(F) applies, and that this Court has jurisdiction. We address each argument in turn. The MCOs first argue that since they were not added as parties to the case until after the enactment of Rule 1-023(F), the case was not "pending" as to them when the rule became effective. The MCOs cite to no authority in support of the proposition that the phrase "pending case" refers to parties in the lawsuit, rather than the case itself. We acknowledge that this case presents an unusual situation for the MCOs. If Rule 1-023(F) does not apply in this case, the MCOs are uniquely denied any recourse under the rule. At the presentment hearing, the district court denied the MCOs' request to make findings as required by Section 39-3-4 that would allow the MCOs to request an interlocutory appeal. The district court stated, "[a]nd I think that's where the right of appeal is going to lie with 23-F." The MCOs did not have an opportunity to challenge the original class certification because they were not parties to the case at the time that certification was granted. With Rule 1-023(F) being inapplicable, the MCOs are not able to appeal the new certification order under the rule.

{12} Although the MCOs make an attractive argument, it fails for two reasons. First, the primary rule of construction is that, when possible, we give effect to the clear and unambiguous language of the constitutional provision, the goal being "to give effect to the intent and objectives of the framers." *State v. Isaac M.*, 2001-NMCA-088, ¶ 5, 131 N.M. 235, 34 P.3d 624. The plain language of Article IV, Section 34 indicates that it applies to "any pending case" and makes no reference to "parties" in the case. To interpret the provision to apply to parties in the case is inconsistent with our rules of construction. It puts language into the constitution that is not there, is inconsistent with case law interpreting the constitutional provision, and is inconsistent with the intent of the provision.

{13} Second, as stated in *Stockard*, 25 N.M. at 245, 180 P. at 295, the intent of the provision is to prevent interference with cases that are in the process of litigation and not yet determined by final judgment. The aim is to avoid having changes in the procedural rules governing a case while the case is still pending. To have different procedural rules apply to different parties throughout litigation, as the MCOs suggest, would be grossly contrary to the goals of consistency.

{14} This ties in closely with the MCOs' next argument, which is that to treat this case as "pending" as to the MCOs would not advance the purpose that Article IV, Section 34 was designed to serve. The MCOs claim the purpose of Article IV, Section 34 is to prevent interference with cases during the course of adjudication through the adoption of rules that effectively "decide the merits of [the] consolidated cases under the guise of changing the procedure" to be applied. *In re Held Orders of U.S. West Communications,*

Inc., 1999–NMSC–024, ¶¶ 14, 16, 127 N.M. 375, 981 P.2d 789. According to the MCOs, Rule 1–023(F) does not work the type of change in procedure that the constitutional provision aims to prohibit, and only affects the appeal procedure in a de minimis way. Prior to the adoption of Rule 1–023(F), class certification orders were reviewable by discretionary, interlocutory appeal. *See Ridley v. First Nat'l Bank,* 87 N.M. 184, 185, 531 P.2d 607, 608 (Ct.App.1974). Similarly, Rule 1–023(F) provides for discretionary review. The MCOs argue that the difference in the appeal procedures between an interlocutory appeal and a Rule 1–023(F) is minimal, and does not offend the purpose of the constitutional provision.

{15} This argument also fails. Rule 1–023(F) allows an appeal of a district court order granting or denying class certification at the discretion of the Court of Appeals. Prior to enactment of the rule, appeals from the grant or denial of class certification were by interlocutory appeal. Interlocutory appeals require the district court to issue an interlocutory order pursuant to Section 39–3–4. One major difference between the two procedures is that there are two layers of discretion in interlocutory appeals. The district court has discretion in issuing an interlocutory order or decision, and the appellate court has discretion in granting or denying the appeal. Interlocutory appeals also require the existence of a substantial difference of opinion on a controlling issue of law and that immediate appeal would substantially advance the resolution of the case. Section 39–3–4. Under Rule 1–023(F), the discretion lies solely with the Court of Appeals. Contrary to the MCOs' argument, we do not find this difference to be de minimis. We believe this is precisely the type of procedural change the constitution sought to prevent, and is similar to the changes in procedure we discussed in *Marquez* and *Brown.* If we were to adopt the MCOs' argument, the procedure for appellate review in this case would vary by party in the same lawsuit. And, as applied to future cases, different procedural rules could apply to different parties in a case, depending on when the parties joined the lawsuit. This is the type of inconsistency the constitution sought to prevent, and we find that the purpose of the constitution is upheld by holding Rule 1–023(F) inapplicable in this case.

{16} The MCOs next argue that Rule 1–023(F) applies because where the Supreme Court has wished to make amendments to the Rules of Civil Procedure apply only to cases filed after a certain date, it has explicitly done so. The MCOs rely on the revision of Rule 1–068 NMRA, "Offer of settlement," as an example, where the Supreme Court expressly indicated the rule was "effective for cases filed on or after August 1, 2003." Vol. 42, No. 26, SBB 11. Our Supreme Court has addressed and rejected this exact argument in *Marquez.* The Court in *Marquez,* 78 N.M. at 547, 434 P.2d at 72 stated, "[w]e decline to imply . . . that the omission of the words 'filed in the district court after . . .' was intended by us to have any particular meaning." In other words, omission of the language "effective date," or language in the rule that says the rule applies to cases filed after a certain date, cannot be given a particular meaning as argued by the MCOs. While it is true that the Supreme Court could have indicated that Rule 1–023(F) applies to cases filed after a certain date, its failure to do so is of no significance.

{17} Finally, the MCOs' reliance on federal case law in determining the applicability of Rule 1–023(F) is misplaced. Cases interpreting the federal counterpart to the New Mexico Rules of Civil Procedure are often instructive, but that is not the case here because there is no federal counterpart to Article IV, Section 34.

CONCLUSION

{18} In sum, we find that this case was pending within the meaning of the N.M. Const. art. IV, § 34 at the time Rule 1–023(F) became effective, and therefore, appeal under the rule is not available to the MCOs. This Court does not have jurisdiction under Rule 1–023(F) to hear this appeal, and we therefore dismiss.

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

WE CONCUR: A. JOSEPH ALARID and CYNTHIA A. FRY, Judges.

2005-NMCA-042

110 P.3d 531

STATE of New Mexico, Plaintiff–Appellee,

v.

Hector Nicholas GARCIA, Defendant–Appellant.

State of New Mexico, Plaintiff–Appellee,

v.

Juan Carlos Munoz, Defendant–Appellant.

Nos. 24,072, 24,065.

Court of Appeals of New Mexico.

Feb. 28, 2005.

Certiorari Denied, No. 29,130, April 12, 2005.

Certiorari Granted, No. 29,135, April 15, 2005.

Patricia A. Madrid, Attorney General, Santa Fe, NM, Max Shepherd, Assistant Attorney General, Albuquerque, NM, for Appellee.

Liane E. Kerr, Albuquerque, NM, for Appellant Hector Nicholas Garcia.

John Bigelow, Chief Public Defender, Sheila Lewis, Assistant Appellate Defender, Santa Fe, NM, for Appellant Juan Carlos Munoz.

OPINION

SUTIN, Judge.

{1} These cases arose out of a melee at an apartment complex in Las Cruces, New Mexico, consisting of serious altercations between two groups of young men. One group consisted of Alex Medina (Victim) and his friends, and the other consisted of Defendant Juan Carlos Munoz, Defendant Hector Nicholas Garcia, and their friends. Munoz and

Garcia fired shots from Munoz's apartment at Victim's vehicle as the vehicle was either leaving the area, or had left and was coming back to the apartment complex. A bullet hit and killed Victim. We affirm Defendants' convictions.

PROCEDURAL BACKGROUND

{2} Based on uncertainty as to who fired the fatal bullet, Defendants were charged: in Count 1 of their indictments with felony murder or, alternatively, depraved mind murder, each a first degree murder charge, *see* NMSA 1978, § 30–2–1(A)(2), (3) (1994); in Count 2 with shooting at or from a motor vehicle resulting in great bodily harm, *see* NMSA 1978, § 30–3–8(B) (1993); in Count 3 with aggravated battery (deadly weapon), *see* NMSA 1978, § 30–3–5(A), (C) (1969); and in Counts 4 and 5 with aggravated assault (deadly weapon), *see* NMSA 1978, § 30–3–2(A) (1963). The jury was instructed on second degree murder and voluntary manslaughter as lesser offenses of Count 1.

{3} The jury found Defendants guilty of the crimes charged in Counts 2 through 5. The jury informed the court that it could not reach a verdict on the charge in Count 1 as to each Defendant. Based on the jury's inability to reach a verdict on the first degree murder charges in Count 1, the court declared a mistrial as to each Defendant.

{4} As the State was preparing for a second trial on the first degree murder charges, Defendants entered no contest pleas to second degree murder. Defendants reserved their right to appeal. The district court entered judgments showing Defendants convicted of, and sentencing Defendants on, Count 1, second degree murder; Count 2, shooting at or from a motor vehicle (great bodily harm); Count 3, aggravated battery (deadly weapon); and Counts 4 and 5, aggravated assault (deadly weapon).

{5} On appeal, Munoz asks this Court to determine that his plea was not knowing, intelligent, and voluntary because he was not advised that the most serious charge he faced at retrial was voluntary manslaughter, not second degree murder. He claims that he should have been advised of this because the district court failed to properly poll the jury, resulting in an implied acquittal on the second degree murder charge. He asserts he should therefore be permitted to withdraw his plea to second degree murder. He claims ineffective assistance of counsel as the basis for this relief.

{6} In addition, Munoz appeals on the further grounds that: on double jeopardy grounds, his conviction of shooting at a motor vehicle resulting in death barred retrial on the murder charge; the court erred in excluding Victim's blood alcohol content; and the court erred in admitting evidence of weapons that were not used in the commission of any crime.

{7} Garcia raises six issues on appeal, three of which are ones Munoz has also raised, namely: his convictions for shooting at a motor vehicle resulting in death and second degree murder violate double jeopardy; the court erred in excluding Victim's blood alcohol content; and the court erred in admitting evidence of weapons that were not used in the commission of any crime. Garcia's other appellate issues are that the district court: erred in excluding evidence of a prior altercation involving Victim; erred in excluding evidence of a witness's prior convictions; and erred by improperly admitting certain photos of Victim.

DISCUSSION

{8} We have consolidated these two appeals, *State v. Garcia*, Docket No. 24,072, and *State v. Munoz*, Docket No. 24,065, for purposes of disposition of these cases on appeal. We discuss the facts material to Defendants' appellate points under our separate discussions of the points.

Ineffective Assistance of Counsel—Munoz Only

{9} Garcia did not raise ineffective assistance of counsel on appeal. Munoz contends he did not receive effective assistance of counsel, because his counsel failed to advise him at the time of his plea to second degree murder that the highest degree of crime on which he could be retried was voluntary manslaughter. Underlying this contention is Munoz's further assertion that, based on the district court's failure in the first trial to poll the jury as to its deliberations on the second

degree murder charge, there was an implied acquittal as to second degree murder and the State was legally precluded from retrying Munoz on the first degree murder charge under principles of double jeopardy.

{10} Munoz's point on appeal requires us to determine whether the district court was required to poll the jury in regard to its deliberations on second degree murder. We view this issue as dispositive on Munoz's claim of ineffective assistance of counsel. The issue is one of law; we review issues of law de novo. *See State v. Moore*, 2004–NMCA–035, ¶ 12, 135 N.M. 210, 86 P.3d 635; *State v. Galaz*, 2003–NMCA–076, ¶ 4, 133 N.M. 794, 70 P.3d 784.

{11} For his implied acquittal and double jeopardy arguments, Munoz relies on *State v. Castrillo*, 90 N.M. 608, 566 P.2d 1146 (1977), *State v. Wardlow*, 95 N.M. 585, 624 P.2d 527 (1981), and Rule 5–611(D) NMRA. We discuss *Castrillo* and *Wardlow* at the outset. We then recite in more detail what occurred at trial. Following that, we discuss the legal effect of what occurred in court.

{12} In *Castrillo*, charges of first and second degree murder and voluntary manslaughter were, as in the present case, submitted to the jury. *Id.* at 610, 566 P.2d at 1148. The jury stated it was unable to reach a verdict, and the court declared a mistrial without inquiring into the jury's deliberations. *Id.* at 610, 613, 566 P.2d at 1148, 1151. The defendant was retried and found guilty of second degree murder. *Id.* at 610, 566 P.2d at 1148. The defendant appealed on double jeopardy grounds. *Id.* The *Castrillo* Court noted that "[a] manifest necessity for the declaration of a mistrial is shown since the jury could not agree to at least one of the included offenses within the murder charge." *Id.* at 613, 566 P.2d at 1151. However, the Court also noted that the record was "silent upon which, if any, of the specific included offenses the jury had agreed and upon which the jury had reached an impasse." *Id.* The Court further noted that "[t]he record is clear . . . that the jury did not acquit the defendant on all offenses." *Id.* The Court stated that its holding in *State v. Spillmon*, 89 N.M. 406, 553 P.2d 686 (1976), "dictates a dismissal upon double jeopardy grounds as to such offenses on which the record is unclear." *Castrillo*, 90 N.M. at 613, 566 P.2d at 1151. The Supreme Court further stated:

> [T]he record is not clear as to which of the included offenses the jury was considering at the time of its discharge. Without inquiry by the trial court into the jury's deliberations on the greater, included offenses, no necessity is manifest to declare a mistrial as to those offenses and thus jeopardy has attached. Jeopardy did not attach to the offense of voluntary manslaughter which was the least of the included offenses. Had the jury reached a unanimous decision on that offense it could not have been in the posture it announced to the court.

Id. at 613–14, 566 P.2d at 1151–52.

{13} In *Spillmon*, the jury deadlocked on first and second degree murder, and found the defendant guilty of attempted robbery and not guilty of burglary. 89 N.M. at 407, 553 P.2d at 687. No mistrial was declared. *Id.* The district court set the case for retrial on the murder charge and the defendants moved to dismiss on double jeopardy grounds. *Id.* Our Supreme Court held that: "to try these defendants again on the murder charge would constitute double jeopardy because the trial court concluded the proceedings without declaring a mistrial and without reserving the power to retry those issues upon which the jury could not agree. If a mistrial had been properly declared, . . . the State would be free to assert its claims before another jury." *Id.* According to the Court, when the district court finds "there is a reasonable probability that the jury could not agree," a manifest necessity exists to discharge the jury. *Id.* (internal quotation marks and citation omitted). In *Spillmon*, apparently because the district court failed to make such a finding and declare a mistrial, "the record [did] not disclose a 'manifest necessity' for the discharge of the jury and a final termination of the trial," requiring our Supreme Court to hold that further proceedings were barred because the defendants had already been placed in "jeopardy." *Id.* at 408, 553 P.2d at 688.

{14} The Court in *Castrillo* seems to have equated the district court's failure in *Castril-*

lo to inquire of the jury as to its deliberations with the court's failure in *Spillmon* to make a finding that there was a reasonable probability that the jury could not agree, thus, in effect, reading *Spillmon* to require more of the court than mere acknowledgment of the jury's announcement of deadlock. No inquiry having been made "into the jury's deliberations on the greater, included offenses," the Supreme Court in *Castrillo* determined that "no necessity is manifest to declare a mistrial as to those offenses and thus jeopardy has attached." *Id.* at 613–14, 566 P.2d at 1151–52. The *Castrillo* Court held that jeopardy did not attach to the offense of voluntary manslaughter, which was the least included offense, and the Court remanded for retrial on voluntary manslaughter. *Id.* at 614, 566 P.2d at 1152. As in *Spillmon,* the Court in *Castrillo* "resolve[d] any doubt in favor of the liberty of the citizen." 90 N.M. at 613, 566 P.2d at 1151 (internal quotation marks and citation omitted).

{15} After *Castrillo,* the Supreme Court decided *Wardlow,* 95 N.M. 585, 624 P.2d 527, a 1981 case in which a charge of battery on a peace officer and the sole lesser included offense of simple battery were at issue. Our Supreme Court read *Castrillo* to "require[ ] that where a jury is deadlocked on a charge involving included offenses, the trial court must determine whether the jury has voted to acquit or convict the defendant on any of the lesser-included offenses." *Wardlow,* 95 N.M. at 587, 624 P.2d at 529. In *Wardlow,* after being informed by the jury that it was deadlocked on the charge of battery on a peace officer, the court questioned the jury further. *Id.* at 586, 624 P.2d at 528. The foreman indicated "that there was a unanimous vote that there was no simple battery." *Id.* The court sought clarification, and the foreman replied that "[t]he vote is not unanimous for battery upon a peace officer." *Id.* (internal quotation marks omitted). Thus, upon questioning the jury as to the lesser included charge of simple battery, the district court understood the jury to have "voted neither to acquit nor convict the defendant . . . but [to have] considered the charge inappropriate." *Id.* at 587, 624 P.2d at 529. It was clear, however, that the jury deadlocked on the greater charge of battery on a peace officer. *Id.* On appeal, the Supreme Court read the circumstances to be that the jury considered the simple battery charge first, afterwards moving to the greater charge and indicating that "the true deadlock was between the option of finding Wardlow guilty on the greater offense or acquitting him, and that the jury did not have the intent to acquit Wardlow on the lesser offense." *Id.* Thus, the Court held that manifest necessity for a mistrial was supplied through the jury's inability to agree on a verdict and jeopardy did not attach. *Id.* at 587–88, 624 P.2d at 529–30.

{16} We realize that one might read *Castrillo* to require district courts to follow certain rules when a first degree murder charge and the lesser included charge of second degree murder are submitted to a jury and the jury indicates it is unable to reach a verdict on the greater charge. *Castrillo* states that "when a jury announces its inability to reach a verdict . . ., the trial court [is] required to submit verdict forms to the jury to determine if it has unanimously voted for acquittal on any of the included offenses." 90 N.M. at 611, 566 P.2d at 1149. *Castrillo* also states that "[a] trial court should not accept an announcement as to the jury vote on any included offense until the jury has carried its deliberations as far as possible." *Id. Castrillo* further states that the district court must inquire into the jury's deliberations on the greater, included offenses, for, without such inquiry, "no necessity is manifest to declare a mistrial as to those offenses and thus jeopardy has attached." *Id.* at 613–14, 566 P.2d at 1151–52. Moreover, one might also understand the Supreme Court to have intended the words, "any of the included offenses," "any included offense," and "greater, included offense," to have meant and included the first degree murder charge and the lesser included second degree murder charge.

{17} Nevertheless, we think it important to note that nothing in *Spillmon* indicates, and nowhere in *Castrillo* is it expressly stated, that the district court in either case was required to make its finding regarding deadlock beyond the first degree murder charges, if indeed the jury was deadlocked at that

level. Further, nothing in the analyses in *Spillmon, Castrillo,* or *Wardlow* explains why a district court must inquire beyond the jury's deliberations on first degree murder, assuming a deadlock at that level. In addition, in *Spillmon* and *Castrillo* the lower courts did not even inquire as to the jury's first degree murder deliberations. Thus, based on the circumstances we discuss later in this opinion, and for the reasons that follow, we conclude that the district court in the present case was not required to inquire beyond the jury's first degree murder deliberations.

{18} The district court submitted to the jury an instruction conforming to UJI 14–250 NMRA. The instruction, commonly referred to as a "step-down" instruction, required the jury first to address first degree murder, and decide whether Munoz was guilty; if unable to decide Munoz was guilty of that charge, the jury was required to address second degree murder; if unable to decide Munoz was guilty of that charge, the jury was required to address voluntary manslaughter and decide whether Munoz was guilty of that charge. The jury was also instructed that if it had reasonable doubt as to whether Munoz committed any of the crimes, the jury was to determine that Munoz was not guilty of that crime, and if the jury found him not guilty of all of the crimes, it must return a verdict of not guilty.

{19} After submission of the jury instructions in the present case, the jury sent a note to the court stating, "We have deliberated and discussed our differences as to the charges in count one and [cannot] come to an agreement. We have come to an agreement on the [sic] counts two, three[,] four and five. How should we proceed?" The court sought input from counsel and then stated to counsel that it planned pursuant to Rule 5–611(D) to:

> call the jury in and have them affirm that they've arrived at a verdict as to Counts 2, 3, 4 and 5 as to each defendant, and they are hung as to Count 1.
>
> . . . [W]e'll inquire where the jury stands with respect to each of the two forms of first-degree murder. If they've reached a unanimous agreement as to those, and they are not guilty, then the Court will inquire as to the status on second degree. If they unanimously agree not guilty as to that one, then the Court will inquire as to voluntary manslaughter. If they have not agreed as to either form of first-degree murder, that will end the inquiry, and the Court will declare a mistrial as to Count 1 entirely.

No party objected to this plan.

{20} The court called the jury in and confirmed that the jury had reached verdicts on Counts 2 through 5. The court ascertained that the jury was unable to reach a decision as to Count 1. The court then read the verdicts on Counts 2 through 5. The parties waived the polling of the jury on Counts 2 through 5. The court then announced it was going to declare a mistrial as to Count 1. The following then occurred:

> [DEFENSE]: Did you inquire as to whether they had reached a unanimous—
>
> THE COURT: I'm going to.
>
> [DEFENSE]: Don't we have to do that before you declare a mistrial?
>
> THE COURT: I think, before we find out where they are on any given count, I have to declare the mistrial first.
>
> [DEFENSE]: Okay. I'm sorry, Your Honor. (NOTE: Bench Conference concluded.)
>
> THE COURT: Ladies and gentlemen, the Court has declared a mistrial as to Count 1.
>
> I want to ask a few questions of you, . . ., as the foreperson.
>
> As to Hector Nic[h]olas Garcia, was the jury able to reach a unanimous agreement as to first-degree murder, which is killing by an act greatly dangerous to others?
>
> JUROR: No, sir.
>
> THE COURT: Was the jury able to reach a unanimous agreement as to Hector Garcia as to felony murder, which is first-degree murder?
>
> JUROR: No, sir.
>
> THE COURT: As to the defendant Juan Carlos Munoz, was the jury able to reach a unanimous agreement as to first-degree murder, killing by an act greatly dangerous to others?

JUROR: No, sir.

THE COURT: As to Juan Carlos Munoz, was the jury able to reach a unanimous agreement as to felony murder, which is murder in the first degree?

JUROR: No, sir.

THE COURT: Counsel, is there any further inquiry?

[PROSECUTOR]: Not from the State, Your Honor.

[DEFENSE]: No, Your Honor.

At the conclusion, the State reserved the right to retry Defendants on Count 1, the felony murder and the depraved mind murder charges. The court permitted retrial in its order declaring a mistrial. The record does not reflect any objection by Munoz to the reservation of the right to retry him on Count 1 or to the court's decision to permit retrial.

{21} We do not think that *Castrillo* or *Wardlow* requires the conclusion that the district court in the present case failed to properly poll the jury by failing to specifically inquire into the jury's deliberations on the second degree murder charge. Nor do we think that these cases require a determination of acquittal on the second degree murder charge for failure to conduct such inquiry. The district court in *Castrillo* did not conduct inquiry into deliberations on any charge; therefore, there was no need for the court to analyze, and we do not believe it in that case analyzed whether, if it had inquired and determined a deadlock as to first degree murder, the court was required to continue its inquiry in regard to the jury's deliberations on second degree murder. *See Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, ¶ 6, 133 N.M. 661, 68 P.3d 901 (indicating propriety of Court of Appeals distinguishing prior Supreme Court case when present case under consideration involves a different issue than the prior case or facts that distinguish the present case from the analysis in the prior case); *Fernandez v. Farmers Ins. Co. of Ariz.*, 115 N.M. 622, 627, 857 P.2d 22, 27 (1993) (holding cases are not authority for propositions not considered); *State v. Wenger*, 1999-NMCA-092, ¶ 10, 127 N.M. 625, 985 P.2d 1205 (same), *rev'd on other grounds sub nom. State v. Johnson*, 2001-NMSC-001, 130 N.M. 6, 15 P.3d 1233. We do not, therefore, read *Wardlow* as locking in a rule that a failure to inquire as to second degree murder deliberations requires an acquittal on that charge. These cases did not, in our opinion, intend to require inquiry into the jury's second degree murder deliberations under the circumstances here. *See State v. Baca*, 115 N.M. 536, 540, 854 P.2d 363, 367 (Ct.App.1993) (stating that "[w]hile we are conscious of the controlling nature of Supreme Court precedent, *see Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973), we do not believe that the Supreme Court meant to expand the scope of [Rule] 11-405(B) [NMRA] in *Baca* [,]" and noting that the language in the Supreme Court's *Baca* case on which the defendants relied "was not necessary to the court's resolution of the issues in that case").

{22} Analysis of this issue requires the conclusion that, in cases in which first and second degree murder charges are submitted to the jury, a district court need only inquire whether the jury has truly deadlocked on the greater offense of first degree murder. This is because when a jury is in deadlock on a single murder count containing first and second degree murder charges, as in the present case, it would appear to be logically inconsistent, if not a logical impossibility, for the jury to deadlock on the greater offense of first degree murder and acquit on the lesser included offense of second degree murder.[1] Thus, once the court has ascertained by inquiry of the jury that the jury was unable to reach a verdict on the first degree murder charge, we see no reason why the court should have to inquire any further down the line. Apparently, in the present case, the

1. The logical inconsistency, if not impossibility, is shown by this example: Assume first degree murder is comprised of elements A, B, C, and D, and second degree murder, a pure lesser included offense, is comprised of elements B, C, and D. The jury states it is deadlocked on first degree murder. Deadlock means that one or more, but not all, jurors have voted to convict on first degree murder. This means that one or more jurors have found that the State proved A and B and C and D beyond a reasonable doubt. Those one or more jurors cannot, then, logically vote to acquit on second degree murder.

district court did not think it had to continue to poll the jury as to second degree murder. Under analysis, we hold that further inquiry was not necessary under manifest necessity or double jeopardy rationales.

{23} Further, to hold lack of further inquiry in this case to be reversible error would have the effect of encouraging defendants to knowingly sit by and allow a court to err by an incomplete jury inquiry. The effect would be to permit defendants to benefit by an implied acquittal when, if the defendants had objected at the time and permitted the court to cure the problem, the inquiry would have continued, and the jury surely would have indicated that it was deadlocked on second degree murder and a mistrial as to second degree murder would have been appropriate. Such a mischievous strategy on the part of a defendant undermines the administration of justice. Of course, defense counsel may simply be ignorant of the issue at the time of polling, permitting the court to err because of that ignorance. And, of course, appellate counsel for the defendants would no doubt raise ineffective assistance of counsel for failing to alert the court to the incomplete inquiry. Nevertheless, we do not see silence of defense counsel, whether ignorant or planned, as constituting ineffective assistance of counsel under these circumstances. The circumstances do not rise to a level of objectively unreasonable defense counsel performance or prejudice to Munoz to permit a determination of ineffective assistance of counsel. *See Patterson v. LeMaster*, 2001–NMSC–013, ¶ 17, 130 N.M. 179, 21 P.3d 1032 (setting out the "reasonableness" and "prejudice" prongs of the test for a prima facie case of ineffective assistance); *see also Lytle v. Jordan*, 2001–NMSC–016, ¶ 25, 130 N.M. 198, 22 P.3d 666 (setting out two components, whether defense counsel's performance was deficient, and whether the deficient performance prejudiced the defendant).

{24} Another mischief could result from the rule Munoz advocates, which is demonstrated by what almost happened in *Wardlow*, i.e., the jury could unanimously think that the lesser included offense is simply inappropriate and could be encouraged to acquit on it, if required to state a position on it in response to a poll. For example, in the case of first and second degree murder and voluntary manslaughter, the jury could unanimously be of the opinion that there was no sufficient provocation and be hung between first and second degree murder. If the inquiry were required to proceed beyond first degree murder and all the way down to voluntary manslaughter, there is the danger of an acquittal of voluntary manslaughter, which would then preclude conviction on the higher offenses even though each and every juror believes that a defendant is guilty beyond a reasonable doubt of one or the other higher offense.

{25} Rule 5–611(D) does not change our view. When a jury is instructed as it was in the present case, and it "cannot unanimously agree upon any of the offenses submitted," Rule 5–611(D) requires that:

> [T]he court shall poll the jury by inquiring as to each degree of the offense upon which the jury has been instructed beginning with the highest degree and, in descending order, inquiring as to each lesser degree until the court has determined at what level of the offense the jury has disagreed. If upon a poll of the jury it is determined that the jury has unanimously voted not guilty as to any degree of an offense, a verdict of not guilty shall be entered for that degree and for each greater degree of the offense.

{26} We first note that the committee commentary to Rule 5–611 states that paragraphs A, B, D, and E of the rule were derived from Rule 31 of the Federal Rules of Criminal Procedure and Rule 32 of the Colorado Rules of Criminal Procedure. We have reviewed those rules in their current state and with respect to our Rule 5–611(D) they are too different to assist in resolving the issues before us. It is apparent that Rule 5–611(D) was likely drafted, for the most part, based on the committee's reading of *Castrillo*. *See* Rule 44 NMRA (Supp.1978).

{27} We think it significant that Rule 5–611(D) requires the court to make inquiry only "until the court has determined at what level of the offense the jury has disagreed" after beginning "with the highest degree." Rule 5–611(D). This is in conformity with

our view of what should be required when the jury states it is deadlocked on a count including first degree murder and the jury has been instructed on the lesser included offense of second degree murder. That is, the court need inquire no further than first degree murder if that is the highest level of the offense at which the jury has disagreed.

{28} As we have analyzed *Castrillo* and the need or lack of need for further inquiry past first degree murder deliberations, we see no basis on which to invoke the last sentence of Rule 5–611(D) in the present case. Further, even if *Castrillo* were read as Munoz wants, *Castrillo* does not appear to have required the court to inquire whether the jury unanimously voted not guilty as to voluntary manslaughter, since the Court in *Castrillo* required retrial on that charge, holding that jeopardy did not attach to it as "the least of the included offenses." 90 N.M. at 614, 566 P.2d at 1152.

{29} Based on the foregoing analyses, we hold that the district court in the present case did not err in the manner in which it polled the jury. The court's poll was sufficient for it to conclude manifest necessity to declare a mistrial as to Count 1. Defendant could properly have been retried on first and second degree murder offenses. We therefore reject Munoz's claim that he was denied effective assistance of counsel.

Double Jeopardy—Both Garcia and Munoz

{30} Under double jeopardy principles, Defendants assert that their convictions for shooting at a motor vehicle under Section 30–3–8(B) precluded the State from seeking a further conviction for first or second degree murder under Section 30–2–1. This issue was recently addressed adversely to Defendants' contention in *State v. Dominguez*, 2005–NMSC–001, ¶¶ 15–16, 137 N.M. 1, 106 P.3d 563.

Exclusion of Victim's Blood Alcohol Content—Garcia and Munoz

{31} The district court excluded a toxicology report showing Victim's blood alcohol content (BAC) to be .245 percent at the time of his death. The court excluded the report on relevancy grounds, *see* Rule 11–402 NMRA, stating:

> [While] [i]t is certainly scientifically or medically believed that over .08 may result in impairment of the ability to safely operate a vehicle, it is not relevant to an essential element in this case or to the defense.
>
> As I understand the evidence, everyone was drinking, and the jury is certainly going to know that, and the Court feels that [that] evidence can be considered by the jury. The Court is of the opinion [the deceased's BAC] doesn't indicate whether someone is aggressive, passive, happy, sad, angry, et cetera. There is no criteria or scientifically established principle on that that I am aware of.

We review the exclusion of evidence under an abuse of discretion standard. *See State v. Stampley*, 1999–NMSC–027, ¶ 37, 127 N.M. 426, 982 P.2d 477.

{32} On appeal, Munoz asserts that the evidence would discredit the testimony of Victim's friends, who, Munoz also asserts, essentially testified that they all had not drunk much. He also states that the evidence supports his claim of self-defense, putting together the following argument. Munoz first argues that an exception to Rule 11–404(A) NMRA against admission of character evidence to prove conformity on a particular occasion allows the defense to offer evidence of a "pertinent trait of character of the victim." *See* Rule 11–404(A)(2). Munoz further argues that where the pertinent character trait of a victim goes toward proving an essential element of the defense, a defendant can prove specific instances of the victim's conduct under Rule 11–405(B). From there, Munoz argues that when the defense is self-defense, a defendant can present a victim's conduct that shows the defendant was reasonable in his apprehension of the victim and shows who was the first aggressor. Therefore, Munoz concludes, Victim's character in this case constitutes an element of self-defense that properly can be proven by a specific instance of conduct. Thus, the toxicology report was "essential to prove self-defense" and was being offered "to counteract the [S]tate's claim that a reasonable person in Mr. Munoz'[s] position would

not have shot at [Victim]" and to show that because Victim was extremely intoxicated, Munoz was reasonable in his apprehension and, further, that Victim was the first aggressor. Garcia argues that the BAC of .245 percent was relevant to Victim's state of mind and participation as first aggressor.

{33} Under an abuse of discretion test, we cannot agree that the district court's ruling was "clearly untenable or not justified by reason." *State v. Woodward*, 121 N.M. 1, 4, 908 P.2d 231, 234 (1995) (internal quotation marks and citation omitted); *State v. Litteral*, 110 N.M. 138, 141, 793 P.2d 268, 271 (1990). Nor do we think the court's ruling was "clearly against the logic and effect of the facts and circumstances of the case." *Woodward*, 121 N.M. at 4, 908 P.2d at 234 (internal quotation marks and citation omitted); *State v. Telles*, 1999–NMCA–013, ¶ 12, 126 N.M. 593, 973 P.2d 845. Although Defendants contend that evidence of Victim's .245 percent BAC would have tended to show that Defendants were reasonable in their apprehension and that Victim was the first aggressor, Defendants have not supplied authority to support this proposition. There undoubtedly is in many instances a correlation between alcohol and violence. However, as the district court observed, although it is clear that BAC may demonstrate impaired ability to drive a motor vehicle, a correlation between BAC and aggressiveness seems speculative unless tied more specifically to an individual's history. As such, the probative value of the BAC evidence in this case is questionable at best. *Cf. id.* ¶ 14 (holding BAC of .05 percent not relevant in vehicular homicide case to show that the victim somehow contributed to the accident). Even if some relevance had been found, the district court could properly have determined that any slight probative value that the BAC evidence might have had was outweighed by its prejudicial effect. *Cf. State v. Meadors*, 121 N.M. 38, 48, 908 P.2d 731, 741 (1995) (upholding the district court's limitation of cross-examination concerning the extent of the victim's drug abuse, in light of its limited probative value and the prejudicial effect of the evidence). Further, we have held that specific instances of conduct are not admissible under Rule 11–405(B) to prove Victim was the first aggressor. *See Baca*, 115 N.M. at 540, 854 P.2d at 367.

{34} Moreover, although Defendants were not permitted to introduce Victim's BAC, evidence was presented to the jury indicating that Victim had been drinking prior to the shooting incident. For example, there was evidence that a thirty-pack of beer which was missing twenty-three cans was in Victim's car, and that Victim and his three companions each had four to six beers before they arrived at the apartment complex. There was also evidence of Victim's conduct. After Victim and his friends came to the apartment uninvited, they quickly engaged in a fight and seriously beat one of Munoz's guests. Also there was evidence that, later on, Victim tried to punch Munoz and they scuffled; one of Victim's friends had a tire iron in hand and also fought with Munoz. There was also evidence that Munoz and Garcia both saw Victim with a small caliber gun. According to some witnesses, at some point when a free-for-all erupted between the two groups, Victim tried to fire the gun into the crowd, but the gun jammed. The jury was aware of the evidence of Victim's drinking and behavior occurring before Munoz and Garcia got rifles from Munoz's apartment and Victim was back in his vehicle. As a result, we conclude that the exclusion of the BAC evidence did not prejudice Defendants. *See State v. Wildgrube*, 2003–NMCA–108, ¶ 11, 134 N.M. 262, 75 P.3d 862.

{35} Finally, the evidence of Defendants' series of shots at Victim's vehicle is plentiful. This evidence, together with the abundance of other evidence before the jury regarding Defendants and Victim, persuades us that evidence of Victim's BAC was not important to Defendants for the purpose of attempting to discredit Victim's friends' testimony. Admission of this evidence would have had a minuscule impact, if any at all, on Munoz's or Garcia's guilt or innocence. Defendants have not shown a reasonable probability that the inability to use this evidence to attempt to discredit witnesses contributed to their convictions. *See State v. Baca*, 1997–NMSC–045, ¶ 22, 124 N.M. 55, 946 P.2d 1066 ("If the court erred in denying the [d]efendant use of the evidence, no relief is warranted unless

the Defendant also shows a reasonable probability the ruling contributed to his conviction.").

{36} For all of the foregoing reasons, we hold that the district court did not err in excluding the evidence of Victim's BAC.

Admission of Evidence Regarding Other Weapons—Garcia and Munoz

{37} In the course of the trial, several witnesses testified about the presence of firearms at the scene. Apart from the testimony concerning the rifles in question and a Luger handgun that were present in Munoz's apartment, witnesses also testified that additional firearms were contained in a truck owned by Munoz and parked in the vicinity. The weapons in Munoz's truck were a Tech .22 and a .38 caliber revolver. Defendants objected on relevancy grounds to evidence regarding these two weapons. The court allowed the evidence. Later, when the jury submitted a question to the court, "Why were the handguns in the truck?" Defendants moved for a mistrial, asserting that the evidence created a false collateral issue. Defendants also asserted that the evidence concerning the presence of the firearms in the truck was improperly placed before the jury to attempt to show nothing more than Munoz was a "gun nut," in order to inflame the jury. The motion for a mistrial was denied. Munoz asserts on appeal that the court erred in allowing this evidence—evidence that, according to Munoz, was in effect improper character evidence used by the State to inflame the jury. Garcia asserts on appeal that he was entitled to a mistrial as a result of admission of the evidence—evidence that according to Garcia, was neither relevant nor probative.

{38} We review the district court's decision to admit evidence under an abuse of discretion standard. *See Stampley*, 1999–NMSC–027, ¶ 37, 127 N.M. 426, 982 P.2d 477; *Baca*, 1997–NMSC–045, ¶ 22, 124 N.M. 55, 946 P.2d 1066. An abuse of discretion relating to the admission of evidence is measured by whether the district court's ruling was "clearly untenable or not justified by reason," and by whether the ruling was "clearly against the logic and effect of the facts and circumstances of the case." *Woodward*, 121 N.M. at 4, 908 P.2d at 234 (internal quotation marks and citation omitted); *Telles*, 1999–NMCA–013, ¶ 12, 126 N.M. 593, 973 P.2d 845. A decision to grant or deny a motion for a mistrial is reviewed for an abuse of discretion. *See State v. Varela*, 1999–NMSC–045, ¶ 28, 128 N.M. 454, 993 P.2d 1280 (stating that an "[a]buse of discretion exists when the trial court acted in an obviously erroneous, arbitrary, or unwarranted manner" (internal quotation marks and citation omitted)); *State v. Simonson*, 100 N.M. 297, 301, 669 P.2d 1092, 1096 (1983); *State v. Burdex*, 100 N.M. 197, 200, 668 P.2d 313, 316 (Ct.App.1983).

{39} We find no abuse of discretion in this case. One of the State's witnesses testified, without objection, about the presence of one gun in Munoz's truck. The defense then cross-examined the witness on that subject, eliciting testimony that he was unaware of any other firearms in the truck and that the witness had not seen either Defendant go to the truck during the altercations. Only later, when a separate witness began to testify about his discovery of weapons in the truck, did the defense raise any objection. Because "the horse was already out of the barn" in regard to at least one gun in Munoz's truck, Defendants' objections were untimely and failed to preserve the issue for review on appeal. *State v. Neswood*, 2002–NMCA–081, ¶ 18, 132 N.M. 505, 51 P.3d 1159 (holding an objection untimely when raised after the testimony has been heard, such that the issue would not be considered on appeal).

{40} Defendants did timely object to the admission of evidence concerning the .38 caliber revolver in Munoz's truck. The State contends that the prejudicial effect of this evidence was slim to nonexistent. We agree. The jury had already heard a good deal of evidence concerning guns, including Munoz's two rifles, a Luger, and a Tech .22. The testimony concerning the presence of a .38 caliber weapon in the glove box of Munoz's truck cannot have had any prejudicial impact on the verdict. *See State v. Christopher*, 94 N.M. 648, 653, 615 P.2d 263, 268 (1980) (holding that the admission of testimony concerning the presence of a gun in the family home

may have been inadmissible, but the evidence "was miniscule [sic] in relation to the overwhelming amount of evidence" properly before the jury, such that any error was harmless and the district court properly denied a motion for mistrial); *Burdex*, 100 N.M. at 200, 668 P.2d at 316 (stating that "[e]rror in the admission of evidence is harmless if the evidence was not such that it could have substantially contributed to the conviction"). "Even if the testimony should not have been admitted, the district court acted well within the bounds of its discretion in determining that the evidence did not so taint the trial as to require a mistrial." *State v. Foster*, 1998-NMCA-163, ¶ 24, 126 N.M. 177, 967 P.2d 852; *see also Varela*, 1999-NMSC-045, ¶ 28, 128 N.M. 454, 993 P.2d 1280 (stating that the appellate court will not disturb the denial of a motion for mistrial absent an abuse of discretion).

Exclusion of Evidence of a Prior Altercation–Garcia

{41} Garcia contends that the district court erred in excluding evidence of a separate, earlier altercation at another location involving Victim and Munoz. We review the district court's ruling for abuse of discretion. *See Stampley*, 1999-NMSC-027, ¶ 37, 127 N.M. 426, 982 P.2d 477; *Baca*, 1997-NMSC-045, ¶ 22, 124 N.M. 55, 946 P.2d 1066.

{42} We observe that Garcia failed to make an offer of proof of the circumstances of an earlier altercation. *See generally* Rule 11-103(A)(2) NMRA (requiring a party to make an offer of proof in order to preserve error concerning the exclusion of evidence). This prevents us from evaluating the merits of Garcia's claim of error on appeal. *See, e.g., State v. Garcia*, 100 N.M. 120, 123, 666 P.2d 1267, 1270 (Ct.App.1983) (addressing Rule 11-103(A)(2) and concluding that the defendant failed to make an offer of proof necessary to preserve the issue of whether the district court properly excluded testimony).

{43} Even if the record were adequate, we believe the district court's ruling was within its discretion. It appears that the admissibility of the evidence in question is controlled by Rule 11-404(B), the "prior bad acts" rule. Generally speaking, evidence of prior bad acts is subject to exclusion unless it bears on something other than propensity. *See State v. Niewiadowski*, 120 N.M. 361, 363-64, 901 P.2d 779, 781-82 (Ct.App.1995) (observing that evidence of "other bad acts can be admissible if it bears on [an] issue . . . in a way that does not merely show propensity"); *State v. Jones*, 120 N.M. 185, 187, 899 P.2d 1139, 1141 (Ct.App.1995) (cautioning that "courts must be careful in admitting other-bad-acts evidence because of its large potential for prejudice" and observing that such evidence may only be admitted "to show some proper purpose . . . that is not character or propensity"). In the course of the proceedings below, Garcia specifically argued that the evidence of the prior altercation should have been admitted because it tended to prove "that these people had the propensity . . . of getting into a fight that night." Because evidence of prior bad acts for this purpose is subject to exclusion under Rule 11-404(B), the district court did not abuse its discretion in excluding the evidence.

{44} Garcia attempts to show error by contending that the evidence in question was admissible under Rule 11-404(B) as probative of motive, intent, knowledge, absence of mistake, and/or context. By this argument, we understand Garcia to suggest that the prior incident had some bearing on the issue of self-defense, as tending to establish that Victim was the first aggressor. However, evidence of the prior altercation was not admissible to show that Victim was the first aggressor. *See Baca*, 115 N.M. at 540, 854 P.2d at 367 (holding that specific incidents of a victim's conduct are not admissible to show that the victim was the first aggressor).

{45} Finally, even though the district court found the evidence of the prior incident to be more prejudicial than probative, given the limited information that is available to this Court on appeal, we are not in a position to evaluate the district court's assessment. *See State v. Rojo*, 1999-NMSC-001, ¶ 53, 126 N.M. 438, 971 P.2d 829 ("Where there is a doubtful or deficient record, every presumption must be indulged . . . in favor of the correctness and regularity of the [trial] court's judgment." (internal quotation marks

and citation omitted) (alteration in original)); *State v. Brown,* 116 N.M. 705, 706, 866 P.2d 1172, 1173 (Ct.App.1993) (same).

{46} For all of the foregoing reasons, we reject Garcia's assertion of error as to the court's exclusion of evidence of a prior altercation between Victim and Munoz.

Exclusion of Evidence Concerning Prior Convictions—Garcia

{47} Garcia asserts that the district court prohibited him from inquiring about the prior convictions of one of the witnesses for the State, Jeffrey Pate, and Garcia contends that he was improperly precluded from fully examining this witness about his motive for testifying.

{48} Although the record contains pretrial and sidebar exchanges concerning Garcia's entitlement to information about the witness's prior convictions, it is devoid of any indication that Garcia was prevented from any proper exploration of the witness's criminal background or motive. In fact, the witness admitted that he had prior convictions when he took the stand. Because Garcia failed to object to the information provided, failed to make any offer of proof, and fails to cite to relevant portions of the record, Garcia's claim of error is unpreserved, unsupported by the record, and deficiently briefed. *Cf. Rojo,* 1999–NMSC–001, ¶ 53, 126 N.M. 438, 971 P.2d 829 ("Where there is a doubtful or deficient record, every presumption must be indulged ... in favor of the correctness and regularity of the [trial] court's judgment." (internal quotation marks and citation omitted) (alteration in original)); *State v. Herrera,* 2004–NMCA–015, ¶¶ 8–9, 135 N.M. 79, 84 P.3d 696 (observing that "a defendant can waive fundamental rights, including constitutional rights," and holding that a defendant waives the right to confrontation by failing to enter an objection); *Brown,* 116 N.M. at 706, 866 P.2d at 1173 ("[O]n a doubtful or deficient record, we presume regularity and correctness in the proceedings below.").

Admission of Photographs of Victim—Garcia

{49} Garcia challenges the admission of two photographs depicting Victim with his children, taken prior to his death, and three photographs of Victim's condition after he received the fatal gunshot wound. The court admitted the former on the ground the State was entitled to humanize Victim and the latter for the purpose of showing the nature of the injury.

{50} "A trial court has great discretion in balancing the prejudicial impact of a photograph against its probative value." *Mora,* 1997–NMSC–060, ¶ 55, 124 N.M. 346, 950 P.2d 789. We review the admission of photographs under the abuse of discretion standard. *State v. Pettigrew,* 116 N.M. 135, 139, 860 P.2d 777, 781 (Ct.App.1993). In this case, the photographs of Victim after death were used to show the nature of the injury, to explain the basis of the forensic pathologist's opinion, and to illustrate the forensic pathologist's testimony. It is well established that photographs may properly be admitted for such purposes, even if they are gruesome. *See, e.g., Mora,* 1997–NMSC–060, ¶¶ 54–55, 124 N.M. 346, 950 P.2d 789 (upholding the admission of photos of a child homicide victim on grounds they were illustrative); *State v. Perea,* 2001–NMCA–002, ¶ 22, 130 N.M. 46, 16 P.3d 1105 (holding that a potentially inflammatory photograph of a victim's face was relevant and that its admission was well within the discretion of the district court), *aff'd in part and vacated in part,* 2001–NMSC–026, 130 N.M. 732, 31 P.3d 1006; *Pettigrew,* 116 N.M. at 139, 860 P.2d at 781 (holding that photos of a battered victim were relevant to depict the extent of the victim's injuries and to illustrate a physician's testimony, and that the admission of the photos was not an abuse of discretion); *State v. Blakley,* 90 N.M. 744, 748, 568 P.2d 270, 274 (Ct.App.1977) (holding that a photograph of the body of the victim at the scene was relevant and admissible because it "illustrated, clarified, and corroborated the testimony of various witnesses"). Accordingly, we perceive no abuse of discretion in the admission of photographs of Victim after receiving the fatal gunshot wound.

{51} Garcia argues that admission of the portrait photographs of Victim

prior to his death was error because Victim's identity was not at issue and, therefore, there was no need to establish Victim's identity by use of the photographs. *Cf. State v. Baros,* 87 N.M. 49, 50, 529 P.2d 275, 276 (Ct.App. 1974) (holding that the admission of a photograph of a homicide victim for the purpose of identification was within the discretion of the district court, and determining that a family photo excluded by the court as prejudicial that was inadvertently seen by two jurors was harmless error). However, we cannot conclude that the court abused its discretion in the present case by admitting the photographs of Victim when he was alive. There no doubt may be instances in which a photograph of a victim while alive can have no legitimate purpose than to inflame the passions of the jury against a defendant, with that likely effect. But Garcia points to no particular circumstances in his case, or to any particular aspect of the admitted photographs, that necessarily move the admission of the photographs from fair humanization of Victim to unfair and prejudicial inflammation such that the court's admission of the photographs constituted an abuse of discretion. *Cf. State v. Webb,* 81 N.M. 508, 510, 469 P.2d 153, 155 (Ct.App.1970) ("The question of admissibility of photographic evidence, objected to as being inflammatory of the passions and prejudices of the jury, is largely one of discretion to be exercised by the trial court. Ordinarily, the trial court's discretion thereon will not be disturbed on appeal." (citations omitted)). Further, even if the admission of the photographs of Victim with his children was an abuse of discretion, we conclude that the error was harmless. *See State v. Roybal,* 107 N.M. 309, 312, 756 P.2d 1204, 1207 (Ct. App.1988) (holding admission of challenged evidence is harmless error where the record contains other properly admitted evidence that independently establishes guilt). The photographic evidence is minuscule in comparison with the evidence supporting Defendants' convictions, including the testimony of numerous eyewitnesses, experts, and investigators, as well as testimony that Garcia and Munoz each fired a rifle at Victim's vehicle. Because the photos are not likely to have contributed to Defendants' convictions, we conclude that reversible error was not committed. *See Baros,* 87 N.M. at 50, 529 P.2d at 276 (holding that the admission of a family photo was harmless error in light of the overwhelming evidence in support of the conviction).

CONCLUSION

{52} We affirm the convictions of both Defendants, Garcia (Docket No. 24,072) and Munoz (Docket No. 24,065).

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

WE CONCUR: LYNN PICKARD and CELIA FOY CASTILLO, Judges.

2005-NMCA-043

110 P.3d 544

Carolyn WEGNER and Elaine Mosqueda, Workers–Appellants,

v.

HAIR PRODUCTS OF TEXAS, and Spring Tyme, Employers,

and

New Mexico Uninsured Employers' Fund, Insurer–Appellee.

No. 24,627.

Court of Appeals of New Mexico.

March 2, 2005.

Victor A. Titus, Titus & Murphy Law Firm, Farmington, NM, for Appellants.

Patricia A. Madrid, Attorney General, Santa Fe, NM, Robert M. Aurbach, Special Assistant Attorney General, Albuquerque, NM, for Appellee.

OPINION

CASTILLO, Judge.

{1} In this case, we must determine if the provisions of the New Mexico statute creating an uninsured employers' fund (statute) apply prospectively or retroactively to the claims of Appellants Wegner and Mosqueda. We hold that the terms of the statute apply prospectively, and we affirm.

I. BACKGROUND

{2} Wegner was injured on February 9, 1998. She timely filed her claim against her employer and was awarded compensation by orders entered in 1999 and 2001. Wegner's employer was uninsured at the time of the injury, and no benefits have been paid. On July 18, 2003, Wegner filed a claim for payment from the uninsured employers' fund under the statute.

{3} Mosqueda's case is similar. She was injured on April 6, 2000. A compensation order against the employer was issued in 2002. Mosqueda's employer was uninsured at the time of her injury, and she has been paid no benefits. Mosqueda filed her claim against the uninsured employers' fund on June 26, 2003.

{4} Enacted by the legislature during the 2003 regular session, the statute is found in 2003 New Mexico Laws, Chapter 258, Section 1, and was compiled in NMSA 1978, § 52–1–9.1 (2003) (amended 2004),[1] as part of the Workers' Compensation Act (Act), NMSA 1978, §§ 52–1–1 to –70 (1929, as amended through 2004). The statute provides that the fund be administered by the workers' compensation administration and directs the administration to establish rules to administer the fund. Section 52–1–9.1(A). Payments from the fund may be made for "workers['] compensation benefits to a person entitled to the benefits when that person's employer has failed to maintain workers' compensation coverage because of fraud, misconduct or other failure to insure or otherwise make compensation payments." Section 52–1–9.1(D). Although the initial appropriation to establish the fund was made by the legislature for fiscal year 2004, 2003 N.M. Laws, ch. 258, § 2, the terms of the statute require annual funding from employers in the form of a fee that is to be paid quarterly at a rate established annually by the administration. Section 52–1–9.1(B), (C). The rate has a cap but must be sufficient to generate enough income to meet payments from the fund for the next

1. References in this opinion are to the form of the statute passed in 2003 because the 2003 version was in effect when Appellants filed their claims.

fiscal year. *Id.* Funding is also derived from fund income, reimbursements, penalties, or money otherwise allocated to the fund. Section 52–1–9.1(B), (C), (H), (J).

{5} By operation of law, the statute became effective on June 20, 2003. N.M. Const. art. IV, § 23 ("Laws shall go into effect ninety days after the adjournment of the legislature enacting them, except general appropriation laws[.]"). The parties agree that Wegner and Mosqueda were injured before the effective date of the statute and that in both cases, supplemental compensation orders were entered prior to the effective date of the statute. Wegner and Mosqueda filed claims for payment from the fund and named the New Mexico Uninsured Employers' Fund (Fund) as a defendant. Their cases were consolidated. The Workers' Compensation Judge (WCJ) heard arguments on cross-motions for summary judgment and granted summary judgment in favor of the Fund on January 30, 2004. Wegner and Mosqueda appealed.

II. DISCUSSION

{6} We must determine whether the WCJ erred in determining that the statute should be given prospective application only. Appellants make three arguments in support of reversal. First, they argue that public policy enunciated in the statute supports retroactive applicability. In this regard, Appellants also assert that the statute does not impair existing rights or create new obligations. We evaluate this contention, together with Appellants' second argument: that the statute is procedural, not remedial, in nature and can therefore be applied retroactively. Lastly, Appellants argue that their claims against the Fund did not accrue until after passage of the statute in question and therefore should be covered by the statute. While we are sympathetic to Appellants and the fact that they have received no benefit coverage, we do not believe that the legislature intended the statute to apply to claims that accrued before the effective date of the statute.

A. Public Policy

{7} Interpreting a statute is a question of law; therefore, our review is de novo. *Meyers v. W. Auto,* 2002–NMCA–089, ¶ 13, 132 N.M. 675, 54 P.3d 79. Our goal is to give primary effect to the intent of the legislature. *Id.* Generally, a statute is to be applied prospectively, unless the legislature clearly intended otherwise. *City of Albuquerque v. State ex rel. Los Ranchos de Albuquerque,* 111 N.M. 608, 616, 808 P.2d 58, 66 (Ct.App.1991). Legislative silence is not a reliable indicator of intent. *Swink v. Fingado,* 115 N.M. 275, 283, 850 P.2d 978, 986 (1993). The prospective application of a newly enacted statute must be determined by the words of the statute, the legislature's intent in enacting the statute, and the public policy considerations that are evident from the statute. *Id.* at 284, 850 P.2d at 987.

{8} Here we are dealing with an amendment to the Act. In *Jojola v. Aetna Life and Casualty,* 109 N.M. 142, 143, 782 P.2d 395, 396 (Ct.App.1989), we observed the sui generis nature of worker's compensation law and reviewed the various cases that had analyzed the effective date of amendments to the Act. We set forth "a simple rule upon which the legislature and litigants can rely: in the absence of express statutory language or compelling reasons to the contrary, any new provisions of the Workers' Compensation Act shall apply only to causes of action accruing after the effective date of the provision." *Id.* at 144, 782 P.2d at 397. The parties agree that the legislature did not explicitly state that the enactment was to have retroactive application.

{9} The compelling reason to apply the statute retroactively, according to Appellants, is enunciated in the public policy of the statute, specifically in Section 52–1–9.1(H), which begins with the following language: "For the purpose of ensuring the health, safety and welfare of the public[.]" The "public," according to Appellants, refers to the working men and women of New Mexico. Based on this interpretation, Appellants contend that the statute is intended to protect these working men and women by addressing the "former hole in the system," which the legislature corrected by enactment of the statute. Appellants conclude that the public policy of the statute is to insure that all

injured workers be compensated, regardless of the insurance status of their employers, and that this policy provides the compelling reason for allowing retroactive application.

{10} The Fund contends that the legislature had three purposes in mind when it enacted this legislation: (1) to provide injured workers with a new remedy, (2) to impose quasi-criminal sanctions on employers who fail to insure properly their workers, and (3) to spread equitably the economic burden of fund maintenance among all the payers of workers' compensation benefits. We believe that the Fund has the better argument. The statute is extensive in nature. It provides an additional remedy for those injured workers whose employers have not paid benefits as required by law. Section 52–1–9.1(C). In order for injured employees to recover under this new remedy, the statute creates a fund and sets out how it is to be administered. Section 52–1–9.1(A), (B). It establishes a mechanism for ongoing funding, places a cap on expenditures, and creates an incentive system that encourages employers to pay benefits under the Act. Section 52–1–9.1(B), (G), (H). Given the comprehensive nature of the statute and its effect on the entire workers' compensation system, we see no compelling reason to deviate from the general rule and allow a claim for payment under this statute, regardless of accrual date. The statute affects not only workers but the entire workers' compensation system. The statute also affects the public, to the extent that workers receiving benefits will not look to the welfare system for support.

{11} In further reviewing the statute, we observe that the public policy language relied on by Appellants introduces Section 52–1–9.1(H); the actual content of the subsection, however, relates to penalty payments and reimbursement to the fund by uninsured employers. Payments to injured employees are addressed in Section 52–1–9.1(D), (E). Accordingly, it appears to us that this particular public policy announcement by the legislature is directed to employers and that it provides the basis for imposing penalties and reimbursement obligations on employers who do not provide the required benefits to injured employees.

B. Procedural Versus Remedial Statute

{12} Appellants contend that the statute is procedural in nature because no rights or remedies are impaired or created and because the statute merely establishes a procedure that makes it easier for employees to receive the benefits to which they are entitled. Appellants point out that the rights of injured employees are not changed; these employees remain entitled to the same benefits they would have received had their employers been properly insured. Based on this, Appellants conclude that the statute should be applied retroactively.

{13} We agree with Appellants that employees remain entitled to the same benefits they would have received had their employers been insured. Section 52–1–9.1(D), (E). However, the statute provides an additional remedy, under which employees may petition for these benefits. Section 52–1–9.1. Section 52–1–9.1(B) requires an uninsured employer to pay an uninsured employer's fee on a quarterly basis. Section 52–1–9.1(H) requires an uninsured employer to reimburse the fund and pay penalties. The imposition of fees and the requirement to make reimbursements and pay penalties are new obligations imposed on employers by the statute. In reading the language of Section 52–1–9.1(B), (H), we conclude that these new obligations can only begin after the date of enactment. Any other interpretation would cause an absurd result: there would be no specific date from which to impose these obligations, and an employer would not know when its liability would begin. "We do not adopt an interpretation of a statute that leads to absurd results." *State v. Adam M.*, 1998–NMCA–014, ¶ 24, 124 N.M. 505, 953 P.2d 40.

{14} In response, Appellants urge us to treat these quasi-criminal remedies as separate issues and deal with them another day, "between other participants not parties to this action." This approach would have us evaluate the effective date of the statute in a piecemeal fashion, an approach we will not adopt. *See State v. Rivera*, 2004–NMSC–001, ¶ 13, 134 N.M. 768, 82 P.3d 939 (direct-

ing that in interpreting a statute, an appellate court must look at a particular statute's function within a comprehensive legislative scheme and that a statutory subsection must be considered in reference to the statute as a whole). If retroactive application of a newly enacted law attaches new legal consequences to events completed before its enactment, substantial rights are affected, and prospective application is generally required. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 270, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (stating that presumption against statutory retroactivity is based on the unfairness that results when new burdens are placed on persons after the fact); *Swink*, 115 N.M. at 290, 850 P.2d at 993. Clearly, there is a question about the constitutionality of imposing penalties and requiring reimbursement based on events that predate enactment of the statute imposing the new obligations. *See Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 33, 132 N.M. 207, 46 P.3d 668 (clarifying that if retroactive application of a statute results in attaching legal consequences to events completed before enactment, prospective application may be required by the New Mexico Constitution).

{15} We do not agree with Appellants' characterization of the statute. As we explained in the preceding paragraph, the statute is substantive legislation that creates new duties, rights, and obligations. As such, the statute is to be applied prospectively. *Id.; see Consol. Freightways, Inc. v. Subsequent Injury Fund*, 110 N.M. 201, 204, 793 P.2d 1354, 1357 (Ct.App.1990) (holding that new provisions of the Act "apply only to causes of action accruing after the effective date of the provision"). Further, we presume that the legislature, when it enacted the statute, was aware of our holdings in *Jojola* and *Consolidated Freightways* and how the effective date of an amendment to the Act is interpreted. *Herrera v. Quality Imps.*, 1999-NMCA-140, ¶ 8, 128 N.M. 300, 992 P.2d 313 (stating that the "[l]egislature is presumed to know of existing law when it enacts legislation" (internal quotation marks and citation omitted)).

C. Claim Accrual

{16} Appellants argue that because no cause of action under the statute could accrue until after creation of the fund, their claims accrued after passage of the statute, and Appellants should be allowed to recover under the statute. We agree that any right to recover from the fund did not arise until after the effective date of the statute. The accrual date, however, depends on the event that triggers the right. Relying on *Jojola* and *Consolidated Freightways*, Appellants argue that the operable event is the passage of the statute. Our reading of these cases is otherwise.

{17} *Jojola* and *Consolidated Freightways* dealt with amendments to the Subsequent Injury Fund (SIF). In *Jojola*, we held that an amendment requiring the pre-injury filing of a certificate of preexisting impairment would only be applicable to causes of action accruing after the effective date of the amendment. 109 N.M. at 143–44, 782 P.2d at 396–97. The operative date in *Jojola* was the date of the subsequent injury, which is the same as the date of injury under the Act. *Id.* at 142–43, 782 P.2d at 395–96. Therefore, our holding essentially stated that the filing requirement would apply only to those cases wherein the injury occurred after the effective date of the amendment. *Id.* at 144, 782 P.2d at 397.

{18} In *Consolidated Freightways*, we reviewed the same amendment, requiring a certificate of preexisting injury, as well as another amendment, requiring the filing of a notice of claim ninety days before the actual filing of a claim against the SIF. 110 N.M. at 203, 793 P.2d at 1356. We saw no reason to apply different effective dates to the two amendments and reiterated our holding in *Jojola:* "[N]ew provisions of the Workers' Compensation Act shall apply only to causes of action accruing after the effective date of the provision." *Consol. Freightways*, 110 N.M. at 204, 793 P.2d at 1357. One of SIF's arguments in that case was very similar to Appellants' contention here: that the employer's action against the SIF was not pending until the date the claim was actually filed—in that case, on May 16, 1988, which was two months after the amendment's effective date. *Id.* In *Consolidated Freightways*, we relied on *Jojola* and rejected SIF's posi-

tion that the date of claim filing is the same as the date of claim accrual and held that the date the claim was filed was "irrelevant to the prospective application of the amended provision." *Consol. Freightways,* 110 N.M. at 204, 793 P.2d at 1357. Accordingly, we continue to rely on *Jojola* and *Consolidated Freightways* for the proposition that amendments to the Act shall apply only to "causes of action accruing after the effective date of the provision." *Jojola,* 109 N.M. at 144, 782 P.2d at 397; *see Consol. Freightways,* 110 N.M. at 204, 793 P.2d at 1357.

{19} In the cases of Appellants, there is no dispute that the events upon which a claim against the fund would be premised occurred well before the effective date of the statute. The date of claim accrual in this case does not mean the date the new remedy was created by the statute. Rather, we look to the date of injury, which triggers the cause of action under the Act. Consequently, we agree with the Fund: a claimant is limited to an employee whose injury occurs after the effective date of the statute.

D. Agency Interpretation of the Statute

{20} The Fund, in its answer brief, points to the regulations adopted by the workers' compensation administration, arguing that the agency's interpretation of the statute is entitled to deference by the courts. Specifically, 11.4.12.8.B(1) NMAC (2004) limits claims to "injuries or illnesses that arose from accidents or exposures occurring on or after June 22, 2003." The workers' compensation administration is directed to adopt rules to administer the fund pursuant to the provisions of the statute. Section 52–1–9.1(A). The first set of regulations governing the fund was adopted on October 15, 2003. The claims in this case were filed between three and four months before the regulations were promulgated. We have interpreted the statute such that the WCJ is affirmed; thus, there is no need to address this issue.

III. CONCLUSION

{21} Based on the foregoing, we affirm the order of the WCJ dismissing Appellants' claims against the Fund.

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

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

2005-NMSC-011

110 P.3d 1071

Justin BAKER and Bobbie Baker, Plaintiffs–Respondents,

v.

BP AMERICA PRODUCTION COMPANY, f/k/a Amoco Production Company, a foreign corporation, Defendant–Petitioner.

No. 28,654.

Supreme Court of New Mexico.

March 31, 2005.

Modrall, Sperling, Roehl, Harris & Sisk, P.A., Kenneth L. Harrigan, Earl E. Debrine, Jr., Albuquerque, NM, for Petitioner.

Branch Law Firm, Turner W. Branch, Law Offices of Brian K. Branch, Brian K. Branch, Albuquerque, NM, Chain, Younger, Cohn & Stiles, Milton Younger, Bakersfield, CA, for Respondents.

Miller Stratvert, P.A., Marte D. Lightstone, Kelsey D. Green, Albuquerque, NM, for Amicus Curiae, New Mexico Oil & Gas Association.

OPINION

BOSSON, Chief Justice.

{1} In this appeal we decide where venue lies in an action involving multiple defendants, all of which are foreign corporations. *See* NMSA 1978, § 38–3–1 (1988). The district court ruled that venue was proper in any county as to nine of the foreign corporations because these defendants did not maintain a statutory agent in the state. The court then concluded that venue was also proper in any county against Defendant British Petroleum (BP), although BP maintains a statutory agent with a residence in Lea County, New Mexico. On certiorari, BP contends that the district court wrongfully denied its motion to dismiss for improper venue. Applying our venue statute, we reverse the district court. We also take this opportunity to reverse in part a prior decision of the Court of Appeals, *Toscano v. Lovato,* 2002–NMCA–022, 131 N.M. 598, 40 P.3d 1042.

BACKGROUND

{2} Plaintiffs Justin and Bobby Baker, both California residents, filed a personal injury action in Santa Fe County after an oilfield accident in San Juan County, New Mexico. Plaintiff Justin Baker alleged an injury due to a defective drilling rig that was manufactured and distributed by nine foreign corporations (Manufacturing Defendants). None of the Manufacturing Defendants are admitted to do business in New Mexico, or have a statutory agent in the state. Plaintiffs also sued BP, as operator of the well, on a theory of ultra-hazardous or inherently dangerous activity. Pursuant to our corporate registration and venue statutes, BP is admitted to do business in New Mexico and maintains a statutory agent in Lea County. *See* NMSA 1978, § 53–17–1 (1975); § 38–3–1(F). BP does not have a statutory agent in Santa Fe County.

{3} In response to the complaint, BP moved to dismiss for improper venue under Rule 1–012(B), arguing that the venue statute did not authorize venue in Santa Fe County for BP. The relevant subsections of the venue statute provide:

> All civil actions commenced in the district courts shall be brought and shall be commenced in counties as follows and not otherwise:
>
> A. 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.
>
> . . . .
>
> F. 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.

Section 38–3–1. Given that Plaintiffs resided out-of-state, BP contended that venue was proper only in San Juan County, the site of the accident, or in Lea County, the residence of its statutory agent. *See* § 38–3–1(F). BP does not dispute that Santa Fe County is a proper venue for the Manufacturing Defendants.

{4} The district court denied BP's motion. In so doing, the court correctly held that the Manufacturing Defendants can be sued in any county in New Mexico, including Santa Fe County, because the Manufacturing Defendants are not admitted to do business and did not designate statutory agents in New Mexico. The district court then concluded that because venue was proper in Santa Fe

County for the Manufacturing Defendants, venue was also proper for BP. The court relied on *Toscano,* 2002–NMCA–022, ¶ 27, 131 N.M. 598, 40 P.3d 1042 (holding that venue is proper in any New Mexico county for an action against a non-resident insurance company, and that therefore the same venue is proper for a resident defendant who resided in another county). The district court certified its ruling for interlocutory appeal, but the Court of Appeals declined to accept review. This Court granted BP's petition for writ of certiorari, finding the proper interpretation of the venue statute to be a matter of substantial public interest. *See* Rule 12–502(C)(4)(d) NMRA 2005.

{5} We now decide whether a proper venue for a foreign corporation that has no statutory agent in New Mexico can also establish venue for a foreign corporation that does have an appointed statutory agent, but in a different county.

DISCUSSION

{6} A motion to dismiss for improper venue based on the meaning of the venue statute involves questions of law, which we review *de novo. Cooper v. Chevron U.S.A., Inc.,* 2002–NMSC–020, ¶ 5, 132 N.M. 382, 49 P.3d 61. Venue "relates to the convenience of litigants" and "reflect[s] equity or expediency in resolving disparate interests of parties to a lawsuit in the place of trial." *Team Bank v. Meridian Oil Inc.,* 118 N.M. 147, 150, 879 P.2d 779, 782 (1994) (quoted authorities omitted). Our courts have noted that New Mexico's venue statute is expansive and provides plaintiffs with broad discretion in choosing where to bring an action. *See Sunwest Bank v. Nelson,* 1998–NMSC–012, ¶ 10, 125 N.M. 170, 958 P.2d 740; *Toscano,* 2002–NMCA–022, ¶ 7, 131 N.M. 598, 40 P.3d 1042. Yet we have also said that "the venue rules reflect an attempt to balance the common-law right of a defendant to be sued in his most convenient forum (usually the county of his residence) with the right of the plaintiff to choose the forum in which to sue." *Team Bank,* 118 N.M. at 150, 879 P.2d at 782.

{7} We begin by considering the text of the venue statute. One of the ways the legislature attempts to balance the rights of the parties is by giving plaintiffs wide latitude in selecting a forum under Section 38–3–1(A), while also providing a special rule in actions against foreign corporations under Section 38–3–1(F). The residence of the defendant determines which subsection applies. *See Cooper,* 2002–NMSC–020, ¶ 5, 132 N.M. 382, 49 P.3d 61. If the defendant is a New Mexico resident, then Section 38–3–1(A) allows the lawsuit to be filed in any county in which a plaintiff or a defendant resides. Subsection A provides that when there is more than one resident plaintiff or defendant, venue is proper in any county where one of the parties resides.

{8} If the defendant is a foreign corporation, however, Subsection A directs our attention to Subsection F. *See* § 38–3–1(A) ("[E]xcept as provided in Subsection F of this section relating to foreign corporations. . . ."). According to Subsection F, if the foreign corporation defendant does not have a registered statutory agent in New Mexico, then the corporation is treated as any other type of non-resident and venue lies in any county in New Mexico. However, if the foreign corporation defendant "maintain[s] a statutory agent in this state upon whom service of process may be had," venue is proper in the county where the statutory agent resides, in the county where the plaintiff is a resident, or where the cause of action originated. Section 38–3–1(F).

{9} Despite the language in Subsection F limiting venue for foreign corporations with statutory agents, Plaintiffs allege that venue is still appropriate in Santa Fe County. They argue that the Manufacturing Defendants are non-resident corporations that may be sued in Santa Fe County, and that once a proper venue is established for the Manufacturing Defendants, it is also proper for BP. To support their interpretation of the venue statute, Plaintiffs rely on the prior interpretation of the statute by our Court of Appeals in *Toscano,* 2002–NMCA–022, 131 N.M. 598, 40 P.3d 1042. We turn to that case and its interpretation of the venue statute.

{10} In *Toscano,* 2002–NMCA–022, ¶ 1, 131 N.M. 598, 40 P.3d 1042, an automobile accident victim joined an out-of-state insur-

ance company in an action against an alleged tortfeasor. *See Raskob v. Sanchez,* 1998–NMSC–045, ¶ 7, 126 N.M. 394, 970 P.2d 580 (holding that an insurance company could be joined as a defendant in an action arising out of an automobile collision when insurance coverage is mandated for the benefit of the public). Even though both drivers, the plaintiff and the defendant, resided in Bernalillo County where the accident took place, the plaintiff filed her action in Santa Fe County claiming that county was a proper venue for a foreign insurance company.

{11} The Court of Appeals held that an insurance company was a non-resident, and thus subject to suit in any county within the state. *Toscano,* 2002–NMCA–022, ¶ 27, 131 N.M. 598, 40 P.3d 1042. The court then concluded that because venue was proper in Santa Fe County as to the out-of-state insurer, venue was also proper as to the other defendant, the resident driver from Bernalillo County. *Id.* ("Because venue was proper as to Dairyland, venue was proper as to Defendant Lovato as well."). Therefore, even though both drivers resided in Bernalillo County, and Bernalillo County was the site of the accident, the defendant driver in *Toscano* was forced to defend in Santa Fe County purely because it was a proper venue as to the joined insurer. It appears that the defendants in *Toscano* did not seek certiorari review in this Court.

{12} BP argues forcefully that *Toscano* is an anomaly that this Court needs to address, and we agree. BP points to the plain language of Subsection A, which provides that if one or more of the parties to an action is a resident of New Mexico then "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.*" Section 38–3–1(A) (emphasis added). In contrast, Subsection F deletes the reference to multiple defendants, merely stating the action "shall only be brought in the county where the plaintiff, or any one of them in case there is more than one, resides." Section 38–3–1(F). BP argues that the *Toscano* court erred in extending the express provisions for multiple resident defendants in Subsection A to multiple non-resident defendants in Subsection F. Thus, as BP sees it, the *Toscano* court improperly created an overly broad rule that venue for any party always establishes venue for other defendants.

{13} We agree with BP that the Court of Appeals' opinion in *Toscano* leads to the wrong result. To explain our disagreement, we return to the venue statute. In construing the language of a statute, our goal is to give effect to the intent of the legislature. *See Roth v. Thompson,* 113 N.M. 331, 332, 825 P.2d 1241, 1242 (1992). Section 38–3–1(F) provides that suits against non-residents may be brought in any county *except* for suits against foreign corporations with a statutory agent. Subsection F then limits the proper venues in an action against a foreign corporation with a statutory agent to: the county of the plaintiff's residence; the county where the foreign corporation's statutory agent resides; and the county where the action originated. As previously noted, Subsection F does not contain the same language in Subsection A that allows the residency of any one defendant to establish venue for all.

{14} As we read the venue statute, *Toscano's* conclusion that venue for one is venue for all is overly broad as applied in *Toscano,* and as applied in these circumstances. The statute instructs that if an action is against a resident defendant, then venue based on that defendant's residence is proper for all resident defendants. *See* § 38–3–1(A). Venue based on a defendant's residence would certainly be proper for a non-resident defendant, including a foreign corporation without a statutory agent, because venue is proper for such defendants in any New Mexico county. *See* § 38–3–1(F). However, the statute does not authorize venue for residents and foreign corporations with statutory agents based on proper venue for a non-resident, including a foreign corporation without a statutory agent. *See* § 38–3–1. Thus, when the only defendants are foreign corporations, Subsection F clearly designates the limited venues where a foreign corporation with a statutory agent can be sued. To rule otherwise would allow a plaintiff to subvert the distinct rules the legislature has designed for

both resident defendants and foreign corporations with statutory agents.

{15} In *Toscano,* the Court of Appeals candidly recognized that its broad interpretation of the venue statute appeared contrary to legislative intent. 2002–NMCA–022, ¶ 27, 131 N.M. 598, 40 P.3d 1042 ("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."). Nevertheless, the Court of Appeals felt compelled to reach the opposite result based on the special situation of insurance companies, which like banks are excluded from the Business Corporation Act. *Id.* ¶¶ 21–22 (relying on *Sunwest Bank,* 1998–NMSC–012, ¶¶ 15–16, 125 N.M. 170, 958 P.2d 740). We also acknowledge that the Court of Appeals was driven to its result based on the unusual joinder rule for insurers providing mandatory automobile insurance. *See id.* ¶ 1 (framing the opinion as addressing the implications of *Raskob* on the issue of venue). While we understand the rationale behind the Court of Appeals' holding, we find that those policy considerations do not justify the court's overly broad interpretation of the venue statute and of our precedent.

{16} In reaching its decision in *Toscano,* the Court of Appeals relied on *Teaver v. Miller,* 53 N.M. 345, 208 P.2d 156 (1949). In *Teaver,* this Court stated that "the *residence* of one of the defendants determines the venue of the action against all." *Id.* at 349, 208 P.2d at 159 (quoted authority omitted) (emphasis added). Unlike the case before us, *Teaver* involved multiple *resident* defendants, a situation expressly addressed by the plain terms of what is now Section 38–3–1(A) of the statute. We find the application of *Teaver* to the situation in *Toscano* unsupported by the express terms of Subsection F and contrary to legislative intent. Nothing in the statute indicates that the legislature intended plaintiffs to be able to overlook the residency of the parties to an automobile accident, and instead base venue for all solely on a proper venue for an insurance company.

{17} As a direct result of *Toscano,* a litigant can file an action in a county different from the scene of an accident and from the residency of any party. Even heeding the expansive nature of our venue statute, we cannot conclude that the legislature intended to give any party such unbridled discretion. As we noted previously, our venue rules attempt to balance the interests of the parties. *Team Bank,* 118 N.M. at 150, 879 P.2d at 782. Venue is not a substantive right, but a procedural matter designed for the convenience of the litigants and for allocating judicial resources. *See Torres v. Gamble,* 75 N.M. 741, 744, 410 P.2d 959, 961 (1966). It makes little sense to conclude that a foreign corporation that has complied with the venue statute by designating a statutory agent cannot take advantage of the protections offered by the legislature, simply because other foreign corporate defendants in the lawsuit did not. As we have explained above, we do not read the venue statute to stand for that proposition.

{18} Toscano's rule undermines the venue statute by allowing a party to pick a forum convenient to no one, a result contrary to the limited venues the venue statute authorizes for residents and foreign corporations with a statutory agent. Because it is contrary to the venue statute, we overrule *Toscano's* holding that a venue proper for a non-resident is also proper for a resident. This result is not contrary to the general rule we cited approvingly in *Teaver,* 53 N.M. at 349, 208 P.2d at 159, that "the residence of one of the defendants determines the venue of the action against all," because here the question is whether a proper venue for a non-resident establishes venue for all.

{19} We hold that venue for a non-resident defendant, including a foreign corporation without a statutory agent, cannot determine proper venue for a foreign corporation with a statutory agent, nor can venue for a non-resident defendant determine proper venue for a resident defendant. Consistent with legislative intent, Subsection F should be interpreted to "give foreign corporations that are admitted to do business and that have designated and maintained a statutory agent in this state the same 'weight' in the

venue balance as resident defendants." *Team Bank*, 118 N.M. at 150, 879 P.2d at 782.[1] Thus, in this action, venue is proper as to BP only in San Juan County or in Lea County. As part of our holding, we also overrule that portion of *Toscano* that allows venue to be established for resident defendants solely on the basis of the venue of a non-resident insurance company.

CONCLUSION

{20} We reverse the district court's order that venue is proper in Santa Fe County as to Defendant BP.

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

WE CONCUR: PAMELA B. MINZNER, PATRICIO M. SERNA, PETRA JIMENEZ MAES, and EDWARD L. CHÁVEZ, Justices.

2005-NMCA-045

110 P.3d 1076

Mark HEADLEY and Patricia Headley, Plaintiffs–Appellants,

v.

MORGAN MANAGEMENT CORPORATION, (a foreign-for-profit corporation), Defendant–Appellee.

No. 23,134.

Court of Appeals of New Mexico.

Feb. 3, 2005.

Certiorari Denied, No. 29,152, April 20, 2005.

1. In so holding, we do not address situations involving other combinations of multiple defendants such as residents and foreign corporations with statutory agents or multiple foreign corporations with statutory agents in different counties. *Cf. Cooper*, 2002–NMSC–020, ¶ 20, 132 N.M. 382, 49 P.3d 61 (dicta).

Kevin J. Hanratty, Hanratty Law Firm, Artesia, New Mexico, for Appellants.

Richard J. Shane, Myra F. Moldenhauer, Riley, Shane & Hale, P.A., Albuquerque, New Mexico, for Appellee.

OPINION

ROBINSON, Judge.

{1} In this appeal, we consider whether Defendant Morgan Management Corporation (MMC) can be sued for negligence, or whether it is protected by the exclusivity provisions of the Workers' Compensation Act (the Act), NMSA 1978, §§ 52-1-6(E) (1990), -8 (1989), and -9 (1973). The answer depends on the relationship between MMC and Plaintiffs. The district court granted summary judgment in favor of MMC on Plaintiffs' negligence claim, determining that MMC and Morgan Building and Spa Manufacturing Corporation (MFG) have the "same identity" for purposes of the Act and, therefore, the Act provided Plaintiffs' sole remedy against MMC. We agree and conclude that Plaintiffs' tort claim is barred by the exclusivity provisions of the Act.

BACKGROUND

{2} Plaintiff Mark Headley (Worker) was seriously injured while working in MFG's manufacturing plant in Raton, New Mexico, when a heavy roll of insulation material fell on him. Payments exceeding $200,000 have been paid to him. He brought this negligence action against numerous entities other than MFG. His theory is that MMC negligently placed the roll, or was somehow responsible for the fact that the roll fell on him.

{3} There are a number of Morgan Companies, apparently divided up, based on their essential roles such as manufacturing, transportation, and sales. MMC is separately incorporated, and is the common corporate office of the Morgan Companies, including MFG. Guy Morgan is the sole shareholder of both MMC and MFG. MMC was the named insured on the workers' compensation policy at the time of Worker's accident, and all the Morgan Companies, including MFG, were covered by this policy.

{4} Terry Baca, Worker's supervisor and production manager at the Raton plant on the date of Worker's accident, was an MMC employee and was paid by MMC. Baca hired Worker and had the authority to fire him. Worker contends that MMC was negligent

directly and vicariously through its agent/employee, Terry Baca.

DISCUSSION

STANDARD OF REVIEW

{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. *Self v. United Parcel Serv., Inc.*, 1998–NMSC–046, ¶ 6, 126 N.M. 396, 970 P.2d 582. "If the facts are undisputed and only a legal interpretation of the facts remains, summary judgment is the appropriate remedy." *Bd. of County Comm'rs v. Risk Mgmt. Div.*, 120 N.M. 178, 179, 899 P.2d 1132, 1133 (1995). We apply a *de novo* standard of review.

{6} On appeal, the parties have analyzed the issue in terms of whether MMC had a right to control Worker, or whether Worker was an independent contractor. *See* NMSA 1978, § 52–1–22 (1989) (stating that the Workers' Compensation Act requirements do not apply to independent contractors). We believe the appropriate analysis depends on whether Worker was an employee of MMC. We have determined that Worker was an employee of MMC.

A. *Exclusivity*

{7} Under the exclusivity provisions of the Act, NMSA 1978 §§ 52–1–1 to –70 (1929, as amended through 2004), "[n]o cause of action outside the Workers' Compensation Act shall be brought by an employee ... against the employer or his representative ... for any matter relating to the occurrence of or payment for any injury ... covered by the Workers' Compensation Act." § 52–1–6(E). Moreover, an employer's compliance with the Act results in "a surrender by the employer and the [employee] of their rights to any other method, form or amount of compensation or determination thereof or to any cause of action at law, suit in equity, or statutory or common-law right to remedy or proceeding whatever for or on account of personal injuries or death of the [employee] than as provided in the ... Act." § 52–1–6(D).

B. *Whether MMC is an Employer of Worker*

{8} "If an employment relationship is found, then Section 52–1–6(D) clearly presents a bar to this suit." *Salswedel v. Enerpharm, Ltd.*, 107 N.M. 728, 730, 764 P.2d 499, 501 (Ct.App.1988). Our Supreme Court has adopted the *RESTATEMENT (SECOND) OF AGENCY* to evaluate employee-employer relationships. *See Harger v. Structural Servs., Inc.*, 1996–NMSC–018, 121 N.M. 657, 661, 916 P.2d 1324, 1328. *RESTATEMENT (SECOND) OF AGENCY: TORTS OF SERVANTS* § 220(1) (1958) provides that "[a] servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." Some factors to consider in determining whether the right to control exist include: (1) the extent of control which the master may exercise over the details of the work; (2) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (3) the length of time for which the person is employed; (4) the method of payment, whether by the time or by the job, *Id.* § 220(2); and (5) "the right to delegate the work or to hire and fire assistants." *Harger*, 121 N.M. at 667, 916 P.2d at 1334.

{9} Harger added that "no particular factor should receive greater weight than any other." *Id.* Moreover, "the totality of the circumstances should be considered in determining whether the employer has the right to exercise essential control over the work or workers." *Id.; see also Dibble v. Garcia*, 98 N.M. 21, 24, 644 P.2d 535, 538 (Ct.App.1982) (holding that the right to control is a test for determining employer-employee relationship in workmen's compensation action).

{10} Here, all of MFG management personnel are employed by MMC and receive their paychecks from MMC. MMC also provides workers' compensation insurance for MFG. The MFG plant manager reports directly to his supervisor in MMC's office. Terry Baca, who was the production manager of the Raton plant, hired Worker and other employees who worked at the MFG plant. Subsequently, Terry Baca served as the plant manager, which required him to

report directly to his supervisor in MMC's corporate office. Under the totality of the circumstances, MMC made a *prima facie* showing that MMC, through Terry Baca in his role as plant manager, not only controlled Worker's objectives, but also controlled Worker's means and methods of his performance.

{11} Once MMC made a *prima facie* showing that it was Worker's employer, the burden shifted to Worker to demonstrate the existence of specific evidentiary facts to rebut this conclusion. *See Roth v. Thompson,* 113 N.M. 331, 334–35, 825 P.2d 1241, 1244–45 (1992). In an attempt to show that MMC had no right to control his work, Worker presented evidence that he used his own tools on the job. This fact is not determinative. Like in *Harger,* the nature of the instrumentalities (tools) is but one factor among many to consider. The other factors presented by MMC, as well as the totality of the circumstances, persuade us that MMC was Worker's employer. MMC hired the workers at the plant, including Worker, and it presumably had the right to terminate anyone it had hired. MMC provided workers' compensation insurance for all plant workers and it required all managers at the plant to be MMC employees. The plant manager reported directly to MMC. *See, e.g., Utah Home Fire Ins. Co. v. Manning,* 985 P.2d 243, 246 (Utah 1999) (stating that "[r]egardless of how the parties intended to structure their relationship, a worker is considered to have been an employee [for purposes of the Workers' Compensation Act] if the employer had the right to control the worker's manner or method of executing or carrying out the work"); *Schwartz v. Riekes & Sons,* 195 Neb. 737, 240 N.W.2d 581, 584 (1976) (stating that where a labor staffing firm provides temporary workers to an ultimate employer, which controls the details of the work done, then the ultimate employer is protected by the exclusivity provisions of workers' compensation); *St. Claire v. Minn. Harbor Serv., Inc.,* 211 F.Supp. 521, 528 (D.C.Minn.1962) (holding that worker from temporary agency may not sue ultimate employer if it had a right to control the details of the work).

{12} Normally, the existence of an employment relationship is a question of fact. *Garcia v. Am. Furniture Co.,* 101 N.M. 785, 789, 689 P.2d 934, 938 (Ct.App.1984); *Reynolds v. Swigert,* 102 N.M. 504, 508, 697 P.2d 504, 508 (Ct.App.1984) (stating that whether physician was employee or independent contractor of hospital is a question of fact). However, where reasonable people cannot differ on the issue, the court may grant summary judgment. *See N.M. State Highway Dep't v. Van Dyke,* 90 N.M. 357, 360, 563 P.2d 1150, 1153 (1977). We hold that, under the facts here, Worker failed to rebut MMC's *prima facie* showing that it had the right to control the work in the MFG plant and that it was therefore Worker's employer. Thus, the district court properly concluded that MMC is entitled to the protection of the exclusivity provisions in the Act.

{13} If Worker were truly an independent contractor, he would not have been entitled to the $200,000 he has already received in workers' compensation benefits under MMC's workers' compensation policy. *See Harger,* 121 N.M. at 664–70, 916 P.2d at 1331–37. Additionally, it is inconsistent for Worker to claim that MMC was vicariously negligent through the acts of its employee, Terry Baca, apparently because of his right to control the work at MFG, while at the same time contending that MFG was not an agent of MMC due to MMC's inability to control the workers at MFG.

C. *Discovery*

{14} Worker argues that the district court erred in ruling on the motion for summary judgment before he could take the depositions of two corporate officers of MMC. We review the court's ruling on this issue for an abuse of discretion. *See Design Prof'ls Ins. Cos. v. St. Paul Fire & Marine Ins. Co.,* 1997–NMCA–049, ¶ 18, 123 N.M. 398, 940 P.2d 1193 (stating that the court's ruling on whether to permit further discovery before ruling on summary judgment motion is reviewed for an abuse of discretion).

{15} Worker's brief-in-chief contains less than a page devoted to this issue. There is no explanation of his argument, nor are there any facts that would allow us to evaluate this claim. We will not review unclear arguments, or guess at what his arguments might be. *See Santistevan v. Centinel Bank*

of Taos, 96 N.M. 734, 737, 634 P.2d 1286, 1289 (Ct.App.1980), *rev'd on other grounds by*, 96 N.M. 730, 634 P.2d 1282 (1981) (stating that we are not required to surmise what argument is being made where a brief is unclear). In his reply brief, Worker makes an equally brief argument, allegedly relying on several facts, but does not cite to the record to support his assertions. We decline to review such an undeveloped argument. *See Santa Fe Exploration Co. v. Oil Conservation Comm'n*, 114 N.M. 103, 108, 835 P.2d 819, 824 (1992) (stating that we have no duty to entertain arguments when facts are cited without citation to the record, and no authority is presented in support of an argument).

CONCLUSION

{16} We conclude that the facts are clear and undisputed that Worker was an employee of MMC within the meaning of the New Mexico's Workers' Compensation Act, and entry of summary judgment was proper. The judgment of the district court is affirmed.

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

WE CONCUR: CYNTHIA A. FRY and RODERICK T. KENNEDY, Judges.

2005-NMCA-046

110 P.3d 1080

WXI/Z SOUTHWEST MALLS Real Estate Liability Company, Plaintiff–Appellant,

v.

Frank MUELLER, Renee Mueller, and Aspen Ventures Accord, Inc., Defendants,

and

C.W. and Margaret Ritter, Defendants–Appellees.

No. 24,492.

Court of Appeals of New Mexico.

Feb. 9, 2005.

Certiorari Denied, No. 29,149, April 20, 2005.

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OPINION

FRY, Judge.

{1} WXI/Z Southwest Malls Real Estate Liability Company (Southwest Malls) appeals from an order denying summary judgment against Defendants C.W. and Margaret Ritter (the Ritters) for unpaid rent and other tenant charges that it claims amount to over $200,000. The Ritters, who were assignors of a lease and guarantors of the rent, claim they were entitled to prompt notice from Southwest Malls that an assignee was failing to pay rent. The Ritters also claim that Southwest Malls breached the implied covenant of good faith and fair dealing in the guaranty by failing to provide such notice. For the reasons that follow, we hold that Southwest Malls had no express or implied duty under the guaranty to provide notice of the default prior to filing suit against the Ritters. We also hold that in such an arms-length, commercial transaction, the Ritters have failed to raise genuine issues of material fact as to any breach by Southwest Malls of the implied covenant of good faith and fair dealing. Both holdings are informed by the "long-standing backdrop of New Mexico law enforcing contractual obligations as they are written" and the public interest in ensuring that private parties are secure in the knowledge that their contracts will be enforced. *United Props. Ltd. v. Walgreen Props., Inc.*, 2003-NMCA-140, ¶¶ 12, 10, 134 N.M. 725, 82 P.3d 535.

BACKGROUND

{2} The Ritters leased commercial space in a shopping mall, in which they operated a tavern. The lease period was for slightly more than ten years. Rent and various operating expenses shared by mall tenants were due monthly. Eight years into the lease, the Ritters sought to assign the lease to Frank and Renee Mueller (the Muellers), who would continue to operate the tavern. Southwest Malls, which became the landlord in 1999, consented to the assignment on the condition that the Ritters would continue to be liable for rent and would guarantee the lease. The Ritters signed the document and were listed as "assignor and guarantor." The assignment contained the following clause:

> 5. Continuing Liability. Landlord's consent to the Assignment is granted subject to Assignor remaining primarily liable on the lease, and Assignor, as a Guarantor (jointly and severally) under the Lease, hereby acknowledges such continuing liability to Landlord.

{3} Two months later, the Muellers assigned the lease to Aspen Ventures Accord, Inc. (Aspen), in which they had an interest. Southwest Malls again consented to the assignment, but on the condition that both the Ritters and Muellers remained liable on the lease as guarantors. The Ritters signed the assignment and were listed as "guarantors." The document contained this language:

> 5. *Continuing Liability.* Landlord's consent to the Assignment is granted subject to Assignor and all Guarantors of the Lease, if any, remaining primarily liable on the lease, and Assignor and all Guarantors, if any, hereby acknowledge the continuing liability of Assignor and Guarantors to Landlord under the Lease.

{4} Aspen failed to pay rent starting in August 2000. Southwest Malls apparently took no action to evict Aspen or terminate the lease, and Aspen did not surrender the premises. During the time that rent was going unpaid, a division of Southwest Malls was in contact with the Ritters regarding a separate dispute about monies owed prior to the assignment to the Muellers. Southwest Malls did not notify the Ritters about Aspen's default until April 2002, nearly two years after Aspen stopped paying rent, when it sued all three parties (the Ritters, the Muellers, and Aspen) for the unpaid rent and other charges. After the suit was filed, Aspen and the Muellers were both discharged in bankruptcy proceedings, and the trustee for Aspen reported that no assets remained for distribution. Thus, Southwest Malls seeks the full amount owing plus attorney fees from the Ritters under the lease, the assignments, and, in particular, the two guaranty agreements.

{5} The Ritters defend on the grounds that Southwest Malls had a duty under the guaranty contract to timely notify them of Aspen's default, and that its unjustified delay in doing so both violated the covenant of good faith and fair dealing and allowed damages to pile up. The Ritters contend that had Southwest Malls simply informed them of the situation, they could have applied their extensive experience as restauranteurs either to operate the tavern themselves or locate new, paying tenants. In either case, the Ritters argue that they could have prevented the unpaid rent from growing to the amounts claimed by Southwest Malls.

{6} Southwest Malls moved for summary judgment, which the district court denied. The district court found that the Ritters did guarantee the payment of rent, but that there were two issues of material fact impacting the question of whether Southwest Malls breached the implied covenant of good faith and fair dealing: (1) whether a creditor like Southwest Malls owes a guarantor, like the Ritters, any notice that the principal obligor (Aspen) is in default on the underlying obligation, particularly where periodic payments are due; and (2) the failure by Southwest Malls to provide notice of Aspen's default, in the context of the ongoing communications with the Ritters, and the purported resulting harm to the Ritters.

{7} The district court issued an order authorizing interlocutory appeal, stating that the case involved controlling questions of law for which there are substantial grounds for difference of opinion and that an immediate appeal would advance the ultimate termination of the litigation. This Court granted the request for a permissive interlocutory appeal pursuant to NMSA 1978, § 39–3–4 (1999) and Rule 12–203(A) NMRA.

DISCUSSION

Standard of Review

{8} We review denials of summary judgment de novo because the issue on appeal is a question 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 moving party is entitled to judgment as a matter of law. *Id.* We consider any facts presented in the light most "favorable to support a trial on the issues because the purpose of summary judgment is not to preclude a trial on the merits if a triable issue of fact exists." *Madsen v. Scott*, 1999–NMSC–042, ¶ 7, 128 N.M. 255, 992 P.2d 268 (internal quotation marks and citation omitted). "[S]ummary judgment is not appropriate when the facts before the court are insufficiently developed or where further factual resolution is essential for determination of the central legal issues involved." *Brown v. Taylor*, 120 N.M. 302, 307, 901 P.2d 720, 725 (1995) (internal quotation marks and citation omitted). We address in turn each of the concerns that prevented the district court from granting summary judgment to Southwest Malls.

Duty to Notify Guarantor of Principal's Failure to Pay Monthly Rent

{9} The Ritters contend that even though the guaranty agreement did not expressly require any notice of default by the principal, Southwest Malls had a duty to alert them to the default so that they could take action to mitigate damages once Aspen stopped paying rent. This is a novel issue in New Mexico.

{10} A guaranty is a contract and we apply all of the general rules regarding the application and construction of contracts. See *Shirley v. Venaglia*, 86 N.M. 721, 724, 527 P.2d 316, 319 (1974) (stating that "[t]he guaranty agreement is a separate, distinct contract"); see also Restatement (Third) of Suretyship and Guaranty § 14 (1996) (stating that standard contract rules apply to secondary obligations). Therefore, we begin with a brief summary of these rules.

{11} "When discerning the purpose, meaning, and intent of the parties to a contract, the court's duty is confined to interpreting the contract that the parties made for themselves, and absent any ambiguity, the court may not alter or fabricate a new agreement for the parties." *CC Hous. Corp. v. Ryder Truck Rental, Inc.*, 106 N.M. 577, 579, 746 P.2d 1109, 1111 (1987). "Absent ambiguity, provisions of [a] contract need only be applied, rather than construed or

interpreted." *Richardson v. Farmers Ins. Co.*, 112 N.M. 73, 74, 811 P.2d 571, 572 (1991). "Parties to a contract agree to be bound by its provisions and must accept the burdens of the contract along with the benefits. When a contract was freely entered into by parties negotiating at arm's length, the duty of the courts is ordinarily to enforce the terms of the contract which the parties made for themselves." *Nearburg v. Yates Petroleum Corp.*, 1997–NMCA–069, ¶ 31, 123 N.M. 526, 943 P.2d 560 (internal citation omitted). "[C]ourts may not rewrite obligations that the parties have freely bargained for themselves ... [i]n the absence of fraud, unconscionability, or other grossly inequitable conduct." *United Props. Ltd.*, 2003–NMCA–140, ¶ 10, 134 N.M. 725, 82 P.3d 535 (internal quotation marks and citation omitted).

{12} As for the interpretation and application of a guaranty, "[t]he language of the written guaranty agreement governs the rights of the [g]uarantors" and "[t]he parties ... are free to determine for themselves by contract ... the duties and obligations which follow." *Levenson v. Haynes*, 1997–NMCA–020, ¶ 19, 123 N.M. 106, 934 P.2d 300; see *Sunwest Bank v. Garrett*, 113 N.M. 112, 116, 823 P.2d 912, 916 (1992) ("The respective rights of the guarantor and the creditor are determined by reference to the terms of the contract between them."). Generally, a guarantor is entitled to strict construction of the guaranty, cannot be held liable beyond the strict terms or intent of that agreement, and is considered a "favorite of the law". *Shirley*, 86 N.M. at 724, 527 P.2d at 319 (internal quotation marks and citation omitted).

{13} Guaranties are categorized into various types, and for reasons that will become apparent, the Ritters characterize their guaranty as being akin to a continuing or open guaranty. Southwest Malls characterizes the agreement as an absolute guaranty. We agree with Southwest Malls, as did the district court, that the Ritters made an absolute guaranty. We summarize the various guaranties and the rules relating to each and apply those rules to this case.

{14} Generally, the law classifies guaranty agreements as either absolute or conditional. See *Am. Bank of Commerce v.Covolo*, 88 N.M. 405, 409, 540 P.2d 1294, 1298 (1975) (classifying guaranty as unconditional); *Bank of N.M. v. N.W. Power Prods., Inc.*, 95 N.M. 743, 747, 626 P.2d 280, 284 (Ct.App.1980) (classifying guaranty as conditional); *Williams v. Clark*, 417 N.W.2d 247, 251 (Iowa Ct.App.1987) (stating that guaranties are generally classified as either conditional or absolute). See generally 38 Am. Jur.2d Guaranty § 18 (1999) (comparing absolute and conditional guaranties). A guaranty is conditional when its terms state that a condition precedent must be met before the guarantor is held liable; otherwise it is absolute. *Williams*, 417 N.W.2d at 251. The distinction is meaningful here because a guarantor who does not impose conditions on his liability is considered automatically liable upon the default of the principal, and the creditor is neither required to first seek payment from the principal nor to notify the guarantor of any default. *Id.;* see *Pavlantos v. Garoufalis*, 89 F.2d 203, 206 (10th Cir. 1937) ("An absolute guaranty is an unconditional undertaking ... and such a guarantor is liable immediately upon default of the principal without notice."); *W. States Leasing Co. v. Adturn, Inc.*, 31 Colo.App. 256, 500 P.2d 1190, 1191 (1972) (explaining that notice is not required where an unambiguous, absolute guaranty is silent as to notice); *Bowyer v. Clark Equip. Co*, 171 Ind.App. 431, 357 N.E.2d 290, 293 (1976) ("It is well established in Indiana that a guarantor is not entitled to notice of his principal's default when his undertaking ... is absolute."). A guarantor's promise to pay rent is generally viewed as an absolute guaranty. See 49 Am.Jur.2d Landlord and Tenant §§ 816–17 (1995) (stating that a guaranty of payment of rent is absolute, the guarantor is not entitled to notice, and it is the business of the guarantor to see that the principal pays any rent due). Like the district court, we conclude that the Ritters' guaranty was absolute because the plain language imposed no condition precedent upon their liability to pay rent. See *Richardson*, 112 N.M. at 74, 811 P.2d at 572 (explaining that unambiguous contracts need only be applied rather than interpreted). Because the guaranty was absolute and was silent as to notice, Southwest Malls was not

required to provide notice prior to enforcing the guaranty.

{15} Guarantees are also classified as either continuing or restricted. *Gen. Elec. Capital Corp. v. Dodson Aviation, Inc.*, 286 F.Supp.2d 1307, 1313 (D.Kan.2003) (applying Kansas contract law). See generally, 38 Am.Jur.2d Guaranty §§ 20, 22 (1999) (defining continuing and restricted guarantees). A continuing guaranty is one in which a guarantor assumes liability, but the amount of debt or time for payment remains undefined, such as a line of credit. *Levenson*, 1997-NMCA-020, ¶ 23, 123 N.M. 106, 934 P.2d 300 (stating that a "guaranty is continuing if it contemplates future course of dealing during an indefinite period or series of transactions"); *F.D.I.C. v. Moore*, 118 N.M. 77, 78-80, 879 P.2d 78, 79-81 (1994) (noting a guaranty for an unlimited amount was "continuing"); Restatement (Third) of Suretyship and Guaranty § 16 (defining continuing guaranty as one in which guarantor is bound to all future obligations of the debtor and the guarantor may terminate his guaranty as to future debts); see also 49 Am.Jur.2d Landlord and Tenant § 819 (1995) (explaining that a guaranty to pay rent may be a continuing guaranty if the parties intended for it to extend into successive terms). Some courts have described a continuing guaranty as a series of offers that are accepted by the creditor upon the extension of further credit to the debtor. See *Georgia-Pacific Corp. v. Levitz*, 149 Ariz. 120, 716 P.2d 1057, 1059 (Ct.App.1986). On the other hand, a guaranty is restricted if the guaranty contemplates a single transaction or a limited number of transactions. 38 Am.Jur.2d Guaranty §§ 20, 22.

{16} It is well-settled that a creditor must provide notice of a principal's default to a guarantor in the case of a continuing guaranty. Bowyer, 357 N.E.2d at 293 (stating that notice was required where debts were unknown and indefinite and no due date was established); 38A C.J.S. Guaranty § 74 (1996) (explaining that a guarantor is only entitled to notice of default "when the guaranty is conditional or uncertain as to amount or accrual"); see also *Davis v. Wells*, 104 U.S. 159, 170, 26 L.Ed. 686 (1881) (holding that in the case of a continuing guaranty, the guarantor could be discharged if the creditor's delay in giving notice caused actual loss to the guarantor). In a continuing guaranty, the guarantor can intervene to stem potentially limitless liability by terminating the guaranty as to future debts, so it naturally follows that the guarantor must be given notice of a default. See Restatement (Third) of Suretyship and Guaranty § 16, cmt. b (stating that a guarantor of a continuing guaranty can terminate the guaranty and thereby terminate liability for any future debts).

{17} The Ritters characterize their guaranty as more like a continuing guaranty because more than a single payment was contemplated, and therefore it was not a "single obligation." They further contend that in such a case the law conditions their liability on notice from the creditor that the principal has defaulted. We reject the contention that this guaranty was similar to a continuing guaranty and conclude that this was a restricted guaranty. Here, the district court found that the Ritters' guaranty was absolute, yet it questioned whether notice still may have been necessary due to the periodic accrual of the obligation to pay rent. The district court's uncertainty was misplaced. An obligation to pay a reasonably ascertainable rent for a fixed period is not a continuing guaranty because both the depth and duration of the liability can be easily ascertained at the outset. *Compare Bowyer*, 357 N.E.2d at 293 (finding that notice was required for a guaranty where "the liabilities guaranteed have not been created and are uncertain in amount"); with *W. States Leasing Co.*, 500 P.2d at 1191 (stating that where "the maximum amount guaranteed is determinable at the time the guarantee is entered into" and the guaranty is absolute, there is no requirement of notice of default).

{18} The Ritters' liability on the ten-year lease was created when it was executed—the underlying obligation to pay rent was not created monthly, but was created when the lease began. The lease was a single ten-year obligation and not a series of obligations or transactions. The guaranties signed by the Ritters involved reasonably certain amounts

for rents and other charges. The Ritters' operation of the tavern under this lease for the prior eight years allowed them to assess the typical monthly rent and other charges and they do not contend otherwise. The guaranty was also of limited duration—the lease terms indicate it terminated on January 1, 2002. The fact that rents and charges were due monthly does not convert the quantifiable and finite liability into an obligation analogous to an unlimited line of credit or an obligation with no end date. Because this was a single obligation, and not an open-ended series of obligations, and because the amount guaranteed was reasonably ascertainable, we conclude that this was a restricted guaranty. See *Richardson,* 112 N.M. at 74, 811 P.2d at 572 (explaining that unambiguous contracts need only be applied rather than interpreted). While the guaranty language in this case says that the Ritters guaranty is "continuing," that refers to the obligation continuing through the term of the lease and is not dispositive of the nature of the obligation.

{19} The conclusion that such a guaranty was for a finite period and sum is bolstered by the rule articulated by our Supreme Court that generally a guarantor is not liable to pay rent forever, even if the guarantor's principal becomes a holdover tenant under holdover terms in a lease. *Shirley,* 86 N.M. at 724–25, 527 P.2d at 319–20 (stating that a guarantor is released after the lease term has expired unless there is some assent by the guarantor or the guaranty expressly contemplates such extension). In this case, the Ritters signed a restricted absolute guaranty and no notice of default was required prior to Southwest Malls acting to enforce the guaranty. While arguably it may have been potentially of some benefit to the Ritters if Southwest Malls had given them notice, there was simply no legal duty to do so.

{20} We note that this is not a case where a creditor and debtor act together to impede a guarantor's right of recourse against the debtor, as when a creditor discharges the principal debtor. Southwest Malls did not discharge Aspen; it sued Aspen, and the Ritters were not prevented from acting against Aspen. See *Venaglia v. Kropinak,* 1998–NMCA–043, ¶¶ 9, 29, 125 N.M. 25, 956 P.2d 824 (adopting the Restatement rule that a guarantor of a negotiable instrument is discharged to the extent that the payee impairs the guarantor's recourse against the payor); see also Restatement (Third) of Suretyship and Guaranty § 44 (stating that guarantor can be discharged if the creditor impairs a guarantor's right of restitution from the principal); Restatement (Third) of Suretyship and Guaranty § 50(1) (stating that a creditor's delay or failure to act against the principal does not discharge the guarantor).

{21} We also decline to impose a general affirmative duty on creditors to provide updates to guarantors during the course of the guaranty. Courts have imposed a duty upon creditors to disclose facts to a guarantor, but this duty is limited to situations where the guaranty agreement is not yet executed, cases of a continuing guaranty, or where the guarantor has reserved a right of termination. See *Alan Stephens, Annotation, Creditor's Duty of Disclosure to Surety or Guarantor After Inception of Suretyship or Guaranty*, 63 A.L.R.4th 678 (1988); Restatement (First) of Security § 124(1) (1941) (describing guarantor's defenses based on a creditor's non-disclosure of facts before the guaranty arises); § 124(2) (imposing on creditor a duty to inform guarantor of facts which would give guarantor a right to terminate the guaranty); Restatement (Third) of Suretyship and Guaranty § 47 (stating that if a creditor fails to disclose events which would give a guarantor the ability to terminate the guaranty, the guarantor is discharged from further liability); see also Me. *Nat'l Bank v. Fontaine,* 456 A.2d 1273, 1275 (Me.1983) (imposing a duty on creditor to disclose facts where guaranty is for a series of credit extensions); *Georgia–Pacific Corp.,* 716 P.2d at 1059 (stating that in a continuing guaranty, a creditor may be required to notify the guarantor where the creditor is aware of facts that increase risk to the guarantor, has reason to think the guarantor is unaware of these facts, and has an opportunity to communicate them prior to further extensions of credit). Here, the guaranty had been executed, it was not a continuing guaranty, and the circumstances known to Southwest Malls

did not give the Ritters a right to terminate the guaranty. Thus, there was simply no duty for Southwest Malls to reach out to the Ritters to keep them apprised of Aspen's performance.

{22} Finally, while the Ritters are correct that a guaranty must be construed strictly so as to not expand their liability, the guaranty here is clear and unambiguous, and there is nothing to construe. We apply the plain terms of the express contract which indicate that if the assignees failed to pay rent, then the Ritters were obligated to do so. Southwest Malls bargained for an absolute guaranty to which the Ritters agreed, and Southwest Malls should get the benefit of that bargain. The Ritters were free to insist on a notice requirement or any other condition or limitation in their guaranty, but having failed to do so, this Court will not write such a condition in after the fact. Absent one of the few recognized exceptions, which the Ritters do not raise in their appeal, this Court will not re-write the bargain reached by the parties into one that is arguably more fair, even if the agreement results in a hard bargain or substantial risk. United Props. Ltd., 2003–NMCA–140, ¶ 28, 134 N.M. 725, 82 P.3d 535 (stating that "New Mexico courts do not have discretion either to relieve parties to a commercial lease of their contractual obligations or to interfere with contractual rights and remedies" (internal quotation marks and citation omitted)); see also Cafeteria Operators, *L.P. v. Coronado–Santa Fe Assocs., L.P.*, 1998–NMCA–005, ¶¶ 20, 23, 124 N.M. 440, 952 P.2d 435 (holding that a commercial building had to be removed because the builder violated a shopping mall lease restriction).

{23} We also observe that, even without the guaranty, the Ritters would most likely be liable for all unpaid rent as assignors, even if Aspen had abandoned the premises. *Jacob v. Spurlin,* 1999–NMCA–049, ¶¶ 9–12, 127 N.M. 127, 978 P.2d 334 (stating the general rule that an assignment does not relieve an assignor of the duty to pay rent); *Mesilla Valley Mall Co. v. Crown Indus.*, 111 N.M. 663, 665, 808 P.2d 633, 635 (1991) (stating that unless a landlord accepts a tenant's surrender of the premises, the landlord has no duty to mitigate damages during the term of the lease). While it is not essential to our analysis, we see no benefit in imposing disparate interpretations of a tenant's duty under a guaranty compared with the tenant's obligations under an assignment, particularly where both agreements are intended to facilitate the same activity.

Breach of the Covenant of Good Faith and Fair Dealing

{24} The Ritters contend that Southwest Malls breached its contractual duty of good faith and fair dealing by not providing notice to the Ritters that rent was going unpaid. The district court, in denying summary judgment to Southwest Malls, found that a material question of fact did exist on this issue in light of the Ritters' claims that Southwest Malls failed to notify them of the unpaid rent for approximately twenty months, even though Southwest Malls was in contact with the Ritters on other matters. Even if all of the Ritters' claims are true, we conclude there is no material question of fact on the issue of whether Southwest Malls violated the covenant of good faith and fair dealing.

{25} We start with a review of the standard of good faith and fair dealing.

> Whether express or not, every contract in New Mexico imposes the duty of good faith and fair dealing upon the parties in the performance and enforcement of the contract. The breach of this covenant requires a showing of bad faith or that one party wrongfully and intentionally used the contract to the detriment of the other party.

Paiz v. State Farm Fire & Cas. Co., 118 N.M. 203, 212, 880 P.2d 300, 309 (1994) (internal quotation marks and citation omitted) limited on other grounds by *Sloan v. State Farm Mut. Auto. Ins. Co.*, 2004–NMSC–004, ¶ 12, 135 N.M. 106, 85 P.3d 230. Our Supreme Court has defined the covenant as follows:

> The concept of the implied covenant of good faith and fair dealing requires that neither party do anything that will injure the rights of the other to receive the benefit of their agreement. Denying a party

its rights to those benefits will breach the duty of good faith implicit in the contract. *Planning & Design Solutions v. City of Santa Fe,* 118 N.M. 707, 714, 885 P.2d 628, 635 (1994); see also *Dairyland Ins. Co. v. Herman,* 1998–NMSC–005, ¶ 12, 124 N.M. 624, 954 P.2d 56 (stating that "with insurance contracts, as with every contract, there is an implied covenant of good faith and fair dealing that the insurer will not injure its policyholder's right to receive the full benefits of the contract"); *Azar v. Prudential Ins. Co. of Am.,* 2003–NMCA–062, ¶ 51, 133 N.M. 669, 68 P.3d 909 ("The implied covenant is aimed at making effective the agreement's promises.").

{26} The Ritters rely on a case from the insurance context for the notion that one party to a contract must balance its interests against those of the other party to the contract and cannot be partial to its own interests. *Lujan v. Gonzales,* 84 N.M. 229, 236, 501 P.2d 673, 680 (Ct.App.1972). The Court in Lujan explicitly stated it was not attempting to give a complete definition of good faith "because of the variety of situations held to involve a question of good faith" and used the term good faith "in this case to mean [that] an insurer cannot be partial to its own interests." *Id* Lujan was limited to its facts involving a contract between an insurer and insured, and we decline to impose on one party a duty to balance its interests with that of the other party in all contracts.

{27} Even if all of the Ritters' claims are believed, there is no suggestion that Southwest Malls acted to injure the rights of the Ritters to receive the benefit of their agreement or that it acted to negate any of its promises. *Dairyland Ins. Co.,* 1998–NMSC–005, ¶ 12, 124 N.M. 624, 954 P.2d 56. Southwest Malls promised to allow the Ritters to step out of their role as lessors and operators of the tavern in exchange for the Ritters' promise to guarantee performance of the lease. We fail to see how Southwest Malls' failure to notify the Ritters of Aspen's unpaid rent prevented the Ritters from getting the benefit of their bargain—a bargain that allowed them to assign the remainder of their lease. *Smoot v. Physicians Life Ins. Co.,* 2004–NMCA–027, ¶¶ 13, 14, 135 N.M. 265, 87 P.3d 545 (stating that covenant of good faith is not breached when a party was given the product or service bargained for). As Southwest Malls did not agree to provide the Ritters notice of any missed rental payments and met its obligation to allow the Ritters' assignment, there is no basis to find a breach of the duty of good faith.

{28} Some courts have found that a creditor may breach a duty of good faith by failing to inform a guarantor of facts that materially increase the guarantor's risks. See *Morris v. Columbia Nat'l Bank of Chicago,* 79 B.R. 777, 785–86 (N.D.Ill.1987) (remanding for factual findings where bad faith could be found under Illinois law from creditors' acts and omissions toward guarantor); see Stephens, *supra.* In this case, the plain language of the Ritters' guaranty anticipates the risk of non-payment of rent for the remainder of the lease term, so we cannot see how Southwest Malls' inaction materially increased the risks contemplated in the guaranty. We will not re-write the Ritters' guaranty so as to contemplate no risk whatsoever, or to limit the risk to some arbitrary period less than the remainder of the lease.

{29} Finally, the Ritters point us to authority imposing a duty to disclose facts in certain circumstances, particularly where a builder has a duty to disclose facts to buyers of land. *Krupiak v. Payton,* 90 N.M. 252, 253, 561 P.2d 1345, 1346 (1977). We see no basis to impose a duty on Southwest Malls to disclose the fact that Aspen was not paying rent. In Krupiak, the Supreme Court noted that a duty to disclose facts may arise if a party has superior knowledge that is not within reach of the other party or could not have been discovered by reasonable diligence. *Id* Here, there is no contention that Apen's failure to pay rent was a matter beyond the reach of the Ritters or that they could not have discovered it by reasonable diligence. Southwest Malls had no affirmative duty to apprise the Ritters of the status of Aspen's non-payment of rent under the guaranty, nor was it fraudulent for Southwest Malls not to notify the Ritters about the situation.

CONCLUSION

{30} We hold that Southwest Malls is entitled to summary judgment as a matter of law. The Ritters signed an absolute restricted guaranty and therefore Southwest Malls was not required to provide any notice of Aspen's default in paying monthly rent. Southwest Malls did not breach the implied covenant of good faith and fair dealing because it did not withhold from the Ritters any of the benefits of the bargain the parties struck in allowing the two lease assignments.

{31} We reverse the district court's denial of summary judgment and remand with instructions to enter judgment in favor of Southwest Malls and to conduct any further proceedings necessary to determine the amount of damages owed under the lease.

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

I CONCUR: LYNN PICKARD, Judge.

IRA ROBINSON, Judge (dissenting).

ROBINSON, Judge (dissenting).

{33} Rarely have I seen a fact pattern that demands a dissent as much as this one.

{34} I am concerned that the landlord, Southwest Malls, intentionally chose not to notify or even verbally inform the Ritters that their sublessee, Aspen, had defaulted on the lease payments.

{35} What makes it so improper is that Southwest Malls waited twenty months—one month at a time and $10,000 at a time—before notifying the Ritters of the default. And then, how did Southwest Malls finally notify them? It sued them for $200,000 in unpaid rent and other charges.

{36} What is even more disturbing is that Southwest Malls never took any action to evict Aspen or terminate the lease. Southwest Malls allowed Aspen to keep the tavern open, making money, without paying the rent.

{37} What is downright egregious is that, during the time beginning August 2000, when Aspen stopped paying rent, a division of Southwest Malls was in contact with the Ritters over a separate dispute in which it claimed that the Ritters owed it money prior to the Ritters' assignment of the lease to the Muellers, who later assigned it to Aspen with Southwest Malls' approval. What earthly reason or possible justification could Southwest Malls have had not to inform the Ritters, even by telephone, let alone in writing, that they already owed money for Aspen's default.

{38} Citing *Richardson*, 112 N.M. at 74, 811 P.2d at 572, the majority views the Ritters' guaranty as "a single obligation, and not an open-ended series of obligations, and because the amount guaranteed was reasonably ascertainable, we conclude that this was a restricted guaranty." Majority Opinion ¶ 18.

{39} I do not agree. I see the Ritters' obligation as one that continues on a monthly basis, one month at a time. If the primary obligor, Aspen, pays its rent in a given month, then the Ritters do not need to pay any rent. Then we go on to the next month. If Aspen pays rent during that month, the Ritters have no obligation to pay anything. The same continues to be true each month, one month at a time. Their obligation to pay a month's rent as guarantor only kicks in after Aspen has failed to pay that month's rent. The rent becomes due for the Ritters at the end of a month on which Aspen has defaulted, not at the end of the lease term, twenty months later. But, how can they fulfill their guaranty unless Southwest Malls notifies them of Aspen's default?

{40} The majority acknowledges, citing Morris, 79 B.R. at 785–86, that "a creditor may breach a duty of good faith by failing to inform a guarantor of facts that materially increase the guarantor's risks." Majority Opinion ¶ 28. The majority also states "we cannot see how Southwest Malls' inaction materially increased the risks contemplated in the guaranty." *Id* I can.

{41} Any reasonably prudent man who signs a guaranty on a lease where monthly payments are required contemplates that he will be called upon to make a monthly payment at the time the primary obligor fails to do so—not six months later, not twenty months later, not $200,000 later.

{42} After the first month of Aspen's nonpayment, the Ritters could have taken rea-

sonable actions to avoid getting stuck with all the remaining monthly payments under the lease in several different ways. Had Southwest Malls only informed them of Aspen's default, the Ritters could have tried to find a new tavern operator to take over the business and the lease, and could have taken steps to force Aspen out. The Ritters could even have gone back in and operated the tavern themselves, having good reason to do so if they were going to get stuck with the remaining twenty lease payments. To say that the Ritters' risk was not increased is incorrect. It was increased as each month went by that Southwest Malls intentionally failed to notify them of Aspen's continuing default in paying the rent.

{43} At any time during the long period of Aspen's default, the Ritters could have walked through the Mall and would have had no way of knowing that Aspen had stopped paying rent because Southwest Malls let Aspen continue operating the tavern without evicting them.

{44} Since Southwest Malls did not evict Aspen, the Ritters were lulled into a false belief that everything was okay, thanks to Southwest Malls' inaction. I have no doubt that the Ritters suffered prejudice by the action or inaction of Southwest Malls.

{45} Does Southwest Malls' actions or inaction amount to deceit or fraud? Perhaps. Does it amount to bad faith and unfair dealing? It certainly does.

{46} This case reminds me of a puzzle that school children put together. One may think that all the little pieces are being put together in all the correct places. The problem is that when you look at the finished puzzle, you see a picture that is all wrong.

{47} I would affirm the court's denial of Southwest Malls' motion for summary judgment. I, therefore, respectfully dissent.

2005-NMCA-044
110 P.3d 1090

STATE of New Mexico, Plaintiff–Appellee,

v.

Donald COLLINS, Defendant–Appellant.

No. 24,118.

Court of Appeals of New Mexico.

March 4, 2005.

Patricia A. Madrid, Attorney General, Ann M. Harvey, Assistant Attorney General, Santa Fe, NM, for Appellee.

Daniel R. Lindsey, Daniel R. Lindsey, P.C., Clovis, NM, for Appellant.

OPINION

SUTIN, Judge.

{1} Charged with aggravated DWI and convicted of DWI, Defendant appeals on eight grounds. We affirm.

BACKGROUND

{2} On January 27, 2001, Officer Christopher Williams was talking to another officer in the parking lot of a gas station when he saw a pick-up truck, while turning left at an intersection, cross left of the center of the street onto which he was turning, and almost strike another vehicle that was stopped in the lane reserved for traffic going the other direction. Officer Williams pursued Defendant and stopped him a short distance away when Defendant pulled into the parking lot of an apartment building.

{3} The officer observed the following signs of intoxication: Defendant stumbled when exiting his vehicle, an odor of alcohol coming from Defendant, slurred speech, swaying, and one watery and bloodshot eye. The officer learned that Defendant's other eye was a prosthesis. The officer administered field sobriety tests including the one-leg stand and the walk-and-turn test. After the officer demonstrated and explained the one-leg stand he asked Defendant if he had any problems that would prevent him from performing the test, to which Defendant answered that he had been working on boilers all day. The officer nonetheless continued with the tests, concluded that Defendant was driving while under the influence of alcohol, placed him under arrest, and transported him to jail. At the jail, the officer administered a twenty-minute waiting period and then administered a breath alcohol content (BAC) test. Three breath samples were taken, the first was an insufficient sample, the second was .18, and the third was .17.

{4} Defendant was charged with aggravated driving while under the influence of intoxicating liquor or drugs (aggravated DWI), pursuant to NMSA 1978, § 66–8–102(D) (2004). The case was tried to a jury. The jury was instructed on the charges of aggravated DWI and driving with a BAC of .08 or greater (DWI .08) as a lesser included offense of the aggravated DWI charge. Defendant was convicted of DWI .08. Additional facts will be detailed as necessary in the opinion.

DISCUSSION

{5} Defendant raises eight arguments on appeal: (1) the district court erred in submitting to the jury an instruction that Defendant could be found guilty of DWI .08; (2) by not checking to see if there was anything in Defendant's mouth, the officer did not administer the breath test according to New Mexico regulations, rendering the test results unreliable and inadmissible; (3) the district court erred in admitting the results of the BAC test because the State failed to make the required threshold showing that the machine used to test Defendant was reliable; (4) the court denied Defendant his right to confront the witnesses against him; (5) Defendant's seizure was unreasonable and thus evidence obtained therefrom was inadmissible; (6) the State made improper comments during its cross-examination of Defendant, thus denying him a fair trial; (7) Defendant was prejudiced by cumulative error; and (8) the district court erred in denying Defendant's motion for a directed verdict.

1. The District Court Did Not Err by Instructing the Jury on the Offense of DWI .08

{6} Aggravated DWI can be committed in one of three ways: (1) driving with a blood or BAC of .16 or greater (DWI .16), (2) causing bodily injury to a human being while driving while intoxicated, or (3) refusing to submit to a chemical test. *Id.* The information charging Defendant with aggravated DWI did not specify with which type of aggravated DWI Defendant was charged. At trial, the State requested and the court submitted jury instructions on the offenses of aggravated DWI .16 and DWI .08 as a lesser included offense of DWI .16. Defendant was convicted of DWI .08.

{7} Defendant argues that the district court erred in submitting a jury instruction for DWI .08 to the jury for three reasons: (1) he was charged only with aggravated DWI and thus was not put on notice that he needed to defend against the charge of DWI .08, (2) DWI .08 is not a lesser included offense of aggravated DWI, and (3) the district court erred by amending the pleadings sua sponte to include the charge of DWI .08.

a. Notice and Lesser Included Offense Analysis

{8} When one offense is a lesser included offense of a crime named in a charg-

ing document, the defendant is put on notice that he must defend not only against the greater offense as charged but also against any lesser included offense. *See State v. Meadors,* 121 N.M. 38, 45, 908 P.2d 731, 738 (1995) ("[A]n offense is a lesser-included offense only if the defendant cannot commit the greater offense in the manner described in the charging document without also committing the lesser offense. Accordingly, the defendant should be fully aware of the possible offenses for which he or she may face prosecution and should have ample opportunity to prepare a defense."). Thus, if we conclude that DWI .08 is a lesser included offense of aggravated DWI it will be dispositive of Defendant's argument that he was not on notice of the charges against him. Whether a defendant is erroneously convicted of an uncharged lesser included offense is a question of law which we review de novo. *See State v. McGee,* 2002–NMCA–090, ¶ 7, 132 N.M. 537, 51 P.3d 1191.

{9} *Meadors* sets forth the test for determining whether one offense is a lesser included offense of another. 121 N.M. at 41–47, 908 P.2d at 734–40. First, one must decide whether the stringent "strict elements" test is met. *Id.* at 42, 908 P.2d at 735. Under the strict elements test, one offense is "a lesser-included offense of another only if the statutory elements of the lesser offense are a sub-set of the statutory elements of the greater offense such that it would be impossible [to ever] commit the greater offense without also committing the lesser offense." *Id.*

{10} If the strict elements test is not met, then the court should turn to the "cognate approach" to determine whether one offense is a lesser included offense of another. *Id.* at 44, 908 P.2d at 737. The cognate approach was developed in *Meadors,* as a clarification of the earlier rule developed in *State v. DeMary,* 99 N.M. 177, 179, 655 P.2d 1021, 1023 (1982). *Meadors,* 121 N.M. at 45, 908 P.2d at 738. Under the cognate approach, a party is entitled to an instruction on a lesser included offense, even if the strict elements test is not met, when:

> (1) the defendant could not have committed the greater offense in the manner described in the charging document without also committing the lesser offense, and therefore notice of the greater offense necessarily incorporates notice of the lesser offense; (2) the evidence adduced at trial is sufficient to sustain a conviction on the lesser offense; and (3) the elements that distinguish the lesser and greater offenses are sufficiently in dispute such that a jury rationally could acquit on the greater offense and convict on the lesser.

Id. at 44, 908 P.2d at 737.

{11} In the present case, no specific form of aggravated DWI was charged. The charge was essentially an open charge, which notified Defendant that he needed to prepare against all three forms of aggravated DWI. *See State v. Stephens,* 93 N.M. 458, 461, 601 P.2d 428, 431 (1979) (holding that an open charge of murder which did not specify the type or degree of murder nonetheless afforded proper notice to the defendant of the charges against him), *overruled on other grounds by State v. Contreras,* 120 N.M. 486, 903 P.2d 228 (1995); *State v. Gurule,* 90 N.M. 87, 91, 559 P.2d 1214, 1218 (Ct.App.1977) (holding that an indictment was not insufficient where it charged violation of one statute that could be committed in two ways).

{12} Defendant argues that DWI .08 cannot be a lesser included offense under a strict elements test because aggravated DWI can be committed without committing DWI .08. It is true that one can commit aggravated DWI with a BAC less than .08, either by refusing to submit to a chemical test or by causing injury to a human. § 66–8–102(D)(2), (3). Thus, because the greater crime of aggravated DWI can be committed in such a manner that the lesser crime of DWI .08 is not committed, we agree with Defendant that the strict elements test has not been met in this case. *See State v. Munoz,* 2004–NMCA–103, ¶ 13, 136 N.M. 235, 96 P.3d 796 (holding that the strict elements test was not met because, analyzing the statutory elements of the charges in the abstract, it was theoretically possible to commit the greater crime without committing the lesser crime); *State v. Romero,* 1998–NMCA–057, ¶¶ 15–16, 125 N.M. 161, 958 P.2d

119 (same). We therefore turn to the cognate approach.

{13} *Romero* provides support for the determination that DWI .08 was a lesser included offense in the present case under the cognate approach. *See id.* ¶ 14. In *Romero,* the greater offense with which the defendant was charged was burglary, of which one element is unauthorized entry. *Id.* ¶ 11. The lesser offense was criminal trespass, which could be committed by either entering or by remaining in a dwelling without permission. *Id.* ¶ 15. This Court determined that it was theoretically possible to commit the lesser crime without committing the greater crime, if the defendant had entered the dwelling with permission but remained without consent. *Id.* ¶¶ 15–16. Thus, we concluded that the strict elements test was not met. *Id.* ¶ 16. However, we further concluded that under the cognate approach, criminal trespass was a lesser included offense because the sole factual basis of the charge of criminal trespass was unauthorized entry, and under that theory the defendant could not have committed aggravated burglary without also committing criminal trespass. *Id.*

{14} In the case at hand, it is the greater offense, aggravated DWI, which can be committed in more than one way. However, this Court's reasoning in *Romero* applies. Under the evidence adduced at trial, the only factual basis for the aggravated DWI charge was DWI .16. Defendant nowhere presents an argument showing that he could not have had notice of DWI .08 as a lesser included offense. We conclude that the first prong of the *Meadors* cognate approach is met in this case because, under the offense in the charging document and the evidence adduced at trial, Defendant could not have committed the greater offense (DWI .16) without also committing the lesser offense (DWI .08). *See Meadors,* 121 N.M. at 42–43, 908 P.2d at 735–36.

{15} The second and third prongs of the *Meadors* cognate approach are also met. The second prong requires sufficient evidence to convict Defendant of the lesser charge to be introduced at trial. *Id.* at 44, 908 P.2d at 737. As we discuss in greater detail later in this opinion, the BAC results of .17 and .18 are sufficient evidence to show that Defendant drove with a BAC greater than .08. The third prong of the *Meadors* cognate approach is that the elements distinguishing between the greater and lesser offenses were sufficiently in dispute at trial such that a rational jury could acquit on the greater charge but convict on the lesser charge. *Id.* Defendant introduced evidence intended to show that the BAC machine was unreliable, including that it had given a previous out-of-range result during a calibration check and that Defendant had chewing tobacco in his mouth which may have affected the results of the test. However, there was also evidence that showed that, after the out-of-range reading, the machine received maintenance which included calibration checks that indicated the machine was within range and functioning properly. Further, there was evidence that if Defendant had tobacco in his mouth, the machine would have given a reading of "interferant detected," and that the machine did not give that reading. Under these circumstances, a rational jury could have concluded that Defendant's BAC may have been less than .16 but greater than .08. Thus, the third prong of the *Meadors* test is met in this case.

{16} We conclude that all three prongs of the *Meadors* cognate approach test are met in this case. We hold that DWI .08 was a lesser included offense of aggravated DWI in this case, and that Defendant had notice of the lesser included charge of DWI .08.

b. Sua Sponte Amendment of the Charges

{17} Defendant also argues that the district court erred by amending the pleadings sua sponte to include the offense of DWI .08. He claims that the charges were amended by the court at the close of evidence over his objection in violation of the rule that an amendment to the charge may not "impose an entirely new charge against a defendant after the close of testimony." *State v. Roman,* 1998–NMCA–132, ¶ 9, 125 N.M. 688, 964 P.2d 852.

{18} During cross-examination of the officer by defense counsel on the subject of the field sobriety tests, the court requested coun-

sel for both parties to approach. Though the discussion at the bench is difficult to hear on the tapes submitted with the record, it is clear that the court addressed the issues of jury instructions. The State said that the jury instructions should include one on the charge of aggravated DWI, one on the charge of DWI .08 as a lesser included offense of aggravated DWI, and one on not guilty of DWI. The court then asked the State if it was amending the charge against Defendant and the State answered "Yes." Nothing more on amending the charges was discussed at the bench conference. Later, after the close of evidence, Defendant objected to the jury instruction on the lesser included offense of DWI .08. At that time, the court stated that it considered the charge amended to conform to the evidence adduced at trial.

{19} We fail to see how the amendment was sua sponte. During the questioning of the State's first witness, the court asked the State to clarify whether the State's request for the jury instruction of DWI .08 was also a motion to amend the charges. The State responded that it did seek to amend the charges and the court granted the State's request at that time.

{20} Moreover, even were the amendment in this case sua sponte or at the close of evidence, we would not find error. In *McGee*, we stated:

> *Meadors* starts with the accepted proposition that a trial court, upon the State's request, may consider an uncharged offense if the statutory elements of the lesser crime are a subset of the statutory elements of the charged crime[.] . . . Simply put, a defendant is on constructive notice that he may have to defend against a lesser included, uncharged offense that satisfies the strict elements test.

McGee, 2002–NMCA–090, ¶ 9, 132 N.M. 537, 51 P.3d 1191 (citation omitted). Similarly, a charging document containing only a greater offense gives constructive notice of an offense that is a lesser included offense under the cognate approach. *See Meadors*, 121 N.M. at 45, 908 P.2d at 739 (stating that under the cognate approach the defendant has notice of the charges against him when he cannot commit the greater offense in the manner described in the charging document without also committing the lesser offense). Based on these cases, we conclude that there is no need to amend a charging document to include a lesser included offense because notice of a lesser included offense is constructively given. Since amendment of the information was unnecessary, Defendant's argument that amendment of the charges was error is without merit.

2. Admission of the BAC Test Results Was Not Error Even Though the Officer Did Not Inspect Whether Defendant Had Tobacco in His Mouth

{21} At trial, Defendant testified that he had chewing tobacco in his mouth during the BAC test. Defendant argues that the BAC test was not administered in accordance with the Implied Consent Act, NMSA 1978, §§ 66–8–105 to –112 (1978, as amended through 2003) (the Act), and regulatory requirements because the officer did not "ascertain" whether Defendant had chewing tobacco in his mouth by looking in Defendant's mouth with a flashlight. He also argues that because the requirements of the regulations were not met, he did not consent to the BAC test because consent is deemed given only if those requirements are met. Defendant argues that for these reasons the results of the BAC test were inadmissible.

{22} The State argues that the fact finder may not have believed that Defendant had chewing tobacco in his mouth, that evidence was introduced that the machine would have given a reading of "interferant detected" if there was tobacco in Defendant's mouth, and that the regulations did not require the officer to look in Defendant's mouth. The State must show compliance with regulations governing breath alcohol testing in order to lay a proper foundation that the results of such tests are reliable and thus introduce the results into evidence. *State v. Gardner*, 1998–NMCA–160, ¶ 9, 126 N.M. 125, 967 P.2d 465. Similarly, in order for a defendant to have been deemed to have given his consent to a breath test under the Act, the State must comply with the regulations governing breath testing. *Id.* Thus, we

view the issue as whether the State complied with the Act and the regulations in force at the time of Defendant's BAC test. We hold that the State complied with its requirements under the Act and the regulations. Thus, Defendant was deemed to have consented to the test and the results were admissible.

{23} We must interpret a regulation contained in the Administrative Code. We review the provision de novo, as we would a statute. *Cf. Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806 (noting that the appellate courts normally defer to agency rulings on the meaning of a regulation if "it implicates agency expertise" but also noting that statutory interpretation is done de novo); *Old Abe Co. v. N.M. Mining Comm'n*, 121 N.M. 83, 96, 908 P.2d 776, 789 (Ct.App.1995) (noting, while testing the constitutionality of a regulation, that we test regulations by the same standards with which we test statutes).

{24} Defendant cites the current Administrative Code provision governing BAC tests, which reads:

> Two breath samples shall be collected and analyzed by certified Operators or Key Operators only, and shall be end expiratory in composition. Breath shall be collected only after the Operator or Key Operator has ascertained that the subject has not had anything to eat, drink or smoke for at least 20 minutes prior to collection of the first breath sample. If during this time the subject eats, drinks or smokes anything, another 20 minutes deprivation period must be initiated.

7.33.2.12(B)(1) NMAC (2004). However, this regulation does not apply in this case. Defendant was arrested and the BAC test was administered on January 27, 2001. The regulation cited and quoted here did not become effective until March 14, 2001. 7.33.2.5 NMAC (2004).

{25} The regulation in effect at the time Defendant was tested, and therefore the regulation applicable in this case, reads:

> Two breath samples shall be collected and/or analyzed by certified Operators or Key Operators only, and shall be end expiratory in composition. Breath shall be collected only after the subject has been under continuous observation for at least 20 minutes prior to collection of the first breath sample. If during this time the subject regurgitates or introduces any foreign substance suspected of containing alcohol into his mouth or nose, another 20 minutes observation period must be initiated.

Regulations Governing Blood and Breath Testing Under the New Mexico Implied Consent Act, 6 N.M. Reg. No. 3 at 272, 275 (Feb. 15, 1995).

{26} This regulation did not require the officer to take affirmative steps to "ascertain" whether Defendant had anything in his mouth before administering the BAC test. *Id.* The officer needed only to continuously observe Defendant for twenty minutes to determine whether he "regurgitate[d] or introduce[d] any foreign substance suspected of containing alcohol into his mouth or nose." *Id.* There was testimony that the officer observed Defendant for twenty minutes and there was no testimony that Defendant regurgitated or introduced any foreign object into his mouth during that time. We conclude that the State met its burden of showing that the test was conducted in accordance with the applicable regulation.

3. Admission of the BAC Test Results Was Not Error Even Though There Had Been a Prior Out-of-Range Calibration Test

{27} Defendant contends his conviction should be reversed because the BAC test was performed on a malfunctioning machine and the State failed to show that the "out of range" reading produced at an earlier date did not affect the reliability of the test. If a defendant raises an issue as to the validity of a BAC test result, the State must make a threshold showing that the result was reliable in order for the results to be admitted into evidence. *See State v. Christmas*, 2002-NMCA-020, ¶ 10, 131 N.M. 591, 40 P.3d 1035. Evidentiary rulings are reviewed for an abuse of discretion. *Id.* ¶ 8. We conclude that the district court did not abuse its discretion in determining that the State met its

burden of making the required threshold showing of the reliability of the BAC test results. *See id.* ¶¶ 8–12.

{28} At trial, the State called Julie Lucero, a forensic toxicologist who works for the State Laboratory Division, to testify regarding the reliability of the Intoxilyzer 5000, commonly called the IR 5000, which was the machine used to test Defendant's BAC. On cross-examination, defense counsel raised the issue of the reliability of the IR 5000 by eliciting testimony that there was a test sample that was out of range on January 11, 2001, and that the machine was sent for preventative maintenance on January 24, 2001.

{29} Ms. Lucero described the maintenance performed and testified that, during the inspection, there was no problem with the IR 5000. During the preventative maintenance, a calibration check was done, in which the machine produced readings within the guidelines set by the State Laboratory Division. *See* Regulations Governing Blood and Breath Testing Under the New Mexico Implied Consent Act, 6 N.M. Reg. No. 3 at 278.

{30} Defendant claims that, despite the within-range calibration check, the State failed to meet its burden of making a threshold showing of validity because the State did not show the cause of the prior out-of-range reading, nor did the State explain how the problem was corrected. The proper threshold showing of the validity of the BAC test is made when the State shows that it complied with the regulations of the State Laboratory Division of the Department of Health. *Gardner*, 1998–NMCA–160, ¶ 11, 126 N.M. 125, 967 P.2d 465. Regulations required the machine to be calibrated every seven days and the results of the calibration check to be within .01 grams of alcohol per 210 liters of the target solution. Regulations Governing Blood and Breath Testing Under the New Mexico Implied Consent Act, 6 N.M. Reg. No. 3 at 278 ("Breath analysis instruments shall be field certified for proper calibration at least once in every seven-day period by a certified key operator using a solution of ethyl alcohol authorized by the Scientific Laboratory Division.... A field certification is valid when the results of the approved ethyl alcohol solution test is at target value + .01 grams per 210 liters.").

{31} Because the State showed that the IR 5000 was calibrated and functioning properly within the seven-day period prior to Defendant's BAC test on January 27, 2001, we hold that the calibration requirements in the regulations were met and that it was not an abuse of discretion for the district court to admit the results of the BAC test. Defendant's arguments regarding the reliability of the IR 5000 went to the weight of the evidence and not its admissibility, and the court properly let the issue go to the jury. *See Gardner*, 1998–NMCA–160, ¶ 10, 126 N.M. 125, 967 P.2d 465.

4. Defendant Did Not Preserve the Confrontation Clause Issue

{32} Defendant argues that the district court refused to allow him to cross-examine the officer regarding the field sobriety tests after the State was afforded ample direct examination on those tests and that Defendant was therefore denied the right to confront his accusers. During defense counsel's cross-examination of the officer, he asked whether there was snow or ice on the ground where Defendant stepped out of his vehicle. The officer testified that he did not look at the ground in that spot and that he did not remember snow being there. Then the court asked counsel to approach the bench. During the bench conference, defense counsel was told that his cross-examination of the officer on the subject of the field sobriety tests was becoming tedious. The State noted that it would object, if necessary, on the grounds that questions had been asked and answered. Defense counsel stated he would have to continue. After the bench conference, defense counsel questioned the officer on whether he remembered snow being on the ground. The State objected that the question was asked and answered, and the court sustained the objection. No other questions were asked during cross-examination on the subject of the field sobriety tests.

{33} "The issue of denial of the right to confrontation may not be raised for the

first time on appeal." *State v. Lucero,* 104 N.M. 587, 590–91, 725 P.2d 266, 269–70 (Ct. App.1986). In *Lucero,* the defendant did not make an objection at the time one would have been expected, and though he made an objection earlier, his objection was on the basis that there was no exception to the hearsay rule for the testimony elicited. *Id.* at 591, 725 P.2d at 270. The court found that the "defendant's objection was not sufficiently specific to alert the trial court to the claimed constitutional error.... The court had no opportunity to reach the confrontation issue." *Id.* (citations omitted). In the present case, Defendant at no time alerted the district court that its ruling violated his right to confront the witnesses against him. Thus, we hold that Defendant failed to preserve his Confrontation Clause claim.

5. Defendant's Seizure Was Not Unreasonable

{34} Defendant claimed that his stop was unreasonable and filed a motion to suppress any evidence obtained as a result of the stop. The district court denied his motion. "We review the denial of a suppression motion to determine whether the trial court correctly applied the law to the facts viewed in the manner most favorable to the prevailing party." *State v. Brennan,* 1998–NMCA–176, ¶ 10, 126 N.M. 389, 970 P.2d 161. "While we afford de novo review of the trial court's legal conclusions, we will not disturb the trial court's factual findings if they are supported by substantial evidence." *State v. Leyba,* 1997–NMCA–023, ¶ 8, 123 N.M. 159, 935 P.2d 1171. An officer may stop a vehicle when he has "a reasonable, articulable suspicion that Defendant was violating traffic laws." *Brennan,* 1998–NMCA–176, ¶ 11, 126 N.M. 389, 970 P.2d 161. "[A] reasonable suspicion may be a mistaken one." *Id.* ¶ 12 (internal quotation marks and citation omitted).

{35} Defendant argues that the officer could not see that Defendant's vehicle had crossed left of the center of the roadway because there were gas pumps obstructing his view, it was dark, the distance was too great, there was no line marking the center of the roadway, and the officer was talking to another officer. However, the officer testified that he saw Defendant turning and believed that Defendant's vehicle crossed left of the center of the roadway. Viewing the facts in the manner most favorable to the prevailing party, based on the officer's testimony we conclude there was substantial evidence that he observed Defendant cross left of the center of the roadway. Crossing left of the center of a roadway is a traffic violation under either NMSA 1978, § 66–7–308 (1978), or NMSA 1978, § 66–7–313 (1978). That Defendant was not charged with violating either of these statutes is immaterial because our analysis only focuses on whether the officer articulated a reasonable suspicion that Defendant violated the statutes. *See Brennan,* 1998–NMCA–176, ¶ 10, 126 N.M. 389, 970 P.2d 161 ("The police may conduct investigatory stops where they have a reasonable, objective basis for suspecting a person is engaged in criminal activity."). There was no unreasonable search or seizure and the district court did not err in denying Defendant's motion to suppress.

6. There Was No Prejudicial Prosecutorial Misconduct or Denial of a Fair Trial

{36} Defendant argues that his conviction should be reversed based on three comments by the prosecutor, which he claims were improper and prejudicial, and based on the district court's failure to take measures to remedy the claimed prejudice from the comments.

{37} Defendant essentially claims prosecutorial misconduct. When a timely objection is made to a claim of prosecutorial misconduct,

> we determine whether the trial court abused its discretion by denying a motion for a new trial based upon the prosecutor's conduct, by overruling the defendant's objection to the challenged conduct, or by otherwise failing to control the conduct of counsel during trial. The trial court's determination of these questions will not be disturbed unless its ruling is arbitrary, capricious, or beyond reason. Our ultimate determination 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.

State v. Duffy, 1998–NMSC–014, ¶ 46, 126 N.M. 132, 967 P.2d 807 (citations omitted).

a. The Prosecutor's Reference to the Police Report

{38} The first instance of claimed prejudicial error involved the prosecutor referring to the police report concerning Defendant's arrest. Defendant testified at trial that he had a couple of beers at a bar earlier that night. During cross-examination, the prosecutor asked Defendant whether he initially told the officer that he had not had any beers. When Defendant responded by saying he did not tell the officer that he had not had anything to drink, the prosecutor said: "if I told you that it's in the [police] report, that you told him that you had not been. . . ." At this point, defense counsel objected on the ground that the officer did not testify whether Defendant told him that he had not been drinking. The court stated that the jury would remember the officer's testimony and that the court was not going to make a decision on the objection. Moments later, the prosecutor asked Defendant, "You told the officer that you had been at your parent's that night, right?" Defendant stated that he told the officer he was at the bar. The prosecutor then asked, "That's not in the report, would that surprise you?" Defense counsel objected, stating, "he didn't do the report." The court sustained the objection before defense counsel finished his argument. On appeal, Defendant argues that the prosecutor's comments were attempts to discredit Defendant and were improper and prejudicial because they gave a false impression of fact to the jury.

{39} The district court did not abuse its discretion in failing to sustain Defendant's first objection based on the court's curative comment and Defendant's failure to focus on an applicable evidentiary rule. Similarly, the district court did not abuse its discretion in sustaining Defendant's second objection, which we interpret as falling under Rule 11–602 NMRA (requiring personal knowledge). Moreover, the prosecutor's alleged improprieties in this case did not have "such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial." *Duffy,* 1998–NMSC–014, ¶ 46, 126 N.M. 132, 967 P.2d 807. We find no prejudicial effect on the jury's verdict because the jury found that Defendant drove with an unlawful BAC, and any opinion as to Defendant's credibility would not have a material bearing on that determination. Because the alleged misconduct could have no effect on the jury's verdict, Defendant was not prejudiced or denied a fair trial.

{40} Defendant further argues that even though his second objection was sustained, the prosecutor's comments were so prejudicial that the court had a duty to give a curative instruction or take some other step to remedy the prejudice caused by the statement, relying on *Enriquez v. Cochran,* 1998–NMCA–157, 126 N.M. 196, 967 P.2d 1136. In *Enriquez,* a personal injury case, defense counsel made improper references to the defendant's ability to pay a verdict against him, knowing full well that the defendant had insurance which would likely cover the full amount of any award. *Id.* ¶¶ 132, 134. In *Enriquez,* this Court stated: "[t]he trial court did nothing in response to Plaintiff's objections beyond instructing the jury to 'ignore the last remark[.]' . . . This single admonition, in the absence of other cautionary or corrective instructions, was insufficient to meet the false impression left by Counsel's statement." *Id.* ¶ 136.

{41} *Enriquez* is distinguishable from the case at hand on several grounds, the most compelling of which is that in *Enriquez,* the plaintiff asked for a curative instruction and the court refused. *Id.* ¶ 137. Here, Defendant did not request a curative instruction, but nonetheless appears to argue, based on our language in *Enriquez,* that the court had a sua sponte duty to give a corrective instruction. We decline to make such a rule. It is the duty of the complaining party to request a curative instruction. *State v. Sandoval,* 88 N.M. 267, 268, 539 P.2d 1029, 1030 (Ct.App.1975). *Enriquez* is also distinguishable because there the district court found that the comment had a prejudicial effect and, in this case, there was no such

prejudice. 1998–NMCA–157, ¶ 138, 126 N.M. 196, 967 P.2d 1136. Defendant was not denied a fair trial on the basis of the references to the police report by the prosecutor.

b. The Prosecutor Stated, "I don't see any [snow], do you see any?"

{42} The second claimed instance of prosecutorial misconduct occurred during cross-examination of Defendant after Defendant pointed out snow in a picture. The prosecutor responded: "I don't see any [snow], do you see any?" Defense counsel objected, and the objection was sustained before defense counsel even stated a ground for the objection. The pictures were published to the jury.

{43} We will assume, without deciding, that this comment by the prosecutor was an improper comment on the evidence. *See State v. Reynolds,* 111 N.M. 263, 266, 804 P.2d 1082, 1085 (Ct.App.1990) ("[T]here are restrictions on the prosecutor's freedom to express an opinion to the jury[.]"). We, nonetheless, see no abuse of discretion by the district court. The court's actions in sustaining Defendant's objection and publishing the pictures to the jury would have cured any prejudice from the prosecutor offering his own opinion on the evidence. Concluding that the district court's actions were reasonable and that there was no prejudice, we hold that this instance of claimed prosecutorial misconduct did not deny Defendant a fair trial. *See Duffy,* 1998–NMSC–014, ¶ 46, 126 N.M. 132, 967 P.2d 807. Further, even assuming there were prejudice, we reiterate that there was no sua sponte duty on the part of the court to take any further action to remedy the prejudice as Defendant argues.

c. Reference to the Booking Sheet

{44} The final instance of claimed prosecutorial misconduct occurred after Defendant testified that he had a can of chewing tobacco with him when arrested and that the tobacco was listed on the booking sheet at the jail. During the State's cross-examination of Defendant, the following colloquy took place:

Prosecutor: Did you have a can of Red Seal that night or Coppenhagen?

Defendant: Red Seal.

Prosecutor: And you said you were booked with that?

Defendant: Yes, I was.

Prosecutor: May I approach your honor?

The Court: You may.

[unknown speaker]: Is that off the booking report?

Defense Counsel: That's not off of the booking report. I'd object. I'd called the jail and had them bring it [ ] over, the booking report it has his personal effects, it has a can of Red Seal in it. So if he's going to show this he needs to . . .

The Court: If you are testifying Mr. Lindsey, why don't you do it up here at the bench.

Defense Counsel: I'm sorry your Honor. I apologize. . . . My objection would be that that's incomplete and if they are going to offer it they need to do the whole file.

The Court: Approach.

Defense Counsel: . . . and I object to all of it, it's hearsay [inaudible] . . . it's incomplete and it's misleading [inaudible].

The Court: Before evidence closes in this case I want to see that report.

{45} Apparently after the close of evidence, defense counsel obtained the entire booking sheet from the jail and offered it into evidence. The court did not admit it into evidence, stating as the grounds for its ruling that evidence had already closed, he did not believe the jury had been misled about the booking sheet, and he did not believe that it would be proper to admit the booking sheet at the time because no one was available to authenticate it. Neither version of the booking sheet was shown to the jury; nor is either version included in the record on appeal.

{46} The only mention of the booking sheet in the presence of the jury was made by defense counsel and the State's version of the booking sheet was not offered or introduced into evidence. Defendant failed to timely offer his version of the booking sheet. Under these circumstances, we see no error and Defendant has not alerted us as to how there was a violation of a rule of evidence.

Finding no error, we reject Defendant's argument that the district court had a duty to allow the booking sheet into evidence to correct the alleged prosecutorial misconduct. We hold that the court did not abuse its discretion in refusing to admit the full booking sheet into evidence.

{47} In conclusion, looking at all of the instances of claimed prosecutorial misconduct, both separately and together, we conclude that Defendant was not denied a fair trial.

7. There Was Not Cumulative Error

{48} Defendant claims that cumulatively the errors in his trial were so prejudicial as to require reversal.

> Cumulative error requires reversal of a defendant's conviction when the cumulative impact of errors which occurred at trial was so prejudicial that the defendant was deprived of a fair trial[.] . . . The doctrine cannot be invoked if no irregularities occurred, or if the record as a whole demonstrates that a defendant received a fair trial[.]

State v. Martin, 101 N.M. 595, 600–01, 686 P.2d 937, 942–43 (1984) (citations omitted). Given that, even assuming that there conceivably were errors in Defendant's trial, we have found no prejudice and no cumulative error.

8. The District Court Did Not Err by Denying the Motion for Directed Verdict

{49} Defendant argues that the district court should have granted his motion for a directed verdict because there was insufficient evidence to convict him of DWI .08. Defendant argues that the jury must have believed that the results of the BAC test were unreliable because the jury did not convict him for aggravated DWI .16 even though the results of the tests were .17 and .18. He argues that, because the jury believed that the tests were unreliable, it could not have reasonably relied on the results of the BAC test at all. Further, he argues that the field sobriety tests alone cannot possibly show that Defendant had a BAC of .08 or greater.

{50} "The question presented by a directed verdict motion is whether there was substantial evidence to support the charge." *State v. Dominguez,* 115 N.M. 445, 455, 853 P.2d 147, 157 (Ct.App.1993).

> In reviewing a claim of insufficient evidence, we determine 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 every element of the crime charged. We view the evidence in the light most favorable to the verdict, resolving all conflicts and indulging all reasonable inferences in favor of the verdict. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The question on appeal is not whether substantial evidence would also have supported a verdict of acquittal, but whether substantial evidence supports the verdict rendered.

State v. Caudillo, 2003–NMCA–042, ¶ 7, 133 N.M. 468, 64 P.3d 495 (internal quotation marks and citations omitted).

{51} Once the .17 and .18 BAC test results were admitted in evidence, the State had met the foundational requirements and the jury was required to determine if Defendant's BAC was .16 or greater beyond a reasonable doubt in order to convict him of aggravated DWI. The jury acquitted Defendant of aggravated DWI. Yet the jury convicted him of DWI .08, presumably determining that reasonable doubt existed that the .17 and .18 readings were sufficiently accurate to convict for aggravated DWI, but that those readings were sufficiently accurate, beyond a reasonable doubt, to convict based on a BAC of .08 to .15. Evidence before the jury as to Defendant's claimed tobacco use, as well as testimony indicating there was an allowable margin of error in BAC readings, gave the jury a rational basis on which to consider the BAC readings with some scepticism, yet also a rational basis on which to find the BAC readings probably indicative of a BAC somewhere between .08 and .15. Our cases indicate that a defendant's contentions that a BAC test has been compromised in some manner goes to the weight of the evidence. *See State v. Montoya,* 1999–NMCA–001, ¶ 12, 126 N.M. 562, 972 P.2d 1153; *Gardner,* 1998–

NMCA–160, ¶ 17, 126 N.M. 125, 967 P.2d 465. We conclude that it was not error to permit the jury to consider whether Defendant was guilty of DWI .08. *Cf. State v. Baldwin*, 2001–NMCA–063, ¶ 23, 130 N.M. 705, 30 P.3d 394 (stating that, in New Mexico, "a jury may reasonably infer that an excessive BAC reading relates back to the time of driving").

CONCLUSION

{52} For the foregoing reasons, we affirm.

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

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

2005-NMCA-037

111 P.3d 226

BANK OF AMERICA, N.A., Cross–Plaintiff/Appellant,

v.

BA MORTGAGE, LLC (A Wholly Owned Subsidiary of Bank of America, N.A.), the Estate of Rita Sanchez, Deceased, Melanie Sanchez, Personal Representative of the Estate of Rita Sanchez, Deceased, the Unknown Heirs, Devisees and Legatees of Rita K. Sanchez; Bank of America, N.A.; John Doe, Tenant Whose True Name is Unknown; Jane Doe, Tenant Whose True Name is Unknown, Cross–Defendants,

and

Albuquerque Home Loans, LLC, Real Party in Interest/Appellee.

No. 24,133.

Court of Appeals of New Mexico.

Jan. 27, 2005.

Elizabeth M. Dranttel, Little & Dranttel, P.C., Albuquerque, NM, for Appellant.

Sylvain Segal, Law Offices of Sylvain Segal, Albuquerque, NM, for Appellee.

OPINION

VIGIL, Judge.

{1} A fund was created when BA Mortgage, LLC foreclosed on its mortgage and the subsequent sale of the property resulted in a surplus of $28,467.43. This appeal requires us to determine whether a junior mortgagee or the debtor's assignee of her rights of redemption and surplus is entitled to the surplus. The district court ruled that the debtor's assignee was entitled to the surplus. We hold that if the lien of junior mortgagee is valid, it is entitled to the surplus. We therefore reverse and remand for further proceedings.

BACKGROUND

{2} On April 5, 1999, BA Mortgage, LLC obtained a promissory note from Rita Sanchez secured by a mortgage on real property she owned. In July 2001, it filed a complaint for foreclosure against Ms. Sanchez. Ms. Sanchez died while the proceedings were pending, and her estate (Estate) was substituted as a defendant in an amended complaint.

{3} Bank of America, N.A. (Junior Mortgagee) was named as a defendant in the suit brought by BA Mortgage, LLC, because on October 22, 1999, it obtained a different promissory note from Ms. Sanchez secured by a mortgage on the same real property which was recorded on November 16, 1999. Junior Mortgagee's answer and cross-claim alleged that Ms. Sanchez had defaulted on its loan, that she remained indebted to it in the amount of $46,521.10, and requested foreclosure of the property pursuant to its mortgage.

{4} The Estate failed to answer and the property was ordered sold pursuant to a default judgment filed on August 13, 2004. In its order for default judgment, the district court recognized that Junior Mortgagee had filed a cross-claim for foreclosure "which is pending and undetermined." The court also noted that Junior Mortgagee had reserved the right to proceed on its cross-claim and that the court "retain[ed] jurisdiction of [the] proceedings for the purpose of . . . resolving [Junior Mortgagee's] crossclaim . . . [and] determining the rights of the parties in and to any surplus monies realized from the foreclosure sale."

{5} On October 2, 2002, the property was sold for $107,000. The district court approved the sale and ordered the resulting surplus of $28,467.43 deposited into the court registry. On November 1, 2002, the Estate assigned its right of surplus in the property to Albuquerque Home Loans (Assignee) and on November 12, 2002, Assignee recorded an assignment of right of redemption it received from the Estate. Assignee does not contend, and it presented no evidence that either assignment predated the recorded lien of Junior Mortgagee.

{6} On November 21, 2002, Assignee filed an application with the district court asking that the surplus from the foreclosure sale of the property be paid to it, and five days later, it petitioned the district court to allow it to exercise its assigned right of redemption. Junior Mortgagee responded to Assignee's application, arguing that it had a higher priority claim to the surplus than Assignee because of its mortgage on the foreclosed property, and filed its own motion for judgment of foreclosure and priority claim to surplus money proceeds. Following a hearing, the district court ordered that Assignee was entitled to the surplus proceeds. Consequently Assignee obtained title to the property at a net cost of $80,315.91 by paying $108,783.34 to the district court clerk to redeem the property and then receiving the surplus of $28,467.43 from the court registry. Junior Mortgagee appeals.

DISCUSSION

A. Standard of Review

{7} This case involves the application of law to undisputed facts; we therefore review the court's ruling de novo. *See Paradiso v. Tipps Equip.*, 2004–NMCA–009, ¶ 23, 134 N.M. 814, 82 P.3d 985.

B. Entitlement to the Surplus

{8} G. Nelson and D. Whitman, *Real Estate Finance Law* § 7.31, at 588 (2d ed.1985), states the rule regarding the right to surplus after foreclosure:

> The major underlying principle is that the surplus represents the remnant of the eq-

uity of redemption and security wiped out by the foreclosure. Consequently, the surplus stands in the place of the foreclosed real estate and the liens and interests that previously attached to that real estate now attach to the surplus. They are entitled to be paid out of the surplus in the order of priority they enjoyed prior to foreclosure. The claim of the foreclosed mortgagor or the owner of the equity of redemption normally is junior to those of all valid liens wiped out by the foreclosure. (footnotes omitted).

{9} Restatement (Third) of Property: Mortgages § 7.4 (1997), states the same rule, providing that "the surplus is applied to liens and other interests terminated by the foreclosure in order of their priority and the remaining balance, if any, is distributed to the holder of the equity of redemption." Therefore, "the claim of the holder of the foreclosed equity of redemption to the surplus is subordinate to the claims of all other holders of liens and interests terminated by the foreclosure." *Id.* cmt. b.

{10} It is undisputed that Junior Mortgagee recorded its lien before Assignee obtained its assignment of right of redemption and made a claim to the right to any surplus. Applying the foregoing rule, Junior Mortgagee has a higher priority claim to the surplus than Assignee. *See Pacific Loan Mgmt. Corp. v. Superior Court,* 196 Cal. App.3d 1485, 242 Cal.Rptr. 547, 551–52 (1987) (stating that a junior lienor had the right to have its secured debt paid from surplus); *W.A.H. Church, Inc. v. Holmes,* 46 F.2d 608, 611 (D.C.1931) (stating that surplus arising from foreclosure must be used to satisfy subordinate mortgages, liens, and judgments before any surplus can be turned over to the mortgagor); *Builders Supply Co. v. Pine Belt Sav. & Loan Ass'n,* 369 So.2d 743, 745 (Miss.1979) (stating that "the surplus arising from a sale under a senior lien should be applied on a junior lien"); *Morsemere Fed. Sav. & Loan Ass'n v. Nicolaou,* 206 N.J.Super. 637, 503 A.2d 392, 394 (Ct.App.Div.1986) (stating that "surplus funds take on the character of the land, at least with respect to junior encumbrancers whose liens existed at the time of the foreclosure").

{11} Assignee persuaded the district court, and makes the argument on appeal, that Junior Mortgagee's failure to obtain a judgment on its lien means that Junior Mortgagee lost any right it had to the surplus. The court's view was that the junior lien was wiped out in the foreclosure, and because there was no judgment on the junior lien, the lien did not survive the foreclosure.

{12} We disagree. Under the general rule, the surplus stands in the place of the foreclosed real estate and the liens and interests that previously attached to the real estate now attach to the surplus. Nelson & Whitman, *supra,* § 7.31, at 589; Restatement of Prop. § 7.4. Junior Mortgagee was timely and proactive in asserting its right to any surplus. It filed a cross-claim in the foreclosure action, appeared, and argued its position. When questioned by the court, it explained that it had not yet obtained a judgment because there was no reason to do so until after the foreclosure and after it became clear there was a surplus. It explained that to maintain its status as a lienor, it only needed to have a valid lien, not a judgment. We agree with this proposition. *See* Nelson & Whitman, *supra,* § 7.31, at 589 (stating, "[i]n order to qualify for lienor status, it must be established that the claim was reduced to a lien prior to the foreclosure sale." (footnote omitted)). Moreover, in addition to its express reservation of jurisdiction, the court's order granting foreclosure recognized that there still might be additional matters to resolve, including the parties' rights to any surplus that might result from the sale. This would include the distribution of any possible surplus that might result from the sale. Junior Mortgagee's decision to make its claim and lien known, but to wait and see how things developed, was reasonable. We therefore also reject Assignee's additional argument that Junior Mortgagee did not exercise the diligence required because it never served its cross-claim on the mortgagor.

{13} Foreclosure is an equitable action, and the distribution of foreclosure proceeds should be governed by equitable considerations. *See Las Campanas Limited Partnership v. Pribble,* 1997–NMCA–055,

¶ 9, 123 N.M. 520, 943 P.2d 554; *see also Kankakee Federal Savings & Loan Association v. Mueller*, 134 Ill.App.3d 943, 89 Ill. Dec. 781, 481 N.E.2d 332, 334 (1985) (noting that the distribution of proceeds from foreclosure is equitable). Junior Mortgagee timely appeared and made its claim and lien known well before the sale, and continued to press its point before the surplus was distributed. We conclude that the steps taken by Junior Mortgagee, including filing its motion for judgment for foreclosure and priority claim to surplus money proceeds, were sufficient to preserve its claim to the surplus. *See id.* 89 Ill.Dec. 781, 481 N.E.2d at 333–34 (holding that junior mortgagee was entitled to its share of the surplus from foreclosure even though it initially defaulted in the senior's foreclosure action and did not appear until it filed a motion, after the foreclosure, where the junior mortgage had been set forth in the senior mortgagee's petition, the junior mortgage was admitted in the answer, and the court had preserved its right to control the future distribution of the surplus); *Morsemere*, 503 A.2d at 394–95 (allowing a junior claimant to share in the surplus even though it did not move to intervene in the senior mortgagee's foreclosure action until after the sale); *Cowan v. Stoker*, 100 Utah 377, 115 P.2d 153, 155 (1941) (holding that a motion made before the proceeds of the foreclosure sale have been distributed "and served on all parties to the suit who are thereafter given an opportunity to plead and be heard, is a proper means for opening up the judgment for the purpose of allowing a junior mortgagee to make claim to surplus funds" because the "law is interested not so much in form as in substance").

{14} We conclude that Junior Mortgagee is entitled to the surplus because it has a higher priority claim to the surplus than Assignee unless, on remand, it is determined that its lien is invalid. For these reasons, we reverse and remand for further proceedings.

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

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

2005-NMCA-047

111 P.3d 229

STATE of New Mexico, Plaintiff–Appellee,

v.

Jesse OTTO, Defendant–Appellant.

No. 23,280.

Court of Appeals of New Mexico.

March 18, 2005.

Certiorari Granted, No. 29,158, April 26, 2005.

Patricia A. Madrid, Attorney General, Santa Fe, NM, M. Victoria Wilson, Assistant Attorney General, Albuquerque, NM, for Appellee.

John Bigelow, Chief Public Defender, Susan Roth, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

KENNEDY, Judge.

{1} Defendant appeals his conviction for Criminal Sexual Penetration of a Minor (CSPM) committed against his stepdaughter (the child). He challenges the admissibility and effect of evidence contained in the second of two videotapes. In this second videotape, the child testified about similar conduct Defendant had perpetrated against her. These similar acts by Defendant had occurred *after* the conduct that was charged in this case and took place in Colorado (the Colorado acts). Defendant was not charged or on trial for the Colorado acts, only for acts that took place earlier when the family lived in Alamogordo, New Mexico (the Alamogor-

do or charged acts). Defendant also asserts that the trial court erroneously allowed Kimberly Otto, his former wife and the mother of the child (Mother), to testify concerning statements the child had made to her that Defendant had penetrated the child with his fingers in Colorado. Finally, Defendant appeals the trial court's aggravation of his sentence by six years as an abuse of discretion.

{2} We hold that the use of the uncharged Colorado acts as evidence of the charged Alamogordo acts in this context is contrary to Rule 11–404(B) NMRA. Similarly, Mother may not testify as to what the child told her about the inadmissible Colorado acts. In this case, this evidence crossed the line from proper use of evidence of other bad acts to impermissible evidence of Defendant's propensity to commit the crime with which he was charged. Additionally, we hold the admission of this evidence is more prejudicial than useful for a proper purpose; we accordingly reverse Defendant's conviction and remand for a new trial.

{3} As we are remanding for a new trial, at which Defendant may or may not be convicted, we need not address the sentencing issue. We note, however, that we recently held that sentences may not be increased on the basis of aggravating circumstances unless those circumstances are found by the jury beyond a reasonable doubt. *See State v. Frawley,* 2005–NMCA–017, 137 N.M. 18, 106 P.3d 580, *cert. granted State v. Frawley,* 2005–NMCERT–002, —— N.M. ——, 110 P.3d 74 [No. 29,011 (Feb. 8, 2005)].

FACTS

{4} The child testified by video deposition that Defendant penetrated her with his fingers while she was sleeping in bed between Defendant and Mother. This occurred in Alamogordo, in September or October of 2000. Mother also testified that while living in Alamogordo, Defendant had told her that he did not want the child sleeping in bed with him because he had awakened fondling the child. Mother testified that she took his statement to mean the child's vaginal area. At that time, Mother did not report the incident because Defendant promised that it would not happen again.

{5} Shortly after this incident, Defendant and Mother moved to Colorado. The child soon came to live with them. Mother testified that after they had moved to Colorado, she had seen Defendant and the child in bed together. When Mother asked the child about what had happened, the child said to her that "[Defendant] comes in there just about every night" and that Defendant digitally penetrated her on these occasions. Mother then confronted Defendant about this accusation and in the course of a conversation that lasted about an hour and a half, Defendant cried and said he was sorry. Mother would later report the incidents to police.

{6} Defendant was charged with CSPM for the Alamogordo acts. Following his arrest, Defendant gave a statement to Detective Sanchez of the Otero County Sheriff's Department. Detective Sanchez would later testify at trial that Defendant admitted having had contact with the child's vaginal area that was "pretty damn close" to penetration, but did not remember any digital penetration taking place. According to Detective Sanchez, Defendant stated that, at the time the incident happened, he was "ready to finger [the child] but he woke up but he didn't think that he did." Detective Sanchez also said that when Defendant was questioned about the fact that the child claimed to have been penetrated and asked if she would lie, Defendant said that he did not believe the child would lie. Defendant said he knew the child had told the truth.

{7} Prior to trial, Defendant argued that although Mother could testify about the discussion she had had with Defendant regarding the sexual abuse in Colorado, she could not testify about the child's statements that had precipitated this conversation. Defendant asserted that such statements were hearsay and inadmissible. Defendant conceded that Mother's conversation with him and his admissions in those conversations were all admissible. The trial court ruled that, subject to a limiting instruction informing the jury that the child's statements were not offered for their truth but to allow the jury "the complete picture as to how this all

unfolded," Mother could testify to the child's statements to her about the Colorado acts.

{8} The child gave a two-part videotaped deposition in January 2002. The first tape concerned events that transpired in Alamogordo between September and October 2000; in the second tape the child testified to the similar Colorado acts occurring after Christmas of that year. Defendant sought to exclude the second videotape. The State sought to have the child's statements about the Colorado acts admitted as evidence under Rule 11–404(B) to show a lack of mistake or accident on Defendant's part and as evidence of his intent. The parties argued over the effect of Defendant's statement that he had come "pretty damn close" to penetrating the child, the State urging that this statement left "some room for interpretation" regarding the issue of whether Defendant knowingly engaged in the Alamogordo acts. The State further argued that this statement showed that Defendant had "sought out the child" to repeat his conduct, which abuse then continued on an almost daily basis. Defendant countered that his defense was not rooted in any mistake but in different facts, namely that what had occurred was no more than contact, and not penetration. The trial court allowed the admission of the child's testimony concerning Defendant's actions in Colorado, ruling that "what went on in Colorado is part of this whole picture, that cannot be presented properly without all the pieces of the puzzle and all pieces of the picture," and that its probative value would not be outweighed by its prejudicial effect.

{9} Trial commenced, Defendant's motion in limine was denied, and the evidence of the Colorado acts was presented. The State presented both halves of the child's deposition before calling Mother as a witness. The only other State witnesses were a state patrol officer, who conducted an initial interview with the child, and Detective Sanchez. The State rested its case, and the defense called no witnesses. Defendant was convicted of first degree CSPM.

STANDARDS OF REVIEW

{10} We review the admission or exclusion of evidence under Rule 11–404(B) for abuse of the trial court's discretion. *State v. Williams*, 117 N.M. 551, 557, 874 P.2d 12, 18 (1994). We defer to the court's admission of Rule 11–404(B) evidence. *See State v. McGhee*, 103 N.M. 100, 104, 703 P.2d 877, 881 (1985) (stating that "[t]he admission of evidence is within the trial court's discretion and will not be disturbed absent a clear abuse of discretion").

DISCUSSION

Admission of the Colorado Acts Was a Wrongful Introduction of Propensity Evidence Unjustified by the Application of Rule 11–404(B)

{11} Defendant was charged with criminal conduct occurring in Alamogordo. The child's deposition concerning that conduct was explicit; his fingers had penetrated her, and it had hurt. Prior to trial, the State made it clear why it wanted to include evidence of his similar conduct in Colorado. Interpreting Defendant's statement that he had not committed an act involving penetration as one in which he was mistaken as to what he had done, the State sought the admission of the child's testimony concerning the later Colorado acts of penetration. The State maintained that the evidence of the Colorado acts showed Defendant's "intent and it shows knowledge that [Defendant] knew what he was doing, and it shows that it's not an accident because in this particular case in Alamogordo, the child had gotten in bed with the parents whereas in Colorado, [Defendant] sought out the child." In its opening statement to the jury, the State was more explicit: "[W]hat happened in September or October of 2000 was not a mistake, it wasn't an accident, but in fact, it was a purposeful, intentional act on the part of [Defendant] *because he continued to do the same thing to her when they moved to Colorado.*" (Emphasis added.)

{12} This view of the evidence was not borne out by the testimony, nor was it the way the case was argued in closing arguments. By the end of trial, the question came down to one of fact. The State said Defendant's finger(s) penetrated the child's vagina while she was between him and his former wife in Alamogordo; the defense said there was no penetration. We now look at

the admission of the testimony about the Colorado acts to see if it was properly admitted, as the trial court believed, as "part of this whole picture, that cannot be presented properly without all the pieces of the puzzle."

Rule 11–404(B) is a Rule of Exclusion

{13} Rule 11–404(B) is fundamentally a rule of exclusion. *Williams,* 117 N.M. at 557, 874 P.2d at 18 (stating that "[t]he purpose of Rule 404(B) is to exclude the admission of character traits to prove that a defendant acted in accordance with those traits"); *but see State v. Jones,* 120 N.M. 185, 187–88, 899 P.2d 1139, 1141–42 (Ct.App.1995) (stating in dicta that in New Mexico, Rule 11–404(B) may be a rule of inclusion, since New Mexico allows more exceptions than those explicitly stated in the Rule). Rule 11–404(B)'s first words that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith" establishes a prohibition against using acts to prove a character trait from which it may then be inferred Defendant followed to commit the present crime. This general prohibition against character evidence is followed by a set of exceptions. The second sentence of Rule 11–404(B) establishes the proper purposes, other than proving character, for which evidence of prior bad acts may be admitted. *See* Rule 11–404(B) (stating in pertinent part that other bad acts may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident"); *State v. Lamure,* 115 N.M. 61, 70, 846 P.2d 1070, 1079 (Ct.App. 1992) (Hartz, J., concurring). "Thus, the issue in New Mexico is whether there is a probative use of the evidence that is not based on the proposition that a bad person is more likely to commit a crime." *Jones,* 120 N.M. at 188, 899 P.2d at 1142. Yet even these admissible exceptions to "bad acts" evidence are subject to another general qualifier: prejudice to Defendant. Using Rule 11–404(B) to admit evidence requires its proponent to affirmatively demonstrate the consequential fact to which the proffered evidence is directed. *State v. Lucero,* 114 N.M. 489, 492, 840 P.2d 1255, 1258 (Ct.App.1992). After the proponent has made an adequate showing, the court must then also be satisfied that the probative value is not "substantially outweighed" by other considerations. *Id.* (internal quotation marks and citation omitted).

{14} Because evidence that Defendant acted in accordance with a propensity would be exceedingly probative evidence if admitted, even permitted uses of "bad acts" evidence are tempered in turn by the application of Rule 11–403 NMRA. Rule 11–403 requires a balancing of the evidence between its probative value and potentially prejudicial effect. *State v. Ruiz,* 2001–NMCA–097, ¶ 15, 131 N.M. 241, 34 P.3d 630. We recognize "the grave risk of unfair prejudice when evidence of multiple bad acts is introduced in a single trial." *Id.* ¶ 14. Rule 11–403 reinforces the very purpose of Rule 11–404(B). This purpose is to protect a defendant from the circumstantial use of other bad acts to establish a character trait or propensity that might be given more weight by the jury than it deserves, and might lead a fact finder to punish the defendant because he is a bad person. *Ruiz,* 2001–NMCA–097, ¶ 13, 131 N.M. 241, 34 P.3d 630. We hold that both rules were violated in this case, for the reasons below.

Denial Versus Mistake; Fact Versus Intent

{15} Factual probity—whether a prior bad act shows a basis to believe that a fact exists—is easily confused with the assertion of an element of character. Issues of fact must be separated from issues of character. The factual propositions for which other bad acts may be admissible are those which give rise to an inference of the defendant's involvement or identity as the culprit; that the evidence sought to be admitted negates an attempt by the defendant to disassociate him- or herself from the crime. The exceptions to Rule 11–404(B) exist to reel the defendant back into the case. *See, e.g., Martin v. State,* 144 S.W.3d 29, 31 (Tex.Ct.App. 2004) (stating that Rule 11–404(B) evidence must tend to "establish some elemental fact, such as identity or intent; that it tends to

establish some evidentiary fact, such as motive, opportunity, or preparation, leading inferentially to an elemental fact; or that it rebuts a defensive theory by showing, e.g., absence of mistake or accident"). Showing that a criminal defendant possessed motive or opportunity to commit the crime, that the crime was committed with a unique factual signature (modus operandi) associated with the defendant, or that extrinsic evidence shows a defendant's knowledge of the criminality of the act alleged (lack of mistake) are all ways intended to factually connect the defendant to the commission of or intent to commit a crime. Where a defendant concedes that he committed a criminal act, but disputes which one, such connection is not probative.

{16} In this case, despite the prosecution's assertions, Defendant did not allege a mistake as to the character of his actions. At no point in the trial did Defendant deny having had contact with the child's genitals. Defendant asserted that what had occurred was sexual contact with the child but not penetration, which is a factual proposition. In the course of the trial, sufficient evidence of Defendant's factual proposition was presented to justify the trial court's giving a jury instruction on criminal sexual contact as a lesser included offense of CSPM. The court also gave instructions factually distinguishing penetration into the child's vagina from contact with the child's vulva as elements of each offense, respectively, as well as an instruction providing separate definitions of "vagina" and "vulva." Clearly, the difference between sexual penetration and sexual contact, and external and internal anatomy, were well enough factually developed by the evidence to justify these instructions. With the uncontested admission of evidence from the child and other witnesses such as Detective Sanchez, the factual issues of contact versus penetration were well developed. The question presented by Defendant was factual—simply, while in Alamogordo did he commit one criminal act or the other? Not in issue was whether he did what he did accidentally or by mistake. In *Ruiz,* the defendant asserted that the events never happened or the girls accusing him were mistaken in their perceptions, and the State attempted to counter the defense with evidence of other acts. *Ruiz,* 2001–NMCA–097, ¶ 17, 131 N.M. 241, 34 P.3d 630. There, the use of the other acts was found to violate Rule 11–404(B), as being no more than evidence of the defendant acting in conformity with his propensity to molest girls, as is the case here. *Ruiz,* 2001–NMCA–097, ¶ 18, 131 N.M. 241, 34 P.3d 630.

{17} Furthermore, though we sympathized in *Ruiz* with the State's desire to bolster its victims' testimony,

> 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.

Id. ¶ 19 (internal quotation marks and citation omitted).

{18} The State's use of the Colorado acts to, as it alleged, establish that Defendant committed the Alamogordo crime "because" he repeated it later was wrong, and the evidence should have been excluded. "Testimony which amounts to evidence of a defendant's bad character or disposition to commit the crime charged is clearly inadmissible." *Lucero,* 114 N.M. at 492, 840 P.2d at 1258.

{19} Even if the evidence was offered, as it was accepted by the trial court, to show the "context" of other admissible facts, the Colorado acts as used at trial were intended by the State to show that Defendant had committed the act "because" he committed other similar acts at a later date. The "context" as set by the State at trial does no more than amount to character or propensity evidence to allow an inference of conformity of behavior. We have stated that "[w]hile we recognize the potential difficulty in prosecuting [CSPM] cases, then, we do not believe the appropriate solution is to wink at the dictates of Rule [11–]404(B)." *Id.* at 494, 840 P.2d at 1260. Furthermore, this use of the Colorado acts is unduly prejudicial and Rule 11–403 should eliminate this evidence from admissibility. *See* Rule 11–403 (stating that

even relevant evidence will be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury"). Additionally, there was a contextual difference between the Alamogordo acts and the Colorado acts—the Colorado acts involved allegations that Defendant purposely "sought out" the child to commit sexual acts, where in Alamogordo, the acts occurred after the child had climbed into bed between Defendant and Mother. To admit the Colorado acts, then, admits the implication of the added circumstantial element that the State used: That Defendant "sought out" the child to repeat his conduct. The invitation provided by the court to show "the complete picture as to how this all unfolds" is therefore a green light to expand both the nature and effect of the evidence beyond its probative value.

{20} Where a defendant does no more than create a factual dispute where the issue is believability, other bad acts should not be admissible for the reasons stated above. The trial court therefore abused its discretion by failing to exclude them. "When there is error in admitting the other-crimes evidence under [Rule] 11–404(B), prejudice is established when there are convictions." *Jones,* 120 N.M. at 190, 899 P.2d at 1144.

{21} The State now argues that the videotape deposition and hearsay could have been properly admitted as evidence of Defendant's lewd and licentious disposition. As mentioned above, Rule 11–404(B) evidence of other bad acts must be tendered with specific reference to its purpose and the basis for its relevancy. *Lucero,* 114 N.M. at 492, 840 P.2d at 1258. Such use was not proffered by the State at trial. Further, we have recognized lewd and licentious disposition evidence as "nothing more than a euphemism for the character evidence which [Rule 11–404(B) is] designed to exclude." *Id.* at 492–93, 840 P.2d at 1258–59. In this case, Defendant's behavior progressed, at worst, from the opportunistic to the intentional. That he later "sought out" the child to commit sexual acts is more prejudicial than probative of his acts in Alamogordo that were alleged to be of a much different character. For either reason, lack of specific proffer, or the tipping of the balance toward prejudice from probative use, the State's urging adoption of this evidence of lewd and licentious disposition is misplaced. This is especially so in cases of child sexual abuse, as we pointed out in *Lucero. Id.* at 493–94, 840 P.2d at 1259–60.

The Trial Court's Limiting Instruction Was Insufficient to Insulate Defendant from the Prejudice Resulting from the Admission of the Child's Statements to Mother

{22} The trial court also admitted the child's statements to her Mother that Defendant had penetrated her with his fingers for "contextual" purposes, doing so while also giving a limiting instruction. Specifically, Mother testified that after she saw Defendant in bed with the child, she asked the child "what he was doing in there." The child replied that Defendant came in about every night. Mother asked "does he do anything?" and when the child reluctantly said yes, Mother had proceeded to question the child as to whether Defendant touched her and touched her in her private parts. She then asked "what does he do?" The child answered "he sticks his finger inside me and wiggles it around and it hurts mom and I don't like it."

{23} Shortly thereafter, Defendant's counsel reminded the trial court of its intention to give a cautionary instruction. The trial court informed the jury what hearsay was, and that it normally was not admissible evidence. The court further stated that an exception to the hearsay rule exists when the hearsay is offered for a limited purpose of showing what the person who heard the statement did in response to or reliance on the statement. The court then instructed the jury to "consider the statements of the child through Mother for the limited purpose only of explaining or supporting what Mother did in response or reaction to that and not for the truth of the child's statements to [M]other."

{24} Again, we review the admission of these statements for an abuse of discretion and reverse only when a defendant is prejudiced thereby. *State v. Worley,* 100 N.M. 720, 723, 725, 676 P.2d 247, 250, 252 (1984). Here, the trial court informed the jury that

the statement made by the child to Mother was hearsay. A statement not offered for its truth, "but for such legitimate purposes as that of establishing knowledge, belief, good faith, reasonableness, motive, effect on the hearer or reader," is not hearsay, and is admissible. *State v. Rosales,* 2004–NMSC–022, ¶ 16, 136 N.M. 25, 94 P.3d 768 (internal quotation marks, citation, and emphasis omitted). In this context, the details of the alleged act are virtually impossible to separate from their use as mere evidence that the description of the acts was uttered.

CONCLUSION

{25} We reverse the trial court and remand for further proceedings consistent with this opinion.

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

I CONCUR: A. JOSEPH ALARID, Judge.

LYNN PICKARD, Judge (dissenting).

PICKARD, Judge (dissenting).

{27} I respectfully dissent from the majority opinion. I believe that the majority (1) has taken the State's argument below for admission of the evidence out of context and (2) has improperly rested its rationale (a) on the incomplete justification articulated by the trial judge, as opposed to justifications that can be lawfully articulated based on the facts and evidence adduced below, and (b) on Defendant's argument to the jury, as opposed to the evidence introduced below from which the jury could draw inferences that could be properly rebutted by evidence of the Colorado acts. I explain.

{28} First, the majority concentrates on one sentence in the State's opening argument, during which the State used a shorthand version of its contention—that what happened in Alamogordo was not an accident or a mistake, but instead was intentional and purposeful "because" Defendant continued to do the same thing in Colorado. This shorthand version did not do justice to the State's argument that it articulated to the trial court during the hearing on the motion in limine and during its closing argument. That argument concentrated on Defendant's statement made to the police, in which he claimed that he was "ready to finger" the child, but woke up and did not think that he did, and that he might have come close to penetration, but did not remember any penetration. The State argued that this statement was ambiguous and subject to interpretation as to Defendant's knowledge of what he was doing and his intent. It appeared that Defendant was telling the police that what he did might have been done in his sleep without his conscious intent and whatever he did, he stopped it as soon as he awoke and realized what he was doing. As the State argued in closing argument, the Colorado acts "tell[ ] you that [what Defendant did in Alamogordo] was unlawful and intentional. It was not an accident that [D]efendant did that on that first occasion. You know, not like he was in his sleep or anything, because this is something that continued to occur."

{29} Second, in my view, the majority has violated one cardinal rule of appellate procedure and one basic rule of criminal law in resting its decision on the trial court's inartful articulation of why it was allowing admission of the evidence and on the defense's tactical concession to the jury that Defendant committed contact but not penetration. The rule of appellate procedure is that an appellate court "will affirm a trial court's decision reaching a correct result, even though the reason offered to support the result is wrong." *Moore v. Sun Pub'g Corp.,* 118 N.M. 375, 379, 881 P.2d 735, 739 (Ct.App. 1994). This rule applies equally to criminal cases. *See State v. Clah,* 1997–NMCA–091, ¶ 20, 124 N.M. 6, 946 P.2d 210; *State v. Urban,* 108 N.M. 744, 747, 779 P.2d 121, 124 (Ct.App.1989). This rule is subject to an exception, in that the rule will not be applied when it would be unfair to an appellant to apply it, such as when the issue being reviewed is fact dependent and the failure to give the correct reason below deprived the appellant of the opportunity to offer facts that would show the potential error of the allegedly correct reason. *See State v. Franks,* 119 N.M. 174, 177, 889 P.2d 209, 212 (Ct.App.1994). The exception does not apply here. Nor do those cases in which we have been reluctant to apply the rule because we

really do not know how the trial court would have exercised its discretion had it not been mistaken as to the law. *See State v. Salgado,* 112 N.M. 793, 796, 819 P.2d 1351, 1354 (Ct. App.1991). In this case, the rationale articulated by the trial court was that the jury should be aware of the complete picture. This rationale was, at most, incomplete. The trial court could well have been correct in thinking that the jurors should be aware of why Defendant cried and apologized to his wife in Colorado. Otherwise, they would not understand and appreciate the strength of Defendant's admissions. But there were additional reasons why the evidence was properly admissible under Rule 11–404(B). The trial court having found that the jury should be aware of the whole picture and, having found that unfair prejudice did not outweigh probative value, it is virtually certain that the trial court would have admitted the evidence for these additional reasons as well.

{30} The rule of criminal law is that we do not limit the State's presentation of evidence to the narrow question of what a defendant has expressly put in issue. For example, we routinely uphold the admission of gory photographs even though a defendant concedes that the victim is dead or died in a particular way. *See, e.g., State v. Hernandez,* 115 N.M. 6, 19, 846 P.2d 312, 325 (1993); *State v. Stephens,* 93 N.M. 368, 370, 600 P.2d 820, 822 (1979); *State v. Upton,* 60 N.M. 205, 210, 290 P.2d 440, 442–43 (1955). Moreover, we apply this principle in the context of the admission of Rule 11–404(B) evidence. *See State v. Martinez,* 1999–NMSC–018, ¶¶ 30–34, 127 N.M. 207, 979 P.2d 718 (holding Rule 11–404(B) evidence admissible and not excluded by Rule 11–403 because a defendant's offers to stipulate do not bind the state to the sanitized way that the defendant wants the case presented); *State v. Nguyen,* 1997–NMCA–037, ¶¶ 6–11, 123 N.M. 290, 939 P.2d 1098 (indicating, among other things, that the defendant's willingness to stipulate that mistake or accident would not be defenses does not mean that the state does not have to prove intent and it may do so by offering other bad acts evidence).

{31} Our Rule 11–404(B) jurisprudence permits the admission of other bad acts evidence if there is an "articulation or identification of the consequential fact to which the proffered evidence of other acts is directed." *Jones,* 120 N.M. at 187, 899 P.2d at 1141. Moreover, the articulation should not be "based on the proposition that a bad person is more likely to commit a crime." *See id.* at 188, 899 P.2d at 1142. Here, the evidence of the Colorado acts satisfies this test. The consequential facts were intent, lack of accident, mistake, and knowledge of what Defendant was doing, all put in issue by Defendant's statement to the police. Moreover, the fact that the defense tactic was to admit that Defendant committed contact and urge the jury to convict of the lesser included offense did not mean that the jury would necessarily do so. With the evidence and inferences available from Defendant's own statement, the jurors could easily have believed that whatever Defendant did, he did in his sleep and stopped as soon as he was awake and aware. The State should have the right to rebut Defendant's statements as long as it can do so consistently with the rules of evidence.

{32} Because I believe that the State did rebut Defendant's statements consistently with the rules of evidence in this case, even though the majority has utilized certain statements by the trial judge and the prosecutor that make it seem that those rules were violated, I would affirm Defendant's conviction. The rule requiring cases to be affirmed if the correct result is reached, regardless of the rationale articulated below, is one of judicial economy that is designed to spare the system and the people who deal with it the time, expense, and emotions of a new trial where the result would surely be the same. In this case, had the prosecutor and the trial judge more artfully articulated proper Rule 11–404(B) rationales, it appears that the case would have been affirmed. I would not put the judge and the prosecutor through another trial, nor the victim and her family through another emotional ordeal, on the grounds given by the majority. If the true basis of the majority's opinion is not the articulations of the prosecutor or the trial judge, then other bad acts evidence will never be able to be used in child sexual abuse cases, which I do not believe is the law. *See,*

e.g., State v. Jordan, 116 N.M. 76, 80–81, 860 P.2d 206, 210–11 (Ct.App.1993).

2005-NMSC-009

111 P.3d 701

William M. TURNER, in his official capacity as Trustee of and on behalf of Manzano Resources, an express, common law business trust, and Westwater Resources, an express, common law business trust, Plaintiffs–Respondents,

v.

Carroll G. BASSETT, Gordon R. Bassett, James N. Bassett, Bassett Brothers Water Sales Company, Hydro Source, Inc., a New Mexico corporation, Estancia Basin Water Supply, L.L.C., a New Mexico limited liability company, Edgewood Water Cooperative, Inc., a non-profit New Mexico corporation, and All Unknown Claimants of Interest in the Water Rights Adverse to Plaintiffs, Defendants–Petitioners.

No. 28,317.

Supreme Court of New Mexico.

March 7, 2005.

Sheehan, Sheehan & Stelzner, P.A., Susan C. Kery, Ray M. Vargas, II, Albuquerque, NM, for Petitioners.

Wolf, Taylor & McCaleb, P.A., Jolene Lucille McCaleb, Elizabeth Newlin Taylor, Wayne C. Wolf, Albuquerque, NM, for Respondents.

D.L. Sanders, R. Bruce Frederick, Santa Fe, NM, for Amicus Curiae Office of the State Engineer.

OPINION

BOSSON, Justice.

{1} Fourteen years after the sale of a parcel of land in Edgewood, New Mexico, a dispute arose between the buyer, William Turner (Turner), and the sellers, the Bassetts, as to the ownership of associated water rights. Following a hearing, the district court granted summary judgment in favor of the Bassetts, finding in relevant part that the water rights had been properly severed from the land prior to its sale, and that even if the water rights had not been successfully severed, Turner's action was precluded by New Mexico's adverse possession statute, NMSA 1978, § 37–1–22 (1973). The Court of Appeals reversed, finding that the Bassetts had failed to sever the water rights, and that adverse possession of water rights cannot occur in New Mexico. On certiorari to this Court, the Bassetts challenge a portion of the Court of Appeals opinion, arguing that the water rights in question were severed prior to the land sale and did not transfer to Turner with the conveyance of land. In our examination of the severance issue, we agree with the district court and reverse the Court of Appeals. We also take this opportunity to clarify certain language in a previous opinion of this Court, *Sun Vineyards, Inc. v. Luna County Wine Dev. Corp.*, 107 N.M. 524, 760 P.2d 1290 (1988), and limit its effect. We hold that the State Engineer's permit to transfer location of water usage creates a rebuttable presumption of severance. Because Turner had no evidence with which to rebut that presumption, the presumption of severance holds.

BACKGROUND

{2} In December 1984, Turner entered into a real estate contract to purchase roughly 130 acres of land in Edgewood from the Bassetts. For many years prior to the sale, Ray Bassett, predecessor in interest to Carroll G. Bassett, Gordon R. Bassett, James N. Bassett, Bassett Brothers Water Sales Company (collectively referred to as the Bassetts), had irrigated 125 acres of the land with 312.5 acre-feet (AF) of water, or 2.5 AF/acre of licensed and vested (diversion) water rights from well E–87, located on the property. In 1974, Ray Bassett filed an Application for Permit to Change Place or Purpose of Use, Combine and Appropriate Underground Waters (1974 application). The application requested permission to combine water from well E–87 with water from two other wells, E–544 and E–1107, and to sever the water from the property. This application described the Bassetts' plan to become a local water supplier in the Edgewood area by gradually converting their water use from irrigation to municipal and industrial applications. The application was approved in relevant part by the State Engineer, and a permit issued (1976 permit). The permit allowed the Bassetts to phase out irrigation on the property over time, while combining the water from well E–87 with water from other wells to provide water service to the growing Edgewood community.

{3} The permit required the Bassetts to file proof by December 15, 1976 that they were applying the water to beneficial use, as set forth in their application. The permit also required the Bassetts to furnish the State Engineer with data concerning the amount of water pumped for irrigation, the amount of land to be irrigated each season, and the metering of water diverted for non-irrigation purposes. In 1979, the Bassetts obtained a second permit from the State Engineer to enlarge the area in which the water could be used (1979 permit). This permit was subject to the same conditions as the earlier permit, including the requirement that the Bassetts submit proof that the water was actually applied to the new beneficial uses described in the application.

{4} Starting in late 1979, the Bassetts filed a series of applications for an extension of time to apply the water to beneficial use. Ten applications, filed annually until 1988, chronicle the Bassetts' gradual progress towards the transition from irrigation uses to supplying Edgewood community needs. The plan included the construction of the physical infrastructure necessary to connect the wells and deliver the water to the community, as well as monitoring the growth of the community and the anticipated need for water. The 1982 application for an extension of time states that "[a]ll irrigation has been stopped now" at each of the wells, including well E-87.

{5} Thus, the Bassetts complied with the permit conditions that required them to meter non-irrigation uses and submit use information to the State Engineer. However, at the time of the January 1985 sale to Turner, the Bassetts were not yet applying the full permitted amount of water to beneficial use at the new locations, and had not yet completed the prescribed administrative procedure of filing proof to the State Engineer that the permitted water was applied to the new beneficial use. The Bassetts concede that they were not exercising their entire water right during the 1980s. Therefore, at the time of the land conveyance to Turner, the Bassetts had not fully complied with the conditions set forth in either the 1976 or 1979 permit from the State Engineer.

{6} At the time of the real estate contract negotiations between the Bassetts and Turner, neither party discussed water rights. The Bassetts retained an easement to the well on the property and the right to rework the well, but importantly, they did not reserve water rights in the sale documents. Several years after the sale, Turner indicated that he was planning to develop a residential subdivision and did not intend to irrigate the property. Turner contemplated purchasing water for the subdivision from the Bassetts. In 1987, Turner submitted a petition for reclassification of land to the U.S. Department of Agriculture seeking to reclassify the property from "prime farm land" to "dry land." In the petition, Turner states that "[n]o water rights transferred with the land" when he purchased it from the Bassetts in 1985. He also acknowledged in the 1987 petition that the property had once been irrigated, but that the water formerly applied to irrigation was no longer available because it had been severed from the land.

{7} Turner became aware of a possibility that the Bassetts may not have successfully severed the water rights, when, in 1998, the Bassetts' successor in interest, Hydro Source, Inc., sought to convey the full amount of water rights described in the 1976 permit to Estancia Basin Water Supply, L.L.C. Hydro Source filed a change of ownership form with the State Engineer for the rights in the 1976 permit and the property's appurtenant irrigation water rights. Alerted to the possibility that his property might still have appurtenant water rights, Turner initiated an investigation, in which he was reminded that the Bassetts had not expressly reserved their irrigation water rights when they executed the warranty deed to Turner. In September 1998, Turner also filed a change of ownership of water rights with the State Engineer. In October 1998, Turner received a copy of a letter from the State Engineer to Carroll Bassett, noting that both parties had filed change of ownership of water rights for the same water, and requesting clarification.

{8} Turner then filed the underlying quiet title suit. The district court granted summary judgment in favor of the Bassetts. Even though the Bassetts had not reserved the water rights in the conveyance documents, the court found that the water rights had been severed prior to the land conveyance to Turner, and that even if the water rights had not been severed, the Bassetts had reacquired them through adverse possession. On appeal, the Court of Appeals reversed, finding that the water rights had not been severed prior to the conveyance, and that adverse possession of water rights cannot occur in New Mexico. The latter issue has not been appealed and is not before us. The sole issue on certiorari is whether the Bassetts' water rights had been severed, and thus were no longer appurtenant to the property, by the time of Bassetts' conveyance to Turner.

DISCUSSION

Standard of Review

{9} The district court determined that there were no material facts in dispute. The Court of Appeals agreed, but found that the district court erred as a matter of law in concluding that the Bassetts had successfully severed the appurtenant water rights prior to the conveyance to Turner. We now review de novo that issue of law. *Hasse Contracting Co. v. KBK Fin., Inc.*, 1999–NMSC–023, ¶ 9, 127 N.M. 316, 980 P.2d 641 ("Appellate courts review matters of law de novo.").

Severance of Water Rights

{10} In New Mexico, water that is applied to irrigation becomes appurtenant to the land on which it is used. "[A]ll waters appropriated for irrigation purposes . . . shall be appurtenant to specified lands owned by the person, firm or corporation having the right to use the water, so long as the water can be beneficially used thereon." NMSA 1978, § 72–1–2 (1907). These water rights remain appurtenant to the land until they are severed. The requirements and procedures for the severance and transfer of appurtenant water rights are defined by state statutes and the administrative procedures of the State Engineer. *See* NMSA 1978, § 72–5–22 (1907); NMSA 1978, § 72–5–23 (1941),[1] and 19.26.2 NMAC (2005).

{11} In the case before us, the district court found that the water rights had been severed prior to the sale of the land. The court relied on two factors. First, the Bassetts had been issued a permit by the State Engineer to change the place and purpose of water usage, and second, the Bassetts had ceased irrigation of the land four years prior to the sale. *Turner v. Bassett*, 2003–NMCA–136, ¶ 11, 134 N.M. 621, 81 P.3d 564. Despite these undisputed facts, the Court of Appeals reversed, finding *Sun Vineyards*, 107 N.M. 524, 760 P.2d 1290 dispositive of the issue. *Turner*, 2003–NMCA–136, ¶ 12, 134 N.M. 621, 81 P.3d 564.

{12} The Court of Appeals interpreted *Sun Vineyards* as articulating a comprehensive test for determining whether a severance has occurred as a matter of law, and the appellate court concluded that the district court had misapplied the test. *Id.* "In *Sun Vineyards, Inc.*, however, the Supreme Court specifically held that when a person claiming severance conveys property without reserving the water rights, that conveyance results in the discontinuation of the severance process." *Id.* ¶ 14, 760 P.2d 1290. Applying this test, the Court of Appeals concluded that the conveyance of land to Turner, lacking an express reservation of water rights, automatically discontinued the severance process because the Bassetts had not yet obtained a license. *Id.* "The deciding factor for determining whether severance has occurred is completion of the necessary administrative steps and procedures," which culminates in the issuance of a license. *Id.* ¶ 16, 760 P.2d 1290.

{13} The parties do not dispute that at the time of the land sale, the Bassetts had neither obtained a license from the State Engineer nor reserved water rights in the deed. Nonetheless, the Bassetts argue that the water was effectively severed from the property prior to the sale. The Bassetts had obtained a permit from the State Engineer which involved creating a detailed development plan, and then had progressed in implementing that plan towards the ultimate goal of supplying the water needs of the growing community of Edgewood. In making steady progress towards the approved goal, the Bassetts maintain that they have complied with all constitutional and statutory requirements for effecting a severance. *See* N.M. Const., art. XVI, § 3; NMSA 1978, § 72–12–2 (1931); § 72–5–22; § 72–5–23. Turner, on the other hand, analogizes this case to *Sun Vineyards*, and like the Court of Appeals, argues that the Bassetts' failure to complete

1. These statutes are part of the New Mexico Surface Water Code, but our courts have applied these same laws to cases involving the transfer of groundwater. *See Sun Vineyards, Inc.*, 107 N.M. at 527, 760 P.2d at 1293; *cf. McCasland v. Miskell*, 119 N.M. 390, 394, 890 P.2d 1322, 1326 (Ct.App.1994) (noting, in a case involving the transfer of both irrigation well and ditch rights, that "[s]ection 72–5–23 sets out the mechanism for severing and transferring water rights from the lands to which they are appurtenant.").

the State Engineer's administrative requirements for licensure automatically caused the severance process to cease and the water rights to pass along with the land to Turner.

{14} In *Sun Vineyards,* the operator of a vineyard obtained a permit from the State Engineer to sever a fraction of the appurtenant water, spread it to other land, and thereby reduce the amount of water appurtenant to the original irrigated area. *Sun Vineyards,* 107 N.M. at 525, 760 P.2d at 1291. The vineyard operator then negotiated a sale of part of the original irrigated land. *Id.* Though the operator had a permit from the State Engineer for the severance and transfer of the fractional water rights, the operator had not yet obtained a license. *Id.* at 528, 760 P.2d at 1294. When the buyer discovered the irrigated land was being conveyed with only part of its original water rights, the buyer filed suit seeking to quiet title to the original water rights, as well as specific performance and damages resulting from a breach of contract. The district court held for the buyer, ordering the seller to convey the remaining portion of the water rights. *Id.* at 527, 760 P.2d at 1293.

{15} On appeal, this Court undertook a review of the record to determine whether there was sufficient evidence to support the district court's decision. *See Sun Vineyards,* 107 N.M. at 526, 760 P.2d at 1292. This Court first analyzed the threshold issue of severance as a matter of law, and concluded that the water rights remained appurtenant to the land and passed to the buyer because a license had not issued and because the seller had not reserved the rights in the conveyance documents. *Id.* at 527, 760 P.2d at 1293. The second analysis centered upon the plaintiff's contract claim. The warranty deed in *Sun Vineyards* stated that the land came "with water rights," and the district court correctly determined that the purchaser relied on receiving the full amount of water originally appurtenant to the land. *Id.* at 528, 760 P.2d at 1294. The purchasers "had no knowledge prior to the purchase of the property that the water rights would be less than normal." *Id.*

{16} As a result, this Court upheld the order granting specific performance of the contract plus contractual damages, and the buyer received the full duty of three acre-feet per acre. *Id.* In affirming specific performance, this Court observed that, although the seller had received a permit from the State Engineer for partial transfer of water rights, thereby effecting a severance, the actual transfer of those water rights had not yet vested because no license had yet issued. *Id.* at 527, 760 P.2d at 1293. Therefore, those water rights, severed but not yet transferred, were still subject to a court order for specific performance, based upon the reasonable contractual expectations of the buyer. *See id.* at 528, 760 P.2d at 1294.

{17} We observe that the case before us might have involved two issues, as *Sun Vineyards* did: a threshold legal issue of whether water rights were severed prior to the conveyance, and a separate contract or tort issue concerning what the parties were reasonably led to believe would result from the conveyance. The threshold legal issue focuses upon whether the water rights were appurtenant at the time of the conveyance. Analysis of the threshold issue centers upon the prior actions taken by the seller to sever the water rights, as seen through the administrative procedures set forth by the State Engineer. The separate contract or tort issue examines the expectations created by the parties to the land sale contract, and the civil liability of one party to the other that may result from those expectations. The State Engineer is not a party to the contract.

{18} The parties agree they did not discuss water rights at the time of the land sale negotiations, and neither party argues there was any writing or communication that constituted a mutual understanding regarding appurtenant water rights. Instead of an implied contractual understanding between the parties, this case is based upon the threshold legal issue of whether the Bassetts had done enough, according to requirements of the State Engineer, to sever their water rights prior to the sale of land to Turner.

{19} To more fully explore this issue, we consider the applicable statutes and agency regulations, the common practice of the State Engineer, and the policy implications of our decision upon the practice of severance in the

State of New Mexico. The statutory procedures for severing and transferring water rights are set forth in Section 72–5–23:

> All water used in this state for irrigation purposes, except as otherwise provided in this article, shall be considered appurtenant to the land upon which it is used, and the right to use it upon the land shall never be severed from the land without the consent of the owner of the land, but, by and with the consent of the owner of the land, *all or any part of the right may be severed from the land,* simultaneously transferred and become appurtenant to other land, or may be transferred for other purposes, without losing priority of right theretofore established, if such changes can be made without detriment to existing water rights and are not contrary to conservation of water within the state and not detrimental to the public welfare of the state, *on the approval of an application of the owner by the state engineer.* Publication of notice of application, opportunity for the filing of objection or protests and a hearing on the application shall be provided as required by Sections 72–5–4 and 72–5–5 NMSA 1978.

(Emphasis added.)

{20} In order to effect a severance, Section 72–5–23 requires consent of the landowner, and "approval of an application" by the State Engineer. Both consent of the landowner and approval of the State Engineer are present in this case. As is clear from the Bassetts' permit, the active review of an application by the State Engineer occurs during the permitting phase of the process. The proposed severance is evaluated by the State Engineer to determine whether the changed use of water may result in adverse impacts to other appropriators or may be detrimental to water conservation and the public welfare. Protests and objections are also submitted at this initial point in the process.

{21} In fulfillment of the permit requirements, the Bassetts clearly described their plan to phase out irrigation and use their water to meet growing municipal and industrial demand in the Edgewood area. In reviewing the application, the State Engineer considered the amount of water available, population projections for the area and associated water use, as well as return flow projections, before approving the application for a total diversion of no more than 1570.7 AF/year. Thus, the State Engineer's approval of the application and issuance of a permit resulted from a detailed review of the possible impacts and projected benefits with respect to the proposed use of the water. The Bassetts were in compliance with the conditions of the permit. By approving a plan to gradually convert irrigation uses to municipal and industrial uses, the State Engineer knew the plan would take years before all the water formerly used in irrigation would be fully committed to the new use. The Bassetts submitted annual applications for extensions of time before and after the sale, as provided by the formal administrative procedures of the State Engineer. 19.26.2 NMAC (2005). These applications were routinely granted.

{22} Consistent with the statute and with the Bassetts' position, the State Engineer has acknowledged to this Court that "[u]nder the typical transfer permit, the water right is automatically severed upon issuance of the permit, and the severance is not dependent upon the application of beneficial use at the new location—the severance is complete upon issuance of the permit." This interpretation is supported by State Engineer Regulations, which state: "A *permit* from the state engineer is required to change the place and/or purpose of use of all or any part of a water right." 19.26.2.11(B) NMAC (2005) (emphasis added).

{23} The State Engineer's position that the water right "is automatically severed upon issuance of the permit" is consistent with the position the State Engineer took 16 years ago in *Sun Vineyards.* There, a district manager from the Office of the State Engineer testified that "once an application is filed and approved the water rights are severed from the old location and become appurtenant to the new location[.]" *Sun Vineyards,* 107 N.M. at 527, 760 P.2d at 1293. The Court nonetheless proceeded to characterize severance as a process that could be nullified should the underlying land be sold prior to issuance of a license. *Id.* In the case

before us, the Court of Appeals relied upon this characterization to conclude that because the Bassetts failed to obtain a license, the appurtenant water rights passed to Turner. *Turner*, 2003-NMCA-136, ¶ 15, 134 N.M. 621, 81 P.3d 564. Although that conclusion is proper under the facts of *Sun Vineyards*, it overreaches when applied to cases that do not involve a contract or tort dispute.

{24} The holding in *Sun Vineyards* was correct. The promise of water in the language of the deeds and evidence of the buyer's reliance indicated the parties had intended a transfer of water rights, rather than a reservation. Further, it was clear that all of the procedures necessary to the issuance of a license had not yet occurred. However, a bright line rule that a severance is interrupted upon sale of the underlying land makes little sense when a contract or tort claim does not arise. Considering the statutes, regulations and practice of the State Engineer, a better approach to the issue of severance is to recognize the issuance of a permit as giving rise to a presumption that the land and water rights are no longer appurtenant. Without more, the conveyor of title to the land who has acquired a permit need not express in the conveyance documents that which is already presumed as a matter of law: the land passes without water. *See generally* 2 Robert E. Beck, *Waters and Water Rights*, § 14.04(d)(3), 14-87 (2001) ("Case law in most states fairly consistently applies the appurtenancy rule as a rule of construction.").

{25} However, like all presumptions this, too, can be overcome. If the seller acts as if the land and water remain as one, if the seller creates reasonable expectations in the buyer contrary to the presumption of severance, then those water rights remain within the power of the court to order full relief to the parties, just as this Court did in *Sun Vineyards*. We clarify, however, that a post-severance conveyance of land, even in the absence of reservation of rights, does not nullify a severance. Individuals who hold water rights, like the Bassetts, and follow the statutory and administrative procedures to effect a severance and initiate a transfer, may convey the underlying land severed from its former water rights, without necessarily reserving those water rights to the seller in the conveyance documents.

{26} We recognize nonetheless that the safer course for the prudent seller is to expressly reserve any such water rights in the conveyance documents. *See Twin Forks Ranch, Inc. v. Brooks*, 1998-NMCA-129, 125 N.M. 674, 964 P.2d 838 (stating that appurtenant water rights, never severed by permit, passed to the buyer by contract without a reservation of rights). While a reservation in a deed may be nothing more than a simple statement, however, a permit represents a severance application to the State Engineer that describes the details of a plan to sever and transfer the water, a technical analysis by the State Engineer of the proposed severance, evaluation of impairment issues, policy review for the propriety of the transfer, and a notice and comment period during which others may protest the application. A permit is issued only after these hurdles are cleared.

{27} In contrast, the relative ease of reserving water rights in a conveyance document underscores how appropriate it is that we clarify *Sun Vineyards* by today's action. A reservation of rights in a sale document would enable a landowner to complete severance and transfer proceedings, subject to the approval of the State Engineer. Recognizing, on the one hand, a contractual reservation as effectively severing water rights, while failing, on the other hand, to recognize a permit as accomplishing the same severance, produces an anomalous result. A reservation of rights that necessarily requires completion of the administrative process ought not have greater legal significance than acquiring the permit, which is an important step in the administrative process.

{28} We conclude that the severance statute, the applicable regulations, the general practice of the State Engineer, and the permit itself all support the view that the Bassetts presumptively severed their water rights from the property upon receipt of a permit from the State Engineer. Turner presented nothing to the district court that would rebut the presumption created thereby: that the land passed to Turner without

those water rights. The district court properly disclaimed any jurisdiction over those water rights, given the absence of any need for power over those water rights to be able to accord relief to the parties.

{29} We also observe that reliance upon the issuance of a permit promotes both equity and predictability in land transactions. This approach prevents purchasers of land from claiming water rights for which they never bargained. As acknowledged by the Bassetts, prospective purchasers of land may obtain both license and permit information from the records of the State Engineer's Office. Such an approach is also supported by statute and case law recognizing that both *permitted* and licensed water rights are alienable property rights. *See* NMSA 1978, § 72-1-2.1 (1991); *KRM, Inc. v. Caviness,* 1996-NMCA-103, ¶¶ 6, 7, 122 N.M. 389, 925 P.2d 9; *Clodfelter v. Reynolds,* 68 N.M. 61, 66, 358 P.2d 626, 631 (1961).

{30} The facts of this case bring into sharp relief the need for certainty regarding severances. As conceded by the parties, Turner was aware of the Bassetts' water development activities, and even considered purchasing water from the Bassetts to supply his planned residential subdivision. Furthermore, the Bassetts were not in violation of their permit. They continued putting water to beneficial use in conformity with the plan approved by the State Engineer, and as described in their annual applications for extensions of time. The Bassetts note that under their approved plan to provide water to Edgewood, obtaining a license prior to the land sale to Turner would have been impossible, because in 1984, the Bassetts were not yet applying all the permitted water to beneficial use. A rule that automatically annuls the officially approved severance not only results in uncertainty as to the ownership of the water rights, but also emasculates the ability of the State Engineer to maintain control over the place and purpose of use of water as approved in the permit.

CONCLUSION

{31} For the foregoing reasons, we reverse the Court of Appeals and uphold the district court's grant of summary judgment in favor of the Bassetts.

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

WE CONCUR: PAMELA B. MINZNER, PATRICIO M. SERNA, and EDWARD L. CHÁVEZ, Justices.

2005-NMCA-049

111 P.3d 708

KOB-TV, L.L.C., Petitioner-Appellant,

v.

CITY OF ALBUQUERQUE, Respondent-Appellee.

No. 22,853.

Court of Appeals of New Mexico.

March 23, 2005.

[redacted]

[redacted]

[redacted]

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OPINION

WECHSLER, Judge.

{1} We consider in this appeal the effect of a change in regulation on an existing property use. KOB–TV (KOB) had obtained a permit from the City of Albuquerque (City), allowing KOB to build a helipad, and had operated a helicopter at the site for several years. The City then adopted Ordinance O–73, regulating the placement of helicopters within City limits and instituting a one-year amortization period for conformance. KOB appeals the district court's order denying its appeal from the City's adoption of O–73 and determining that the City's decision to revoke KOB's permit was moot. We hold that the City's adoption of O–73 was a valid zoning decision, which was not a quasi-judicial action, and that KOB's use of its property as a helipad was not subject to immediate termination. However, we further hold (1) that there is no evidence in the record showing that the ordinance's one-year amortization period is reasonable and (2) that the City's decision to revoke KOB's building permit is not moot and the City's revocation decision

was improper. We affirm in part, reverse in part, and remand for further proceedings.

Background

{2} KOB's television studios have been located at Broadcast Plaza SW for nearly fifty years. The property is triangular in shape and is zoned SU–2/O–1. Special use/commercial properties are on two sides, including KRQE's studio to the east and the City's fire training complex to the south. The Huning Castle and Barelas residential neighborhoods are adjacent to the property. KOB has operated a news-gathering helicopter at the property for several years. The other two major television stations in Albuquerque have similar operations. In 1980, the City considered, but did not pass, legislation that would have restricted helicopters in the City.

{3} In 1997, KOB began to remodel its facility and sought to build a permanent helipad. It received approval from the Federal Aviation Administration for operation of its helicopter. KOB then applied to the City's Zoning Enforcement Division for approval of its site plan for the helipad. On July 22, 1997, the City granted KOB approval for the construction of the helipad, stating that it was "an integral part of the [t]elevision [s]tation under this zoning." The City issued KOB a building permit and KOB presented evidence to the City that, in reliance on the building permit, KOB acquired a $1 million helicopter and began remodeling its facility.

{4} In the spring of 1998, the City's Environmental Health Department received noise complaints and conducted an investigation. It did not reach a conclusion regarding the violation of any ordinances or statutes in connection with KOB's helicopter use. KOB took steps to address some of the neighbors' concerns. It limited flying and idling times of the helicopter, hired acoustic engineers to identify solutions to the noise problem, and agreed to mediation with the neighborhood associations. Nevertheless, the neighborhood association complaints resulted in the introduction of two proposed ordinances to the City Council: one, O–73, restricted helipads to a special use zone, and the other, O–109, restricted the take-off and landing of all helicopters to the airport.

{5} Although related, the two ordinances proceeded through the City's zoning process separately. After deferrals, the Land Use Planning and Zoning Committee (LUPZ) held a hearing regarding O–109. It received expert testimony about noise and setbacks. The owners and managers of the television stations in Albuquerque presented comments, as did the neighborhood associations from the areas of operating helipads. At the conclusion of the hearing, the LUPZ determined to send the ordinance to the full council without a recommendation.

{6} O–73 was also deferred before it was heard by the LUPZ. The LUPZ then decided to conduct a joint hearing on O–73 and O–109. There was again comment from the neighborhood associations and the television stations. After further discussion, the LUPZ voted to pass both O–73 and O–109 to the full council with a "do pass" recommendation. The vote was 5–0 for O–73 and 3–2 for O–109.

{7} The full City Council considered the two pieces of legislation at a public hearing, at which it heard further comment from the television stations and their neighbors. At the conclusion of the public hearing, the council voted 8–1 to approve O–73. The council voted unanimously not to pass O–109. KOB appealed the passage of O–73 to the district court.

{8} O–73 effected a text amendment to the City zoning code making helipads allowable uses only within a SU–1 special use zone. A SU–1 zone is regulated by a site plan, which must be approved by the City zoning authority. The ordinance required a minimum distance from residential areas of 350 feet, limited non-emergency operations to three daily, and prohibited helicopter landing and take-off operations. It excluded medical and law enforcement helicopters from its restrictions. It adopted an amortization period of one year for all property owners to correct nonconforming helicopter use.

{9} While the legislation was proceeding through the City, the neighborhood associations appealed the City's grant of the permit

to KOB to redesign its parking lot and build a helipad. The appeal included the City's decision to allow fuel storage and distribution at the site. The Environmental Planning Commission (EPC) heard the appeal and failed to reach a decision. The neighborhood associations appealed. The LUPZ voted to send the appeal to the full council. The full council decided to grant the appeal and revoked the permit allowing KOB's helipad use, finding that the zoning authority's interpretation of the zoning code with regard to helicopter use by television stations was incorrect. KOB appealed that decision to the district court.

{10} KOB consolidated its two appeals in district court into an amended petition for review of the administrative action and complaint for violation of due process, equal protection, inverse condemnation, unconstitutional taking, and civil rights violation. It voluntarily dismissed its inverse condemnation/just compensation claim. The issues ultimately before the district court for decision were KOB's claims regarding the adoption of the helipad ordinance and the revocation of the approval of KOB's helipad permit. KOB claimed that it had a vested right to maintain a helipad on its property. It argued that the enactment of O–73 was a downzoning of its property, which entitled it to a quasi-judicial hearing before the City. It further contended that the evidence did not justify the ordinance, including the one-year amortization period. After considering the written briefs and the parties' oral arguments, the district court affirmed the City Council's action in the adoption of the ordinance. As a result, the court determined that the matters relating to the permit were moot. It denied KOB's motion for reconsideration. Thereafter, KOB petitioned this Court for a writ of certiorari to review the decision of the district court. We granted the writ.

Vested Right v. Nonconforming Use

{11} KOB alleges that it has a vested right in the property to maintain a helipad by virtue of the City's granting it a building permit and its investment in reliance on the permit. Both vested rights and nonconforming uses are means of requiring the government to allow property uses that have been prohibited by newly enacted legislation. *See generally* 1 Kenneth H. Young, *Anderson's American Law of Zoning* § 6.01 (4th ed.1996); 6 Patrick J. Rohan, *Zoning and Land Use Controls* § 41.01[5] and § 41.02[4] (Lori A. Hauser & Nancy H. Greening eds. 1992). However, the two doctrines appear to protect different land use matters.

{12} A nonconforming use is a use that lawfully existed prior to the enactment of a zoning ordinance prohibiting such a use. *See City of Las Cruces v. Huerta,* 102 N.M. 182, 184–85, 692 P.2d 1331, 1333–34 (Ct.App. 1984). The use must be an actual rather than contemplated use of the property. *Id.* at 184–85, 692 P.2d at 1333–34. If the property is actually lawfully being used before the enactment of the ordinance restricting the use, the government may not immediately terminate the use. *Rhod–A–Zalea & 35th, Inc. v. Snohomish County,* 136 Wash.2d 1, 959 P.2d 1024, 1027 (1998) (en banc); *cf. Temple Baptist Church, Inc. v. City of Albuquerque,* 98 N.M. 138, 145, 646 P.2d 565, 572 (1982) (stating that a reasonable amortization period satisfies constitutional requirement of just compensation in termination of nonconforming use).

{13} The term "vested right" may be used to describe a nonconforming use. *See Rhod–A–Zalea & 35th, Inc.,* 959 P.2d at 1027 ("The right to continue a nonconforming use despite a zoning ordinance which prohibits such a use in the area is sometimes referred to as a 'protected' or 'vested' right."). However, in New Mexico, the vested rights doctrine applies to an ongoing development or project that has been approved and upon which substantial investment has been made. *El Dorado at Santa Fe, Inc. v. Bd. of County Comm'rs,* 89 N.M. 313, 319, 551 P.2d 1360, 1366 (1976) (holding that the rights of a subdivider to complete subdivision vested after county approval of lands such that subsequent subdivision law and regulations did not apply); *In re Sundance Mountain Ranches, Inc.,* 107 N.M. 192, 195, 754 P.2d 1211, 1214 (Ct.App.1988) (applying a vested right analysis to hold that ordinances and regulations in effect at the time of subdivision application applied to ongoing develop-

ment of proposed subdivision); *see also Brazos Land, Inc. v. Bd. of County Comm'rs,* 115 N.M. 168, 170, 848 P.2d 1095, 1097 (Ct. App.1993) (applying vested rights analysis to determine that new zoning ordinance applied to proposed subdivision because there was no approval of the application or substantial reliance or changing position by the developer). The vested rights doctrine allows the development or project to be completed and operated in accordance with the regulations in effect at the time of approval and substantial investment. *See In re Sundance Mountain Ranches, Inc.,* 107 N.M. at 193–94, 754 P.2d at 1212–13. Thus, the vested rights doctrine is used in those instances in which there is work in progress when a change in the land use regulations goes into effect. *See id.*

{14} As a general rule, a party seeking to establish a vested right to the use of property to exempt it from subsequent land use regulation must show: "(1) [the] issuance of written approval to the applicant for the proposed subdivision or construction project; and (2) a substantial change in position by the applicant in reliance upon such approval." *Sandoval County Bd. of Comm'rs v. Ruiz,* 119 N.M. 586, 589, 893 P.2d 482, 485 (Ct.App. 1995); *see also Brazos Land, Inc.,* 115 N.M. at 170, 848 P.2d at 1097 (stating two requirements for vested right; approval by regulatory body and "substantial change in position in reliance thereon"). As we have previously noted, the purpose of the vested rights doctrine is to protect a property developer from governmental regulation that shifts. *In re Sundance Mountain Ranches, Inc.,* 107 N.M. at 194, 754 P.2d at 1213. Thus, when changes in the law occur after a developer has secured a building permit and has substantially invested in the property in reliance on that permit, but before the development is completed, the developer is assured that the project may be completed and operated despite the intervening change in the law. *See id.*

{15} There is no dispute in this case that KOB acquired a permit from the City to locate and construct a permanent helipad on its property and that, after receiving the permit, KOB constructed the helipad, made improvements to its facility, and purchased a $1 million helicopter. As a result, KOB had a vested right to complete its development of a helipad in the face of any intervening regulation. However, O–73 did not go into effect until after KOB had completed its helipad and had started the use of the helicopter. KOB was lawfully using its property for helicopter take-off and landing at the time that the City enacted O–73 prohibiting such use. Therefore, KOB's use of its property for its helicopter was a nonconforming use. As a nonconforming use, it was not subject to immediate termination.

{16} KOB argues that because its right to operate a helicopter from its premises became a vested right as opposed to a nonconforming use, the City could never impair that right. Even accepting KOB's position that it had a vested right and not a nonconforming use, this distinction is one without a difference in this context. Both create a right in the property owner to continue a use that has been restricted by newly enacted legislation. However, the use does not continue perpetually as KOB argues. A vested right is nothing more than "the power to do certain actions or possess certain things lawfully." *Rubalcava v. Garst,* 53 N.M. 295, 298, 206 P.2d 1154, 1156 (1949) (internal quotation marks and citation omitted). It protects the property owner from the impairment of that right by the government. Like a nonconforming use, a vested right may be impaired by the government "whenever reasonably necessary to the protection of the health, safety, morals, and general well being of the people." *Swink v. Fingado,* 115 N.M. 275, 291, 850 P.2d 978, 994 (1993) (internal quotation marks and citation omitted). A property owner does not have a vested right in a particular zoning classification. *Aragon & McCoy v. Albuquerque Nat'l Bank,* 99 N.M. 420, 423, 659 P.2d 306, 309 (1983).

{17} In this case, the City determined that the operation of helicopters within the City had "potential adverse impacts on the health, safety, and welfare of the users and the surrounding property." O–73, § 1. It therefore determined that the location and operation of helipads needed to be regulated. That determination impairs KOB's right,

whether it is a "vested right" or a "nonconforming use."

Quasi-judicial v. Legislative Action

{18} The district court found that the actions of the City in enacting O–73 were quasi-judicial rather than legislative. According to KOB, this finding requires remand to the City to conduct a quasi-judicial hearing. We do not agree with the district court's finding.

{19} Legislative action "reflects some public policy relating to matters of a permanent or general character, is not usually restricted to identifiable persons or groups, and is usually prospective." *Dugger v. City of Santa Fe,* 114 N.M. 47, 51, 834 P.2d 424, 428 (Ct.App.1992); *see Miles v. Bd. of County Comm'rs,* 1998–NMCA–118, ¶¶ 11, 12, 125 N.M. 608, 964 P.2d 169 (concluding that county-wide comprehensive zoning ordinance was a legislative action); *W. Old Town Neighborhood Ass'n v. City of Albuquerque,* 1996–NMCA–107, ¶ 11, 122 N.M. 495, 927 P.2d 529 (discussing the difference between zoning actions that apply to a single property and those that reflect public policy of a general nature).

{20} On the other hand, quasi-judicial action has been defined as involving "a determination of the rights, duties, or obligations of specific individuals on the basis of the application of presently existing legal standards or policy considerations to past or present facts developed at a hearing conducted for the purpose of resolving the particular interests in question." *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill.,* 757 P.2d 622, 625 (Colo.1988) (en banc). Thus, application of a general rule to a particular piece of property to determine the manner in which a particular piece of property can be used is quasi-judicial. *W. Old Town Neighborhood Ass'n,* 1996–NMCA–107, ¶ 11, 122 N.M. 495, 927 P.2d 529; *Dugger,* 114 N.M. at 51, 834 P.2d at 428.

{21} To make the distinction in a particular case, the principal focus is "on the *nature of the governmental decision and the process by which that decision is reached.*" *Jafay v. Bd. of County Comm'rs,* 848 P.2d 892, 898 (Colo.1993) (en banc) (internal quotation marks and citation omitted). The relevant issues include whether the zoning action applies only to a single site rather than establishing an area-wide policy regarding future urban growth, and whether the government's factfinding is adjudicative as opposed to legislative. *Id.* at 898. "This determination is not based on whether the zoning decision adversely affects an individual piece of property but whether the [zoning] decision itself is made on individual or general grounds." *Bucktail, L.L.C. v. County Council of Talbot County,* 352 Md. 530, 723 A.2d 440, 447 (1999). The nature of the factfinding process is determinative. *Id.* at 447.

{22} We recognize that a legislative decision may appear adjudicatory when parties focus on the effect of the particular decision on individual rights. However, policy decisions generally "begin with the consideration and balancing of individual rights." *Raynes v. City of Leavenworth,* 118 Wash.2d 237, 821 P.2d 1204, 1210 (1992) (en banc). If the zoning decision has general application and reflects public policy in relation to matters of a general nature, such as zoning of a community or area, without consideration to any particular piece of property, the action is legislative.

{23} In this case, O–73 enacted an amendment to the zoning code. The amendment restricted the location and operation of all helicopters, except medical and law enforcement helicopters, to SU–1 zones. Because the restriction applied throughout the City, it was not a quasi-judicial decision directed at KOB.

{24} KOB argues to the contrary, contending that the restriction only applies to the handful of television stations in Albuquerque and is thus quasi-judicial. But, the fact that a zoning authority considers a particular party's proposed development or a particular parcel when it takes action does not change the nature of the decision. *See Atlanta Bio–Med, Inc. v. DeKalb County,* 261 Ga. 594, 408 S.E.2d 100, 102 (1991) (upholding zoning amendment of general application despite focus on specific property for development). Additionally, the ordinance

amendment applies to all helicopters that may be used in conjunction with a business, except medical and law enforcement. The amendment is not limited to television helicopters or KOB's helicopter in particular.

{25} KOB further argues that the amendment is quasi-judicial because it specifically targeted KOB's helicopter use. We agree that KOB's neighbors initiated the amendment. However, the purpose of the amendment was to regulate the location and use of helicopters within the City. Even if KOB's helicopter use triggered the City's actions, the final action reflected policy to be applied in the future, such that it is not a rezone, targeting a single property. *See Greenbriar Vill., L.L.C. v. City of Mountain Brook,* 202 F.Supp.2d 1279, 1293 (N.D.Ala.2002), *reversed in part on other grounds sub nom. Greenbriar Vill., L.L.C. v. Mountain Brook, City,* 345 F.3d 1258, 1267 (11th Cir.2003) (upholding ordinance designed to resolve ambiguities and clarify existing code even though it was enacted at least in part, in response to concerns of landowners surrounding the plaintiff's property); *N. Ga. Mountain Crisis Network, Inc. v. City of Blue Ridge,* 248 Ga.App. 450, 546 S.E.2d 850, 853 (2001) (stating that "a zoning amendment does not discriminate against a property owner merely because the amendment may have originated from [neighbors'] complaints"); *see also Atlanta Bio-Med, Inc.,* 408 S.E.2d at 102. KOB's property was not the sole property subject to the helicopter restrictions. The restrictions are applicable to all properties and future helicopter use in the City.

{26} Procedurally, KOB argues that the City cannot challenge the district court's determination that the City's action was quasi-judicial because it did not file a cross-petition for certiorari. We do not agree. In its arguments to this Court, KOB has raised the district court's ruling that the City's action was quasi-judicial. It also argues that "[t]he linchpin to this appeal is the fact that the City treated its stripping KOB of its vested property rights as a legislative, rather than an adjudicative, act." Thus, contrary to KOB's argument, the nature of the City's action was not raised first by the City. Rather, the City was responding to KOB's arguments. The City may argue that its actions were legislative rather than quasi-judicial because that conclusion provides an alternative ground for affirmance of the City's enactment of O–73. *See Aitken v. Starr,* 99 N.M. 598, 599, 661 P.2d 498, 499 (Ct.App.1983) (pointing out that the rules allow "review of rulings adverse to appellee which need [to] be considered only in the event the appeal is found to have merit, *but because of which it is contended the case should nevertheless be affirmed* ").

Downzoning

{27} KOB specifically contends that the City's actions downzoned its property. *See Davis v. City of Albuquerque,* 98 N.M. 319, 320–21, 648 P.2d 777, 778–79 (1982) (explaining that downzoning consists of the rezoning of a property to a more restrictive use); *Miller v. City of Albuquerque,* 89 N.M. 503, 506, 554 P.2d 665, 668 (1976). Rezoning to a more restrictive classification requires "a mistake in the original zoning or . . . a substantial change . . . in the character of the neighborhood since the original zoning" justifying a change in zoning. *Miller,* 89 N.M. at 506, 554 P.2d at 668. However, there was no change in the zoning of KOB's property, it remains SU–2/O–1. By virtue of the amendment, helicopters are no longer viewed as an ancillary use and are limited to a SU–1 zone. Although KOB argues that O–73 was site specific, as we pointed out above, O–73 established policy for the entire city. This case is not one in which a single property was rezoned to a more restrictive use. Rather, it is like *Mandel v. City of Santa Fe,* 119 N.M. 685, 689, 894 P.2d 1041, 1045 (Ct.App.1995), in which we held that a city-wide height restriction in historic zones did not target a specific property and was not a downzone of the property in question. KOB's claim that the City's actions amounted to a downzoning that required a change or mistake in the original zoning is without merit.

Setback

{28} KOB further argues that the setback of 350 feet established in O–73 is not supported by substantial evidence. "Ju-

dicial review of a zoning authority's decision is limited to questions of law." *Downtown Neighborhoods Ass'n v. City of Albuquerque,* 109 N.M. 186, 189, 783 P.2d 962, 965 (Ct.App. 1989). We conduct "the same review as the district court, which is simply to determine whether the zoning authority's decision is illegal in whole or in part." *Siesta Hills Neighborhood Ass'n v. City of Albuquerque,* 1998–NMCA–028, ¶ 6, 124 N.M. 670, 954 P.2d 102. Our review of actions taken by the City Council "is undertaken with deference and those decisions are disturbed only if the court is not satisfied that the action was authorized by law or if it is not supported by substantial evidence." *Id.* When we review the evidence, we review it in the light most favorable to the administrative body and we do not substitute our judgment for that of the administrative body. *Id.*

{29} Initially, City staff recommended that helipads should not be located within 250 to 500 feet of a residential area. It later reduced its recommendation to 200 feet with fewer than four operations per day. At the first EPC hearing, there was a great deal of discussion regarding the noise level at different distances. The discussion among the EPC members after public comment indicated that they wanted a distance of more than 300 feet. Thereafter, the distance was established at 350 feet for further discussion. City staff pointed out that the site visits supported a distance of several hundred feet. A noise expert, Harvey Penower, who also conducted site visits, reported his conclusions regarding distance, noise, and annoyance levels to the EPC.

{30} KOB attacks the testimony of Penower contending that he did not provide the factual or scientific basis to support his conclusions. We recognize that an expert, even in an administrative hearing, must explain the steps followed to reach a conclusion. *Four Hills Country Club v. Bernalillo County Prop. Tax Protest Bd.,* 94 N.M. 709, 714, 616 P.2d 422, 427 (Ct.App.1979). We do not agree, however, that Penower failed to explain how he reached his conclusions. He explained that much of his conclusions was a function of the existing noise level, the distance from the measurement site to the helipad, and the manner in which the helicopters were operated.

{31} Furthermore, Penower's testimony was not the sole evidence regarding the relationship between distance and noise and annoyance. The City's Environmental Health Department also studied the noise and acceptable decibel levels, along with the influence of distances on noise levels. Further, although KOB urges that such opinion is unsubstantiated and thus not admissible, there is a great deal of evidence from people living in the neighborhoods near the three television stations regarding the noise from the helicopters. Contrary to KOB's contention, persons affected by the noise of the helicopters are not giving expert opinions regarding the relationship between distance and noise and annoyance. They are simply stating their admissible observations regarding the noise. *See* Rule 11–701 NMRA (allowing lay opinion when witness's testimony is based on the witness's own perception and would be helpful to a determination of a fact in issue); *see also City of Farmington v. Fawcett,* 114 N.M. 537, 548, 843 P.2d 839, 850 (Ct.App.1992) (allowing witnesses to give their own opinions based on their own observations).

{32} KOB additionally argues that there was no specific evidence to support the 350–foot distance requirement because none of the studies was conducted at 350 feet. Tests were performed at 110 feet, 200 feet, and over 400 feet, comparing the level of noise. There was extensive public testimony regarding annoyance levels of the noise in comparison with the distances from the helipads. The decibel and annoyance levels were greatest at 110 feet and were least at 400 feet. It was not necessary that tests be performed at 350 feet to support the City Council's decision to adopt 350 feet as the minimum distance requirement. There was sufficient evidence from which the City Council could reach a conclusion regarding the minimum distance of helipads from residential areas.

Amortization

{33} O–73 allows a one-year amortization period for helipad operators to con-

form to O–73 or make alternative arrangements and recoup their financial investment. KOB challenges the reasonableness of this amortization period. The City argues that KOB cannot attack the amortization period because it dismissed its inverse condemnation claim. We recognize that our Supreme Court has stated that a reasonable amortization period is a constitutional alternative to just compensation for a taking. *Temple Baptist Church, Inc.,* 98 N.M. at 145, 646 P.2d at 572. However, KOB's claim regarding the amortization period is not a claim for compensation, but rather a claim that the amortization period is unsupported by the evidence and, therefore, unreasonable. In addressing the amortization issue in this case, we reiterate that, when a use becomes nonconforming because of a change in the zoning regulations, the government cannot immediately terminate that use. Even though the use has been found to be detrimental to the public, "it would be unfair and perhaps unconstitutional to require an immediate cessation of a nonconforming use." *Rhod–A–Zalea & 35th, Inc.,* 959 P.2d at 1027.

{34} Nevertheless, there are methods that the government can use to terminate a nonconforming use, including condemnation, nuisance law, abandonment, and amortization. *See generally* Jay M. Zitter, *Validity of Provisions for Amortization of Nonconforming Uses,* 8 A.L.R.5th 391, 406 (1992). Under amortization, the government grants a grace period for the property use to come into conformance with the new regulations. *Temple Baptist Church, Inc.,* 98 N.M. at 145, 646 P.2d at 572. A decision to amortize a nonconforming use is a legislative decision. *See AVR, Inc. v. City of St. Louis Park,* 585 N.W.2d 411, 414–15 (Minn.Ct.App. 1998).

{35} The dispositive question in amortization "is whether the amortization period is reasonable." *Temple Baptist Church, Inc.,* 98 N.M. at 145, 646 P.2d at 572. "In order to decide the reasonableness of an amortization period, courts generally review evidence relating to the circumstances bearing upon a balancing of the public gain against the individual loss." *Id.* The factors to be considered in this balancing heavily depend on the circumstances and the particular type of nonconforming use. As stated in *AVR, Inc.,* those factors may include (1) the nature of the structure located on the property; (2) the nature of the use; (3) the location of the property in relation to surrounding uses; (4) the character of and uses in the surrounding neighborhood; (5) the cost of the property and improvements; (6) the benefit to the public by requiring the termination of the nonconforming use; (7) the burden on the property owner by requiring termination of the nonconforming use; and (8) the length of time that use has been in existence and the length of time the use has been nonconforming. *See AVR, Inc.,* 585 N.W.2d at 412–13 (listing statutory factors used by the city in determining a reasonable amortization period). Other cases have included factors relating to the ability and cost of relocation, the ability of the business to continue to operate, the depreciation value of the asset, and the useful life of the use. *See Harbison v. City of Buffalo,* 4 N.Y.2d 553, 176 N.Y.S.2d 598, 152 N.E.2d 42, 47 (1958); *Validity of Provisions for Amortization of Nonconforming Uses,* 8 A.L.R.5th at 407.

{36} It appears that the one-year amortization period in this case was initially inserted in the ordinance temporarily while the City accumulated evidence to support a reduction of the City's standard forty-year amortization period. Even though further research was required, the ordinance was sent to the City Council with the one-year amortization period. At the City Council hearing, there was further discussion about the factors and evidence that needed to be weighed to determine an amortization period. Although there was discussion regarding the factors and evidence required, nothing was presented. Thus, the record does not reflect a weighing of the impact on KOB's business of the termination of the use against the public gain of removing helicopter use from the property in order to ascertain the reasonableness of the amortization. *See Temple Baptist Church, Inc.,* 98 N.M. at 145, 646 P.2d at 572. We therefore reverse and remand to the City for consideration of evidence regarding a reasonable amortization period. In so doing, the City must consider

the fact that KOB's building and use of the helipad was the result of the City's approval of a building permit. *See AVR, Inc.*, 585 N.W.2d at 415.

Mootness

{37} The district court determined that the City's decision to revoke the permit it gave KOB for construction and installation of a permanent helipad on its property was moot in light of the court's decision to uphold the enactment of O–73. Courts do not decide abstract or moot questions. *Appelman v. Beach*, 94 N.M. 237, 239, 608 P.2d 1119, 1121 (1980). A case is moot when no actual controversy exists. *City of Las Cruces v. El Paso Elec. Co.*, 1998–NMSC–006, ¶ 16, 124 N.M. 640, 954 P.2d 72. Thus, when legislation is enacted that resolves a conflict, a question concerning the conflict addressed to a court will be moot. *Id.* ¶ 17.

{38} The City argues that because O–73 affected KOB's use of the helipad, the permit originally allowing the construction of the helipad no longer has effect. It therefore argues there is no actual controversy concerning the revocation of the permit. We do not agree. First, the neighborhood associations' appeal that the City Council granted revoking the permit identified the permit as being for a helipad and related fuel tanks. The permit, on its face, says nothing about fuel tanks. The record indicates that the fuel tanks were installed many years before the helipad was built and had nothing to do with the helicopter or the helipad. As a result, KOB has the right to continue the use of the fuel tanks, and the City's decision regarding those fuel tanks in connection with helicopter use was not in accordance with the law. The district court should have made a decision regarding KOB's right to use its fuel tanks.

{39} Second, the permit approved KOB's building of a helipad and KOB subsequently made substantial investment in reliance on the permit. The permit and the investment gave rise to a vested right in the use of the property in accordance with the permit. *See Sandoval County Bd. of Comm'rs*, 119 N.M. at 589, 893 P.2d at 485; *In re Sundance Mountain Ranches, Inc.*, 107 N.M. at 194–95, 754 P.2d at 1213–14. The City cannot revoke the permit after KOB's use vested without recognizing KOB's vested right. *See El Dorado at Santa Fe, Inc.*, 89 N.M. at 319, 551 P.2d at 1366 (stating that once rights vest, they "cannot thereafter be withheld, extinguished or modified except upon due process of law"); *City of Chicago v. Zellers*, 64 Ill.App.2d 24, 212 N.E.2d 737, 739 (1965) (pointing out that when a legal permit has been issued and substantial change in position has occurred, the permit cannot be revoked). By adopting O–73, the City recognized KOB's right to the use of its property for helicopter take-off and landing and subjected this right to the amortization period of O–73. The City cannot then revoke the permit so as to remove KOB's right to amortization. Thus, not only is KOB's appeal of the revocation not moot, but the revocation was improper pending amortization.

Conclusion

{40} We hold that the adoption of O–73 was a valid exercise of the City's zoning authority. However, the record does not support that the one-year amortization period was reasonable. We affirm in part, but reverse and remand for proper consideration of the factors necessary to determining a reasonable amortization period. Finally, we reverse the City's revocation of KOB's building permit. The City cannot revoke KOB's underlying right to the use of its helipad subject to a reasonable amortization period, yet to be determined by the City Council.

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Chief Judge, and JONATHAN B. SUTIN, Judge.

2005-NMCA-050

111 P.3d 721

Paul DOMINGUEZ, Plaintiff–Appellant,

v.

PEROVICH PROPERTIES, INC., Defendant–Appellee.

No. 24,932.

Court of Appeals of New Mexico.

March 30, 2005.

Certiorari Denied, No. 29168, May 3, 2005.

Edmund R. Pitts, Taos, NM, for Appellant.

Kimberly A. Syra, Amy M. Cardwell, Hatch, Allen & Shepherd, P.A., Albuquerque, NM, for Appellee.

OPINION

SUTIN, Judge.

{1} Plaintiff Paul Dominguez appeals from an adverse summary judgment rejecting his tort claim for personal injury, commonly called a "*Delgado* claim." Plaintiff sought relief against his employer, Perovich Properties, Inc. (Employer), outside of the Workers' Compensation Act (the Act), NMSA 1978, §§ 52–1–1 to –70 (1929, as amended through 2004), alleging Employer wilfully and intentionally injured him. In *Delgado v. Phelps Dodge Chino, Inc.*, 2001–NMSC–034, 131 N.M. 272, 34 P.3d 1148, our Supreme Court permitted a worker to sue his employer in tort for an injury received within the scope of employment that would otherwise be exclusively compensable only under the Act if the worker could prove that the employer intentionally inflicted or wilfully caused the worker to suffer the injury. *Id.* ¶ 24. We affirm the summary judgment in favor of Employer.

BACKGROUND

{2} Plaintiff received serious injuries in April 1999 while working at a gravel processing operation in northern New Mexico. His primary job was to operate a front-end loader by feeding raw gravel and rock material into screening equipment to be processed and separated. The screening equipment had to be cleaned from time to time, and the equipment's screen had to be changed from time to time. Employer's procedure was to stop operation of the equipment by turning it off and then someone would determine if the screen needed to be cleaned or changed. Plaintiff was familiar with the procedure.

{3} According to Plaintiff's brief in chief, but unsupported by any citation to a statement of undisputed facts supported by facts under oath, on the day Plaintiff was injured, Employer's supervisor for the screening operation told Plaintiff to perform a periodic, routine maintenance task on the screener to clear rocks that were jammed in one of the screens. The equipment was stopped and Plaintiff climbed onto a conveyor belt. While he was standing on the conveyor belt and performing the maintenance work, the supervisor, without warning, started the equipment. Plaintiff was carried down the conveyor belt and injured.

{4} Employer's answer brief also states facts that are unsupported by any citation to a statement of undisputed facts supported by facts under oath, but that are at least somewhat supported by a fairly detailed affidavit attached to Employer's summary judgment documents. According to Employer's answer brief, the supervisor and other employees determined that the screen needed to be changed; the supervisor went to the control room. After five or ten minutes, the supervisor saw Plaintiff motioning to him with his hands from a catwalk next to the screener and the conveyor belt connected to the screener. The supervisor interpreted Plaintiff's hand gestures as a signal that the screen had been changed and that the supervisor was to restart the equipment. The supervisor left the control room and engaged the engine on the impact crusher needed for the operation. Engagement of the engine sounded an audible alarm, which alerted employees that operations were about to recommence. The supervisor then climbed down off the impact crusher, went back to the control room, and started the conveyor belt connected to the rock screener. Other employees appeared and motioned to the supervisor, who sensed something was wrong, and immediately hit the emergency stop button which ceased all operations. Plaintiff filed no reply brief indicating that any of these facts was erroneous. Plaintiff concedes that he was attempting to perform a regular task for Employer's supervisor.

{5} Plaintiff filed a complaint for personal injury, which he amended twice. Employer filed two motions for summary judgment. Among other points, Employer argued that Plaintiff failed to properly allege a *Delgado* claim in his second amended complaint. Employer further argued that Plaintiff could not, as a matter of law, meet the three-pronged *Delgado* test even were it determined that Plaintiff properly alleged a *Delgado* claim. Together with his memorandum in opposition to Employer's second motion for summary judgment, Plaintiff sought leave to file a third amended complaint in order to specifically allege a *Delgado* claim. The district court granted Employer's second motion for summary judgment and denied Plaintiff's motion for leave to file a third amended complaint. In a letter opinion, the district court determined that based on undisputed facts Plaintiff could not meet the requirement of *Delgado* that Employer wilfully caused an injury to Plaintiff. The district court's grant of summary judgment for Employer implicitly invoked the Act's exclusivity and thus immunity provisions. *See* § 52–1–8 (stating that employer who complies with the Act "shall not be subject to any other liability," except as provided in the Act); § 52–1–9 (providing for compensation under the Act "in lieu of any other liability whatsoever").

{6} Plaintiff's points on appeal are: (1) there exist genuine issues of material fact as to the wilfulness of Employer's acts and omissions; (2) the court erred in determining as a matter of law that he could not meet the *Delgado* requirements for a conclusion of wilful conduct permitting a tort action and meeting the exception to the Act's preclusion

of such claims in Section 52–1–9; and (3) the court erred in denying his motion for leave to file a third amended complaint. Because these three issues are intertwined, we discuss them together in one point.

DISCUSSION

{7} The difficult analytic issue is whether an employer's egregious and knowing general disregard for safety measures can come within *Delgado* and thereby remove the employer's protection from a tort claim. *See* § 52–1–8 (stating, in what is known as the Act's exclusivity provision, that "[a]ny employer who has complied with the provisions of the [Act] . . . shall not be subject to any other liability whatsoever for the . . . personal injury to any employee, except as provided in the [Act]").

{8} Plaintiff's material facts essentially are as follows: Employer had no mandatory manual lock-out devices for the equipment although such devices were available to lock the electrical start up for the conveyor and to lock the conveyor belt itself from moving while a person was on it. Employer did not report Plaintiff's accident as required by law to the United States Mine Safety and Health Administration (MSHA). Employer did not have a mining permit for the gravel pit where the accident occurred. Employer avoided mine safety inspections by not obtaining a permit. Employer also took affirmative action to prevent inspectors from finding mine safety violations. Employer never held safety meetings or gave instructions even though Plaintiff and others were told there would be safety meetings as required by law. Plaintiff's safety certificate had expired months before the accident, and his request to Employer that he attend a safety course to get his certificate renewed fell on deaf ears. Employer's office manager told Plaintiff, after the accident, that she was told by Employer to report the accident as having occurred at a site different than where it actually occurred, and the report of the accident to the Workers' Compensation Administration contains a false statement as to the site where the accident occurred and also a false statement that Plaintiff "fell." The MSHA cited Employer for mine safety law violations, including failure to use lock-out devices, failing to report other workers' accidents, and failure to notify the MSHA of mining operations. The MSHA report corroborates that Employer's office manager was told by Employer to report the accident as happening at a different site. Employer does not contest the foregoing facts.

{9} Plaintiff contends that these facts show Employer's gravel pit and rock crushing operations were run in an intentionally and wilfully dangerous, reckless, and unsafe way with total disregard for safety and licensing requirements. He refers to a statement in the MSHA report that under the circumstances, injury to an employee was reasonably likely to happen in a given time. It is based on these facts and contentions that Plaintiff opposed summary judgment and seeks reversal on appeal under *Delgado.* There being no genuine issue of material fact, we review the grant of summary judgment in this case de novo, determining whether Employer is entitled to dismissal of Plaintiff's claims as a matter of law. *See Self v. United Parcel Serv., Inc.,* 1998–NMSC–046, ¶ 6, 126 N.M. 396, 970 P.2d 582; *Goodman v. Brock,* 83 N.M. 789, 793, 498 P.2d 676, 680 (1972).

Applicable Case Law

{10} Our stage for study is best set by discussing the cases of *Delgado, Morales v. Reynolds,* 2004–NMCA–098, 136 N.M. 280, 97 P.3d 612, *cert. denied,* 2004–NMCERT–008, 136 N.M. 491, 100 P.3d 197, *Cordova v. Peavey Co.,* 273 F.Supp.2d 1213 (D.N.M. 2003) [hereinafter *Cordova I*], and the Tenth Circuit case affirming *Cordova v. Peavey Co.,* No. 03–2295, 2004 WL 2307344 (10th Cir. Oct.14, 2004) [hereinafter *Cordova II*].

1. *Delgado*

{11} In *Delgado,* the district court entered a Rule 1–012(B)(6) NMRA dismissal of the plaintiff's complaint asserting tort claims against the deceased worker's employer on the ground that the Act provides the exclusive remedy for the claims alleged and the employer was, therefore, immune from tort liability. *Delgado,* 2001–NMSC–034, ¶ 1, 131 N.M. 272, 34 P.3d 1148. The plaintiff alleged that the worker "died following an explosion

that occurred at a smelting plant ... after a supervisor ordered [the worker] to perform a task that, according to [the plaintiff], was virtually certain to kill or cause [the worker] serious bodily injury." *Id.* The plaintiff also alleged that the employer chose to subject the worker to that risk despite its knowledge that by performing the task the worker "would suffer serious injury or death as a result." *Id.* The material facts are more fully set out in *Delgado* and are also succinctly set out in *Morales,* 2004–NMCA–098, ¶ 9, 136 N.M. 280, 97 P.3d 612.

{12} This Court affirmed the district court's dismissal in *Delgado. Delgado,* 2001–NMSC–034, ¶ 1, 131 N.M. 272, 34 P.3d 1148. The Supreme Court reversed. *Id.* The Court rejected the actual-intent-to-injure test that theretofore had been invoked to escape the Act's immunity. *Id.* ¶¶ 23–24. The Court held "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 the benefits of exclusivity, and the injured worker may sue in tort." *Id.* ¶ 24. The Court's underlying goal was to equalize the "bilateral abuse" that can occur when, for example, "[a]n unscrupulous worker ... might seek recovery from a self-induced injury, knowing that the Act generally awards compensation regardless of fault[,][and][a]n employer ... may ... subject[ ] 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." *Id.* ¶ 13.

{13} The Supreme Court in *Delgado* set out the following test:

> 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.

Id. ¶ 26. As to the first prong, the Court stated that "we determine whether a reasonable person would expect the injury suffered by the worker to flow from the intentional act or omission." *Id.* ¶ 27. "The second prong requires an examination of the subjective state of mind of the worker or employer." *Id.* ¶ 28. Explaining this significant aspect of the test in more detail, the Court stated:

> 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.

Id. The meaning of an expected injury, as used in the first two prongs of the *Delgado* test, is clarified by the Court's discussion of the difference between an accidental injury and a virtually certain injury. *Id.* ¶¶ 13–15, 18. The Court made it clear that an accidental injury is covered by the Act, and includes "an unlooked-for mishap or some untoward event that is not expected or designed." *Id.* ¶ 14 (internal quotation marks and citation omitted). On the other hand, when "an employer ... knows his acts will cause certain harm or death to an employee," or when the employer "disregard[s] the consequences" of his acts, then the employer may be sued in tort. *Id.* ¶¶ 18, 26 (internal quotation marks omitted). Finally, the third prong requires proximate cause. *Id.* ¶ 29. The Court's ultimate justification for rejecting the actual-intent-to-injure test was the fairness in treating workers and employers equally in regard to whether their intentional conduct should deny them benefits and protections of the Act. *Id.* ¶¶ 12–24, 31.

2. *Morales*

{14} *Morales* involved two cases filed by two workers, Morales and Fernandez, against two separate employers. Morales

was fixing a pump that carried a chemical from a storage tank to a mix head. 2004–NMCA–098, ¶ 2, 136 N.M. 280, 97 P.3d 612. Some of the chemical was released, causing Morales's protective hood to pop up, ultimately causing Morales personal injury. *Id.* Morales sought damages, alleging that his employer "wilfully or intentionally ordered him to fix the pump even though [it] knew that [he] would suffer grave injuries[.]" *Id.* ¶ 3 (internal quotation marks omitted). Fernandez was injured while working on a scaffolding approximately sixteen feet above ground, when a metal sheet slipped from the hands of another worker working above Fernandez and hit Fernandez on the side of the head causing him to fall and sustain injuries. *Id.* ¶ 4. Fernandez sought damages, alleging that the employer had "intentionally failed to provide him with adequate safety equipment." *Id.* ¶ 5.

{15} In *Morales,* this Court characterized the facts of *Delgado* as "helpful in illustrating what type of employer conduct the Court [in *Delgado*] sought to address in broadening the non-accidental exception" in the Act. *Morales,* 2004–NMCA–098, ¶ 9, 136 N.M. 280, 97 P.3d 612. We stated that the *Delgado* decision stemmed from the following "egregious employer conduct: a combination of deadly conditions, profit-motivated disregard for easily implemented safety measures, complete lack of worker training or preparation, and outright denial of assistance to a worker in a terrifying situation." *Morales,* 2004–NMCA–098, ¶ 10, 136 N.M. 280, 97 P.3d 612. After discussing *Delgado,* we analyzed the federal district court decision in *Cordova I,* which arose in New Mexico, and which held against a worker seeking tort damages. *Morales,* 2004–NMCA–098, ¶ 11, 136 N.M. 280, 97 P.3d 612; *see Cordova I,* 273 F.Supp.2d at 1220. The Tenth Circuit's affirmance in *Cordova II* of the district court's decision, which we discuss later in this opinion, had not yet occurred at the time *Morales* was decided. *See Cordova II,* 2004 WL 2307344 (filed Oct. 14, 2004); *Morales,* 2004–NMCA–098, 136 N.M. 280, 97 P.3d 612 (2004). The Court in *Morales* set out the facts in *Cordova I:* "the worker's hand was caught in an auger when another worker began to operate the auger." *Morales,* 2004–NMCA–098, ¶ 11, 136 N.M. 280, 97 P.3d 612. The worker alleged several intentional acts and omissions of the employer, including "the failure to provide adequate training and supervision, the failure to provide a safety guard device, and the assignment of the [worker] to a job outside of his temporary employment contract." *Id.* In addition, the Court in *Morales* discussed a Tenth Circuit case that affirmed a summary judgment against a worker who relied on *Delgado* when the worker was injured after a heavy box fell on his back. *Morales,* 2004–NMCA–098, ¶ 12, 136 N.M. 280, 97 P.3d 612; *see Wells v. U.S. Foodservice, Inc.,* No. 03–2125, 2004 WL 848606, at *1–3 (unpublished) (10th Cir. Apr. 21, 2004) (reciting the *Delgado* test, and holding that, at best, even under the plaintiff's theory of the employer's wilful act or omission in failing to provide a safety device required under Department of Transportation Regulations, the employer's conduct was negligent and not intentional).

{16} The Court in *Morales* concentrated on the procedural and evidentiary requirements a plaintiff must meet in order to overcome a motion to dismiss or for summary judgment. The Court stated: "[s]o as not to eviscerate the essential provisions of the Act, we hold that plaintiffs must plead or present evidence that the employer met each of the three *Delgado* elements through actions that exemplify a comparable degree of egregiousness as the employer in *Delgado* in order to survive a pre-trial dispositive motion." *Morales,* 2004–NMCA–098, ¶ 14, 136 N.M. 280, 97 P.3d 612. Further, based on a balancing of competing social and personal interests, we concluded that it was "appropriate for a district court to grant summary judgment to an employer when a worker who pursues a tort claim under *Delgado* cannot demonstrate wilful conduct that approximates the employer's conduct in *Delgado* under the three-prong test." *Id.* ¶ 17. We note that our Supreme Court denied certiorari in *Morales.* *See Morales,* 2004–NMCERT–008, 136 N.M. 491, 100 P.3d 197.

3. *Cordova I* and *Cordova II*

{17} As briefly indicated earlier in this opinion in our discussion of *Morales,* the

plaintiff in the *Cordova* decisions was injured while placing his arm in a grain auger. *Cordova II,* 2004 WL 2307344, at *1. The plaintiff was a temporary employee working under a staffing agency contract pursuant to which the employee was supposed to perform simple manual labor and not operate machinery or vehicles. *Id.* Despite this, the plaintiff "was instructed to service a certain truck and then move it to be loaded with grain." *Id.* The plaintiff drove the truck to a barn for loading, and once out of the truck, he saw a co-employee lubricating a grain auger chain drive. *Id.* At some point the plaintiff walked to an area close by, apparently one at which he lost sight of the co-employee. *Id.* He noticed some grain and a piece of twine inside the chute of the auger and he reached in to remove them, unaware that the co-employee was no longer lubricating the chain drive and was activating the auger. *Id.* The plaintiff's arm was crushed by the auger. *Id.*

{18} The plaintiff sued his employer in tort, essentially alleging intentional and wilful conduct on the part of the employer for failure to provide safety and other training, failure to supervise, failure to install safety devices, failure to require certain safety practices, and assigning the plaintiff to duties outside of those to be performed under his contract. *Id.* at *1, 3; *Cordova I,* 273 F.Supp.2d at 1216. As indicated in the federal district court's opinion, the plaintiff and the co-employee "were unsupervised at the location and time of [the] injury[,] . . . there was no guard on the auger[,] . . . there were no lock-out/tag-out procedures to prevent the auger from being engaged," and neither employee had been offered, nor had either received, any training with regard to "the operation or maintenance of the auger." *Id.*

{19} The *Cordova I* court analyzed *Delgado* and discussed its three-pronged test for wilfulness. *Cordova I,* 273 F.Supp.2d at 1217–20. Interpreting the first prong of the test as one requiring general foreseeability, the federal district court determined that the assignment of tasks to the plaintiff was not reasonably expected to result in the loss of his arm. *Id.* at 1219. As to the second prong, the court examined the subjective intent of the employer, and determined that there was "no evidence that [the employer] expected any of its actions to result in [the p]laintiff's injury or that [the employer] utterly disregarded the consequences of [its] actions." *Id.* In explaining this determination, the court stated: "I find that [the employer] could not have utterly disregarded consequences that are not reasonably foreseeable nor could [the employer] have reasonably expected [the p]laintiff's injury to have occurred." *Id.* at 1219–20. Additionally, under the second prong, the court determined that "the facts relative to subjective intent are clearly distinguishable from those in *Delgado,* where one is easily repulsed by the insensitivity of [the employer] to what had to be most certainly a disastrous outcome for the employee." *Id.* at 1220. These determinations as to the first and second prongs of the *Delgado* test made it unnecessary for the *Cordova I* court to examine the third, proximate-cause prong. 273 F.Supp.2d at 1220. Following these analyses, the district court concluded that *Delgado* envisioned "conduct that is well above negligence," and that the facts did not establish that the plaintiff's claims fell under the "willful, intentional acts exception to the [Act], as enunciated . . . in *Delgado.*" *Cordova I,* 273 F.Supp.2d at 1220.

{20} In affirming the district court's summary judgment in *Cordova I,* the Tenth Circuit analyzed both *Delgado* and *Morales* and concluded that "[the worker's] case is much more similar to the situations discussed in *Morales* than it is to *Delgado.*" *Cordova II,* 2004 WL 2307344, at *3. The Tenth Circuit held that, "[a]t most, [the employer's] actions were negligent." *Id.* In reaching these conclusions, the Tenth Circuit looked specifically at the determinations in *Morales* that (1) "[t]here [was] no indication that [defendants] knew or should have known that their actions were the equivalent of sending Morales into certain severe injury or death," and (2) "[t]here [was] no indication that the failure to provide safety devices was anything but negligent in this case." *Cordova II,* 2004 WL 2307344, at *3 (internal quotation marks and citations omitted). Further, the Tenth Circuit noted that "no one required or directed [the employee] to remove the twine or grain from the grain auger," and, therefore, there

was "no proximate cause between any intentional conduct by [the employer] and [the employee's] injury." *Id.*

The Present Case

{21} In the present case, as in *Morales* and the *Cordova* cases, Plaintiff has failed to measure Employer's conduct up to the employer's conduct in *Delgado.* Having Plaintiff perform the routine task he was asked to perform, a task with which he was familiar and he had performed in the past, was hardly the equivalent of sending Plaintiff into certain injury. Even with the absence of safety measures as Plaintiff asserts, Plaintiff shows no inherent probability of injury, nor modicum of intent on Employer's part to send Plaintiff into harm's way. Further, while it may be foreseeable that a co-employee might negligently start equipment operation, such foreseeability does not rise to the level contemplated under the first prong of the *Delgado* test. Still further, while Employer may have intentionally failed to provide safety devices it knew or is claimed to have known that it was required to provide, the disregard does not reach the standard contemplated under the second prong of the *Delgado* test. The general failure to provide safety devices was not in and of itself a probable injury for Plaintiff on the occasion in question, notwithstanding the fact that the reason for safety devices is to assist in, and to lower the chances of, injury or death during maintenance of equipment. Finally, Plaintiff has not shown proximate causation between Employer's negligent management in regard to safety precautions and an intentionally caused injury.

{22} We believe that the Supreme Court in *Delgado* intended more than the disregard of preventative safety devices as occurred in the present case. The Act explicitly provides for enhanced compensation for an employer's failure to provide safety devices. § 52–1–10(B); *see also Cordova I,* 273 F.Supp.2d at 1220 n. 5 (stating that the unambiguous language of Section 52–1–10(B) "shows a legislative intent that the [Act] apply to worker injuries caused by an employer's failure to supply reasonable safety devices"). It is appalling that some employers disregard safety requirements that are in place to help prevent injury and death in connection with the performance of an employee's work. Nonetheless, such circumstances do not permit a conclusion that the employer has specifically and wilfully caused the employee to enter harm's way, facing virtually certain serious injury or death, as contemplated under *Delgado.* The critical measure, as reflected in the *Morales* and *Cordova* decisions, is whether the employer has, in a specific dangerous circumstance, required the employee to perform a task where the employer is or should clearly be aware that there is a substantial likelihood the employee will suffer injury or death by performing the task. The possibility, as in the present case, that an accident might occur because of an unexpected careless act of a co-employee does not meet the *Delgado* standard.

Contentions Not Reached

{23} Employer raises an alternative argument to persuade us to affirm. It asserts that *Delgado* should not be applied retroactively in this case to permit Plaintiff to pursue a cause of action. This assertion is based on the circumstance that Plaintiff's accident occurred in 1999, and *Delgado* was decided in 2001. The primary bone of contention between Plaintiff and Employer appears to be whether *Delgado* creates a new cause of action. In his brief in chief, Plaintiff states that *Delgado* "merely relaxed the standards and proof required by an employee to show 'intent' to cause the injury" and did not create a new cause of action. Plaintiff filed no reply brief addressing Employer's various arguments, including prejudice, inequity, as to why *Delgado* should not be applied retroactively to permit Plaintiff's claim. *See Stein v. Alpine Sports, Inc.,* 1998–NMSC–040, ¶ 9, 126 N.M. 258, 968 P.2d 769 (stating that one factor in assessing retroactive application is whether the case creates a new principle of law). We see no need to address this alternative contention of Employer. Assuming, without deciding, that *Delgado* applies retroactively, we are satisfied that Plaintiff is not entitled to relief, based on his failure as a matter of law to satisfy the *Delgado* requirements.

Third Amended Complaint

{24} The district court determined Plaintiff's third amended complaint would be

a futility given the court's ruling that his facts could not "sustain a *Delgado* action, or a claim outside the exclusivity provision[ ] of the [Act]." The court did not abuse its discretion, since we have affirmed the court's determination and have held that Plaintiff is not entitled to relief because of his failure as a matter of law to satisfy the *Delgado* requirements.

CONCLUSION

{25} We affirm the district court's summary judgment in favor of Employer.

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

WE CONCUR: MICHAEL D. BUSTAMANTE and MICHAEL E. VIGIL, Judges.

2005-NMCA-048
112 P.3d 270

STATE of New Mexico, Plaintiff–Appellee,

v.

STEPHEN F., Child–Appellant.

No. 24,007.

Court of Appeals of New Mexico.

Feb. 21, 2005.

Certiorari Granted, No. 29,128, April 26, 2005.

Patricia A. Madrid, Attorney General, Santa Fe, NM, Jacqueline R. Medina, Assistant Attorney General, Albuquerque, NM, for Appellee.

John B. Bigelow, Chief Public Defender, Vicki W. Zelle, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

FRY, Judge.

{1} Stephen F. (Child) appeals the trial court's finding that he is a delinquent juvenile and its judgment committing him to the custody of the Children, Youth and Families Department (CYFD) until the age of twenty-one. He requests a new trial, alleging that his jury trial was marred by evidentiary error and erroneous jury instructions. Alternatively, he argues the charges against him should be dismissed because his post-trial dispositional hearing occurred beyond the time limit provided in the Children's Court Rules. Because this claim of procedural error is dispositive, we need not address Child's other arguments.

{2} The nature of Child's offenses subjected him to youthful offender status, and the State sought the imposition of an adult sentence. Rule 10–101(A)(2)(b) NMRA provides that the Rules of Criminal Procedure govern youthful offender proceedings in the children's court under certain circumstances. However, we conclude that this rule governs only the adjudicatory phase of certain youthful offender proceedings, and that the Children's Court Rules govern the dispositional phase in all youthful offender proceedings. The trial court violated Rule 10–229(C) NMRA of the Children's Court Rules because it did not recommence Child's dispositional hearing within forty-five days of an order committing Child for diagnostic evaluation. Because we determine, as a matter of first impression, that this time limit is mandatory, we reverse and remand for the trial court to dismiss the claims with prejudice.

BACKGROUND

{3} A jury found Child guilty of two counts of criminal sexual penetration. Because of his statutory status as a youthful offender, *see* NMSA 1978, § 32A–2–3(I) (2003), the trial court ordered that Child receive an amenability to treatment evaluation. *See* NMSA 1978, § 32A–2–20 (2003). Approximately two months after this order, the dispositional hearing on amenability to treatment had not yet occurred, and Child filed a motion to dismiss for failure to comply with the forty-five day time for dispositional hearings as set forth in Rule 10–229(C). The State countered that the time limit had not been reached, arguing that the trial court should instead apply the ninety-day time limit for sentencing found in the Rules of Criminal Procedure. The trial court ruled in favor of the State, and this appeal followed.

DISCUSSION

Applicability of Children's Court Rules or Rules of Criminal Procedure

{4} We begin our analysis with Rule 10–101 of the Children's Court Rules. The relevant portions of this rule provide as follows:

> **A. Scope.** Except as specifically provided by these rules, the following rules of procedure shall govern proceedings under the Children's Code [32A–1–1 NMSA 1978]:
>
> (1) the Children's Court Rules govern procedure in the children's courts of New Mexico in all matters involving children alleged by the state:
>
> (a) to have committed a delinquent act as defined in the Delinquency Act;
>
> . . . .
>
> (2) the Rules of Criminal Procedure for the District Courts govern the procedure:
>
> (a) in all proceedings in the district court in which a child is alleged to be a "serious youthful offender", as defined in the Children's Code [32A–1–1 NMSA 1978];
>
> (b) in all proceedings in the Children's Court in which a notice of intent has been filed alleging the child is a "youthful offender", as that term is defined in the Children's Code [32A–1–1 NMSA 1978]. If the indictment or bind over order does not include a "youthful offender" offense, any further proceedings for the offense shall be governed by the Children's Court rules[.]

Rule 10–101(A)(1)–(2). Because the procedural issue in this case turns on interpretation of this rule and other rules of procedure, we apply de novo review. *See In re Daniel H.*, 2003–NMCA–063, ¶ 8, 133 N.M. 630, 68 P.3d 176.

{5} Child does not dispute that the State filed a notice of intent alleging that Child was a youthful offender, nor does he dispute that the bind over order included allegations that Child committed a "youthful offender" offense. These undisputed facts bring this case within Rule 10–101(A)(2)(b), which means, according to the plain language of this rule, that the Rules of Criminal Procedure apply to the proceedings. *See In re Michael L.*, 2002–NMCA–076, ¶ 9, 132 N.M. 479, 50 P.3d 574 ("We apply the same rules to the construction of Supreme Court rules of procedure as we apply to statutes."); *see also State v. Rivera*, 2004–NMSC–001, ¶ 10, 134 N.M. 768, 82 P.3d 939 (explaining that courts must give effect to clear and unambiguous language in a statute). However, reading the Children's Code and the Children's Court Rules together, we conclude that the overall

scheme contemplates that, while the Rules of Criminal Procedure govern the adjudicatory proceedings in youthful offender cases like the present one, the Children's Court Rules govern all dispositional proceedings for all youthful offenders. *See Quantum Corp. v. State Taxation & Revenue Dep't*, 1998-NMCA-050, ¶ 8, 125 N.M. 49, 956 P.2d 848 (holding that statutes governing the same subject matter must be read in connection with one another).

{6} We first look to the statutory context. The proceedings against Child were governed by the Delinquency Act (the Act), NMSA 1978, §§ 32A-2-1 to -33 (1993, as amended through 2003), which is a chapter within the Children's Code. NMSA 1978, §§ 32A-1-1 to -21-7 (1993, as amended through 2003). The Act's purpose, in part, is to protect society and hold children accountable for their acts. § 32A-2-2. At the same time, the Act's stated purpose includes the goals of insulating children from adult consequences and providing rehabilitation. *Id.*

{7} Because Child's status as a youthful offender is critical, we next consider the definition of youthful offender within the statutory scheme. When a child commits a delinquent act, the adjudication procedures and the available sanctions depend on whether the law defines the child as (1) a delinquent offender, (2) a youthful offender, or (3) a serious youthful offender. *State v. Muniz*, 2003-NMSC-021, ¶ 6, 134 N.M. 152, 74 P.3d 86. With respect to the consequences after a determination of guilt, offenders in the first category, delinquent offenders, receive only juvenile sanctions. § 32A-2-3(C). Those in the second category, youthful offenders, may be subject to either juvenile or adult sanctions, § 32A-2-3(I); adult sanctions apply to youthful offenders only where the State follows statutory procedures for seeking an adult sentence, and where the trial court subsequently finds that the offender is not amenable to treatment as a child. § 32A-2-20. The third category, serious youthful offender, encompasses individuals who are fifteen to eighteen years of age at the time of an offense that results in charges of first degree murder. § 32A-2-3(H). The definition of serious youthful offender is clear: from a legal perspective, these offenders are no longer considered children. *Id.; see also Muniz*, 2003-NMSC-021, ¶ 15, 134 N.M. 152, 74 P.3d 86 (holding that "the [l]egislature intended to treat children charged with first degree murder as adults").

{8} The legislature obviously intended to create three categories of juvenile offenders subject to varying degrees of accountability. With respect to the youthful offender category at issue here, the Act further divides this category into three subcategories. A youthful offender is a child who is "fourteen to eighteen years of age at the time of the offense," and who (1) is adjudicated for at least one of several specific offenses, or (2) has three prior felony adjudications within the past three years, or (3) has been adjudicated for first degree murder. § 32A-2-3(I). In the present case, Child's youthful offender status resulted from his adjudication for the offense of criminal sexual penetration. § 32A-2-3(I)(1)(h).

{9} Against this statutory backdrop, we now return to the Children's Court Rules. The Supreme Court apparently intended that application of the Children's Court Rules and Rules of Criminal Procedure in youthful offender cases turns on the nature of the offenses charged. Rule 10-101(A)(2)(b) provides that the Children's Court Rules govern proceedings involving youthful offenders "[i]f the indictment or bind over order does not include a 'youthful offender' offense[.]" The same rule provides that the Rules of Criminal Procedure govern proceedings involving all other youthful offenders. Referring back to the statutory definition of youthful offender, then, it is clear that the only youthful offenders who may be subject to proceedings governed by the Children's Court Rules are those who have three prior felony convictions within the past three years. The other two types of youthful offenders, defined by Subsections (1) and (3) of Section 32A-2-3(I), will, by definition, be subject to indictments or bind over orders alleging youthful offender offenses, and thus, their proceedings will be governed by the Rules of Criminal Procedure.

{10} Having said this, there is nevertheless a compelling argument that these subca-

tegories of youthful offender proceedings—those governed by the Children's Court Rules, and those governed by the Rules of Criminal Procedure—apply only to the adjudicatory stage of the proceedings. No matter what kind of Rule 10–101(A)(2)(b) youthful offender category a child falls under, that child is entitled to a dispositional hearing to determine whether he or she will be subject to juvenile sanctions or an adult sentence. § 32A–2–20(A) ("The court has the discretion to invoke either an adult sentence or juvenile sanctions on a youthful offender."); *Muniz*, 2003–NMSC–021, ¶ 6, 134 N.M. 152, 74 P.3d 86 (noting that in all youthful offender proceedings, "the children's court must determine whether the child is amenable to treatment or rehabilitation as a child in available facilities") (internal quotation marks and citation omitted); *cf. State v. Michael S.*, 1998–NMCA–041, ¶ 11, 124 N.M. 732, 955 P.2d 201 (noting that a child who agrees in a plea and disposition agreement that he could be sentenced as an adult has waived his right to a dispositional hearing). A youthful offender cannot be sentenced as an adult unless the children's court makes specific findings that the child "is not amenable to treatment or rehabilitation as a child in available facilities" and that "the child is not eligible for commitment to an institution for the developmentally disabled or mentally disordered." § 32A–2–20(B)(1)–(2). Consequently, because the Rules of Criminal Procedure do not provide for such a dispositional hearing, it would make sense that when the adjudicatory stage has been completed, the next stage of the proceedings should fall under the purview of the Children's Court Rules. Then, if the child is found not to be amenable to treatment as a child, the sentencing procedures in the Rules of Criminal Procedure would be triggered once again. Therefore, we conclude that once a child is adjudicated a youthful offender, the Children's Court Rules governing dispositional proceedings, not the Rules of Criminal Procedure, should apply in all cases.

{11} The State argues that the ninety-day sentencing time limit in Rule 5–701(B) NMRA of the Rules of Criminal Procedure applies instead of the forty-five day dispositional hearing time limit in Rule 10–229(C) of the Children's Court Rules. To the extent that the State relies on *State v. Todisco*, 2000–NMCA–064, ¶ 31, 129 N.M. 310, 6 P.3d 1032 for this proposition, we are not persuaded. In *Todisco*, we considered a case where the trial court did not resume the continuation of a dispositional hearing for more than nine months after this Court clarified the factors to be considered in determining amenability to treatment, and where the defendant, who was ultimately found not amenable to treatment, argued that the delay violated the six-month rule governing the time to begin trial. *Id.* ¶¶ 6–8, 31–35. The defendant's argument failed because the six-month rule for the commencement of trial does not apply to sentencing. *Id.* ¶ 34. Although *Todisco* suggests that Rule 5–701(B) on sentencing might apply to a dispositional hearing, the opinion explicitly refrains from deciding that issue. *Id.* ¶ 35. In addition, the opinion responds to arguments very different from those that we address today. *See State v. Erickson K.*, 2002–NMCA–058, ¶ 20, 132 N.M. 258, 46 P.3d 1258 (stating that cases are not authority for matters not decided).

Rule 10–229(C) Commitment for Diagnosis

{12} Having concluded that the Children's Court Rules apply in this case, we now turn to Rule 10–229(C), which specifically provides that where the court orders diagnostic commitment under the Children's Code, dispositional proceedings "shall be recommenced within forty-five (45) days after the filing of the court's order." We first observe that the rule refers to the *re* commencement of dispositional proceedings. A review of the Children's Code convinces us that the proceedings at issue in the present case fit within the language of the rule.

{13} The Code provides that "[T]he court may proceed immediately or at a *postponed hearing* to make disposition of the case." NMSA 1978, § 32A–2–16(F) (1993) (emphasis added). Here, immediately upon the discharge of the jury following the adjudicatory stage, the trial court began proceedings of a dispositional nature. The court asked counsel for their positions on obtaining a diagnos-

tic evaluation. Counsel concurred that such an evaluation was desirable, and the trial court stated that it would enter an order regarding the evaluation. When the trial court filed its written order on October 22, 2002 directing that Child be committed for a diagnostic evaluation, the time limit for recommencement of the dispositional hearing was triggered.

{14} We next observe that the language of Rule 229(C) regarding the time limits for recommencing the proceedings is unequivocal and mandatory. *See State v. Davis,* 2003-NMSC-022, ¶ 7, 134 N.M. 172, 74 P.3d 1064 (stating that the word "shall" is mandatory language). Here, the trial court ordered a diagnostic commitment on October 22, 2002. Under Rule 10-229(C), therefore, the deadline for recommencement of the dispositional hearing was December 6, 2002. The rule provides that for good cause shown, the Supreme Court may grant an extension of this time limit. Rule 10-229(D). In this case, however, the State made no such request. Thus, the hearing held on February 21, 2003, was well past the time limit of the rule.

{15} Because the dispositional hearing was held past the mandatory time limit in Rule 10-229(C), we must determine the proper remedy. The State argues that dismissal would be improper and points to Rule 10-117 NMRA, which states that "failure to comply with time limits is not grounds for . . . dismissing an action, unless refusal to take any such action appears to the court inconsistent with substantial justice or unless these rules expressly provide otherwise." However, it is significant to us that the mechanism for obtaining an extension of the Rule 10-229 time limit is to request one from the Supreme Court by showing good cause. Rule 10-229(D). This suggests a valid parallel with the six-month rule, Rule 5-604 NMRA, and with the provisions for extending the time limits applicable to the commencement of adjudicatory hearings governed by the Children's Court Rules. *See* Rule 10-226(E) NMRA (limiting the time for commencement of an adjudicatory hearing in a delinquency proceeding); Rule 10-320(C)(2) NMRA (limiting the time for commencement of an adjudicatory hearing in an abuse and neglect proceeding). Rule 5-604(D), Rule 10-226(E), and Rule 320(C)(2) all provide that time extensions, past the limited extensions the trial courts may grant, may only be obtained from the Supreme Court for good cause shown. In fact, as we discuss below, the wording of Rule 10-229(D) is virtually identical to the wording of Rule 5-604(D) and (E), Rule 10-226(E), and Rule 10-320(C)(2).

{16} Rule 10-229(D) provides:

> **D. Extension of time.** For good cause shown the time for commencing a disposition hearing may be extended by the Supreme Court, a justice thereof, or a judge designated by the Supreme Court. The party seeking an extension of time shall file with the clerk of the Supreme Court a verified petition for extension concisely stating the facts petitioner deems to constitute good cause for an extension of time to commence the dispositional hearing. The petition shall be filed within the applicable time limits prescribed by this rule, except that it may be filed within ten (10) days after the expiration of the applicable time limits if it is based on exceptional circumstances beyond the control of the state or children's court which justify the failure to file the petition within the applicable time limit. A party seeking an extension of time shall forthwith serve a copy thereof on opposing counsel. Within five (5) days after service of the motion, opposing counsel may file an objection to the extension setting forth the reasons for such objection. No hearing shall be held except upon order of the Supreme Court. If the Supreme Court finds that there is good cause for the granting of an extension beyond the applicable time limit, it shall fix the time limit within which the dispositional hearing must be commenced.

Similarly, Rule 5-604(D) provides that "[f]or good cause shown, the time for commencement of trial may be extended by the Supreme Court or a justice thereof[,]" and Rule 10-226(E) provides that "[f]or good cause shown, the time for commencement of an adjudicatory hearing [in a delinquency proceeding] may be extended by the Supreme Court, a justice thereof, or a judge designated by the Supreme Court." Rule 10-

320(C)(2) states that the time for commencing an adjudicatory hearing in an abuse and neglect case may be extended by the "Supreme Court, a justice thereof, or a judge designated by the Supreme Court for good cause shown." In addition, Rule 5-604(E), Rule 10-226(E), and Rule 10-320(C)(2) have provisions virtually identical to Rule 10-229(D)'s provisions relating to the procedure for seeking an extension of time from the Supreme Court.

{17} Despite these notable similarities, Rule 5-604, Rule 10-226, and Rule 10-320 each has an additional provision that Rule 10-229 does not have. Rules 5-604(F), 10-226(F), and 10-320(D) all provide that noncompliance with the time limits of those rules or with the time limits of any extensions granted shall result in dismissal with prejudice of the charges against the accused. Rule 10-229 has no such provision. We find this fact puzzling. If time limits, in whatever context, are deemed so important that only the Supreme Court may extend them beyond a certain point, then it would seem logical that noncompliance with those time limits should have the same result in every context.

{18} In an attempt to understand this apparent inconsistency, we have reviewed the history of Rule 10-229. *See Key v. Chrysler Motors Corp.*, 121 N.M. 764, 768-69, 918 P.2d 350, 354-55 (1996) ("In interpreting statutes, we seek to give effect to the [l]egislature's intent, and in determining intent we look to the language used and consider the statute's history and background."). Before the 1997 amendment, the rule provided that for a child in detention, dispositional proceedings "shall begin within twenty (20) days from the date the adjudicatory hearing was concluded or an admission of the factual allegations of the petition was accepted by the court[.]" Rule 10-229(B) NMRA 1996. It went on to state that a child could be transferred to a department of corrections facility for diagnosis and education, but for no more than sixty or ninety days, depending on the specifics of the child's adjudication. *Id.* If a child was so transferred, "the dispositional hearing shall begin within twenty (20) days from the date the court receives the diagnostic report of the department." *Id.* The rule concluded:

> If the hearing is not begun within the times specified in this paragraph, the petition shall be dismissed with prejudice after notice and hearing if:
>
> (1) the child has not agreed to the delay or has not been responsible for the failure to comply with the time limits; and
>
> (2) the child has been prejudiced by the delay.

Rule 10-229(B)(1)-(2). Thus, failure to comply with the rule's time limits resulted in dismissal, but only if the child played no part in the delay and was prejudiced by the delay.

{19} Following the 1997 amendment, the current version of Rule 10-229 is quite different. With respect to a child in detention, the current rule provides for more time—thirty days rather than twenty days—for a dispositional hearing to commence following the adjudicatory proceedings. Rule 10-229(B). If the hearing is not begun within this time, "unless the child has agreed to the delay or has been responsible for the failure to comply with the time limits, the child shall be released from detention on such conditions as appropriate until the dispositional hearing can be commenced." *Id.* Thus, the exception for child-caused delay that was in the prior version of the rule was incorporated into the current version, but only with respect to a child in detention. In addition, failure to comply with the time limit for a child in detention results in release of the child in the current version, rather than dismissal as provided in the prior version of the rule.

{20} The 1997 amendment also created a new paragraph devoted to the situation, like the one in the present case, where a child is committed for diagnosis. New paragraph (C) provides that the court may commit a child "to a facility for purposes of diagnosis and recommendations to the court as to what disposition is in the best interests of the child and the public." Rule 10-229(C). If the court orders such a commitment, "the dispositional proceedings shall be recommenced within forty-five (45) days after the filing of the court's order." *Id.* Thus, the 1997 amendment considerably shortened the time permitted for diagnostic commitment. Under the prior version of the rule, a child could be committed to a facility for as long as

ninety days, and the twenty-day time limit for commencement of the dispositional hearing was not triggered until the court received the diagnostic report. The current version of the rule requires commitment, diagnosis, and report to be completed within forty-five days of the court's order of commitment. We can only conclude from this that the Supreme Court believed it was critical to strictly limit the amount of time a child could be committed for diagnosis.

{21} The 1997 amendment's reduction of the time limit to forty-five days also brought the rule into compliance with the Children's Code, which provides that a "court may order that a child adjudicated as a delinquent child be transferred ... for a period of not more than fifteen days within a three hundred sixty-five day time period for purposes of diagnosis[.]" NMSA 1978, § 32A–2–17(D) (1995). Thus, it appears that the Supreme Court settled on a forty-five-day time limit applicable to children committed for diagnosis by adding the fifteen days permitted by Section 32A–2–17(D) to the thirty days adopted in Rule 1–229(B) for the commencement of dispositional hearings for children in detention.

{22} The 1997 amendment also added the paragraph with which we are now confronted: the paragraph providing that "[f]or good cause shown the time for commencing a disposition hearing may be extended by the Supreme Court, a justice thereof, or a judge designated by the Supreme Court." Rule 10–229(D). Significantly, the addition of this paragraph manifests a heightened emphasis on the importance of the time limits, as compared to the pre–1997 version. Yet, paradoxically, even though the prior version provided for dismissal of the petition in the event of noncompliance with the time limits under certain circumstances, the current version makes no provision dictating the consequences for noncompliance with the new, more stringent time limits.

{23} Considering the current and prior versions of the rule and comparing the rule's provision for Supreme Court extensions of time with virtually identical provisions in Rules 10–226, 10–320, and 5–604, we conclude that the appropriate remedy for noncompliance with Rule 10–229(C)'s time limit is dismissal. *See Quantum Corp.*, 1998–NMCA–050, ¶ 8, 125 N.M. 49, 956 P.2d 848 (explaining that a statute whose construction is in question is to "be read in connection with other statutes concerning the same subject matter"). The Supreme Court clearly provided for dismissal in the pre–1997 version of Rule 10–229 and inexplicably did not make a similar provision in the amended version, even though it enhanced the stringency of the time limits applicable to children committed for diagnosis. We surmise that when the Supreme Court added the provision permitting only the Supreme Court to grant an extension for good cause, it also intended to add a paragraph stating the consequences for noncompliance with the time limit, similar to Rule 10–226(F) and Rule 5–604(F). The absence of such a provision was likely an oversight. We note as an aside that the committee commentary to Rule 10–229 sheds no light on our inquiry because it was not changed in any way after the 1997 amendment significantly changed the rule.

{24} We observe that while the 1997 amendment shortened the time limit for diagnostic commitment, it lengthened the time limit for children in detention and also provided that a child in detention must be released "[i]f the hearing is not begun within the time specified[.]" Rule 10–229(B). Although this appears at first blush to be a less stringent consequence than the dismissal required by the pre–1997 version, we think the current version of Rule 10–229(D) permits the State to ask the Supreme Court for an extension of the thirty-day limit on detention; if the hearing does not begin within the extended time frame, then the consequence—dismissal—would be the same as the consequence for failure to comply with the forty-five day limit or any Supreme Court extensions on diagnostic commitment.

{25} We acknowledge that Rule 10–117 provides that "failure to comply with time limits is not grounds ... for dismissing an action ... unless these rules expressly provide otherwise" and is clearly intended to be the default rule. The newer version of Rule 10–229 on dispositional hearings has no such express provision for failure to comply with

the new deadlines. It is not the role of this Court to re-write the rules or to freely insert our view of the proper or ideal language. It is only after careful review of the overall scheme of similar rules and the increasingly strict revisions made over time to Rule 10–229 that we conclude the dismissal clause is not only conspicuously absent, but unreasonably absent. Typically, the removal of an exception clause would indicate that the rule's drafters intended for the default rule to apply. However, the stark inconsistency with similar rules, the new time extension via only the Supreme Court (compared to rules that allow lower court extensions), and the drastic change from the prior rule without any clarification convince us that the omission of the dismissal clause creates results that are not only different from the old rule, but that are unreasonable if literally applied. *See Rivera,* 2004–NMSC–001, ¶ 13, 134 N.M. 768, 82 P.3d 939 (explaining that courts have not relied on the literal meaning of statutes "when such an application would be absurd, unreasonable, or otherwise inappropriate"). *See also State v. Doe,* 93 N.M. 31, 33–34, 595 P.2d 1221, 1223–24 (Ct.App.1979) (holding that dismissal was the appropriate remedy for violation of the time limits applicable to dispositional delinquency hearings under a prior version of the relevant rule in order "to insure prompt handling of children's court matters").

{26} In summary, despite the absence of an express provision requiring dismissal for noncompliance with the Rule 10–229(C) time limit, we hold dismissal is proper. Because the dispositional hearing in this case commenced more than forty-five days after the trial court's order committing Child for diagnosis, the charges against Child must be dismissed.

CONCLUSION

{27} For the foregoing reasons, we reverse the trial court's judgment and remand with instructions to the trial court to dismiss the charges against Child.

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

I CONCUR: MICHAEL E. VIGIL, Judge.

CELIA FOY CASTILLO, Judge (concurring in part and dissenting in part).

CASTILLO, Judge (dissenting).

{29} I respectfully dissent. While I agree that Rule 10–229 of the Children's Court Rules is the correct rule to use for the dispositional portion of this case, I do not agree that automatic dismissal is the sanction to be imposed when a dispositional hearing is not recommenced within forty-five days from entry of the order committing a child to a facility for diagnostic purposes.

{30} The majority relies on two bases for their holding that dismissal is the proper sanction. First, they look to the history of the rule; second, they interpret the language of the rule as necessarily including the dismissal provision that is contained in Rules 5–604, 10–226, and 10–320. My view is different. I believe there is a distinction between not meeting the time requirements for the dispositional portion of the case and not meeting those for the adjudicatory portion. Over the years, our Supreme Court has refined how a court is to remedy the late commencement of a dispositional hearing, and the requirement of automatic dismissal with prejudice has been eliminated. Other bases for dismissal remain. Consequently, the absence of an express automatic dismissal provision is intentional, and we would be rewriting the rule if we included it through statutory construction.

HISTORY

{31} The Children's Court Rules were first enacted in 1976. Since then, there have been numerous changes, including a renumbering and a recompilation. Two rules are applicable in this case: Rule 10–229, which deals with time limits for dispositional proceedings, and Rule 10–117, which deals with the consequences of not meeting the time requirements set out in the rules.

Rule 10–229

{32} In *State v. Doe,* 93 N.M. 31, 595 P.2d 1221 (Ct.App.1979), our court first dealt with what is today Rule 10–229(B). At that time, it was designated as Rule 49(b), N.M.R. Child. Ct. (Repl.Pamp.1979), and stated as follows:

> (b) **Time limits.** When the respondent is in detention, the dispositional hearing shall begin within twenty days from the date the adjudicatory hearing was concluded or an admission of the factual allegations of the petition was accepted by the court, except as provided herein. The court may order that the respondent be transferred to an appropriate facility of the department of corrections . . . for a period of not more than sixty days for purposes of diagnosis. If the respondent is so transferred, the dispositional hearing shall begin within seventy-five days from the date the adjudicatory hearing was concluded or an admission of the factual allegations of the petition was accepted by the court.

Id.; Doe, 93 N.M. at 32, 595 P.2d at 1222. This rule established the time limits for commencement of a dispositional hearing (1) when a child was in detention and (2) when the child had been transferred to an appropriate facility for purposes of diagnosis. It was silent regarding the sanction for exceeding the time requirements. In holding that the consequence for violation of this rule was automatic dismissal, this court rejected the argument that a child should have to demonstrate prejudice before dismissal could be imposed. *Doe,* 93 N.M. at 33–34, 595 P.2d at 1223–24.

{33} We again considered Rule 49(b), N.M.R. Child. Ct. (Repl.Pamp.1979), in *State v. Doe,* 94 N.M. 282, 609 P.2d 729 (Ct.App.1980). We again upheld dismissal, this time rejecting the state's argument that the child's own actions in delaying the hearing acted as a waiver against the strict application of the time limits. *Id.* at 284, 609 P.2d at 731.

{34} In 1982, the rule was amended to read as follows:

> (b) **Time limits.** When the [child] is in detention, the dispositional hearing shall begin within twenty days from the date the adjudicatory hearing was concluded or an admission of the factual allegations of the petition was accepted by the court, except as provided herein. The court may order that the [child] be transferred to an appropriate facility of the department of corrections for a period of not more than sixty days with respect to a child adjudicated as a child in need of supervision and for a period of not more than ninety days with respect to a child adjudicated as a delinquent for purposes of diagnosis and education. If the [child] is so transferred, the dispositional hearing shall begin within twenty days from the date the court receives the diagnostic report of the department. If the hearing is not begun within the times specified in this paragraph, the petition shall be dismissed with prejudice after notice and hearing if:
>
> (1) the child has not agreed to the delay or has not been responsible for the failure to comply with the time limits; and
>
> (2) the child has been prejudiced by the delay.

Rule 49(b), N.M.R. Child. Ct. (Repl. Pamp.1982). There are three major changes. First, the consequence of failure to meet time deadlines is express—dismissal with prejudice. Second, dismissal is no longer automatic but occurs if the child has not agreed to or been responsible for the delay *and* if prejudice is shown as a result of delay in the dispositional hearing. Third, commencement of the dispositional hearing for a child having been transferred for diagnostic purposes is no longer calculated from the date of the adjudicatory hearing, but rather from the date the diagnostic report is received. In the new language, the Supreme Court fashioned a rule that would take into consideration the reason for delay and prejudice, two factors that had been expressly rejected in interpreting the former rule. *Doe,* 94 N.M. at 284, 609 P.2d at 731; *Doe,* 93 N.M. at 33–34, 595 P.2d at 1223–24 (the *Doe* cases). The limitation for time spent in a diagnostic facility was treated separately from the time requirement for beginning the dispositional hearing.

{35} In 1986, the Supreme Court recompiled the rules, and Rule 49, N.M.R. Child. Ct. (Repl.Pamp.1982), became Rule 10–229 NMRA 1986. The form of the rule we are considering today was amended effective April 1, 1997, and, as observed by the majority, appears to have no updated Committee Commentary. Majority opinion ¶ 22. The majority recognizes the substantial changes

made to all of Rule 10–229 by the 1997 amendments. *Id.* ¶¶ 16–20.

{36} The 1997 amendments were based in part on the 1993 rewrite of the Children's Code, wherein the categories of youthful offenders and serious youthful offenders were established. *See Michael S.*, 1998–NMCA–041, ¶ 3, 124 N.M. 732, 955 P.2d 201. Rule 10–229(B) NMRA 1997 specifically refers to trials in youthful offender proceedings. This section also establishes time limits for the commencement of dispositional "proceedings," and the entire rule is retitled "Dispositional proceedings." The prior version of the rule used the more limited term of "hearing" in the title and in the text of the rule. Rule 10–229 NMRA 1986. The current rule further relaxes the consequence for failure to begin the dispositional hearing (in this part of the rule, "hearing" is used) of a child in detention. Rule 10–229(B). The remedy is no longer dismissal, but rather release "on such conditions as appropriate until the dispositional hearing can be commenced." *Id.*

{37} The 1986 version of the rule calculated time limits from the conclusion of the adjudicatory hearing, from the date that the court accepts an admission of the petition allegations, or from receipt by the court of the diagnostic report. Rule 10–229(B) NMRA 1986. The period of time spent by a child in a diagnostic facility was limited to sixty or ninety days, depending on the adjudication. *Id.* The current version of the rule includes an entirely new subsection dealing with diagnostic commitment; this topic is no longer contained in the subsection dealing with time limits for commencement of dispositional proceedings. Rule 10–229(C). The language of Rule 10–229(C) allows the court to enter an order committing a child to a facility for diagnostic purposes and directs that the dispositional proceedings "shall be recommenced" within forty-five days after the filing of the court's order. *Id.* The majority concludes that the Supreme Court, believing that it was critical to limit commitment time, intended to impose automatic dismissal as the remedy for violating the time requirements regarding commitment. Majority opinion ¶¶ 19, 22. While I agree that the time for commitment has been reduced, I do not agree this indicates that the remedy should be automatic dismissal. I will begin with the language of the statute. The operable words in this subsection are "shall" and "recommenced." I will address them in reverse order.

{38} The word "recommence" means to commence or begin again. Webster's Third New International Dictionary 1897 (3d ed.1976). Thus the use of the word "recommence" indicates that dispositional proceedings have already commenced. As observed by the majority, the trial court began the dispositional proceedings immediately after the adjudication. Majority opinion ¶ 13. Rule 10–229(B) indicates that once begun, the "dispositional proceedings shall be concluded as soon as practical[,]" thereby supporting the conclusion that once commenced, reasonable time is allowed for the conclusion of proceedings.

{39} I agree with the majority that the word "shall" is mandatory. I agree that the dispositional proceedings in this case should have been recommenced within forty-five days from the filing of the court's order of commitment. I also agree with the majority that the key question relates to the consequences of missing the deadline. The majority points to Rule 10–229(D), which sets out the procedure for obtaining an extension for "commencing a disposition hearing," and concludes that this section refers to recommencement of dispositional proceedings after commitment. I disagree. By its very language, Rule 10–229(D) refers to commencement, not recommencement, and to proceedings, not hearings. Consequently, extensions for recommencing dispositional proceedings would be governed by the general rule for time extension. Rule 10–106(B)(2) NMRA. In this case, no motion was made, as required by this rule, because it appears that the court determined that the ninety-day period set forth in the Criminal Rules of Procedure applied. So we are left with a failure to comply with a deadline imposed by the rules, which is the subject of Rule 10–117.

Rule 10–117

{40} Following the *Doe* cases, the Children's Court Rules have been amended to

refine the consequences of missing the deadline for beginning dispositional hearings, as I have explained above. Effective in February 1982, the Supreme Court amended what is today Rule 10–117 to deal with those cases wherein the Children's Court Rules are silent with regard to the sanction to be imposed when deadlines are missed. Rule 17, N.M.R. Child. Ct. (Repl.Pamp.1982). The pertinent language of Rule 10–117 states that "[e]rror or defect in any ruling, . . . including failure to comply with time limits[,] is not grounds for . . . dismissing an action, unless . . . these rules expressly provide otherwise." Rule 10–117.

{41} The Committee Commentary on Rule 10–117 indicates that the purpose of the amendment was to "clarify that failure to comply with time limits is not grounds for dismissal of an action unless expressly provided otherwise by the rules." *Id.* Although the Commentary lists Rules 10–226, 10–229, and 10–308 NMRA as specifically requiring dismissal with prejudice for not meeting the time limits in the rules, there has been no update to the Commentary, and it does not reflect the current status of the rules. For example, Rule 10–308 is now Rule 10–320 NMRA, and recent amendments to Rule 10–229 are not considered.

Express Dismissal

{42} The majority contends that inclusion of the language in Rule 10–229(D) setting out the method by which an extension may be granted for commencement of a dispositional hearing indicates that the Supreme Court meant to include a provision dismissing the case if the time limit for recommencement of a dispositional proceeding is not met. I disagree. The majority points to similar extension language in Rules 5–604, 10–226, and 10–320, all of which contain express dismissal provisions, and concludes that the Supreme Court meant to include express dismissal in Rule 10–229. Rules 5–604, 10–226, and 10–320 deal with adjudication and trial, not with disposition or sentencing. Time requirements for the commencement of the adjudicatory phase of a case are treated differently from time requirements for the dispositional phase. The content of Rule 10–117 is clear: absent an express provision requiring dismissal, failure to comply with time limits in the Children's Court Rules is not a ground for dismissal of an action. We interpret rules in the same manner as we interpret statutes. *In re Michael L.*, 2002–NMCA–076, ¶ 9, 132 N.M. 479, 50 P.3d 574 (applying the same rules of construction to Supreme Court rules as to statutes). The legislature is also presumed to know its laws. *Bd. of Comm'rs of Doña Ana County v. Las Cruces Sun–News*, 2003–NMCA–102, ¶ 23, 134 N.M. 283, 76 P.3d 36 (stating that the court cannot say that the legislature " 'forgot' " to reassess a statute after amending another statute because the legislature is presumed to know the law). Similarly, the Supreme Court is presumed to know its rules; this supports the conclusion that the absence of an express provision for dismissal was intentional.

{43} The majority's reading results in inconsistent applications of sanctions. If a child is in detention and there has been no conduct that would act as a waiver, failure to begin the dispositional hearing results in release from detention. If, however, a child has been committed for diagnosis and the proceedings are not recommenced as provided by the rule, the majority view results in dismissal of the entire case, regardless of waiver, prejudice, or any other factor that might bear on late commencement of the proceedings. The purpose of diagnosis is to help the court fashion a disposition that is in the best interests of the child and the public. § 32A–2–17(D). It makes little sense to require an automatic dismissal of a case for late recommencement of dispositional proceedings yet require release from detention in the general case. *See Rivera*, 2004–NMSC–001, ¶ 13, 134 N.M. 768, 82 P.3d 939 (observing that statutes are not to be read literally if such reading results in an unreasonable application). The history of the development of the rule points in the opposite direction. Automatic dismissal for failure to begin a dispositional hearing, as occurred at the inception of these rules, is no longer the case.

{44} While my reading of the rule would not allow dismissal for mere failure to comply with the time limit in Rule 10–229(C), my

reading does not prevent a child from arguing for dismissal based on other grounds. For example, Rule 10–117 would allow dismissal when failure to meet the required deadline is inconsistent with substantial justice. There also may be cases wherein the facts would support a denial of due process or other constitutional violations. These alternative arguments were not made in this case.

{45} A child's right to a speedy dispositional hearing is similar to the general right to speedy sentencing. This court has acknowledged the difference between the right to a speedy trial and the right to speedy sentencing in children's court cases. In *Todisco,* we relied on *Perez v. Sullivan,* 793 F.2d 249, 254 (10th Cir.1986), in stating that "a delay in sentencing involves considerations different from those related to pre-trial delay. The alteration of a defendant's status from accused and presumed innocent to guilty and awaiting sentence is a significant change[,] which must be taken into account. . . . " *Todisco,* 2000–NMCA–064, ¶ 23, 129 N.M. 310, 6 P.3d 1032 (quoting *Perez,* 793 F.2d at 254). We went on to say that "[m]ost of the interests designed to be protected by the speedy trial guarantee 'diminish or disappear altogether once there has been a conviction.' " *Todisco,* 2000–NMCA–064, ¶ 23, 129 N.M. 310, 6 P.3d 1032 (quoting *Perez,* 793 F.2d at 256). This type of language supports the interpretation that dismissal is not an automatic sanction when the forty-five—day deadline for recommencement of dispositional proceedings is not met.

CONCLUSION

{46} For the above reasons, I would not dismiss this case based on failure to comply with Rule 10–229(C).

{47} I therefore respectfully dissent.

2005-NMCA-061

112 P.3d 281

Ermelinda WILLIAMS, Nasario Lopez, Lillian Starzyk, Olivama Sandoval, and Erlinda Trujillo, on their own behalves and as Representatives of a class of similarly situated persons, Plaintiffs–Appellants,

v.

Michael W. STEWART, M.D., Defendant–Appellee.

No. 23,730.

Court of Appeals of New Mexico.

March 22, 2005.

Certiorari Denied, No. 29,167, May 10, 2005.

[redacted]

[redacted]

[redacted]

Richard W. Hughes, Caren I. Friedman, Rothstein, Donatelli, Hughes, Dahlstrom & Schoenburg, LLP, John C. Bienvenu, Santa Fe, for Appellants.

Robin A. Goble, Alice Tomlinson Lorenz, Gary L. Gordon, Miller Stratvert P.A., Albuquerque, for Appellee.

OPINION

WECHSLER, Judge.

{1} This is an appeal from an order granting summary judgment and dismissing a class action lawsuit. The issues primarily concern the application of the discovery rule. The essential elements of fraud are also at issue. Under the circumstances presented, we conclude that publicity concerning a program to use body parts removed in autopsies did not give rise to a duty to inquire as a matter of law and that the district court therefore erred in determining that the statute of limitations bars the claims asserted. Additionally, we hold that fraud was not adequately pleaded because emotional distress damages are not recoverable as part of the fraud claim. We reverse and remand for further proceedings.

Background

{2} This lawsuit arises out of a program that the Los Alamos National Laboratory (LANL) conducted from 1959 through the early 1980s. LANL arranged with the Los Alamos Medical Center (LAMC) and several of its pathologists to have organs, tissues, and other body parts removed in the course of autopsies performed at LAMC and other

area hospitals. The body parts were then delivered to LANL so that their plutonium content could be studied. In total, body parts from 407 individuals (the decedents) were collected as part of this program.

{3} It appears that little or no effort was made to obtain the informed consent either of the decedents before their deaths or their families. Further, neither the existence of the program nor its purposes were publicly disclosed until 1993, when a reporter obtained documents using the Freedom of Information Act (FOIA). *See generally* 5 U.S.C. § 552 (2002).

{4} Plaintiffs filed this class action lawsuit on October 15, 1996, roughly three years after the FOIA disclosure. Initially, the class included the next of kin and/or the immediate family members of all the decedents who were involved in the program. The Regents of the University of California, as operator of LANL, and Lutheran Hospitals & Homes Society of America, Inc., as operator of LAMC, were among the original defendants. The first complaint sought damages for intentional infliction of emotional distress, conversion, fraud, negligence, and civil rights violations. After discovery had been conducted and additional information had been gathered about the program, Plaintiffs obtained leave to amend their complaint to join Dr. Michael W. Stewart as an additional defendant and to add claims for mistreatment of a corpse, breach of contract, civil conspiracy, and aiding and abetting.

{5} The defendants filed a number of motions to dismiss and for summary judgment. The district court dismissed many of the claims, including the claim for fraud. However, the claims for intentional infliction of emotional distress, negligence, mistreatment of a corpse, civil conspiracy, and aiding and abetting remained.

{6} Following protracted negotiations, Plaintiffs obtained settlements with all defendants except Dr. Stewart. The parties agree that a de facto sub-class was thereby created consisting of only those members of the original class who were related to the decedents autopsied during Dr. Stewart's tenure at LAMC (Plaintiffs).

{7} As the only remaining party-defendant, Dr. Stewart moved the district court to reconsider a motion for summary judgment that he had previously filed, contending that Plaintiffs' claims against him were barred by the statute of limitations. He based his argument on media coverage relating to the program, including television programs and newspaper articles that were published from the 1980s through the mid–1990s. The district court determined as a matter of law that, in light of this publicity, Plaintiffs should have discovered their claims by June 1995. Because Dr. Stewart was not joined as a party until May 1999, the district court concluded that all Plaintiffs' remaining claims were barred. Plaintiffs appealed.

Standard of Review

{8} The district court's ruling on the statute of limitations issue presents a question of law that we review de novo. *See Bartlett v. Mirabal*, 2000–NMCA–036, ¶ 4, 128 N.M. 830, 999 P.2d 1062 (observing that the grant of a motion for summary judgment presents a question of law, which is reviewed de novo). We must review the record in the light most favorable to the non-movant to determine whether there are genuine issues of material fact. *Handmaker v. Henney*, 1999–NMSC–043, ¶ 18, 128 N.M. 328, 992 P.2d 879.

{9} The district court's dismissal of Plaintiffs' fraud claims also presents a question of law to be reviewed de novo. *See City of Sunland Park v. Macias*, 2003–NMCA–098, ¶ 9, 134 N.M. 216, 75 P.3d 816.

> For purposes of a motion to dismiss, we accept all well-pleaded facts as true and consider whether the plaintiff might prevail under any state of facts provable under the claim. A complaint should not be dismissed unless there is a total failure to allege some matter essential to the relief sought.

Id. (citation omitted).

Statute of Limitations

A. *Classification and Accrual of the Causes of Action*

{10} The district court and the parties have proceeded on the theory that Plaintiffs'

claims for intentional infliction of emotional distress, negligence, mistreatment of a corpse, civil conspiracy, and aiding and abetting are classifiable as claims for personal injuries, such that the three-year statute of limitations applies. *See* NMSA 1978, § 37–1–8 (1976) ("Actions must be brought . . . for an injury to the person . . . within three years."). In light of Plaintiffs' prayer for damages, by which they primarily seek to recover for pain, suffering, physical injuries, and the emotional distress that they have suffered, we agree with this characterization. *See Mantz v. Follingstad,* 84 N.M. 473, 478–79, 505 P.2d 68, 73–74 (Ct.App.1972) (observing that if the object is the recovery of damages for personal injury, the statute of limitations for personal injury claims applies regardless of the form of the claim); *cf. Jacobs v. Meister,* 108 N.M. 488, 495, 775 P.2d 254, 261 (Ct.App.1989) (stating that "[d]istress is a personal injury familiar to the law") (internal quotation marks and citation omitted).

{11} Depending on the nature of the claims asserted and the context out of which they arise, personal injury claims may accrue at the time of the occurrence, the time of injury, or the time of discovery. Dr. Stewart does not contest that the time of discovery applies in this case. We therefore apply the discovery rule for our analyses. *See Cummings v. X-Ray Assocs. of N.M., P.C.,* 1996–NMSC–035, ¶ 49, 121 N.M. 821, 918 P.2d 1321 ("A statute of limitations begins to run when the cause of action accrues, the accrual date usually being the date of discovery."); *see also Roberts v. Southwest Cmty. Health Servs.,* 114 N.M. 248, 255–56, 837 P.2d 442, 449–50 (1992) (acknowledging the widespread adoption of the discovery rule, as well as the various policy considerations that support it).

B. *Application of the Discovery Rule*

{12} The discovery rule provides that "the cause of action accrues when the plaintiff discovers or with reasonable diligence should have discovered that a claim exists." *Id.* at 255, 837 P.2d at 449. There has been no suggestion that Plaintiffs had actual knowledge of their claims more than three years before the complaint was filed. Instead, the parties dispute whether Plaintiffs "should have discovered" their claims at an earlier date.

{13} The district court concluded that Plaintiffs should have discovered the basis for their claims by June 1995 in light of the publicity that the program received. The evidence supporting this determination included newspaper articles published in *The New York Times, The Albuquerque Tribune,* the *Los Alamos Monitor,* the *Albuquerque Journal,* and *The Santa Fe New Mexican,* describing the program or other related studies with varying degrees of specificity. *Associated Press* releases appeared in a number of out-of-state publications. Several television programs aired, including features on *60 Minutes, The Geraldo Rivera Show,* and *ABC World News Tonight.* Finally, several scientific publications described aspects of the program, and there was also a presidential advisory committee report.

{14} The discovery rule carries an inquiry obligation. A plaintiff must exercise reasonable diligence to discover a claim. *Id.* The standard of "reasonable diligence" imports an analysis of objectivity. *See, e.g., Martinez v. Showa Denko, K.K.,* 1998–NMCA–111, ¶ 24, 125 N.M. 615, 964 P.2d 176 (stating that tolling of the statute of limitations ends when a plaintiff "acquires knowledge of facts, conditions, or circumstances which would cause a reasonable person to make an inquiry leading to the discovery of the concealed cause of action") (internal quotation marks and citation omitted). Under this standard, Plaintiffs had an obligation to inquire as to facts that would indicate they had a claim if the publicity reached a level that would objectively make a reasonable person inquire as to the presence of a claim. *See id.* ¶ 25 (holding that information the plaintiff received from family, newspaper articles, doctors, and her attorney constituted sufficient information to put a reasonable person on notice and imposed a duty on the plaintiff to timely file a claim).

{15} Courts applying this standard have reached different results. By way of example, Dr. Stewart directs our attention to *Ball v. Union Carbide Corp.,* 385 F.3d 713 (6th

Cir.2004), in which the Sixth Circuit held that the plaintiffs had a duty to inquire about potential personal injury claims connected to emissions or releases of local nuclear weapons manufacturing and research facilities based on repeated local and national news media reports and repeated reports of a governmental panel studying the health effects of the operation of the facilities. *Id.* at 721–23; *see also Hughes v. Vanderbilt Univ.*, 215 F.3d 543, 548 (6th Cir.2000) (holding that numerous news reports, including report on similar lawsuit, placed the plaintiff on constructive notice of underlying events even though she did not hear or read any of the reports); *In re: Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 2004 WL 1535828, at ** 7, 8 (E.D.Pa. July 6, 2004) (holding that plaintiffs were on inquiry notice that their alleged heart problems were related to diet drugs based on the widespread publicity concerning recall of diet drugs and nationwide class action settlement agreement). On the other hand, in *O'Connor v. Boeing North American, Inc.*, 311 F.3d 1139, 1149–52 (9th Cir.2002), the Ninth Circuit held that "numerous and notorious" newspaper reports concerning the release of potentially hazardous substances did not preclude the possibility that a reasonably diligent person in the locale might not have been aware of the release of the contaminants. The Court stated that such a determination

> required a fact-intensive examination of the geographic scope of the circulation of various publications, the level of saturation of each publication within the relevant communities, the frequency with which articles . . . appeared in each publication, the prominence of those articles within the publication, and the likelihood that a reasonable person living in [p]laintiffs' various communities at the same time as [p]laintiffs would have read such articles.

Id. at 1152. It concluded that such issues were within the purview of a jury. *Id.; see also Bibeau v. Pac. Northwest Research Found. Inc.*, 188 F.3d 1105, 1110–11 (9th Cir.1999) (holding that duty of inquiry under discovery rule not triggered by news articles of experiment causing injury without consideration of reasons plaintiff may not have read the articles); *Orlikow v. United States*, 682 F.Supp. 77, 85 (D.D.C.1988) ("Without actual notice or without having read the articles it would go too far to state that the statute of limitations began to run when the articles were published. The trier of fact must resolve the issue of diligence and notice.") (footnote omitted).

{16} Historically, the courts of this state have characterized the application of the discovery rule as a jury question, particularly when conflicting inferences may be drawn. *See, e.g., Roberts*, 114 N.M. at 257, 837 P.2d at 451) (concluding, in a medical malpractice case involving the discovery rule, "that whether plaintiff . . . with reasonable diligence should have known of the injury and its cause is a question of fact"); *Brown v. Behles & Davis*, 2004–NMCA–028, ¶¶ 12, 17, 135 N.M. 180, 86 P.3d 605 (observing that the application of the discovery rule is generally a question of fact and holding that whether a reasonable person would have investigated the public records and discovered the basis for a legal malpractice claim is a question for the jury); *Kevin J. v. Sager*, 2000–NMCA–012, ¶ 20, 128 N.M. 794, 999 P.2d 1026 ("Because there are differing permissible inferences that the fact finder could make . . . summary judgment was not proper in this case. The question of when [p]laintiff knew or had reason to know of the alleged abuse and its impact is a question for the jury to decide."); *Montoya v. Kirk–Mayer, Inc.*, 120 N.M. 550, 554, 903 P.2d 861, 865 (Ct.App. 1995) (stating that summary judgment is improper when equally logical but conflicting inferences can be drawn from undisputable basic facts); *cf. Romero v. Sanchez*, 83 N.M. 358, 362, 492 P.2d 140, 144 (1971) (holding, in a case involving an action to set aside a deed on grounds of fraud, that whether the claimant should, in the exercise of ordinary diligence, have investigated the public records raises a question of fact); *Medina v. Fuller*, 1999–NMCA–011, ¶ 22, 126 N.M. 460, 971 P.2d 851 (holding that "[w]here there are disputed questions of material fact as to whether a plaintiff is barred by the statute of limitations, these questions are to be decided by a jury") (internal quotation marks and citation omitted).

{17} In this case, Dr. Stewart attached written copies of the articles and transcripts of the various publicity concerning the program, but did not present evidence addressing other facts which would allow a factfinder to determine the level of awareness the publicity would generate to a reasonable person in Plaintiffs' communities. Without this type of information, we believe that a reasonable inference could be reached that the publicity did not generate a duty to inquire on the part of a reasonable diligent person in Plaintiffs' situation in Plaintiffs' communities. We note that some of the Plaintiffs are elderly and live in a small, isolated village in Northern New Mexico and at least one is primarily Spanish speaking and claimed that he could not have understood the publicity without an interpreter.

{18} Moreover, the impact of the publicity raises additional questions of fact. As mentioned above, the various articles, reports, and broadcasts describe the program with varying degrees of specificity. Much of the publicity appears to have been lacking pertinent details, such as the secretive nature of the program and LANL's failure to obtain informed consent. As such, it remains an open question whether reasonably prudent persons in Plaintiffs' position would have realized that their decedents might have been involved with the program. *Cf. Brown,* 2004–NMCA–028, ¶ 17, 135 N.M. 180, 86 P.3d 605 (holding that even if the claimant was on inquiry notice, it was nevertheless a question for the jury whether a search of the records would have revealed the basis for the claim).

{19} In addition, the summary judgment record does not lead to the single conclusion that a reasonably diligent person who made inquiry based upon the publicity would have learned of a claim. *See O'Connor,* 311 F.3d at 1155–56 (stating that application of discovery rule requires that reasonable inquiry provide notice of claim). At oral argument, Dr. Stewart's counsel provided the following scenario leading from the available publicity in 1994 to notice of a claim. February 1994 articles in *The Albuquerque Tribune* and the *Los Alamos Monitor* stated that Dr. Stewart performed autopsies as part of the program in the relevant time period. The article in *The Albuquerque Tribune* indicated that information was published in scientific studies. *The Albuquerque Tribune* published an article the following day stating that autopsies of the general population were performed at LAMC. Three additional articles in February 1994 discussing autopsies of persons not part of Plaintiffs' class indicated that family members had not given permission to remove and study body parts of the deceased. *The Santa Fe New Mexican* published several articles on the program during February through April 1994. It stated that a congressional committee was investigating whether permission had been granted for the use of the body parts in the program. The *Associated Press* then picked up the story, and articles were published nationwide. The *Albuquerque Journal* carried an article in August 1994. According to Dr. Stewart's counsel, Plaintiffs could have gone to the scientific studies, which were not classified, to identify the personal characteristics and date of death of their decedents to learn of their involvement in the program.

{20} Dr. Stewart's argument requires a plaintiff to track through various information sources in order to reach the point of knowledge sufficient to form a belief that the plaintiff may have a claim. Moreover, for Plaintiffs to even understand that they had a claim, they would need to suspect that an autopsy had been performed on their relative. By its very nature, information about the autopsy of a deceased relative is not readily understood or conceptualized. Consequently, we consider Dr. Stewart's reasoning too tenuous to conclude that the sole reasonable inference is that an inquiry would necessarily lead to sufficient notice.

{21} Therefore, we conclude that the district court erred in ruling that Plaintiffs' claims are time barred as a matter of law. We acknowledge that the application of the discovery rule may be summarily resolved in exceptional cases. *See Brunacini v. Kavanagh,* 117 N.M. 122, 127, 869 P.2d 821, 826 (Ct.App.1993) ("Although the time when a party is deemed to have discovered [the basis for a claim] is generally a question of fact, nevertheless, where the undisputed facts show that [p]laintiffs knew, or should have

been aware of the negligent conduct on or before a specific date, the issue may be decided as a matter of law."). However, we see nothing to take this case outside of the general rule. The issue of whether, in the exercise of reasonable diligence, Plaintiffs should have made themselves aware of the foregoing articles, broadcasts, and reports is a question of fact for the jury to decide. Similarly, the jury should be permitted to determine whether Plaintiffs should have discovered the basis for their claims in a more timely fashion by virtue of the publicity.

C. *Consideration of Alternative Bases for Affirmance*

{22} Dr. Stewart suggests several alternative bases for affirmance of the district court's order. Although we may affirm a district court ruling on grounds that differ from the theory relied upon below, we only do so when it is fair to the appellant. *See State v. Franks,* 119 N.M. 174, 177, 889 P.2d 209, 212 (Ct.App.1994). "Only rarely will it be fair to affirm on a ground that was not raised in the lower court." *Rupp v. Hurley,* 1999–NMCA–057, ¶ 25, 127 N.M. 222, 979 P.2d 733.

1. *Standing*

{23} Dr. Stewart argues that certain class representatives lack standing because they did not execute a consent form for the performance of an autopsy. Because standing is jurisdictional, Dr. Stewart's apparent failure to raise this issue below does not prevent consideration of it on appeal. *See Town of Mesilla v. City of Las Cruces,* 120 N.M. 69, 70, 898 P.2d 121, 122 (Ct.App. 1995) (providing that "standing is a jurisdictional question that may be raised at any time") (internal quotation marks and citation omitted).

{24} However, even when issues may be raised for the first time on appeal, issues that rely on facts may not be reviewable based on the state of the record. *Cf. State v. Wood,* 117 N.M. 682, 687, 875 P.2d 1113, 1118 (Ct. App.1994) (declining to review an issue that is permitted to be raised for the first time on appeal due to the lack of a factual basis in the record). In this case, because standing was not raised below, Plaintiffs were not on notice that they had to introduce facts relevant to the issue. As a result, we believe it would be unfair to address Dr. Stewart's issue, based on facts offered below for a different purpose, to hold that Plaintiffs lack standing. *See Eldin v. Farmers Alliance Mut. Ins. Co.,* 119 N.M. 370, 376, 890 P.2d 823, 829 (Ct.App.1994)

2. *Existence of a Legal Duty of Care*

{25} In his briefs to this Court, Dr. Stewart contends that Plaintiffs' claims hinge on medical forms used by LAMC to obtain consent to perform autopsies. Because only one of the class representatives was a signatory to one of these authorization forms, Dr. Stewart argues that most of the class representatives lack standing to pursue claims against him.

{26} Dr. Stewart's argument conflates two distinct legal issues. Standing requires injury in fact, causation, and likelihood of redress. *John Does I Through III v. Roman Catholic Church of the Archdiocese of Santa Fe, Inc.,* 1996–NMCA–094, ¶ 28, 122 N.M. 307, 924 P.2d 273. Our limited review of Plaintiffs' standing indicates that these elements are satisfied in this case based on the amended complaint. By contrast, Dr. Stewart's argument appears to be addressed to the question of legal duty. Specifically, we understand Dr. Stewart to contend that he did not owe a legal duty of care apart from any duty that might have arisen from the consent forms.

{27} This argument fails for two reasons. First, we find nothing in the amended complaint or the other pertinent pleadings to indicate that Plaintiffs' claims are predicated on the consent forms. Rather, Plaintiffs' tort claims appear to rest on the duty of ordinary care that applies generally to all foreseeable claimants, dependent on public policy considerations. *See Herrera v. Quality Pontiac,* 2003–NMSC–018, ¶ 7, 134 N.M. 43, 73 P.3d 181 (observing that the existence of a legal duty is dependent upon foreseeability and public policy). Plaintiffs also rely on *Jaynes v. Strong–Thorne Mortuary, Inc.,* 1998–NMSC–004, ¶ 23, 124 N.M. 613, 954 P.2d 45

in which our Supreme Court stated that a duty of care is owed by those with custody of the dead to family members. *See also Flores v. Baca*, 117 N.M. 306, 310, 871 P.2d 962, 966 (1994). To the extent that consent is an issue, it appears to take the form of an affirmative defense. As such, it has no bearing on the immediate question of the existence of a duty.

{28} Second, Plaintiffs dispute Dr. Stewart's claim that consent forms were executed in all cases. Plaintiffs contend that a significant number of the decedents were "coroner's cases," in which no consent form was required or used. Accordingly, a genuine issue of material fact appears to exist, such that summary judgment could not properly have been granted on the consent theory. *See Gardner-Zemke Co. v. State*, 109 N.M. 729, 732, 790 P.2d 1010, 1013 (1990) ("If genuine controversy as to the facts exists, a motion for summary judgment should be denied and the factual issues should proceed to trial.").

3. *Class Certification*

{29} Dr. Stewart also attacks the validity of the class certification on two grounds. First, he suggests that the district court's failure to expressly certify Plaintiffs as a sub-class should prevent them from proceeding with the appeal. However, as stated above, the district court appears to have implicitly certified the sub-class when it authorized the settlements. Furthermore, Dr. Stewart points to no New Mexico authority indicating that the district court's failure to formally recognize the validity of the sub-class should prevent Plaintiffs from proceeding with an appeal from the dismissal of their claims. To the extent that Dr. Stewart invites this Court to adopt such a rule, we decline.

{30} Second, Dr. Stewart suggests that the de facto sub-class is overbroad and that application of the discovery rule will require such particularized inquiry with regard to each class member that it is no longer appropriate for the litigation to proceed as a class action. The district court implicitly rejected this argument when it concluded that common questions of fact and issues of law predominate over matters affecting individual class members. *See generally* Rule 1-023(B)(3) NMRA. We have previously acknowledged that the district courts are better situated to resolve such class certification issues. *See Salcido v. Farmers Ins. Exch.*, 2004-NMCA-006, ¶ 11, 134 N.M. 797, 82 P.3d 968 (recognizing district court's discretion in adopting guidelines for appellate review of class certification). In light of this general rule, we are not inclined to second guess the district court's informed ruling on the matter and leave the resolution of these matters to the district court. *See id.* ¶ 28 ("The district court is better positioned to decide the fluid and factually sensitive class certification questions, and [w]e should err, if at all, on the side of allowing the district court an opportunity to fine-tune its class certification order.") (internal quotation marks and citation omitted).

{31} We therefore conclude that Plaintiffs' various tort claims were improperly dismissed and that Dr. Stewart's alternative arguments in support of the district court's ruling lack merit. With the application of the discovery rule, we need not address Plaintiffs' fraudulent concealment argument. In the amended complaint, Plaintiffs allege that the defendants' fraudulent concealment tolls the statute of limitations until the FOIA disclosure in 1993. The discovery rule issue in this case addresses the time Plaintiffs should have discovered that they had a claim against Dr. Stewart. Dr. Stewart does not argue that this time was before the FOIA disclosure. Because of the relative time periods embodied within the two issues, we consider the fraudulent concealment issue to be subsumed within the discovery rule issue and to be redundant in Plaintiffs' case. If further developments in the case demonstrate that the fraudulent concealment issue is not redundant, the district court may address the issue at that time.

Viability of the Fraud Claims

{32} Among the various causes of action in the amended complaint, Plaintiffs assert claims for fraud. The gravamen of these claims is that the defendants, including Dr. Stewart, fraudulently induced class members

to consent to autopsies without disclosing the defendants' secret intent to remove and destroy body parts for purposes of scientific research unrelated to the cause of death. The district court dismissed these claims, apparently on the ground that an action for fraud cannot be maintained unless pecuniary losses are provable. Plaintiffs appeal this ruling.

{33} As an initial matter, Dr. Stewart contends that the viability of the fraud claims is not properly before this Court. Specifically, Dr. Stewart argues that Plaintiffs failed to perfect their appeal from the order dismissing their claims for fraud because that order was not attached to the notice of appeal. However, the Rules of Appellate Procedure merely require the final order to be attached. *See Bd. of County Comm'rs v. Ogden,* 117 N.M. 181, 184, 870 P.2d 143, 146 (Ct.App.1994) ("As we read [Rule] 12–202(B) [NMRA], attachment of only the relevant final judgment perfects an appeal from any previous oral or written orders encompassed in that judgment, as long as error has otherwise been preserved."). Plaintiffs did attach a copy of the final order, by which summary judgment was granted as to all pending claims, and the case was dismissed. Their appeal from this order simultaneously perfected an appeal from the district court's previous interlocutory order dismissing the fraud claim. *See id.* (holding that attachment of the final order granting summary judgment was sufficient to perfect an appeal from a previous ruling on a motion to dismiss).

{34} The elements of fraud include (1) a misrepresentation of fact, (2) either knowledge of the falsity of the representation or recklessness on the part of the party making the misrepresentation, (3) intent to deceive and to induce reliance on the misrepresentation, and (4) detrimental reliance on the misrepresentation. *See* UJI 13–1633 NMRA; *see also Unser v. Unser,* 86 N.M. 648, 653–54, 526 P.2d 790, 795–96 (1974) (defining fraud as "a misrepresentation of a fact, known to be untrue by the maker, and made with an intent to deceive and to induce the other party to act upon it with the other party relying upon it to his injury or detriment"). UJI 13–1633 enables a party to recover damages proximately caused by fraud. Our case law provides, in the general sense, that a plaintiff alleging fraud may recover "such damages as are the direct and natural consequences" of the reliance on a fraudulent representation. *Indus. Supply Co. v. Goen,* 58 N.M. 738, 743, 276 P.2d 509, 512 (1954).

{35} As a general rule, emotional distress damages are not available in a fraud claim because of the lack of pecuniary loss. 2 Dan B. Dobbs, *Law of Remedies* § 9.2(4), at 560 (2d ed.1993). The theory of the general rule is that fraud is an economic tort which protects economic interests, and other torts protect interests in personalty. As a result, even though fraudulent misrepresentation may cause emotional distress, such distress has not generally been recognized as an element of damage. *Id.* The Restatement of Torts comports with this general rule. *See generally* Restatement (Second) of Torts § 525 (1977). New Mexico has not addressed the issue. Our cases involving actionable fraud have been commercial in nature, and the damage awards have been calculated accordingly. *See, e.g., Register v. Roberson Constr. Co.,* 106 N.M. 243, 246–47, 741 P.2d 1364, 1367–68 (1987) (observing that either benefit of the bargain or out-of-pocket losses may constitute appropriate measures of damages for fraud); *Chromo Mountain Ranch P'ship v. Gonzales,* 101 N.M. 298, 300–01, 681 P.2d 724, 726–27 (1984) (upholding contract reformation and awarding interest in a constructive fraud case).

{36} Plaintiffs urge that we make an exception to the general rule based on *Flores.* In *Flores,* our Supreme Court recognized a claim for emotional distress damages in connection with the breach of a funeral and burial services contract. *Flores,* 117 N.M. at 308, 871 P.2d at 964. The Court reasoned, quoting Dobbs, Law of Remedies, that contracts for funeral and burial services are entered to provide well-being for survivors such that "emotional distress damages would seem to be recoverable" as "contemplated damages for a loss of that well-being in the event of breach." *Id.* at 311, 871 P.2d at 967

(internal quotation marks and citation omitted). Plaintiffs urge that we extend this approach to include not only breach of contract, but also the tort of fraud.

{37} We are not inclined to do so in this case. First, the approach set forth by Professor Dobbs is reasonable. As accepted by our Supreme Court, when parties to a contract contemplate the emotional distress damages, the contract would be frustrated unless such damages could be awarded upon breach. *Id.* In the tortious circumstances of fraudulent concealment as alleged in this case, there is no meeting of the minds or expression of the parties' intent as with a contract. Second, this case points out the difficulty with recognizing emotional distress damages for fraudulent concealment. Because a funeral and burial services contract contemplates the mental well-being of the living, it is possible to address damages with clarity in discussing the family's rights as intended third-party beneficiaries of the contract. *Id.* at 310–11, 871 P.2d at 966–67. The claim in this case does not present such clarity. Rather, we agree with the approach of Professor Dobbs that, in this case, fraud that "amounts to or is a part of a dignitary invasion such as a battery, an outrageous infliction of emotional distress, or a libel," allows a plaintiff to "recover emotional harm damages on such a theory, with recovery of purely economic damages on the fraud theory." Dobbs, *supra,* § 9.2(4), at 562.

{38} We are supported in this view by our Supreme Court's limitations in cases involving emotional distress. The tort of negligent infliction of emotional distress is "extremely narrow" and is limited to bystander recovery. *See Fernandez v. Walgreen Hastings Co.,* 1998–NMSC–039, ¶ 6, 126 N.M. 263, 968 P.2d 774. The tort of intentional infliction of emotional distress requires extreme or outrageous conduct and severe distress. *See Trujillo v. N. Rio Arriba Elec. Coop., Inc.,* 2002–NMSC–004, ¶ 25, 131 N.M. 607, 41 P.3d 333. We agree with Professor Dobbs that many of the cases seeming to allow emotional distress damages for fraud are actually not cases supporting the proposition that emotional distress damages are awardable without more on a fraud theory or are cases that contain little analysis. *See* Dobbs, *supra,* § 9.2(4), at 560. Therefore, we are hesitant to rely on them to effect a change in an area of the law that has been so carefully circumscribed by our Supreme Court. Moreover, to the extent that a case could be made for allowing the fraud claim to go forward with limitations analogous to those found in our Supreme Court cases, we believe that little of any practical effect would be accomplished, and we fear that such a holding might have unforeseen consequences of opening the door to emotional distress claims that should not be allowed for the same policy reasons expressed in our existing cases on emotional distress claims. *See Trujillo,* 2002–NMSC–004, ¶ 28, 131 N.M. 607, 41 P.3d 333.

{39} Plaintiffs have alleged claims of intentional infliction of emotional distress, negligence, mistreatment of a corpse, civil conspiracy, and aiding and abetting that remain viable in this case. The district court properly dismissed Plaintiffs' claims for fraud.

Conclusion

{40} We uphold the dismissal of Plaintiffs' claims for fraud. However, we conclude that the application of the statute of limitations presents a jury question. We therefore reverse and remand for further proceedings.

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

PICKARD, J., concur.

MICHAEL E. VIGIL, Judge (concurring in part and dissenting in part).

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

{42} I concur with the majority opinion in all respects except its conclusion that the fraud claims were properly dismissed. Defendants obtained dismissal of the fraud claims pursuant to Rule 1–012(b)(6) NMRA on the basis that damages in a fraud action are limited to pecuniary, actual monetary losses, and plaintiffs only alleged they suffered non-pecuniary mental or emotional distress damages as a result of the fraud. No New Mexico case has ever limited fraud damages to pecuniary, actual monetary loss-

es, and whether a claim for fraud is stated when only such damages are alleged is a question of first impression in New Mexico.

{43} Allowing the recovery of mental or emotional distress damages in appropriate cases is consistent with evolving New Mexico tort and contract law. In *Flores,* 117 N.M. at 314, 871 P.2d at 970, our Supreme Court held that where plaintiffs proved severe emotional distress, they were entitled to recover damages for mental anguish caused by a breach of a funeral contract.

{44} I agree that awarding mental and emotional distress damages in a fraud case should not be without limitations. However, the issue is before us pursuant to Rule 1–012(b)(6). A motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 1–012(B)(6) tests the legal sufficiency of the complaint. "A motion to dismiss should be granted only when appears that the plaintiff is not entitled to recover under any facts provable under the complaint." *Kirkpatrick v. Introspect Healthcare Corp.,* 114 N.M. 706, 709, 845 P.2d 800, 803 (1992); *see Noriega v. Stahmann Farms, Inc.,* 113 N.M. 441, 442, 827 P.2d 156, 157 (Ct.App.1992) ("A motion to dismiss for failure to state a claim should be granted only if it appears that plaintiff cannot recover, or be entitled to relief, under any state of facts provable under the complaint.").

{45} In this case Plaintiffs allege that Dr. Stewart and Defendants fraudulently induced them to authorize autopsies of their loved ones to determine the cause of death without disclosing their secret intent to remove and destroy body parts for purposes of scientific research unrelated to the cause of death. All the elements of a fraud claim under UJI 13–1633 are stated: (1) Defendants' misrepresentation of a fact; (2) Defendants' knowledge of the falsity of their representation; (3) Defendants' intent to deceive and induce reliance on the misrepresentation; and (4) detrimental reliance on the misrepresentation. *See Unser,* 86 N.M. at 653–54, 526 P.2d at 795–96. As to damages, UJI 13–1633 simply states, "[a] party is liable for damages proximately caused by [his][her] fraudulent misrepresentation," and Plaintiffs allege, "[a]s a direct and proximate result of the fraud, [P]laintiffs and the members of the class have suffered damages, including loss, serious anguish, severe mental and emotional distress, pain, and suffering."

{46} Numerous decisions from many states have already held, in varying contexts, with various limitations, that mental or emotional distress damages are recoverable in a fraud action. *See* Steven J. Gaynor, Annotation, *Fraud Actions: Right to Recover for Mental or Emotional Distress,* 11 A.L.R.5th, 88 (1993). One approach to balancing the various interests is expressed by Andrew L. Merit, *Damages for Emotional Distress in Fraud Litigation: Dignitary Torts in a Commercial Society,* 42 Vand. L.Rev. 1, 1 (1989). Even the authority relied upon by the majority states, "[c]ases involving mishandling of dead bodies have long recognized emotional harm damages, fraud or no fraud." Dobbs, *supra,* § 9.2(4), at 565. Professor Dobbs concludes his discussion of this issue by stating,

> There are assuredly cases in which some kind of intangible-harm damages should be awarded when the defendant's misconduct consists in part of fraudulent representations. Given the plenteous supply of tort doctrine for redress of emotional harm claims, however, there may be little or no need to add such a claim to fraud cases, where it would be quite likely to become a routine allegation. When it is coupled with punitive damages, it may, in addition, tend to weigh the misconduct twice. In any event, if emotional harm damages are to be permitted in fraud cases, it would be desirable to identify particular elements that especially justify such recovery. This might be done most readily by recognizing that the emotional harm recovery should be awarded when the elements of some other tort, such as intentional infliction of distress, can be shown, and that fraud itself would in some cases tend to show some of the elements of the intentional infliction tort.

Id.

{47} Since I am unable to agree with the majority that mental or emotional damages are *never* recoverable in *any* fraud case un-

der *any* circumstances, I respectfully dissent from that portion of the opinion affirming dismissal of the fraud claims. In all other respects I agree with the majority.

2005-NMCA-052

112 P.3d 293

STATE of New Mexico, Plaintiff–Appellee,

v.

Albert MARTINEZ, Defendant–Appellant.

No. 24,470.

Court of Appeals of New Mexico.

March 23, 2005.

Certiorari Denied, No. 29,172, May 11, 2005.

Patricia A. Madrid, Attorney General, Santa Fe, NM, Joel Jacobsen, Assistant Attorney General, Albuquerque, NM, for Appellee.

John Bigelow, Chief Public Defender, Cordelia A. Friedman, Steven J. Potter, Assistant Appellate Defenders, Santa Fe, NM, for Appellant.

OPINION

PICKARD, Judge.

{1} Defendant appeals the district court order denying his motion to suppress the evidence obtained from a traffic stop. Defendant entered a conditional guilty plea to driving while intoxicated (DWI), reserving the right to appeal the denial of his motion to suppress. On appeal, Defendant argues that the traffic stop and his detention and arrest are illegal because Navajo Tribal Officer Franklin Begaye (Officer Begaye) lacked the power to act as a New Mexico peace officer with authority to enforce the Motor Vehicle Code on non-Indian land in the City of Gallup by virtue of NMSA 1978, § 29–1–11(C)(8) (2002). Defendant's remaining arguments, challenging the legality of his stop, detention, and arrest, are all predicated on Officer Begaye's lack of authority to act in the City of Gallup. We do not agree, however, with

Defendant's argument that Section 29–1–11(C)(8) precludes Officer Begaye from enforcing the law as a commissioned deputy in Gallup. Mindful of Defendant's burden to demonstrate error on appeal and considering only those arguments properly raised and developed in Defendant's briefs, we hold that Defendant failed to establish error. On these grounds, we affirm the district court's denial of the motion to suppress the evidence.

FACTUAL AND PROCEDURAL BACKGROUND

{2} Officer Begaye was uniformed, on duty, and driving his squad car through the City of Gallup, not his usual area of patrol, when he observed a white vehicle traveling off a highway exit. The vehicle pulled out in front of Officer Begaye, who had to swerve to avoid a collision as he was traveling through an intersection. Officer Begaye followed the vehicle and noticed that it was not traveling safely in one lane. In response, Officer Begaye turned on his squad car's emergency lights and followed the vehicle, which eventually pulled over and stopped. Officer Begaye then contacted the City of Gallup Metro Dispatch for assistance and exited his squad car to investigate the driver for possible drunk driving. The driver, identified as Defendant, gave Officer Begaye his driver's license, registration, and proof of insurance. Officer Begaye smelled the odor of intoxicating liquor on Defendant's breath and person and observed that Defendant had red, watery eyes. Further, Officer Begaye observed beer cans in the vehicle and noticed that the middle, back passenger appeared passed out and that the other passengers were holding beer cans.

{3} The Gallup city officer contacted by Metro Dispatch arrived on the scene and informed Officer Begaye that her agency did not assist other agencies in investigating traffic offenses. Officer Begaye again contacted Metro Dispatch, which referred the matter to the McKinley County Sheriff's Office, which sent a deputy to assist. Officer Begaye handcuffed Defendant and placed him in the back seat of his squad car until the county deputy arrived. McKinley County Deputy George Justice (Deputy Justice) arrived, spoke with Officer Begaye about his observations, and conducted his own investigation including field sobriety tests. Deputy Justice also smelled the odor of alcohol on Defendant, noticed that Defendant's eyes were red and watery, and observed clues from the field sobriety tests indicating that Defendant was intoxicated. Believing that Defendant was intoxicated over the legal limit for operating a motor vehicle, Deputy Justice arrested Defendant and transported him to the McKinley County Detention Center.

{4} In district court, Defendant moved to suppress the evidence, challenging the legality of the stop and arrest on the grounds that Officer Begaye lacked authority to stop and detain him in Gallup. The district court denied the motion without entering findings and conclusions. Defendant pled guilty to DWI, reserving the right to appeal the denial of his motion to suppress.

DISCUSSION

{5} On appeal, Defendant's brief in chief asserts several grounds on which the stop, detention, and arrest of Defendant are illegal, all based on the notion that Officer Begaye is not duly commissioned to act as a New Mexico peace officer with authority to enforce the Motor Vehicle Code in Gallup. The brief in chief asserts only one basis to challenge Officer Begaye's claimed commissioned authority. Defendant argues that Section 29–1–11(C)(8) expressly precludes tribal officers from exercising commissioned law enforcement authority in the City of Gallup. Defendant makes this argument while apparently conceding that Officer Begaye was properly commissioned as a deputy sheriff. It is undisputed that Officer Begaye testified that he was commissioned as a deputy sheriff and produced his commission card in court. The brief in chief states, "Sheriff Gonzales testified that the cross-commissioned officers (deputies) had the authority to do [respond to] a traffic offense or a domestic violence matter within the City of Gallup, but the authority granted did not 'create or supercede any statutes.'" (Brackets in original.) It also states, "The factual issue of whether Officer Begaye is, in fact, a cross-commissioned officer does not resolve the issue of the legality of his motor vehicle stop.

Even if Officer Begaye was a cross-commissioned officer, he lacked authority to stop and arrest [Defendant] based solely on the location of the stop."

{6} In response, the State argues that Section 29–1–11 governs only agreements between New Mexico tribes and the New Mexico State Police. The State contends, as it did below, that Officer Begaye was cross-commissioned, not by the state police, but by the McKinley County Sheriff's Office, which has law enforcement jurisdiction over the City of Gallup.

{7} At district court, much of the parties' debate concerned Officer Begaye's claimed authority as a cross-commissioned county deputy. Nevertheless, Defendant failed to argue against this basis for affirmance in his brief in chief. Rather, in his reply brief, Defendant presents a cursory and poorly articulated argument, unsupported by authority, suggesting that our statutes do not expressly give county sheriffs cross-commissioning power, and his reply brief continues his brief in chief argument, relying on Section 29–1–11, that "Officer Begaye could not have acted as a New Mexico peace officer in the Municipality of Gallup, whether cross-commissioned or not." *See* Rule 12–213 NMRA; *State v. Druktenis,* 2004–NMCA–032, ¶ 122, 135 N.M. 223, 86 P.3d 1050 (refusing to reach an issue raised for the first time in a reply brief); *Largo v. Atchison, Topeka & Santa Fe Ry. Co.,* 2002–NMCA–021, ¶ 31, 131 N.M. 621, 41 P.3d 347 (refusing to reach an issue raised for the first time in a reply brief where it deprives opposing party the opportunity to respond); *see also State v. Southworth,* 2002–NMCA–091, ¶ 53, 132 N.M. 615, 52 P.3d 987 (refusing to reach the defendant's cursory Fourth Amendment argument presented without citation to authority or explanation). Defendant's conclusory assertion in his reply brief and his failure to argue against affirmance on these grounds in his brief in chief, which deprives the State of an effective rebuttal as contemplated by the rules, is not sufficient to present the issue for our review or to demonstrate error. Thus, we need not consider the assertion concerning cross-commissioning by county sheriffs further. *See, e.g., Klopp v. Wackenhut Corp.,* 113 N.M. 153, 162 n. 6, 824 P.2d 293, 302 n. 6 (1992) (noting that where a party "for the most part has directed her argument" to a specific point, the Court elected not to consider other matters "[w]ithout the benefit and guidance of briefing").

{8} For these reasons, we limit our review to Defendant's argument challenging Officer Begaye's authority to act as a cross-commissioned peace officer in Gallup under Section 29–1–11(C)(8), and we do not decide whether Officer Begaye was duly commissioned as a county deputy under a different statutory provision. Accordingly, our inquiry on appeal is a narrow question of statutory construction. We review this pure question of law de novo. *See State v. McClendon,* 2001–NMSC–023, ¶ 2, 130 N.M. 551, 28 P.3d 1092.

{9} Our Supreme Court has stated that "[t]he starting point in every case involving the construction of a statute is an examination of the language utilized by [the Legislature] in drafting the pertinent statutory provisions." *State v. Rivera,* 2004–NMSC–001, ¶ 10, 134 N.M. 768, 82 P.3d 939 (internal quotation marks and citations omitted). "Under the plain meaning rule of statutory construction, '[w]hen a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation.'" *Id.* (citation omitted). Also, where the statute contains several sections, we read them together in a manner that gives effect to all parts. *See High Ridge Hinkle Joint Venture v. City of Albuquerque,* 1998–NMSC–050, ¶ 5, 126 N.M. 413, 970 P.2d 599.

{10} Defendant correctly observes that Section 29–1–11 is a statute that authorizes tribal and pueblo officers, not otherwise permitted, to act as New Mexico peace officers pursuant to commission agreements. *See* § 29–1–11(A), (B); *see also* Russell G. Donaldson, Annotation, *Validity, in State Criminal Trial, of Arrest Without Warrant by Identified Peace Officer Outside of Jurisdiction, When Not in Fresh Pursuit,* 34 A.L.R.4th 328, 332–33, 1984 WL 263286 (1984) (recognizing that, without authorization, whether statutory or otherwise, an officer may not stop or apprehend a suspect in

an official capacity outside the territorial boundaries of his or her jurisdiction). We agree with the State's arguments, however, that Section 29–1–11 involves only commissions issued by the state police and does not apply to Officer Begaye's claimed commission by the county sheriff.

{11} Section 29–1–11(B) states the following:

> The *chief of the state police* is granted authority to issue commissions as New Mexico peace officers to members of the police or sheriff's department of any New Mexico Indian tribe or pueblo or a law enforcement officer employed by the bureau of Indian affairs to implement the provisions of this section. The procedures to be followed in the issuance and revocation of commissions and the respective rights and responsibilities of the departments *shall be set forth in a written agreement to be executed between the chief of the state police and the tribe* or pueblo or the appropriate federal official.

(Emphasis added.) Tribal officers, duly commissioned by the chief of the state police pursuant to a written agreement under Section 29–1–11(B), may be "recognized and authorized to act as New Mexico peace officers ... to enforce state laws in New Mexico, including the power to make arrests for violation of state laws." Section 29–1–11(A). Section 29–1–11(C) imposes conditions on the commission agreements "referred to in [Section 29–1–11(B)]," including the condition that "[t]he municipalities of Cuba and Gallup and the villages of Thoreau and Prewitt are excluded from the grant of authority that may be conferred in any written agreement." Section 29–1–11(C)(8). Reading these subsections together, we apply their plain meaning and construe them to govern commissions issued only by the chief of the state police, including the exclusion of Gallup from the grant of cross-commissioned authority. Because Officer Begaye claims to have been deputized by the McKinley County Sheriff, we hold that Section 29–1–11(C)(8) does not defeat his claimed authority to act as a cross-commissioned county deputy. Therefore, we hold that Defendant has not met his burden of demonstrating error. *See State v. Aragon*, 1999–NMCA–060, ¶ 10, 127 N.M. 393, 981 P.2d 1211 (recognizing that there is a presumption of correctness in the rulings of the trial court, and the party claiming error bears the burden of showing such error).

{12} The remainder of the arguments that were properly raised in Defendant's brief in chief presume that he successfully challenged Officer Begaye's authority to stop and detain Defendant by operation of Section 29–1–11(C)(8). Because we reject Defendant's reading of the statute, we need not reach Defendant's remaining arguments.

CONCLUSION

{13} For the reasons discussed above, we affirm the district court's denial of Defendant's motion to suppress the evidence.

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

WE CONCUR: JONATHAN B. SUTIN and CELIA FOY CASTILLO, Judges.

2005-NMCA-055

112 P.3d 296

Jared G. BARRERAS, Petitioner–Appellee,

v.

NEW MEXICO MOTOR VEHICLE DIVISION, Respondent–Appellant.

No. 24,207.

Court of Appeals of New Mexico.

March 30, 2005.

Jared G. Barreras, Albuquerque, NM, Pro Se Appellee.

Patricia A. Madrid, Attorney General, Albert Roland Fugere, Special Assistant Attorney General, Santa Fe, NM, for Appellant.

Brian A. Pori, Inocente, P.C., Albuquerque, NM, for Amicus Curiae New Mexico Criminal Defense Lawyers Association.

OPINION

PICKARD, Judge.

{1} Respondent (sometimes called Motor Vehicle Division or MVD) appeals from the district court's granting of Petitioner's petition for a writ of mandamus by a final order, ordering that his plea of guilty to a traffic offense, made pursuant to signing a uniform traffic citation, be withdrawn and that the metropolitan court proceed to trial on the matter. We affirm because the defects about which Respondent complains were waived or are without merit, and any potentially meritorious issues were raised on appeal for the first time in the reply brief, which is considered too late to raise an issue for consideration on appeal. *See Jaramillo v. Fisher Controls Co.*, 102 N.M. 614, 625, 698 P.2d 887, 898 (Ct.App.1985) ("An issue raised for

the first time in the reply brief will not be considered.").

FACTS

{2} Petitioner's unverified petition alleged that he was accused of driving ten miles over the speed limit and that the officer gave him the option of "sign[ing] the citation or hav[ing] a trial contesting guilt." The petition further alleged that he did not know of other legal options and, as a result, he "inadvertently wa[i]ved his right to a day in court . . . and to [s]eek [a] deferred sentence." There was no certificate of service in the record, but a notice of hearing was mailed to MVD, following which MVD filed a notice of excusal of the assigned judge, Judge Baca.

{3} The matter was assigned to Judge York and was set for hearing, with another notice being mailed to MVD. MVD did not appear at the hearing. A recess was taken during which the judge's office attempted unsuccessfully to contact the attorney for MVD or someone from his office, and the hearing commenced again. Following the hearing, the district court entered a final order, withdrawing Petitioner's guilty plea and ordering MVD to return a copy of the uniform citation to metropolitan court for trial on the merits. This order recited that MVD was served with a verified petition and a writ of mandamus, but there is nothing in the record indicating any verification of the petition, any writ of mandamus, or any service on MVD other than the mailing of requests for and notices of hearing.

{4} After MVD filed its brief in this case, Petitioner did not respond and the case was submitted in accordance with Rule 12–312(B) NMRA. However, because this case is one of several raising similar issues, we perceived the matter to be of public importance, and we invited the participation of the New Mexico Criminal Defense Lawyers Association as amicus curiae. We are grateful for its participation, which has provided Petitioner with advocacy. When we refer in this opinion to Petitioner's contentions, we are referring to arguments made on their behalf by amicus.

DISCUSSION

{5} MVD contends that the district court never acquired jurisdiction over it because neither it nor the Attorney General was ever personally served with process allowing the district court to acquire jurisdiction over it. MVD also contends that the district court did not acquire jurisdiction over it because the petition was not verified. Petitioner responds that MVD waived its issues, that the facts were never in dispute and the requirement of verification is a technicality under such circumstances, that he substantially complied with applicable service requirements, and this Court should not reverse the issuance of the writ because his entitlement to the writ was clearly shown due to his allegation of an involuntary plea. MVD argues the merits of the allegation of an involuntary plea for the first time in its reply brief.

{6} Although we decline to reach the merits of the involuntary plea issue, we express our reservations about Petitioner's claim on the merits as we did in *Trujillo v. Goodwin*, 2005–NMCA–095, ¶ 7, 138 N.M. ——, 116 P.3d 839 [No. 24,115, (Mar. 30, 2005)]. Further, we agree with MVD on the merits that the absence of service in this case would ordinarily preclude the district court from binding the MVD by any judgment. *See id.* ¶¶ 8–10.

{7} However, in this case, as soon as MVD received notice of the hearing before Judge Baca, it filed a notice of peremptory challenge pursuant to Rule 1–088.1 NMRA. MVD argues that it did not understand the filing of its challenge to constitute a general appearance. But our courts have "consistently followed the rule" that

> If the appearance be for the purpose of *objecting to the jurisdiction of the court*, and is confined solely to the question of jurisdiction, then the appearance is special; but any action upon the part of the defendant, except to object to the jurisdiction, which recognizes the case as in court, will amount to a general appearance.

Guthrie v. Threlkeld Co., 52 N.M. 93, 96, 192 P.2d 307, 308 (1948) (internal quotation marks and citations omitted). Thus, MVD waived any objection to personal jurisdiction. For the same reasons, because the notice of peremptory challenge was made by counsel in his capacity as "Special Assistant Attorney

General," we hold that any objection to personal jurisdiction based on a failure to serve the Attorney General would also be without merit.

{8} We next determine whether the failure to verify the petition for the writ was fatal to the jurisdiction of the district court. MVD argues that petitions for writs of mandamus are analogous to motions for orders to show cause why a person should not be held in contempt, which must be verified if they are not initiated by the judge for conduct occurring in the presence of the court. *See In re Byrnes,* 2002–NMCA–102, ¶ 37, 132 N.M. 718, 54 P.3d 996. Since contempt can result in a fine or imprisonment, we are not persuaded that the formalities applicable to contempt apply to writ of mandamus procedure.

{9} To be sure, the governing rule requires a verified pleading. *See* Rule 1–065(C), NMRA. The statutes, however, are silent on the matter. *See* NMSA 1978, §§ 44–2–1 to –14 (1884, as amended through 1887). Furthermore, our cases hold that defects in the pleadings in mandamus cases can be waived. *City of Sunland Park v. N.M. Pub. Regulation Comm'n,* 2004–NMCA–024, ¶ 8, 135 N.M. 143, 85 P.3d 267. This is particularly the case where the facts are not contested. *Id.* ¶ 9. Because MVD appeared generally in the case and subsequently did not answer or appear at any hearing, we hold that MVD waived any formal defects in the petition for writ.

CONCLUSION

{10} Because MVD waived below the issues it properly raised on appeal and because we do not reach the issues not properly raised on appeal, we affirm the district court's final order.

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Chief Judge and A. JOSEPH ALARID, Judge.

2005-NMCA-057

112 P.3d 299

Manuel VIGIL, Petitioner–Appellee,

v.

NEW MEXICO MOTOR VEHICLE DIVISION, Respondent–Appellant.

No. 24,208.

Court of Appeals of New Mexico.

March 30, 2005.

Manuel Vigil, Albuquerque, NM, Pro Se Appellee.

Patricia A. Madrid, Attorney General, Albert Roland Fugere, Special Assistant Attorney General, Santa Fe, NM, for Appellant.

Brian A. Pori, Inocente, P.C., Albuquerque, NM, for Amicus Curiae New Mexico Criminal Defense Lawyers Association.

OPINION

PICKARD, Judge.

{1} Respondent (sometimes called Motor Vehicle Division or MVD) appeals from the district court's granting of Petitioner's petition for a writ of mandamus, ordering that his plea of guilty to a traffic offense, made pursuant to signing a uniform traffic citation, be withdrawn and that the metropolitan court proceed to trial on the matter. We reverse because MVD did not have a clear duty to forward a penalty assessment traffic citation to the metropolitan court when Petitioner's allegations did not rise to the level of what would be required to entitle him to withdraw his guilty plea.

FACTS

{2} Petitioner's petition alleged that he was accused of driving 72 miles per hour in a zone where the speed limit was 50 miles per hour. He alleged that he was given the choice of "sign[ing] the citation acknowledging guilt" or "appear[ing] in court at a later date to contest guilt." Petitioner alleged that he was driving with the flow of traffic, but could not truthfully testify that he was not speeding. He further alleged that he had since learned that his speedometer was not working. His basic complaint, however, was that the officer did not advise him that he could appear in court and acknowledge factual guilt, but request that the court defer adjudication of guilt in light of his excellent driving record. As a result, he claimed to have "inadvertently and unknowingly waived his right to seek a deferred sentence."

{3} After several hearings addressing service of process issues, MVD filed a response on the merits and the matter came before the district court for a hearing on the merits. At that hearing, Petitioner could not remember what happened when he received his ticket, so the court had Petitioner read the factual allegations of his petition and swore him in with the intent of having this procedure substitute for Petitioner's current testimony. MVD then argued its position on the merits.

{4} Its position, which it reiterates on appeal, is that (1) it had no clear duty to allow withdrawal of the penalty assessment inasmuch as the officer told Petitioner his two choices, Petitioner chose one, and the statutes do not allow him to change his mind; (2) Petitioner had an adequate remedy at law in that he could appeal his license suspension when he did not pay the fine; (3) Petitioner failed to join an indispensable party—the officer; and (4) laches. The district court granted the petition, withdrawing Petitioner's guilty plea and ordering MVD to return a copy of the uniform citation to metropolitan court for trial on the merits. MVD appeals, arguing the four issues raised above, and in addition arguing an issue concerning the alleged lack of verification of the petition for the writ. As this last issue was not called to the district court's attention at the final hearing, prior to which problems with service and verification were supposed to have been resolved, we do not reach the issue. *See Collado v. N.M. Motor Vehicle Div.*, 2005–NMCA–056, ¶ 8, 137 N.M. 442, 112 P.3d 303 [No. 23,938 (Mar. 30, 2005)].

{5} After MVD filed its brief in this case, Petitioner did not respond and the case was

submitted in accordance with Rule 12–312(B) NMRA. However, because this case is one of several raising similar issues, we perceived the matter to be of public importance, and we invited the participation of the New Mexico Criminal Defense Lawyers Association as amicus curiae. We are grateful for its participation, which has provided Petitioner with advocacy. When we refer in this opinion to Petitioner's contentions, we are referring to arguments made on his behalf by amicus.

DISCUSSION

{6} We only need address MVD's assertion that it had no clear duty to return the traffic citation to metropolitan court under the circumstances of this case. *See Brantley Farms v. Carlsbad Irrigation Dist.*, 1998–NMCA–023, ¶ 16, 124 N.M. 698, 954 P.2d 763 ("Mandamus lies only to force a clear legal right against one having a clear legal duty to perform an act[.]"). We agree with MVD under the facts of this case, although we also agree with the district judge that, under different facts, such as when a police officer physically forced a driver to sign the citation, MVD might have such a clear duty. We begin with an explanation of penalty assessment procedure in New Mexico, and then we discuss the due process rights of people entering pleas.

{7} New Mexico law provides that, with certain exceptions, mainly for more serious offenses, *see* NMSA 1978, § 66–8–122 (1985), persons arrested for motor vehicle violations who are not given warning notices are to be given the choice of appearing in court upon their promise to appear, as evidenced by signing the notice to appear section of a uniform traffic citation, or paying the penalty assessment, as evidenced by signing an agreement to pay the assessment on the uniform traffic citation. NMSA 1978, §§ 66–8–117 (1990) & –123 (1989). The penalty assessment amounts for ordinary traffic violations are set forth in NMSA 1978, § 66–8–116 (2003), and range from $10 to $30 for most violations, including speeding up to 15 miles per hour over the speed limit, although there are penalty assessments as high $200 for speeding over 35 miles per hour over the speed limit and $300 for littering. In addition, there are various fees that must be paid that could add up to $50. *See* NMSA 1978, § 66–8–116.3 (2003).

{8} If a person elects to accept the penalty assessment, the person's signature is an admission of guilt and the payment of the assessment is to be made within 30 days. Section 66–8–117. Thereafter MVD remits the payment to the state treasurer for distribution. NMSA 1978, § 66–8–119 (1998). MVD is authorized to suspend the license, without a preliminary hearing, of anyone who its records show has not paid a penalty assessment in a timely fashion. NMSA 1978, § 66–5–30(A)(10) (2003). The person may then request a hearing, which shall be scheduled within 20 days. Section 66–5–30(B). If the driver is not satisfied with the results of the hearing, the driver may appeal to district court. NMSA 1978, § 66–5–36 (1999).

{9} An Attorney General's opinion answered in the negative the question whether a person who has accepted and signed a penalty assessment can thereafter change his or her position and request an appearance before a magistrate. N.M. Att'y Gen. Op. 69–88 (1969). The opinion reasoned that there is no provision in the statutes for a change of mind, and the opinion found instructive the statutes of a neighboring state that did provide for an opportunity to reconsider. The opinion concluded that the matter of allowing for reconsideration was for the legislature and that, until statutes were changed, drivers could not reconsider their acceptance of penalty assessments.

{10} The voluntariness of a guilty plea is an issue that is governed by due process principles. *See State v. Moore*, 2004–NMCA–035, ¶ 13, 135 N.M. 210, 86 P.3d 635 (indicating that voluntariness of pleas is essentially a due process issue); *State v. Garcia*, 121 N.M. 544, 548–49, 915 P.2d 300, 304–05 (1996) (similar). "Because due process is a flexible right, the amount of process due at each stage of the proceedings is reflective of the nature of the proceeding and the interests involved, as well as the nature of the subsequent proceedings." *State ex rel. CYFD v. Maria C.*, 2004–NMCA–083, ¶ 25, 136 N.M. 53, 94 P.3d 796.

{11} In the criminal area, our cases require that a defendant be advised of the nature of the charge as well as the mandatory minimum penalty, if any, provided by law and the maximum possible penalty. *Garcia*, 121 N.M. at 548, 915 P.2d at 304 (relying on Rule 5–303(E) NMRA). Another formulation requires that a defendant be advised of the permissible range of sentences. *Id.* at 549, 915 P.2d at 305. While the maximum possible penalty and any mandatory minimum are generally set forth in the statutes proscribing the offenses, Supreme Court approved forms contain various formulations for non-mandatory minimum penalties, ranging from "a suspended sentence," Form 9–406 NMRA (paragraph 2), to no statement of a minimum penalty, Form 9–406A NMRA (paragraph 2); Form 9–408A NMRA, to "probation," Form 9–408 NMRA (paragraph 2 under District Court Approval). No mention is made of conditional discharge or deferred sentencing in these forms, and no form indicates the possibility of being found not guilty or of having the charges dismissed for any one of the myriad other reasons that can result in dismissal.

{12} Nonetheless, because of the ubiquitousness of the language that a defendant must be informed of the permissible range of sentences, *see Boykin v. Ala.*, 395 U.S. 238, 245 n. 1, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), Petitioner claims that his plea was involuntary because the officer did not advise him that he could appear in court and request a deferral of the prosecution or a deferred sentence. As a result, Petitioner claims he has "an absolute constitutional right to withdraw his plea of guilty," and because mandamus lies to prevent unconstitutional conduct by state officers, he further claims he has a right to a writ of mandamus in this case. *See State ex rel. Taylor v. Johnson*, 1998–NMSC–015, ¶ 18, 125 N.M. 343, 961 P.2d 768; *State ex rel. Clark v. Johnson*, 120 N.M. 562, 569, 904 P.2d 11, 18 (1995).

{13} We disagree because, after considering the respective interests involved and the flexibility of the due process response to them, we do not believe that the police officers must advise drivers of all the various possibilities that could happen if one went to court, e.g., the case may be dismissed because the officer does not show up, the judge may be lenient, the judge may give probation, etc. *Cf. Jaouad v. City of New York*, 4 F.Supp.2d 311, 313 (S.D.N.Y.1998) (holding that it is not a violation of due process not to inform ticket recipients of their right to have defective tickets vacated when they are informed that they can pay the ticket or utilize procedures to challenge it); *City of Hollywood v. Miller*, 471 So.2d 655, 655–56 (Fla. Dist.Ct.App.1985) (holding that notice on ticket that required payment of fine or contacting traffic bureau, but did not specifically set forth right to hearing, did not violate due process because "[t]he elements required to be included in the notice are to be tailored to the circumstances of the case and depend upon an appropriate accommodation of the competing private and governmental interests involved." (internal quotation marks and citation omitted)); *see also People v. Krantz*, 58 Ill.2d 187, 317 N.E.2d 559, 564 (1974) (holding that substantial compliance with rule on admonishments to defendants entering pleas does not include being "informed by the court concerning the possible dispositions by way of periodic imprisonment, probation, conditional discharges in cases of juvenile offenders and fines"), *overruled on other grounds by People v. Wills*, 61 Ill.2d 105, 330 N.E.2d 505, 508 (1975).

{14} Penalty assessment misdemeanors are minor offenses that involve at most a few hundred dollars in fines and usually involve less than $100. While not wishing to minimize the impact of such fines on persons of modest means, we must also consider that the legislature has provided a streamlined method of handling these matters that benefits both the driving public and state government. However, the legislature has not made provisions for drivers having second thoughts about whether it was wise to plead guilty. Given the relatively minor consequences involved to the drivers and the potential disruption of otherwise smoothly working procedures, we do not believe that mandamus would lie except in those situations posited by the court below where there was a plea made under duress or some like circumstance. In this connection, we deem it

noteworthy that Petitioner has cited no case that requires the formalities, including those prescribed by *Boykin*, concerning the waiver of such rights as confrontation and self-incrimination, 395 U.S. at 242, 89 S.Ct. 1709, to be observed in cases of minor traffic offenses.

CONCLUSION

{15} As Petitioner's due process rights were not violated by the choice the officer gave him, MVD did not have a clear duty to return the citation to the metropolitan court. The district court therefore erred in granting mandamus, and we reverse its ruling and remand with instructions to dismiss the petition.

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Chief Judge and A. JOSEPH ALARID, Judge.

2005-NMCA-056

112 P.3d 303

Kathleen Ann COLLADO, Petitioner–Appellee,

v.

NEW MEXICO MOTOR VEHICLE DIVISION, Respondent–Appellant.

Ann Marie Zambrano, Petitioner–Appellee,

v.

New Mexico Motor Vehicle Division, Respondent–Appellant.

Nos. 23,938, 23,939.

Court of Appeals of New Mexico.

March 30, 2005.

Kathleen Ann Collado, Albuquerque, NM, Pro Se Appellee in No. 23,938.

Ann Marie Zambrano, Albuquerque, NM, Pro Se Appellee in No. 23,939.

Patricia A. Madrid, Attorney General, Albert Roland Fugere, Special Assistant Attorney General, Santa Fe, NM, for Appellant.

Brian A. Pori, Inocente, P.C., Albuquerque, NM, for Amicus Curiae New Mexico Criminal Defense Lawyers Association.

OPINION

PICKARD, Judge.

{1} Respondent (sometimes called Motor Vehicle Division or MVD) appeals from the district court's granting of Petitioners' petitions for writs of mandamus, ordering that their pleas of guilty to traffic offenses, made pursuant to signing uniform traffic citations, be withdrawn and that the metropolitan court proceed to trial on the matters. We first resolve jurisdictional questions concerning the finality of the orders from which the appeals are taken and the proper method of appellate review. We then summarily address the two issues raised in these cases, which are whether the facts that the petitions were not verified, that proper service was not made on MVD, and that service was not made on the Attorney General were fatal to the district court's exercise of jurisdiction. We hold that they are not and, because MVD did not raise any other issues relating to the merits of these cases until its reply brief, we affirm. We consolidate these cases for decision.

FACTS

{2} Petitioner Zambrano's unverified petition alleged that she was accused of driving ten miles over the speed limit and that the

officer gave her the choice of either "sign[ing] the citation [and] acknowledging guilt ... or ... appear[ing] in court at a later date to contest guilt." The petition further alleged that Zambrano did not know of the other legally valid options that the officer did not mention and as a result "inadvertently waived her right to a day in court ... [and] to seek a deferred sentence." There was no certificate of service in the record, but a notice of hearing was mailed to MVD, following which there was a hearing. No transcript of that hearing was designated, and no transcript of that hearing was filed. Counsel for MVD appeared at that hearing and objected to the court's subject matter jurisdiction, but, apart from MVD's acknowledgment in its written response that "the Court attempted to cure the fatal jurisdictional flaw [of nonverification] by having the petitioner orally swear in open court to the contents of the petition," we do not know what else happened at that hearing. Without further hearing, but following MVD's filing of its written response, the district court entered a final order, withdrawing Zambrano's guilty plea and ordering MVD to return a copy of the uniform citation to metropolitan court for trial on the merits. MVD appeals. Our notice assigning the case to the general calendar ordered the parties to brief the issues of the finality of the order and the proper procedures for appealing orders from district court mandamus proceedings that require lower court trials.

{3} Petitioner Collado's unverified but acknowledged petition alleged that she was accused of driving eleven miles over the speed limit. Collado's petition further alleged that she "pleaded Not Guilty" and "forthrightly signed the citation with the guilty box checked without the full understanding that the direction of travel did not pass by the [roads identified on the citation,]" and "she was wrongfully identified as the supposed speeding vehicle." She further alleged that she "misunderstood the implications of signing the citation with the guilty box checked." She later amended her petition to contain allegations similar to Zambrano's, but the petition was still not verified, and the record proper contains no certificate of service for it or the writ based thereon. MVD filed a response, containing a limited entry of appearance and contesting both subject matter and personal jurisdiction because the petition was not verified or properly served.

{4} On the date of the hearing, Collado did not appear, and the proceedings were dismissed without prejudice. Collado moved to reinstate, and MVD filed a response to that motion, stating that its appearance was still limited, but asking the court for sanctions in the event of reinstatement. Collado replied that she did not receive a confirmed date of the original hearing. At the hearing on the motion to reinstate, MVD began by opposing the motion to reinstate on the merits, indicating that the writ itself, which was served on MVD by Collado by mail, contained the hearing date. MVD then said, "we need to clear the jurisdictional defects before we proceed." The court entered a final order, withdrawing Collado's guilty plea and ordering MVD to return a copy of the uniform citation to metropolitan court for trial on the merits.

{5} After MVD filed its brief in these cases, Petitioners did not respond, and the cases were submitted in accordance with Rule 12–312(B) NMRA. However, because these cases are two of several raising similar issues, we perceived the matter to be of public importance, and we invited the participation of the New Mexico Criminal Defense Lawyers Association as amicus curiae. We are grateful for its participation, which has provided Petitioners with advocacy. When we refer in this opinion to Petitioners' contentions, we are referring to arguments made on their behalf by amicus.

DISCUSSION

Finality of Order

{6} The issue of finality arises because the district court's orders did not end the cases, but instead remanded them to metropolitan court for trial on the merits. Ordinarily, an order remanding a case is not a final order, sufficient to allow this Court to exercise jurisdiction. *High Ridge Hinkle Joint Venture v. City of Albuquerque,* 119 N.M. 29, 33–34, 888 P.2d 475, 479–80 (Ct. App.1994). However, there are exceptions to the general rule, and one such exception applies the doctrine of practical finality to

hold that a remand order is sufficiently final for appeal if the party opposing remand would be unable to have the propriety of the remand heard at a later date. *Id.* at 34–36, 888 P.2d at 480–82. It is apparent that if Petitioners have their way in metropolitan court, they could well be acquitted or could well be allowed deferred adjudications of guilt or deferred sentences, from which MVD would have no ability to appeal. *See State v. Ahasteen,* 1998–NMCA–158, ¶¶ 11–13, 126 N.M. 238, 968 P.2d 328 (stating that where a remand to magistrate court could well result in a judgment of acquittal, this Court would hear the State's appeal). Accordingly, the remand orders are sufficiently final to hear the appeals now.

Proper Appellate Procedure

{7} The issue of proper appellate procedure arises because of NMSA 1978, § 44–2–14 (1887), which states that "in all cases of proceedings by mandamus in any district court of this state, the final judgment of the court thereon shall be reviewable by appeal or writ of error in the same manner as now provided by law in other civil cases." Our Rules of Appellate Procedure now provide for review of certain orders by writ of error. Rule 12–503 NMRA. We review collateral orders under writ of error procedure. *See Carrillo v. Rostro,* 114 N.M. 607, 617, 626, 845 P.2d 130, 140, 149 (1992). However, we have reviewed district court mandamus orders, requiring hearings in the lower courts, as direct appeals, indicating that we have jurisdiction to do so. *See State ex rel. Whitehead v. Vescovi–Dial,* 1997–NMCA–126, ¶ 2, 124 N.M. 375, 950 P.2d 818. We see no reason, and no party has argued any reason, to depart from this practice in this case.

Merits

{8} The issues raised in MVD's brief in chief in these cases are limited to its contentions that the district court lacked jurisdiction to grant the relief requested because the petitions were not verified and were not properly served. As in *Barreras v. N.M. Motor Vehicle Div.,* 2005–NMCA–055, ¶ 1, 137 N.M. 435, 112 P.3d 296, 2005 WL 1280120 (2005), we do not consider contentions that were not raised in the briefs in chief.

{9} Also, as in *Barreras,* we do not consider the fact that the petitions were not verified to be fatal. *See id.* ¶ 9. In Zambrano's case, MVD admitted below that Zambrano swore to the contents of the petition in open court. In Collado's case, as in *Barreras,* there was no indication below, nor any indication on appeal, that MVD in any way contests the facts alleged in the petition. Instead, even on the merits, MVD's position is a challenge to the legal effect of those facts. Under these circumstances, we reject MVD's contention that the district court lacked subject matter jurisdiction because the initial petitions were not verified.

{10} With regard to the service aspects of Zambrano's case, we resolve the issues on the basis that MVD did not provide us with a record sufficient to review the issues. By not designating the transcript of the only hearing that occurred in this case, which appeared to be one that dealt with MVD's initial objections to jurisdiction, MVD has deprived us of a record sufficient to review its issues. As we have held in *Barreras* that defects in service can be waived, *see id.* ¶ 7, we apply the rule that we presume that missing portions of the record would support the trial court's judgment, and we therefore presume that any defects in service were waived or cured at the hearing for which we do not have a transcript. *See State v. Kurley,* 114 N.M. 514, 518, 841 P.2d 562, 566 (Ct.App.1992) ("When the record provided by defendant is incomplete, this court will presume that the absent portions of the record support the trial court's actions.").

{11} With regard to the service aspects in Collado's case, as in *Barreras,* we apply the rule that any action on the part of the defendant, except solely objecting to jurisdiction, will constitute a general appearance and waive any defects in service. *Barreras,* 2005–NMCA–055, ¶ 7. In Collado's case, despite attempting to be careful to enter only limited appearances to contest jurisdiction, when the court proposed to dismiss the case for Collado's failure to appear, MVD

cooperated in the court's dismissal without arguing that the court first needed to reach the jurisdictional issues it raised. At the hearing, MVD pointed out to the court that the date proposed for the hearing was in the writ itself. The court announced that it would dismiss the case and said to MVD, "If you would like to submit an order for my signature, you can do so within ten days." MVD said, "Very well, Your Honor. Is that with prejudice?" The court indicated not, and MVD said, "So should I indicate without prejudice, Your Honor?" The court said, "Yes, that will be fine," and MVD said, "Thank you. I will submit that directly to the Court." This cooperation constituted " 'any action upon the part of the defendant, except to object to the jurisdiction, which recognizes the case as in court, [and it] will amount to a general appearance.' " *Id.* (quoting *Guthrie v. Threlkeld Co.*, 52 N.M. 93, 96, 192 P.2d 307, 308 (1948)).

CONCLUSION

{12} We hold that we have jurisdiction in these cases, and we affirm the trial court's orders.

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Chief Judge, and A. JOSEPH ALARID, Judge.

2005-NMSC-013
112 P.3d 1104

STATE of New Mexico, Plaintiff–Petitioner,

v.

Gina FRANCO, Defendant–Respondent.

No. 28,791.

Supreme Court of New Mexico.

April 29, 2005.

Rehearing Denied May 19, 2005.

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

John Bigelow, Chief Public Defender, Trace L. Rabern, Assistant Appellate Defender, Santa Fe, for Respondent.

OPINION

MINZNER, Justice.

{1} Defendant appeals from convictions following a jury trial for possession of a controlled substance, contrary to NMSA 1978, Section 30–31–23(D) (1990), and tampering with evidence, contrary to NMSA 1978, Section 30–22–5 (1963, prior to 2003 amendment). Defendant initially appealed her convictions to the Court of Appeals on several grounds, including whether her conviction for possession of a controlled substance and tampering with evidence violated her right to be free from double jeopardy. *State v. Franco,* 2004–NMCA–099, ¶ 1, 136 N.M. 204, 96 P.3d 329. The Court of Appeals reversed on the double jeopardy issue and remanded to the district court with instruc-

tions to vacate Defendant's conviction and sentence for possession of a controlled substance. *Id.* ¶ 24. The State petitioned this Court for certiorari, and we now hold the two convictions did not violate the constitutional prohibition against double jeopardy. We therefore reverse the Court of Appeals on this issue, and we affirm Defendant's judgment and sentence.

I.

{2} The following facts were testified to at trial. Police obtained a warrant to search an apartment of a suspected drug dealer. The warrant was granted the day after Defendant's boyfriend, "Patrick," sold cocaine at the apartment to an undercover police officer. As officers arrived to execute the warrant, they observed several people in front of the apartment whom they secured before entry. Officer Moyers knocked at the partially opened front door, identified himself as a police officer and announced he had a search warrant. After waiting a few seconds, he entered the apartment, which was a small, one-room efficiency, consisting of a combined living room, bedroom, and kitchen, and a walled-off bathroom. As he entered, Moyers saw two men jump up from the couch, and he ordered them to the ground. As Officer Edmondson entered immediately behind Moyers, he saw Moyers securing one of two men. As he began securing the second, he saw Defendant run into the bathroom. Edmondson could see Defendant facing the bathroom window, but he did not see anything in her hand or see her throw anything out the window. Moyers, who did not notice Defendant when he entered, ran into the bathroom to secure the area. When he went into the bathroom, Defendant was standing between the toilet and window, facing the door. After securing her, he searched the bathroom, but he did not find any contraband or indication the toilet had been flushed to dispose of evidence. Officers initially located drug paraphernalia in the kitchen area, including pipes to smoke crack, brillo pads to filter the crack in the pipes, razor blades, baking soda to cook powder cocaine into crack for smoking, and a spoon with white residue. After conducting a more thorough search, police discovered a Tylenol bottle containing 7.32 grams of crack cocaine outside the apartment, directly under the bathroom window.

{3} Defendant admitted she was in the apartment for about thirty to forty-five minutes before police arrived. She also admitted handling a similar Tylenol bottle during that time, until "L.D.," the owner of the apartment, told her not to handle it and took possession of the bottle. She denied knowing what the bottle contained or throwing it out the window. Defendant claimed she entered the bathroom before police arrived and was fixing her hair when they arrived. According to Moyers, Defendant told him and Edmondson that she would admit the cocaine was hers if they did not arrest her. In addition, according to Edmondson, Defendant asked whether she would be arrested if she admitted the "dope" was hers. Defendant testified the officers told her she would not be arrested if she admitted it was hers, which she refused to do. Defendant was arrested and charged with possession of a controlled substance and tampering with evidence.

{4} The jury convicted Defendant on both charges. The Court of Appeals concluded the charge of possession should be viewed as a lesser-included offense of the charge of tampering with evidence, and therefore convictions for both offenses violated double jeopardy. For the following reasons, we disagree.

II.

{5} Whether Defendant's conviction for the violation of Sections 30–31–23(D) and 30–22–5 constitutes multiple punishment for the "same offense" as barred by the double jeopardy clause is a question of legislative intent, which we review de novo. *See State v. Foster*, 1999–NMSC–007, ¶ 28, 126 N.M. 646, 974 P.2d 140. To determine whether these statutes are the "same offense" for double jeopardy purposes, we apply a two-part test: (1) "whether the conduct underlying the offenses is unitary;" and, if so, (2) "whether the legislature intended to create separately punishable offenses." *Swaf-*

ford v. State, 112 N.M. 3, 13, 810 P.2d 1223, 1233 (1991).

{6} In applying the first part of this test, the Court of Appeals concluded Defendant's conduct was unitary. The State argued Defendant's conduct was not unitary because the jury could have concluded that Defendant possessed the cocaine before the police arrived and subsequently tampered with the evidence by throwing it out the window. *Id.* However, the court limited its assessment to the State's legal theory at trial, which was that Defendant was in possession when she ran to the bathroom and threw the bottle. *Id.*

{7} We do not agree with the Court of Appeals' analysis to the extent it suggests the State's legal theory necessarily determines whether conduct may be considered unitary. "The conduct question depends to a large degree on the elements of the charged offenses and the facts presented at trial." *Swafford,* 112 N.M. at 13, 810 P.2d at 1233. The proper analytical framework is whether "the facts presented at trial establish that the jury reasonably could have inferred independent factual bases for the charged offenses." *Id.* at 14, 810 P.2d at 1234. If, after examining the elements and the facts, "it reasonably can be said that the conduct is unitary, then one must move to the second part of the inquiry." *Id.* On the other hand, separate punishments may be imposed if the offenses are "separated by sufficient indicia of distinctness." *Id.* at 13, 810 P.2d at 1233. To determine whether a defendant's conduct was unitary, we consider such factors as whether acts were close in time and space, their similarity, the sequence in which they occurred, whether other events intervened, and the defendant's goals for and mental state during each act. *See State v. Dominguez,* 2005-NMSC-001, ¶ 23, 137 N.M. 1, 106 P.3d 563.

{8} The jury was instructed that it could find Defendant committed possession of cocaine if it was on her person or in her presence, she exercised control over it, and she knew or believed it was cocaine or some other unlawful or regulated drug or substance. UJI 14-3102, 14-3130 NMRA 2005. The jury was instructed it could find Defendant tampered with evidence if she threw cocaine out the window and she intended to prevent the apprehension, prosecution or conviction of herself or others. UJI 14-2241 NMRA 2005. While the prosecutor's legal theory might have tied the State in proving tampering with evidence, *see State v. Smith,* 104 N.M. 729, 730, 726 P.2d 883, 884 (Ct.App. 1986), that theory did not limit the evidence the jury could consider to find Defendant guilty of possession.

{9} Based on the elements stated in the instructions and the evidence produced at trial, the jury had an independent factual basis for finding each act. The jury could reasonably find Defendant possessed cocaine and exercised control over it before the police arrived. The jury could reasonably find the act of possession was distinct from the act of tampering.

{10} Defendant testified she was inside the apartment for thirty to forty-five minutes before the police arrived; it was a one-room efficiency apartment. Defendant was in close proximity to drug paraphernalia commonly used to smoke and/or cook crack cocaine, as well as to possible cocaine users and/or dealers. She admitted handling the Tylenol bottle before police arrived, and she was warned not to handle the bottle. In addition, there was evidence to support a reasonable inference that the crack belonged to Defendant or her boyfriend. The jury could reasonably infer Defendant tried to destroy the evidence because she knew or believed there was an illegal substance inside the bottle before police arrived. Because Defendant threw the cocaine out the window after police arrived, rather than leaving the evidence for police to discover, the jury could have found two distinct acts, committed at different times, in different locations, with a different mental state and purpose, and separated by the intervening arrival of the police.

{11} Nevertheless, the jury might have based its verdict on the theory that Defendant possessed the cocaine when she tampered with evidence. In that event, the conduct was unitary. Because the jury could have based its verdict on the theory Defendant possessed the cocaine at the time she

threw it out the window, we presume unitary conduct. *See Foster*, 1999–NMSC–007, ¶¶ 27–28, 126 N.M. 646, 974 P.2d 140 (applying presumption the legal theory that potentially violates double jeopardy is relevant in determining whether conduct is unitary when the State charged kidnapping under alternative theories and it was unclear from the verdict on which theory the defendant was convicted); *State v. Crain*, 1997–NMCA–101, ¶ 22, 124 N.M. 84, 946 P.2d 1095 (presuming conviction was based on a theory that violated double jeopardy when kidnapping was charged under alternative theories, but State tried case on only one theory and the verdict did not indicate which alternative was used to convict defendant). Because we presume the conduct was unitary, we proceed to the second part of the *Swafford* analysis to determine whether the Legislature intended to allow multiple punishments based on the facts and circumstances of this case.

{12} The same act may result in violations of more than one statute. *Swafford*, 112 N.M. at 8, 810 P.2d at 1228. The test for determining conduct is unitary helps us decide whether more than one act has occurred. *Id.* at 13, 810 P.2d at 1233. The test for determining whether more than one act has occurred was never intended to be the sole test for determining whether the Legislature intended to punish conduct under more than one statute. *See State v. Mora*, 2003–NMCA–072, ¶ 20, 133 N.M. 746, 69 P.3d 256 (noting that while criminal sexual contact of a minor and attempted criminal sexual penetration of a minor may both arise from the same conduct on specific facts, we do not look at the specific facts of the offense under *Swafford;* rather, we look at the statutory elements). "[T]he sole limitation on multiple punishments is legislative intent," *Swafford*, 112 N.M. at 13, 810 P.2d at 1233, and, unless the Legislature clearly authorized multiple punishments, we apply the test articulated in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932), to determine that intent. Under the *Blockburger* test, we compare the elements of the relevant statutes to determine whether the Legislature intended to authorize separate punishments under each statute. *Id.* at 304, 52 S.Ct. 180. Under that additional test, "the evidence and proof offered at trial are immaterial." *Swafford*, 112 N.M. at 8, 810 P.2d at 1228. "If that test establishes that one statute is subsumed within the other, the inquiry is over and the statutes are the same for double jeopardy purposes . . . ." *Id.* at 14, 810 P.2d at 1234. However, if each offense requires proof of an element that the other does not, a presumption that separate punishments were intended arises. *Id.* The presumption may be rebutted by other indicia of legislative intent, such as the language, structure, history, and purpose of the statutes. *Id.* Other factors that are probative of legislative intent to punish are whether the statutes are violated together and the quantum of punishment. *Id.* at 14–15, 810 P.2d at 1234–35.

{13} The Court of Appeals held the Legislature did not intend separate punishments and therefore the convictions violated double jeopardy. *See Franco*, 2004–NMCA–099, ¶ 22, 136 N.M. 204, 96 P.3d 329. Although the court articulated the proper test for determining legislative intent under *Swafford*, it applied a much different test. To determine under *Blockburger* whether one offense subsumed another, the court considered only the theory that Defendant tampered with evidence by throwing cocaine out the window with the requisite intent. *Id.* The court then held the possession conviction was subsumed within the tampering conviction, " 'because Defendant possessed the cocaine when she was in the act of throwing it out the window.' " *Id.* In other words, the Court of Appeals construed *Swafford* to support treating the offense of possession as subsumed within the offense of tampering because under the State's legal theory the act of possessing cocaine was necessarily included in the act of throwing cocaine. *See id.* We conclude this was the wrong analysis.

{14} As *Swafford* suggested, we treat statutes written in the alternative as separate statutes for purposes of the *Blockburger* analysis. *See State v. Rodriguez*, 113 N.M. 767, 771, 833 P.2d 244, 248 (Ct.App. 1992). This means that instead of looking at the statute in the abstract, we look at the "legal theory" of the offense that is charged.

Id. Nevertheless, we then compare " 'the elements of the specific criminal cause of action for which the defendant was convicted without examining the facts in detail.' " *Id.* (quoting *Pandelli v. United States,* 635 F.2d 533, 538 (6th Cir.1980)). The reason for this approach is that a statute that serves several purposes and has been written in the alternative may "have many meanings and a wide range of deterrent possibilities." *Pandelli,* 635 F.2d at 538–39 (quoted in *Rodriguez,* 113 N.M. at 771, 833 P.2d at 248). Unless we focus on the relevant alternatives, we run the risk of misconstruing legislative intent.

{15} We are more likely to depart from a strict application of *Blockburger* when a defendant is charged with multiple alternatives of a compound statute and it is unclear which alternative the jury relied on. *Compare Mora,* 2003–NMCA–072, ¶¶ 21–22, 27, 133 N.M. 746, 69 P.3d 256 (analyzing the elements of criminal sexual contact of a minor and attempted criminal sexual penetration of a minor and, because each statute could be violated without violating the other, concluding neither was subsumed within the other although other indicia of legislative intent precluded multiple punishment) *with Rodriguez,* 113 N.M. at 771–72, 833 P.2d at 248–49 (concluding the crime of dangerous use of explosives was subsumed in the crime of arson under the alternatives charged for each offense). We also have considered the State's legal theory in determining the appropriate unit of prosecution when a defendant was charged with multiple violations of a single statute. *See generally State v. LeFebre,* 2001–NMCA–009, ¶ 23, 130 N.M. 130, 19 P.3d 825 (holding the Legislature did not intend multiple punishments for resisting, evading or obstructing an officer in different ways in a single high-speed chase).

{16} In this case, when we compare the elements of the two statutes, it is clear that each statute requires proof of an element the other does not. Possession of a controlled substance requires proof Defendant knew or believed it was cocaine or some other substance that is regulated, which is not required to prove tampering. Tampering with evidence requires proof Defendant intended to prevent the apprehension, prosecution or conviction of herself or others, which is not required to prove possession. Although tampering can be committed in different ways, *see* § 30–22–5(A), the element of intent distinguishes the offense of tampering from the offense of possession, however the offense of tampering is committed. Similarly, the element of knowledge distinguishes the offense of possession from the offense of tampering, however the offense of tampering is committed. Application of the *Blockburger* test therefore results in a presumption that the Legislature intended a separate punishment for each crime.

{17} The Court of Appeals concluded the possession statute was subsumed within the tampering statute by analogy to the holding in *State v. Medina,* 87 N.M. 394, 534 P.2d 486 (Ct.App.1975). *Franco,* 2004–NMCA–099, ¶ 22, 136 N.M. 204, 96 P.3d 329. In *Medina,* the court held "possession of marijuana was a lesser offense necessarily included in the greater offense of distribution of marijuana." *Id.* at 396, 534 P.2d at 488. The court reasoned that the prohibited conduct of distribution was equivalent to the act of delivery and that the act of delivery was equivalent to the act of transferring or "making over the possession or control." *Id.* at 395, 534 P.2d at 487. Thus the court concluded one cannot distribute marijuana without also possessing marijuana. *Id.* However, *Medina* was decided under the "necessarily included" test, an evidence-based approach that *Swafford* later rejected in favor of the *Blockburger* tests, which is an elements-based approach. The "necessarily included test" is a subset of the "same evidence" and "necessarily involved" tests, because it focuses on the facts that will sustain a conviction, as well as defendant's conduct. *See Swafford,* 112 N.M. at 10–12, 810 P.2d at 1230–32 (describing the tests our courts had used in the past to develop multiple punishment theory). While *Rodriguez* and its progeny teach us to look at the State's legal theory in charging compound crimes, and perhaps in evaluating whether multiple violations of a single statute have occurred, we have never departed from the *Blockburger* test, which focuses on elements, by examining the conduct or evidence in detail. In fact, we have indicated that examination was neither re-

quired nor appropriate. *See LeFebre,* 2001–NMCA–009, ¶ 22, 130 N.M. 130, 19 P.3d 825; *Rodriguez,* 113 N.M. at 771, 833 P.2d at 248. The Court of Appeals' opinion is a departure from the *Blockburger* test that is inconsistent with *Swafford.* We must look for legislative intent in another way, and we must recognize the presumption that results from the *Blockburger* test, whether applied in its strict or modified form.

{18} The presumption that results under *Blockburger* from comparing the elements of tampering with evidence and the elements of possession is supported by other indicia of legislative intent to punish Defendant's conduct under both statutes. The possession and tampering statutes are directed at different social purposes. Possession of cocaine is regulated by a comprehensive scheme of penalties designed to protect the public from the dangers of drug abuse. *See State v. Reams,* 98 N.M. 372, 377, 648 P.2d 1185, 1190 (Ct. App.1981) (Wood, J., dissenting) (adopted as the opinion of this Court in *State v. Reams,* 98 N.M. 215, 216, 647 P.2d 417, 418 (1982)). The tampering with evidence statute is aimed at the preservation of evidence for trial. In addition, the crimes are not necessarily violated together, which supports an inference the Legislature intended multiple punishment. *See State v. Sosa,* 1997–NMSC–032, ¶ 36, 123 N.M. 564, 943 P.2d 1017 ("The fact that each statute may be violated independent of the other will also lend support to the imposition of sentences for each offense."). Possession of a controlled substance certainly can be committed without tampering with evidence. Conversely, tampering with evidence, even if the evidence is illegal drugs, probably can be committed without legally possessing the drugs; one might exercise control over a controlled substance with intent to hamper law enforcement without knowing the nature of the evidence. Finally, the quantum of punishment is the same for both statutes, which suggests the Legislature did not intend one offense to subsume the other, but intended separate punishment for each. *Cf. Swafford,* 112 N.M. at 15, 810 P.2d at 1235 ("Where one statutory provision incorporates many of the elements of a base statute, and extracts a greater penalty than the base statute, it may be inferred that the legislature did not intend punishment under both statutes.").

III.

{19} We conclude the Legislature intended separate punishments for possession of a controlled substance and for tampering with evidence. We conclude convictions for possession of cocaine and tampering with evidence did not violate Defendant's double jeopardy rights. Even if based on unitary conduct, the convictions are valid because there are sufficient indicia of legislative intent for separate punishment. The Court of Appeals properly exercised caution in analyzing the facts of this case. Had the jury convicted Defendant on a basis that the constitutional protection against double jeopardy precluded, reversal would have been appropriate. We conclude this is not such a case. Defendant's convictions are affirmed.

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

BOSSON, Chief Justice, SERNA, MAES and CHÁVEZ, Justices, concur.

2005-NMCA-060

112 P.3d 1113

STATE of New Mexico,
Plaintiff–Appellee,

v.

Anthony ROMERO, Defendant–Appellant.

No. 24390.

Court of Appeals of New Mexico.

March 14, 2005.

Certiorari Granted, No. 29,159,
May 3, 2005.

Patricia A. Madrid, Attorney General, Santa Fe, Joel Jacobsen, Assistant Attorney General, Albuquerque, for Appellee.

John Bigelow, Chief Public Defender, Will O'Connell, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

PICKARD, J.

{1} On motion for rehearing, the opinion filed March 1, 2005, is withdrawn, and the following opinion is substituted in its place. The motion for rehearing is otherwise denied.

{2} Defendant was convicted of second degree murder for the beating death of his wife. The cause of death was contested at trial, with Defendant presenting expert testimony that the death was caused by a liver condition and the State presenting expert testimony that the death was caused either by smothering in the course of a kidnaping or rape, or as a result of multiple complications of mechanical injuries to the head, i.e., being beaten about the head. This case requires us to decide whether Defendant was entitled to instructions on nondeadly force self-defense or involuntary manslaughter based on these facts. We hold that both of these instructions are applicable to the facts of this case, where there was evidence, although contradicted, that the force Defendant used was necessary to protect himself from attack and that this force would ordinarily not result in death or great bodily harm, but unexpectedly did so result in this case. We therefore reverse the conviction. Defendant also raises the issue that his sentence was improperly aggravated because there was no jury finding beyond a reasonable doubt of any aggravating factors. This issue was recently decided in Defendant's favor in *State v. Frawley,* 2005–NMCA–017, ¶¶ 1, 11–14, 137 N.M. 18, 106 P.3d 580, *cert. granted,* 2005-NMCERT-002, 137 N.M. 266, 110 P.3d 74, [no. 29,011, (Feb. 8, 2005)], but we need not reach it here in light of our disposition.

FACTS AND PROCEEDINGS

{3} Defendant was charged with first degree murder (deliberate intent or in the commission of the felonies of kidnaping or criminal sexual penetration), criminal sexual penetration, kidnaping, three counts of tampering with evidence, and escape from a community custody electronic monitoring program. At trial, the jury was instructed on these charges, as well as the lesser included offenses of second degree murder and voluntary manslaughter for the murder count, and various lesser included offenses on the kidnaping and criminal sexual penetration counts. The jury acquitted Defendant of kidnaping, criminal sexual penetration, their lesser included offenses, and one count of tampering with evidence; it convicted Defendant of second degree murder and the remaining counts of tampering and escape. This appeal involves only the murder conviction.

{4} The charges arose from the death of Defendant's wife (the victim). It was undisputed that the marriage involved domestic violence. Several months before her death, the victim had kicked Defendant out of the house and obtained a restraining order against him. One month later, an incident occurred at the place where Defendant was living that resulted in Defendant's being convicted of aggravated battery and aggravated assault against a household member. As a result of his arrest for this incident, Defendant was put on electronic monitoring and instructed to have no contact with the victim. Nonetheless, there was evidence that Defendant contacted the victim, stating his eagerness to reconcile. The evidence also revealed that the victim was not blameless in her contacts with Defendant, inasmuch as both the prior incident and the incident that resulted in her death occurred at the place

Defendant was living, the victim's having gone there.

{5} The evidence concerning the night of the victim's death consisted of Defendant's statements to others and the forensic testimony. Defendant's statements indicated that the victim came to his room at 3:00 in the morning and was very intoxicated. They watched television and then began trading insults. The victim urinated in her pants and took her hand and rubbed Defendant's face with the urine. The couple then fought physically (including a strike by Defendant that made the victim's nose bleed), made up, and fought again, after which they made up, made love, and fought again. This fighting included the victim's pinning Defendant beneath her, punching him in the face, and elbowing him in the mouth, during which time Defendant bit her. Defendant admitted that he hit the victim four or five times during the last fight and, after the victim grabbed Defendant by the genitals, he also bit her and struck her again on the side of the head to get her to release her grip. Eventually, they stopped fighting and went to sleep. When Defendant woke up at 9:30, the victim was not breathing, and Defendant went to his parents' house nearby to summon help. Defendant turned himself in and an officer saw that he had fingernail and other scratches on his face and neck and redness on his shoulder; the officer remarked that the fight appeared to be "pretty vicious" by looking at Defendant.

{6} The evidence showed that the victim had two black eyes; bleeding on the white of one eye; bruises and scrapes around the forehead, lips, ear, and nose; a broken nose; bleeding into the scalp; small bruises on the strap muscles of the neck; defensive wounds to the hands; and numerous bite marks. The evidence also showed that the victim had a blood alcohol content of .082 percent at the time of death and a liver condition often associated with obesity or consumption of alcohol. The victim was slightly over five feet tall and weighed 155 pounds.

{7} The medical evidence concerning the cause of death was disputed. The State's expert explained that it was a complex case with no obvious cause of death. She testified that there was no reason for the victim to be dead except for the possibility of injuries to the brain or asphyxia, such as by smothering, which could explain the scraping around the nose or the bruises to the neck. There was testimony, however, that the autopsy report did not reveal evidence of injury to the brain or significant indications of asphyxia, perhaps because the victim did not live long enough after injury for these indications to manifest themselves. Nonetheless, the State's expert opined that the victim died as a result of "complications of mechanical injuries to the head," which would include all of the possibilities of brain injury, mechanical occlusion of the nose, and strangulation, all being in the presence of alcohol, which would compromise the victim's life systems. After consultation with colleagues, the State's expert said there was no doubt that this was a homicide, as it fit the pattern of sexual homicide. The State's expert stated that "[the victim] had had intercourse; [s]he was in bed.... [s]he had bite marks. All of those things go together in forensic pathology. Asphyxia, beating, bite marks, sex, domestic violence, all go together." The defense expert testified that the victim died a natural or accidental death as a result of the liver condition because there was no other clear cause of death, although he acknowledged that the State's theories could be possibilities.

DISCUSSION

{8} Defendant contends that the trial court erred in refusing his requested instructions on nondeadly force self-defense, UJI 14–5181 NMRA, and involuntary manslaughter, UJI 14–231 NMRA. The propriety of jury instructions is a mixed question of law and fact. *State v. Gaitan*, 2002–NMSC–007, ¶ 10, 131 N.M. 758, 42 P.3d 1207. When considering a defendant's requested instructions, we view the evidence in the light most favorable to the giving of the requested instruction. *State v. Hill*, 2001–NMCA–094, ¶ 5, 131 N.M. 195, 34 P.3d 139. With those facts in mind, we then review the issue de novo. *Id.; see Gaitan*, 2002–NMSC–007, ¶ 10, 131 N.M. 758, 42 P.3d 1207. In the case of self-defense, there must be some evidence, even if slight, to support the defense. *State v. Duarte*, 1996–NMCA–038, ¶ 3, 121 N.M.

553, 915 P.2d 309. In the case of lesser included offense instructions, there must be some view of the evidence that could sustain a finding that the lesser offense was the highest degree of crime committed. *State v. Pettigrew,* 116 N.M. 135, 138, 860 P.2d 777, 780 (Ct.App.1993).

{9} The trial court denied the instruction on self-defense, and the State supports such denial, on the ground that the instruction on nondeadly force self-defense is inapplicable as a matter of law when the victim dies. The trial court also denied the instruction on involuntary manslaughter. The State supports this denial on the grounds that, because self-defense was negated, there was no lawful act to be committed in an unlawful manner, the battery committed on the victim was not a misdemeanor, and the Supreme Court rejected involuntary manslaughter as a verdict in cases of imperfect self-defense in *State v. Abeyta,* 120 N.M. 233, 240, 901 P.2d 164, 171 (1995), *abrogated on other grounds by State v. Campos,* 1996–NMSC–043, ¶ 32 n. 4, 122 N.M. 148, 921 P.2d 1266. Under the facts of this case, we disagree with enough of these propositions to warrant a reversal.

{10} The premises underlying the State's argument concerning the self-defense instructions are that there are two uniform jury instructions, UJI 14–5171 NMRA and UJI 14–5181, one for deadly force and one for nondeadly force, and that the former is used when death is the result, and the latter is used when there is no death. (There is also a deadly force self-defense instruction for use when death does not result. UJI 14–5183 NMRA.) These premises are logical, at least on first glance, and there are cases from other jurisdictions that support them. *See, e.g., State v. Rhodes,* 688 So.2d 628, 640 (La.Ct.App.1997) (stating, without much analysis, in response to a defendant's argument that his requested instruction on nondeadly force should be given, that such instruction should be given only when the force does not result in death and that when the force does result in death, the stricter standard requiring defendant to reasonably believe he is in imminent danger of death or great bodily harm applies); *Ferrel v. State,* 55 S.W.3d 586, 592 (Tex.Crim.App.2001) ("Because we have found that the actual blow of the bottle indisputably caused serious bodily injury to [the victim], [the defendant] by definition used deadly force.").

{11} But we are more persuaded by cases such as *Southard v. State,* 422 N.E.2d 325, 330 (Ind.Ct.App.1981), *Commonwealth v. Bastarache,* 382 Mass. 86, 414 N.E.2d 984, 996 (1980), and *State v. Hare,* 575 N.W.2d 828, 832–33 (Minn.1998). In *Southard,* the court stated that "self-defense is available to an accused who accidentally kills his assailant while asserting reasonable force to repel the assailant." 422 N.E.2d at 330. In *Bastarache,* the court said that a defendant could use "nondeadly force to protect himself, even from a drunk susceptible to injury, if he reasonably believed that his personal safety . . . was in peril," even in cases of the death of the victim. 414 N.E.2d at 996 and n. 15.

{12} *Hare* is the case that is most closely analogous to this case. After stating that instructions on self defense must be given with "analytic precision," the court continued:

> Hare contends that the trial court should have given [the nondeadly force self defense instruction] in this case because he claimed that [the victim's] death was accidental. This contention has merit. We have repeatedly cautioned trial courts that when a defendant, asserting self-defense, claims that the resulting death was unintentional, [the deadly force self defense instruction] is inappropriate and that [the nondeadly force self defense instruction] is likely to better fit the facts of the case. For example, . . . this court noted that [the deadly force self defense instruction] is useful only when the death was intended. * * * When a defendant claims that he pointed a gun in self-defense but that the shooting was accidental, [the deadly force self defense instruction] clearly does not fit. Likewise, . . . this court made it clear that if a defendant claims that he intentionally stabbed the victim in self-defense but without intending to kill the victim, the language in [the deadly force self defense instruction] providing, "the killing must have been done in the belief that * * * " is inappropriate because it implies that the

defendant must believe it necessary to kill in order for the killing to be justified. 575 N.W.2d at 833 (some internal quotation marks, footnote, and citations omitted).

{13} We are of the opinion that the propositions in these cases are most consistent with existing New Mexico law. For example, in *State v. Gallegos,* 2001–NMCA–021, ¶¶ 13, 18, 130 N.M. 221, 22 P.3d 689, we held that a defendant was entitled to self-defense instructions even though she claimed the death was accidental. In fact, our uniform jury instructions so contemplate. Although use note 1 to UJI 14–5181 states that it is for use in nonhomicide cases, use note 4 instructs to use the phrase "The force used by defendant ordinarily would not create a substantial risk of death or great bodily harm" if the defendant's actions do result in death, thereby indicating that UJI 14–5181 is contemplated to be used in certain homicide cases.

{14} The State contends that the Committee Commentary to this use note suggests that it is to be used when the defendant "unintentionally kills a third person in self-defense." We do not read the Commentary so restrictively. While the phrase should certainly be used in the case of an unintentional killing of a third person during the exercise of self-defense, we do not believe that the Commentary was intended to cover the field.

{15} In this case, in the light most favorable to Defendant, the evidence was that he was both humiliated and attacked by the victim. The attack, consisting of hitting, scratching, pinning down, and grabbing, allowed Defendant to respond with the like force of hitting, punching, grabbing, and biting. The victim's injuries, in the light most favorable to Defendant, were a broken nose, and various cuts and bruises. The cause of death was disputed, and in the light most favorable to Defendant, the cause of death did not exclude an accidental death caused by the exercise of nondeadly force. The nondeadly force self-defense instruction should have been given.

{16} For similar reasons, the involuntary manslaughter instruction should have been given. For purposes of this instruction, Defendant was not contending imperfect self-defense, i.e., that he used excessive force while otherwise lawfully defending himself. *See Abeyta,* 120 N.M. at 241, 901 P.2d at 172. His contention was that he was always in the lawful exercise of self-defense, but that unusual circumstances caused the victim to die as a result of that lawful exercise, for which the jury might find him culpable.

{17} Involuntary manslaughter includes the killing of a human being either in the commission of an unlawful act not amounting to a felony; in the commission of a lawful act that might produce death, in an unlawful manner; or in the commission of a lawful act that might produce death without due caution or circumspection. *State v. Salazar,* 1997–NMSC–044, ¶ 54, 123 N.M. 778, 945 P.2d 996. As we have held that self-defense was available to Defendant, the jury could have found that his beating of the victim was in the commission of a lawful act, but without due caution or circumspection due to her drunken state and liver condition. Further, if the jury so found, it would necessarily find that involuntary manslaughter was the highest degree of offense committed. We need not discuss the other methods of possibly committing involuntary manslaughter; it is sufficient if one applies to these facts.

{18} To the extent that the State argues that the beating inflicted on the victim was severe and therefore "her death does not belong in the category of the least-culpable homicides," we point out that the State is viewing the evidence in the light most favorable to the conviction, as it is entitled to do when defending against a sufficiency of the evidence contention. *See State v. Barber,* 2004–NMSC–019, ¶ 33, 135 N.M. 621, 92 P.3d 633. However, when evaluating a defendant's right to have the jury instructed in accordance with the defendant's tendered instructions, we view the evidence in the light most favorable to the giving of the requested instruction. *Hill,* 2001–NMCA–094, ¶ 5, 131 N.M. 195, 34 P.3d 139.

{19} The State argues that permitting an involuntary manslaughter instruction under the facts of this case would be contrary to the doctrine that defendants take their victims as they find them. *See, e.g., State v. Munoz,* 1998–NMSC–041, ¶¶ 19–22, 126 N.M. 371, 970 P.2d 143; *State v. Duffy,* 1998–

NMSC–014, ¶¶ 2, 28, 126 N.M. 132, 967 P.2d 807. However, these cases are distinguishable inasmuch as the defendants in them did not claim that their actions that caused the death were lawful. Their claim was limited to the notion that such actions as they took would not ordinarily cause death. Here, Defendant is claiming both that his actions were lawful and that they would not ordinarily cause death.

{20} The State contends that Defendant's defense was essentially a reasonable doubt defense in the sense that he denied that his actions proximately caused the victim's death, at least according to the testimony of his expert. However, a jury could have found that his actions did proximately cause the victim's death, but that those actions were privileged, nondeadly force self-defense that had accidental consequences because of the effect of alcohol on the victim's life systems. Moreover, for the proximate cause defense to prevail, Defendant had to rely on the jury's reasonable doubt that the death was a foreseeable result of Defendant's actions or that Defendant's act was a significant cause of her death. *See* UJI 14–134 NMRA (defining proximate cause). We do not believe that a jury would entertain any reasonable doubt as to the fact that Defendant's acts were a significant cause of the victim's death.

{21} While there might be a reasonable doubt about whether the death was foreseeable, we do not believe a simple foreseeability instruction adequately conveys to the jurors the idea that they should convict Defendant of involuntary manslaughter if they find that he undertook reasonable self-defense measures in response to the victim's hitting him and squeezing his genitals, but without due caution and circumspection, thereby accidentally causing the victim's death. Nor does it convey to the jurors that they should acquit if they found that Defendant undertook reasonable self-defense with due caution and circumspection, but still accidentally caused the victim's death. A defendant is entitled to have the jury instructed on his defenses with some semblance of liberality. *Poore v. State,* 94 N.M. 172, 174, 608 P.2d 148, 150 (1980). The lone foreseeability instruction did not adequately instruct on Defendant's theory of the case.

{22} The State also contends that Defendant's argument to the trial court negated his entitlement to the jury instructions he requested in writing. In determining whether instruction issues are properly preserved, we generally require evidence to support the instruction under the applicable standard and a tender of correct instructions. *See State v. Diaz,* 121 N.M. 28, 30, 908 P.2d 258, 260 (Ct.App.1995). There is no contention here, apart from those that we have discussed and rejected above, that the tendered instructions were erroneous. Instead, the State contends that during the instruction conference, defense counsel made some concessions that provided the trial court with a rationale for denying the instructions, specifically that defense counsel told the trial court that his position was that there was nothing that Defendant did that killed the victim. We have considered the full colloquy between the trial court and counsel and do not believe that defense counsel conceded away Defendant's right to have instructions on his theory of the case. The trial court was aware of Defendant's theory of self-defense as well as his theory of entitlement to an involuntary manslaughter instruction. The trial court ruled, as argued by the State on appeal, that the evidence and law did not support either instruction. Under these circumstances, it would be an unwarranted use of the preservation rule to hold that Defendant's issues were not preserved because counsel misled the trial court. *Cf. id.* at 33–34, 908 P.2d at 263–64 (holding that where the defendant tendered an incorrect instruction, but offered the correct instruction orally and the trial court understood the issue being raised and erroneously ruled on the merits, the appellate court would reach the merits of the issue).

CONCLUSION

{23} We reverse Defendant's conviction for second degree murder and remand that count for a new trial.

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

CASTILLO and VIGIL, JJ., concur.

2005-NMCA-064

112 P.3d 1119

STATE of New Mexico, Plaintiff–Appellee,

v.

Clayborn S. VINCENT, Defendant–Appellant.

No. 23,832.

Court of Appeals of New Mexico.

March 24, 2005.

Certiorari Granted, No. 29,174, May 20, 2005.

Corrected June 8, 2005.

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

John Bigelow, Chief Public Defender, Sujatha Baliga, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

VIGIL, Judge.

{1} This case raises issues pertaining to (1) whether Defendant's court-appointed attorney had a conflict of interest, (2) whether Defendant made a valid waiver of his Sixth Amendment right to counsel, (3) whether Defendant was denied his Sixth Amendment right to effectively represent himself, (4) whether Defendant made a valid plea of no contest to the charges while representing himself, and (5) whether Defendant received the effective assistance of standby counsel. We find no error and affirm Defendant's judgment and sentence.

BACKGROUND

{2} The State alleged that on December 1, 2001, Defendant pointed a compound hunting bow loaded with a razor-tipped arrow at four victims and threatened them, while in the company of a co-defendant. He was charged with four counts of aggravated assault with a deadly weapon and one count of conspiracy to commit aggravated assault with a deadly weapon. An attorney on contract with the public defender department was appointed to represent Defendant. However, Defendant represented himself at trial with standby counsel after the district judge granted his motion to represent himself, accepted his waiver of counsel, and granted his attorney's motion to withdraw. On the second day of trial, Defendant decided he wanted to plead no contest to the charges, and the district

judge allowed him to do so. Defendant then filed a motion to withdraw his plea, which the district judge denied. Defendant appeals.

COUNSEL'S ALLEGED CONFLICT OF INTEREST

{3} Defendant contends that his attorney and an attorney for the co-defendant were members of the same law firm representing conflicting interests at a hearing on the State's petition for an extension of time to bring the case to trial under Rule 5–604 NMRA (providing generally that the district court must commence trial within six months after arraignment, but that for good cause shown, a district judge may extend time for commencement of trial for three months). Defendant argues that since members of the same law firm are treated as one attorney for conflict of interest purposes under Rule 5–105 NMRA, and he did not waive the conflict, he was denied his constitutional right to his attorney's undivided loyalty. *State v. Joanna V.*, 2004–NMSC–024, ¶ 5, 136 N.M. 40, 94 P.3d 783 (" 'The right to effective assistance of counsel free from conflicts of interest is guaranteed by the Sixth Amendment to the United States Constitution.' ") (quoting *State v. Sosa*, 1997–NMSC–032, ¶ 20, 123 N.M. 564, 943 P.2d 1017); *see also State v. Martinez*, 2001–NMCA–059, ¶ 24, 130 N.M. 744, 31 P.3d 1018 (stating Sixth Amendment right to counsel includes the right to counsel's undivided loyalty).

{4} When the record demonstrates that an actual conflict rendered counsel's assistance ineffective, prejudice is presumed, and the claim can be addressed for the first time on appeal. *Martinez*, 2001–NMCA–059, ¶¶ 24, 26, 130 N.M. 744, 31 P.3d 1018. "However, to invoke such a presumption of prejudice, there must be an actual, active conflict that adversely affects counsel's trial performance; the mere possibility of a conflict is insufficient." *Id.* ¶ 24. We review de novo whether there is a conflict of interest and whether Defendant is entitled to a presumption of prejudice. *Churchman v. Dorsey*, 1996–NMSC–033, ¶ 11, 122 N.M. 11, 919 P.2d 1076.

{5} An attorney on contract with the public defender department was appointed to represent Defendant, and an attorney from the public defender department originally represented the co-defendant. The charges against Defendant and the co-defendant were ordered consolidated without objection, and on June 20, 2002, the joint trial was scheduled to commence on July 29, 2002, on a trailing docket. However, on July 11, 2002, the co-defendant's attorney was allowed to withdraw because of workload problems in the public defender's office, and a new attorney on contract with the public defender department was subsequently appointed to represent him. As a consequence, the consolidated cases were taken off the July 29, 2002, trailing docket.

{6} The State therefore filed a petition on July 23, 2002, under Rule 5–604 asking for a three-month extension of time to bring Defendant's case to trial because the deadline to bring his case to trial expired at the end of the month. The petition states that Defendant's attorney opposed the requested extension.

{7} The hearing on the State's petition was held on July 29, 2002. The co-defendant's new attorney said that since he was assigned to the case the previous week, he told the district attorney that he was going to need an extension of time to prepare. He therefore did not oppose the State's petition. Defendant's attorney argued against granting the petition. She had cleared her calendar for the trial, and she remained ready to proceed. She pointed out that since his arrest on December 5, 2001, Defendant had been incarcerated because he was unable to post the required $15,000 cash bond. He would have been entitled to be brought to trial within six months, but co-defendant's original attorney raised the issue of his competence. Since the case had already been taken off the July trial docket, Defendant's attorney asserted that the charges against Defendant should be dismissed. Finding good cause under the circumstances, the district judge granted the State's petition, extending the time to bring to trial through October 29, 2002. Defendant remained in custody when the district judge refused to modify the existing conditions of release.

{8} The record does not establish that Defendant's attorney and the co-defendant's new attorney were partners of the same law firm during the applicable time, from July 2002 through September 2002. In fact, the record establishes that in July 2002, Defendant's attorney was using P.O. Box 4280 in Alamogordo, New Mexico, and the co-defendant's new attorney was using P.O. Box 4065 in Alamogordo, New Mexico.

{9} Defendant asks us to consider documents attached to his brief-in-chief and reply brief, which are not part of the record, to establish the factual basis of his claim that his attorney and co-defendant's attorney were partners during the applicable time frame. We decline to do so. Since at least 1928, the rule has been that unless the facts necessary to consider a contention are in the record on appeal, we cannot consider the claim. *See State v. Manzanares,* 33 N.M. 573, 574, 272 P. 565, 565 (1928) (declining to consider sufficiency of evidence "because the record does not contain a bill of exceptions, setting forth the evidence"); *see also State v. Wood,* 117 N.M. 682, 687, 875 P.2d 1113, 1118 (Ct.App.1994) (refusing to consider an exhibit to a brief that was not part of the record proper); *Martinez,* 2001–NMCA–059, ¶ 20 n. 1, 130 N.M. 744, 31 P.3d 1018 ("Because . . . allegations are outside the record proper on appeal, we do not consider them in this opinion.").

{10} The factual basis for Defendant's claim is not found in the record on appeal. We therefore reject it. *See Joanna V.,* 2004–NMSC–024, ¶¶ 7, 17, 136 N.M. 40, 94 P.3d 783 (stating that child failed to demonstrate on the record that her attorney's representation was compromised by an actual, active conflict of interest); *see also State v. Jensen,* 1998–NMCA–034, ¶ 18, 124 N.M. 726, 955 P.2d 195 ("Without a factual basis in the record, even a double-jeopardy claim must be rejected.").

WAIVER OF COUNSEL

{11} Defendant argues that his Sixth Amendment right to counsel was violated because his decision to waive counsel and represent himself was involuntary. Defendant had a Sixth Amendment right to counsel to represent him. As a corollary, Defendant also had a Sixth Amendment right to reject counsel and represent himself. *See State v. Rotibi,* 117 N.M. 108, 110, 869 P.2d 296, 298 (Ct.App.1994); *see also Faretta v. California,* 422 U.S. 806, 836, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *Gideon v. Wainwright,* 372 U.S. 335, 345, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Because Defendant expressed a desire to represent himself, the district judge was required to determine if Defendant was making a "knowing and intelligent" waiver of his right to an attorney and understood fully the dangers of self-representation. *State v. Plouse,* 2003–NMCA–048, ¶ 22, 133 N.M. 495, 64 P.3d 522; *Rotibi,* 117 N.M. at 108, 869 P.2d at 298; *State v. Castillo,* 110 N.M. 54, 57, 791 P.2d 808, 811 (Ct.App.1990) (internal quotation marks omitted). Further, because Defendant was given a clear choice between waiver of counsel and another course of action, the district judge was required to inquire into the voluntariness of Defendant's decision to represent himself. *See Plouse,* 2003–NMCA–048, ¶ 22, 133 N.M. 495, 64 P.3d 522; *Castillo,* 110 N.M. at 56, 791 P.2d at 810. We review de novo whether Defendant's decision to waive counsel was knowingly, intelligently, and voluntarily made. *Plouse,* 2003–NMCA–048, ¶ 21, 133 N.M. 495, 64 P.3d 522.

{12} Defendant's specific argument here is that when his court-appointed attorney was allowed to withdraw, he was presented with a "Hobson's choice" between continued pretrial confinement for an additional four months before newly appointed counsel could be obtained for him or keeping the existing trial setting but with self-representation. Whether a waiver of counsel is valid depends on the facts and circumstances of each case. *See id.* ¶ 27; *State v. Aragon,* 1999–NMCA–060, ¶ 11, 127 N.M. 393, 981 P.2d 1211. We therefore set forth in detail the facts leading to Defendant's decision to represent himself and the substantial efforts undertaken by the district judge to ensure that Defendant's waiver was knowing, intelligent, and voluntary.

{13} After granting the State's petition for an extension of time to commence trial on July 29, 2002, the district judge ordered that

the trial would commence on October 29, 2002. On September 17, 2002, Defendant's attorney filed a motion to withdraw. She stated that client-attorney communications had deteriorated beyond repair, that Defendant had verbally requested that her services be terminated, and that Defendant had written to several judicial agencies complaining about the representation he was receiving and asserting that there was "a conspiracy within the [T]welfth [J]udicial [District] against him."

{14} The motion was heard on September 25, 2002. Defendant's attorney told the district judge that two letters Defendant wrote in August 2002, complaining of her representation, were still being investigated. One letter was written to the Attorney General accusing people of the Twelfth Judicial District of engaging in a conspiracy. In part, it states that in a small community like Alamogordo, attorneys often work with each other in close proximity and exchange roles.

> These parties see each other in the community on a daily basis and are forced out of professionalism as well as civic duty, not to mention natural friendship, to be agreeable and get along. Just the presence of these courtesies would lead one to believe that working and living in this environment would lead to concessions because of the relationships forged in this environment.

The letter continues that such a judicial system is ineffective in dispensing impartial justice.

> In my specific case, the unprofessionalism has gotten to the point of falsified police reports, discovery being withheld, witnesses disappearing, and strategic stalling.

Defendant also wrote a letter to the federal public defender complaining about his representation. However, his attorney declined to disclose the contents of that letter because "it basically sets forth his entire defense."

{15} The district judge stated that if the motion to withdraw was granted, it would inevitably result in a postponement of the October trial setting. He advised Defendant that he was looking at January 2003 before trial could be reset and that he would remain incarcerated until trial because motions to review conditions of release had already been denied twice. When asked if he was aware of that, Defendant responded that he was and added, "I've got in my possession two Motions that I plan on filing this morning, as soon as [counsel] withdraws. One is a Waiver of Counsel, the other one is a Motion to Proceed Pro Se, and we'll go from there." Defendant asserted that it was his desire to represent himself and proceed with the trial setting in October. The district judge continued ruling on the motion to withdraw, took it under advisement, and consolidated it with the hearing on Defendant's expected motion to represent himself.

{16} Defendant's motion to proceed pro se and waiver of counsel were prepared in Defendant's own handwriting. They were filed that same day at the conclusion of the hearing. In the motion to proceed pro se, Defendant asserts that he has a constitutional right to appear and defend himself. The waiver of counsel he wrote states:

> I understand that I am charged with the following offenses: 4 counts of Agg. Assault–4th degree felonies, 1 count of conspiracy–4th degree felony under the law and that if I am found guilty I can be given a severe punishment, including imprisionment (sic) in the New Mexico Penitentiary and a fine.
>
> I understand that under the Constitution of the United States and the State of New Mexico, I have the right to be represented by a lawyer at all stages of the criminal case-before trial, at the trial itself, during proceedings to determine what sentence should be imposed if I am found guilty, and any appeal. I understand that if I am unable to, without undue hardship, to pay for all or a part of the expense of legal representation from available present income and assets, a lawyer will be furnished for me free of charge.
>
> After reading and writing all of the above, I hereby give up my rights to a lawyer in this case, and to have a lawyer furnished for me free of charge, and to have a lawyer from Otero County furnished free of charge if I cannot afford one.

At the end of the pleading Defendant prepared an acknowledgment for the district judge to sign which states, "I find that the Defendant knowingly, voluntarily and intelligently with full awareness of his rights, has waived his right to counsel."

{17} The continued hearing on counsel's motion to withdraw and Defendant's motion to proceed pro se was held on September 30, 2002. The district judge advised Defendant that he was considering appointing standby counsel as he had done in other cases where a defendant exercised his right to self representation.

> And one of the things that stand-by counsel would be able to do is things like get subpoenas issued, arrange for them to be served, do things like request depositions and other practical things that are difficult to do for somebody that's not a lawyer, first of all, and doubly difficult for somebody to do without a lawyer that's in jail.

Defendant thanked the court for its help and added, "[y]es, sir, Your Honor, I'm fully competent to handle this. And please, please let me proceed pro se so that we can get this issue disposed of." Defendant added that he had no objection to a court-appointed standby counsel.

{18} During a recess, the district judge reviewed copies of *Rotibi* and *Castillo,* which were provided by the prosecutor. The district judge then carefully advised Defendant that representing oneself in the courtroom involved technical procedures and that Defendant would have to abide by the same standards in following the rules as an experienced attorney. Defendant was warned that he could fail to object to a question, fail to raise a particular issue or, in some other way, make some mistake that might result in the waiver of various issues. The district judge stated this was his concern and explained that "stand-by counsel is just there to answer questions that you might have and not keep you from making a mistake." Defendant responded:

> Okay. I would like to go on the record for saying I fully understand, I'm competent, I'm intelligent, I don't watch TV. I won't miss anything, I guarantee that, because this is my case. And like I said earlier, I'm very serious about it.
>
> It's my contention that if the D.A. was—was prepared to take this to trial and was confident with their case, they wouldn't be opposing me trying to represent myself.

{19} The district judge then ascertained that Defendant was thirty-nine years old with a high school GED. Defendant stated that he had been to three criminal trials in his life and while he did not represent himself in any of them, "on all of them [he] provided the fact-finding information." Defendant asserted he was familiar with the rules of evidence and the rules of criminal procedure in terms of the order of progress of a criminal trial. Defendant asserted that he understood that if he represented himself, he would not be able to complain about the competency of his representation to the appellate courts. Finally, the district judge reminded Defendant that a lawyer who represents himself has a fool for a client.

{20} The district judge advised Defendant that if his motive was to exercise his constitutional right to represent himself, he could not prevent him from doing so. On the other hand, if Defendant did not believe that the court had provided him with competent representation, a completely different issue was present. The district judge asked Defendant: "Do you want to represent yourself because you could not find anybody else, or are you doing this because the Court has not provided you competent representation?" Defendant answered, "I'm doing it because I don't think anybody else can represent me as good as I can, knowing the facts of my case."

{21} The district judge then made a finding that "Defendant knowingly, intelligently, and voluntarily in full awareness of his rights waived counsel" and the judge signed the acknowledgment Defendant prepared in his own handwriting on the waiver of counsel form. The district judge also said that Defendant's existing attorney "wants to withdraw and stay withdrawn." Defendant replied, "I fully concur with that."

{22} We hold that the district judge scrupulously complied with the requirements of *Plouse,* 2003–NMCA–048, ¶¶ 22–23, 133 N.M.

495, 64 P.3d 522, *Castillo,* 110 N.M. at 57, 791 P.2d at 811, and *State v. Chapman,* 104 N.M. 324, 327, 721 P.2d 392, 395 (1986) to insure that Defendant's waiver of his Sixth Amendment right to counsel was knowing, intelligent, and voluntary. In fact, on the facts before us, if the district judge had denied Defendant's right to proceed pro se, Defendant's constitutional right to represent himself would have been violated. *See Rotibi,* 117 N.M. at 111, 869 P.2d at 299 ("[O]nce it has been determined that the waiver of counsel was 'knowingly and intelligently' made by a defendant, as in this case, the court had no alternative but to allow Defendant to proceed on his own."). We further hold that Defendant was not presented with a "Hobson's choice" between appearing pro se and remaining incarcerated for four months. This record clearly demonstrates that Defendant affirmatively and freely chose to proceed to represent himself at trial without any coercion. *See Plouse,* 2003–NMCA–048, ¶ 31, 133 N.M. 495, 64 P.3d 522 (rejecting a defendant's claim that "he was presented with an 'impossible Hobson's choice' between appearing pro se or proceeding with incompetent counsel" where no matters of record supported a defendant's assertion that his counsel was incompetent or unprepared).

DENIAL OF RIGHT TO EFFECTIVE SELF REPRESENTATION

{23} Defendant contends that he was effectively unrepresented at trial because he was deprived of access to legal materials and his standby counsel was "virtually inactive." This raises a legal issue we review de novo while considering the proceedings as a whole. *See Lytle v. Jordan,* 2001–NMSC–016, ¶¶ 26, 28, 130 N.M. 198, 22 P.3d 666.

{24} Defendant filed a request for relief asking that the court provide "access to the tools needed to prepare and defend himself." The district judge held a hearing on October 16, 2002. Defendant said, "I was being—I was having trouble getting paper and pens and access to the law library. I think we've got that issue pretty much resolved. I'm still having a little problem getting a hold of some case law information that I need to prepare for the trial." Standby counsel, who was appointed on October 10, 2002, told the district judge that the previous week, Defendant sent him an eighteen-page facsimile requesting copies of 156 cases. However, he did not have the ability to generate this number of photocopies in the time remaining before trial. The district judge stated that he had to balance Defendant's need to prepare with security at the detention center and he could not order the detention center to have a guard bring Defendant to the courthouse library at 8:00 a.m. and return him to the detention center at 5:00 p.m. so that he could read the cases in the hope of finding something he could use. The district judge implored,

> [I]f you have specific cases on specific issues [or] that you needed the support of a particular issue, I suggest that you discuss with your stand-by counsel what it is that you're trying to prove. And perhaps [stand-by counsel] is able to, with his experience, to tell you that okay, Case A, B, C, and D aren't going to tell you anything, you need a copy of Case E. And then that will help narrow your search.
>
> And since I don't know what you're seeking to do, I don't want to intrude in your pretrial preparation and compromise the confidentiality of that, so I can't give you any further guidance. All I can do is encourage Detention to give you reasonable access to the law library to make reasonable preparation.

{25} *Rotibi* could be interpreted to mean that an incarcerated defendant who represents himself is entitled to access to a law library because it cites *Bounds v. Smith,* 430 U.S. 817, 828, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977) in discussing the defendant's argument that he had such a right. *Rotibi,* 117 N.M. at 111–12, 869 P.2d at 299–300 ("[T]he Supreme Court held that prisoners' rights to access the courts encompasses either adequate law library facilities or assistance of persons trained in the law."). However, *Rotibi* was not required to analyze the extent to which an incarcerated pro se defendant has a right to access to a law library because the trial court ruled that the defendant would be incarcerated in a facility with a law library

while representing himself. *Id.* at 112, 869 P.2d at 300.

{26} *Bounds* addressed a prisoner's *post-conviction* rights of access to legal materials to collaterally attack his sentence and challenge his conditions of imprisonment. 430 U.S. at 828, 97 S.Ct. 1491; *see Lewis v. Casey,* 518 U.S. 343, 350–51, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (emphasizing that *Bounds* did not establish a right to a law library or to legal assistance, but the right of access to the courts, and stating that "prison law libraries and legal assistance programs are not ends in themselves, but only the means for ensuring 'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts' " (citation omitted)). In contrast, Defendant is a *pretrial* detainee who waived his constitutional right to court-appointed counsel and now argues he was denied access to legal materials to prepare his defense. While this precise situation has not been clarified by the United States Supreme Court, there appear to be two approaches.

{27} First, most federal courts have determined that an accused who refuses representation by counsel is not entitled to access to a law library. The reasoning seems to be that the state satisfies its obligation to an accused under the Sixth Amendment by providing counsel, and that the accused does not have a right to dictate an alternative form of assistance by choosing not to accept counsel's representation. *See, e.g., United States v. Taylor,* 183 F.3d 1199, 1205 (10th Cir.1999) (stating that a "prisoner who voluntarily, knowingly, and intelligently waives his right to counsel in a criminal proceeding is not entitled to access to a law library or other legal materials"); *Degrate v. Godwin,* 84 F.3d 768, 769 (5th Cir.1996) (stating a prisoner who knowingly and voluntarily waives appointed representation by counsel in a criminal proceeding is not entitled to access to a law library); *United States v. Smith,* 907 F.2d 42, 45 (6th Cir.1990) (stating that the state does not have to provide access to a law library to defendants who wish to represent themselves); *United States ex rel. George v. Lane,* 718 F.2d 226, 233 (7th Cir.1983) (stating that the state was not required to offer a defendant law library access once it offered the defendant assistance of counsel, which defendant declined); *United States v. Wilson,* 690 F.2d 1267, 1271 (9th Cir.1982) (stating *Bounds* right of access satisfied when state offered appointed counsel at its expense; defendant could not insist on avenue of his own choosing); *Kelsey v. Minn.,* 622 F.2d 956, 958 (8th Cir.1980) (holding that a prisoner's constitutional right of access to courts did not obligate officials to provide him with an adequate law library where alternative means of satisfying access to courts were available). At least one state agrees with the approach taken by the federal courts. *State v. Brandt,* 135 Idaho 205, 16 P.3d 302, 304 (Ct.App.2001) ("[A]ny prisoner who voluntarily, knowingly, and intelligently waives his or her right to counsel in a criminal proceeding is not entitled . . . to alternative means of access to the courts, including access to a law library or other legal material.").

{28} A second approach is to recognize that a pretrial detainee who has exercised his constitutional right to represent himself nevertheless has a right to reasonable access to state-provided resources that will enable him to prepare a meaningful defense. *State v. Silva,* 107 Wash.App. 605, 27 P.3d 663, 674–75 (2001) states:

> [W]e conclude that [the Washington State Constitution] affords a pretrial detainee who has exercised his constitutional right to represent himself, a right of reasonable access to state provided resources that will enable him to prepare a meaningful pro se defense. What measures are necessary or appropriate to constitute reasonable access lies within the sound discretion of the trial court after consideration of all the circumstances, including, but not limited to, the nature of the charge, the complexity of the issues involved, the need for investigative services, the orderly administration of justice, the fair allocation of judicial resources (i.e., an accused is not entitled to greater resources than he would otherwise receive if he were represented by appointed counsel), legitimate safety and security concerns, and the conduct of the accused.

Id. (footnote omitted).

{29} Defendant has not argued that we should adopt the *Silva* approach as a

matter of our own state's constitutional law, and therefore we do not express any view on the matter. However, even if we were to adopt the *Silva* approach, it would not provide Defendant with any relief in this case. The district judge was sensitive to Defendant's constitutional right to represent himself and to his need to have access to materials to prepare his defense. He exercised his discretion in asking Defendant to consult with his standby counsel to determine which specific cases might assist him and which would not. This was eminently reasonable under the circumstances. Defendant stated he understood what the district judge was suggesting. However, he did not follow the district judge's suggestion, and the record fails to show that Defendant attempted to use any other alternative procedure for obtaining copies of the cases he wanted. Under these circumstances, he may not complain on appeal that he was denied access to legal materials necessary for his defense. *See State v. Peterson,* 103 N.M. 638, 643, 711 P.2d 915, 920 (Ct.App.1985) (noting that the defendant argued that lack of access to detention center's law library precluded him from adequately preparing for trial, but record showed defendant's own lack of due diligence in seeking to obtain access to research materials; when he asked for access to the detention center law library, it was granted); *see also State v. Brockenshire,* 26 Kan. App.2d 902, 995 P.2d 905, 909 (2000) ("When a defendant alleges a violation of his or her right to effectively represent himself or herself, the defendant is required to show actual injury to that right.").

VALIDITY OF NO CONTEST PLEA

{30} Defendant argues his no contest plea is invalid, contending that when he let it be known on the second day of trial that he felt he was in over his head and not capable of further representing himself, he effectively revoked the waiver of his right to counsel, and standby counsel should have been required to assume defense of the case. He further contends he was placed in the impossible position of choosing between his constitutional right to a trial and his constitutional right to counsel. As such, Defendant contends his plea was not knowing and voluntary. In addition, Defendant contends the district judge accepted his no contest plea without establishing a factual basis for the plea. For all these reasons, he argues, reversible error was committed in denying his motion to withdraw his plea.

{31} We review the decision of the district judge in refusing to allow Defendant to withdraw his no contest plea for an abuse of discretion. *See State v. Moore,* 2004–NMCA–035, ¶ 10, 135 N.M. 210, 86 P.3d 635 (stating standard of review is an abuse of discretion when reviewing order denying motion to withdraw guilty plea made prior to sentencing). In this regard, "[a] trial court abuses its discretion when it acts unfairly or arbitrarily, or commits manifest error. 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." *Id.* ¶ 11 (internal quotation marks and citations omitted). Defendant has not argued that any other standard applies to his motion to withdraw his guilty plea. Since we review each case on its own unique facts to determine if a no contest plea is valid, *see State v. Garcia,* 121 N.M. 544, 547, 915 P.2d 300, 303 (1996) (discussing guilty plea), we set forth in detail the facts leading up to Defendant's plea.

{32} Trial commenced on October 22, 2002, with Defendant representing himself. The co-defendant agreed to plead no contest the day before trial, and there was a hearing outside the presence of the jury concerning the scope of his cross-examination without violating his Fifth Amendment rights. Defendant was given the opportunity to discuss with standby counsel the scope of his proposed impeachment of the prosecution's witnesses. Defendant participated in voir dire, challenged prospective jurors for cause, and struck jurors from the panel pursuant to the rules of criminal procedure.

{33} After opening statements, two of the witnesses testified and they were cross-examined by Defendant. Defendant also attempted to impeach the co-defendant by calling him as his own witness.

{34} The following day, the trial continued with testimony from police personnel. After

the last officer testified about how a photographic line up was shown to the victims and Defendant identified, a recess was taken when Defendant said he anticipated a lengthy cross examination.

{35} After the recess, standby counsel stated that Defendant advised standby counsel "that he felt like he was at this point in this trial over his head and not capable of further representing himself." The only possible remedy standby counsel could recommend was for the court to find Defendant incompetent to continue representing himself, declare a mistrial, and retry the case with a new attorney. Counsel added that he did not think it was appropriate to request him to step in at this point of the proceedings and attempt to complete the trial. The district judge agreed, saying,

> Well, the answer is that [Defendant is] going to have to live with his choice to represent himself, and we're not going to change horses in the middle of the stream so to speak.
>
> I regret that—that the difficulties of self representation have only now manifested themselves in their full reality, but I—I cannot let the defendant or anyone create the circumstances to cause his or her own mistrial. That's not going to happen.

Standby counsel requested another recess "to discuss what we were discussing before we were called."

{36} Following the recess, out of the presence of the jury, the district judge announced that Defendant had advised the court he wanted to change his plea. Before proceeding further, however, the district judge assured himself that Defendant had an opportunity to discuss a change of plea with standby counsel. Standby counsel said:

> Your Honor, as I noted just before we had that last recess, Mr. Vincent expressed to me some concerns regarding that he felt incompetent to continue to represent himself, or unable to continue to represent himself in this matter. I expressed those to the Court.
>
> He's asked me what his options are. I've explained to him that he can proceed with this case and then to properly cross examine witnesses against him, or he has the right to stand up and change his plea.
>
> He—I've discussed with him that he is faced with five fourth-degree felonies. Carrying a felony is up to 18 months each, up to a $5,000 fine each, and that he may or may not be subject to a habitual offender prosecution, if he had prior felonies, that that would carry a one-year enhancement for each count.
>
> And Mr. Vincent—I've told him it was his decision to make that decision, and Mr. Vincent came back in here and made his decision (inaudible).
>
> If there's some specific matter that the Court wishes me to inquire of Mr. Vincent or discuss with Mr. Vincent further, I'll go, Your Honor.

{37} The district judge then advised Defendant:

> Mr. Vincent, there's a—a process that I go through and that every judge goes through in terms of someone changing their plea, and I use a written checklist for that purpose. It's designed to satisfy the Court that you understand the potential consequences of pleading—changing your plea and that you understand the Constitutional rights that you've giv[en] up by changing your plea.
>
> Now, this is the first time someone's changed their plea in the middle of a trial. That's happened before in this Court and many other courts, but it's the first time it's happened with me with someone who's self represented. And I—I want to make certain that you are—are doing this as a reasoned decision and not as a panic decision.
>
> I have to make a finding that you're doing this free and knowingly, intelligently, and voluntarily. And as we go through this, if you have any questions, you'll have the opportunity to consult with [standby counsel] about those questions.
>
> If you think you don't want to change your plea, you'll have an opportunity to tell me that as we go through this process.
>
> However, once we finish it, and then I'll go through this form, initial each paragraph, give it to your attorney, who will be

with you, and ask that you both sign it, and then I'll ask that you stand and swear to the fact that we did this in open court here today.

And after we get that far, there won't be any changing or (inaudible) later about your plea.

{38} Defendant thereupon advised the district judge that he wanted to change his plea to all the counts from not guilty to no contest. The following colloquy then occurred:

THE COURT: Mr. Vincent, do you understand what each of those five charges is all about, what the State would have to prove in order for you to be found guilty of each of those?

MR. VINCENT: Yes, sir.

THE COURT: Now, the range of possible sentences in this case, disregarding any question of habitual for the moment, is from a minimum sentence of some sort of probation up to a maximum of two years and a fine of $5,000 on each count, which could be consecutive.

So that would be times five, a maximum of ten years, and $25,000 on each count.

There is a possible sentence for probation up to ten years and fined $25,000. Do you understand that?

MR. VINCENT: Yes, sir.

THE COURT: Of course, each of those fourth-degree felonies is a basic sentence of 18 months, which can be increased by as much as one-third upon a finding of aggravated circumstances. That would make two years each and can be reduced by as much as one-third upon finding and ... any [mitigating] circumstances. So it's actually one to two years on each count. There is no mandatory minimum unless you get into habitual issues.

Now, do you understand how the sentence on each count is computed, Mr. Vincent?

MR. VINCENT: Yes, sir.

THE COURT: Now, if you are sentenced to a term of actual incarceration in the penitentiary, upon sentencing you will be required to serve a mandatory parole term of one year. And if you should violate that parole, you could be subject to additional incarceration for parole violation. Do you understand the mandatory one-year parole charge?

MR. VINCENT: Yes, sir.

THE COURT: In addition, if you have prior felony convictions within the last ten years, the Habitual Criminal Offender Act in New Mexico will apply.

Under that act, if you have one prior felony, your basic sentence on each count will be enhanced by one year. If you've had two prior felonies, your basic sentence on each count will be enhanced by four years. If you have three or more prior felonies, your basic sentence on each count will be enhanced by eight years, which cannot as a matter of law be suspended or deferred.

Do you understand the [provisions] of the Habitual Criminal Offender Act?

MR. VINCENT: Yes, sir.

THE COURT: All right. Now, Mr. Vincent, under New Mexico law, the penalty [provisions] for these offenses is the same whether you're found guilty upon a finding of guilt by a jury or by a plea of no contest or by a guilty plea. The maximum penalty is the same. Do you understand that?

MR. VINCENT: Yes, sir, I do.

THE COURT: Now do you understand, Mr. Vincent, that by pleading no contest at this point that you're waiving or giving up a number of your Constitutional rights?

MR. VINCENT: Yes, sir, I do.

THE COURT: All right. Do you understand that you're giving up your Constitutional right to a trial by jury? You can finish the trial today if you want to.

MR. VINCENT: Yes, sir, I do.

THE COURT: And you understand you're giving up that right?

MR. VINCENT: Yes, sir.

THE COURT: Do you understand that you have the right to be represented by an attorney at all stages of these proceedings and to have a Court-appointed attorney represent you free of charge if you cannot afford one, just as you have the right to represent yourself, that's your choice.

MR. VINCENT: Yes.

THE COURT: Do you understand you're giving up your right to have [stand-by counsel's] assistance through the balance of this trial?

MR. VINCENT: Yes, sir.

THE COURT: All right. Do you understand that when you give up the right to a trial, you're giving up the right to confront (inaudible) to confront and cross examine the witnesses against you?

MR. VINCENT: Yes, sir.

THE COURT: All right. And do you understand you're giving up your right to present evidence on your own behalf and to have the State confront witnesses of your choosing to appear and testify?

MR. VINCENT: Yes, sir.

THE COURT: Do you understand you're giving up your Constitutional right to remain silent and to be presumed innocent until proven guilty beyond a reasonable doubt?

MR. VINCENT: Yes, sir.

THE COURT: And is it your desire to go ahead and give up all of those Constitutional rights and persist in your plea of no contest in this case?

MR. VINCENT: Yes, sir.

THE COURT: Now, you understand that by doing this plea that you're giving up any legal defenses that you might have, any time limit violations, any claims of Constitutional defects that may have arisen in these proceedings, any of these pretrial motions, or any of that stuff. You're waiving or giving up whatever rights may have accrued under those matters? Do you understand that?

MR. VINCENT: Yes, sir.

THE COURT: Okay. Now, has anybody promised you anything, Mr. Vincent, to get you to change your plea in this Court?

MR. VINCENT: No, sir, they haven't.

THE COURT: Has anyone threatened you in any manner or applied any type of force, pressure, coercion to get you to change your plea?

MR. VINCENT: No, sir.

THE COURT: Are you today under the influence of any narcotic drug, controlled substance, alcoholic beverage, or any medications that might affect your competency?

MR. VINCENT: No, sir, I'm not.

THE COURT: Are you presently being treated for any mental illness?

MR. VINCENT: No, sir.

THE COURT: Are you satisfied with the services that you're asking to be provided as stand-by counsel in these proceedings?

MR. VINCENT: Yes, sir, I am.

THE COURT: Now, I need to make certain that you understand what a no contest plea means. A no contest plea means to me that you're not admitting committing these offenses, but you're telling me that you understand what the charges are all about, that you've made the choice of—to do this plea rather than continue with trial, and you acknowledge that if put to the burden, the State would be able to bring in witnesses and other evidence upon which the jury could find you guilty beyond a reasonable doubt. Is that your understanding of what we're doing by this no contest plea here today?

MR. VINCENT: Yes, sir.

THE COURT: The Court finds from the testimony, at least so far, that there is a factual basis for the plea and it's reasonable for the Defendant to enter his plea.

{39} After the change of plea was approved and the jury discharged, Defendant had another conference with standby counsel and standby counsel advised the district judge that Defendant wanted him to take over representing Defendant in the sentencing phase of the case. Defendant formally waived his constitutional right to represent himself further and agreed to proceed with standby counsel as his attorney for the balance of the case. Defendant then filed a motion to change his plea, which was denied.

{40} The district judge scrupulously insured that Defendant's plea was knowing, voluntary, and intelligent, and he did not abuse his discretion in refusing to set aside Defendant's plea. First, Defendant insisted on representing himself, and we have already

held that he made a valid waiver of his Sixth Amendment right to counsel. Once Defendant waived his right to counsel and insisted on his constitutional right to represent himself, it continued through to all subsequent proceedings, unless it was limited to a particular phase of the case or withdrawn. *See People v. Crayton*, 28 Cal.4th 346, 121 Cal. Rptr.2d 580, 48 P.3d 1136, 1145 (Ca.2002) ("Federal authority holds that once a defendant gives a valid waiver [of counsel], it continues through the duration of the proceedings unless it is withdrawn or is limited to a particular phase of the case."); *State v. Lovelace*, 140 Idaho 53, 90 P.3d 278, 289–90 (2003) (stating a competent election by a defendant to represent himself, once made, continues through all further proceedings in the case, unless appointment of counsel for subsequent proceedings is expressly requested or circumstances suggest that waiver was limited to a particular stage of the proceedings); *People v. Baker*, 92 Ill.2d 85, 65 Ill. Dec. 1, 440 N.E.2d 856, 859 (1982) (stating waiver of right to counsel, once made, carries through to all subsequent proceedings unless the defendant later requests counsel or other circumstances suggest that the waiver is limited in scope); *see also State v. Gonzales*, 1997–NMSC–050, ¶ 15, 124 N.M. 171, 947 P.2d 128 (stating a defendant is bound by his waiver of counsel unless he can prove the waiver was ineffective).

{41} Secondly, Defendant never expressly requested that he be allowed to rescind his waiver of counsel, and even if we were to construe Defendant's actions at trial as an express request to order a mistrial so counsel could represent Defendant at a new trial, it was not an abuse of discretion. *See Biglari v. State*, 156 Md.App. 657, 847 A.2d 1239, 1246 (Ct.Spec.App.2004) ("The decision whether to permit mid-trial substitution of counsel is left to the trial court's discretion.") (quoting *State v. Brown*, 342 Md. 404, 676 A.2d 513, 518 (1996) (emphasis omitted)). While an accused has a right to reassert a previously waived right to counsel, it is not without boundaries. One of the boundaries is the orderly administration of justice. *See United States v. Pollani*, 146 F.3d 269, 273 (5th Cir.1998) (reaffirming that a pro se litigant may not abuse the right to reassert a right to counsel "by repeatedly altering his position on counsel to achieve delay or obstruct the orderly administration of justice"); *Stamper v. State*, 809 N.E.2d 352, 354 (Ind. Ct.App.2004) (stating trial courts have discretion to determine whether a defendant may abandon pro se representation and reassert the right to counsel, and setting forth "any disruption or delay in the trial proceedings which might be expected to ensue if the request is granted," as one of the factors to consider). It was not an abuse of discretion not to grant a mistrial after two days of trial simply because Defendant perceived the case was not going his way or "he felt like he was at this point in this trial over his head and not capable of further representing himself." *See Commonwealth v. Bryant*, 579 Pa. 119, 855 A.2d 726, 736 (2004) ("A criminal defendant who knowingly and intelligently waives his right to counsel so that he may represent himself at trial may not later rely upon his own lack of legal expertise as a ground for a new trial.").

{42} The district judge fully complied with the rules of criminal procedure in insuring that Defendant's plea was knowing, voluntary, and intelligent. *See* Rule 5–303(E) and (F) NMRA; *see also State v. Moore*, 2004–NMCA–035, ¶ 13, 135 N.M. 210, 86 P.3d 635 ("A guilty plea does not violate the Due Process Clause where it is made knowingly, voluntarily, and intelligently."). No threats, improper promises, or other forms of wrongful coercion induced Defendant to change his plea. Defendant's decision to plead no contest was his own, freely made, and he was fully aware of the consequences of his plea. There is no constitutional barrier to a pro se defendant changing his plea when he recognizes he made a bad decision to represent himself. If we accepted Defendant's arguments in this case, we would be adopting such a rule. We decline to do so.

{43} Finally, Defendant's argument that the plea is invalid because it was obtained without a factual basis is without merit. A court is not required to inquire into whether there is a factual basis for a no contest plea. *See* Rule 5–304(G) NMRA (stating court must inquire and be satisfied

that there is a factual basis for a "plea of guilty or guilty but mentally ill"); *see also* Rule 5–303 committee commentary ("[U]nlike the case in which the defendant pleads guilty, a court need not inquire into whether or not there is a factual basis for the no contest plea."). Moreover, the district judge heard two of the victims testify, and he presided over Defendant's arraignment, where he had a copy of the affidavit for arrest warrant. *See Bielen v. State,* 265 Ga.App. 865, 595 S.E.2d 543, 545 (2004) (stating that despite a failure to establish a factual basis for a guilty plea as required by rule, there is no manifest injustice warranting a guilty plea to be withdrawn after sentence is imposed where there is evidence in the record establishing a factual basis for the crime).

{44} The district judge properly rejected Defendant's attempt to set aside his no contest plea.

EFFECTIVE ASSISTANCE OF STANDBY COUNSEL

{45} Defendant argues that he was denied his Sixth Amendment Constitutional right to counsel because his counsel refused to perform even the simplest of tasks such as copying cases requested by him, standby counsel's mere passive presence during the trial did nothing to level the playing field, and standby counsel did not take over Defendant's representation during the trial. We review this claim de novo. *See State v. Joanna V.,* 2003–NMCA–100, ¶ 11, 134 N.M. 232, 75 P.3d 832 ("Questions of ineffective assistance of counsel are reviewed de novo."), *aff'd,* 2004–NMSC–024, ¶ 5, 136 N.M. 40, 94 P.3d 783.

{46} Counsel may not be forced upon an accused after he has properly waived his right to counsel and exercised his right to represent himself. *See State v. Lewis,* 104 N.M. 218, 221, 719 P.2d 445, 448 (Ct.App.1986) (recognizing right to represent self on appeal without court-appointed counsel); *Peterson,* 103 N.M. at 642, 711 P.2d at 919 ("Just as surely as a defendant has a right to counsel, he has the right to be free from unwanted counsel."). "However, the trial court may in its discretion, even over the protest of a defendant, appoint 'standby' counsel or advisory counsel to aid defendant if he requests assistance." *Lewis,* 104 N.M. at 221, 719 P.2d at 448 (quoting *Faretta,* 422 U.S. at 834–35 n. 46, 95 S.Ct. 2525). Standby counsel can also be "available to represent the accused if termination of self-representation [becomes] necessary." *Rotibi,* 117 N.M. at 111, 869 P.2d at 299. Beyond these functions, our cases give little guidance on what the obligations and limitations of standby counsel are.

{47} The role of standby counsel was never clearly expressed in this case. After Defendant waived his right to counsel, the district judge stated that he was considering appointing standby counsel to do things like getting subpoenas issued and served and performing similar functions that are extremely difficult to do by someone in jail. The district judge also stated that standby counsel would assist in assuring that Defendant received complete discovery. Another time, the district judge told Defendant that standby counsel would be present to answer questions Defendant might have, but would not keep Defendant from making a mistake in representing himself. The record does not show what specific instructions, if any, the district judge gave to standby counsel on what his role would be when he was appointed.

{48} Standby counsel was appointed to aid Defendant in his pro se defense. However, there is no federal constitutional right to standby counsel, *see State v. DeWeese,* 117 Wash.2d 369, 816 P.2d 1, 6 (1991) (en banc), and once a defendant has validly waived his right to counsel, he may not later demand the assistance of counsel as a matter of right. *Id.; State v. Canedo–Astorga,* 79 Wash.App. 518, 903 P.2d 500, 504 (1995).

{49} This record only demonstrates that Defendant asked standby counsel to photocopy cases for him and defense counsel was not able to comply with his request, given the volume of cases involved and the limited time. Standby counsel is not to act as an errand runner for a defendant, he is not a defendant's personal paralegal assistant, and he is not required to perform unreasonable, irrelevant, and time consuming errands and research requests. *See Silva,*

27 P.3d at 677. To ensure adequate access to the tools necessary to prepare a defense, we adopt the following standard from *Silva:*

> [A] trial court may, upon a proper showing, order standby counsel to do any or all of the following:
>
> 1) Act as a liaison between the accused and the court or prosecutor in confirming motions, coordinating discovery, interviews, etc.;
> 2) Provide forms, including subpoena forms, court forms, etc.;
> 3) Assist in securing an investigator, if necessary; and
> 4) Any other duties logically associated with appointed counsel that would satisfy the accused's right of access to tools necessary to prepare an adequate pro se defense.

Id. at 678.

{50} This record does not demonstrate Defendant was denied adequate access to the tools necessary to prepare a defense by the actions of his standby counsel. We therefore reject Defendant's arguments under this point.

CONCLUSION

{51} We affirm Defendant's judgment and sentence.

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

WE CONCUR: A. JOSEPH ALARID and LYNN PICKARD, Judges.

2005-NMCA-062

112 P.3d 1134

STATE of New Mexico, Plaintiff–Appellee,

v.

Charles MAESTAS, Defendant–Appellant.

No. 24507.

Court of Appeals of New Mexico.

March 28, 2005.

Certiorari Granted, No. 29,178, May 20, 2005.

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

David Henderson, Downing & Henderson, P.C., Santa Fe, for Appellant.

OPINION

FRY, J.

{1} In this appeal we consider whether coercion is an essential element of second

degree criminal sexual penetration perpetrated in the commission of another felony (CSP II (felony)), contrary to NMSA 1978, § 30–9–11(D)(5) (2003). Defendant Charles Maestas, who was an Española municipal judge at the time of the charged events, appeals his convictions of five counts of requesting or receiving sexual favors "conditioned upon or given in exchange for promised performance of an official act" (official acts prohibited), NMSA 1978, § 10–16–3(D) (1993), a fourth degree felony, and five counts of CSP II (felony). The underlying felony for each CSP II conviction was official acts prohibited. We conclude coercion is not an essential element of CSP II (felony). We also find no error in the trial court's evidentiary rulings and affirm Defendant's convictions.

BACKGROUND

{2} Defendant's convictions arose from allegations that he accepted sexual favors from Victim in exchange for leniency in the resolution of charges against Victim in municipal court. At trial, Defendant's theory was that Victim plotted to seduce Defendant and then falsely claimed that Defendant coerced her into various sex acts so that she could sue Defendant's employer, the City of Espanola, for violation of her civil rights.

{3} In support of his theory, Defendant presented evidence that Victim heard rumors that Defendant was giving preferential treatment to women in the city jail in exchange for sexual favors. Several months later, when Victim had several traffic charges pending before Defendant, Victim hid a tape recorder under her clothing and recorded two sexual encounters with Defendant. There was also evidence that Victim was gleeful when she learned about Defendant's subsequent arrest and said, "We got him."

{4} The State presented evidence supporting a different theory. Victim testified that she first appeared before Defendant in municipal court on several traffic code violations. Victim pleaded guilty, whereupon Defendant told Victim to come with him to his office. Defendant told Victim that she faced possible jail time of seventy to ninety days and about $700 in fines. Victim began crying. When she got up to leave, Defendant took her hand and said, "[M]aybe you could do something for me to take away your fines and you won't go to jail." Victim understood that Defendant was asking her for sex. She initially declined, but she was afraid Defendant would take her children away "because I knew he has the power to take them away because he's a Judge." Victim told Defendant she would have to think about it, and Defendant told Victim to ask the court clerk to set another court date.

{5} Although it is unclear what happened between this first encounter in Defendant's office and the first sexual encounter, at some point following the initial court date, according to Victim, Defendant picked Victim up at her office and took her to his house, where they had sexual intercourse. Because Victim had complied with Defendant's request for sex, she testified, "I figured he would drop everything [and] my kids wouldn't get taken away[.]"

{6} Sometime later, in response to a mailed notice, Victim went back to court, where Defendant talked to Victim (presumably in Defendant's office) about helping her with her fines. She told Defendant she thought her fines were cleared, and Defendant told her they were not. He then asked Victim to do him a favor, closed the door, and asked her to perform oral sex; Victim complied. Defendant then told Victim to make another court date.

{7} Victim testified about two other incidents when Defendant picked her up. On one occasion he took her to his house, and on another, Defendant took Victim in his vehicle to an area near the community college, where he parked. On both occasions Defendant asked Victim for oral sex, and Victim complied. On another occasion, Defendant came to Victim's office and asked for oral sex, which Victim performed in Defendant's truck. While these encounters were taking place, nothing was happening with Victim's court case. She kept appearing in court, but nothing was dropped.

{8} At about this time, Victim heard from a friend that Defendant had done something similar to another woman, so Victim decided to tape-record Defendant. Victim

recorded Defendant once at his office and once at his house.

{9} On the first tape, Defendant and Victim discussed Victim's fines, potential jail time, and suspended driver's license. Defendant told Victim that if she would get her license cleared up, he would assess only $17 in fees on each charge for a total of $68. Defendant then commented on Victim's breasts and lips. He scheduled Victim's next court date and said, "We'll see if we can try and get together before that.... Give me a call when you're ready."

{10} On the second tape, Victim stated that she was at Defendant's house, waiting for him. When Defendant arrived, Victim asked, "Okay what am I going to get out of this? ... Will you lower my fines?" Defendant responded, "Oh yeah." A sex act then ensued, the two said goodbye, and Victim stated on the tape, "I just exchanged ... giving head to the judge to change my[,] to lower my fines."

{11} The audiotapes made by Victim ultimately led to Defendant's arrest. He was charged with six counts each of CSP, extortion, and official acts prohibited, which corresponded with the six sexual encounters Victim reported. Several other women then alleged that they had also performed sexual favors for Defendant in exchange for lenient treatment in court, and these allegations gave rise to additional charges.

{12} At trial, the court instructed the jury on ten counts of sexual misconduct involving three women, nine counts of extortion, eight counts of official acts prohibited, and one count of stalking. The jury acquitted Defendant of all charges pertaining to the women other than Victim. With respect to Victim, the jury convicted Defendant of five counts of official acts prohibited and five counts of CSP II (felony), and it acquitted him of one count of CSP, one count of criminal sexual contact, one count of official acts prohibited, and all counts of extortion. We discuss additional background information in our analysis of the appellate issues.

DISCUSSION

Jury Instructions

{13} Defendant argues the jury instructions on the elements of CSP II (felony) were flawed because they did not tell the jury it could only convict Defendant if it found that Defendant coerced Victim into engaging in the various sex acts alleged. Defendant contends that, even if the jury agreed with his view of the evidence—i.e., that Victim enticed Defendant into having sex and that the sex was therefore consensual—the jury instructions nonetheless compelled the jury to convict Defendant.

{14} The issue of whether a given jury instruction is proper presents a mixed question of law and fact, which we review de novo. *State v. Gaitan*, 2002–NMSC–007, ¶ 10, 131 N.M. 758, 42 P.3d 1207; *State v. Salazar*, 1997–NMSC–044, ¶ 49, 123 N.M. 778, 945 P.2d 996. A jury instruction is proper, and nothing more is required, if it fairly and accurately presents the law. *State v. Duncan*, 113 N.M. 637, 644, 830 P.2d 554, 561 (Ct.App.1990). "We review [the] instructions to determine whether a reasonable juror would have been confused or misdirected by the jury instructions." *State v. Montoya*, 2003–NMSC–004, ¶ 23, 133 N.M. 84, 61 P.3d 793; *State v. Benally*, 2001–NMSC–033, ¶ 12, 131 N.M. 258, 34 P.3d 1134. "[J]uror confusion or misdirection may stem not only from instructions that are facially contradictory or ambiguous, but from instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law." *Id.*

{15} We limit our review to the instructions pertaining to Victim because only those instructions gave rise to convictions. The trial court instructed the jury that, with respect to each count of CSP, there were three alternatives, including CSP II (felony), where the underlying felony was official acts prohibited. The jury did not arrive at a verdict on the other alternatives, so we are concerned only with the instruction on CSP II (felony; official acts prohibited), which reads as follows:

> For you to find the Defendant guilty of criminal sexual penetration while committing another felony as charged in the alternative to Count [__], the State must prove to your satisfaction beyond a reasonable

doubt each of the following elements of the crime:

1. The Defendant caused [Victim] to engage in [sex act];
2. The Defendant committed the act during the commission of violating official acts prohibited; . . .
3. This happened in New Mexico on or about . . . [date].

This instruction referred the jury to another instruction that defined official acts prohibited as follows:

1. That the defendant requested or received a thing of value from [Victim];
2. That the thing of value was given in exchange for a promised performance by the Defendant of an official act;
3. This happened in New Mexico on or about . . . [date].

{16} Defendant argues, and we agree, that CSP II (felony) is a "compound crime" like felony murder. *State v. Tsethlikai,* 109 N.M. 371, 373, 785 P.2d 282, 284 (Ct.App.1989) (stating that a compound crime consists of two crimes, a predicate offense that is a prerequisite and the compound offense itself). Thus, he argues that in order to prove CSP II (felony), the State had to prove the elements of third degree CSP (CSP III) *plus* the elements of the underlying felony. CSP III is statutorily defined as "all criminal sexual penetration perpetrated through the use of force or coercion." § 30–9–11(E). Therefore, Defendant contends the State had to prove CSP perpetrated through force or coercion plus the elements of the underlying felony. Because the concept of force or coercion was not mentioned in either the instruction on the elements of CSP II (felony; official acts prohibited) or the instruction on the elements of official acts prohibited, Defendant maintains the instructions lacked an essential element and resulted in jury confusion and an erroneous conviction.

{17} We disagree with the premise underlying Defendant's logic—that proof of the elements of CSP III is necessary in order to prove CSP II (felony). We reach this conclusion through an examination of the governing statute. § 30–9–11.

{18} Section 30–9–11(A) defines the base crime of criminal sexual penetration as "the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission." This definition says nothing about force or coercion; instead, it speaks in terms of "causing" a person to engage in a sex act.

{19} Section 30–9–11(D) then defines second degree CSP, which is at issue here, as follows:

D. Criminal sexual penetration in the second degree consists of all criminal sexual penetration perpetrated:

(1) on a child thirteen to eighteen years of age when the perpetrator is in a position of authority over the child and uses this authority to coerce the child to submit;

(2) on an inmate confined in a correctional facility or jail when the perpetrator is in a position of authority over the inmate;

(3) by the use of force or coercion that results in personal injury to the victim;

(4) by the use of force or coercion when the perpetrator is aided or abetted by one or more persons;

(5) in the commission of any other felony; or

(6) when the perpetrator is armed with a deadly weapon.

{20} We first observe that force or coercion is an express element of only three out of the six alternative grounds for CSP II. Under a guiding principle of statutory construction, it appears that the legislature knew how to require the element of force or coercion and yet chose not to include it when the crime is perpetrated on an inmate, § 30–9–11(D)(2), in the commission of any other felony, § 30–9–11(D)(5), or when the accused is armed with a deadly weapon, § 30–9–11(D)(6). *See State v. Davis,* 2003–NMSC–022, ¶ 6, 134 N.M. 172, 74 P.3d 1064 (explaining that in ascertaining legislative intent we start by looking at the words chosen by the legislature). Because the legislature omitted from the definition of CSP II (felony) a re-

quirement for force or coercion, we cannot agree with Defendant that the legislature intended that CSP II (felony) necessarily includes the elements of CSP III, which is defined as all CSP "perpetrated through the use of force or coercion." § 30-9-11(E). This omission of any requirement of force or coercion is even more striking in the context of CSP I (on a child under thirteen years of age). If Defendant is correct in this case, then force or coercion is also required for CSP I, which we are certain the legislature did not intend.

{21} Defendant relies on various New Mexico cases to support his position that force or coercion is an essential element of CSP II (felony). We are not persuaded. It is true that in *State v. Pisio,* 119 N.M. 252, 889 P.2d 860 (Ct.App.1994), we said that "unless there is force or coercion beyond that inherent in almost every CSP, the proper charge is CSP III." *Id.* at 259, 889 P.2d at 867. However, in *Pisio,* we were discussing whether the trial court should have instructed the jury that CSP III was a lesser included offense of CSP II (felony) and that false imprisonment was a lesser included offense of kidnaping under the circumstances of that case. *Id.* at 259-60, 889 P.2d at 867-68. Similarly, in *State v. Corneau,* 109 N.M. 81, 85-87, 781 P.2d 1159, 1163-65 (Ct.App.1989), our discussion of the force used to perform the act of CSP was in the context of determining whether charges of false imprisonment and CSP II (felony; false imprisonment) violated the prohibition against double jeopardy. In neither case were we confronted with the issue presented here. *See Ramirez v. Dawson Prod. Partners, Inc.,* 2000-NMCA-011, ¶10, 128 N.M. 601, 995 P.2d 1043 (explaining that "cases are not authority for propositions they do not consider").

{22} Other cases on which Defendant relies are similarly distinguishable. *State v. Lucero,* 118 N.M. 696, 884 P.2d 1175 (Ct.App. 1994), and *State v. Johnson,* 102 N.M. 110, 692 P.2d 35 (Ct.App.1984), *overruled in part on other grounds by Manlove v. Sullivan,* 108 N.M. 471, 775 P.2d 237 (1989), unlike the present case, each involved a conviction for CSP III. *State v. Gillette,* 102 N.M. 695, 699 P.2d 626 (Ct.App.1985), concerned CSP II where the victim was a minor and the perpetrator was in a position of authority and used his authority to coerce the child's submission, charged under what is now Section 30-9-11(D)(1). *Gillette,* 102 N.M. at 698, 702, 699 P.2d at 629, 633. As noted, this form of CSP II requires coercion, while the statutory language defining CSP II (felony) does not.

{23} Defendant next points to the contrast between the elements of the crimes with which he was alternatively charged—CSP II (felony; extortion) and CSP III—and the crime of which he was convicted, CSP II (felony; official acts prohibited). He contends that the instructions for both CSP II (felony; extortion) and CSP III required an element of coercion, while the instructions for CSP II (felony; official acts prohibited) did not. In order to convict Defendant of CSP II (felony; extortion), the jury would have had to find that (1) "Defendant caused [Victim] to engage in [a specified sex act]" committed "during the commission of extortion;" and (2) "Defendant used threats of fines, jail and/or to separate her from her children, intending to wrongfully compel [Victim] to do something she would not have done, to-wit: engage in [the sex act]." In order to return a conviction for CSP III, the jury would have had to find that "Defendant caused [Victim] to engage in [a specified sex act,] . . . used threats of fines, jail and/or to separate her from her children" and that Victim believed Defendant would carry out the threats. Thus, because the instructions for CSP II (felony; extortion) and CSP III contained elements of coercion, and because the instruction for CSP II (felony; official acts prohibited) did not, Defendant argues that, even if the jury believed all of Victim's sexual contact with Defendant was purely consensual, it makes sense that the jury could have acquitted Defendant of CSP II (felony; extortion) and CSP III, and yet also convicted him of CSP II (felony; official acts prohibited). Defendant contends the only logical conclusion is that coercion must also be an essential element of CSP II (felony; official acts prohibited).

{24} We disagree. Defendant overlooks those parts of the CSP II (felony; official acts prohibited) instructions requiring the

jury to find that Defendant *caused* Victim to engage in the various sex acts and that the acts occurred *during* the commission of the underlying felony. The emphasized words constitute a requirement that there be a causal connection between the felony and the sex act. This requirement is enough to insure that an accused will not be convicted for engaging in purely consensual sex.

{25} Our Supreme Court has analyzed the requirement for a causal connection in the analogous context of felony murder. Felony murder consists of "all murder perpetrated: ... in the commission of or attempt to commit any felony[.]" *State v. Harrison,* 90 N.M. 439, 441, 564 P.2d 1321, 1323 (1977), *superseded by rule on other grounds as stated in Tafoya v. Baca,* 103 N.M. 56, 60, 702 P.2d 1001, 1005 (1985). Thus, "there must be a causal relationship between the felony and the homicide[.]" *Id.* In defining what causal relationship is necessary, the Court stated that "causation must be physical; causation consists of those acts of [the] defendant or his accomplice initiating and leading to the homicide without an independent force intervening, even though [the] defendant's or his accomplice's acts are unintentional or accidental." *Id.* at 441–42, 564 P.2d at 1323–24 (footnote omitted).

{26} We hold that force or coercion is not an essential element of CSP II (felony). Through its definitions of CSP II, the legislature intended to punish those who participate in certain sexual activity, even without force or coercion, when the participant is in a position of authority over an inmate, when the participant is armed with a deadly weapon, or when the sex act is caused by the defendant in the commission of any other felony. Although some felonies underlying CSP II (felony) may themselves require force or coercion, not all felonies will require such force or coercion. The legislature did not limit CSP II to only felonies involving force or coercion, but simply required that the CSP be caused by the defendant "in the commission of any other felony." § 30–9–11(D)(5). It is apparent, then, that "any other felony" includes felonies that have no element of force or coercion and, therefore, any felony may serve as the underlying felony for a conviction of CSP II (felony). The legislature has determined as a matter of policy that sex acts occurring in certain specified contexts are more blameworthy than CSP III, and we will not second guess that determination. *See Torres v. State,* 119 N.M. 609, 612, 894 P.2d 386, 389 (1995) ("[I]t is the particular domain of the legislature, as the voice of the people, to make public policy.").

{27} Defendant's final argument attacking the jury instructions relies on affidavits signed by six jurors after the jury rendered its verdict and had been discharged. The affidavits generally state that the jurors did not vote to convict Defendant of "Criminal Sexual Penetration, rape or extortion for sex." Defendant argues that these affidavits corroborate the jury's acquittal of Defendant on certain other charges and demonstrate the jury's confusion.

{28} We do not agree. First, apart from the affidavits, the record does not indicate that the jury acquitted Defendant of the charges on which he relies. In fact, the record reflects neither acquittal nor conviction on these charges, which were presented to the jury in the instructions and one verdict form as alternatives to the CSP II charge on which Defendant was convicted. Second, it is settled law that jurors may not impeach their verdict by affidavit after they are discharged. *Lamkin v. Garcia,* 106 N.M. 60, 62, 738 P.2d 932, 935 (Ct.App.1987); *see also,* Rule 11–606(B) NMRA (prohibiting a juror from testifying "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 ... or concerning the juror's mental processes in connection therewith, [the verdict]"). The only exception to this rule permits a juror to testify regarding "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." *Id.* This exception does not apply in this case.

Testimony of Witness Lisak

{29} Defendant argues the trial court erroneously permitted Dr. David Lisak to testi-

fy for the State as a rebuttal witness. He argues that Lisak's testimony did not provide "reliable [or] relevant assistance to the jury of any material factual issue." Defendant appears to be contending that Lisak's testimony should have been excluded on the ground that the State failed to establish (1) the reliability of the scientific method relied upon and (2) that the testimony would assist the jury. *See State v. Alberico,* 116 N.M. 156, 166–68, 861 P.2d 192, 202–04 (1993) (explaining that expert testimony should not be admitted unless the expert is qualified, the testimony will assist the trier of fact, and the expert will testify regarding scientific or other specialized knowledge).

{30} The State claims Defendant failed to preserve this argument below. However, it is clear from the record that the State and the trial court knew Defendant was making an *Alberico*-type objection, and that the trial court directed the prosecutor to attempt to lay an appropriate foundation. *See State v. Varela,* 1999–NMSC–045, ¶ 26, 128 N.M. 454, 993 P.2d 1280 (explaining that in order to preserve an issue for appeal, the defendant must make a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling on the objection). We conclude Defendant preserved his objection, and we review the trial court's admission of the evidence for abuse of discretion. *State v. Woodward,* 121 N.M. 1, 4, 908 P.2d 231, 234 (1995).

{31} Outside the presence of the jury, Lisak testified to his qualifications, which Defendant does not challenge. Lisak then testified that the scientific understanding of the impact of trauma on victims comes from forty years of observational study of victims of sexual trauma, domestic violence, or combat trauma. These studies have been published in peer-reviewed journals for decades. In addition, the results of these studies are taught at the university level. He explained that he had been asked to testify regarding how certain characteristics make victims more or less vulnerable to victimization, how victims respond to threats, and how trauma affects memory.

{32} The trial court concluded that Lisak's testimony could be helpful to the jury, and, in the presence of the jury, Lisak testified that the more vulnerable a person is—whether due to financial concerns, lack of educational opportunity, legal troubles, lack of family support, or a history of substance abuse or prior victimization—the more vulnerable that person is to victimization. He also testified that if a perpetrator has more power than the victim, it is easier for the perpetrator to commit an assault, such as a sexual assault, on the victim. In fact, if there is a significant power differential, the perpetrator can communicate a threat with a glance or a gesture. Finally, Lisak testified that studies show that victims of trauma tend to remember the core details of the trauma very clearly, but the peripheral details of the trauma tend to be lost.

{33} The trial court did not abuse its discretion in admitting this testimony. Lisak's testimony established that the scientific observation of victims has been going on for decades and that the results of those studies have been peer-reviewed and taught for an equally long period of time. This testimony reasonably supported the reliability of the general conclusions Lisak stated. *See State v. Torres,* 1999–NMSC–010, ¶ 25, 127 N.M. 20, 976 P.2d 20 (explaining that, in considering the reliability of scientific evidence, a trial court should consider whether a theory has been tested, subjected to peer review, subjected to standards, and whether it is generally accepted in the field). In addition, we do not agree with Defendant that these conclusions "were not tethered in a reliable way to [a] factual proposition at issue." Lisak's testimony could have helped the jury to understand why the alleged victims may have agreed to provide sexual favors to Defendant, and consequently, the testimony may have assisted the jury in deciding the ultimate factual question of guilt or innocence.

Exclusion of Evidence of Prostitution

{34} Defendant claims the trial court violated his right of confrontation and his right to present evidence in his own defense when it excluded evidence that Victim ran a house

of prostitution. In a motion in limine, Defendant stated that he sought to cross-examine Victim on this issue and to ask another witness, Leroy Salazar, whether he had evicted Victim from public housing for running a brothel.

{35} We note at the outset that Defendant cites no case law on the substance of these issues and presents only a cursory argument in support of his contentions. We therefore address Defendant's arguments in similar, summary fashion.

{36} In determining whether the trial court unduly restricted Defendant's right to cross-examine Victim, we undertake de novo review. *State v. Martinez,* 1996–NMCA–109, ¶ 14, 122 N.M. 476, 927 P.2d 31. "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *State v. Gonzales,* 1999–NMSC–033, ¶ 22, 128 N.M. 44, 989 P.2d 419 (internal quotation marks and citations omitted). Here, as best we can tell from the record, the trial court excluded any mention of Victim's alleged prostitution because Defendant failed to meet his burden under the so-called rape shield law. *See* NMSA 1978, § 30–9–16(A) (1993) (precluding admission of evidence of a victim's past sexual conduct unless the trial court determines that "the evidence is material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value"). Because defense counsel laid the foundation for admission of this evidence during an in camera hearing that does not appear in the record, we are unable to assess the propriety of the trial court's determination that Defendant failed to meet his burden. We therefore indulge every presumption "in favor of the correctness and regularity of the lower court's judgment." *In re Ernesto M., Jr.,* 1996–NMCA–039, ¶ 19, 121 N.M. 562, 915 P.2d 318.

{37} Similarly, with respect to Defendant's intention to ask witness Salazar on direct about Victim's alleged prostitution, we review the trial court's exclusion of this evidence for abuse of discretion. *Woodward,* 121 N.M. at 4, 908 P.2d at 234. It appears the trial court relied on the same ground for excluding this testimony—Defendant's failure to meet his burden under the rape shield law. In order to present evidence of Victim's alleged prostitution, Defendant had to establish that the evidence was material and that its prejudicial effect did not outweigh its probative value. § 30–9–16(A). While this evidence was certainly relevant to Defendant's theory of the case, which portrayed Victim as the instigator of the sex acts in question, without the benefit of a complete record of the relevant hearing, we cannot say the trial court abused its discretion if it concluded that the evidence's inflammatory nature outweighed its probative value. *See State v. Jim,* 107 N.M. 779, 780, 765 P.2d 195, 196 (Ct.App.1988) ("It is the defendant's burden to bring up a record sufficient for review of the issues he raises on appeal.").

CONCLUSION

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

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

PICKARD and CASTILLO, JJ., concur.

2005-NMCA-058

112 P.3d 1142

Floyd H. GRANT, III, Petitioner–Appellee/Cross–Appellant,

v.

Leslie D. CUMIFORD, f/k/a Leslie D. Interrante, Respondent–Appellant/Cross–Appellee.

No. 24,445.

Court of Appeals of New Mexico.

March 31, 2005.

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Sandra Morgan Little, Les W. Sandoval, Little & Gilman–Tepper, P.A., Albuquerque, NM, for Appellee/Cross–Appellant.

Leslie D. Cumiford, Albuquerque, NM, Pro Se Appellant/Cross–Appellee.

OPINION

BUSTAMANTE, Chief Judge.

{1} Both Mother and Father appeal from the district court's custody, timeshare, and child support order that arose from Father's motion to modify custody, timesharing, and support. The district court sealed the trial on the merits, but allowed a local television station to attend and televise the proceedings, while prohibiting the release of the recording. The court determined that there had been no material change in circumstances to warrant a change in legal and

physical custody, but clarified timesharing and support responsibilities of the parents and ordered the parties to pay their own attorney fees. The court also ordered Father to pay Mother's share of the guardian ad litem's (GAL) fees and to deduct that amount from his support responsibilities. Mother appeals the rulings on child support and attorney fees; Father appeals the custody ruling. Both parents challenge different aspects of the court's rulings sealing the hearing but permitting television cameras in the courtroom. We affirm the court's custody ruling, but for the reasons that follow, we reverse and remand the support issues. In light of our rulings, we also reverse and remand the issue of attorney fees.

BACKGROUND

{2} Father and Mother were never married, but had a child on November 2, 1994. On April 22, 1996, the district court entered a stipulated judgment and decree of custody and child support giving the parents joint legal custody. By that time, Mother and Child were living in Albuquerque, and Father was living in Norman, Oklahoma. The order provided that Mother would have primary physical custody and Father would have periods of visitation, but stated that Child would not sleep away from his own bed and/or Mother until he was at least two and one-half years old. Evidence was presented at trial that Child made his first visit to Oklahoma in December 1998. Between 1999 and 2000, Child made approximately two visits to Oklahoma, with his parents meeting in Amarillo, Texas to transfer him from one parent to the other. In the summer of 2001, when Child was six, he began to fly to Oklahoma, and in the summer of 2002, Father told Mother that he wanted Child to spend most of the summer with him, but Mother wanted Child to stay in Oklahoma for only two to three weeks. Father testified that negotiations about visits became increasingly difficult, and in June 2002 he filed a motion to modify custody due to a significant change in circumstances. In his motion to modify custody, Father sought primary physical custody, claiming that Child wanted to spend more time with him and that Mother was failing to comply with the provisions of the 1996 decree. Father requested the appointment of an expert under Rule 11–706 NMRA to conduct a custody evaluation and to make recommendations as to Child's best interests.

{3} Following the filing of Father's motion to modify custody, the relationship between Child's parents appears to have become increasingly contentious, and a GAL was appointed to represent Child's best interests. Then in November 2002, the court appointed an expert under Rule 11–706 to perform a custody evaluation. The court-appointed expert completed the psychological evaluation and parenting plan on March 14, 2003, which recommended a continuation of joint legal custody and primary residence with Mother.

{4} By this time, numerous motions had been filed, alleging claims by Father that Mother was not complying with the joint custody and visitation provisions, allegations by the GAL that Mother had made unsubstantiated claims of sexual abuse against Father, and claims by Mother that the GAL was hostile to her and not objective. The conflict between the parties culminated in Father's filing a motion on March 13, 2003, to modify joint legal custody and award sole legal custody to Father. A hearing on this motion was set for April 29, 2003.

{5} On April 7, 2003, Mother moved to adopt the March 14 parenting plan recommended by the court-appointed expert with only one change concerning the return date from summer vacation. Father objected to this change and requested a two-day evidentiary hearing on the parenting plan. Father and the GAL then filed additional motions alleging that Mother had refused to take Child to see a therapist and refused to allow Father telephone access to Child. At the hearing on April 29, 2003, the court appointed a therapist for Child, ordered the parties to follow the recommendations of the court-appointed expert on a temporary basis, ordered the parties to attend a facilitation before trial, and set a trial date for August 20–21, 2003. The court also ordered that all pending motions would be heard at trial.

{6} On May 16, 2003, however, the GAL filed an emergency motion to transfer custody from Mother to Father in Oklahoma. In this motion, the GAL made the following

allegations: that Mother had unreasonably attempted to block Father's time with Child; that Mother had gone to great lengths to prevent Father from having a meaningful relationship with Child; that Mother had falsely accused Father of being a pedophile; that Mother had turned against the GAL and the court's expert for failing to accept her accusations; that Mother refused to take Child to therapy when the therapist did not accept Mother's accusations; that Father, whom the GAL found credible, had reported Mother was obstructing Father from communicating with Child; that by enrolling Child in a karate program, Mother was attempting to influence Child's feelings about going to Oklahoma; that Mother had claimed Father had convictions for driving while intoxicated and later acknowledged this was not true; that Mother's home was toxic and she should receive only supervised visitation; and that Mother had been uncooperative in general with the GAL. On May 20, 2003, a day before the hearing on the GAL's motion, the court-appointed expert issued an addendum to his psychological evaluation, in which he recommended that Father have temporary sole legal and physical custody of Child for the summer.

{7} Following a hearing on the GAL's motion, held on May 21, 2003, a week before Child was due to go to Oklahoma for the summer, the court entered a minute order awarding immediate, sole, temporary custody of Child to Father in Oklahoma and awarding one week of supervised visitation to Mother in July. A week after Child left for Oklahoma, Father filed a motion to modify Mother's summer visitation, requesting that Mother travel to Oklahoma and be supervised at all times. The motion alleged that Mother had published a flyer claiming that Child had been removed from her home without notice and without justification. At a hearing held on June 4, 2003, the court ordered that the GAL had authority to determine whether summer visitation should be modified and noted that the GAL did not intend to modify the visitation at that time.

{8} The GAL initially determined that Child should visit Mother in Albuquerque for seven days from August 3, 2003. However, on July 18, 2003, the GAL filed a report recommending the visit be changed to coincide with Father's trip to Albuquerque for court-ordered mediation from July 30, 2003, until August 2, 2003. Because Mother was also ordered to participate in the mediation at this time, her access to Child was to be restricted to the evenings until Father picked up Child and took him to a hotel. In addition, the GAL recommended that all of Mother's visitation be supervised.

{9} On August 11, 2003, the court-appointed expert issued a second addendum to his psychological evaluation, recommending that Father have sole legal custody of Child and Mother have a limited amount of visitation. Less than a week before the trial on the merits, held on August 20–25, 2003, the GAL filed a motion to exclude televised media from the hearing and a motion to seal the hearing on the merits. The court denied the motion to exclude the media, but ordered that the media could "not release the outtakes of the footage to any party or nonparty in this matter." The court also sealed the hearing to all who did not have a direct interest in the matter.

{10} Following the trial, the court ruled that there had not been a material change in circumstances since the 1996 stipulated judgment warranting a change in legal and physical custody. In addition to clarifying timesharing arrangements, the court ordered Father to pay sixty percent and Mother forty percent of Child's support. The court also abated Father's support by one-half for June and July 2003, when Child would be with Father. The parties were ordered to pay the court expert and the GAL fees in the same proportion as child support. In addition, the court ordered Father to pay Mother's share of the GAL fees and then to deduct up to $300 per month from child support to offset those payments. The parties were ordered to pay their own attorney fees. This appeal and cross-appeal followed.

{11} We include the remaining facts pertinent to each appellate issue in our discussion.

DISCUSSION

{12} Mother raises five issues in her appeal: whether the district court (1) abused

its discretion in ordering both parties to pay their own attorney fees, (2) erred in imputing salary to Mother, (3) erred in ordering Father to pay the GAL fees and to deduct Mother's portion from child support payments, (4) improperly abated Father's summer child support payments on an annual basis, and (5) improperly sealed the hearing on the merits. Father raises two issues in his cross-appeal: whether the court abused its discretion in (1) failing to modify custody; and (2) allowing the news media to be present in the courtroom. Because the issues of support and attorney fees follow from the resolution of the custody issue, we first address the substantive issue of whether the court erred in failing to modify custody.

Child Custody

{13} Father argues that the district court should have given him sole legal and physical custody of Child. He contends that there was overwhelming evidence before the district court that circumstances had substantially changed since the entry in 1996 of a stipulated custody order awarding joint legal custody to both parents and primary physical custody to Mother. As Father acknowledges, there is a presumption that joint custody is in the best interests of the child. NMSA 1978, § 40–4–9.1(A) (1999). And, as this Court has stated, "[a] court may modify a custody order only upon a showing of a substantial change in circumstances since the prior order that affects the best interests of the children." *Thomas v. Thomas,* 1999–NMCA–135, ¶ 10, 128 N.M. 177, 991 P.2d 7. "We will overturn the trial court's custody decision only for abuse of discretion, and we will uphold the court's findings if supported by substantial evidence." *Id.* "An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Sims v. Sims,* 1996–NMSC–078, ¶ 65, 122 N.M. 618, 930 P.2d 153. "To reverse the trial court under an abuse-of-discretion standard, 'it must be shown that the court's ruling exceeds the bounds of all reason . . . or that the judicial action taken is arbitrary, fanciful, or unreasonable.' " *Edens v. Edens,* 137 N.M. 207, 109 P.3d 295, 2005–NMCA–033, ¶ 13, (2005) (quoting *Meiboom v. Watson,* 2000–NMSC–004, ¶ 29, 128 N.M. 536, 994 P.2d 1154 (internal quotation marks and citation omitted)). "When there exist reasons both supporting and detracting from a trial court decision, there is no abuse of discretion." *Talley v. Talley,* 115 N.M. 89, 92, 847 P.2d 323, 326 (Ct.App.1993).

{14} Father argues in his cross-appeal that he presented overwhelming evidence at trial to demonstrate a material change in circumstances. Father argues that the court-appointed expert's May and August reports showed Mother's actions were causing emotional damage to Child, and that the expert's May report concluded that Mother was trying to align Child with her and to destroy the Father/Child relationship. Father states that the court acknowledged Mother's destructive conduct, which demonstrated that there was no evidentiary support for the court's statement that the parties had worked well together.

{15} Father also argues that the expert's August report concluded that the conflict between the parents was expected to continue and that Father should have sole custody. In addition, Father argues that the GAL concluded that it was in Child's best interest to award sole custody to him because Mother's "fabrication of pedophilia and alcoholism would make it unlikely that joint custody was a workable arrangement." Father argues that there was evidence that Mother restricted Father's access to Child at school, that she falsely accused Father of pedophilia, driving while intoxicated, and alcohol abuse, that Mother interfered with Child's telephone calls to Father, that she refused to let Child go to Oklahoma over the Easter weekend, that she refused to take Child to therapy, and that she tried to brainwash Child against Father. In light of all this evidence, Father contends that the court abused its discretion in not finding a material change in circumstances.

{16} The recorded transcript of the trial, however, indicates that the court was not persuaded by the testimony of the court-appointed psychological expert and the GAL. The court specifically questioned the court-appointed expert about what had caused him

to change his recommendation between March 14, 2003—the date of the original report recommending joint legal custody and primary physical custody with Mother—and May 20, 2003—the date of the first addendum to the report recommending temporary sole legal custody and primary physical custody with Father. On cross-examination of the expert, Mother's counsel challenged the accuracy of the expert's version of the events he claimed caused him to change his recommendation between March and May 2003.

{17} In addition, the testimony of Mother's expert psychologist, who was hired to provide a second opinion on the custody recommendation, questioned the court-appointed expert's conclusions in the May addendum. Mother's expert noted that the information on which the court's expert based his first addendum to his report was incomplete and one-sided because the expert never interviewed Mother or Child to obtain their versions of what had occurred, and noted that there was no evidence from the psychological tests to support some of the conclusions the court's expert had drawn about Mother, stating that the expert appeared to have relied on data provided by Father and the GAL. Mother's expert also testified that there appeared to have been no major breaches of the parenting plan to justify recommending a change in custody.

{18} Specifically, Mother's expert stated that if Mother's version of the facts indicated that, rather than simply refusing to take Child to counseling, Mother had sought clarification from the court about whether such a visit (sought by the GAL in preparation for an additional custody evaluation) was necessary, that information should have been included in the court-appointed expert's report. She also testified that where the evidence indicated that Child had been involved in a karate class before the summer visitation was to occur, his participation in that program would have been an insufficient basis to recommend a change in custody. Mother's expert also testified that even if Mother blocked the Easter visitation, Child had made numerous visits to Oklahoma and was due to spend the entire summer there and in her view, that was not a sufficient reason to recommend a change in custody. She also noted that there was consistent phone contact between Father and Child. Moreover, from reviewing the record, Mother's expert observed, it appeared that the allegations that Father had been convicted of driving while intoxicated were based on faulty information supplied to Mother, and that the allegations were withdrawn shortly after they had been raised, once Mother became aware they were untrue. In addition, Mother explained that Child's behavior had led her to consult physicians about the possibility of sexual abuse.

{19} The court's concern about what specifically had occurred between March and May to change the custody recommendation became apparent again when the court questioned Mother's expert. The court stated that it was trying to evaluate what had happened to change the court-appointed expert's opinion about custody, resulting in three different reports on March 14, 2003, May 20, 2003, and August 11, 2003. Mother's expert responded that the recommendations of the court's expert had changed by May 20, 2003, but that those recommendations were based on incomplete information.

{20} In its oral ruling, the court stated that from 1996 to 2002, the parties had been able to function very well without court intervention, but in June 2002 things had spiraled out of control. The court did not find, however, that there had been a material and substantial change in circumstances warranting a change in custody. From our review of the record, we find no abuse of discretion and affirm the district court's decision. Therefore, we will proceed to address Mother's issues regarding child support and attorney fees.

Child Support

{21} Mother raises three issues concerning the child support award: that the district court erred in imputing income to Mother, in ordering Father to pay the GAL fees and to deduct Mother's portion from child support payments, and in abating Father's summer child support payments on an annual basis. "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." *Quintana v. Eddins,* 2002–NMCA–008, ¶ 9, 131 N.M. 435, 38 P.3d 203. "[E]ven when we review for an abuse of discretion, our review of the application of the law to the facts is conducted de novo. Accordingly, we may characterize as an abuse of discretion a discretionary decision that [is] premised on a misapprehension of the law." *N.M. Right to Choose/NARAL v. Johnson,* 1999–NMSC–028, ¶ 7, 127 N.M. 654, 986 P.2d 450 (internal quotation marks and citations omitted) (alteration in original). Findings made by the district court about the parents' incomes, as required by the guidelines to apportion child support, are reviewed to determine whether they are supported by substantial evidence. *Quintana,* 2002–NMCA–008, ¶ 9, 131 N.M. 435, 38 P.3d 203; *see* NMSA 1978, § 40–4–11.1(E) (1995). Questions of law are reviewed de novo. *Styka v. Styka,* 1999–NMCA–002, ¶ 8, 126 N.M. 515, 972 P.2d 16.

Imputation of Income

{22} 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, the district court admitted evidence of Mother's actual income, which was approximately $51,000 per year. Mother testified that she worked at Sandia Laboratories twenty-five hours per week, but that she worked an additional twenty-five to thirty hours at her own business, which had not yet generated any income. The district court stated when ruling that it had imputed income to Mother because although Mother was entitled to start her own business, she could not do it at Child's expense.

{23} Mother argues that income should not have been imputed to her because she was fully employed, not underemployed or working part-time. Mother argues that under *Boutz v. Donaldson,* 1999–NMCA–131, ¶¶ 4–6, 128 N.M. 232, 991 P.2d 517, the district court should not have imputed income to her because, like the mother in that case, she had made and continued to make a good faith effort to succeed in developing her business. In *Boutz,* this Court wrote that "[i]t is for the trial judge . . . subject to judicial review, to assess Mother's efforts, sincerity, conscientiousness, and credibility, and then to decide whether Mother has acted in good faith to earn and preserve as much money to support her children as could reasonably be expected under the circumstances." *Id.* ¶ 6. More recently, in *Quintana,* we reaffirmed the test described in *Boutz* and stated "that the trial court must determine whether a parent's career choice is made in good faith and is reasonable under the circumstances." *Quintana,* 2002–NMCA–008, ¶ 23, 131 N.M. 435, 38 P.3d 203. We stated that in the absence of greater legislative guidance, the determination of underemployment "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." *Id.* ¶ 24 (citing *Boutz,* 1999–NMCA–131, ¶¶ 5–6, 128 N.M. 232, 991 P.2d 517).

{24} This is not a case in which Mother is working part-time or is clearly underemployed. Indeed, there was evidence before the district court that Mother was working more than forty hours per week. Therefore, the questions for the district court to consider were whether Mother was acting in good faith in her career choice and whether those actions were reasonable under the circumstances. Because the district court did not provide any explanation or findings and conclusions in relation to Mother's good faith and the reasonableness of her actions in reaching the ultimate determination of imputation of income to Mother, we remand this issue for reexamination to assure that the court has considered the imputation issue using the test set forth in *Quintana.*

Deduction of the GAL Fees from Child Support

{25} Mother also argues that the district court erred in ordering Father to pay the GAL fees and to deduct up to $300 per month from child support payments in order to pay Mother's share of the GAL fees. As we stated earlier, the setting of child support is within the sound discretion of the district

court, "exercised in accordance with the child support guidelines." *Quintana*, 2002-NMCA-008, ¶ 9, 131 N.M. 435, 38 P.3d 203. Under NMSA 1978, § 40-4-11.2 (1989), any deviation from the guidelines "shall be supported by a written finding in the decree, judgment or order of child support that application of the guidelines would be unjust or inappropriate." Section 40-4-11.2 then continues to explain that "[c]ircumstances creating a substantial hardship in the obligor, obligee or subject children may justify a deviation upward or downward from the amount that would otherwise be payable under the guidelines."

{26} Mother argues that nothing in the guidelines provides for a deduction from child support to pay a GAL. She also argues that deducting GAL fees from support constitutes a tax on child support and deprives Mother of the opportunity to dispute the GAL fees. Father argues, on the other hand, that because Mother had previously been ordered to pay the GAL fees and had refused, the court was entitled to deduct the fees from child support.

{27} The court is authorized to appoint a GAL in contested custody cases, pursuant to NMSA 1978, § 40-4-8 (1993), and to allocate expenses, costs, and attorney fees between the parties. However, nowhere in either the child support guidelines or the GAL statute is any specialized procedure outlined to ensure the payment of GAL fees by deducting them from child support. Moreover, our Supreme Court has recognized the "ongoing right of a child to receive support money from his [parent]." *Brannock v. Brannock*, 104 N.M. 385, 386, 722 P.2d 636, 637 (1986) (internal quotation marks and citation omitted). Although Father argues that Mother cites no law negating the district court's authority to modify child support payments "to ensure the payment of Mother's portion of the GAL's outstanding fees," Father has cited no law requiring the GAL's right to payment to take priority over Child's right to support, especially when the support guidelines indicate that any deviation must be justified by a showing of hardship.

{28} In the absence of legislative guidance to the contrary, therefore, we see no reason why GAL fees should be treated any differently from any other attorney fees, and we reverse that part of the custody and support order requiring Father to pay Mother's share of the GAL fees and to deduct up to $300 per month from his child support obligation.

Abatement of Summer Child Support

{29} Mother also argues that the court improperly abated Father's summer child support payments. Mother states that although the district court's written order states that Father's child support payments for June and July 2003 are to be abated by one-half, the written worksheet shows an annual abatement. Mother argues that because this ruling effectively modifies the amount of support required by the guidelines, the court should have explained its reasons in the order. Father responds that it was within the district court's discretion to modify the support in this way. Mother also argues that the abatement in the custody and support order only refers to two months in 2003 and not to future years.

{30} The court's child support worksheet stated that Father's monthly share of child support was to be $1416. Section 40-4-11.1(F)(1) permits "a partial abatement of child support for visitations of one month or longer" in visitation situations like the one before us. *See* § 40-4-11.1(D)(2) (defining a "basic visitation" custody arrangement); *see also Erickson v. Erickson*, 1999-NMCA-056, ¶ 3, 127 N.M. 140, 978 P.2d 347 (discussing the statutory definitions of custody arrangements). Because Father was awarded visitation for June and July, the court was permitted to abate Father's support payments. In this case the court abated the support payments by one-half for the months of June and July, thus reducing the total support for each year by $1416. The court's oral ruling clarified that the court spread the abatement for those two months over the course of the year. Accordingly, the court ordered Father's support payments to be $1298 per month, beginning on September 1, 2003 (($1416 × 11) ÷ 12).

{31} We hold that an annual abatement of child support of this type is not a deviation from the guidelines, as Mother argues, but is explicitly provided for in those guidelines. Contrary to Mother's argument, therefore, the court was not required to state in its order its reasons for deviating from the guidelines. *Cf.* § 40–4–11.1(A) (providing for a statement explaining reasons for deviation from the guidelines). In addition, we are not persuaded that the order only mandates abatement for 2003. The order specifically abates support for 2003 and, consistent with the district court's oral ruling, calculates future support obligations with the same abatement based on the parties' timesharing arrangement.

{32} In light of our ruling on the imputation of Mother's income, however, Mother's income is currently undetermined. Accordingly, on remand, in determining the precise amount of the parents' support obligations, the district court should consider whether, and if so, to what extent, the abatement amount should be different.

Attorney Fees

{33} Mother argues that the district court failed to properly consider the factors set forth in Rule 1–127 NMRA to determine whether to award Mother her attorney fees. Mother also argues that she was denied the ability to prepare and argue her case. As we understand her, Mother argues that the district court stated on August 25, 2003, that if the parties wanted a hearing on attorney fees, the court would hold one. Mother states, however, that at a hearing on October 3, 2003, which had been moved forward from October 10, 2003, the court refused to hear arguments on the issue. In response, Father argues that the court ruled on attorney fees on August 25, 2003, and that Mother did not preserve any argument on the issue. We are not persuaded by Father's contentions that the court ruled that the issue of attorney fees had been fully addressed on August 25, 2003, or that Mother's arguments were not preserved.

{34} The transcript of the trial reveals that following the presentation of evidence on August 22, 2003, the court reviewed all pending motions with the parties. After instructing the parties on how it wanted to deal with the pending motions, the court instructed the parties to come to court on August 25, 2003, with information relevant to the four factors listed in Rule 1–127 regarding attorney fees, and to be prepared to give the court that information orally. The court stated that it would give its recommendation on fees on August 25, 2003. On August 25, 2003, after ruling that all issues raised by the trial and motions had been addressed, the court then recommended that each party pay his or her own attorney fees. Neither party sought to introduce evidence of costs and fees at that time, and the court acknowledged that it had not heard evidence on these issues, stating that if the parties wanted another hearing on the issues of costs and fees, the court would give it. Neither party indicated at that time that it wanted a hearing on the issue, and no request for a hearing appears in the record. Mother represents, however, that she filed an attorney affidavit on attorney fees and costs with the court on September 9, 2003. Although this document does not appear in the record, Father's motion to strike the affidavit, filed on September 16, 2003, states that such a motion was filed. Father represents in his answer brief, however, that although he received a copy of the affidavit, he has no knowledge of whether it was filed with the court. At the October 3, 2003, hearing, however, the court not only noted that it had recommended that each party pay his or her own attorney fees, it also acknowledged receipt of Mother's affidavit. The court then stated that, having reviewed the entire file and notes from the trial and having considered all the factors required by rule, statute, and case law, it was ruling that each party pay his or her own attorney fees.

{35} By presenting the court with an affidavit, Mother sufficiently alerted the court's attention to her request for attorney fees to have preserved this issue for appeal. *See Marquez v. Marquez,* 74 N.M. 795, 799, 399 P.2d 282, 285 (1965) (holding that "[t]he trial court must be alerted to a claimed nonjurisdictional error in order to preserve it for consideration on appeal"). Under NMSA 1978, § 40–4–7(A) (1997), "the determination

of whether to grant an award of attorneys' fees and the amount of such award is within the discretion of the trial court and will be reviewed only to determine whether there has been an abuse of discretion." *Monsanto v. Monsanto,* 119 N.M. 678, 681, 894 P.2d 1034, 1037 (Ct.App.1995). Rule 1–127 requires that the court

> consider relevant factors presented by the parties, including but not limited to:
>
> A. disparity of the parties' resources, including assets and incomes;
>
> B. prior settlement offers;
>
> C. the total amount of fees and costs expended by each party, the amount paid from community property funds, any balances due and any interim advance of funds ordered by the court; and
>
> D. success on the merits.

Although the court stated that it had considered these factors, because we have remanded the issue of Mother's income, we also remand this issue for the district court to determine whether disparity of income combined with success on the merits affects the earlier ruling on attorney fees. Accordingly, Mother's issue of whether she should have been given more time to prepare an argument on the issue of attorney fees is now moot.

Limiting Public Access to the Trial

{36} Mother and Father both raise issues related to the court's rulings sealing the hearing but allowing the televising, without the release of footage, of the proceedings. Less than a week before the trial on the merits, the GAL filed two motions: (1) to exclude the televised media from the hearing on the merits, and (2) to seal the hearing on the merits to protect the emotional health of the Child. The court's written orders denied the motion to exclude the media, but closed the courtroom to all persons not having a direct interest in the matter.

{37} We first address the issue raised by Mother in her brief-in-chief that the court improperly sealed the hearing on the merits. The GAL moved to seal the hearing to protect the emotional health of Child on August 18, 2003. On August 19, 2003, both Father and a local television station responded to this motion. The television station argued that the courtroom should be open and that the GAL had not met his burden of proof to close proceedings. Father's response supported the GAL's position. Mother did not respond, and the court heard the motion immediately before trial. Mother only argued very briefly about factual matters, but the issue Mother raises on appeal was clearly before the district court, as argued by the television station, and we will therefore consider Mother's issue preserved for appeal.

{38} Mother appeals only from the court's order granting the GAL's motion to seal the hearing and close the courtroom to all persons not having a direct interest in the matter. The order defined those with a direct interest as the parties, the television station representatives, and the attorneys and members of their staff working on the case. Although we note that the court's oral ruling also appeared to seal the court records, the written order, signed by the attorneys for all the parties, does not reflect that. Because the court's written order only ordered the sealing of the hearing on the merits and because that hearing has already occurred, we hold that this issue is moot. *See Hamman v. Clayton Mun. Sch. Dist. No. 1,* 74 N.M. 428, 429, 394 P.2d 273, 274 (1964) (stating that "[a] case is moot when it does not involve any actual controversy [or][w]here the issues involved in the trial court no longer exist" (internal quotation marks omitted)); *Insure N.M., LLC v. McGonigle,* 2000–NMCA–018, ¶¶ 26–27, 128 N.M. 611, 995 P.2d 1053 (refusing to issue an advisory opinion where a defendant's claim had been rendered moot).

{39} In his cross-appeal, Father appeals from the order denying the GAL's motion to exclude the media from the courtroom. Father filed a response supporting the GAL's position. The court's order denied the GAL's motion to exclude the media from the trial, but prohibited it from releasing its footage. The only part of this order that has future effect is the ruling prohibiting the release of footage, and neither party raises an issue from that part of this order.

We hold, therefore, that because the hearing has already occurred, the issue Father raises concerning the presence of the media in the courtroom is moot.

CONCLUSION

{40} For the reasons we have given above, we affirm the district court's ruling that there had been no material change in circumstances justifying a change in legal and physical custody. We reverse that part of the court's order requiring Father to pay Mother's share of the GAL fees and to deduct that amount from his monthly support payments. We also reverse the court's ruling imputing salary to Mother and remand for the district court to determine whether Mother's choice of self-employment was in good faith and was reasonable under the circumstances. Because Mother's income remains undetermined, we also remand the issue of whether Mother should have been awarded attorney fees under Rule 1–127. For the same reason, although the district court was authorized to abate Father's child support payments, we remand that issue for the court to determine what the parties' support payments should be. Finally, we hold that the issues Mother and Father raise concerning the sealing of the hearing and the presence of the media at the trial on the merits are moot. On remand, the district court should consider whether Appellant is entitled to costs under Rule 1–054(D) NMRA.

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

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

2005-NMSC-015

113 P.3d 320

TOM GROWNEY EQUIPMENT CO., Ace USA, Patterson Drilling, Clearnan Insurance Co., Big Dog Drilling and Highland Insurance Co., Employers–Insurers–Petitioners,

v.

James JOUETT, Worker–Respondent.

Nos. 28,481, 28,482, 28,486.

Supreme Court of New Mexico.

May 20, 2005.

Hinkle, Hensley, Shanor & Martin, L.L.P., Thomas D. Haines, Jr., Mary Lynn Bogle, Roswell, NM, Miller Stratvert P.A., Timothy R. Briggs, Jennifer L. Stone, Sturges, Houston & Sexton, P.C., Paul L. Civerolo, Christina M. Bartosh, Albuquerque, NM, for Petitioners.

Max Houston Proctor, Hobbs, NM, for Respondent.

OPINION

SERNA, Justice.

{1} This workers' compensation case involves the questions of whether an initial employer or subsequent employers are liable for disability and medical benefits for a non-disabling injury originally sustained during employment that was exacerbated by subsequent employment resulting in disability and whether the initial or subsequent employers can recover a proportionate share of the compensation amount from the other employers. James Jouett, the worker, appealed from the Workers' Compensation Judge's (WCJ) order denying his claims against three successive employers, Tom Growney Equipment Co. and its insurer, Ace USA (Growney Equipment), Patterson Drilling and its insurer, Clearnan Insurance Co. (Patterson Drilling), and Big Dog Drilling Co. and its insurer, Highland Insurance Co. (Big Dog). The Court of Appeals concluded that Jouett's first employer is liable for medical treatment and

for the period of temporary total disability. *Jouett v. Tom Growney Equip. Co.*, 2004-NMCA-023, ¶ 15, 135 N.M. 136, 85 P.3d 260. The Court also concluded that the first employer may seek contribution outside the workers' compensation system from the subsequent employers despite the fact that Jouett became disabled while working for a later employer and despite the exclusivity provisions of the Workers' Compensation Act. *Id.* ¶ 19. This Court granted the employers' petitions for writ of certiorari.

{2} We conclude that the Workers' Compensation Act provides the exclusive remedies for work-related injuries and that contribution outside the Act from subsequent employers to initial employers is not authorized by statute. We also conclude that the initial employer, Growney Equipment, is not liable for the period of temporary total disability caused by aggravation of the initial non-disabling injury related to the subsequent employment which occurred after Jouett's employment with Growney Equipment ended. We conclude that Big Dog, the employer at the time Jouett became disabled, is potentially liable for disability compensation where the initial non-disabling injury is aggravated by subsequent work-related activities resulting in disability, assuming compliance with the Act. We remand this case to the WCJ to determine whether, under an analysis of applicable law, Big Dog is liable for disability and medical compensation dependent on whether Jouett complied with the Act, as well as to consider whether Growney Equipment is responsible for some portion of Jouett's medical expenses related to the initial accidental injury. Thus, we reverse the Court of Appeals. We affirm the WCJ in part, reverse in part, and remand for further proceedings.

I. Facts and Background

{3} The parties stipulated that Jouett sustained an injury to his left shoulder while employed by Growney Equipment on January 9, 1999. Jouett received medical care from Dr. Steve Hood for this injury, described as muscular in origin, including medication, rest in a harness, massage, and range of motion exercises. Because he apparently "forgot," Jouett did not attend a scheduled follow-up appointment for this injury. The parties stipulated that Jouett had no lost time or disability as a result of this initial injury; thus, he received only medical benefits from Growney Equipment at the time of his initial injury. Jouett was not absent from work due to this injury, was not disabled, and continued working for Growney Equipment until May of 2000, when he left in order to earn a higher wage. The WCJ found that the initial injury arose out of and in the course of employment with Growney Equipment and that the employer had notice of the injury.

{4} Jouett described the difference between his work at Growney Equipment and his subsequent oil rig work and stated that his work on the rigs was more strenuous. From May 10 to May 23, 2000, approximately two weeks, Jouett was employed by Patterson Drilling. In regard to Patterson Drilling's employment application question regarding prior work injuries and claims, Jouett conceded that he failed to indicate on his application that he had a previous work-related injury. Jouett stated that he continued to be in a great deal of pain from the time he left Growney Equipment through his employment at Patterson Drilling. Jouett stated that he injured his shoulder "pulling a six-inch collar" in a work-related accident at Patterson Drilling when the tool pusher was running the rig and "came up too fast;" he claimed he told a driller, but Jouett admitted that he did not report the incident according to procedure or fill out the required accident report. Jouett stated that this work-related accident increased and worsened the pain in his shoulder, describing that "it felt like everything just came apart again" and it "popped and pulled." Jouett described two situations in which performing the requirements of the job, chipping paint and "tripping pipe" at Patterson Drilling, also aggravated his shoulder. Jouett did not seek medical attention for these incidents. A Patterson Drilling employee testified that employees sign a drilling report daily indicating whether they had accidents or injuries, and that Jouett never indicated any injury to his shoulder on these reports. The WCJ found

that Jouett did not give actual or written notice to Patterson Drilling regarding any work-related accident within fifteen days of its occurrence.

{5} Aside from some short absences, Jouett was employed by Big Dog from June 6, 2000, until December 14, 2001. Jouett claimed that he continued to have shoulder pain while working for Big Dog, stating that he wore his sling to relieve the pain. In response to a question regarding work incidents in which he injured his shoulder at Big Dog, Jouett described several situations in which he was performing his work duties tripping pipe, working derricks, and carrying 100 pound sacks, and agreed that these activities aggravated his shoulder. Jouett stipulated that, on April 7, 2001, he went to the emergency room and received treatment for his left shoulder, stating that he had injured himself while working on a drilling unit. Jouett received pain medication for this injury, and he was restricted from work until April 12. Jouett stated that he stopped working for Big Dog on May 5, 2001, to try to have his shoulder injury treated. He was examined by another doctor on May 10 and referred to Dr. Frank P. Maldonado, an orthopedic surgeon, for three visits beginning May 15, 2001, until May 31, 2001. Jouett did not give Big Dog notice of any specific injury or disability related to the incidents he described and did not request medical expenses from Big Dog at this time; instead, Jouett requested that Growney Equipment continue paying for medical expenses.

{6} In his medical history, Dr. Maldando recounted that Jouett received "appropriate" "non-operative treatment" for his initial injury from Dr. Hood. Regarding his May 15, 2001, examination of Jouett, Dr. Maldonado described his "muscle wasting or loss of muscle mass about the left shoulder," as well as "some atrophy of his left arm and forearm musculature and significant loss of motion in the left shoulder." Dr. Maldonado reviewed diagnostic radiographs taken on January 13, 1999, and May 10, 2001, noting that "[t]he left shoulder films were normal on the 1999 films, and on the 2001 films they were essentially normal except [for a possible] small osteophyte or bone spur," or abnormal growth off of bone, on the tip of his shoulder blade. He stated that a bone spur can be the result of a specific injury or the result of cumulative injury over time. Dr. Maldonado ordered two additional tests, an MRI and a electrical diagnostic test, which were both normal. Finally, he recommended an arthroscopic examination of Jouett's shoulder to determine whether the bone spur was causing an impingement and whether it could be corrected. He diagnosed Jouett's condition as "painful left shoulder" with an unknown cause, but attributed the condition and disability to the 1999 injury to a reasonable degree of medical probability. In Dr. Maldonado's opinion, Jouett never reached maximum medical improvement following the original injury. However, Dr. Maldonado based these opinions on two questions Dr. Maldonado asked Jouett: whether he had shoulder problems prior to the 1999 injury and whether he had any subsequent injuries, both of which Jouett answered in the negative. After being informed about Jouett's testimony regarding his working conditions and work-related injuries sustained while working for subsequent employers, Dr. Maldonado opined that these subsequent employment activities aggravated his initial injury. During his visits in May of 2001, Dr. Maldonado told Jouett that he was temporarily totally disabled, and he recommended that Jouett not return to work. Despite this recommendation, Jouett subsequently returned to work.

{7} In the summer of 2001, Jouett applied again to work at Big Dog. Jouett continued to work for Big Dog until December of 2001, with the exception of a few weeks in July of 2001, when he worked for Key Drilling. Jouett apparently performed all required duties of his work for Big Dog during this time. Big Dog's attorney, during Jouett's deposition, asked Jouett if he had a conversation with Mike Whitley, Big Dog's safety representative, in June of 2001 regarding his initial shoulder injury. Jouett stated that he told Whitley "what was going on" and that the work on the rig "wasn't helping," because he was about to go into court on this case. Suffering what he described as progressively worsening, severe pain while working for Big Dog, Jouett finally quit working in December

of 2001 because he was in too much pain due to his shoulder and could no longer do the work required. Jouett stated that he could no longer tolerate the pain because of his work in the oil fields and that it made his shoulder worse. All parties stipulated that Jouett's "last day of work at Big Dog Drilling was December 14, 2001[,] due to left shoulder pain."

{8} Growney Equipment refused to pay for the arthroscopic evaluation or further treatment, so Jouett then filed a claim against Growney Equipment on June 27, 2001. Growney Equipment responded that subsequent employment was instead responsible for Jouett's current condition. Jouett amended his complaint in September of 2001, adding subsequent employers Patterson Drilling and Big Dog. This complaint indicated that Jouett continued to work at Big Dog at the time the complaint was filed.

{9} A recommended resolution was filed in November of 2001, advising that Growney Equipment and Big Dog pay Jouett's benefits "at a rate of fifty percent each," and that Patterson Drilling be dismissed with prejudice. Big Dog and Growney Equipment rejected this recommended resolution. Following this rejection, Jouett filed his complaint against Growney Equipment, Patterson Drilling, and Big Dog on December 24, 2001. Although continuing to reflect that the date of the accident was January 9, 1999, this complaint, for the first time, indicated that December 14, 2001, was the "[f]irst date [Jouett] was unable to perform [his] job duties."

{10} The parties agreed that the contested issues in the case included whether Jouett's current shoulder condition is causally related back, to a reasonable medical probability, to the work accident of January 9, 1999, with Growney Equipment, or whether his condition is a factor of one or more subsequent work accidents, injuries or aggravations with Jouett's subsequent employers, Big Dog and Patterson Drilling, breaking the chain of causation with respect to the first employer. The parties also agreed that another contested issue is "[w]hether [Jouett] is entitled to disability benefits, medical care and attorney fees from any party."

{11} The WCJ entered an order in November of 2002, finding that Jouett continually aggravated his initial injury, sustained while working for Growney Equipment, when he worked for Patterson Drilling and Big Dog. He found that Jouett's work activities at Patterson Drilling and Big Dog "substantially exceeded the normal physical strains of daily life," and that the aggravation of his shoulder caused by these activities "constituted an independent intervening event breaking causation for the Growney accident." The WCJ concluded that Jouett had accidents while working for Patterson Drilling and Big Dog which arose out of and in the course of his employment with these employers and resulted in injury. The WCJ decided that Jouett's failure to give timely notice to Big Dog and Patterson Drilling constituted a complete defense, and thus denied Jouett's workers' compensation claims against Big Dog and Patterson. The WCJ decided that Jouett's activities at the subsequent employers constituted an independent intervening event which broke the chain of causation, resulting in the decision that Growney Equipment did not owe Jouett benefits.

{12} The Court of Appeals reversed the WCJ. *Jouett*, 2004–NMCA–023, ¶¶ 15, 18, 135 N.M. 136, 85 P.3d 260. The Court concluded that Growney Equipment was liable for both medical and disability benefits for the period of temporary total disability that began in December of 2001. *Id.* ¶ 15. The Court also held that Growney Equipment could seek contribution from the subsequent employers, Patterson Drilling and Big Dog. *Id.* ¶ 18. This contribution remedy was apparently not raised or briefed to the WCJ or the Court of Appeals. The Court of Appeals noted that it was addressing the contribution issue as a matter of judicial economy because it was likely to arise on remand. *Id.* ¶ 16.

II. Discussion

{13} "On appeal from a compensation order, the whole record standard of review applies. Under that standard, we must consider all evidence bearing on the findings, favorable or unfavorable, to determine if there is substantial evidence to support the

result." *Garcia v. Mora Painting & Decorating,* 112 N.M. 596, 600, 817 P.2d 1238, 1242 (Ct.App.1991) (citation omitted). Findings of fact are reviewed for substantial evidence. "Where the testimony is conflicting, the issue on appeal is not whether there is evidence to support a contrary result, but rather whether the evidence supports the findings of the trier of fact." *Urioste v. Sideris,* 107 N.M. 733, 736, 764 P.2d 504, 507 (Ct.App.1988). "Appellate courts review matters of law *de novo.*" *Hasse Contracting Co. v. KBK Fin., Inc.,* 1999–NMSC–023, ¶ 9, 127 N.M. 316, 980 P.2d 641. We review the WCJ's application of the law to the facts regarding liability for compensation, apportionment, and notice de novo.

A. Proceedings Below

{14} Regarding Growney Equipment, the WCJ found that Jouett's work activities at his subsequent employers, arising out of and in the course of his employment, "substantially exceeded the normal physical strains of daily life," resulting in injury, and this aggravation of Jouett's initial injury "constituted an independent intervening event breaking causation for the Growney accident." The WCJ relied on *Aragon v. State Corrections Department,* 113 N.M. 176, 179, 824 P.2d 316, 319 (Ct.App.1991) for his decision. *Aragon* addressed a subsequent non-work-related accident which aggravated a work-related injury. *Id.*

> It is reasonable to say that an injury resulting from the concurrence of a preexisting injury and the normal movements of everyday life is a "direct and natural result" of the original injury. It strains the meaning of "natural and direct result," however, to say that the phrase encompasses a subsequent injury precipitated by a severe and uncommon trauma.

Id. at 181, 824 P.2d at 321. We believe that the WCJ relied on *Aragon* as an analogy or a basis for concluding that there is an insufficient causal relationship between Jouett's initial 1999 injury and his 2001 disability because of the aggravation of the injury sustained at subsequent workplaces. However, we agree with the Court of Appeals that reliance on *Aragon,* a case involving a subsequent non-industrial aggravation, is not particularly instructive to the present matter.

{15} The Court of Appeals concluded that Growney Equipment was liable for the workers' compensation claim for medical treatment as well as the period of temporary total disability that began on December 14, 2001. *Jouett,* 2004–NMCA–023, ¶ 1, 135 N.M. 136, 85 P.3d 260. We believe the authority relied upon does not support this conclusion.

{16} The Court of Appeals concluded that "[t]he employer at the time of the accidental injury remains responsible for medical and related treatment even if the original accidental injury is later aggravated when the worker returns to work," *Jouett,* 2004–NMCA–023, ¶ 10, 135 N.M. 136, 85 P.3d 260, relying on *McMains v. Aztec Well Service,* 119 N.M. 22, 888 P.2d 468 (Ct.App.1994). We believe that *McMains* does not support the determination that Growney Equipment is initially solely liable for compensation. In *McMains,* the worker suffered an initial injury to his lower back resulting in temporary total disability while working for his first employer, which resolved with medical treatment; he later suffered another work accident, injuring his lower back, while working for a second employer. 119 N.M. at 23, 888 P.2d at 469. The Court of Appeals in *McMains* concluded that the second employer "has the primary responsibility for payment of future medical benefits," and noted that, under NMSA 1978, § 52–1–47(D) (1991), the second employer may be able to reduce its liability "to the extent that future medical expenses are necessary as a result of Worker's accident at [the initial employer]." *Id.* at 24, 888 P.2d at 470. We believe that this analysis is consistent with our discussion of the issue.

{17} In *Jouett,* the Court of Appeals distinguished *Salinas–Kendrick v. Mario Esparza Law Office,* 118 N.M. 164, 879 P.2d 796 (Ct.App.1994) from the present matter. *Jouett,* 2004–NMCA–023, ¶ 14, 135 N.M. 136, 85 P.3d 260. *Salinas–Kendrick* held that, where the initial accident occurred over a year before disability, the insurer who covered the employee at the time she became disabled, rather than the insurer who covered the employee when she was initially

accidentally injured, is liable for medical and compensation benefits. 118 N.M. at 165–66, 879 P.2d at 797–98. In *Jouett*, the Court of Appeals stated that "there was no medical testimony in *Salinas–Kendrick* that the initial accident was causally connected to the subsequent need for medical treatment or to the subsequent disability." *Jouett*, 2004–NMCA–023, ¶ 14, 135 N.M. 136, 85 P.3d 260. The Court of Appeals then concluded that the case was thus inapplicable to Jouett's situation. *Id.* However, in *Salinas–Kendrick*, the worker suffered an initial accident in 1990; she continued to work with some pain, and, in 1991, she could no longer tolerate the pain and became disabled from aggravation of the initial injury. *Salinas–Kendrick*, 118 N.M. at 165, 879 P.2d at 797 ("Although Claimant suffered an accident in September 1990, she did not become disabled *from that accident* until December 1991.") (emphasis added). Thus, we determine that *Salinas–Kendrick*, as discussed further below, is directly applicable to the present matter. We conclude that *Salinas–Kendrick* does not support the determination that Growney Equipment, as the employer at the time of the initial injury but not the later disability, is initially responsible for the payment of disability benefits where there is evidence that Jouett's continued work-related activities have contributed to his 2001 disability.

{18} In its adoption of a contribution theory, the Court of Appeals addressed whether Growney Equipment would be liable "for the entire cost [of] medical treatment, temporary total disability, and related benefits" if further medical tests demonstrate that Jouett's current condition is causally connected to his work with subsequent employers. *Jouett*, 2004–NMCA–023, ¶ 18, 135 N.M. 136, 85 P.3d 260. The Court noted that Section 52–1–47(D) allows a subsequent employer to reduce its payments to avoid overlap of an initial employer's payments, but found no similar statutory provision for the initial employer. *Jouett*, 2004–NMCA–023, ¶ 18, 135 N.M. 136, 85 P.3d 260. The Court described the apportionment between the employers as an equitable remedy when two successive injuries combine to produce the final disability and stated that "the successive employers and their insurers are each required to contribute their proportionate share of the total responsibility for benefits when those benefits are awarded on the basis of a single rating of disability resulting from more than one compensable injury." *Id.* ¶ 19. The Court explained that its decision was based on the notion of alleviating the harsh result on the initial employer, Growney Equipment, "when subsequent injuries may have combined to produce a single disability." *Id.* The Court of Appeals determined that its conclusion was consistent with other provisions of the Workers' Compensation Act, including Section 52–1–47(D), as well as New Mexico's public policy as exemplified by our adoption of comparative negligence. *Id.* ¶ 20. The Court of Appeals concluded that because the contribution claim is "completely separate from" the compensation claim, the contribution claim is "not subject to the notice requirements and statute of limitations applicable to a worker's claim;" instead, as "a third-party action brought by an employer against other employers that may be deemed liable for contribution, the general statute of limitations for contribution actions shall apply." *Id.*

{19} We find no authority for the conclusion that, where a non-disabling work-related accidental injury is aggravated by subsequent employment, the first employer is initially wholly liable for medical and disability benefits resulting from the later disability. There is also no support for contribution by successive employers based on theories outside of workers' compensation law because the Workers' Compensation Act is the exclusive remedy for work-related injuries.

{20} We agree with the Court of Appeals' observation that Section 52–1–47(D) authorizes only subsequent employers to reduce its payments and thus "is of no assistance to First Employer," as well as its recognition that "there is no similar provision giving relief where the First Employer is held initially responsible." *Jouett*, 2004–NMCA–023, ¶ 18, 135 N.M. 136, 85 P.3d 260. However, we believe that the fact that the Legislature has only provided for subsequent, or current, employers to apportion payment, not previous employers, is particu-

larly significant in answering the preliminary question of which employer has initial liability to the employee for a disabling work injury. We agree with the Court of Appeals that "[t]he principle behind apportionment is to treat the employers and their insurance companies equitably when two successive injuries combine to produce the final disability." *Id.* ¶ 19. However, we conclude it is impractical to hold the first employer liable for disability that arises following subsequent work-related aggravation of an initial non-disabling injury. Growney Equipment argues that, under the *Jouett* opinion, because the first employer is presumptively liable where there were subsequent work injuries or aggravations, the first employer is burdened to attempt "to track Worker's subsequent employment history and accidents, even if it is years after any accidents with First Employer." We also note that this scheme would frustrate the purposes of the notice provision. Consistent with New Mexico law and from a practical standpoint, we conclude that the employer at the time of the disability is responsible for compensation for preexisting non-disabling injuries aggravated by subsequent work activities.

B. Worker's Compensation Liability

{21} "[T]he question of apportionment ordinarily arises only after the determination of initial liability is made." *Garcia,* 112 N.M. at 600, 817 P.2d at 1242. Thus, we first determine, as a preliminary matter, which employer has potential liability for Jouett's 2001 disability.

{22} "The right to the compensation provided for in [the Act], in lieu of any other liability whatsoever, . . . shall obtain in all cases where . . . *at the time of the accident,* the employee is performing service arising out of and in the course of [the worker's] employment," and the injury or death is "proximately caused by [an] accident arising out of and in the course of [the worker's] employment." NMSA 1978, § 52–1–9 (1973) (emphasis added). 'Claims for workers' compensation shall be allowed only . . . when the accident was reasonably incident to [the worker's] employment . . . and . . . when the disability is a natural and direct result of the accident." NMSA 1978, § 52–1–28(A) (1987). Thus, Jouett is entitled to compensation for a work-related injury from the employer at the time of the accident. For purposes of defining an accident with regard to a disability, "[c]ompensation is paid only when a work-related accidental injury becomes disabling." *Salinas–Kendrick,* 118 N.M. at 166, 879 P.2d at 798.

{23} It is undisputed that Jouett suffered a compensable, work-related accident while employed with Growney Equipment in January of 1999, meeting the requirements of Section 52–1–9. However, Growney Equipment satisfied its obligation for Jouett's 1999 accidental injury at that time by providing medical treatment; because he was not disabled in 1999, Jouett was not entitled to a disability claim under Section 52–1–28 at that time.[1] The WCJ found that Jouett aggravated his initial injury sustained during his employment with Growney Equipment while working for his subsequent employers, Patterson Drilling and Big Dog. We therefore must determine which employer is potentially liable for Jouett's 2001 disability, based on the fact that Jouett aggravated his initial injury sustained at Growney Equipment during his employment with Patterson Drilling and Big Dog, eventually becoming disabled while in the employ of Big Dog.

{24} *Salinas–Kendrick* addressed a situation in which the worker suffered a work-related accident, continued to work for the same employer, but became disabled due to aggravation of the earlier accident over a year later. 118 N.M. at 165, 879 P.2d at 797. "[W]here there is evidence that [the worker's] continued work-related activities have contributed to [the worker's] disability, the insurance company insuring Employer at the time of the disability is responsible for payment of the disability benefits." *Id.* "[D]isability arising from an accident is the event that triggers the obligation

1. Whether Jouett is currently entitled to medical benefits attributable to his 1999 injury from Growney Equipment is discussed below.

for payment." *Id.* at 165–66, 879 P.2d at 797–98. "[T]he date that the injury became compensable due to further work-related causes is the determinative factor." *Id.* at 166, 879 P.2d at 798. " 'When a disability develops gradually, or when it comes as the result of a succession of accidents, the insurance carrier covering the risk at the time of the most recent injury or exposure bearing a causal relation to the disability is usually liable for the entire compensation.' " *Id.* (quoted authority omitted).

{25} In *Gonzales v. Stanke–Brown & Associates, Inc.*, 98 N.M. 379, 381, 648 P.2d 1192, 1194 (Ct.App.1982), the Court of Appeals addressed a situation in which the worker suffered successive compensable disabilities where there were successive compensation insurers but a single employer. "Compensation is paid, under New Mexico law, for disability. For an accidental injury to be compensable, the disability must be a natural and direct result of the accident and where such a result is denied, causation must be established as a medical probability by expert medical testimony." *Id.* at 382, 648 P.2d at 1195 (citation omitted). In *Stanke–Brown,* the worker had a preexisting condition caused by an initial accident, that had resulted in a forty-five percent permanent partial disability, when a second accident occurred, resulting in injury and an additional ten percent permanent partial disability. *Id.* at 381, 648 P.2d at 1194. The Court of Appeals concluded that, under New Mexico law, "disability resulting from the second accident, regardless of the pre-existing condition, is compensable by the employer and compensation insurer at the time of the second accident." *Id.* at 383, 648 P.2d at 1196. The Court relied on an opinion from this Court which held that

> where there is a direct relationship or causal connection between the accidental injury and the resulting disability the employee is entitled to compensation to the full extent of the disability even though attributable in part to a pre-existing condition, notwithstanding acceleration or aggravation may be absent. It must be clear that there must be some causal connection....

Reynolds v. Ruidoso Racing Ass'n, Inc., 69 N.M. 248, 258, 365 P.2d 671, 678 (1961). "A causal connection between work done and an injury is insufficient; an accident is required. Unless an accidental injury resulting in disability occurred during the time the second compensation carrier insured the employer, the second carrier had no compensation liability." *Stanke–Brown,* 98 N.M. at 384, 648 P.2d at 1197.

{26} The Court of Appeals concluded that "[t]he employer and compensation carrier at the time of the first accidental injury remain liable for compensation benefits payable for disability resulting therefrom." *Id.* at 386, 648 P.2d at 1199. However, the worker's preexisting condition in *Stanke–Brown* was a work-related accidental injury that resulted in disability prior to the successive work injury. *Id.* at 383, 648 P.2d at 1196. *Stanke–Brown* was addressing "[t]he problem [of] whether *a prior employer, liable for disability* from an accidental injury, *is relieved* of liability by a subsequent accidental injury causing disability." *Id.* at 384, 648 P.2d at 1197 (emphasis added). By contrast, in the present matter, Jouett suffered a work-related injury but no disability at the time of his initial accident. Thus, the question for this Court is not whether Growney Equipment, the employer "at the time of the first accidental injury[,] *remain[s]* liable for compensation benefits payable for disability resulting therefrom." *Id.* at 386, 648 P.2d at 1199 (emphasis added). Rather, the question is which employer is liable when the worker suffered an initial non-disabling injury, aggravated the injury through later employment, and became disabled while working for a successive employer. "The employer and compensation carrier at the time of the second accidental injury are initially liable for disability resulting from the second accidental injury, to the full extent of the disability." *Id.* As discussed further below, this liability on the part of the successive employer may be reduced under Section 52–1–47(D) if the initial injury resulted in disability prior to the subsequent injury. *See id.*

{27} Thus, under both *Salinas–Kendrick* and *Stanke–Brown,* Big Dog is poten-

tially responsible for Jouett's disability claim because disability resulting from the subsequent accident, regardless of the preexisting condition, that is, Jouett's initial 1999 injury, is compensable by the employer and compensation insurer at the time of the subsequent accident. It is undisputed that Jouett suffered a work-related accident while employed with Growney Equipment. It is also undisputed that Jouett was not disabled at the time of his initial injury. Perhaps the confusion in this case is partially the result of whether or not Jouett suffered an "accidental injury" resulting in his 2001 disability while working for Patterson Drilling or Big Dog. The WCJ found that Jouett suffered work-related accidents that resulted in injury while working for his subsequent employers, Patterson Drilling and Big Dog. Further, our precedent does not require a discrete "accident," in the traditional sense, if employment activity itself aggravates a preexisting injury and results in disability, which is also consistent with the WCJ's finding that Jouett's work with Patterson Drilling and Big Dog aggravated his initial shoulder injury.

{28} The Court of Appeals, in an earlier case, described the rule in New Mexico for what constitutes an accident: "[I]f the stress of labor aggravates or accelerates the development of a preexisting infirmity causing an internal breakdown of that part of the structure, a personal injury by accident does occur." *Herndon v. Albuquerque Pub. Sch.*, 92 N.M. 635, 640, 593 P.2d 470, 475 (Ct.App. 1978). In *Herndon*, the worker had a preexisting back condition caused by non-industrial accidents. *Id.* at 637, 593 P.2d at 472. The worker suffered an employment-related accident resulting in severe back pain in June; she continued to work for several weeks before becoming disabled in September as a result of the severe pain. *Id.* at 637–38, 593 P.2d at 472–73. The Court of Appeals summarized that a worker has suffered an accidental injury if he or she has preexisting pain from a previous work-related accident, continues "normal employment under pain," and subsequently suffers a disability that was "caused or accelerated while working." *Id.*, at 640, 593 P.2d at 475. "[A] malfunction of the body itself . . . caused or accelerated by doing work required or expected in employment is an accidental injury within the meaning and intent of the compensation act." *Id.* (emphasis omitted) (quoted authority omitted). Under these circumstances, where a work-related accidental injury is aggravated by continued employment activities but the worker continues normal employment under pain resulting in later disability, the Court concluded that the time and place of the "accident," for purposes of "definiteness and certainty" of the Act, is the date the worker became disabled. *Id.* at 639, 642, 593 P.2d at 474, 477.

{29} Jouett's aggravation of his 1999 non-disabling injury through his employment duties at Patterson Drilling and Big Dog, where he performed his work, albeit in pain, resulting in his 2001 disability, thus constitutes an "accidental injury" within the meaning and intent of the Workers' Compensation Act regardless of whether Jouett had other discrete work-related accidents while employed with Patterson Drilling and Big Dog. *See Herndon*, 92 N.M. at 640, 593 P.2d at 475 ("The 'accident' was the subsequent and continued strain on plaintiff's back that resulted in an accidental injury on September 2, 1975 [when she terminated her employment because of disability due to severe pain]."). Despite any pain he may have suffered due to accidents or aggravation of his injury, Jouett did not become disabled during the two weeks he worked for Patterson Drilling, so this employer is not liable for disability compensation. Big Dog is potentially responsible for Jouett's 2001 disability claim because it was his employer at the time of the second accident or aggravation of his injury resulting in disability, if Jouett complied with other requirements of the Act. *See Salinas–Kendrick*, 118 N.M. at 166, 879 P.2d at 798, *Stanke–Brown*, 98 N.M. at 383, 648 P.2d at 1196.

{30} The WCJ did not determine a date of disability for Jouett. The WCJ may have decided that a specific determination was unnecessary because, under the facts of this case, Jouett became disabled in 2001 while employed by Big Dog, either in May, when he was told by Dr. Maldonado that he was temporarily totally disabled and

should not continue his work with Big Dog, or as of December 14, 2001, when he quit work with Big Dog because he could no longer perform his duties due to his injury. We do not fault the WCJ; we agree with the WCJ that this is a complex case, both factually and substantively, as also demonstrated by the efforts of the Court of Appeals. However, we believe that the date of disability is an ultimate fact necessary for a determination of liability. *See Torres v. Plastech Corp.*, 1997–NMSC–053, ¶ 13, 124 N.M. 197, 947 P.2d 154. "Conclusions of law must be supported by findings of ultimate fact." *Id.* We assume that Jouett became disabled as of December 14, 2001. This fact appears to be consistent with both the record and the definition of temporary total disability as "the inability of the worker, by reason of accidental injury arising out of and in the course of [the worker's] employment, to perform [the worker's] duties prior to the date of [the worker's] maximum medical improvement." NMSA 1978, § 52–1–25.1(A) (1991). Although the medical expert may not have been able to give an opinion as to what percentage of Jouett's disability was the result of work performed at Growney Equipment, Patterson Drilling, and Big Dog, it appears that Jouett became disabled as of December 14, 2001, when he could no longer perform his employment duties. For purposes of this analysis, December 14, 2001, is therefore the operative date for determining liability for Jouett's disability compensation. We recognize that there continues to be argument by some of the employers that Jouett became disabled earlier. Notwithstanding our assumption, on remand we direct the WCJ to determine the date of disability and consider arguments contrary to our assumption.

C. Notice

{31} The date of disability is an ultimate fact necessary to determine not only liability for compensation, but also notice. *See Torres*, 1997–NMSC–053, ¶ 13, 124 N.M. 197, 947 P.2d 154. The WCJ decided that Jouett failed to give written or actual notice to Big Dog and to Patterson Drilling, which barred Jouett's recovery for disability compensation from these employers. With regard to Big Dog, in his notice of proposed decision, the WCJ indicated that he based this decision on the fact that Mike Whitley, Big Dog's safety representative, testified that Jouett had never mentioned any accident, that a second Big Dog employee had testified that there was no notice of injury made to the company, and that Jouett, although responsible for preparing drilling well logs, did not report an accidental injury to his shoulder on these logs. Based on this explanation, the WCJ appeared to believe that Jouett was required to give notice to Big Dog fifteen days after a specific "accident," rather than the date of Jouett's disability. From a review of the record, and due to Jouett's emphasis on the 1999 accidental injury, it appears that the parties also measured the notice requirement from the date of the initial accident or the subsequent discrete accidents at Patterson Drilling or Big Dog described somewhat inconsistently by Jouett. However, in a case such as the present one, where aggravation of a prior injury results in disability, notice must be measured from the date of disability, as discussed further below.

{32} NMSA 1978, § 52–1–29(A) (1991) provides that workers "shall give notice in writing to [their] employer of the accident within fifteen days after the worker knew, or should have known, of its occurrence." This provision required that Jouett give notice in writing to Big Dog of the accident within fifteen days after he knew, or should have known, of its occurrence. "No written notice is required to be given where the employer or any superintendent or foreman or other agent in charge of the work in connection with which the accident occurred had actual knowledge of its occurrence." Section 52–1–29(A). Thus, if Big Dog or an agent in charge of the work had actual knowledge of Jouett's accidental injury, Jouett is not required to give written notice. The statute of limitations requires Jouett to file a claim within one year after an employer fails or refuses to pay him compensation. *See* NMSA 1978, § 52–1–31(A) (1987).

{33} Big Dog argues that Jouett failed to give notice, contending that Jouett was required to do so when his injury was aggravated by his work duties, on his daily tour

sheets, when he sought medical treatment for his shoulder in April of 2001, and when he had accidental injuries chipping paint, pulling drill collars, or tripping pipe. Big Dog further argues that Jouett knew that, in Dr. Maldonado's opinion, he was temporarily totally disabled in May of 2001, when he briefly stopped working for Big Dog in order to seek treatment for his shoulder. We note that Big Dog, in its discussion of the Court of Appeals' holding that the WCJ's findings and conclusions were to be vacated as premature because the extent of the injury to Jouett's shoulder had not been ascertained, correctly argues that disability triggers liability for compensation and recognizes that Jouett claimed that he could no longer perform his duties due to disability on December 14, 2001. However, Big Dog continues to argue that Jouett was required to give notice, not as measured from December 14, 2001, but from the date of alleged work accidents and the dates when Jouett sought medical care. The date of disability, as determined by the WCJ on remand, will also determine the date from which notice is to be measured.

{34} Establishing the date of the "accident" "is essential to determine whether the employer had written notice or actual knowledge" pursuant to Section 52–1–29(A). *Herndon,* 92 N.M. at 639, 593 P.2d at 474. In *Herndon,* the Court of Appeals addressed notice in the context of a work-related accident that later became disabling due to employment activities where the worker did not give written notice of the injury-producing event within the statutory time period. *Id.* at 638–39, 593 P.2d at 473–74. The Court measured the date of the worker's accident not as the date of the initial accident but from the date the accidental injury became disabling. *Id.* at 642, 593 P.2d at 477. An employment report prepared by her supervisor for purposes of workers' compensation indicated that the worker was injured in June and noted that she continued to work, except for a vacation, for several weeks until September. *Id.* The employer argued that it had no actual knowledge of an accident for purposes of the Workers' Compensation Act but only knowledge that the worker's back was hurting her. *Id.* The *Herndon* Court concluded that the worker gave actual notice based on the report and the supervisor's "previous knowledge of [her] work and the pressure brought to bear upon the aggravation of her back injury." *Id.* Particularly relevant to the present case, the Court,

> [i]n determining whether [the employer] had actual knowledge of the accident, . . . [gave] no credence to [the supervisor's] testimony as to the meaning of an "accident," nor to [the worker's] statement that the "accident" occurred on June 4, 1975. It is obvious that the employer and claimant have no understanding of what may constitute an "accident" in a workmen's compensation claim. The average person believes that an accident occurs, by way of illustration, where a claimant suffers a cut finger or smashed thumb. Neither of the parties knew or understood the meaning of an "accident" as described [by precedent]. Our duty is to glean from the evidence presented, the "accident" that occurred and the date thereof.

Id. The Court thus concluded that, for purposes of notice, it did "not fix the date of [the worker's] accident as June 4, 1975;" instead, "[t]he 'accident' was the subsequent and continued strain on [the worker's] back that resulted in an accidental injury on September 2, 1975," when the injury became disabling. *Id.*

{35} In the present matter, as with *Herndon,* the date Jouett became disabled is the operative date of accidental injury for purposes of notice, so Jouett was required to give notice to Big Dog within fifteen days after his disability prevented him from working. Also as with *Herndon,* it is not relevant how the worker or employer might define an "accident." Jouett's somewhat conflicting testimony that he may or may not have suffered discrete accidental injuries while working for Patterson Drilling and Big Dog is less relevant than the fact that he testified that his work activities at these subsequent employers aggravated his initial injury, supported by Dr. Maldonado's expert testimony. This work-activity-induced aggravation of his shoulder resulting in disability constituted the "accident" for which he is required to give notice. However, December 14, 2001, is the latest date that Jouett could argue that

he became disabled and could no longer perform his work duties; thus, he knew or should have known, by that date at the very least, that he had suffered a compensable injury for which notice is required.

{36} This Court discussed the notice requirement in *Gomez v. B.E. Harvey Gin Corp.*, 110 N.M. 100, 792 P.2d 1143 (1990). In *Gomez*, the worker injured his lower back on December 14, 1988, in a work-related accident; he suffered immediate pain but continued to work for the day, receiving medical treatment that evening. *Id.* at 101, 792 P.2d at 1144. He remained home the following day due to pain from this injury, "but thereafter worked in continual pain at his regular job until January 27, 1989," eventually going to the hospital on February 3 due to severe pain. *Id.* at 102, 792 P.2d at 1145. He gave notice of an accidental injury to his employer on January 31. *Id.* The hearing officer barred the claim because of his failure to provide timely notice to his employer of the December 14 accident. *Id.* This Court noted that "[t]he time for giving notice begins to run when the employee knows, or should know by the exercise of reasonable diligence, that [the worker] has sustained a compensable injury." *Id.* We recognized that "[t]his rule concerns the worker's knowledge of some legal disability or inability to perform work." *Id.* Although we noted that actual disability is not required, the worker must be "impaired and unable, at least to some percentage extent, to perform the job for which the worker is suited. The period for written notice does not begin to run until the claimant is charged with such knowledge." *Id.* (citation omitted). "[T]his recognition may become apparent to a worker [such as Jouett] only after loss of the capability to perform regular duties, notwithstanding the fact that some time has elapsed from the date of the original incident during which the worker was able to perform usual tasks while experiencing pain." *Id.*

{37} In the present matter, although Jouett was told in May of 2001 that he had a compensable disability and should not continue working, Jouett apparently managed to continue to perform the usual tasks required at Big Dog for approximately six more months before he was no longer able to work due to aggravation of his injury, resulting in disability. *See Martinez v. Darby Constr. Co.*, 109 N.M. 146, 150, 782 P.2d 904, 908 (1989) (discussing a worker who failed to give notice regarding an accidental neck injury, despite advised medical treatment, but gave notice following disability, six months later, and concluding that, where "the evidence concerning his ability to perform his regular duties, albeit in pain, indicates that no special accommodations were made for the claimant" and he did not do less work or work fewer hours, the worker's belief was "within the bounds of reason"). Although the workers in *Gomez* and *Martinez* were not advised, as Jouett was in May of 2001, that they were temporarily disabled before they continued to work, Big Dog, involved in Jouett's claim by September of 2001, appears to have had much more information regarding his condition while he continued as an employee than the employers in those cases.

{38} Big Dog bases its arguments on a failure to give notice while Jouett was continuing his employment with Big Dog rather than the date of disability. However, the date of disability is the operative date with regard to notice. Big Dog argues that Jouett knew or should have known of his disability by May 15, 2001, when Jouett sought medical treatment for his shoulder and Dr. Maldonado told him that he should not return to work because he was temporarily totally disabled. We agree that it was, from a health standpoint, clearly a mistake for Jouett to continue working with his self-described severe pain and muscle atrophy. However, Jouett, despite the pain he describes as extreme, was apparently able to continue to perform the requirements of heavy labor on drill rigs for Key Drilling and Big Dog for several months to the presumed satisfaction of these employers. Big Dog rehired Jouett in the summer of 2001, and Jouett continued to work in his normal job until December of 2001 when he claimed he could no longer work due to disability.[2] De-

2. There are allegations that Jouett failed to disclose his preexisting condition on employment applications. *See* NMSA 1978, § 52–1–28.3(A) (1991) (providing that "[w]hen an employer asks

spite Big Dog's awareness of Jouett's initial shoulder injury and his ongoing claim against all three employers, including Big Dog, during this time, Jouett evidently continued to work for Big Dog performing his strenuous duties. Nothing in this discussion, however, should be viewed as preventing the parties, following remand, from arguing that Jouett was not performing his duties as required during his last few months at work for Big Dog.

{39} These arguments, concerning whether Jouett gave adequate notice based on the date of disability as determined by the WCJ, must be resolved on remand following application of the appropriate legal precedent as discussed in this opinion. We remand this case to the WCJ to determine whether Big Dog received written or actual notice of Jouett's accident from the date of disability. *See Chavez v. S.E.D. Labs.*, 2000-NMSC-034, ¶ 22, 129 N.M. 794, 14 P.3d 532 ("We believe that when a determination is unsupported, justice requires a remand for entry of proper findings and conclusions.").

D. Contribution

{40} Big Dog argues that the Court of Appeals' contribution holding subjects employers to two sets of claims, one from workers who must comply with notice and statute of limitations provisions and the second from previous employers where these provisions would be inapplicable. Patterson Drilling distinguishes between contribution and apportionment; it argues that contribution is a statutory obligation on one joint tortfeasor to contribute that tortfeasor's share to the discharge of common liability. *See* NMSA 1978, § 41-3-1 (1947) (defining joint tortfeasors). Patterson Drilling argues that the Court of Appeals erred by injecting contribution, as a fault or negligence principle, into workers' compensation, an explicitly no-fault system. Patterson Drilling also argues that the WCJ is not authorized to hear, consider, or rule on a contribution claim between employers which could result in parallel proceedings in state or federal district court for the same case. We agree that Big Dog and Patterson Drilling raise valid concerns regarding the Court of Appeals' opinion.

{41} Both Patterson Drilling and Big Dog argue that the Court of Appeals' contribution remedy contravenes the exclusive remedy provisions of the Workers' Compensation Act. We agree. NMSA 1978, § 52-1-6(D) (1992) provides that

> compliance with the provisions of the Workers' Compensation Act, ... shall be ... a surrender by the employer and the workers of their rights to any other method, form or amount of compensation or determination thereof or to any cause of action at law, suit in equity or statutory or common-law right to remedy or proceeding whatever for or on account of personal injuries or death of the worker than as provided in the Workers' Compensation Act and shall be an acceptance of all of the provisions of the Workers' Compensation Act and shall bind the worker ..., as well as the employer....

"The Workers' Compensation Act provides exclusive remedies." Section 52-1-6(E).

by written questionnaire for the disclosure of a worker's medical condition, no compensation is payable from that employer for an injury to that worker ... if ... the worker knowingly and willfully concealed information or made a false representation of his [or her] medical condition"). We first emphasize that it is not only required by statute but also in the worker's best interest to disclose preexisting conditions so as not to further aggravate injuries to the point of disability. Secondly, we note that Section 52-1-28.3 requires that the employer "was not aware of the concealed information that, if known, would have been a substantial factor in the initial *or continued* employment of the worker" or the employer "relied upon the false representation, and this reliance was a substantial factor in the initial *or continued* employment of the worker." (Emphasis added.) We note that of relevance to this issue, Big Dog continued to employ Jouett for several months after learning of his medical condition without apparent work restrictions related to his shoulder. This defense also does "not apply unless, in the written questionnaire, the employer clearly and conspicuously discloses that the worker shall be entitled to no future compensation benefits if [the worker] knowingly and willfully conceals or makes a false representation about the information requested." Section 52-1-28.3(B). *See generally Pena v. Phelps Dodge Chino Mines*, 119 N.M. 735, 737-38, 895 P.2d 257, 259-60 (Ct.App.1995). We leave the ultimate resolution of this issue to the WCJ on remand.

NMSA 1978, § 52–1–8 (1989) provides that employers who have complied with the Act

> shall not be subject to any other liability whatsoever for the death of or personal injury to any employee, except as provided in the Workers' Compensation Act, and all causes of action, actions at law, suits in equity, and proceedings whatever, and all statutory and common-law rights and remedies for and on account of such death of, or personal injury to, any such employee and accruing to any and all persons whomsoever, are hereby abolished except as provided in the Workers' Compensation Act.

The Court of Appeals' contribution analysis, in which an initial employer may seek contribution from subsequent employers, and the Court's conclusion that contribution was outside the Workers' Compensation Act, is in direct conflict with these provisions.

E. Apportionment Under Section 52–1–47(D)

{42} The Workers' Compensation Act does not provide for contribution by different employers or insurers for disability or medical benefits. However, the Act does contain a provision regarding the reduction of benefits that would duplicate previous benefits. Section 52–1–47(D) provides that

> the compensation benefits payable by reason of disability caused by accidental injury shall be reduced by the compensation benefits paid or payable on account of any prior injury suffered by the worker if compensation benefits in both instances are for injury to the same member or function or different parts of the same member or function or for disfigurement and if the compensation benefits payable on account of the subsequent injury would, in whole or in part, duplicate the benefits paid or payable on account of such prior injury.

"Section 52–1–47(D) 'is not merely a device for preventing a double recovery. It is an affirmative allocation of the burden in a successive injuries situation.'" *Garcia*, 112 N.M. at 603, 817 P.2d at 1245 (quoted authority omitted).

{43} We note that this section does not limit its application in terms of employers; thus, it is presumably applicable to a single employer or insurer, as well as subsequent employers and subsequent insurers. Stated another way, an employer could reduce compensation payments for a current disability if that employer previously paid disability to the employee for injury to the same member if the compensation would otherwise duplicate the benefits the employer paid on account of the prior injury. Section 52–1–47(D) authorizes a reduction in benefits paid by the current employer or insurer only when previous "compensation benefits paid or payable on account of any prior injury" "would, in whole or in part, duplicate the benefits paid or payable on account of such prior injury." As discussed below, based on Section 52–1–47(D) as well as New Mexico precedent, a reduction of payments for the current employer, initially responsible for all disability compensation to a worker disabled by a work-related injury in compliance with requirements of the Act, is authorized only where the worker has suffered a prior work-related accident for which the initial employer or insurer paid or must pay on account of the prior injury. Thus, Section 52–1–47(D) is operative where an employer or insurer has paid or must pay a worker for medical benefits or disability compensation for a prior accidental injury when the worker has suffered an aggravation or later injury to the "same member or function" and "the compensation benefits payable on account of the subsequent injury would, in whole or in part, duplicate the benefits paid or payable on account of such prior injury." We believe that this interpretation of Section 52–1–47(D) is consistent with the plain language of the statute, legislative intent, and our precedent.

{44} In *Stanke–Brown*, the Court of Appeals discussed a hypothetical situation in which a worker "suffers an accidental injury resulting in a 50 percent partial disability and compensation benefits are paid on the basis of that disability" and then the worker suffers "[a] subsequent accidental injury [that] results in a 100 percent disability" where "[t]he subsequent accidental injury aggravated the pre-existing condition and caused disability." 98 N.M. at 386, 648 P.2d at 1199. The Court noted that, under *Reynolds*, "the employer and compensation carrier

for the subsequent accident are liable for the 100 percent disability," but that because it was not an issue in *Reynolds,* that case did not address "what happened to the liability of the employer and compensation carrier for the pre-existing 50 percent disability." *Id.* The Court of Appeals then discussed the applicability of Section 52–1–47(D) and concluded that

> [t]he employer and compensation carrier at the time of the first accidental injury remain liable for compensation benefits payable for disability resulting therefrom. The employer and compensation carrier at the time of the second accidental injury are initially liable for disability resulting from the second accidental injury, to the full extent of the disability. Liability for disability resulting from the second accidental injury is reduced to the extent of benefits paid or payable for disability resulting from the first accidental injury if the requirements of [Section] 52–1–47(D) are met.

Id. " '[B]enefits for the subsequent injury may not duplicate benefits paid or payable for the prior injury. It is the overlap in benefits to which the reduction applies.' " *Id.* at 387, 648 P.2d at 1200 (quoted authority omitted, alteration in original). Thus, *Stanke–Brown's* analysis applies when there is disability and compensation paid or payable for that disability for an initial injury.

{45} Although involving the later repealed Subsequent Injury Act, the Court of Appeals instructively discussed *Stanke–Brown* and Section 52–1–47(D) in *Lea County Good Samaritan Village v. Wojcik,* 108 N.M. 76, 766 P.2d 920 (Ct.App.1988). Based on *Stanke–Brown* and Section 52–1–47(D), "if an employee has previously sustained a compensable injury under the Workers' Compensation Act *and has been awarded benefits* and thereafter suffers a subsequent injury involving the same members or functions, . . . the employer at the time of the second accident . . . [is not] liable for any impairment *for which the worker has already been compensated.*" *Wojcik,* 108 N.M. at 81, 766 P.2d at 925 (emphasis added). Thus, Section 52–1–47(D) operates only where the worker received benefits for the initial injury and subsequently suffers a work-related injury to the same member or function and benefits for the subsequent injury would duplicate benefits paid or payable for the initial injury.

{46} Under *Stanke–Brown,* the employer at the time of the second or subsequent accidental injury is initially liable for the "full extent of the disability," and then the current employer's liability is "reduced to the extent of benefits paid or payable for disability resulting from the first accidental injury." 98 N.M. at 386, 648 P.2d at 1199. Applying Section 52–1–47(D) and the analysis of *Stanke–Brown* to the present matter, Big Dog and its insurer, as the employer and compensation carrier at the time of the subsequent accidental injury resulting in disability, are initially potentially liable for disability resulting from the subsequent accidental injury, to the full extent of the disability. Big Dog's potential liability for Jouett's disability can be reduced under Section 52–1–47(D) only to the extent of disability benefits paid or payable by Growney Equipment or Patterson Drilling resulting from the first or prior accidental injuries.

{47} In order for Growney Equipment or Patterson Drilling to be liable for any portion of disability compensation or medical benefits under Section 52–1–47(D), in addition to any other requirements with the Workers' Compensation Act, these employers must be responsible for "compensation benefits paid or payable on account of any prior injury suffered by the worker." Jouett must have previously complied with all requirements of the Act and received medical or disability benefits paid or payable by Growney Equipment or Patterson Drilling for his prior injury for which current benefits would be duplicative.

{48} Patterson Drilling argues that it is not responsible for either medical benefits or disability compensation by operation of the notice statute as well as the statute of limitations. Patterson Drilling recognizes that *Stanke–Brown* held that the worker's employer at the time the injury becomes disabling is responsible for compensation benefits related to the disability, and notes that the employer can then seek apportionment under Section 52–1–47 to reduce bene-

fits proportionally to the extent of any benefits payable from a prior disability or preexisting injury. Patterson Drilling asserts that under New Mexico case law and the undisputed facts of the present case, Big Dog is solely responsible for payment of disability benefits to Jouett because Jouett continued to work after his initial January 1999 accident with Growney Equipment and the injury did not become disabling until December of 2001. We agree that Patterson Drilling is not liable for disability or medical benefits. Because Jouett did not make any claim for disability or medical benefits while working at Patterson Drilling, there is no injury for which Patterson Drilling is responsible for benefits paid or payable that would duplicate the medical or disability payments potentially owed by Big Dog. Had Jouett given proper notice and filed a successful claim against Patterson Drilling within the statute of limitations for medical or disability benefits suffered while he was an employee, Big Dog could reduce its liability by any duplicative benefits. Because Jouett did not give notice or file a claim while working for Patterson Drilling for any work-related accidental injury or disability for his two weeks of employment, Patterson Drilling was not liable to Jouett while he was an employee for any compensation benefits paid or payable on account of any prior injury which would be duplicative of disability benefits theoretically owed by Big Dog for Jouett's 2001 disability. Thus, Big Dog would not be able to reduce its compensation payments to Jouett for his 2001 disability in relation to Patterson Drilling.

{49} Similarly, because Jouett's 1999 accidental injury did not result in disability, Growney Equipment was not liable to Jouett for disability compensation benefits that would be duplicative of disability benefits theoretically owed by Big Dog. Again, Section 52–1–47(D) would not provide for Big Dog to reduce its compensation payments to Jouett for his 2001 disability in relation to Growney Equipment.

{50} Consistent with our interpretation of Section 52–1–47(D), our precedent supports the conclusion that prior employers and their insurers are not responsible for any portion of disability resulting from an aggravation of a prior injury or a subsequent injury to the same member or function if the initial accidental injury did not result in disability. The employer and its insurer at the time of the disability under such circumstances is wholly responsible. To illustrate this point, we compare those cases which apportioned disability compensation due to a prior injury resulting in disability with a case, similar to the present matter, where the initial injury did not result in disability. Although *Stanke–Brown* concluded that the employer and compensation carrier at the time of the first accidental injury remain liable for compensation benefits payable for disability resulting from the initial injury, 98 N.M. at 382, 648 P.2d at 1195, the initial injury in *Stanke–Brown* resulted in a permanent partial disability that existed prior to the successive injury and resulting disability, *id.* at 381, 648 P.2d at 1194. However, unlike *Stanke–Brown*, Jouett suffered an accidental injury in 1999 with no resulting disability. In *Garcia*, the worker received disability benefits and medical expenses for an initial accidental injury that resulted in disability prior to the second injury and resulting disability. 112 N.M. at 598, 817 P.2d at 1240. *Urioste* applied *Stanke–Brown's* holding that the employer at the time of the initial accidental injury remains liable to the worker for "compensation benefits payable to the extent of any disability resulting from the initial injury," 107 N.M. at 738, 764 P.2d at 509, but also addressed a situation in which the worker was temporarily totally disabled at the time of the initial accident. *Id.* at 736, 764 P.2d at 507. Again, in *McMains*, the Court of Appeals affirmed apportioning liability for disability compensation where the worker received disability benefits from the initial accidental injury. 119 N.M. at 23, 888 P.2d at 469. Unlike *Stanke–Brown*, *Garcia*, *Urioste*, and *McMains*, however, *Salinas–Kendrick* is factually identical to the present matter on this point.

{51} In *Salinas–Kendrick*, the worker suffered an accidental injury in 1990 that was not disabling; more than a year later, she became disabled because her initial inju-

ry was aggravated by continued work. 118 N.M. at 165, 879 P.2d at 797. The employer at the time of the disability is responsible for disability benefits where the evidence indicates that the worker's continued work-related activities contributed to his or her disability. *Id.* We conclude that Growney Equipment is not liable for Jouett's 2001 disability compensation because Jouett was not disabled as a result of his initial accidental injury; Jouett's continued work-related activities at his subsequent employers contributed to his disability, and Gowney Equipment was not the employer at the time Jouett became disabled. "The date of an accident that does not result in disability . . . is irrelevant. In this case, the date that the injury became compensable due to further work-related causes is the determinative factor." *Id.* at 166, 879 P.2d at 798. We see no way to meaningfully distinguish Jouett's case from *Salinas–Kendrick.* We note that *Salinas–Kendrick* did not discuss application of Section 52–1–47(D) despite the fact that the insurer at the time the disability arose argued that the injury was sustained while the worker was employed under an initial insurer. It is consistent to conclude that Section 52–1–47(D) would not apply in *Salinas–Kendrick* because the insurer at the time of the initial injury was not responsible for any disability payments to the worker at that time because her disability arose subsequently. Similarly, with regard to the present case, Section 52–1–47(D) does not apply to Growney Equipment for Jouett's disability benefits because he was not disabled by his 1999 injury and his disability arose later.

{52} Regarding medical benefits, we begin by noting that NMSA 1978, § 52–1–49(A) (1991) provides that employers must provide necessary health care services "as long as medical or related treatment is reasonably necessary." *See Wojcik,* 108 N.M. at 82, 766 P.2d at 926 ("A party seeking recovery of medical expenses in a worker's compensation proceeding has the burden of proving that the expenses were reasonably necessary and directly related to the worker's disability. Similarly, a party seeking payment or reimbursement of medical expenses carries the burden of proof on this issue.") (citation omitted). Growney Equipment was responsible for and paid medical benefits for Jouett's prior 1999 shoulder injury. Our precedent has held that Section 52–1–47(D) applies to medical benefits as well as disability compensation. *Brewster v. Cooley & Assocs.,* 116 N.M. 681, 686, 866 P.2d 409, 414 (Ct.App.1993) (concluding that, despite the plain language of Section 52–1–47(D) applying to "compensation benefits payable by reason of disability," the Section applies to medical benefits); *McMains,* 119 N.M. at 24, 888 P.2d at 470 (concluding that the subsequent employer had "primary responsibility for payment of future medical benefits" and that the subsequent employer could reduce its liability based on Section 52–1–47(D)). Thus, Section 52–1–47(D) would authorize Big Dog, theoretically, to reduce medical benefits paid or payable on account of Jouett's prior 1999 shoulder injury by Growney Equipment if such benefits would, in part, duplicate the benefits paid by Growney Equipment. Although any current medical payments for Jouett's 2001 injury would not presumably duplicate the benefits paid by Growney Equipment in 1999, Growney Equipment may be responsible for some portion of Jouett's current medical benefits that would duplicate Big Dog's liability for Jouett's current medical benefits if causally connected to Jouett's 1999 injury. *See McMains,* 119 N.M. at 25, 888 P.2d at 471 ("If [the worker] incurred medical expenses relating to a work-related injury in the future, he [or she] would still have to prove them in order to recover.") (quoted authority omitted); *cf. Stanke–Brown,* 98 N.M. at 382, 648 P.2d at 1195 ("This causation requirement applies to *any* claim for worker's compensation; it makes no difference whether the claim is for a first, second or successive accidental injury."). On remand, the WCJ should consider whether, if it determines that Big Dog is liable for disability and medical benefits, Big Dog is entitled to reduce some portion of the medical expenses duplicative of medical expenses paid or payable by Growney Equipment.

III. Conclusion

{53} In the present matter, the date of disability determines liability for compensa-

tion. Jouett's initial 1999 work-related injury did not become disabling until 2001, when he was employed by Big Dog. Under these circumstances, where a worker suffers a non-disabling initial injury and continued work-related activities contribute to the worker's subsequent disability, the employer and insurer at the time of the disability are responsible for payment of the disability benefits. Thus, we conclude that Jouett's employer at the time his injury became disabling, Big Dog, is potentially responsible for compensation benefits related to the disability. Liability for compensation resulting from the subsequent accidental injury may be reduced to the extent of benefits paid or payable for compensation resulting from the first accidental injury if the requirements of Section 52–1–47(D) are satisfied. Under Section 52–1–47(D), Big Dog would have the opportunity, if necessary, to reduce the benefits potentially owed Jouett based on any duplicative medical expenses owed by Growney Equipment. Because Jouett did not suffer a disability while employed by Patterson Drilling or give notice or file a claim against Patterson Drilling within the statute of limitations for any injury sustained at that time, Patterson Drilling is not responsible for any portion of Jouett's 2001 compensation claim. We thus affirm the WCJ on this point. Because Jouett's injury with Growney Equipment did not result in a disability at that time, Section 52–1–47 does not authorize Big Dog to reduce disability compensation from Growney Equipment. Because the WCJ did not determine the date of Jouett's disability, an ultimate fact essential for the WCJ's conclusions of law regarding liability and notice, we remand for this determination. Also based on this determination, we remand in order for the WCJ to consider whether Big Dog had written or actual notice of Jouett's accidental injury from the date of disability. On remand, the WCJ should also determine whether Growney Equipment is responsible for some portion of Jouett's medical expenses. Thus, we reverse the Court of Appeals' opinion, affirm the order of the WCJ in part, and remand for further proceedings consistent with this opinion.

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

WE CONCUR: RICHARD C. BOSSON, Chief Justice, PAMELA B. MINZNER, PETRA JIMENEZ MAES, and EDWARD L. CHÁVEZ, Justices.

2005-NMSC-014

113 P.3d 340

In the Matter of Christopher S. KEY, Esq.

An Attorney Licensed to Practice Before the Courts of the State of New Mexico.

No. 29,089.

Supreme Court of New Mexico.

June 1, 2005.

As Corrected June 14, 2005.

Virginia L. Ferrara, Chief Disciplinary Counsel, Albuquerque, NM, for Disciplinary Board.

Charles W. Daniels, Albuquerque, NM, for Respondent.

OPINION

PER CURIAM.

{1} This matter came before the Court following disciplinary proceedings conducted pursuant to the Rules Governing Discipline, Rules 17–101 through 17–316 NMRA 2003, wherein attorney Christopher S. Key admitted to having been convicted by way of a plea of guilty in the United States District Court for the District of New Mexico of the crime of making and subscribing a false tax return in violation of 26 U.S.C. § 7206(1) (2000) and 18 U.S.C. § 2 (2000), a felony offense, and sentenced to a term of three (3) years probation commencing on May 5, 2004. The issue before the Disciplinary Board and before this Court is what discipline is appropriate under the circumstances.

{2} Evidence submitted to the hearing committee showed that beginning in 1994 and continuing through 2000, Respondent claimed extensive business losses on his federal income tax returns offsetting his legitimate income. The losses were allegedly generated from a fictitious offshore warehouse facility named DoChris. DoChris was in fact a shell, having been duly incorporated in

Costa Rica but conducting no business and sustaining no real losses. Through this mechanism, Respondent allegedly defrauded the United States of more than $425,000 in federal income taxes over the seven-year period. The filing of the false returns was made possible by an illicit international network of accountants, lawyers, and financial institutions, who depended upon the inconvenience to the government of obtaining information from foreign authorities to escape detection of their crimes.

{3} Respondent was introduced to this scheme by his accountant, also an attorney. He testified at the hearing before the Disciplinary Board hearing panel that while he thought the plan was "too good to be true," he never sought another opinion as to the legality of his actions. Even after realizing that the tax shelter scam might be illegal, he continued to utilize it until served with a subpoena for documents by federal authorities in 2002. Shortly thereafter, Respondent acknowledged his wrongdoing and cooperated fully with IRS agents and federal prosecutors.

{4} The hearing committee and a three-member panel of the Disciplinary Board found that by virtue of his conviction and his actions, Key had committed violations of several of the Rules of Professional Conduct, Rules 16–101 to 16–805 NMRA 2003. Specifically, Respondent's conduct violated Rule 16–804(B) by having committed a criminal act that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects; Rule 16–804(C) by engaging in conduct involving dishonesty, fraud, deceit, and/or misrepresentation; and Rule 16–804(H) by engaging in conduct that adversely reflects on his fitness to practice law. The hearing committee recommended a sanction of suspension for the duration of Key's criminal probation with all but eighteen (18) months of the suspension to be deferred. Although the Disciplinary Board panel agreed with the suspension recommendation, the panel, with one member dissenting, nevertheless, recommended that all of the suspension be deferred and that Respondent be placed on probation pursuant to Rule 17–206(B) NMRA 2003 for a period to coincide with his criminal probation.

{5} This Court has not formally adopted the ABA Standards for Imposing Lawyer Sanctions, but we do look to them for guidance in determining appropriate sanctions for attorneys found guilty of misconduct and to insure a certain degree of consistency, although each case is decided on the basis of its own merits. The ABA Standards suggest that "[a]bsent aggravating or mitigating circumstances . . . [d]isbarment is generally appropriate when . . . a lawyer engages in serious criminal conduct[,] a necessary element of which includes intentional interference with the administration of justice, *false swearing, misrepresentation, fraud,* extortion, misappropriation, or theft. . . ." *Id.* at 5.11(a) (emphasis added).

{6} Pursuant to the ABA Standards, the following facts may be considered as factors in mitigation: (1) Respondent self-reported his conviction and cooperated fully with the office of disciplinary counsel, (2) Respondent's absence of a prior disciplinary record, (3) Respondent's reputation as a competent and ethical attorney, (4) Respondent's cooperation with federal authorities, (5) Respondent's expression of remorse for his misconduct, and (6) imposition of other penalties against Respondent. On the other hand, the fact that he committed a serious crime, exhibited a dishonest or selfish motive, and has substantial experience in the practice of law are factors in aggravation.

{7} Throughout these proceedings, Respondent did not contend that he is blameless or should escape sanction for his actions. He has, however, stressed that his continued practice of law would in no way endanger the public—a fact which is conceded by disciplinary counsel. He points out that if given probation, he could continue to serve his clients and to render the community service ordered as part of his probation for his criminal offense.

{8} It is true that the ultimate purpose of attorney discipline is the protection of the public. *See In re Allred,* 2001–NMSC–019, ¶ 18, 130 N.M. 490, 27 P.3d 977 (2001); *In re Sheehan,* 2001–NMSC–020,

¶ 21, 130 N.M. 485, 27 P.3d 972 (2001); *In re Sullivan,* 108 N.M. 735, 736, 779 P.2d 112, 113 (1989). It is not, however, the only purpose. This Court has made clear that it is equally concerned with the public's perception of the profession and the legal system.

> The purpose of attorney discipline is not solely to protect clients from being harmed by their attorneys, but also to protect the profession and the administration of justice. The public cannot be expected to have respect for our system of justice if we permit the officers of our courts to violate the very laws they are sworn to uphold and upon which they advise and counsel others to comply.

In re Cox, 117 N.M. 575, 576, 874 P.2d 783, 784 (1994).

{9} Because of this concern, attorneys found to have committed criminal acts are generally suspended or disbarred. The rationale for this practice was first articulated in *In re Griffin,* 101 N.M. 1, 677 P.2d 614 (1983). Griffin had been summarily suspended after pleading no contest to the felony of securities fraud relating to the purchase of residential property and sentenced to eighteen (18) months probation. The hearing committee and panel of the Disciplinary Board recommended his suspension for a period of six (6) months commencing at the time of his summary suspension. The Court rejected the recommendation and disbarred Griffin for the remainder of his period of probation, stating that "it is inconsistent with the practice of law under a license granted by this Court for an attorney to be allowed to practice law while he is on probation for a criminal sentence for a serious crime such as this." *Id.* at 1, 677 P.2d at 614. The *Griffin* opinion was quickly followed by *In re Norrid,* 100 N.M. 326, 670 P.2d 580 (1983), a case involving an attorney's willful failure to file an income tax return. Again, despite a recommendation by the Disciplinary Board for a six (6) month period of suspension, this Court imposed disbarment for the remainder of the probationary period noting that "it is the policy of this Court that attorneys should not be allowed to practice law while on probation under a criminal sentence." *Id.* at 326, 670 P.2d at 580.

{10} This Court has, with one exception, consistently disbarred or suspended attorneys convicted of and sentenced for criminal acts. *See, e.g., In re Bryan,* 116 N.M. 745, 867 P.2d 415 (1993) (attorney suspended with reinstatement automatic upon completion of probation for misdemeanor offense of failing to file income tax return); *In re Lopez,* 116 N.M. 699, 866 P.2d 1166 (1994) (attorney disbarred after conviction of embezzlement over $2500); *In re Esquibel,* 113 N.M. 24, 822 P.2d 121 (1992) (attorney disbarred for conviction of crime of receiving bribe by public official); *In re Kraemer,* 112 N.M. 101, 811 P.2d 1312 (1991) (attorney disbarred for conviction of securities fraud); *In re McCulloch,* 103 N.M. 542, 710 P.2d 736 (1985) (attorney disbarred for tampering with evidence and making a false report).

{11} Respondent points to *In re Stribling,* No. 26,781, as an example of when this Court has departed from its policy that "attorneys should not be allowed to practice law while on probation under a criminal sentence." The disciplinary case involving attorney Stribling came to this Court on a recommendation by the Disciplinary Board to adopt a conditional agreement "not to contest and consent to discipline." Attorney Stribling had been placed on probation in state court without an adjudication of guilt pursuant to NMSA 1978, Section 31–20–13 (1993), and upon his successful completion of probation the charges were to be dismissed. The stipulated disciplinary agreement called for attorney Stribling to be suspended from the practice of law for the eighteen (18) months of his probation, with the suspension deferred subject to his compliance with several conditions. This Court was persuaded by the stipulated disciplinary agreement that because an adjudication of guilt had not been entered, departure from the above-stated policy was appropriate in that case. Here, Respondent argues that his actions were less reprehensible than attorney Stribling and points out that had he been prosecuted in state court he would have had the same opportunity as attorney Stribling to have a conditional discharge of the underlying offenses. Since Respondent was prosecuted in federal court, he argues no such conditional

discharge was available to him. We need not decide in this case whether the very-limited exception made in *In re Stribling* should be applied on other facts. While there might conceivably be a situation where enforcement of this policy could be viewed as unjust, we see no reason to change it under the circumstances of this case and reiterate our previously stated position. The factors in mitigation applicable to Respondent obviate the need for disbarment at this time. We do not agree, however, with the Disciplinary Board that probation is appropriate.

{12} **NOW, THEREFORE, IT IS ORDERED** that Christopher S. Key be and hereby is suspended from the practice of law pursuant to Rule 17–206(A)(2) for the duration of his federal probation and that said suspension shall be effective on March 23, 2005;

{13} **IT IS FURTHER ORDERED** that pursuant to Rule 17–214(B)(1) Respondent will be automatically reinstated to the practice of law upon a showing that he has been released from probation;

{14} **IT IS FURTHER ORDERED** that Respondent shall follow the directives of Rule 17–212 and file his affidavit of compliance on or before April 4, 2005; and

{15} **IT IS FURTHER ORDERED** that Respondent shall pay the costs of this action to the disciplinary board in the amount of $610.38 on or before June 6, 2005.

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

2005-NMCA-051

113 P.3d 347

SANTA FE CUSTOM SHUTTERS & DOORS, INC., Plaintiff–Appellee/Cross–Appellant,

v.

HOME DEPOT U.S.A., INC., Defendant–Appellant/Cross–Appellee,

and

Santa Fe Custom Shutters & Doors, Inc., Plaintiff–Appellee,

v.

Home Depot, Inc., a Georgia corporation, Defendant–Appellant.

Nos. 24,203, 23,825.

Court of Appeals of New Mexico.

March 4, 2005.

Certiorari Denied, No. 29,125, May 1, 2005.

As Corrected May 24, 2005.

Larry D. Maldegen, William P. Templeman, Stephen J. Lauer, Sharon W. Horndeski, Comeau, Maldegen, Templeman & Indall, LLP, Santa Fe, NM, for Plaintiff–Appellee/Cross–Appellant.

Alice T. Lorenz, Miller, Stratvert P.A., Albuquerque, NM, Andrew S. Montgomery, Montgomery & Andrews, P.A., Santa Fe, NM, for Defendant–Appellant/Cross–Appellee.

OPINION

ALARID, Judge.

INTRODUCTION

{1} Defendant–Appellant, Home Depot U.S.A., Inc. (Home Depot), is a foreign corporation with headquarters in Atlanta, Georgia. Plaintiff–Appellee, Santa Fe Custom Shutters and Doors, Inc. (SFCS), is a New Mexico corporation.

{2} In 1995, Julie Lubke and Martin Doobrovo began manufacturing custom shutters in Santa Fe, New Mexico. Subsequently Lubke and Doobrovo incorporated their business as SFCS. In addition to manufacturing shutters, SFCS would also deliver and install its products. In late 1995 and early 1997, SFCS entered into written "Installer Agreements" with Home Depot by which SFCS was to provide custom shutters and installation services to customers of Home Depot at its stores in Albuquerque, New Mexico.

{3} Starting in 1997, Paul Wyman, Home Depot's Divisional Install Manager for Home Depot's Southwest Division, encouraged SFCS to expand its production capacity. Wyman represented to SFCS that Home Depot would buy display samples from SFCS and place them in Home Depot stores in the Dallas/Fort Worth market. Wyman represented to SFCS that Home Depot would professionally market SFCS's products. Wyman represented to SFCS that if SFCS expanded and maintained its production capacity, he anticipated that Home Depot would forward large numbers of shutter orders to SFCS. Wyman further represented to SFCS that eventually Home Depot would market SFCS products nationwide.

{4} SFCS and Home Depot entered into an oral agreement by which SFCS would increase and maintain its production capacity and produce shutters for sale in Home Depot's stores in the Dallas/Fort Worth market. Home Depot agreed to place display samples in its stores in the Dallas/Fort Worth market and to professionally market SFCS's products to Home Depot's customers. SFCS and Home Depot did not discuss or agree on the duration of the agreement, nor did they discuss or agree upon terms governing the termination of the agreement. In mid–1998, Home Depot began to offer and display SFCS's products in some of its Dallas/Fort Worth stores.

{5} Relying on Wyman's representations, SFCS expanded its production capacity. SFCS moved into a larger facility, acquired more efficient equipment, and hired additional employees. SFCS obtained bank financing and borrowed from Lubke's and Doobrovo's retirement plans in order to finance the expansion. SFCS continued to expand its production capacity during 1999. By the end of 1999 SFCS had an annual production capacity of $1 million in gross sales. However, Home Depot did not aggressively market SFCS's products and services in its Dal-

las/Fort Worth stores. In 1999, SFCS sold approximately $200,000 worth of products and services through Home Depot.

{6} The relationship between SFCS and Home Depot soured. SFCS asserted that Home Depot had not lived up to its commitment to market SFCS's products and services to its customers in the Dallas/Fort Worth market. In February 2000, SFCS and Home Depot agreed to mutual commitments to improve the program and increase sales of SFCS's products and services in the Dallas/Fort Worth market. Nevertheless, on March 20, 2000, Home Depot abruptly terminated SFCS's business relationship with Home Depot stores in the Dallas/Fort Worth market. On July 17, 2000, Home Depot terminated all business relationships with SFCS.

{7} SFCS sued Home Depot. The district court conducted an eight-day bench trial. The district court determined that Home Depot was liable under four alternative theories: (1) breach of contract, (2) common-law fraud, (3) violation of the New Mexico Unfair Practices Act (UPA) [1], and (4) violation of the Texas Deceptive Trade Practices–Consumer Protection Act (DTPA).[2] The district court awarded SFCS $3,770,039 in compensatory damages under each theory. The district court trebled the compensatory damages awarded on the UPA and DTPA claims for an award under each statute of $11,310,117. The district court awarded $1,000,000 in punitive damages on the breach of contract claim and $1,000,000 in punitive damages on the fraud claim. Lastly, the district court awarded post-judgment interest. The district court entered a judgment awarding SFCS treble damages of $11,310,117 and post-judgment interest in the amount of $688,936, for a total award of $11,999,053.

{8} Subsequently, in a Supplemental Judgment, the district court awarded SFCS $3,045,338.58 in attorney fees and costs.

{9} Both parties appeal.

The Texas DTPA

{10} Home Depot argues that the district court erred in not dismissing SFCS's DTPA claim. We agree.

{11} Under the DTPA, only consumers have standing to bring a claim. *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 706 (Tex.1983). To qualify as a consumer, the *plaintiff* must have sought or acquired goods or services by purchase or lease, and the goods or services so acquired must form the basis of the DTPA claim. *See Maginn v. Norwest Mortgage, Inc.*, 919 S.W.2d 164, 166 (Tex.App.1996). SFCS does not claim that it acquired goods from Home Depot. SFCS argues that it has standing as a consumer under the DTPA because it acquired "marketing services" from Home Depot. Where, as here, the operative facts are not in dispute,[3] whether a plaintiff was a consumer in relation to a transaction is a question of law. *FDIC v. Munn*, 804 F.2d 860, 863 (5th Cir.1986) (applying DTPA); *cf. N.M. Dep't of Labor v. A.C. Elec., Inc.*, 1998–NMCA–141, ¶ 8, 125 N.M. 779, 965 P.2d 363 (construing NMSA 1978, § 50–4–22 (1999)); *Jicarilla Apache Nation v. Rodarte*, 2004–NMSC–035, ¶ 24, 136 N.M. 630, 103 P.3d 554.

{12} In applying the DTPA, Texas courts distinguish between services that are the "objective" of a transaction and services that are merely "incidental." *Maginn*, 919 S.W.2d at 166. Services that are not the "end and aim" of the transaction and that serve no purpose other than facilitating the objective of the transaction are incidental as a matter of law. *Id.* at 167. A plaintiff's

1. NMSA 1978, §§ 57–12–1 to –22 (1967, as amended through 2003).

2. Tex. Bus & Com.Code Ann. §§ 17.41 to 17.63 (West 2002).

3. There is no dispute that Home Depot agreed to place displays of SFCS's products in its stores in the Dallas/Fort Worth market and to train its sales staff so that they would be able to assist Home Depot's customers in ordering shutters. The district court found that Home Depot's marketing expertise was a "central" factor in SFCS's decision to expand into the Dallas/Fort Worth market. The district court found that "[SFCS] agreed to ... produce shutters for sale through Home Depot's stores at mutually agreed-upon prices."

receipt of some incidental benefit from services performed by the defendant does not confer consumer status on the plaintiff if the plaintiff's objective in entering into the transaction is not the acquisition of goods or services. *See id.* Applying Texas law interpreting the DTPA, we hold as a matter of law that "the end and aim" of SFCS's contract with Home Depot was the receipt of payment of the purchase price of its goods and services. Marketing efforts by Home Depot directed at its own customers were incidental to SFCS's ultimate objective of obtaining payment for goods and services sold to Home Depot. "Money is not 'goods' under the DTPA, and acts to acquire money are not attempts to acquire services as defined by the DTPA." *Canfield v. Bank One, Tex., N.A.*, 51 S.W.3d 828, 839 (Tex.App. 2001). SFCS's attempt to characterize itself as a consumer is a variant of the discredited argument that because "all transactions involve human service to some extent, the cost of which is included in the price of the transaction . . . all 'services' in any transaction are purchased services under the DTPA." *Munn*, 804 F.2d at 863–64 (rejecting the argument that the provision of any services in a transaction otherwise excluded from the DTPA will give rise to consumer status). Under Texas law, SFCS's relationship to the SFCS–Home Depot transaction was as a seller of goods and services whose objective was payment in money for those goods and services. As a seller, SFCS lacks standing under the DTPA.

New Mexico UPA

{13} Home Depot argues that SFCS lacks standing to bring a claim under the UPA. We agree.

{14} The Unfair Practices Act defines an "unfair or deceptive trade practice" as

> any false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale . . . of goods or services . . . by any person in the regular course of his trade or commerce, which may, tends to or does deceive or mislead any person.

Section 57–12–2(D). As we read this provision, the UPA contemplates a plaintiff who seeks or acquires goods or services and a defendant who provides goods or services. In an effort to establish UPA standing as a purchaser of services, SFCS argues that we should treat Home Depot's activities in marketing SFCS's shutters to Home Depot's own customers as marketing services purchased by SFCS. We did not find this argument persuasive in the context of the DTPA and we do not find it persuasive in the context of the UPA.

{15} Whether Home Depot's activities in marketing SFCS's products and services to Home Depot's customers constituted a sale of services within the meaning of Section 57–12–2(D) involves both a question of statutory construction and the application of the statute as construed to the specific facts of this case. *See A.C. Elec., Inc.*, 1998–NMCA–141,¶ 8, 125 N.M. 779, 965 P.2d 363. Here, the historical facts are not in dispute; accordingly, we are faced with a pure question of law, subject to de novo review. *Jicarilla Apache Nation*, 2004–NMSC–035, ¶ 24, 136 N.M. 630, 103 P.3d 554. Although the district court purported to find that the transaction between Home Depot and SFCS involved the exchange, sale, or distribution of Home Depot's marketing services, we are not bound by the district court's characterization of an issue of law as a finding of fact. *See Latta v. Harvey*, 67 N.M. 72, 76, 352 P.2d 649, 651 (1960) (observing that it is improper for a trial court to make findings as to legal conclusions).

{16} The district court found that SFCS agreed to "produce shutters for sale through Home Depot's stores at mutually agreed-upon prices." This finding is consistent with the common understanding that Home Depot's role in the transaction with SFCS would have been as a buyer of goods or services, while SFCS's role was that of a seller. *See* NMSA 1978, § 55–2–103(1)(a), (d) (1993).

{17} If the legislature had defined an unfair or deceptive trade practice in terms of misrepresentations made in connection with the sale *or purchase* of goods or services, we might be inclined to recognize a claim against

Home Depot as a buyer of goods and services. However, the legislature has not chosen to treat sellers and buyers identically under the UPA. Consistent with its purpose as consumer protection legislation, *Ashlock v. Sunwest Bank,* 107 N.M. 100, 102, 753 P.2d 346, 348 (1988); *overruled on other grounds by Gonzales v. Surgidev Corp.,* 120 N.M. 133, 899 P.2d 576 (1995), the UPA gives standing only to buyers of goods or services. *See Channel Cos. v. Britton,* 167 N.J.Super. 417, 400 A.2d 1221 (1979) (construing New Jersey Consumer Fraud Act and observing that "[t]he legislative concern was the victimized consumer, not the occasionally victimized seller").

{18} It is not at all unusual for a sales contract to impose an executory duty on the purchaser to promote sales of the purchased goods or services. *See, e.g.,* NMSA 1978, § 55–2–306(2) (1961) (imposing a statutory duty on the buyer under an exclusive dealing contract to use best efforts to promote the sale of the seller's goods); *Custom Communications Eng'g, Inc. v. E.F. Johnson Co.,* 269 N.J.Super. 531, 636 A.2d 80, 83 (1993) (observing that a distributorship agreement expressly imposed a duty on the distributor to use best efforts to promote the sale of the manufacturer's products). We have not found any case treating the activities of a buyer of goods or services in promoting sales to its own customers of purchased goods or services as a separate sale of marketing services to the manufacturer or supplier of the goods or services. We hold that Home Depot's activities in marketing SFCS's shutters and installation services to Home Depot's own customers was not a sale of marketing services to SFCS for purposes of Section 57–12–2(D); with respect to the SFCS–Home Depot transactions, SFCS was a seller of goods and services, not a buyer. As a seller of goods and services, SFCS lacks standing to bring a UPA claim against Home Depot.

Evidentiary Rulings

{19} Home Depot appeals two evidentiary rulings of the district court. We apply a de novo standard to the question of whether the district court utilized the correct evidentiary rule or standard. *State v. Torres,* 1999–NMSC–010, ¶ 28, 127 N.M. 20, 976 P.2d 20. We otherwise review the district court's rulings admitting or excluding evidence for an abuse of discretion. *Gonzales v. N.M. Dep't of Health,* 2000–NMSC–029, ¶ 24, 129 N.M. 586, 11 P.3d 550.

{20} The district court permitted SFCS to call Mark Berry, who testified in considerable detail as to the dealings between Home Depot and Snappy Sheds, a family-owned business engaged in the manufacture of portable metal storage sheds in Truth or Consequences, New Mexico. The district court overruled Home Depot's objection to this testimony, agreeing with SFCS's argument that it was admissible under Rule 11–404(B) NMRA to establish intent and motive. Home Depot argues that evidence of Snappy Sheds' experience with Home Depot was inadmissible under any theory and should have been excluded. SFCS responds that the Snappy Sheds' evidence was properly admitted pursuant to Rule 11–404(B) to establish that Home Depot acted with fraudulent intent and a culpable state of mind. As we explain below, the admission of evidence of Snappy Sheds' experience with Home Depot under Rule 11–404(B) was error.

{21} Berry testified that his family began manufacturing and selling the sheds in 1999 as a sideline to a construction and steel fabrication business. Initially, Berry and his family members focused on mobile home outlets, feed stores, and hardware stores as potential outlets for the sheds. Between start-up and May 2000, they sold approximately 150 sheds through their own marketing efforts. They phased out other aspects of their family business in order to concentrate on the sheds. In early 2000, Berry was contacted by a Lubbock, Texas businessman who previously had indicated his interest in becoming a Snappy Shed dealer. During this conversation, the potential dealer told Berry that he had been in contact with a "large hardware store chain," and that he was attempting to set up a meeting between Berry and representatives of the chain. A meeting and demonstration took place in Lubbock in April 2000. At the meeting, Berry was excited to

learn that the "large hardware store chain" was Home Depot.

{22} At the initial meeting, Home Depot was represented by Paul Wyman, Home Depot's Divisional Install Manager for the Southwest Division, and by Pat Kinney, a furnishing install manager for a district within the Southwest Division. Berry testified that he was "ecstatic" because "they're [Home Depot] the big boys, they're the No. 1." Berry came away from the meeting with the understanding that there was a "strong possibility" that Wyman would place the sheds in stores throughout the Southwest Division.

{23} A few weeks after the Lubbock meeting, Berry demonstrated the shed to a group of Home Depot store managers in Las Cruces, New Mexico. Kinney, Wyman, and store managers from Lubbock, Midland, Odessa, El Paso, and Las Cruces were present. The managers appeared enthusiastic about selling the sheds in their stores. Berry recalled that "[t]hey had basically the same reaction of, 'How soon can we get these in our stores?' " Wyman told Berry that he was "very excited about trying to get . . . our product into the Home Depot store, and he wanted to get them in right as soon as possible, right away."

{24} The next day, May 12, 2000, Kinney and Wyman met with Berry and his brother-in-law, Martin Gomez. During this meeting, Gomez executed an Installer Agreement on behalf of Snappy Sheds. Berry and Gomez gave Kinney and Wyman a tour of their manufacturing facility. Berry recalled Wyman stating that the possibility of selling such a high quality shed "gave him goosebumps, gave him chills" and that "he was excited to know us now at the ground floor, so he could tell people later when we got big that he knew us back when." Wyman and Berry discussed production capacity. Berry told Wyman that they were set up to produce roughly 240 sheds a month. Wyman told Berry that he should be "prepared to build up to that, beyond that, because once we branch out into other markets, get into all of his stores, our biggest problem would be being able to keep up with their sales." Wyman explained to Berry that "the two things that would cost us our contract with Home Depot would be customer [dis]satisfaction or not being able to keep up with the sales from their stores." Wyman indicated that his concern was with Snappy Sheds' ability to provide product, not with Home Depot's ability to generate sales.

{25} Wyman described to Berry the efforts that Home Depot would make to promote sales of the sheds:

> It was pretty well-discussed that, agreed upon, that Home Depot's job is to sell the items that they have in their stores. We were to sell at cost demo models to their stores. I repeat, at our cost. And they were—we were going to give them literature as far as selling. They were going to keep the literature in stock, keep the [demo models] clean, make them accessible to the public. If they had weekend events or any particular events, that they would help promote our buildings at that point and push them.
>
> . . . .
>
> [W]e were to give them—give their stores PKs, which are product knowledge classes, and that their associates would push our buildings for us. Home Depot's office would help with advertising, get us in their catalogs.

{26} Snappy Sheds began "preparing, building up the demos, so when they gave us the word, like we were told, when they gave us the word it was going to be time to move. So we started leaping in that manner, building up manpower, a little more equipment, material, inventory, in stock buildings." By early July 2000, Berry had set up demonstration sheds at Home Depot stores in southern New Mexico and west Texas.

{27} Sales were "poor." Although Snappy Sheds had the capacity to produce 240 sheds per month, sales through Home Depot stores amounted to six or eight per month. Berry testified that he experienced "large problems as far as the [sheds] being covered up by other products that they sold; customers not being able to get to them; Home Depot associates storing items in them; Home Depot associates not knowing the product." When Snappy Sheds gave product knowledge

classes for sales associates, "very few associates would show, even after they had been scheduled for days and weeks in advance. Some would be cancelled, some would be postponed, some just not dealt with."

{28} Berry raised the possibility of moving Snappy Sheds into more Home Depot stores to increase sales. Snappy Sheds expanded into Home Depot stores in Albuquerque and Santa Fe. Berry also inquired into moving into the Dallas/Fort Worth market. Berry was told by Home Depot management to "[b]e prepared to be buried in sales" and to "just hang in there, Home Depot would get our sales up." In anticipation of moving into Home Depot stores in the Dallas/Fort Worth market Snappy Sheds acquired new vehicles and trailers, and Berry moved to Dallas. Snappy Sheds and its principals financed the new equipment by borrowing money. Snappy Sheds was "strapped" financially and its principals were "equally as stressed." Sales in Dallas were worse than the first few months in New Mexico. Berry attempted to persuade Home Depot management to allow Snappy Sheds to expand into additional stores in Dallas in order to increase sales. Snappy Sheds was given two more stores in Texas, one in Tyler and another in Longview. Sales did not improve. By April 2001, Snappy Sheds and its principals were in "[d]ire straits." Suppliers would not extend credit and some quit dealing with Snappy Sheds. Snappy Sheds' creditors began exercising security interests in its accounts receivables. Berry believed that the low sales were attributable to Home Depot's failure to push sales. In July 2001, Berry wrote Home Depot, explaining that Snappy Sheds was bankrupt and would no longer be supplying products to Home Depot. Berry summarized his family's experience with Home Depot:

> We were naive enough to, I guess, to trust them. They kept telling us, promising us that they would help us. They would get our sales up, do whatever that was necessary. Once it got a certain point, then we had no other options.

{29} Rule 11-404(B) provides that "[e]vidence of other ... 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 ... intent ... or absence of mistake or accident." (Emphasis added.) For evidence to be properly admissible "for other purposes," such as establishing a party's state of mind, the evidence must bear on the issue in question "in a way that does not merely show propensity." *State v. Niewiadowski,* 120 N.M. 361, 363-64, 901 P.2d 779, 781-82 (Ct.App.1995). Although we agree with SFCS that the evidence of Snappy Sheds' experience with Home Depot tends to make it appear more likely that SFCS's roughly contemporaneous experience with Home Depot was intentional, rather than mistaken or accidental, this evidence is persuasive precisely because it tends to establish Home Depot's character for reneging on its promises to small, unsophisticated businesses. In closing argument, SFCS relied on Berry's testimony to argue that Home Depot has a bad corporate character:

> what happened to [Lubke] and [Doobrovo] is not some aberration. This is not a unique circumstance. We unfortunately during our discovery in Atlanta found a letter from Mr. Berry that's in evidence. And that letter jumped out at us because it was unbelievably similar to what these people had been told. And you heard Mr. Berry. These people made the same mistake that Mr. Berry testified to. They trusted Home Depot, and it led to the same result. The Berry family businesses were all bankrupted. Two of the three Berrys went through bankruptcy, and [Lubke] and [Doobrovo] lost Santa Fe Shutters. And, Your Honor, at some point this kind of business practice has to be stopped. Because how many more family businesses like these have to be destroyed?

We hold that evidence of Snappy Sheds' experience with Home Depot constituted improper evidence of "the character of a person in order to show action in conformity therewith." *State v. Ruiz,* 2001-NMCA-097, ¶ 18, 131 N.M. 241, 34 P.3d 630 (reversing the defendant's criminal conviction and observing that the use of evidence of other bad acts to show "that [the][d]efendant had a tendency to abuse children sexually, and if he abused

one girl, then he likely abused the others" is "exactly what Rule 11–404(B) does *not* allow"). The district court erred in admitting this evidence under Rule 11–404(B).

{30} SFCS argues that in any event the admission of this evidence was harmless. Quoting *Builders Steel Co. v. Commissioner of Internal Revenue,* 179 F.2d 377, 379 (8th Cir.1950), SFCS argues that "it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence." We cannot agree.

{31} In a bench trial, a district court frequently must disregard evidence that has been offered by a party, but which the court has excluded. *See State v. Campos,* 1996–NMSC–043, ¶ 27, 122 N.M. 148, 921 P.2d 1266 (observing that in a bench trial the judge serves as both "gatekeeper" and factfinder). In such cases, we presume that the district court disregarded the incompetent evidence. *Gray v. Grayson,* 76 N.M. 255, 256, 414 P.2d 228, 229 (1966) (noting the general rule that the district court may be presumed to have disregarded incompetent evidence). This rule has obvious logical limits. When a district court in its role as gatekeeper *overrules* an objection and admits evidence, it is illogical to presume that the district court in its role as factfinder will disregard evidence that it already has concluded is admissible. This is particularly true when that evidence is highly persuasive. *People v. De Groot,* 108 Ill.App.2d 1, 247 N.E.2d 177, 181–82 (1969) (observing that "[w]here an objection has been made to the evidence and overuled, [sic] it cannot be presumed that the evidence did not enter into the court's consideration. The ruling itself indicates that the court thought the evidence proper"). We find SFCS's argument that the district court could not have used the evidence of Snappy Sheds' experiences for an improper purpose to be somewhat disingenuous considering that (1) in its closing argument SFCS pointedly invited the district court to infer from two suppliers' experiences that Home Depot was untrustworthy and had engaged in a business practice of deceit and broken promises; and (2) in its proposed findings of fact and conclusions of law, SFCS referred to Berry's testimony as evidentiary support for findings that Home Depot's conduct was "malicious, reckless, wanton, oppressive and fraudulent" and that Home Depot made representations to SFCS "knowing that the representations were false and misleading." The district court adopted SFCS's requested finding that Home Depot's conduct was "malicious, reckless, wanton, oppressive and fraudulent" but added the additional phrase "and not as a result of mistake but was a regular practice of Home Depot." Berry's testimony was the only evidence that tended to establish that Home Depot engaged in a regular practice of wrongful conduct toward small suppliers as opposed to one-time wrongful behavior towards SFCS. On such a record, we will not presume that the district court disregarded the improper evidence. *See Moore v. Moore,* 28 N.M. 463, 467, 214 P. 585, 586–87 (1923) (stating the rule that the reviewing court may assume that incompetent evidence was relied upon by a trial court where it "was the only evidence on the subject, or was evidence, without which the court could not properly have reached the result announced").

{32} Error may not be predicated upon the erroneous admission of evidence "unless a substantial right of the [objecting] party is affected." Rule 11–103(A) NMRA. Where there is a "high probability" that the improper evidence may have influenced the factfinder, a "substantial right" of the objecting party has been affected. *City of Albuquerque v. PCA–Albuquerque # 19,* 115 N.M. 739, 744, 858 P.2d 406, 411 (Ct.App.1993). Here, Berry testified in considerable detail about Snappy Sheds' experience with Home Depot, and SFCS emphasized that testimony in its closing argument. We are satisfied that there is a high probability that the evidence of Snappy Sheds' financially disastrous experience as a Home Depot supplier-installer influenced the district court in finding that Home Depot "made representations to [SFCS], knowing that the representations were false and misleading," and that Home Depot's conduct toward SFCS was "malicious, reckless, wanton, oppressive and fraudulent and not as a result of mistake but [as] a regular practice of Home Depot." The district court's error in admitting this evidence

requires that we vacate the judgment on the fraud and contract counts, including the punitive damages awards. We vacate the judgment on the contract count, notwithstanding the general principle that contract liability is liability without fault, *Restatement (Second) of Contracts* 309, Introductory Note to Ch. 11 (1981), because the issue of Home Depot's state of mind was inextricably implicated in the district court's determination that Home Depot breached the implied covenant of good faith. The district court is directed to set aside the findings that Home Depot "made representations to [SFCS], knowing that the representations were false and misleading," and that Home Depot's conduct toward SFCS was "malicious, reckless, wanton, oppressive and fraudulent and not as a result of mistake but [as] a regular practice of Home Depot"; to reconsider the question of Home Depot's state of mind, disregarding the improper evidence relating to Snappy Sheds' experience with Home Depot; and to enter amended findings of fact and conclusions of law. *See Gray,* 76 N.M. at 257, 414 P.2d at 230.

{33} As a second evidentiary claim of error, Home Depot argues that the district court improperly limited Home Depot's introduction of testimony concerning the details of complaints about SFCS made by sales associates and customers, erroneously ruling that such evidence was hearsay.

{34} As we understand Home Depot's theory of admissibility, evidence of the details of these complaints was relevant to show Home Depot's state of mind—i.e., that Home Depot had good faith concerns about SFCS's willingness or ability to meet the expectations of customers and sales associates. Evidence establishing Home Depot's good faith concerns about SFCS's performance arguably would have tended to refute SFCS's claim that Home Depot acted with the culpable mental state required to support an award of punitive damages. *See Romero v. Mervyn's,* 109 N.M. 249, 255–56, 784 P.2d 992, 998–99 (1989) (distinguishing " 'wrongful' " breaches of contract sufficient to support an award of punitive damages from breaches "committed intentionally for legitimate business reasons or those that are the result of inadvertence").

{35} We agree with Home Depot that to the extent statements by out-of-court declarants were offered as circumstantial evidence of Home Depot's state of mind, this testimony was not hearsay. Hearsay is "an utterance by one person, which is offered only to evidence the state of mind which ensued in another person in consequence of the utterance, is admissible insofar as the hearsay rule is concerned." *Glass v. Stratoflex, Inc.,* 76 N.M. 595, 601, 417 P.2d 201, 204 (1966); *see also State v. Stampley,* 1999–NMSC–027, ¶ 39, 127 N.M. 426, 982 P.2d 477 (holding that out-of-court statements identifying the defendant as the perpetrator were not hearsay to the extent they were admitted to refute the defendant's claim that the investigating officer acted unreasonably and with an improper motive in focusing her investigation on the defendant).

{36} Because we are reversing and remanding on other grounds, the district court should use the opportunity presented by remand to revisit the issue of the admission of Home Depot's evidence of the details of specific complaints. At trial the district court generally precluded Home Depot's witnesses from testifying as to the specific details of complaints from customers and sales associates, ruling that such evidence was hearsay. The district court nevertheless allowed Home Depot's witnesses to testify about their own understanding of problems with SFCS, as long as they did not recount specific out-of-court statements by other persons. Within the parameters established by the district court, Home Depot introduced considerable testimony that customers, sales associates, and managers had problems with the quality of service provided by SFCS. Our opinion should not be understood to preclude the district court from considering other grounds for sustaining SFCS's objection to the admission of this evidence or to preclude the district court from exercising its discretion under Rule 11–403 NMRA; we merely hold that exclusion of this evidence solely on the hearsay grounds was improper.

Benefit–of–the–Bargain Damages

{37} Home Depot argues that the district court erred by awarding SFCS benefit-of-

the-bargain damages based upon anticipated sales over a five-year period subsequent to Home Depot's termination of the agreement with SFCS. Because this issue will likely recur on remand, we address it even though we have vacated the judgment on other grounds.

{38} Although the parties have relied on common-law authorities in briefing this case, it is immediately apparent that the contract between SFCS and Home Depot involved the mixed sale of goods (shutters) and services (installation), with the goods component clearly predominating.[4] *Plantation Shutter Co. v. Ezell,* 328 S.C. 475, 492 S.E.2d 404 (1997); *Kirkpatrick v. Introspect Healthcare Corp.,* 114 N.M. 706, 709–10, 845 P.2d 800, 803–04 (1992) (discussing "primary purpose" test). Additionally, our Supreme Court has held that a distributorship agreement—defined as "a contract for the sale of a product from a manufacturer at wholesale prices that is to be marketed in a specific area by the distributor"—is subject to Article 2 of the Uniform Commercial Code (UCC). *United Wholesale Liquor Co. v. Brown–Forman Distillers Corp.,* 108 N.M. 467, 775 P.2d 233 (1989). We hold that the agreement between SFCS and Home Depot is governed by Article 2 of the UCC. The facts that the contract imposed SFCS a duty to maintain sufficient capacity to meet Home Depot's needs and imposed on Home Depot a duty to market SFCS's goods and services to Home Depot's customers does not take the contract out of Article 2. *See* § 55–2–306(2) (requiring seller under exclusive requirements contract to use best efforts to supply goods and requiring buyer to use best efforts to promote sales of the product); *see also* 2A Ronald A. Anderson, *Anderson on the Uniform Commercial Code* § 2–306:54 (3d ed.1997 rev.) (summarizing the duties imposed by the UCC on a buyer of goods under a requirements contract).

{39} As we demonstrate below, Article 2 expressly deals with the termination of a sales contract of indefinite duration. Where the legislature has spoken comprehensively and in detail on a subject, it is an indication that the legislature intends to displace the common law dealing with the same subject. *Rutherford v. Darwin,* 95 N.M. 340, 343, 622 P.2d 245, 248 (Ct.App.1980). We therefore apply the provisions of Article 2 governing termination of sales contracts of indefinite duration, rather common-law principles. *See id.* (holding that UCC law of restrictive endorsements is sufficiently comprehensive and detailed to exclude common-law exceptions which are not mentioned).

{40} The district court found that: (1) Home Depot and SFCS did not discuss or agree upon the duration of the contract, and (2) Home Depot and SFCS did not discuss or agree upon a reasonable time for notice of termination. Where, as here, the parties have not addressed termination of an agreement for an indefinite duration, Article 2 supplies the following default terms:

> (2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.
>
> (3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party.

NMSA 1978, § 55–2–309 (1961).

{41} According to a leading commentator:

> When a continuing contract does not contain any terms specifying the duration of the contract, it continues for a reasonable time but may be terminated at any time, *without regard to whether a reasonable time has already expired,* by one party upon the giving of reasonable notice.

Anderson, *supra* § 2–309:36 (emphasis added; footnotes omitted).

{42} SFCS argues that notwithstanding the at-will nature of its business relationship with Home Depot, we should treat Home Depot's exercise of its right to terminate its relationship with SFCS as a breach of the duty of good faith. SFCS argues that unless we apply the duty of good

4. SFCS's economics expert calculated SFCS's damages on the assumption that ten percent of the gross amount of a typical order was attributable to installation charges.

faith to limit Home Depot's right to terminate,

> [Home Depot] would be free to (a) entice, through misrepresentation, a company like [SFCS] to enter into a contractual relationship of indefinite duration requiring enormous up-front investments and debt, (b) promise a partnership likely to produce substantial profits, (c) fail to keep binding promises to professionally market the company's product, and (d) before the anticipated profits could be realized, terminate the arrangement in breach of any notion of good faith and fair dealing.

{43} We agree with SFCS that the implied duty of good faith, *see* § 55–1–203, applies in the context of a termination of a contract of indefinite duration. That does not mean, however, that the general duty of good faith overrides the right to terminate "at any time" specifically conferred by § 55–2–309(2).

> There can be no question that the broad terms of UCC § 1–203[recognizing an implied duty of good faith] mandate that the limitation of good faith apply to all actions taken under the authority of the Code. This, however, does not answer the question of what is meant by "good faith" in the context of a notice to terminate an indefinite duration contract. The very absence of any predicate that must be established as a condition precedent to terminating the contract emphasizes the absence of any significance to the good faith concept in this particular situation.

Anderson, *supra* § 2–309:49 (footnotes omitted). Other leading commentators agree: "We do not believe that ideas of good faith should be used to deprive a terminating party of the rights it would otherwise have under 2–309(2)." 1 James J. White & Robert S. Summers, *Uniform Commercial Code* 140 (4th ed.1995). We agree with Home Depot that "[t]he essence of the at-will doctrine is the right of either party to cease doing business without liability for *future* profits the other party hopes it will earn if the relationship continues." (Emphasis added.)

{44} The implied duty of good faith does not confer on a district court "a roving commission to do whatever its wishes in the name of fairness." *Cf. United Props. Ltd. v. Walgreen Props., Inc.*, 2003–NMCA–140, ¶ 19, 134 N.M. 725, 82 P.3d 535 (discussing limitations on the authority of a district court exercising equity jurisdiction to relieve a party from the consequences of its failure to exercise an option in accordance with the terms of a lease). If SFCS desired the security of a contract binding Home Depot to a business relationship lasting a specific term of years, it was free to bargain for such a term. *See Melnick v. State Farm Mut. Auto. Ins. Co.*, 106 N.M. 726, 732, 749 P.2d 1105, 1111 (1988) (observing that "[p]arties to a contract may negotiate and bargain for provisions which are beneficial to them" and declining to apply common-law implied covenant of good faith and fair dealing to override express provision making insurance agency terminable at will). In the absence of such a term, Home Depot had the right to terminate its contractual relationship with SFCS "at any time," under Section 55–2–309(2), and this was so without regard to whether the contract had been in effect for a reasonable time when Home Depot terminated the contract. Anderson, *supra* at § 2–309:36. The district court concluded that SFCS was entitled to damages for lost profits calculated over a five-year period beginning January 1, 2000. In view of Home Depot's right to terminate its contracts with SFCS at any time, which there is no dispute Home Depot exercised on March 20, and July 17, 2000, the district court's use of the five-year period in calculating benefit-of-the-bargain damages was error.

{45} Our decision does not inexorably lead to the hyperbolically dire consequences predicted by SFCS for several reasons. First, we see no reason for precluding a party who has been fraudulently induced to enter into a contract from electing to recover costs incurred in preparing to perform the contract as an alternative to seeking damages for the loss of the benefit of the bargain. *See* E. Allan Farnsworth, *Contracts* § 12.16 (3d ed.1999) (discussing reliance interest as an alternative measure of damages for breach of contract); 1 Roy Ryden Anderson, *Damages under the Uniform Commercial Code* § 1:3 (2d. ed.2003) (observing that "the basic law of contract regarding restitution

and reliance is preserved for Code cases by Section 1–103"); *Restatement (Second) of Torts* § 549(1)(b) (1977) (recognizing that victim of fraud may recover pecuniary loss suffered as the result of reliance upon the misrepresentation). SFCS could have sought recovery of damages measured by its "enormous" up-front investment; instead, SFCS elected to pursue damages measured by the benefit of the bargain. Second, if the breaching party's representations in fact are binding promises, those promises may be enforced under established principles of contract law. Under our holding, SFCS is entitled to damages based upon profits that would have accrued if Home Depot had professionally marketed SFCS's products and services over the period *prior to* termination. SFCS may also be entitled to *post*-termination damages if the district court determines on remand that Home Depot failed to provide reasonable notification of its decision to terminate its business relations with SFCS and SFCS suffered damages due to the lack of reasonable notification. *RGJ Assoc., Inc. v. Stainsafe, Inc.*, 300 F.Supp.2d 250 (D.Mass.2004) (discussing measure of seller's damages for buyer's breach of the duty of reasonable notification in the context of an unwritten requirements contract; distinguishing damages caused by inadequate notice of termination from non-recoverable profits lost as a result of the termination of a contract of indefinite duration). Lastly, in cases of fraud or cases involving breach of contract accompanied by reckless disregard for the plaintiff's rights, the injured party may recover punitive damages. *E.g. Garcia v. Coffman*, 1997–NMCA–092, ¶¶ 34–36, 124 N.M. 12, 946 P.2d 216 (affirming award of punitive damages for fraud); *Paiz v. State Farm Fire & Cas. Co.*, 118 N.M. 203, 211, 880 P.2d 300, 308 (1994) (discussing standards for awarding punitive damages in breach of contract cases). Although we have vacated the award of punitive damages, our decision does not foreclose an award of punitive damages on remand.

Issues Rendered Moot

{46} Home Depot appeals from the district court's award of attorney fees. SFCS cross-appeals the amount of damages awarded under the DTPA. Our determination that SFCS lacks standing under both the DTPA and UPA requires that we vacate the award of attorney fees. Our determination that SFCS lacks standing under the DTPA even to seek damages renders moot SFCS's cross-appeal as to the amount of damages.

CONCLUSION

{47} We reverse the judgment of the district court and remand for proceedings consistent with this opinion.

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

WE CONCUR: JONATHAN B. SUTIN and RODERICK T. KENNEDY, Judges.

2005-NMCA-053

113 P.3d 360

ALLIANCE HEALTH OF SANTA TERESA, INC., d/b/a Alliance Hospital of Santa Teresa and Alliance Behavioral Health Services of Southern New Mexico, Inc. d/b/a The Adolescent Pointe, Artc, Plaintiffs–Appellants,

v.

NATIONAL PRESTO INDUSTRIES, INC. and The Araz Group, John Doe No. 1, Mary Roe, and John Doe No. 2, Defendants–Appellees.

No. 23,301.

Court of Appeals of New Mexico.

March 29, 2005.

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OPINION

KENNEDY, Judge.

{1} Alliance Health of Santa Teresa, Inc. and its affiliates (Alliance) appeals the district court's dismissal of its claim for monetary damages against Defendants National Presto Industries, Inc. (National Presto) and The Araz Group (Araz) (collectively, Defendants). In the course of litigation, dismissals of various claims against Defendants occurred at different times. Despite an early dismissal of claims against Araz, Araz continued to act as a party in the case, and we hold that its active role in the proceedings preserved Alliance's ability to timely appeal.

{2} In this opinion, we hold that a third-party healthcare provider is not preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1144 (2000)

(ERISA), from seeking payment of claims based on theories sounding in contract and promissory estoppel under state law. In short, where such a party alleges that the insurer or its agent promised payment of claims to a provider, that promise stands independently, and can support a lawsuit that ERISA does not preempt to collect the promised funds. Accordingly, we reverse the grant of Defendants' motions to dismiss Alliance's state law claims owing to ERISA preemption, and remand for further proceedings.

{3} The controversy in this case is whether National Presto, Araz, or both, are obligated to pay for hospital services that Alliance rendered to a patient, and if so, how much. The question with which we are presented is whether a third-party health care provider such as Alliance can maintain an action under state law against entities that provide and administer health insurance for services provided to an insured based on the insurer's promises to pay or whether such state claims are preempted by ERISA.

{4} ERISA preemption has been generously called a "quagmire of conflicting precedent." *Forest Springs Hosp. v. Ill. New Car & Truck Dealers Ass'n,* 812 F.Supp. 729, 733 (S.D.Tex.1993). One commentator describes the area as one in which "courts cannot agree whether ERISA preempts [or does not preempt the cause of action] . . .; in fact, they cannot even agree on how to analyze the issue." Jay Conison, *ERISA and the Language of Preemption,* 72 Wash. U. L.Q. 619, 620 (1994). Against this less than promising history, we try to make clear one corner of the problem. We discern a pattern of law allowing courts to distinguish between the issues arising from ERISA-covered plans, plan principals, and plan administration, and those interests that are outside the perimeters of ERISA's preemptive interest.

The Parties and Their Claims

{5} Parties John Doe No. 2 (Doe 2), Mary Roe, and John Doe No. 1 are a child and his parents, respectively. Doe 2's father is employed by National Presto, whose employees receive benefits through a self-insured health plan. In this case, National Presto is an employer that provides a group health plan to its employees and, by virtue of its self-insurance, it is also an insurer. National Presto's plan is an ERISA plan. Doe 2 was covered as an insured beneficiary under his father's health plan through National Presto when he required psychiatric treatment on an inpatient basis.

{6} Alliance is a corporation that operates the mental health care facilities where Doe 2 was treated. Alliance claims that Araz is an agent of National Presto and the administrator of the plan. Araz claims that it is no more than a medical precertifier and not a benefits administrator, and that benefits documents make this distinction clear.

{7} The complaint alleges the following facts. In May 1999, Doe 2 was admitted to Alliance Hospital at Santa Teresa for inpatient psychiatric treatment. Subsequently, Araz took over case management of Doe 2's case. Araz, acting as representative or agent of National Presto, represented to Alliance that Doe 2 was indeed covered by National Presto's insurance benefit plan, which is subject to ERISA, and that Alliance would be paid for services rendered. On June 7, 1999, at Araz's request, Alliance Hospital discharged Doe 2, who then was transferred to The Adolescent Pointe, a residential treatment center also operated by Alliance. Over the following months, Alliance and Araz had discussions concerning Doe 2's coverage from the June transfer through December 1999, when Doe 2 was discharged from The Adolescent Pointe by Alliance.

{8} Araz and National Presto contend that residential treatment of the sort provided to Doe 2 was not covered by the plan. They claim that under the plan Doe 2 was covered for only thirty days of inpatient psychiatric treatment, not the residential treatment that was provided after the early part of June 1999, and that no representations were made to Alliance authorizing his treatment or the payment thereof. On October 26, 1999, Araz's consulting psychiatrist informed Alliance that in Araz's consideration, Doe 2 no longer met the criteria for medically necessary psychiatric services. Alliance continued to treat Doe 2 until his discharge in December 1999.

{9} Doe 2's treatment was covered to some extent by National Presto, whose health plan was allegedly administered by Araz. Alliance was not paid for certain amounts of these services that it turns out are not covered under the insurance plan. The parties do not dispute that National Presto insured Alliance's patient to some extent. Alliance received payment for some services that all agree were covered by National Presto's plan. It is suing for payment for services that National Presto has declined to cover.

Procedural Background

{10} Alliance sued National Presto as the insurer under the plan and Araz as the plan administrator or the authorized agent administering National Presto's plan for promissory estoppel, fraud, and breach of contract based on Araz's promises to pay for Alliance's services.[1] These claims are based on state law. A fourth claim for payment of benefits due Doe 2 under ERISA was filed against National Presto alone. The district court dismissed the first three claims against both Defendants based on ERISA preemption on February 26, 2001. It later dismissed the separate ERISA claim against National Presto by summary judgment on May 23, 2002. Araz was dismissed from the suit on May 28, 2002.

{11} Following an April 2002 hearing on National Presto's motion for summary judgment, National Presto's attorney, having secured the approval of all counsel to the form of judgment, sent the judgment to the district court for filing on May 9, 2002. The district court filed the order on May 23, 2002. Araz had obtained an order dismissing "all claims" against it that was filed on May 28, 2002.

{12} Alliance immediately filed a motion for a new trial as to National Presto. It filed a motion for a new trial as to Araz on June 12, 2002, and then, on June 21, 2002, Alliance filed an amended consolidated motion for a new trial, incorporating the previous two motions, specifically requesting reconsideration of all orders entered previously, and for the granting of a new trial. Alliance then filed its notice of appeal on June 26, 2002, taking an appeal against both National Presto and Araz.

DISCUSSION

I. Timeliness of the Appeal

{13} Araz maintains that Alliance did not file a timely appeal following the dismissal of the state law claims against Araz. National Presto does not contest the timeliness of Alliance's appeal.

{14} As this case proceeded through the district court, all state law claims against National Presto and Araz were dismissed from the suit early on when the district court found ERISA preemption of those claims. Alliance filed a motion to reconsider that dismissal, to which Araz responded. The motion was denied. All this occurred by April 2001. Following this dismissal, no other claim remained naming Araz as a defendant. Only the claim against National Presto under ERISA for plan benefits due Doe 2 remained.

Araz's Potential Liability as National Presto's Agent Continued Beyond the Dismissal of State Law Claims

{15} The ERISA claim against National Presto remained active until May 23, 2002, when, during the trial of the remaining ERISA claim, the district court entered its order of summary judgment dismissing the claim as to National Presto. Araz followed up with a response to National Presto's motion for summary judgment that argued for dismissal of all counts against both National Presto and, specifically, Araz. Araz's request was granted and filed by the court on May 28, 2002. At the hearing on the motion, Araz acknowledged that while it was "[t]echnically" out of the case in February 2001, because allegations remained concerning the agency or apparent authority of Araz to bind National Presto, it "was still in the case simply because the ERISA allegations against National Presto remained." We believe that Araz's concession in this regard was correct.

1. Alliance also sued Doe 2 and his parents, although Alliance's claims against them are not at issue in this appeal.

The Remaining Question of Agency Kept the Potential Claim Against Araz Alive

{16} The question of an agent's actual or apparent authority to bind its principal is a question of fact which would preclude summary judgment. *See, e.g., Romero v. Mervyn's,* 106 N.M. 389, 390, 744 P.2d 164, 165 (1987) (holding that genuine issue of fact concerning agent's authority to bind principal precludes summary judgment). Alliance's complaint alleged quite clearly that Araz was acting as National Presto's agent and benefits administrator throughout its transactions with Defendants concerning Doe 2's treatment. The allegation that Araz was representing National Presto as its agent, with authority to bind National Presto to providing coverage under its plan to Doe 2, is accepted as true by us for purposes of reviewing the district court's dismissal of the state law counts. *See Padwa v. Hadley,* 1999–NMCA–067, ¶ 8, 127 N.M. 416, 981 P.2d 1234. It is this agency by which Araz continued to recognize its possible liability as long as National Presto's liability to provide coverage was still an active issue. National Presto's liability under ERISA was not determined until May 2002; Araz's possible liability continued as well.

Even After the February 2001 Dismissal, Araz Continued to Participate in the Case as If It Was a Party

{17} Araz's continuing connection with the case does not rest on its possible liability alone. From February 2001 through the end of the case in June 2002, Araz continued to participate in the case and file pleadings in the district court. Araz responded to discovery, and in December 2001 filed a motion to dismiss for failure to prosecute. This was denied on December 17, 2001. Araz also filed a second motion to dismiss based on Alliance's failure to prosecute on March 27, 2002.

{18} In its motion to dismiss filed on December 13, 2001, Araz sought dismissal of the case against it for failure to prosecute. In that motion, it asserted that it had answered interrogatories, arranged depositions, and had received correspondence alleging failure to answer interrogatories from Alliance—all after the dismissal of the counts against it on February 26, 2001. In that motion, it sought dismissal of all claims against it with prejudice, even though the counts in which Araz itself was named were dismissed on February 26, more than nine months previously. Araz then filed a second certificate of service to Alliance's interrogatories on December 19, 2001, and a scheduling report on December 28, in which it listed its witnesses for trial, stated that its discovery would take another five to six months, and further stated its intention to "[pursue] summary judgment" of the "remaining claims against the corporate defendants."

{19} Clearly, Araz was acting as if it were still a party to the action with a need to defend against Alliance's claims. Araz's continued participation in the case in discovery might well be consistent with a party who had been dismissed from a case but was still a witness. Araz's filing of the second motion to dismiss for failure to prosecute in March 2002, a motion to extend the mediation deadline filed the same day, and in May 2002, another motion to dismiss following National Presto's successful motion for summary judgment, all speak to Araz's understanding that it was not finished with the suit—or more accurately, that the suit was not finished with Araz. Araz further filed a response in support of National Presto's motion for summary judgment attempting to draw the district court's attention to relevant case law supporting ERISA preemption of claims resulting from modification of health care plan terms.

{20} This is not the behavior of a party who has been dismissed from a suit almost a year and a half previously. Araz's pleadings recognize possible continued liability in the case should it be found to have operated as National Presto's agent while dealing with Doe 2. Arguing for dismissal on the merits of the claim indicates to us that Araz considered itself a functioning defendant in the case, even if the counts against it had, as it said, "technically" been dismissed in February 2001.

The February 26, 2001, Order Was Not a Final Order

{21} Despite its activity and seeking a dismissal of "all claims" against it in December 2001, Araz argues that the order of February 26, 2001, was a final order as to all claims against it, and that Alliance's appeal is therefore not timely. Alliance responds that the February 26, 2001, order dismissing state law claims against Araz based on ERISA preemption was not a final order under Rule 1–054 NMRA. We agree with Alliance, and hold that the dismissal of the case was not final until May 2002 when all claims against Araz and National Presto were finally dismissed.

{22} Furthermore, the order of dismissal entered by the district court in February 2001 was not a final order in the case. It did not resolve all claims in the case against Araz under Rule 1–054. Given the continued participation of Araz, and the trial court's specific finding of jurisdiction over Araz, the issue of Araz's liability as an agent of National Presto was one that could still be litigated up to the point of the dismissal of Count VI claiming benefits of National Presto under ERISA should Araz's agency become an issue. Given the actions of the parties, the policy behind hearing appeals on the merits, and the fact that the final order dismissing Araz filed on May 28, 2002, dismissed all claims and was definitive, we hold that Alliance's appeal was timely.

{23} Last, we emphasize that "[i]t is the policy of this court to construe its rules liberally to the end that causes on appeal may be determined on the merits, where it can be done without impeding or confusing administration or perpetrating injustice." *Trujillo v. Serrano,* 117 N.M. 273, 276, 871 P.2d 369, 372 (1994) (internal quotation marks and citation omitted). Here, Araz's active participation in the case, including seeking "final" dismissals for lack of prosecution and as a result of dismissal of the ERISA claim against National Presto that laid to rest the question of its liability as an agent, all recognize that Alliance's claims still carried potential impact on Araz's rights. Araz's clear acknowledgment of this fact to the district court reinforces our decision in this regard.

The Appeal Was Timely

{24} The May 28, 2002, order of dismissal by its own terms dismissed "all claims against [Araz]" with prejudice. We hold that order to be the final, appealable order as to claims against Araz. By filing its appeal on June 26, 2002, Alliance timely filed its appeal of the order dismissing Araz as a defendant in this case.

II. The District Court Erred in Ruling that Alliance's State Law Claims Brought Against Defendants are Preempted by ERISA

Standard of Review and Background

{25} The district court dismissed Alliance's promissory estoppel, fraud, and breach of contract claims against National Presto and Araz. In doing so, the district court found that these state law claims were "preempted by [ERISA] as such claims affect the benefits and administration of the Plan[.]" "Whether Defendants were entitled to judgment as a matter of law based on federal preemption is a legal question we review de novo." *Largo v. Atchison, Topeka & Santa Fe Ry.,* 2002–NMCA–021, ¶ 5, 131 N.M. 621, 41 P.3d 347. "We interpret the intention of Congress and the meaning of its statutes de novo." *Palmer v. St. Joseph Healthcare P.S.O., Inc.,* 2003–NMCA–118, ¶ 17, 134 N.M. 405, 77 P.3d 560, *cert. granted,* 134 N.M. 374, 77 P.3d 278 (2003), *dismissed,* 2004–NMCERT–010, 136 N.M. 542, 101 P.3d 808. Furthermore, in reviewing a motion to dismiss, "all well-pleaded factual allegations" are accepted as true, and all doubts are resolved "in favor of the sufficiency of the complaint." *Padwa,* 1999–NMCA–067, ¶ 8, 127 N.M. 416, 981 P.2d 1234. The only question is "whether the plaintiff might prevail under any state of facts provable under the claim." *N.M. Life Ins. Guar. Ass'n v. Quinn & Co.,* 111 N.M. 750, 753, 809 P.2d 1278, 1281 (1991); *Valles v. Silverman,* 2004–NMCA–019, ¶ 6, 135 N.M. 91, 84 P.3d 1056.

{26} Alliance argues that it is entitled to reversal of the district court's ruling that

its state law claims are preempted by ERISA. It asserts that false or negligent representations of Doe 2's coverage and promises of payment made by Araz, who was alleged to be National Presto's agent or representative or both, bound National Presto to pay for services Alliance provided. It states that without such promises, Alliance would not have rendered medical services and would not thus have suffered financial injury. Alliance maintains that it relied in good faith upon Defendants' misrepresentations that National Presto would pay for the services provided by Alliance. Alliance further argues that it is entitled to full payment for services from Defendants because it relied on Araz's representations that services were medically necessary as a further guarantee that these services were covered by National Presto's insurance plan.

{27} But for the issue of ERISA preemption, these are recognized claims in New Mexico. *See, e.g., Charter Servs., Inc. v. Principal Mut. Life Ins. Co.,* 117 N.M. 82, 86, 868 P.2d 1307, 1311 (Ct.App.1994) ("Negligent misrepresentation is an action governed by the general principles of the law of negligence." (internal quotation marks and citation omitted)); *Teague–Strebeck Motors, Inc. v. Chrysler Ins. Co.,* 1999–NMCA–109, ¶ 16, 127 N.M. 603, 985 P.2d 1183 (noting in dicta several theories of misrepresentation from which damages may arise, including promissory estoppel), *overruled on other grounds by Sloan v. State Farm Mut. Auto. Ins. Co.,* 2004–NMSC–004, ¶ 6, 135 N.M. 106, 85 P.3d 230.

{28} Alliance asserts these claims under state law, asserting National Presto's and Araz's liability for misrepresenting the extent of Doe 2's coverage, and that National Presto would pay. Defendants assert that to allow such an action to proceed would violate ERISA's federal statutory preemption of actions under state law that relate to and affect benefit plan funds and their administration. Defendants also contend that dismissal of Alliance's claims was proper because Araz is not an agent or representative of National Presto. This contention is outside the scope of our review. There was no ruling on the principal-agent issue as the district court dismissed the state law claims based on ERISA preemption. Although the record reflects that the issue concerning agency and the authority of Araz was discussed during the district court proceedings, facts concerning the relationship between National Presto and Araz were not fully developed, and there was no district court ruling on this factual issue. *See J.A. Silversmith, Inc. v. Marchiondo,* 75 N.M. 290, 293, 404 P.2d 122, 124 (1965) (stating that "matters not raised or brought into issue by the pleadings, and upon which no ruling of the trial court was invoked, are not preserved for review on appeal").

{29} Because we accept the allegations in Alliance's complaint as true, we do not decide whether Araz was other than Alliance described, or if there are factual questions about Araz's agency. Thus, for purposes of this appeal, we assume that Araz made representations to Alliance that Doe 2 was covered by National Presto's plan, and that payment would be forthcoming for services Alliance rendered to Doe 2. We also assume that these representations were made by Araz as an agent of National Presto, and that both parties would be liable if these facts were proven at trial. The question, therefore, is simply whether the fraud, promissory estoppel, and breach of contract claims are preempted by federal law.

ERISA PREEMPTION

{30} Although ERISA is federal legislation, Araz urges us to focus on New Mexico state case law for guidance on this preemption issue. It is true that we have some New Mexico cases concerning preemption and its relation to ERISA, and, of course, we take those cases into consideration. However, our case law recognizes that federal cases are more informative on these issues, and we also look to pertinent federal law for guidance. *See Sonntag v. Shaw,* 2001–NMSC–015, ¶ 27, 130 N.M. 238, 22 P.3d 1188 (stating that "[w]ithout binding New Mexico law to interpretations made by the federal courts of the federal statute," we apply the guidelines articulated in the applicable federal law (internal quotation marks and citations omitted)).

{31} Under the Supremacy Clause of the United States Constitution, U.S. Constitution article VI, clause 2, federal preemption of state law may be "explicitly mandated by Congress, compelled due to an unavoidable conflict between the state law and the federal law, or compelled because the state law is an obstacle to the full accomplishment of congressional objectives." *In re Timberon Water Co.*, 114 N.M. 154, 158, 836 P.2d 73, 77 (1992) (citation omitted). ERISA's preemption provision, 29 U.S.C. § 1144(a), provides that the provisions of this Act "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan." (Emphasis added.) Thus, we must decide whether Alliance's state law claims "relate to" National Presto's employer benefit plan because if they do, they are preempted.

{32} The United States Supreme Court has interpreted the phrase "relates to" in a broad sense to include laws that have a "connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n. 21, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983); *Lunn v. Time Ins. Co.*, 110 N.M. 73, 74, 792 P.2d 405, 406 (1990); *Sappington v. Covington*, 108 N.M. 155, 156, 768 P.2d 354, 355 (Ct.App.1988). The scope of the ERISA preemption clause is thus "broad, [but] not infinite, and certain claims based on state law that in some sense relate to an ERISA plan are not preempted." *Lunn*, 110 N.M. at 74, 792 P.2d at 406. Preemption is limited in that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n. 21, 103 S.Ct. 2890. Furthermore, allowed "lawsuits against ERISA plans for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan—are relatively commonplace." *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 833, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988) (holding that statute exempting ERISA plan benefits from state enforcement orders did not preempt collection of money judgments through garnishment).

{33} New Mexico has recognized a strong presumption against preemption. *Palmer*, 2003–NMCA–118, ¶¶ 38, 39, 134 N.M. 405, 77 P.3d 560; *Montoya v. Mentor Corp.*, 1996–NMCA–067, ¶ 7, 122 N.M. 2, 919 P.2d 410; *cf. Stoneking v. Bank of Am., N.A.*, 2002–NMCA–042, ¶¶ 9–10, 132 N.M. 79, 43 P.3d 1089 (holding that federal law and its regulations clearly preempted state laws concerning prepayment penalties on home loans). The United States Supreme Court has "long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). There is a presumption against the preemption of state laws in areas of traditional state regulation and those laws that do not intrude on either ERISA's general purpose or its preemption clause purpose. *See, e.g., De Buono v. NYSA–ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 815, 117 S.Ct. 1747, 138 L.Ed.2d 21 (1997) (suggesting that where existence of a pension plan is not critical to a state law cause of action preemption would not apply); *N.Y. State Conference v. Travelers Ins. Co.*, 514 U.S. 645, 659, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995) (finding that mandatory state surcharges by hospitals on bills where insurance coverage was provided by ERISA plans were not preempted because they have only an "indirect economic influence" on employee plans); *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997) (holding that "[w]here a State's law acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law's operation . . . that 'reference' will result in pre-emption") (citations omitted) (hereinafter *Dillingham*).

{34} Construing the "relates to" language of the preemption clause is difficult. *Dillingham* refers to the " 'unhelpful text' of ERISA's pre-emption provision." *Id.* at 324, 117 S.Ct. 832; *see also Travelers Ins. Co.*, 514 U.S. at 655–56, 115 S.Ct. 1671 (recognizing the problem of a too expansive reading of "relate to" and looking to Congress's intent in creating the ERISA statute in order to interpret the scope of preemption); Conison, *supra* at 623–29. Because of this difficulty in

interpreting the "relate to" language of 29 U.S.C. § 1144 to determine and measure the extent of the relation for purposes of preemption, we must look "to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive[,]" as well as to the nature of the effect of the state law on the ERISA plan. *Travelers Ins. Co.*, 514 U.S. at 656, 115 S.Ct. 1671 (acknowledging that the text of the ERISA preemption provision is unhelpful and looking to Congressional intent for guidance in the interpretation and application of that provision); *Dillingham*, 519 U.S. at 325, 117 S.Ct. 832 (looking both to ERISA's objectives and to the nature of the state law's effect on ERISA plans); *Gonzales v. Surgidev Corp.*, 120 N.M. 133, 139, 899 P.2d 576, 582 (1995) ("Thus we must look to the [federal] statute to determine whether it displaces state courts as forums for considering claims involving medical devices.").

{35} ERISA was enacted

> to protect . . . the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. § 1001(b) (2000). Further, in enacting ERISA, Congress was concerned

> with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds. . . . It established extensive reporting, disclosure, and fiduciary duty requirements to insure against the possibility that the employee's expectation of the benefit would be defeated through poor management by the plan administrator.

Dillingham, 519 U.S. at 326–27, 117 S.Ct. 832 (internal quotation marks and citation omitted).

{36} To this end, the preemption language in 29 U.S.C. § 1144 indicates Congress's intent to establish the regulation of employee welfare benefit plans "as exclusively a federal concern." *Alessi v. Raybestos–Manhattan, Inc.*, 451 U.S. 504, 523, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981). This preemption section of the ERISA statutory framework shows Congress's intent

> to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government . . ., [and to prevent] the potential for conflict in substantive law . . . requiring that tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.

Travelers Ins. Co., 514 U.S. at 656–57, 115 S.Ct. 1671 (internal quotation marks and citation omitted) (alterations in original). "The basic thrust of the pre-emption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Id.* at 657, 115 S.Ct. 1671.

{37} We keep in mind that the purpose of ERISA was to nationally standardize the relationships between participants and beneficiaries in employee benefit plans, and to provide ready access to the federal courts for those who had disputes. Prior to ERISA, the lack of such standardization and proliferation of state laws and regulations had a serious impact upon the insurance industry that in turn had a negative impact upon the consumer. The authority to preempt state actions that relate to an employee benefit plan was broad, but with one singular exception. "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n. 21, 103 S.Ct. 2890. In the ensuing years of litigation filling in the blanks that *Shaw* left behind, the lower federal courts have been left to sort out its language with mixed results. *See* Jeffrey A. Brauch, *Health Care Providers meet ERISA: Are Provider Claims for Misrepresentation of Coverage Preempted?*, 20 Pepp. L.Rev. 497, 500 (1993).

Tests for What "Relates to" a Plan

{38} "Relation to" an ERISA plan has been held to exist if the law "has a connection with or reference to such a plan." *Lunn*, 110 N.M. at 74, 792 P.2d at 406 (internal quotation marks and citation omitted). Although *Lunn* recognized a federal intention to interpret preemptive clauses broadly, it recognized that certain claims under state law are not preempted. *Id.* In its answer brief, National Presto characterizes Alliance's claim in Count VI for payments of benefits under ERISA as Doe 2's surrogate as one that "attempted to advance ... an equitable estoppel/detrimental reliance claim, not a claim based upon any actual benefit provided by the Plan." It is precisely this problem—what is *not* a claim "related to" a benefit plan—with which we are concerned here.

{39} We agree with Defendants to the extent that if Alliance were attempting to stand in the shoes of Doe 2 to collect benefits to which the plan entitled him, such causes of action would be preempted by ERISA. It is expressly for this reason that the dismissal of Alliance's claim under ERISA for payment of benefits to which Doe 2 was entitled was properly based on ERISA preemption. Clearly such a claim directly "relates to" the relationship between plan principals (insurer, insured/beneficiary, fiduciaries), seeks a construction of what is available to Doe 2 under terms of the plan by inserting the third-party provider as a surrogate for the beneficiary, and seeks to challenge the internal administration of claim evaluation and benefit payment under the plan itself. These three considerations unequivocally trigger ERISA preemption. It should be noted that this discussion is illustrative only, as Alliance does not contest the dismissal of its claim pursuant to ERISA.

{40} Defendants attempt to characterize Counts I–III in this case as ones that are preempted by ERISA because Alliance seeks to collect benefits as little more than a proxy of Doe 2's rights as a plan beneficiary. Looking at it through the lens suggested above, National Presto's argument that the ERISA action is not "a claim based upon any actual benefit provided by the Plan" will ultimately be dispositive of the issues concerning state law claims.

{41} In the federal circuits, a minority and majority view has developed of preemption where, as here, a provider is basing its action on state causes of action amounting to claims arising from misrepresentation of the existence or extent of benefits by a plan or its agents. Defendants rely on *Cromwell v. Equicor–Equitable HCA Corp.*, 944 F.2d 1272 (6th Cir.1991), which represents the minority view. In *Cromwell*, a provider of home health care had called the administrator of the plan, allegedly receiving verification of coverage for such services. *Id.* at 1274–75. The provider paid for a time, but then the administrator learned that the plan did not actually cover the services and stopped paying claims, though it did not notify the provider until some two and a half months later that it would no longer pay. *Id.* at 1275. The provider sued in state court alleging breach of contract, promissory estoppel, negligence, and breach of the duty of good faith. *Id.* The administrator removed the case to federal court, where it was dismissed as preempted by ERISA. *Id.* The Sixth Circuit affirmed, rejecting the "tenuous or peripheral effect" argument of the provider, holding instead that the goal of the action was no more than to seek the recovery of an ERISA plan benefit due its patient. *Id.* at 1275–76. The court further held that to allow such recovery would affect the relationship between plan principals by allowing recovery of what essentially would be a plan benefit. *Id.* at 1276. This position has been called "extreme." Scott C. Walton, *ERISA Preemption of Third–Party Provider Claims: A Coherent Misrepresentation of Coverage Exception*, 88 Iowa L.Rev. 969, 983 (2003). The dissent in *Cromwell*, however, looked to the Fifth Circuit's *Memorial Hospital System v. Northbrook Life Insurance Co.*, 904 F.2d 236 (5th Cir.1990) (hereinafter *Memorial Hospital*), and would hold that provider misrepresentation actions do not involve a claim under the plan, but rather a claim brought because there is no coverage under the plan, which does not affect the relations among the ERISA plan principals. *Cromwell*, 944 F.2d at 1283–84.

{42} Viewing the goal of the action and whether litigation affects the relationships between plan principals are but two of at least six tests that are used by the courts to resolve questions involving the possible ERISA preemption of provider claims for damages against plans for what is essentially misrepresentation by plans or their agents concerning benefit availability or promises to pay to the provider upon which the provider relies. In general, these factors are (1) the goal of the action; (2) the administrative effect of an application of state law; (3) economic impact on the plan; (4) the role of the plan document in the litigation; (5) the effect of applying state law on the relationship between the principal ERISA entities, namely the employer, plan, fiduciary, and beneficiary; and (6) the existence of a remedy to the plaintiff. Brauch, *supra*, at 501–11.

{43} Not all factors apply to all cases. We find the four questions set forth in Walton to be a sensible operational blend of these factors when looking at this issue.

> The first question in this paradigm asks whether the provider is suing derivatively or upon a significant independent relationship breached by the plan or its administrators. The second inquiry examines whether finding no preemption would substantially negate an express plan provision. Third, the court should consider whether the economic impact of the claim upon the plan is so substantial and direct as to require preemption. Finally, the analysis inquires whether allowing preemption substantially alters the relationships between the participants, the beneficiaries, the employer, the plan's fiduciaries, and the plan itself.

Walton, *supra*, at 988–89.

{44} It is the Fifth Circuit's decision in *Memorial Hospital* that forms the basis for the majority view that claims such as Alliance's are not preempted, and which we follow in this case. 904 F.2d 236. *Memorial Hospital* further distilled the application of preemption to two situations where: "(1) the state law claims address areas of exclusive federal concern, such as the right to receive benefits under the terms of an ERISA plan; and (2) the claims directly affect the relationship among the traditional ERISA entities—the employer, the plan and its fiduciaries, and the participants and beneficiaries." *Id.* at 245. The Fifth Circuit concluded that a suit for misrepresentation of the existence of coverage by a provider fit neither category where the provider was asserting its state law claim as an independent, third-party provider of medical services. *Cypress Fairbanks Med. Ctr. Inc. v. Pan-Am. Life Ins. Co.*, 110 F.3d 280, 283 (5th Cir.1997).

{45} The effect of applying state law to plans and their administrators and the effect that application might have on the interests ERISA seeks to protect by preemption—plan terms, plan administration, and the relationships between ERISA-covered principals—determines the extent to which such claims may trigger preemption. Although Defendants attempt to distinguish the federal cases which have held that under certain circumstances state law claims are not preempted, we are unpersuaded by these arguments. We follow the reasoning used in the federal court cases which have considered this issue in similar situations, allowing third parties to bring state law claims. *See, e.g., In Home Health, Inc. v. Prudential Ins. Co.*, 101 F.3d 600, 602 (8th Cir.1996) (reversing the district court's finding that a provider's "claim for negligent misrepresentation based on state law was preempted by ERISA"); *The Meadows v. Employers Health Ins.*, 47 F.3d 1006, 1007 (9th Cir.1995) (affirming the district court's finding that ERISA did not preempt the provider's claims for "negligent misrepresentation, estoppel, and breach of contract arising out of an inquiry concerning coverage"); *Airparts Co. v. Custom Benefit Servs.*, 28 F.3d 1062, 1063 (10th Cir.1994) (reversing the district court's finding of ERISA preemption because it found that the claims did not "relate to an ERISA plan"); *Lordmann Enters., Inc. v. Equicor, Inc.*, 32 F.3d 1529, 1530, 1532–33 (11th Cir.1994) (holding that ERISA did not preempt a provider's negligent misrepresentation claim); *Hospice of Metro Denver, Inc. v. Group Health Ins.*, 944 F.2d 752, 756 (10th Cir.1991) (per curiam) (holding that a provider's state common law claim for promissory estoppel was not preempted by ERISA).

> [C]ourts are more likely to find that a state law relates to a benefit plan if it affects relations among the principal ERISA entities—the employer, the plan, the plan fiduciaries, and the beneficiaries—than if it affects relations between one of these entities and an outside party, or between two outside parties with only an incidental effect on the plan.

Memorial Hospital, 904 F.2d at 249 (internal quotation marks and citation omitted). The Tenth Circuit has recognized four categories of laws which have been preempted. *Airparts Co.*, 28 F.3d at 1064–65. These categories include

> laws that regulate the type of benefits or terms of ERISA plans. Second, laws that create reporting, disclosure, funding, or vesting requirements for ERISA plans. Third, laws that provide rules for the calculation of the amount of benefits to be paid under ERISA plans. Fourth, laws and common-law rules that provide remedies for misconduct growing out of the administration of the ERISA plan.

Id. (internal quotation marks and citation omitted). Clearly, these relate directly to the internal workings and relationships of plan principals and participants. This case does not fall within these problem areas.

Alliance's Claims Are Not Derivative of Doe 2's Entitlement to Benefits

{46} Alliance contends that the law established by the Tenth Circuit has "firmly established that state law claims brought by a third party health care provider against the plan sponsor, plan administrator, and/or claims administrator of an ERISA governed group health employee benefit plan are not preempted by ERISA." Alliance argues that it does not seek to claim any rights under the plan, nor does it contend that its state law causes of action seek to enforce or modify the terms of the plan. Rather, Alliance contends it seeks "damages for an independent cause of action separate and apart from the plan."

{47} Here, Alliance seeks recovery for treatment rendered to Doe 2 that was promised but did not exist under the plan. As mentioned above, in commercial circumstances where federal law does not involve itself, misrepresentation as to insurance coverage or that benefits of a policy will be paid are legitimate claims for damages in New Mexico. In contrast, Alliance's claim in Count VI of its complaint specifically sounds under ERISA to compel National Presto to pay benefits owed Doe 2 under the terms of the benefit plan. By asserting Doe 2's rights under the National Presto plan, Alliance seeks by its claim to stand in the shoes of Doe 2 to assert contractual rights under the benefit plan, something clearly preempted by ERISA.

{48} Alliance avers that its state law claims "do not relate to the plan but to representations of coverage made to a third party, that is not a participant or beneficiary of the plan, and [that] do not implicate the administration of the plan." Alliance points out that none of Defendants' alleged conduct relates to the processing of claims or the administration of the plan, or impinges upon the rights or responsibilities of plan principals—simply, the cause of action sounds in Defendants' misrepresentation to Alliance that its services were covered and would be paid for.

{49} Defendants argue that Alliance's claims clearly affect and relate to the structure, administration, and type of benefits provided by National Presto's ERISA health care plan and are preempted by ERISA, as Alliance's claims "equated to a demand for reimbursement from the Plan." They assert that the language of the plan regarding the terms of treatment services as a covered benefit is clear, maintaining that payment has been made to Alliance as an assignee in the maximum amount owed to it under the terms of the plan.

Alliance's Suit Does Not Affect Any Plan Provision

{50} The conceptual line between Alliance seeking benefits that exceed Doe 2's coverage under the plan and seeking damages for misrepresentation of an ability and inclination to pay for Doe 2's treatment seems thin at first blush. However, National Presto's own argument is that Alliance seeks to recover where there was no coverage for Doe 2 at all, and that argument begins to demon-

strate that Alliance's state law claims are separate. The nature of the commercial transaction itself, as explained in *Memorial Hospital,* shows how the two are quite distinct. 904 F.2d 236. "[O]ne of the first steps in accepting a patient for treatment is to determine a financial source for the cost of care to be provided." *Id.* at 246. "[W]hen an insurance company [or its agent] erroneously informs a health care provider . . . that a patient is covered by health insurance, state law, which allocat[es] . . . risks between commercial entities that conduct business in a state, normally provides a remedy." *Cypress Fairbanks Med. Ctr. Inc.,* 110 F.3d at 283 (internal quotation marks and citation omitted). The state law claim does not arise due to the patient's coverage, but "precisely because there is no ERISA plan coverage." *Memorial Hospital,* 904 F.2d at 246. Allowing a state law cause of action in this case where there is no relation to the terms or conditions of the plan that covered Doe 2, or affects its administration only tangentially by encouraging plans to check their facts before confirming coverage and guaranteeing payment, thus does not transgress any area ERISA seeks to protect.

{51} Alliance's state law claims do not seek to enforce or modify any rights under National Presto's plan, do not allege that any of the plan terms have been breached, and do not relate to the administration of the plan. *See Airparts Co.,* 28 F.3d at 1065 ("The state laws involved do not regulate the type of benefits or terms of the plan; they do not create reporting, disclosure, funding, or vesting requirements for the plan; they do not affect the calculation of benefits; and they are not common law rules designed to rectify faulty plan administration."). By allowing this suit to go forward, there is no threat to the structural integrity or the purpose of the ERISA statutory framework. *See id.* The terms of the plan are immaterial to Alliance's state law claims. "It does not matter what the plan provided in the way of coverage for the patient. The only relevant questions, whether of fact or law, are whether the defendant . . . made a promise that the law will enforce[.]" *Suburban Hosp., Inc. v. Sampson,* 807 F.Supp. 31, 33 (D.Md.1992). Although Alliance's damages would be measured in part by the amount of benefits it would have received had there been no misrepresentation regarding coverage, this is incidental in relation to the plan. *See Memorial Hospital,* 904 F.2d at 247. In *Memorial Hospital,* the court discussed the preemption question in relation to an ERISA plan's refusal to pay hospital expenses after the plan had orally represented that there was coverage. The court stated:

> If a patient is not covered under an insurance policy, despite the insurance company's assurances to the contrary, a provider's subsequent civil recovery against the insurer in no way expands the rights of the patient to receive benefits under the terms of the health care plan. If the patient is not covered under the plan, he or she is individually obligated to pay for the medical services received. The only question is whether the risk of nonpayment should remain with the provider or be shifted to the insurance company, which through its agents misrepresented to the provider the patient's coverage under the plan. A provider's state law action under these circumstances would not arise due to the patient's coverage under an ERISA plan, but precisely because there is no ERISA plan coverage.

Id. at 246.

The State Law Claims Do Not Affect the Relationship Between Plan Principals, or the Administration of the Plan

{52} The argument that ERISA preemption is triggered in this case because the state law claims affect the primary administrative function of the benefit plan in that the plan beneficiary's benefit and the amount of that benefit are at issue does not ring true. National Presto argues that the "most important factor under the circumstances of the instant case would appear to be [Alliance's] state law claims' effects on the relations between the alleged principal ERISA entities." This argument arises out of the contention that Araz is National Presto's agent and/or representative and the claim would require an examination of the relations between two ERISA entities. In fact, Araz "denies that its certification that treatment was medically

necessary was a guarantee and/or representation that services were covered and payment would be forthcoming." It also denies an agency relationship with National Presto or that Araz is the plan administrator. Araz contends that it simply contracted with National Presto to perform "utilization review and utilization management for [National] Presto's insureds," i.e., only "to certify whether a proposed treatment was medically necessary." Araz also denies that it was retained by National Presto to verify coverage. The true relationship between Araz and National Presto as plan administrator, agent, or merely reviewer of medical necessity for final coverage decisions by National Presto is one to be established at trial or through other proceedings. The nature of representations and Alliance's reliance on them to its detriment establish the cause of action for misrepresentation.

{53} Alliance has not alleged any conduct on the part of Araz which relates to the administration of the plan, to the processing of Doe 2's claims, or which impinges on or modifies an employee's or beneficiary's rights under the plan. *See Clark v. Coats & Clark, Inc.,* 865 F.2d 1237, 1243–44 (11th Cir.1989) (holding that tort claims had no effect on the administration of an ERISA plan and were therefore not preempted); *Ethridge v. Harbor House Rest.,* 861 F.2d 1389, 1404 (9th Cir.1988) ("ERISA preempts only those state law claims that arise out of the administration of a covered plan."); *cf. Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 48, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) (holding that ERISA preempts a state law claim brought by a plan participant or beneficiary alleging improper processing of a claim for plan benefits) *superceded by statute on other grounds as stated in Hunter v. Ameritech,* 779 F.Supp. 419, 421 (N.D.Ill.1991); *Ramirez v. Inter-Cont'l Hotels,* 890 F.2d 760, 762, 764 (5th Cir.1989) (same). Here, Alliance is not a plan participant or beneficiary and sues for damages for a breach of promised representations of coverage to pay for services, irrespective of plan benefits. Coverage and payment in this case are questions of fact and exist outside the relationship between Doe 2 and his insurer and its agent. Allowing Alliance's suit to go forward does not impact or alter the relationship between Araz and National Presto; its success stands or falls based on the nature of the relationship only as to who bears responsibility for a misrepresentation on which Alliance relied to its detriment. Alliance is not seeking benefits due Doe 2 under the plan, but damages for having provided treatment based on misrepresentations that payment would be forthcoming. The relationship of the beneficiary to the plan and its agents is not an issue, nor are the terms of the plan itself germane to Alliance's claims here.

{54} Defendants argue that *Lunn* is dispositive on the preemption issue because that is a New Mexico Supreme Court case which held that state law claims directly relating to an ERISA plan are preempted. *Lunn,* 110 N.M. at 75, 792 P.2d at 407. However, in that case the breach of the insurance contract claim sought benefits under the plan, and the bad faith and misrepresentation claims directly related to the administration of the plan. *Id.* (stating that "the suit was for benefits under the plan and damages for alleged bad faith in its administration"). We determine that other cases more directly answer the ERISA preemption issue presented and follow their analysis. *See, e.g., Hospice of Metro Denver, Inc.,* 944 F.2d at 756 (allowing state law claims by providers where such claims do not involve a relationship among "the principal ERISA entities" and to hold such claims preempted by ERISA "would stretch the 'connected with or related to' standard too far").

Without the State Law Claims, Alliance Is Left Without a Remedy

{55} Alliance further argues that if its state law claims are preempted, it will have no recourse because as a third party, it has no standing to bring a claim under the plan. It points out that because the ERISA framework only permits a participant in or beneficiary of an employee welfare benefit plan to maintain a civil action to recover benefits due under the terms of the plan. *See* 29 U.S.C. § 1132(a)(1)(B).

{56} Here, if its state law claims are preempted, Alliance has no recourse, as it

concedes that its ERISA claim under the plan in Count VI of its complaint against National Presto was properly dismissed. *See Lunn,* 110 N.M. at 75, 792 P.2d at 407. It is true that "preemption normally is not dependent upon the availability of ERISA remedies." *Hospice of Metro Denver, Inc.,* 944 F.2d at 755. The United States Supreme Court has stated that "[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if *ERISA-plan participants and beneficiaries* were free to obtain remedies under state law that Congress rejected in ERISA." *Pilot Life Ins. Co.,* 481 U.S. at 54, 107 S.Ct. 1549 (emphasis added). However, in this case, Alliance is not a participant or a beneficiary and therefore lacks alternative remedies in the event of preemption. *Hospice of Metro Denver, Inc.,* 944 F.2d at 755 (noting that where the plaintiff is neither a participant nor beneficiary, "its lack of alternative remedies in the event of preemption is deserving of consideration"); 29 U.S.C. § 1132(a)(1)(B) (stating ERISA's civil enforcement scheme).

Alliance's State Law Claims Are Not Preempted

{57} Although there is no simple test for determining when a state law relates to an ERISA plan, we conclude that the state law claims at issue do not fall within any of the categories listed above and have no direct connection with National Presto's ERISA-governed plan. Alliance's state law claims do not seek to enforce or modify any rights under National Presto's plan, do not allege that any of the plan terms have been breached, and do not relate to the administration of the plan. *See Airparts Co.,* 28 F.3d at 1065 ("The state laws involved do not regulate the type of benefits or terms of the plan; they do not create reporting, disclosure, funding, or vesting requirements for the plan; they do not affect the calculation of benefits; and they are not common law rules designed to rectify faulty plan administration."). By allowing this suit to go forward, there is no threat to the structural integrity or the purpose of the ERISA statutory framework. *See id.* at 1066. The terms of the plan are immaterial to Alliance's state law claims. What matters is "whether the defendant . . . made a promise that the law will enforce." *Suburban Hosp., Inc.,* 807 F.Supp. at 33.

{58} Although Alliance's damages would be measured in part by the amount of benefits it would have received had there been no misrepresentation regarding coverage, this is incidental in relation to the plan. *See Memorial Hospital,* 904 F.2d at 247. Further, we acknowledge that breach of contract claims have been held to be preempted. *See, e.g., id.* at 245; *Lunn,* 110 N.M. at 75, 792 P.2d at 407. However, in this case Alliance's breach of contract claim does not refer to the assignment of benefits or attempt to enforce the plan, and thus we see no direct connection or relation between this claim and the plan. The alleged contract at issue is not based on the terms of the insurance policy, but rather, it is based upon the alleged communications between representatives of National Presto, Araz, and Alliance. Furthermore, the promissory estoppel or fraud counts do not arise from the actual contractual terms of National Presto's plan. Finally, the court in *Memorial Hospital* stressed the consideration of commercial realities in making its preemption determination, recognizing that if the third-party health care providers had no recourse under either ERISA or state law, health care providers would be reluctant to provide healthcare without prepayment. 904 F.2d at 247. In this case, the state claims may proceed because issues of material fact exist whether a contract was formed between Alliance and Defendants and whether representations were made by Defendants to Alliance regarding the coverage and obligation to pay for Alliance's health services.

{59} Araz further argues that even if Alliance's promissory estoppel claim is not preempted, summary judgment was appropriate on that claim because Alliance failed to establish that Defendants acted with the requisite scienter necessary to bring an estoppel claim in New Mexico. *See Capo v. Century Life Ins. Co.,* 94 N.M. 373, 377, 610 P.2d 1202, 1206 (1980); *Gonzales v. Pub. Employees Ret. Bd.,* 114 N.M. 420, 427, 839 P.2d 630, 637 (Ct.App.1992). However, the matter was before the trial court on a motion to dismiss, not a summary judgment. The complaint

alleges facts concerning the representations of Defendants, and if Alliance can prove the elements of the estoppel claim, then its suit on this claim should proceed. Again, absent a motion for summary judgment, the facts surrounding the claims must be determined by the finder of fact.

Mootness and Standing

{60} Having held that Alliance asserts its claim for injury without regard to the relationship of Araz to Doe 2, we determine that a factual basis exists for Alliance to allege damages based on its reliance on Araz's representations of coverage and payment due. Alliance has standing to assert a claim for damages. As we find above, Alliance is not asserting its entitlement to payment because of Doe 2's relationship to the plan, or because the plan is alleged to provide benefits that would pay Alliance for its treatment of him. Alliance asserts entitlement to payment because of independent promises made to it by Defendants. Because the state causes of action brought by Alliance all allege its own pecuniary injury as a result of Defendants' misrepresentation of coverage and the promise of payment, it is the real party in interest entitled to bring suit in its name.

{61} The fact that judgment for some of the hospital bill has been rendered against Doe 2's parents as responsible parties, or that Medicaid has paid some of the claim, does not render Alliance's claim moot. Again, the facts that Alliance was paid for some services that all agree were covered or that someone else paid or is responsible for paying other portions is not the issue in this suit—the issue is the responsibility of Defendants for making good on their promises, if any exist, to pay for care that was not covered under the plan. *Hamman v. Clayton Mun. Sch. Dist. No. 1*, 74 N.M. 428, 429, 394 P.2d 273, 274 (1964) (stating that "[a] case is moot when it does not involve any actual controversy [or][w]here the issues involved in the trial court no longer exist" (internal quotation marks and citation omitted)). Thus, we reverse the district court and allow Alliance to go forward to prove its claims for monetary damages against Araz and National Presto. The issue of Defendants' responsibility to Alliance is hotly contested, and will be the continued subject of much heated debate, but the claims are certainly not moot.

CONCLUSION

{62} Based on the foregoing, we reverse the district court's dismissal of Alliance's state law claims against Araz and National Presto. We remand the case to the district court for further proceedings.

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

WE CONCUR: LYNN PICKARD and IRA ROBINSON, Judges.

2005-NMCA-054

113 P.3d 377

Marilyn and George LOPEZ, Plaintiffs–Appellants,

v.

Gopal REDDY, M.D., Defendant–Appellee.

No. 24,420.

Court of Appeals of New Mexico.

March 30, 2005.

Kenneth R. Wagner, Thomas J. McBride, Wagner, McBride, Ford & Associates, P.A., Albuquerque, NM, for Appellants.

Robin A. Goble, Alice Tomlinson Lorenz, Miller Stratvert P.A., Albuquerque, NM, for Appellee.

OPINION

CASTILLO, Judge.

{1} In this case, we review whether the trial court abused its discretion in deciding that a medical expert, without expertise in surgical techniques, was not qualified to testify regarding the standard of care required for the surgical removal of tissue identified for biopsy. Plaintiffs appeal from the trial court's order excluding the testimony of their expert medical witness and granting summary judgment to Defendant in this medical

malpractice case. We affirm the trial court's ruling.

I. BACKGROUND

{2} Plaintiff and her husband (Plaintiffs) filed a medical negligence suit against Defendant, who performed a biopsy of Plaintiff's breast; the alleged negligence was his failure to remove all of the tissue identified by the radiologist as suspicious and subject to biopsy. The issue is whether the failure to remove all of the identified tissue was malpractice.

A. Negligence Claim

{3} In September 1998, Plaintiff was experiencing a problem associated with her right breast. She was referred for a mammogram by her primary-care physician. Based on the results of the mammogram, additional tests were performed, which identified suspicious tissue in the breast. Plaintiff consulted with Defendant, a general and vascular surgeon, who recommended surgery. On October 27, 1998, radiology tests identified the location of the suspicious tissue, and Defendant performed the surgery. In March 1999, Plaintiff developed the same symptom and returned for additional imaging studies. In comparing Plaintiff's imaging studies performed before surgery to those done after surgery, the radiologist stated that "it was clear that the same filling defect and the same mass I had seen prior to surgery [were] still there." The radiologist also informed Plaintiff that it was "possible that the lesion was missed." Plaintiff then consulted Dr. Sylvia Ramos, who performed surgery on Plaintiff and used a different technique for identifying the tissue that needed to be removed. Additional pertinent facts are set out in our discussion of the issues.

B. Procedural History

{4} Plaintiffs filed suit against Defendant with five claims: battery, medical negligence, breach of contract, negligent misrepresentation, and loss of consortium. By the date specified in the pretrial scheduling order, Plaintiffs had not identified an expert witness to testify on their behalf, and Defendant subsequently filed a motion for summary judgment. In response, Plaintiffs requested additional time to obtain new counsel to represent them and moved for a continuance.

{5} At Plaintiffs' continuance hearing, they identified Dr. Barry Singer as their medical expert witness and submitted an affidavit from Dr. Singer, which is not in the record. At that time, Defendant withdrew his motion for summary judgment. Following the deposition of Dr. Singer, Defendant filed a motion with two parts: first, Defendant moved to exclude Dr. Singer's testimony; and second, Defendant moved for summary judgment. Defendant argued that Dr. Singer was not qualified to provide testimony on the relevant standard of care and causation under Rule 11–702 NMRA; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); and *State v. Alberico*, 116 N.M. 156, 861 P.2d 192 (1993). With Dr. Singer's testimony excluded, Defendant asserted that Plaintiffs were unable to establish the essential elements of their claims and that Defendant was therefore entitled to judgment as a matter of law. Plaintiff responded with a memorandum in opposition and another affidavit from Dr. Singer.

{6} At the motion hearing, the trial court placed the burden on Defendant to produce an affidavit from a surgeon asserting that only a surgeon could address the issues in this matter and that Dr. Singer, a non-surgeon, would therefore not be qualified to testify as to the standard of care. The court denied Defendant's motion because he had not produced such an affidavit.

{7} Subsequently, Defendant submitted a motion for reconsideration with a supporting affidavit from his expert, Dr. Leo Gordon, which stated that the applicable standard of care involved surgical technique and that Plaintiffs' expert was not qualified in this area. Plaintiffs responded with an additional affidavit from Dr. Singer. After reviewing the affidavits and other material, the trial court concluded that Dr. Singer was not qualified to provide testimony on the decisions that were made during the surgical procedure in this case. Accordingly, the trial court granted Defendant's motion and dis-

missed the case with prejudice. Plaintiffs now appeal.

II. DISCUSSION

{8} Plaintiffs appeal on the ground that the trial court erred in holding that Dr. Singer was not qualified to testify and that summary judgment was therefore improper. In support of their argument, Plaintiffs assert that contrary to existing New Mexico law, the trial court held Dr. Singer to a higher standard by applying the *Daubert* and *Alberico* evidentiary standard to his testimony. Specifically, Plaintiffs maintain the following: (1) Dr. Singer was qualified to testify in this matter, (2) Defendant's evidence was insufficient to disqualify Dr. Singer, and (3) the public policy effect of the trial court's decision would act as a disincentive for patients to file malpractice suits against doctors. We address these arguments in turn.

A. Admissibility of Expert Testimony

{9} The testimony of a medical expert is generally required when a physician's standard of care is being challenged in a medical negligence case. *Lopez v. Southwest Cmty. Health Servs.,* 114 N.M. 2, 7, 833 P.2d 1183, 1188 (Ct.App.1992) (holding that "[i]n a medical malpractice case, because of the technical and specialized subject matter, expert medical testimony is usually required to establish departure from recognized standards in the community"). The trial court in this case concluded that expert testimony was necessary, and neither party disagrees with that determination. Thus, the exclusion of Dr. Singer's testimony, as Plaintiffs' only medical expert, precludes Plaintiffs' cause of action.

{10} Admission or exclusion of a medical expert's testimony is governed by Rule 11–702, which is as follows:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

Rule 11–702 "makes witness qualifications a question for the trial court." *Baerwald v. Flores,* 1997–NMCA–002, ¶ 8, 122 N.M. 679, 930 P.2d 816. Plaintiffs argue that the trial court could only have reached its decision to exclude Dr. Singer's testimony by requiring him to possess specialized qualifications, in addition to his medical license, and that this requirement is contrary to New Mexico law. Plaintiffs assert that this heightened standard was a result of the trial court's incorrect application of the *Daubert* and *Alberico* standard to this case. While we agree that *Alberico* must be utilized in certain cases where there is a Rule 11–702 question, the trial court in this instance correctly applied Rule 11–702 without employing the *Alberico* analysis. We explain below.

{11} In 1993, the United States Supreme Court adopted new standards related to the validity and reliability of scientific testimony. *Daubert,* 509 U.S. at 594–95, 113 S.Ct. 2786. The New Mexico Supreme Court immediately adopted a similar approach in *Alberico.* 116 N.M. at 158, 166–68, 861 P.2d at 194, 202–04. *Alberico* clarified that Rule 11–702 establishes three prerequisites for admission of expert testimony: (1) the expert must be qualified, (2) the scientific evidence must assist the trier of fact, and (3) the expert may only testify to "scientific, technical or other specialized knowledge." *Id.* at 166, 861 P.2d at 202 (internal quotation marks and citation omitted). In *Alberico,* the experts' qualifications were not at issue; therefore, *Alberico* only addressed the second and third elements of Rule 11–702, dealing with scientific evidence. *Alberico,* 116 N.M. at 166, 861 P.2d at 202. The *Alberico* case established "evidentiary reliability as the hallmark for the admissibility of scientific knowledge," and outlined factors to consider when evaluating such testimony. *State v. Torres,* 1999–NMSC–010, ¶¶ 24–26, 29, 127 N.M. 20, 976 P.2d 20.

{12} Subsequently, a number of New Mexico cases have addressed the application of the *Alberico* standard when the reliability of scientific methods was at issue. *See, e.g., State v. Stills,* 1998–NMSC–009, ¶¶ 24–27, 125 N.M. 66, 957 P.2d 51 (explaining the third element for a specific method of DNA analysis); *State v. Anderson,* 118 N.M. 284,

291–92, 296–301, 881 P.2d 29, 36–37, 41–46 (1994) (addressing the second and third elements as related to DNA evidence). The reliability of scientific methods, however, was not at issue in this case. Here, the question before the trial court was whether Dr. Singer was qualified to testify on the given subject matter. *Alberico* does not address this element of Rule 11–702; accordingly, whether the trial court erred in applying *Alberico* evidentiary standards to this medical negligence case is not an issue that is necessary for this Court to reach in rendering a decision. Additionally, while Defendant argued below and on appeal that the *Alberico* standard for admissibility of expert testimony applies to Dr. Singer's testimony, there is no evidence in the record that the trial court utilized the *Alberico* standard in reaching the decision. In fact, as discussed in the following section and contrary to Plaintiffs' argument, it would have been unnecessary for the trial court to apply *Alberico* in order to reach a decision that Dr. Singer was not qualified to testify on the standard of care in this case.

{13} In a related argument, Plaintiffs urge this Court to extend the reasoning in *Banks* and *Fuyat* as a bar to the application of *Daubert* and *Alberico* in this case. *Banks v. IMC Kalium Carlsbad Potash Co.*, 2003–NMSC–026, ¶ 1, 134 N.M. 421, 77 P.3d 1014 (holding that "*Daubert/Alberico* does not apply to the testimony of a health care provider" under the Workers' Compensation Act); *Fuyat v. Los Alamos Nat'l Lab.*, 112 N.M. 102, 105–06, 811 P.2d 1313, 1316–17 (Ct.App. 1991) (rejecting the argument that in a workers' compensation case, physicians' testimony was required to demonstrate general acceptance of the scientific techniques employed). As we have stated, *Alberico* is inapplicable to the issue at hand. Additionally, *Banks* and *Fuyat* are workers' compensation cases, in which the use of experts is subject to particular statutory standards; therefore, we decline to rely on these cases, as their holdings are limited to a different type of case from the one before us. *Banks*, 2003–NMSC–026, ¶ 1, 134 N.M. 421, 77 P.3d 1014; *Fuyat*, 112 N.M. at 104–05, 811 P.2d at 1315–16.

B. Exclusion of Dr. Singer's Testimony

{14} It is widely recognized that Federal Rule of Evidence 702 and its New Mexico analogue, Rule 11–702, impose a "gate-keeping" function on a trial court judge as to the admissibility of an expert's opinion. *See Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 969 (10th Cir.2001) (internal quotation marks and citation omitted); *Baerwald*, 1997–NMCA–002, ¶ 17, 122 N.M. 679, 930 P.2d 816. In determining whether an expert witness is competent or qualified to testify, "[t]he trial court has wide discretion . . ., and the court's determination of this question will not be disturbed on appeal, unless there has been an abuse of this discretion." *Wood v. Citizens Standard Life Ins. Co.*, 82 N.M. 271, 273, 480 P.2d 161, 163 (1971). The ruling "will not be disturbed . . . [,] unless [it] is manifestly wrong or the trial court has applied wrong legal standards in the determination." *Dahl v. Turner*, 80 N.M. 564, 568, 458 P.2d 816, 820 (Ct.App. 1969) (internal quotation marks and citation omitted). We therefore review the trial court's decision to exclude Dr. Singer's testimony under an abuse of discretion standard.

{15} Under Rule 11–702, "a witness must qualify as an expert in the field for which his or her testimony is offered before such testimony is admissible." *Torres*, 1999–NMSC–010, ¶ 45, 127 N.M. 20, 976 P.2d 20. In most cases, this means that the "calling party must qualify the witness to testify as an expert first, before any substantive testimony is given." *Id.* (internal quotation marks and citation omitted).

{16} The qualifications of an expert are dependent on the type of negligence claimed and the medical complexity involved. We detail the claims and evidence regarding the surgeries in this case. Plaintiffs assert that Defendant failed to remove two papillomas or two intraductal masses that were indicated by the radiology tests. Indeed, after reviewing the radiology films for Plaintiff, Defendant's preoperative diagnosis was a "[n]onpalpable calcified lesion, upper outer quadrant of the right breast, along with another retro-areolar lesion, probably consistent with adenoma of the duct." In other words, the radiology films indicated the pres-

ence of two lesions or masses. After the surgery, the pathology report on the removed tissue indicated that no lesions were found and provided a postoperative diagnosis of fibrosis, scattered microcalcifications, adenosis, benign lymph node, fibrocystic change, and chronic lobular and periductal mastitis. Similarly, pre- and postoperative diagnoses by Dr. Ramos, related to the second surgery, were "[r]ight breast intraductal papillomas." The pathology report on the tissue removed by Dr. Ramos, in pertinent part, diagnosed the tissue as "[b]enign ductal epithelial hyperplasia" with "organizing fat necrosis, fibrosis and old hemorrhage." No papillomas were found by the pathologist in the second tissue sample.

{17} In both surgical cases, the radiology reports and the surgeon's diagnoses indicated abnormal tissue. Both surgeons removed tissue, but subsequent pathology reports found that the tissue did not contain the masses indicated by the radiology reports. According to the deposition testimony of Dr. Ramos, a discrepancy between what is suspected and what is found occurs in her practice approximately one percent of the time. In deposition testimony, Dr. Singer acknowledged that the pathology reports from both surgeries did not show discrete papillomas, which had been indicated by the radiology tests. Because Plaintiffs assert that Defendant failed to remove all of the tissue that made the biopsy necessary, i.e., the two papillomas, an expert would need to address the relationship between the radiology reports and the surgical decision on the amount and location of tissue to be removed, as well as the significance of the disparity between the radiology and pathology reports.

{18} Dr. Singer presented his qualifications and the basis of his opinion to the trial court in his affidavits; further, parts of his deposition testimony were available to the court as exhibits to the motions. In the affidavits, Dr. Singer clearly stated that he was not commenting on the surgical technique employed by Defendant. We summarize Dr. Singer's description of his qualifications and rationale as follows:

(1) He is a medical doctor licensed to practice in Pennsylvania and having been in practice since 1968.

(2) He has medical privileges in internal medicine, hematology, and oncology.

(3) Although he does not perform surgery, he reviews the results of surgical procedures done by surgeons on his cancer patients.

(4) He maintains that he is "perfectly capable of determining whether a surgeon has in fact removed all of the tissue which was meant to be removed during the surgery."

(5) He previously performed biopsies, during his residency training under the supervision of surgeons.

(6) These surgeons instructed that unless there was some reason why it was either imprudent or impossible, all of the tissue that made the biopsy necessary should be removed; in the present case, the records did not indicate that it would be imprudent or impossible.

(7) In arriving at his opinion of Defendant's breach of the standard of care, Dr. Singer reviewed the medical records in the case from before and after both surgeries, as well as the deposition testimony of Dr. Ramos, which supports Dr. Singer's conclusion.

Based on the foregoing, Dr. Singer opined that Defendant's failure to remove all of the tissue identified by the radiology report breached the standard of care.

{19} Plaintiffs contend that under New Mexico law, Dr. Singer is qualified to testify on the issues in this case, even though he is not a specialist in the same field as Defendant. As support for this proposition, Plaintiffs cite to *Sewell v. Wilson*, 97 N.M. 523, 641 P.2d 1070 (Ct.App.1982), a medical negligence case, in which this Court stated that "[w]here expert testimony is required, the mere fact that a medical witness is not a specialist goes to the weight, not to admissibility, of the witness'[s] expert testimony." *Id.* at 528, 641 P.2d at 1075. However, the pertinent holding in that case was that "a non-specialist can testify as to the standards of care owed by a defendant specialist, *but only if the non-specialist is qualified and*

competent to do so." *Id.* (emphasis added). In that case, we reiterated the requirement in Rule 11–702 that an expert witness must be qualified to testify by "knowledge, skill, training or education" and must be "able to testify as to how and why he arrives at an opinion that a defendant physician's conduct has been substandard." *Id.*

{20} Similarly, Plaintiffs cite to *Blauwkamp v. University of New Mexico Hospital*, 114 N.M. 228, 233, 836 P.2d 1249, 1254 (Ct. App.1992), where this Court concluded that the plaintiffs were not required to produce an expert who was a specialist in the identical field of practice as the defendants in order to withstand a summary judgment motion. Contrary to Plaintiffs' assertion, however, *Blauwkamp* does not stand for the proposition that a court may never require that a proposed expert have specific expertise. *See* 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 702.04[2], at 702–58 (2d ed.2004) (stating that "[i]n some instances, it will be appropriate for the trial court to insist that a proposed expert witness have specific expertise before allowing him or her to testify"); *Ralston* 275 F.3d at 969–70 (upholding a lower court finding that the expert, a board-certified orthopedic surgeon, was not qualified to testify about intramedullary nailing, since she had no familiarity with the field of intramedullary nailing).

{21} Additionally, the case at hand is distinguishable from *Blauwkamp* by the differences in the qualifications of the *Blauwkamp* expert as compared to those presented by Dr. Singer. In *Blauwkamp*, the issue was alleged medical negligence during pregnancy and at the birth of the plaintiffs' brain-damaged child. 114 N.M. at 229, 836 P.2d at 1250. The expert provided an affidavit showing that he received doctoral degrees in pharmacy and medicine, had served as an extern and a resident in obstetrics and gynecology, maintained a private practice in obstetrics and gynecology, and served on the medical faculty of a few schools of medicine. *Id.* at 234, 836 P.2d at 1255. This Court found that the doctor had "extensive experience in obstetrics and family practice" and that the affidavit was "sufficient to establish a prima facie showing of the doctor's qualifications." *Id.*

{22} In the present case, the trial court evaluated Dr. Singer's qualifications and found them wanting. Our review is based on an abuse of discretion standard. While we agree that Dr. Singer's qualifications would allow him to testify on a number of subjects, we find no abuse of discretion in determining that he lacked the qualifications to testify as to the standard of care applicable to Defendant in performing the breast biopsy in this case.

{23} Dr. Singer's experience with biopsies was based on his residency more than thirty years ago. His training concerning the standard of care for biopsies is therefore three decades old. Defendant presented evidence that medical science and surgical techniques have changed since that time. Dr. Singer presented no evidence showing that he has kept up with these advances or that advances in the area of biopsies had not subsequently changed that standard of care. His expertise is in internal medicine, hematology, and oncology, and his review of surgical procedures is limited to those performed by surgeons on his cancer patients. Plaintiff was not a cancer patient, and there was no evidence that the tissue removed was cancerous.

{24} At oral argument, Plaintiffs' counsel acknowledged that a trial court could view this case in two ways: (1) as a surgical technique case or (2) as a case where Defendant did not finish the job. Plaintiffs' counsel also acknowledged that the question of whether it was imprudent or impossible to remove certain tissue is one that is decided by the surgeon, based on his or her judgment, and that if the case is characterized as dealing with surgical techniques or methods, an expert in surgical techniques would be necessary. However, Plaintiffs' counsel urged this Court to consider the case as analogous to one where the doctor only cut off half of a leg, instead of the entire leg. The trial court viewed this case as a surgical technique case, and we agree with that view. Admission of this expert testimony was left to the discretion of the trial court, and having reviewed the record, we find no abuse in the exercise of that discretion.

C. Summary Judgment

{25} "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." *Hagen v. Faherty,* 2003–NMCA–060, ¶ 6, 133 N.M. 605, 66 P.3d 974. Such a legal question is reviewed de novo. *Id.* We view the facts in the light most favorable to the party opposing summary judgment, *Gonzalez v. Gonzalez,* 103 N.M. 157, 164, 703 P.2d 934, 941 (Ct.App.1985), and draw all inferences in favor of that party. *Baer v. Regents of Univ. of Cal.,* 118 N.M. 685, 687–88, 884 P.2d 841, 843–44 (Ct.App.1994).

{26} Defendant's motion for summary judgment included an affidavit from Dr. Gordon, a board certified surgeon who performs breast biopsies; the affidavit stated that Defendant was within the standard of care in his treatment of Plaintiff. As discussed above, Plaintiffs' expert was not qualified to offer testimony to rebut this showing; therefore, no issue of material fact was in dispute, and summary judgment was proper. *See Blauwkamp,* 114 N.M. at 232, 836 P.2d at 1253 (stating that summary judgment in a medical malpractice case is appropriate when the " 'nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim' " (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 331, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)); *see also Cervantes v. Forbis,* 73 N.M. 445, 449, 389 P.2d 210, 213 (1964) (upholding summary judgment in the absence of expert testimony as to how a defendant surgeon's conduct fell below the standard of care because there could be no genuine issue of material fact), *modified on other grounds by Pharmaseal Labs., Inc. v. Goffe,* 90 N.M. 753, 757, 568 P.2d 589, 593 (1977).

D. Public Policy Concerns

{27} In their reply brief, Plaintiffs argued for the first time that if the trial court decision is upheld, we will be undertaking de facto tort reform by requiring that "an expert [be] identical in every way to the [d]efendant" in a medical malpractice case. They contend that this will make it more difficult to prosecute those claims. Plaintiffs repeated this argument at oral argument. Although we need not consider arguments made for the first time in a reply brief, *State v. Castillo–Sanchez,* 1999–NMCA–085, ¶ 20, 127 N.M. 540, 984 P.2d 787 (stating that an appellate court will not consider arguments raised for the first time in a reply brief), we believe Plaintiffs' fears are unwarranted. Each malpractice case turns on its own facts. Our holding does not mandate a certain type of expert in every malpractice case; on the contrary, we are making no changes to the requirement that the trial court continue to act as a gatekeeper and determine if the particular expert tendered has the qualifications to testify in the particular case, as set forth in Rule 11–702. Absent an abuse of discretion, the trial court's determination will stand. As explained above, this is the state of the law in New Mexico currently. *Blauwkamp,* 114 N.M. at 234, 836 P.2d at 1255; *Sewell,* 97 N.M. at 527, 641 P.2d at 1074.

III. CONCLUSION

{28} For the foregoing reasons, we affirm the trial court's ruling.

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

WE CONCUR: LYNN PICKARD and CYNTHIA A. FRY, Judges.

2005-NMCA-063

113 P.3d 384

STATE of New Mexico, Plaintiff–Appellee,

v.

Nic AKER, Defendant–Appellant.

No. 24099.

Court of Appeals of New Mexico.

April 12, 2005.

Certiorari Denied, No. 29,192, May 19, 2005.

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

Liane E. Kerr, Albuquerque, for Appellant.

OPINION

ALARID, J.

{1} Defendant Nic Aker appeals from the trial court's judgment and sentence. He pled guilty to second degree murder, kidnaping, burglary, conspiracy to commit kidnaping, and conspiracy to commit first degree murder. Defendant raises two issues on appeal, arguing that the trial court erred in considering previously undisclosed ex parte letters concerning sentencing, and that Defendant was deprived of effective assistance of counsel because counsel did not have an opportunity to review the letters before sentencing. Not persuaded by Defendant's arguments, we affirm on both issues.

FACTUAL AND PROCEDURAL BACKGROUND

{2} Defendant was charged in a forty-four count indictment for various crimes associated with the kidnaping and murder of MaryAlice Stephens (the Victim). The charges arose out of the following incidents: Defendant was the roommate of Richard Clappsy, the Victim's former boyfriend, and the Victim had expressed her fears of Clappsy. Pursuant to a plan between Clappsy and Defendant, Defendant called the Victim to tell her that Clappsy had lung cancer, was remorseful about a prior negative encounter, and wanted to see the Victim. The Victim cancelled her previous plans and went to the apartment shared by Clappsy and Defendant. The Victim and Clappsy had consensual sex and Clappsy convinced the Victim to let him tie her up under the guise of showing Defendant some security moves. Once the Victim was tied up, Clappsy obtained the PIN number from the Victim's bank accounts and Defendant withdrew the Victim's money from various ATM machines. After returning to the apartment, Defendant watched Clappsy strangle the Victim to death. Clappsy and Defendant then disposed of the Victim's body in a dumpster. The Victim's body was never located. Defendant and Clappsy burglarized the Victim's house and pawned or sold a few of the items that they found. Defendant was apprehended and eventually pled guilty to second degree murder, kidnaping, burglary, conspiracy to commit kidnaping, and conspiracy to commit first degree murder. In his plea, Defendant acknowledged that he could be sentenced to a maximum term of sixty years.

{3} Sentencing was scheduled for April 4, 2003. At the instigation of the Victim's sister, almost two hundred people wrote letters to the trial court urging that the maximum sentence be imposed. We provide the details of certain letters in our discussion below. However, in general, the letters address the Victim's attributes and the impact of her murder on her family, friends, and the community at large. The letters urged the court to sentence Defendant to the maximum term of imprisonment allowed under the plea agreement. These letters were apparently compiled by the Victim's Unit of the district attorney's office which delivered 120 letters to the court shortly before sentencing. On April 2, 2003, the defense counsel was advised of the letters. Defense counsel retrieved the letters that day. The next day, defense counsel was advised that another batch of 72 letters had arrived. Due to time constraints, defense counsel was not able to review the second set of letters until after sentencing. In total, 192 letters were submitted to the trial court.

{4} The night before sentencing, the trial judge reviewed all of the letters. Also reviewed was Defendant's sentencing memorandum, the attachments thereto, and a sixty-day diagnostic evaluation report.

{5} At the sentencing hearing, Defendant objected to the letters. Defendant argued that it was improper to sentence him based upon information to which the defense was not privy. He also argued that the ex parte communications violated his constitutional rights to due process and effective assistance of counsel. Defendant argued that the trial judge should recuse himself because he had been tainted by the volume and content of the letters. The judge disagreed and sentenced Defendant to the maximum term of sixty years.

{6} After sentencing, Defendant filed a motion to vacate sentence and renewed motion to recuse, again arguing that the trial judge should recuse himself "based on the intensive and inappropriate lobbying efforts." Defendant argued that the court wrongfully considered the ex parte letters in sentencing Defendant. Defendant also argued that due process guarantees preclude him from being sentenced based upon information to which he is not a party. Defendant claimed that the court impermissibly permitted the input of persons who are not "victims" within the meaning of Sections 31–26–3(D) and (F) of the Victims of Crime Act, NMSA 1978, §§ 31–26–1 to –14 (1994, as amended through 2003). The court held a hearing on Defendant's motion and, after clarifying certain factual misstatements, denied the motion. This appeal followed.

DISCUSSION

{7} As an initial matter, we agree with Defendant that, by pleading guilty, he did not waive his right to appeal any alleged defects in the sentencing proceeding, and we note that the State also agrees with Defendant's contention. *See State v. Todisco*, 2000–NMCA–064, ¶ 13, 129 N.M. 310, 6 P.3d 1032. We therefore proceed to address the merits of Defendant's appeal.

Standard of Review

{8} "We review the trial court's sentencing for an abuse of discretion." *State v. Gardner*, 2003–NMCA–107, ¶ 39, 134 N.M. 294, 76 P.3d 47 (quoting *State v. Jensen*, 1998–NMCA–034, ¶ 19, 124 N.M. 726, 955 P.2d 195).

Analysis

{9} Defendant was sentenced in accordance with his plea agreement, and the trial court had the discretion to order Defendant's sentences to be served consecutively. *See Jensen*, 1998–NMCA–034, ¶¶ 21–22, 124 N.M. 726, 955 P.2d 195 (noting the trial court's authority to impose consecutive sentences in the exercise of its discretion). Furthermore, the trial court's imposition of the sixty-year sentence does not constitute an aggravation of the basic sentence authorized in NMSA 1978, § 31–18–15(A) (2003). *See State v. Sosa*, 1996–NMSC–057, 122 N.M. 446, 448, 926 P.2d 299, 301 (holding that the sentencing court's failure to suspend the defendant's sentence is not an enhancement or aggravation of the sentence, but merely a refusal to grant leniency and, "[i]t is settled law in this jurisdiction that a suspended sentence is a matter of judicial clemency to which a defendant may never claim entitlement"). Therefore, we begin our review with the presumption that the trial court did not abuse its discretion in sentencing Defendant pursuant to Section 31–18–15(A) and in accordance with the plea agreement. *See State v. Cumpton*, 2000–NMCA–033, ¶ 12, 129 N.M. 47, 1 P.3d 429 (observing that "[d]efendant is entitled to no more than a sentence prescribed by law"); *State v. Duran*, 1998–NMCA–153, ¶ 41, 126 N.M. 60, 966 P.2d 768 ("In imposing a sentence or sentences upon a defendant, the trial judge is invested with discretion as to the length of the sentence, whether the sentence should be suspended or deferred, or made to run concurrently or consecutively within the guidelines imposed by the Legislature.")

{10} Even though Defendant received the basic sentence, due process concerns may arise if the sentence is based upon improperly admitted evidence. *See Gardner*, 2003–NMCA–107, ¶ 43, 134 N.M. 294, 76 P.3d 47. In *Gardner*, the defendant challenged his sentence because, at the sentencing hearing, the State introduced the statements of seven witnesses who made allegations of previous improper sexual behavior by the defendant for which the defendant was never charged. This Court affirmed the defendant's sentence because nothing in the record suggested that he was prejudiced by, and the trial court gave no indication that it had considered, the witnesses' statements when imposing the sentence. *Id.* (observing that "[t]he trial court's statement at sentencing reflects that the sentence resulted from the evidence presented at trial"). We recognized that, to the extent the trial court relies on any certain information in determining a defendant's sentence, "due process may require advance notice to the defendant so that the defendant has the opportunity to challenge the accuracy of th[at] information." *Id.*

{11} In this case, Defendant claims that he was denied due process because, in imposing the maximum sixty-year sentence, the trial court improperly considered the 192 letters submitted by the public. He further claims that his due process rights were denied because the State and the court failed to give him adequate notice of the letters, thus depriving him of the opportunity to challenge the accuracy of the information contained in the letters.

The Letters Were Admissible in the Sentencing Proceeding

{12} Defendant claims that the letters were inadmissible because they were not from "victims" or "victims representatives" as defined in the Victims of Crime Act. *See* § 31–26–3(D) and (F) We disagree. Defen-

dant is correct that the Victims of Crime Act only accords rights to persons who are victims of the crime currently before the court and the family members of such victims. However, we are unaware of any statutory or common law authority precluding a court from considering letters or statements from non-victims when sentencing a defendant in a non-capital case. *See Gardner,* 2003-NMCA-107, ¶ 43, 134 N.M. 294, 76 P.3d 47 (recognizing that a trial court has "broad statutory authority to consider at sentencing 'whatever evidence or statements it deems will aid it in reaching a decision' ") (quoting § 31-18-15.1(A)); *State v. Wilson,* 2001-NMCA-032, ¶ 25, 130 N.M. 319, 24 P.3d 351 ("[O]ur case law allows the court discretion to consider almost any relevant factor or evidence in determining the appropriate sentence.").

{13} We are unpersuaded by Defendant's citations to *Payne v. Tennessee,* 501 U.S. 808, 817-18, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), and *State v. Allen,* 2000-NMSC-002, ¶ 17, 128 N.M. 482, 994 P.2d 728, to support his contention that the letters were inadmissible because those cases address victim impact evidence in a capital felony sentencing proceeding before a jury. The admissibility of any evidence during a capital trial is subjected to stricter scrutiny in recognition of " 'the qualitative difference of death from all other punishments.' " *Allen,* 2000-NMSC-002, ¶ 61, 128 N.M. 482, 994 P.2d 728 (quoting *California v. Ramos,* 463 U.S. 992, 998, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983)); *Clark v. Tansy,* 118 N.M. 486, 490, 882 P.2d 527, 531 (1994) ("[T]his Court believes that death indeed is different from other sanctions and thus requires greater scrutiny."). Defendant has failed to apprise us of any statute or case law imposing similar limits to the materials that a trial court may consider in imposing a sentence in a non-capital case. *Cf.* NMSA 1978, § 31-20A-5 (1981) (limiting the aggravating circumstances that may be considered when imposing a sentence in a capital case).

{14} Based upon the foregoing, we hold that the trial court did not err in reviewing the 192 letters from the public before sentencing Defendant even though the letters were not from victims of the crime or their families.

The State Erred in Failing to Notify Defendant Before Submitting the Letters to the Trial Court

{15} The Victim's Unit of the district attorney's office submitted 192 letters to the court prior to the sentencing hearing. Contrary to the State's contention, we hold that the submission of the letters by the Victim's Unit of the district attorney's office constitutes ex parte communication by the State because the letters were submitted to the court by a branch of the district attorney's office without notifying Defendant. *See* A.B.A. Standards for Crim. Justice 3-2.8(c) (3d ed.1993) (stating that "a prosecutor [should not] engage in unauthorized ex parte . . . submission of material to a judge relating to a particular case which is . . . before the judge"). We agree with Defendant that the prosecutor had an obligation to share the letters with Defendant, or, at the least, to notify Defendant before the letters were submitted to the court and that the prosecutor failed to notify Defendant. *See* Rules 5-501 and 5-505 NMRA.

{16} Defense counsel claims that it was only able to review 120 of the letters before the sentencing hearing. Even though the State erred in submitting the letters to the court without notifying Defendant, and this error may have deprived defense counsel of an opportunity to fully review the letters, we hold that the State's error does not warrant reversal because, for the reasons that follow, there is no evidence that Defendant was prejudiced by the admission of the letters. *See State v. Rojo,* 1999-NMSC-001, ¶ 61, 126 N.M. 438, 971 P.2d 829 (refusing to hold that the State's delay in disclosing evidence to the defendant required reversal in the absence of any showing that the non-disclosure prejudiced the defendant); *State v. Roybal,* 120 N.M. 507, 511, 903 P.2d 249, 253 (Ct.App.1995) (holding that the State's failure to disclose plea agreement documents pursuant to Rule 5-501 before offering them into evidence at the habitual offender hearing did not warrant reversal because the defendant was not prejudiced by the State's fail-

ure); *State v. Mares,* 112 N.M. 193, 197, 812 P.2d 1341, 1345 (Ct.App.1991) (holding that the ex parte conduct did not require reversal because there was an absence of prejudice to the defendant and, the defendant was accorded an opportunity to meaningfully participate).

The Trial Court's Consideration of the 192 Letters and the Imposition of the Sixty-year Sentence Was in Accordance with Due Process

{17} In determining whether Defendant was prejudiced by the admission of the letters, given the absence of adequate notice to allow Defendant an opportunity to rebut the information contained therein, we turn first to the sentencing proceeding. *See Gardner,* 2003–NMCA–107, ¶ 42, 134 N.M. 294, 76 P.3d 47 (recognizing that the court's consideration of any evidence at sentencing must be in accordance with the constraints of due process). The record indicates that, prior to sentencing, Defendant introduced mitigating evidence for the court's consideration in his sentencing memorandum and motion to find mitigating factors. He submitted witnesses' statements and investigative summaries indicating that he was controlled by Richard Clappsy, that he feared Clappsy, and that he was under the influence of drugs prior to, and at the time of, the crime. He submitted the results of psychological assessments reviewing Defendant's troubled childhood which included exposure to drug abuse and violence. The psychological assessments opined that, due to his drug abuse and history, Defendant was passive and susceptible to Clappsy's influence. They also suggested that Defendant was depressed and angry. Defendant submitted letters from friends and relatives as to his peace-loving nature and good character.

{18} At the sentencing hearing, defense counsel reiterated the arguments contained in the memorandum and motion, claiming that Defendant was mostly guilty of extreme cowardice in not attempting to assist the Victim, and arguing that Defendant was not the instigator of the Victim's murder. Defendant's mother and father testified and requested leniency from the court. Defendant also testified, expressing remorse for his actions and inactions in connection with the Victim's murder and asking for forgiveness. Defendant conceded that the Victim was a wonderful, special human being whose death was a great loss to her family and to the community.

{19} The Victim's sisters, mother, father, brother-in-law, brother, sister-in-law, and estranged husband all testified at the hearing. They offered compelling testimony as to the Victim's unique gifts and talents and spoke movingly about the profound loss they experienced as a result of the Victim's death. The prosecutor then urged the court to impose the maximum sentence possible under the plea.

{20} At the beginning of the hearing, when denying Defendant's motion for recusal and for a new sentencing hearing, the trial judge addressed the letters from the community. He stated that he considered the letters to be from members of the public interested in Defendant's sentencing. He acknowledged that there were "relationship issues" with the letters because they were not written by "victims" of the crime and expressly stated that he had noted that fact as he read the letters. He also indicated that the letters did not tell him anything he did not already know and that was not acknowledged by Defendant—that the Victim was well-loved and well-known.

{21} In sentencing Defendant, the trial judge did not mention the letters from the community. He noted that Defendant was instrumental in luring the Victim to the apartment and affecting the murder. He observed that Defendant had a chance to prevent the murder while away from the apartment and away from Clappsy's alleged threatening behavior, yet chose to do nothing. He indicated that he failed to see significant remorse on the part of Defendant and observed that Defendant chose to transfer his allegiance from the church to Clappsy. The judge further noted that the Victim would never be paroled from death and that Defendant played a significant part in causing her death. Because Defendant was a significant factor in the Victim's death by virtue of his inaction in preventing it and his

complicity in planning the kidnaping and murder, the court ordered that Defendant serve all of his sentences consecutively and refused to suspend any part of the sixty-year maximum sentence imposed.

The Trial Court Did not Rely on the Ex Parte Letters in Sentencing Defendant

{22} Defendant would be entitled to resentencing if the lack of advance notice deprived him of the opportunity to rebut evidence that the trial court relied upon in determining his sentence. *See, e.g., United States v. Berzon,* 941 F.2d 8, 18 (1st Cir.1991) (recognizing that the defendant is entitled to a meaningful opportunity to comment on factual information on which his sentence is based and thus remanding to determine whether, at sentencing, the trial court relied on information ascertained during the sentencing of the defendant's co-defendant). However, in this case, the record indicates that the trial court relied on the evidence contained in Defendant's plea, the pre-sentence pleadings, and the testimony introduced at the sentencing hearing to determine Defendant's sentence. *See People v. Clark,* 124 Mich.App. 410, 335 N.W.2d 53, 55 (1983) (holding that the trial judge properly considered letters from the public urging that he impose the maximum sentence because (1) the letters were available in the court file for review; (2) the letters contained no factual information about the defendant; and (3) the judge's comments indicated that he was not swayed by the public claim but instead based his sentence on the proper factors). Nothing in the record indicates that the court used, or was influenced by, the letters from the public at large who had no connection with this case when determining Defendant's sentence. *See Oxborrow v. Eikenberry,* 877 F.2d 1395, 1400–1401 (9th Cir.1989) (holding that the defendant failed to establish a violation of his due process rights because the trial judge did not rely upon the unsolicited letters, but instead relied upon the pre-sentence reports and other pleadings for factual findings and observing that, even though the court referred to the outrage contained in the letters at sentencing, "such information was available from the pre-sentencing report").

{23} The record indicates that the trial judge exercised his discretion by disregarding unreliable statements. *See State v. Hernandez,* 1999–NMCA–105, ¶ 22, 127 N.M. 769, 987 P.2d 1156 (stating our presumption that a judge is capable of properly weighing the evidence, and disregarding any improper evidence in rendering a decision); *see also People v. Heredia,* 193 Ill.App.3d 1073, 140 Ill.Dec. 898, 550 N.E.2d 1023, 1030 (1989) (holding that letters to the court expressing the public's outrage that the defendant was only convicted of voluntary manslaughter instead of second degree murder and demanding imposition of the maximum sentence did not violate the defendant's right to an impartial sentence hearing because the court indicated that it considered the letters for what they were worth and it disregarded the general hearsay allegations of abuse). For example, in addressing a letter written by a municipal judge, the trial judge stated that he was not swayed by the letter and expressed disapproval that the writer used an official letterhead. The trial judge indicated that he would not assign such a letter significant weight unless the Victim was a close relative of the person writing the letter. Moreover, we disagree that the trial judge had to be influenced due to the sheer volume and repetitious nature of the letters in light of the more compelling testimony presented orally at the sentencing hearing from persons who were closely related to the Victim.

{24} For the same reasons, we disagree that submission of the letters rendered the sentencing proceeding unfair. *See Tomlinson v. State,* 98 N.M. 213, 215, 647 P.2d 415, 417 (1982) (recognizing that the trial judge must give a defendant the opportunity to speak before pronouncing the sentence for a non-capital felony conviction); § 31–18–15.1(A). As set forth above, Defendant introduced mitigating evidence in his sentencing memorandum and motion to find mitigating factors and in defense counsel's argument at the sentencing hearing. Defendant's parents testified at the sentencing hearing and Defendant also testified. Therefore, contrary to his contentions, Defendant was given the opportunity to speak before his sentence was imposed, and the trial court considered the evidence before it and disregarded any in-

competent evidence. *Heredia*, 140 Ill.Dec. 898, 550 N.E.2d at 1030 (observing that, "[g]enerally, when reviewing a bench trial, a court of review presumes that the judge considered only competent evidence"); *Hernandez*, 1999-NMCA-105, ¶ 22, 127 N.M. 769, 987 P.2d 1156.

The Ex Parte Letters Did not Contain Misrepresentations of a Constitutional Magnitude

{25} Defendant claims that the letters contain misrepresentations. He raised this objection at the sentencing hearing. However, when the trial court indicated that Defendant was free to correct any errors, Defendant did not point to any errors. Likewise, at the hearing on Defendant's motion to vacate the sentence, after defense counsel had an opportunity to review the letters, the court noted it had yet to hear one single misstatement contained in the letters. Therefore, Defendant failed to adequately preserve this issue. *See State v. Varela*, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280 (holding that a timely and specific objection is necessary to preserve error); *Spectron Dev. Lab. v. Am. Hollow Boring Co.*, 1997-NMCA-025, ¶ 32, 123 N.M. 170, 936 P.2d 852 (observing that "[w]e review the case litigated below, not the case that is fleshed out for the first time on appeal." (citation omitted)).

{26} Even if Defendant had adequately preserved this issue, he has failed to show that he was sentenced based upon "misinformation of constitutional magnitude." *United States v. Tucker*, 404 U.S. 443, 447, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972). First, as discussed above, we observe that there is no indication that Defendant was sentenced based upon any information contained in the letters. Furthermore, there is nothing in the record or Defendant's briefs suggesting any material misinformation in the letters, much less a misrepresentation of constitutional magnitude. *See United States v. Corace*, 146 F.3d 51, 54 (2nd Cir.1998) (holding that to establish the sort of prejudice that would justify reversal, the defendant would have to show that the ex parte communications contained some inaccuracy on which the sentencing court might have relied).

{27} Many of the claimed misrepresentations concern matters that Defendant admitted in his plea or at sentencing. Defendant claims that the letters falsely claim that Defendant was an active participant by planning the murder with Clappsy, and by physically participating in the murder. However, Defendant admitted to active participation in the planning when he pled guilty to conspiracy to commit first degree murder. In his plea, he admitted that he agreed with someone else to commit murder and intended to commit murder. He also agreed that he either personally murdered or "helped or encouraged somebody else" to murder the Victim. Finally, in terms of physical participation, he admitted he helped to dispose of the Victim's body.

{28} Defendant makes incorrect factual contentions as to certain misrepresentations. For example, he claims that one letter states that Defendant used a knife. Review of that letter does not support Defendant's contention. Defendant also falsely characterizes the letters as stating that Defendant "indulg[ed] himself." Review of the letters indicate that only one uses this phrase and it is in the context of stating that Defendant facilitated the murder and allowed it to occur. Defendant had already admitted that he facilitated the murder by luring the Victim to the apartment and that he allowed the murder to occur by failing to notify authorities when he had the opportunity to do so. Review of the letters that supposedly cast aspersions on defense counsel, merely reveal claims that defense counsel painted Defendant in a favorable or golden light as a follower. Defense counsel's testimony at the sentencing hearing in fact does make such a portrayal.

{29} We also observe that the letters making statements as to Defendant's role in the murder are expressed in terms of the writer's opinion, not factual statements based on evidence, because the writers do not purport to have personal knowledge of the crime. These writers express their opinions that Defendant knew what he was doing and knew full well that Clappsy intended to kill

the Victim when Defendant lured her to the apartment. These statements are merely reactions to events as established by Defendant in his plea. For example, the letter alleging that Defendant had an "insidious scheme" is reflecting the fact that Defendant made an untruthful call to lure the Victim to the apartment. Defendant also claims that a number of letters falsely state that Defendant lied about knowing where the Victim's body was buried. Review of these letters indicate that they fault Defendant for failing to say where the body was at an earlier time by coming forward and note that Defendant could have assisted and did not. There is no indication that these writers are claiming personal knowledge of the facts of the case. Likewise, the writers who allegedly make false comments about recidivism and a pattern are merely making abstract statements without claiming personal knowledge about Defendant. None of these letters contain factual representations or misrepresentations; they are merely expressions of the public's affection for, and admiration of, the Victim and the public's outrage at the Victim's murder.

{30} We now turn to the few letters that make specific factual allegations concerning Defendant beyond the facts admitted in Defendant's plea, the sentencing memorandum and motion, and the oral testimony at the sentencing hearing. One is a letter from the operator of the Buffalo Exchange who wrote as to his interactions with Defendant and Clappsy when they brought in the Victim's clothes. Another is from a friend of the Victim who relates that the Victim confided in him about her fears of Clappsy and the threats he made to her. Defendant does not dispute the contentions contained in those letters and fails to make any showing that the information contained in them is incorrect.

{31} Finally, we note that if Defendant was concerned about misrepresentations, he could have requested a continuance to review the content of the letters and to prepare a rebuttal. *See United States v. Curran,* 926 F.2d 59, 62–63 (1st Cir.1991) (recognizing that the defendant has the right not to be sentenced on materially false information and that the defendant was entitled to an opportunity to challenge the statements of fact contained in victim impact letters). Had Defendant requested a continuance, he could have precluded even the possibility of prejudice. *See United States v. Radix Labs., Inc.,* 963 F.2d 1034, 1042–1043 (7th Cir.1992) (observing that the issue of prejudice may have been avoided if the defendant's counsel had requested a continuance to review the newly introduced materials instead of simply objecting to the evidence). Contrary to Defendant's contention, he did not request a continuance and instead suggested that the only remedy was for the trial judge to recuse himself and for the case to be reset for sentencing.

{32} Furthermore, Defendant has failed to show that, if he had requested and received a continuance, he could have rebutted the allegations contained in the letters. As set forth in detail above, the Victim's family gave compelling testimony at the sentencing hearing as to the Victim's unique qualities and the loss experienced by the family and the community at large. Defendant made no attempt to rebut this evidence at the sentencing hearing. As the ex parte letters expressed sentiments similar to the oral testimony of the Victim's family, there is no indication that Defendant would have attempted, or been capable of, rebutting the information in the ex parte letters even if he had received prior notice of their content. *See United States v. Patrick,* 988 F.2d 641, 648–649 (6th Cir.1993) (holding that it was harmless error for the sentencing court to rely on information from another proceeding because the evidence introduced at the sentencing proceeding equally supported the judge's findings, and there is no indication that the defendant could have rebutted the improper information even if he had received advance notice of it).

{33} In conclusion, we hold that the prosecutor's actions in failing to divulge the letters until one to two days before trial were wrongful and should not be condoned. However, we affirm Defendant's sentence because there is no evidence that he suffered any prejudice from the admission of the letters without adequate prior notice especially since

the trial court did not rely upon them to determine the sentence..

Ineffective Assistance of Counsel

{34} Defendant claims that he received ineffective assistance of counsel because his attorney did not review the letters before sentencing. We disagree. The test for ineffective assistance of counsel is whether defense counsel exercised the skill of a reasonably competent attorney. *See State v. Talley,* 103 N.M. 33, 36, 702 P.2d 353, 356 (Ct.App.1985). To establish a prima facie case of ineffective assistance of counsel, Defendant must show that (1) counsel's performance was deficient in that it "fell below an objective standard of reasonableness"; and (2) that Defendant suffered prejudice in that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lytle v. Jordan,* 2001–NMSC–016, ¶¶ 26–27, 130 N.M. 198, 22 P.3d 666 (internal quotation marks and citation omitted). As set forth above, there is nothing to indicate that, had Defendant's counsel known of the letters in advance, she could have raised objections or furnished rebuttal to the information contained in the letters. Therefore, we hold that Defendant did not receive ineffective assistance of counsel. *See Duncan v. Kerby,* 115 N.M. 344, 348–49, 851 P.2d 466, 470–71 (1993) (holding that prejudice must be shown before a defendant is entitled to relief based on ineffective assistance of counsel).

CONCLUSION

{35} For the foregoing reasons, we hold that the State should have notified Defendant about the letters before they were submitted to the trial court. However, failure to notify Defendant did not prejudice Defendant. Accordingly, we affirm the judgment and sentence of the trial court.

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

BUSTAMANTE, C.J. and ROBINSON, J., concur.

2005-NMCA-059

113 P.3d 393

Carol Platt CAGAN, J.D. Wolf, and Lobo Land, LLC, a New Mexico Limited Liability Company, Plaintiffs–Appellants,

v.

VILLAGE OF ANGEL FIRE, A.L. "Bubba" Clanton, individually and in his capacity as Mayor of the Village, and Don Lusk, individually and in his capacity as Village Administrator, Defendants–Appellees.

No. 24,142.

Court of Appeals of New Mexico.

April 14, 2005.

Linda G. Hemphill, Stephanie A. Fuchs, Linda G. Hemphill, P.C., Santa Fe, NM, for Appellants.

James P. Sullivan, Gianna M. Mendoza, Sullivan Law Firm, P.A., Santa Fe, NM, for Appellees.

OPINION

KENNEDY, Judge.

{1} Carol Platt Cagan, J.D. Wolf, and Lobo Land (Plaintiffs), filed two cases against the Village of Angel Fire and its officials (referred to collectively as the Village).[1] The first case (Case I) was dismissed with prejudice for failure to prosecute. While the dismissal of Case I was pending, Plaintiffs filed a second case (Case II) that included claims similar to those in Case I. The district court granted summary judgment to the Village in Case II on grounds that collateral estoppel and res judicata barred Plaintiffs' entire complaint as a result of the dismissal of Case I. It is from this order that Plaintiffs appeal.

{2} The application of res judicata does not require the end of one case to give it

1. Each of Plaintiffs' cases named the Village and a number of its officials. Even though each of the complaints named different Village officials in their individual capacities, Plaintiffs do not raise their identities as an issue. For this reason only, we refer to all of the defendants collectively as the Village.

preclusive effect as against another. We therefore affirm the district court's dismissal of three of Plaintiffs' claims in Case II, as these claims are barred by res judicata. Lastly, one claim in Case II did not share enough in common with the Case I claims to be precluded by res judicata; as to that claim we reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

{3} This is not the first time Plaintiffs have asserted that the Village has made politically motivated decisions against established Village policies and ordinances concerning Plaintiffs' businesses. In Case I, on February 17, 2000, Plaintiffs filed a complaint against the Village. The Case I complaint asserted a 42 U.S.C. § 1983 (1996) claim. Case I also contained claims for assault, battery, defamation, intentional interference with contractual relations, conversion, anticipatory breach of contract, and damage to property. The critical claims for the purposes of this appeal are the Section 1983 claim and the anticipatory breach of contract claim, involving the alleged breach of an April 6, 1998, agreement amended June 30, 1998 (Agreement and Amendment).

{4} On October 23, 2001, the Village filed a motion to dismiss Plaintiffs' complaint in Case I for failure to prosecute their claims. It appears from the record proper that Plaintiffs never responded to the motion. On September 11, 2002, the Village filed a second motion to dismiss Plaintiffs' complaint in Case I for failure to prosecute their claims, on grounds that Plaintiffs failed to take any significant action on their complaint within the previous two years. Two days later, on September 13, 2002, new counsel for Plaintiffs entered an appearance in Case I. On the same day, new counsel for Plaintiffs filed a second complaint. This Case II complaint again named the Village as a Defendant. It also named A.L. "Bubba" Clanton, individually and as the Village mayor, and Don Lusk, individually and as the Village administrator.[2] Case II asserted claims for breach of contract (Count I), inverse condemnation/fifth amendment takings (Count II), and two counts pursuant to Section 1983 for violation of substantive due process (Count III) and violation of Plaintiff Carol Platt Cagan's right to petition the courts (Count IV).

{5} On November 13, 2002, the Village filed its answer to the complaint in Case II, raising the affirmative defenses of collateral estoppel and res judicata. Case I was not dismissed until December 4, 2002. After oral argument from the parties, the district court dismissed the Case I complaint with prejudice. Two months later, the Village filed a motion for summary judgment in Case II on the grounds that the Case II claims were barred by collateral estoppel and res judicata given the district court's dismissal of Case I. After hearing oral argument, the district court granted the Village's motion for summary judgment, dismissing Plaintiffs' complaint in Case II in its entirety. Plaintiffs appealed from that order.

DISCUSSION

Collateral Estoppel Will Not Be Addressed

{6} The district court's order dismissed the complaint in Case II in its entirety, but did not indicate the grounds upon which it relied for its decision. Plaintiffs assert that their case was not barred because of collateral estoppel. However, the Village concedes in its answer brief that the doctrine of collateral estoppel does not apply to this appeal. Consequently, we will not address collateral estoppel as a sufficient justification for dismissing Case II, only addressing whether res judicata precludes adjudication of the Case II claims.

Standard of Review

{7} Although the parties disagree about the type of order from which the appeal is taken, they agree that the standard of review is de novo.[3] The decision of whether

2. The Case I complaint had named as a defendant then-mayor Barbara Cottam. The Case II complaint asserts its claims against Clanton as her "successor." The Case II claims against Lusk also designate Lusk as a "successor" to the former administrator, who was not, however, named in Case I.

3. The district court's order and the parties' pleadings indicate it was a motion for summary judgment that was at issue.

res judicata applies to bar a party's claims is a question of law that we review de novo. *Anaya v. City of Albuquerque,* 1996–NMCA–092, ¶ 5, 122 N.M. 326, 924 P.2d 735. As the party seeking to bar Plaintiffs' claims, the Village had the burden of establishing the elements of res judicata. *Id.*

Res Judicata

1. Requirement of Adjudication on the Merits and Rule 1–041 NMRA Dismissals

{8} In order for the doctrine of res judicata to apply, the action asserted to have preclusive effect must have concluded with a final adjudication on the merits. *See Myers v. Olson,* 100 N.M. 745, 747, 676 P.2d 822, 824 (1984) ("Under the doctrine of res judicata, a prior judgment on the merits bars a subsequent suit involving the same parties or privies based on the same cause of action."). Therefore, the first question is whether the Case I order of dismissal with prejudice for failure to prosecute pursuant to Rule 1–041(E)(1) NMRA constitutes an adjudication on the merits. Other than *Smith v. Walcott,* 85 N.M. 351, 512 P.2d 679 (1973), there appears to be no other cases directly addressing this question. A few cases have implied that such a dismissal does constitute an adjudication on the merits. *See, e.g., Eager v. Belmore,* 53 N.M. 299, 307, 207 P.2d 519, 524 (1949) (reaffirming that Rule 1–041(E) has the effect of a statute of limitation and affirming that an order dismissing a complaint with prejudice pursuant to a Rule 1–041(E) motion for failure to prosecute barred the defendant from asserting his cross-complaint). The parties in this appeal argue different interpretations of *Smith* to support their contentions.

{9} Before addressing *Smith,* it should be noted that Rule 1–041 was amended in 1990. *See Vigil v. Thriftway Mktg. Corp.,* 117 N.M. 176, 178–79, 870 P.2d 138, 140–41 (Ct.App.1994) (discussing the amendment of Rule 1–041). Cases filed before January 1, 1990, rely on Rule 1–041 NMRA (Recomp.1986) (referred to as the former rule), under which a dismissal for failure to prosecute within three years specifically operated to bar a subsequent action on the same subject matter.[4] The current Rule 1–041 (referred to as Rule 1–041 or the current rule) provides for when the dismissal of an action is with prejudice and without prejudice. *See* Rule 1–041(E)(1)(2). Subsection (E) is at issue in this appeal. It states:

> (1) Any party may move to dismiss the action, or any counterclaim, cross-claim or third-party claim with prejudice if the party asserting the claim has failed to take any significant action to bring such claim to trial or other final disposition within two (2) years from the filing of such action or claim. An action or claim shall not be dismissed if the party opposing the motion is in compliance with an order entered pursuant to Rule 1–016 NMRA or with any written stipulation approved by the court.
>
> (2) Unless a pretrial scheduling order has been entered pursuant to Rule 1–016 NMRA, the court on its own motion or upon the motion of a party may dismiss without prejudice the action or any counterclaim, cross-claim or third party claim if the party filing the action or asserting the claim has failed to take any significant action in connection with the action or claim within the previous one hundred and eighty (180) days. A copy of the order of dismissal shall be forthwith mailed by the court to all parties of record in the case. Within thirty (30) days after service of the order of dismissal, any party may move for reinstatement of the case. Upon good cause shown, the court shall reinstate the

4. Former Rule 1–041(E)(1) stated: "In any civil action or proceeding pending in any district court in this state, . . . when it shall be made to appear to the court that the plaintiff therein or any defendant filing a cross-complaint therein has failed to take any action to bring such action or proceeding to its final determination for a period of at least three (3) years after the filing of said action or proceeding or of such cross-complaint unless a written stipulation signed by all parties to said action or proceeding has been filed suspending or postponing final action therein beyond three (3) years, any party to such action or proceeding may have the same dismissed with prejudice to the prosecution of any other or further action or proceeding based on the same cause of action set up in the complaint or cross-complaint by filing in such pending action or proceeding a written motion moving the dismissal thereof with prejudice."

> case and shall enter a pretrial scheduling order pursuant to Rule 1–016 NMRA. At least twice during each calendar year, the court shall review all actions governed by this paragraph.

Id. Subsection (E) was essentially rewritten and differs from the former rule in several ways. It provides for dismissal of an action with prejudice by a motion that is not in written form. Rule 1–041(E)(1). Also omitted from the current rule is the former rule's language describing the res judicata effect of a dismissal with prejudice. Rule 1–041(E)(2) also now provides for the dismissal of an action without prejudice for lack of prosecution, either by motion of a party or on the court's own motion. *See id.; Vigil,* 117 N.M. at 179, 870 P.2d at 141 (discussing dismissals under the current version of Rule 1–041(E)(2)). Although a dismissal without prejudice was not expressly provided for in the former rule, cases filed before the current rule took effect in 1990 nevertheless recognized the court's inherent power to dismiss a case sua sponte for lack of prosecution. *See, e.g., Smith,* 85 N.M. at 354, 512 P.2d at 682. The question then is whether the Case I dismissal with prejudice under Rule 1–041(E)(1) operates as an adjudication on the merits. In this case, we hold that it does.

{10} In *Smith,* the plaintiff's first case was dismissed sua sponte in 1970 for lack of prosecution after the defendants admitted some of the debt alleged and promised to pay in their answer. *Smith,* 85 N.M. at 353, 512 P.2d at 681. In 1972, the plaintiffs filed in the same district court a claim that the defendants had not paid on the same promissory note that was the subject of the first case, further asserting the defendants' admission in the first case as to their liability under the note and the specific amount owed. *Id.* The defendants filed an answer and motion to dismiss the second case. *Id.* at 354, 512 P.2d at 682. The defendants also filed a motion under the first case pursuant to the former Rule 1–041(E) seeking dismissal with prejudice. *Id.* The same district judge that entered the 1970 order of dismissal entered another order dismissing the complaint in the first case with prejudice. *Id.*

{11} Our Supreme Court determined that the 1970 order dismissing the complaint in the first case, entered sua sponte by the district court without a motion or hearing, did not constitute an adjudication on the merits; thus, the doctrine of res judicata did not apply. *Id.* at 355, 512 P.2d at 683. The Court further determined that the district court's 1970 sua sponte order, entered pursuant to the court's inherent power to dismiss a cause for failure to prosecute, constituted a final order and effectively terminated the case until properly reinstated. *Id.* Since no case was pending in 1972, there was no cause of action to dismiss "with prejudice." *Id.* The Court also noted that the district court had not followed any of the procedures contemplated by Rule 1–041(E) in entering the original sua sponte dismissal. *Id.* at 354, 512 P.2d at 682. The Court stated that the rule contemplated a hearing on a motion to dismiss where the parties have an opportunity to present evidence on the issue of whether a party has taken any action to bring the case to its final determination. *Id.*

{12} *Smith* is distinguishable here on its facts. Unlike *Smith,* where the dismissal was sua sponte by the court, in this case the Village filed a motion for summary judgment pursuant to Rule 1–041(E) and oral argument was held. *See id.* at 354, 512 P.2d at 682. Contrary to Plaintiffs' assertions, *Smith* is not therefore direct authority for their argument that a dismissal for lack of prosecution is not an adjudication on the merits. *Smith* differs in that it holds that an adjudication on the merits does not flow from a sua sponte order of dismissal for lack of prosecution absent a hearing. *Id.* at 354–55, 512 P.2d at 682–83. Here, we hold that when a dismissal with prejudice for lack of prosecution is entered pursuant to a written motion and after a hearing on the merits where the losing party has had notice and an opportunity to be heard, a dismissal under Rule 1–041(E)(1) constitutes an adjudication on the merits.

{13} This holding is also supported by the relationship between Subsections (B) and (E)(1) of Rule 1–041. Both Subsections (B) and (E)(1) "require longer periods of inaction and have very strict standards," *Vigil,* 117

N.M. at 180, 870 P.2d at 142, that result in "a serious sanction for extremely dilatory parties and their counsel." *Id.* at 179, 870 P.2d at 141. However, Subsection (E)(2) was "designed to serve a different purpose" than Subsections (B) and (E)(1). *Id.* Like Subsection (E)(2), Subsection (B) allows for an involuntary dismissal for failure to prosecute. Rule 1–041(B), (E)(2). Unlike Subsection (E)(2), however, Subsection (B) actually states that, absent the court's indicating otherwise, such a dismissal "operates as an adjudication upon the merits." Rule 1–041(B).

{14} The Village's motion to dismiss in Case I asserted both subsections as a basis for dismissal. We note that notice and an opportunity to be heard are essential to a decision on the merits, even if a written motion under Subsection (E)(1) is not. *Otero v. Sandoval,* 60 N.M. 444, 446, 292 P.2d 319, 320 (1956). The existence of a decision on the merits only becomes an issue when res judicata is asserted. Rule 1–041(B) cases provide us with some guidance in this regard. For example, in *Lowery v. Atterbury,* 113 N.M. 71, 823 P.2d 313 (1992), our Supreme Court rejected a due process challenge to a sua sponte dismissal with prejudice for lack of prosecution under Rule 1–041(B). *Lowery,* 113 N.M. at 73, 823 P.2d at 315. Although lacking notice and a hearing before dismissal, the Court held that the order did not violate due process rights. *Id.* (reaffirming established authority that Rule 1–041(B) does not require notice and a hearing); *cf. Newsome v. Farer,* 103 N.M. 415, 417, 708 P.2d 327, 329 (1985) (rejecting a due process challenge to an order of dismissal, and concluding that such an order under Rule 1–041(B) for failure to comply with a court order was not an adjudication on the merits, and neither notice nor a hearing were required). However, while dismissal under Rule 1–041(B) may not require a notice and a hearing, for an order of dismissal to have res judicata effect, notice and a hearing must be provided, and the result is an adjudication on the merits. *See Otero,* 60 N.M. at 445–46, 292 P.2d at 320 (concluding that mandate of Rule 1–041(B) that "any dismissal not provided for in this rule . . . operates as an adjudication upon the merits" only applies to a dismissal where the party had notice (internal quotation marks, citation, and emphasis omitted)). Under these circumstances, the requirements of notice and a hearing remain essential for an adjudication on the merits.

{15} The order of dismissal entered pursuant to the Village's motion for summary judgment under Subsections (B) and (E)(1) of Rule 1–041 constituted an adjudication on the merits. Therefore, the doctrine of res judicata applies. To the extent that the other elements of res judicata are met, this doctrine will act as a bar to Plaintiffs' claims.

2. The Fact That Case I and Case II Were Pending at the Same Time Does Not Preclude the Application of Res Judicata

{16} Plaintiffs argue that because Case II was filed while Case I was still pending, res judicata is inapplicable. However, as Plaintiffs point out, there is a New Mexico case that directs us to the opposite conclusion. In *Carter v. Thurber,* 106 N.M. 429, 744 P.2d 557 (Ct.App.1987), the plaintiff appealed from a summary judgment dismissing with prejudice his state court action against the defendants. *Id.* at 430, 744 P.2d at 558. The trial court determined that the plaintiff's state court claims were barred by res judicata because of a prior dismissal for lack of prosecution in a federal district court case. *Id.* The plaintiff argued that because the state court action was filed before the federal action, it did not constitute a subsequent action and, therefore, res judicata was inapplicable. *Id.* The plaintiff relied on *Myers,* which stated: "Under the doctrine of res judicata, a prior judgment on the merits bars a *subsequent* suit involving the same parties or privies based on the same cause of action." *Carter,* 106 N.M. at 432, 744 P.2d at 560 (internal quotation marks and citation omitted). Relying on the rationale of an Arizona case, this Court concluded that res judicata applied because "if two actions involving the same issues and parties are pending at the same time when a judgment in one becomes final, it may be raised in bar of the other, regardless of which action was begun first." *Id.*

{17} Here, Case I was filed first, but was still pending at the time Case II was filed. Plaintiffs argue that Case II does not constitute a "subsequent" suit because it was filed while Case I was still pending. However, under *Carter*, res judicata is applicable regardless of the fact that the cases overlapped. *See id.* For this reason, we conclude that the timing of Cases I and II does not bar the application of res judicata.

3. Which of Plaintiffs' Case II Claims Involve the Same Causes of Action and Subject Matter as Plaintiffs' Case I Claims?

{18} We next address whether the elements of res judicata are met. "*Res judicata* applies when four elements are met: (1) identity of parties or privies, (2) identity of capacity or character of persons for or against whom the claim is made, (3) same cause of action, and (4) same subject matter." *Three Rivers Land Co. v. Maddoux*, 98 N.M. 690, 694, 652 P.2d 240, 244 (1982), *rev'd on other grounds by Universal Life Church v. Coxon*, 105 N.M. 57, 59, 728 P.2d 467, 469 (1986). Plaintiffs appear to concede that the first two prongs of this test are not at issue, and do not argue whether or not they are met. Even though a question of privity might arise on the facts before this Court, we may not fairly address an issue that is abandoned and to which the Village did not have an opportunity to respond. Therefore, we deal only with the cause of action and subject matter requirements of res judicata in these cases.

{19} To answer the question of whether the causes of action are the same, we must determine whether Case I and Case II arose out of the same transaction or series of connected transactions. *Three Rivers Land Co.*, 98 N.M. at 695, 652 P.2d at 245. *Three Rivers Land Co.* adopted the Restatement (Second) of Judgments §§ 24, 25 (1982), as a guideline for determining what constitutes a cause of action for the purposes of res judicata. *Three Rivers Land Co.*, 98 N.M. at 695, 652 P.2d at 245. Restatement (Second) of Judgments § 24 is titled "Dimensions of 'Claim' for Purposes of Merger or Bar—General Rule Concerning 'Splitting.'" Restatement, *supra*, § 24, at 196. Section 24 states that:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Id. Restatement (Second) of Judgments § 25, entitled "Exemplifications of General Rule Concerning Splitting," provides:

> The rule of § 24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action
>
> (1) To present evidence or grounds or theories of the case not presented in the first action, or
>
> (2) To seek remedies or forms of relief not demanded in the first action.

Id. Applying these principles and the transactional test adopted in *Three Rivers Land Co.*, we must "examine the operative facts underlying the claims made in the two lawsuits." *Anaya*, 1996–NMCA–092, ¶ 8, 122 N.M. 326, 924 P.2d 735. We thus address each of Plaintiffs' claims in Case II separately to decide whether they involve the same cause of action and subject matter.

a. Breach of Contract and Anticipatory Breach

{20} The complaint in Case I asserted that under terms of the Agreement and Amendment the Village agreed to include Plaintiffs' property in the Village assessment district. By including the property in the assessment district, the Village was obligated to provide and maintain all roads and utilities to the

property, the work for which was to be completed and accepted by the Village no later than November 2001. The complaint asserted anticipatory breach of contract based on the allegation that the Village breached the Agreement and Amendment by abandoning the assessment district and failing to commence installation of the infrastructure as promised.

{21} The breach of contract claim asserted in Case II alleged as completed the same actions that constituted the anticipatory breach claim in Case I, namely that in May 1999 the Village narrowed the scope of the assessment district to include only water and sewer in violation of the Agreement and Amendment. The breach of contract claim in Case II thus was based on Plaintiffs' allegations that the Village failed or refused to honor its obligations to provide the services as promised by the same Agreement and Amendment, and thus the same claim relied upon for the anticipatory breach of contract claim asserted in Case I. The Case II claim for actual breach added no more than an allegation that the Village accomplished the breach that Case I said would happen. Otherwise, both causes of action relied upon the Village's breach of the Agreement and Amendment.

{22} There is not much functional difference between claiming anticipatory and actual breach of a contract. Plaintiffs could have asserted their breach of contract claim in Case I, and would have been entitled there to damages for total breach. *Anticipatory breach of contract* is defined as a breach caused by "a party's anticipatory repudiation, i.e., unequivocally indicating that the party will not perform when performance is due." Black's Law Dictionary 182 (7th ed.1999). We have held that where a defendant's actions evince "a distinct, unequivocal, and absolute refusal to perform according to the terms of the agreement," a plaintiff can demonstrate sufficient repudiation justifying nonperformance of the contract. *Gilmore v. Duderstadt,* 1998–NMCA–086, ¶ 15, 125 N.M. 330, 961 P.2d 175 (internal quotation marks and citations omitted). In *Gilmore,* we indicated that if anticipatory repudiation was proven on retrial, the plaintiff would be entitled to his compensatory damages for the total breach. *Id.* ¶ 20.

{23} The subject matter of this action arose in May 1999 when the Village notified Plaintiffs that it decided to narrow the scope of the assessment district to include only water and sewer despite the promises it had made in the Agreement and Amendment. *See id.* ¶¶ 15, 20. The causes of action and subject matter were the same because they arose out of the same Agreement and Amendment and refusal of the Village to honor its promises. Thus, Defendants could have asserted their breach of contract claim in Case I and would have been entitled to damages for the total breach. *See, e.g., id.* ¶ 20.

{24} Thus, there is no practical distinction to make between the causes of action in Case I and Case II. *See Anaya,* 1996–NMCA–092, ¶ 6, 122 N.M. 326, 924 P.2d 735 (stating that the third and fourth prongs of the res judicata test require that the two claims represent the "same subject matter" and the "same cause of action"). Since the action is brought against the Village, and constitutes the same cause of action and subject matter, there is no difference between the claims Plaintiffs brought in Case I for anticipatory breach and the breach of contract claim brought in Case II. We therefore hold that once dismissed in Case I, the contract claim in Case II was barred by res judicata. *See id.* ¶ 5.

b. Plaintiffs' Inverse Condemnation/Fifth Amendment Takings Claim and Due Process/Section 1983 Claims (Counts II and III) Involve the Same Subject Matter and Cause of Action

{25} In Counts II and III of Case II, Plaintiffs alleged that the Village's failure to provide and maintain roads and utilities as promised in the Agreement and Amendment constituted a taking without due process or compensation. This claim also arises out of the same transaction as the anticipatory breach of contract claim in Case I. The remedy Plaintiffs seek (money damages) is also the same. The only difference between these claims is the legal theory asserted. *See* Restatement (Second) of Judgments § 25

(extinguishing the plaintiff's claim in the second action despite the presentation of theories not asserted in the first action). Plaintiffs could have as easily brought this claim in Case I. *See City of Sunland Park v. Macias,* 2003–NMCA–098, ¶ 18, 134 N.M. 216, 75 P.3d 816 ("Res judicata bars not only claims that were raised in the prior proceeding, but also claims that could have been raised."); Restatement (Second) of Judgments § 25 cmt. d;[5] Restatement (Second) of Judgments § 24 cmt. c ("That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims."). As these claims arose out of the same transaction, res judicata bars Plaintiffs' Fifth Amendment takings claims and due process/Section 1983 claims in Case II. *See Anaya,* 1996–NMCA–092, ¶ 6, 122 N.M. 326, 924 P.2d 735 (setting forth the elements of res judicata).

c. Plaintiff Cagan's Civil Rights Claim in Case II, Count IV Was Not Adjudicated on Its Merits in Case I and Is Not Barred

{26} Plaintiffs assert that the Village failed to meet their burden of proving that summary judgment as to the Section 1983 claim alleged in Count IV was proper because dismissal of this claim was not requested or addressed in the Village's motion or at the hearing. *See Pollock v. State Highway & Transp. Dep't,* 1999–NMCA–083, ¶ 5, 127 N.M. 521, 984 P.2d 768 (stating that the party moving for summary judgment "has the burden of establishing a prima facie case showing there was no genuine issue of material fact" for each issue (internal quotation marks and citation omitted)). We agree.

{27} The Village's motion for summary judgment argued that the doctrine of res judicata barred Plaintiffs from bringing the claims raised in Counts I, II, and III. The Village also sought summary judgment on Count IV, but on different grounds. It asserted that Count IV was barred by the statute of limitations because the retaliatory incident alleged in Count IV occurred on June 28, 2000, and the Case II complaint was not filed until September 13, 2002. The Village later withdrew this argument and did not request summary judgment in writing on an alternative ground for Count IV. Nevertheless, the order granting the Village's motion for summary judgment determined that the complaint should be dismissed in its entirety. We conclude that the Village was not entitled to summary judgment as a matter of law on this count for the reasons set forth below. *See Martinez v. Logsdon,* 104 N.M. 479, 482–83, 723 P.2d 248, 251–52 (1986) (indicating that the court would not be barred from granting summary judgment sua sponte if proper, i.e., there were no material fact issues in dispute and the moving party was entitled to summary judgment as a matter of law).

{28} Plaintiffs' Section 1983 claim in Case I was based on allegations that in retaliation for Plaintiffs' political opposition to them or their official actions: (1) the Village interfered with their contractual rights to deliver concrete by ordering the subcontractor of the project to terminate Plaintiffs because they supported certain candidates for the Village positions; (2) the Village red-tagged two of their concrete trucks, forcing them to dump a load of concrete for violating a state regulation requiring concrete to be off-loaded within ninety minutes; (3) the Village denied their bid to do work for the Village, even though their bid was the lowest one; and (4) the Village interfered with Plaintiff Cagan's ability to operate a business by failing to timely approve her plans to relocate her business, thus requiring her to store retail inventory, delaying the approval of her sign permit, and threatening to require her to remodel her business to meet building codes not enforced against other similarly situated businesses. Plaintiffs claimed that these actions (1) deprived them of their constitutional rights of free speech

5. *"Successive actions changing the theory or ground.* Having been defeated on the merits in one action, a plaintiff sometimes attempts another action seeking the same or approximately the same relief but adducing a different substantive law premise or ground. This does not constitute the presentation of a new claim when the new premise or ground is related to the same transaction or series of transactions, and accordingly the second action should be held barred."

and association because the Village had a pattern of retaliating against businesses based on their political beliefs, racial background, and religious practices, (2) interfered with and threatened their contract and commercial use of property rights merely because they supported certain candidates for Village positions, and (3) violated their due process and equal protection rights by selectively enforcing state regulations and zoning laws against them.

{29} In Count IV of Case II, Plaintiffs' allege that the Village violated Plaintiff Cagan's first amendment rights by interfering with her right to petition the courts. Specifically, the complaint asserted that on June 28, 2000, Clanton and Lusk ordered that the utilities to Cagan's residence be shut off, ordered that Cagan be restrained and handcuffed, and required Cagan to immediately pay for the water bills she had disputed. The Case II complaint alleged that these actions were in retaliation for Cagan's having filed the lawsuit in Case I, and for her continuing protest of the wrongful actions of the Village and its officials. The Village asserts that although the actual forms of retaliation may differ between Cases I and II, Plaintiffs used the same legal theories for both. Consequently, the Village argues, Plaintiffs' Section 1983 retaliation claims arise from the same series of connected transactions, namely the Village's alleged wrongful conduct.

{30} These allegations constitute a different claim because the facts supporting it occurred after Case I was filed. The situation is analogous to *DiMatteo v. County of Dona Ana*, 109 N.M. 374, 379, 785 P.2d 285, 290 (Ct.App.1989), where this Court concluded that a prior judgment on the plaintiff's claim for medical benefits did not bar subsequent litigation as to his disability benefits. The plaintiff alleged that he became disabled after the original award of medical benefits. *Id.* at 376, 785 P.2d at 287. Here, too, we confront facts that arose subsequent to an initial claim.

{31} The Village argues that Plaintiffs could have amended their complaint in Case I to include these additional forms of retaliation because Case I was not dismissed until December 4, 2002, approximately two and a half years after the June 2000 handcuffing incident. The question is whether this claim could have been raised in Case I. *Macias*, 2003–NMCA–098, ¶ 18, 134 N.M. 216, 75 P.3d 816 ("Res judicata bars not only claims that were raised in the prior proceeding, but also claims that could have been raised."). Arguably, it could have been raised in Case I by supplemental pleading. *Elec. Supply Co. v. United States Fid. & Guar. Co.*, 79 N.M. 722, 725, 449 P.2d 324, 327 (1969) (concluding that the defendant did not waive a statute of limitations defense by failing to apply to the court to file a supplemental answer under Rule 1–015(D) NMRA; Rule 1–015(D) may have permitted supplementation, but cannot be read to require it to avoid waiver). The case that the Village relies upon for its arguments is distinguishable because it involved an amended pleading, not a supplemental pleading. *See Apodaca v. AAA Gas Co.*, 2003–NMCA–085, ¶¶ 83–85, 134 N.M. 77, 73 P.3d 215 (rejecting the plaintiffs' argument that they were denied a full and fair opportunity to litigate their claims and holding that where there was no abuse of discretion in the trial court's denial of an untimely amendment under Rule 1–015, the plaintiff cannot avoid the preclusive effect of the trial court's ruling on a subsequent action). The case at hand involves a supplemental pleading alleging facts arising after the original pleading was filed, whereas an amended pleading includes facts that occurred before. *See Elec. Supply Co.*, 79 N.M. at 725, 449 P.2d at 327. However, the subject matter of Count IV was pled in Case II and is based on different Village officials and different actions. We hold that Count IV should not be precluded, and reverse the district court's dismissal of this count.

4. Exceptions to the General Rule on Claim Splitting Do Not Apply

{32} Plaintiffs also assert that the Village's arguments fail to consider Restatement (Second) of Judgments § 26(1)(a) (1982), which provides exceptions to the general rule on claim splitting. Section 26(1)(a) provides, in relevant part:

(1) When any of the following circumstances exists, the general rule of § 24

does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:

(a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein[.]

Restatement (Second) of Judgments § 26 cmt. a states in pertinent part:

Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one of the actions does not preclude the plaintiff from proceeding and obtaining judgment in the other action. The failure of the defendant to object to the splitting of the plaintiff's claim is effective as an acquiescence in the splitting of the claim.

{33} Plaintiffs' argument is that the Village consented to the splitting of claims by failing to inform the court at the hearing on the second motion to dismiss Case I that Case II was pending or that collateral estoppel and res judicata might bar Case II. We disagree. The Village asserted the affirmative defense that the claims asserted in Case II were barred by collateral estoppel and res judicata. It filed a motion for a protective order and motion to stay discovery in Case II, stating its intention to file a motion for summary judgment in Case II asserting the claims were barred by collateral estoppel and res judicata. The Village then filed its motion arguing that Plaintiffs were barred by the order dismissing Case I with prejudice. Although Plaintiffs argue that the Village's motion for protective order and subsequent summary judgment motion did not constitute an objection to claim splitting because they were filed after Case I was dismissed, the Village raised the affirmative defenses of collateral estoppel and res judicata in its answer, which was filed while both cases were pending. The Village's acts were sufficient to bring to the attention of the district court and Plaintiffs that the Village objected to claim splitting.

{34} In addition, the cases relied upon by Plaintiffs are distinguishable. *See, e.g., Klipsch, Inc. v. WWR Tech., Inc.*, 127 F.3d 729, 734 (8th Cir.1997) (describing how the defendants did not object in any way to the plaintiffs' maintenance of two suits until after judgment had been entered in first suit). Also, in *Gilles v. Ware*, 615 A.2d 533, 536, 546 (D.C.1992), the only objection to claim splitting was in the form of a motion to stay state court proceedings pending resolution of the federal court proceeding. The court determined that the defendants failed to clearly register their objection to the claim splitting. *Id.* at 547. Furthermore, in *Funkhouser v. Hurricane Fence Co.*, 524 S.W.2d 780, 783 (Tex.Civ.App.1975), the court concluded that the defendant consented to claim splitting by failing in any way to bring its objection to the attention of the trial court. Thus, raising the affirmative defense of res judicata in the Village's answer to the complaint in Case II was sufficient to make known its objection to Plaintiffs' attempt to maintain two actions on parts of the same claim.

{35} In addition, Plaintiffs argue that Restatement(Second) of Judgments § 26(1)(c) also applies. It states:

(c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief[.]

Plaintiffs argue that Section 26(1)(c) of the Restatement (Second) of Judgments authorizes the court to allow Case II to proceed on the ground that at the time that they filed the complaint in Case I, the issue as to whether the Village breached the Agreement and Amendment was premature. They further contend that because performance under the Agreement and Amendment was not yet due when they filed Case I, it was reasonable to assert the claims in Case II after the date of performance passed. Restatement (Second) of Judgments § 26(1)(c) indi-

cates that the exception applies to situations where formal barriers prevented the plaintiff from fully presenting its claim in the first action, such as jurisdictional or procedural barriers. *Id.* cmt. c. However, as discussed above, Plaintiffs did not have to wait for the performance date to mature before seeking damages for total breach of contract. Therefore, this exception is inapplicable to the case before us.

{36} Plaintiffs further contend that the exception stated in Section 26(1)(e) of the Restatement (Second) of Judgments applies because it allows a second action to be maintained based on a continuing wrong. Plaintiffs assert that when the Village actually failed to perform as promised under the Agreement and Amendment, it continued the "anticipatory breach" envisioned in the complaint filed in Case I. Restatement (Second) of Judgments § 26(1)(e) states:

> (e) For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of suit, and chooses the latter course[.]

The comment to Section 26(1)(e), provides in pertinent part: "A judgment in an action for breach of contract does not normally preclude the plaintiff from thereafter maintaining an action for breaches of the same contract that consist of failure to render performance due after commencement of the first action." *Id.* cmt. g. However, the comment further states:

> [I]f the initial breach is accompanied or followed by a 'repudiation' . . . and the plaintiff thereafter commences an action for damages, he is obliged in order to avoid 'splitting,' to claim all his damages with respect to the contract, prospective as well as past, and judgment in the action precludes any further action by the plaintiff for damages arising from the contract.

Id. (citation omitted). Here, the Village repudiated the contract in May 1999 when it indicated it would not provide the services promised under the Agreement and Amendment. Therefore, Plaintiffs were obligated to claim all the damages arising from the contract, past and prospective, when they filed the complaint in Case I. *See Gilmore,* 1998–NMCA–086, ¶ 15, 125 N.M. 330, 961 P.2d 175. For this reason, this exception is also inapplicable.

{37} Finally, Plaintiffs argue that the exception stated in Section 26(1)(f) of the Restatement (Second) of Judgments provides the policy basis for concluding that the district court erred in dismissing Case II on grounds of res judicata. Section 26(1)(f) states:

> (f) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.

The comment to Section 26(1)(f) indicates that this section applies to extraordinary circumstances where other significant policies outweigh barring the claim. *Id.* cmt. i. However, this exception "is not lightly to be found but must be based on a clear and convincing showing of need." *Id.* Some examples provided in the comment include when personal liberty is at stake, and cases involving civil commitment of the mentally ill or child custody. *Id.* Plaintiffs have not met their burden of establishing a clear and convincing showing of need. Nor do the circumstances in this case present an extraordinary situation. For these reasons, Section 26(1)(f) of the Restatement (Second) of Judgments is inapplicable.

Related Motions

{38} Plaintiffs filed a motion to supplement the record proper, which was held in abeyance pending submission to a panel for a decision. The parties dispute the conversations between their counsel about the entry of appearance of Plaintiffs' new counsel, and Plaintiffs have filed a motion to supplement the record by submitting affidavits concerning the succession of their counsel.[6] We deny the motion to supplement the record.

6. The parties argue over whether Plaintiffs' counsel was aware of the Village's second motion to

CONCLUSION

{39} Since the Village met its burden of showing that res judicata barred Plaintiffs' Case II, Counts I to III, we affirm the district court's dismissal of those counts. As Plaintiffs' Count IV involved a different set of facts than found in Plaintiffs' Case I, we reverse the district court's decision that res judicata barred Count IV of Plaintiffs' complaint in Case II. Finally, we hold that the exceptions to the claim-splitting rule do not apply to this case.

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

WE CONCUR: JAMES J. WECHSLER and CELIA FOY CASTILLO, Judges.

2005-NMCA-065

113 P.3d 406

STATE of New Mexico, Plaintiff–Appellee,

v.

Arthur GARCIA, Defendant–Appellant.

No. 24328.

Court of Appeals of New Mexico.

April 18, 2005.

dismiss at the time counsel for Plaintiffs filed the complaint in Case II. This argument is immaterial to the analysis of the issues, but for the panel's information, Plaintiffs claim that the Village served the second motion to dismiss only on their former counsel, who was still counsel of record, despite Plaintiffs' knowledge that new counsel would be appearing in Case I. It does not seem improper to serve pleadings only on counsel of record, if Plaintiffs' new counsel had not yet entered a formal appearance on their behalf with the district court.

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

Daniel A. Bryant, Daniel A. Bryant, P.A., Ruidoso, Mark Pickett, Pickett & Murphy, Las Cruces, for Appellant.

OPINION

WECHSLER, J.

{1} Defendant Arthur Garcia appeals a special condition of his probation included in the district court's judgment and sentence in his criminal case. The condition prohibits Defendant from having direct or indirect contact with all children under the age of eighteen, including the victim of his crimes, absent a court order. Principally because of the district court's authority in sentencing and the relationship of the special condition to Defendant's conduct in this case, we affirm the district court's judgment and sentence.

Background

{2} Defendant pleaded guilty to eight counts of criminal sexual contact of a minor in the fourth degree. The charges stemmed from a series of incidents that occurred over the course of several months between Defendant and one of his daughters adopted from Russia. After the sentencing hearing, the district court sentenced Defendant to incarceration for three years followed by five years of supervised probation. It partially suspended the sentence and imposed nine conditions of probation. Special condition number eight states that "Defendant shall have no contact, direct or indirect, with children under the age of eighteen (18) or with the victim unless it is pursuant to a Court order." The terms of this provision effectively prohibit Defendant from having contact with his two biological daughters and two adopted daughters until they reach majority, without a court order.

{3} Defendant filed a motion for reconsideration of the sentence. He contended that: (1) he fully cooperated with the authorities in the investigation and prosecution of the case and with the various psychological professionals involved with treating his family; (2) the proposed resolution of the case included treatment, intervention, and reunification of Defendant's family "under stringent protective safeguards to insure that the children are safe and that their urgent psychological need for contact with [Defendant] would be addressed;" (3) he was "caught entirely by surprise" by letters that requested a harsh sentence, which were submitted to the district court prior to the sentencing hearing; (4) he was unable to produce testimony rebutting the assertions made at the sentencing hearing; and (5) condition number eight would "cause significant emotional damage to [Defendant's] other children and the [v]ictim." Finding that its sentence was proper, the district court denied Defendant's motion.

{4} Defendant then moved the district court to reconsider its order denying his motion for reconsideration or, in the alternative, to reconsider certain portions of the sentence imposed. Defendant asserted that special condition number eight should be amended to provide for supervised contact between Defendant and his children in accordance with the recommendations of thera-

pists who observed the children and concluded that special condition number eight was not in conformity with the children's best interests. The prosecutor consented to supervised visitation so long as certain conditions were met. The district court denied Defendant's motion. Defendant now appeals special condition number eight included in the district court's judgment and order partially suspending sentence.

Issues Addressed in This Appeal

{5} On appeal, Defendant contends that the district court did not have jurisdiction to impose special condition number eight prohibiting all contact with minors without a court order because that condition was a "de facto" termination of his parental rights to his four daughters. He argues that the children's court has sole jurisdiction over child custody, contact, and visitation issues, and the Children's Code provides the exclusive, exhaustive, and comprehensive procedure that a court must follow before it "de facto" terminates parental rights. Specifically, Defendant asserts that "when the [d]istrict [c]ourt terminated [his] parental rights by imposing probation condition number 8, it exceeded its jurisdiction, acted illegally, deprived [him] of all due process as proscribed by the Children's Code and violated his family's fundamental right of familial integrity." Defendant urges this Court to strike special condition number eight and remand this case to the district court with instructions to transfer the case to the children's court for proceedings in accordance with the Children's Code to address the subject matter of Defendant's contact with his children. Defendant further argues that special condition number eight enjoined him from having contact with his children without following the proper procedures of Rule 1–066 NMRA.

{6} Defendant states that these issues were preserved in the district court. However, the record does not reflect that Defendant raised the arguments concerning the jurisdiction of the children's court, the constitution, or the need for notice for injunctions before the district court. We generally do not consider issues on appeal that are not preserved below. Rule 12–216(A) NMRA; *State v. Vandenberg,* 2003–NMSC–030, ¶ 52, 134 N.M. 566, 81 P.3d 19 ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked.") (internal quotation marks and citation omitted). Constitutional issues must also be properly preserved. *See Aken v. Plains Elec. Generation & Transmission Coop., Inc.,* 2002–NMSC–021, ¶¶ 9–10, 132 N.M. 401, 49 P.3d 662. However, we will address an argument that a court lacked subject matter jurisdiction for the first time on appeal. *See Gonzales v. Surgidev Corp.,* 120 N.M. 133, 138, 899 P.2d 576, 581 (1995) (stating that subject matter jurisdiction, or the power to decide a particular type of case, may not be waived and "may be raised for the first time on appeal"); *see also In re Aaron L.,* 2000–NMCA–024, ¶ 10, 128 N.M. 641, 996 P.2d 431 (stating that on appeal the reviewing court will not consider issues not raised in the district court unless the issues involve matters of fundamental right or fundamental error). As a result, Defendant did not waive his argument concerning the children's court jurisdiction by failing to preserve it.

{7} To the extent that Defendant appears to argue that the district court lacked personal jurisdiction, this argument has no merit. Defendant submitted to the jurisdiction of the district court when he pleaded guilty to the charges. *See Stetz v. Skaggs Drug Ctrs., Inc.,* 114 N.M. 465, 470, 840 P.2d 612, 617 (Ct.App.1992) ("The defense of lack of personal jurisdiction is subject to waiver when not properly asserted."). Defendant also does not cite authority that states that Rule 1–066 is applicable in the criminal sentencing context. *See In re Adoption of Doe,* 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (stating that an appellate court will not consider an issue if no authority is cited in support of the proposition). We therefore focus our review on Defendant's substantive arguments that the children's court had exclusive subject matter jurisdiction and that the district court acted improperly by imposing special condition number eight.

Subject Matter Jurisdiction of the District Court and the Children's Court

{8} The State initiated this case as a criminal case under the Criminal Code, NMSA 1978, § 30–9–13 (2001). Defendant admitted criminal sexual contact with his adopted daughter who was under the age of eighteen. Upon conviction of a crime under the Criminal Code, the court sentences a defendant in accordance with the Criminal Sentencing Act. NMSA 1978, § 31–18–13 (1993). When sentencing, a district court may, as did the district court in this case, suspend the sentence and order the defendant placed on probation for all or part of the period of the suspension, and when doing so, may require the defendant to satisfy "conditions reasonably related to his rehabilitation." *See* NMSA 1978, § 31–20–6(F) (1997) (stating conditions trial court is required and has discretion to attach to order deferring or suspending sentence); NMSA 1978, § 31–20–5(A) (1985) (allowing court to defer or suspend sentence and order probation for all or part of the period of deferment or suspension).

{9} The State did not bring this case as a termination of parental rights action under the Abuse and Neglect Act provisions of the Children's Code. *See* NMSA 1978, §§ 32A–4–1 to 32A–4–33 (1993, as amended through 2001). The Abuse and Neglect Act contains comprehensive procedures concerning the termination of parental rights when children have been abused or neglected. *Id.* It includes within its purview "sexual abuse" defined as including, but not limited to, "criminal sexual contact." Section 32A–4–2(G). The Children's Code provides that "a court other than the children's court division of the district court" shall transfer a criminal action to the children's court division of the district court if it appears that the "jurisdiction is properly within the children's court division." NMSA 1978, § 32A–1–5(C) (1993).

{10} Defendant contends that the district court should have transferred this case to the children's court because special condition number eight either was a termination of his parental rights or constituted a "de facto" termination of his parental rights subject to the comprehensive provisions of the Abuse and Neglect Act. Defendant's argument poses a standard of review that is both de novo and deferential to the discretion of the district court. We review questions concerning subject matter jurisdiction and issues of law de novo. *Tri–State Generation & Transmission Ass'n, Inc. v. King,* 2003–NMSC–029, ¶ 4, 134 N.M. 467, 78 P.3d 1226; *Ottino v. Ottino,* 2001–NMCA–012, ¶ 6, 130 N.M. 168, 21 P.3d 37. We apply an abuse of discretion standard to determine whether a district court properly imposed a condition of probation. *State v. Baca,* 2004–NMCA–049, ¶ 13, 135 N.M. 490, 90 P.3d 509.

{11} Although special condition number eight affects Defendant's relationship with his children, we do not agree with Defendant that it amounted to a "de facto" termination of parental rights, necessitating jurisdiction within the children's court. In the criminal context, conditions of probation are imposed as part of a criminal sentence. *See id.* ¶ 17. Conditions of probation are reasonably related to rehabilitation if they are "relevant to the offense for which probation was granted." *State v. Gardner,* 95 N.M. 171, 174, 619 P.2d 847, 850 (Ct.App. 1980). The court has broad discretion to effect rehabilitation and may impose conditions "designed to protect the public against the commission of other offenses during the term, and which have as their objective the deterrence of future misconduct." *State v. Donaldson,* 100 N.M. 111, 119, 666 P.2d 1258, 1266 (Ct.App.1983) (citation omitted).

{12} To fashion its sentence, the district court had before it Defendant's psychological evaluation and other information, including letters from community members, family members, and a therapist. An international adoption agency submitted a letter expressing its shock and disappointment about Defendant's charges and the potential jeopardy to future international adoptions. Letters from community members, including a teacher and other families who have adopted children, expressed concern for Defendant's children and the treatment that they received under Defendant's care. Defendant's psychological evaluation, written by a licensed clinical psychologist, revealed, among other things, that Defendant's wife observed that

every few years Defendant " 'feels neglected' and develops a crush on someone." She stated that she had noticed a physical closeness between Defendant and the victim that "felt inappropriate." The evaluation also revealed that Defendant was sexually aroused when he touched his daughter's breasts and that although he knew what he was doing was wrong, he felt that he was unable to stop himself even after she told him not to touch her. The clinical psychologist concluded that these behaviors revealed poor judgment and inadequate impulse control.

{13} Therefore, despite the fact that therapists recommended supervised visitation and that others, such as Defendant, Defendant's wife, Defendant's father-in-law, and the prosecutor, asked that supervised visitation be allowed, the district court could determine that due to the serious nature of the crimes, it would not agree to such visitation and would prohibit all contact with minors, subject to modification by court order. The district court's prohibition of Defendant's contact with all minors, including his daughters, is reasonably related to achieving the sentencing goal of deterring Defendant from engaging in similar criminal conduct to that charged in this case. *See State v. Wacey C.*, 2004–NMCA–029, ¶ 11, 135 N.M. 186, 86 P.3d 611 (stating that the general considerations governing the appropriateness of probation conditions applicable in adult cases were consistent with this Court's holding in a juvenile case that a probation condition forbidding a child from going to certain locations where he committed offenses was not a banishment and was a reasonable probation condition); *State v. McCoy*, 116 N.M. 491, 500, 864 P.2d 307, 316 (Ct.App.1993) (holding that random drug testing as a condition of probation is reasonably related to deterring future criminal conduct), *rev'd on other grounds sub nom. State v. Hodge*, 118 N.M. 410, 882 P.2d 1 (1994). Case law from other jurisdictions addressing similar conditions of probation supports this conclusion. *See, e.g., Nitz v. State*, 745 P.2d 1379, 1381 (Alaska Ct.App. 1987) (holding that a defendant convicted of lewd and lascivious acts toward a child was properly subjected to a probation condition that prohibited contact with his daughter and other girls under eighteen); *Rodriguez v. State*, 378 So.2d 7, 10 (Fla.Dist.Ct.App.1979) (holding that, after a guilty plea to aggravated child abuse, a special condition of probation that prohibited the defendant from having custody of her children was valid because the condition had a clear relationship to the crime); *State v. Credeur*, 328 So.2d 59, 64 (La.1976) (determining that a special probation condition that prevented contact with the defendant's children was reasonable when sexual abuse crime involved the defendant's children); *People v. McAllister*, 150 A.D.2d 913, 541 N.Y.S.2d 622, 622 (N.Y.App.Div. 1989) (upholding condition of probation preventing contact with stepdaughter and biological daughters when the defendant was convicted of sexual intercourse with his stepdaughter); *State v. Crocker*, 96 Or.App. 111, 771 P.2d 1026, 1027–28 (1989) (stating that when the defendant was convicted of raping his stepdaughter, a condition that prohibited his presence in a residence or vehicle with a child of either gender under eighteen years was valid); *see also State v. Kessler*, 199 Ariz. 83, 13 P.3d 1200, 1206 (Ariz.Ct.App. 2000) (holding that a reasonable relationship existed between a probation condition's requirement that the defendant not have unsupervised contact with children and the goals of rehabilitating him and protecting the public from any further criminal acts he might commit); *Ramaker v. State*, 73 Wis.2d 563, 243 N.W.2d 534, 536–37 (1976) (upholding a probation condition prohibiting association with minor children, not his own, when the defendant was convicted of child molestation).

Conclusion

{14} The Abuse and Neglect Act requires the children's court to "give primary consideration to the physical, mental and emotional welfare and needs of the child" in proceedings to terminate parental rights. Section 32A–4–28(A). The children's court must consider the "physical, mental and emotional welfare and needs of the child." NMSA 1978, § 32A–5–15(A) (1995). This focus on the child is different from the focus of sentencing in a criminal case. The prohibition of special condition number eight related to Defendant's crime of criminal sexual con-

tact with a minor. Given the purposes of special condition number eight of rehabilitation and deterrence, the district court had jurisdiction of this case and did not err by not transferring it to the children's court. *See State v. Ehli,* 681 N.W.2d 808, 810–11 (N.D.2004) (holding that a probation condition prohibiting the defendant from having contact with minor children under the age of eighteen, including his own, was proper and not a de facto termination of parental rights). We affirm the district court's imposition of the probation condition prohibiting Defendant from having contact with all children under eighteen unless modified by court order.

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

ALARID and ROBINSON, JJ., concur.

2005-NMCA-067

113 P.3d 859

Robert SEEDS and Laura Seeds, Plaintiffs–Appellants,

v.

Richard LUCERO, John Lenssen, Anthony Vandervossen, and Kathy Vandervossen, Defendants–Appellees.

No. 23,704.

Court of Appeals of New Mexico.

March 30, 2005.

Certiorari Denied, No. 29,182, May 26, 2005.

Scott F. Voorhees, Scott F. Voorhees P.C., Santa Fe, NM, for Appellants.

R. Galen Reimer, Gallagher Casados & Mann, P.C., Albuquerque, NM, for Appellees (City Defendants).

Frank T. Herdman, Brenden J. Murphy, Rubin Katz Law Firm, P.C., Santa Fe, NM, for Appellees (VanderVossens).

OPINION

FRY, Judge.

{1} This case arises from a political and familial feud that has already resulted in two opinions from our Court. *See VanderVossen v. City of Espanola,* 2001–NMCA–016, 130 N.M. 287, 24 P.3d 319; *Seeds v. VanderVossen,* No. 22,718, (N.M.Ct.App. Aug. 11, 2003) (mem.). In this case, Plaintiffs Robert and Laura Seeds sued Robert's sister, Kathy VanderVossen, and Kathy's husband, Anthony VanderVossen, for alleged interference with Plaintiffs and their towing businesses in Espanola. Plaintiffs also sued Espanola's mayor, Richard Lucero (who is Anthony VanderVossen's uncle) and the city attorney, John Lenssen (together, City Defendants), contending that they used their official positions to assist the VanderVossens in their attempt to cause personal and financial harm to Plaintiffs. The issues in this appeal concern: (1) whether the City Defendants were acting within the scope of their duties and therefore were immune under the Tort Claims Act, NMSA 1978, §§ 41–4–1 to –29 (1976, as amended through 2004) (TCA), from a claim of conspiracy to commit certain tortious conduct; and (2) if so, whether the VanderVossens can be liable for civil conspiracy when the City Defendants, with whom they are alleged to have conspired, are immune. The trial court ruled that the City Defendants were immune under the TCA and also dismissed the civil conspiracy claim against the VanderVossens. We affirm the trial court's ruling that the City Defendants are immune, but we reinstate the civil conspiracy claim against the VanderVossens.

BACKGROUND

{2} We set out facts as alleged in Plaintiffs' first amended complaint, considering them undisputed for purposes of our disposition of the issues in this case. Plaintiffs and the VanderVossens are neighbors and business competitors. Each Plaintiff and each VanderVossen owns a towing business in Espanola. All licensed towing companies in Espanola are listed with local law enforcement agencies on 911 rotation logs. When a vehicle requires towing, the towing companies are called on a rotating basis. As we explain below, the rotation logs became a bone of contention between the parties.

{3} Plaintiff Robert Seeds and Defendant Lucero are political rivals. Mr. Seeds was an elected member of the Espanola City Council until the term ending in 1998. At that time he was defeated by a member of a slate of candidates that included Lucero as candidate for mayor. Lucero was elected mayor at that time, whereupon Mr. VanderVossen began to spend considerable time at the city offices, "where he used his position as nephew of the mayor to pressure city employees to take various actions" against Plaintiffs.

{4} Plaintiffs alleged that Lucero "directed city employees to take actions against [Plaintiffs] which were requested by Anthony VanderVossen, and which were designed to harass [Plaintiffs] and damage their businesses." Among the actions allegedly taken were: threatening to remove one of Plaintiffs' towing businesses from the 911 rotation logs and requesting law enforcement agencies to do so; filing baseless criminal complaints against Plaintiffs, at the behest of Mr. VanderVossen, for purported violations of municipal zoning ordinances, while at the same time refusing to prosecute the VanderVossens and others for their violations of the zoning ordinances; and providing assistance

to the VanderVossens in their attempt to obtain utility easement rights across Plaintiffs' property. In addition, Plaintiffs alleged that the VanderVossens asked the city council to set aside a special zoning exception Mr. Seeds had obtained from the planning and zoning commission. When the council denied the VanderVossens' petition, Defendant Lenssen appealed the council's decision to the trial court without the council's permission in order to help the VanderVossens, who were his former clients.

{5} Relying on the above allegations, Plaintiffs asserted claims against the VanderVossens and the City Defendants for conspiracy, violation of 42 U.S.C. § 1983 (1996), malicious abuse of process, wrongful interference with business relations, prima facie tort, intentional infliction of emotional distress, and punitive damages. Defendants removed the case to federal court. Plaintiffs ultimately stipulated to the dismissal of their claim for wrongful interference with business relations and various aspects of the other claims. The federal trial court then granted Defendants summary judgment on the § 1983 claims and remanded the state claims to the state court.

{6} The City Defendants moved under Rule 1–012(B)(6) NMRA for dismissal of all claims against them on the ground that there was no applicable waiver of immunity under the TCA. The City Defendants also sought summary judgment on the ground that they were entitled to judgment on the various tort claims as a matter of law. The VanderVossens also sought summary judgment. The trial court dismissed all claims against the City Defendants on the basis of sovereign immunity. It also granted summary judgment to the VanderVossens on Plaintiffs' claims for intentional infliction of emotional distress and Ms. Seeds' claim for malicious abuse of process. In addition, the court granted the VanderVossens summary judgment on Plaintiffs' conspiracy claims "because the City of Espanola and the employees identified by Plaintiffs as the basis for this claim are immune from liability under the New Mexico Tort Claims Act." Plaintiffs appeal only from the order dismissing all claims against the City Defendants and the order granting the VanderVossens summary judgment on the conspiracy claims; they do not appeal from the summary judgment in favor of the VanderVossens on their other claims.

DISCUSSION

Whether the City Defendants Were Acting Within the Scope of Their Duties

{7} The parties treat the trial court's judgment as a Rule 1–012(B)(6) dismissal. It is clear that the trial court dismissed Plaintiffs' conspiracy claim in response to the City Defendants' Rule 1–012(B)(6) attack based on sovereign immunity. However, we note that the City Defendants attached many documentary exhibits to their motion for summary judgment, and the trial court noted in its final judgment that it had considered both motions. Therefore, we consider the court's ruling to be summary judgment in favor of the City Defendants. *See Santistevan v. Centinel Bank of Taos,* 96 N.M. 730, 731, 634 P.2d 1282, 1283 (1981) (explaining that a motion to dismiss will be treated as a motion for summary judgment when matters outside the pleadings are presented to the trial court).

{8} Summary judgment is warranted if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Koenig v. Perez,* 104 N.M. 664, 665, 726 P.2d 341, 342 (1986). If the facts are not in dispute, and only their legal effect remains to be determined, summary judgment is proper. *Gardner–Zemke Co. v. State,* 109 N.M. 729, 732, 790 P.2d 1010, 1013 (1990). Our review of the trial court's determination is de novo. *Bartlett v. Mirabal,* 2000–NMCA–036, ¶ 4, 128 N.M. 830, 999 P.2d 1062.

{9} Plaintiffs concede that the City Defendants are immune for any actions they performed while in the scope of their duties. *See* NMSA 1978, § 41–4–4 (2001) (providing that "any public employee while acting within the scope of duty [is] granted immunity from liability for any tort except as waived by the New Mexico Religious Freedom Restoration Act [28–22–1 to 28–22–5 NMSA 1978] and by Sections 41–4–5 through 41–4–12 NMSA 1978"). But Plaintiffs contend the City Defendants were not acting within the scope of

their duties when they conspired with the VanderVossens to harm Plaintiffs. Thus, they argue that the conspiracy itself places the City Defendants outside the protection of the TCA and subjects them to personal liability.

{10} "'[S]cope of duty' means performing any duties that a public employee is requested, required or authorized to perform by the governmental entity, regardless of the time and place of performance[.]" NMSA 1978, § 41–4–3(G) (2003). Our case law establishes that a public employee may be within the scope of authorized *duty* even if the employee's *acts* are fraudulent, intentionally malicious, or even criminal. *See Risk Mgmt. Div. v. McBrayer,* 2000–NMCA–104, ¶¶ 12, 17, 129 N.M. 778, 14 P.3d 43 (explaining that TCA may require a governmental entity to defend and indemnify its employee even if the employee "acts fraudulently or with actual intentional malice to injure another," and that "the legislature likely foresaw the possibility that a public employee could abuse the *duties* actually requested, required or authorized by his state employer and thereby commit malicious, even criminal *acts* that were unauthorized, yet incidental to the performance of those duties"). Consequently, Plaintiffs misunderstand the scope of duty concept when they argue that the critical question is "whether [the City Defendants] were motivated solely by personal concerns or whether they were working with a view toward furthering the City's interests[.]" As our Supreme Court stated in *Celaya v. Hall,* 2004–NMSC–005, ¶ 25, 135 N.M. 115, 85 P.3d 239, "the TCA clearly contemplates including [those] who abuse their officially authorized duties, even to the extent of some tortious and criminal activity." The City Defendants' wrongful motive is simply irrelevant, as long as there is "a connection between the public employee's actions at the time of the incident and the duties the public employee was requested, required or authorized to perform." *Id.* ¶ 26 (internal quotation marks and citation omitted).

{11} In this case, the City Defendants were generally performing their authorized duties at the time of the actions forming the basis of Plaintiffs' claims. In broad terms, Plaintiffs alleged that the City Defendants selectively enforced city ordinances and filed groundless criminal charges against Plaintiffs.[1] Yet even if we attribute malicious motives to these actions by the City Defendants, there was an obvious connection between the City Defendants' authorized duties to enforce the city's ordinances and the allegedly malicious conduct. Plaintiffs seem to concede as much in their briefs, stating that they "assume that Richard Lucero and John Lenssen will be immune from liability for acts they performed which were within the scope of their duties." Plaintiffs point to only two categories of acts that they claim were outside the scope of the City Defendants' duties: (1) the act of conspiring with the VanderVossens to injure Plaintiffs, and (2) the acts of the VanderVossens that are imputed to the City Defendants in accordance with the law of civil conspiracy.

{12} A civil conspiracy is a "combination by two or more persons to accomplish an unlawful purpose or to accomplish 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 purpose of a civil conspiracy claim is to impute liability to make members of the conspiracy jointly and severally liable for the torts of any of its members." *Ettenson v. Burke,* 2001–NMCA–003, ¶ 12, 130 N.M. 67, 17 P.3d 440.

{13} With respect to Plaintiffs' claim that the City Defendants' act of conspiring with the VanderVossens was outside the scope of their duties, we do not agree. The purpose of the conspiracy, as alleged by Plaintiffs and developed through the evidence they presented, was to cause Plaintiffs financial harm by utilizing the machinery of city government. Therefore, by allegedly agreeing to this scheme, the City Defendants were doing nothing more than agreeing to use their authorized duties for malicious rea-

1. Plaintiffs also claimed that Defendant Lenssen frivolously appealed the city council's decision refusing to set aside Robert Seeds's special exception, but they later admitted that Lenssen did not appeal that decision and that their allegation to this effect was inaccurate.

sons. We see no basis, and Plaintiffs provide none, to separate the alleged agreement from the acts that carry out the agreement. Thus, a wrongful purpose formed in an agreement is no less protected than is the same purpose in carrying out acts that are within the scope of duty. *See Celaya*, 2004–NMSC–005, ¶ 25, 135 N.M. 115, 85 P.3d 239 (noting that "the TCA clearly contemplates including [those] who abuse their officially authorized duties, even to the extent of some tortious and criminal activity"). Here, the only reasonable conclusion to be drawn is that the City Defendants' alleged act of conspiring to selectively enforce the municipal zoning laws was within the scope of their authorized government duties. *See Medina v. Fuller*, 1999–NMCA–011, ¶ 22, 126 N.M. 460, 971 P.2d 851 (explaining that although the question of whether a public employee was acting within the scope of duty is usually a question of fact, if only one reasonable conclusion can be drawn from the facts presented, summary judgment is appropriate).

{14} As for Plaintiffs' second claim, that the VanderVossens' acts, imputed to the City Defendants, were outside the scope of the City Defendants' duties, we are not persuaded. The only act of the VanderVossens specified by Plaintiffs is Mr. VanderVossen's purported perjury before the city council, where he testified that he did not have notice of the hearing where Mr. Seeds's special exception was approved. As we explain below, even if we assume Mr. VanderVossen in fact lied to the council and that this act is imputed to the City Defendants, we conclude as a matter of law that the act was in the scope of the City Defendants' duties.

{15} We look to the act of conspiring to determine whether imputed acts are within the scope of a public employee's duties. The purpose of the alleged conspiracy was to utilize the functions the City Defendants were authorized to perform, such as the enforcement of zoning ordinances, to harm Plaintiffs. If the VanderVossens' actions are imputed to the City Defendants, it is as if the City Defendants themselves performed those actions. *See* Bryan A. Garner, *A Dictionary of Modern Legal Usage* 427 (2d ed.1995) (defining "impute" as "to regard . . . as being done, caused, or possessed by"). Because the City Defendants' only role in the conspiracy was to perform authorized acts in order to achieve their goal, any actions they undertook, even imputed actions, would necessarily be within the scope of their duties. Thus, as long as the act of conspiring is within the scope of a public employee's duties, any co-conspirator's acts that are imputed to the public employee (such as Mr. VanderVossen's lying to the city council) will be, by definition, within the scope of the employee's duties.

{16} We hold that, as *Celaya* and *McBrayer* have construed scope of duty under the TCA, a public employee's conspiratorial and wrongful intent does not remove the employee's immunity when the employee's acts are within the scope of his or her duties. To hold a public official's immunity to be only qualified, as the dissent contends we should, would require a rejection of our rationale in *McBrayer*, if not legislative action.

Conspiracy Claim Against the VanderVossens

{17} The VanderVossens convinced the trial court that summary judgment on the conspiracy count was proper once the City Defendants were found to be immune. "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 also* Rule 1–056(C) NMRA; *Self v. United Parcel Serv., Inc.*, 1998–NMSC–046, ¶ 6, 126 N.M. 396, 970 P.2d 582 (reviewing questions of law de novo). Because the relevant facts are not in dispute, we consider whether the trial court's legal interpretation of the facts was appropriate. *Garrity v. Overland Sheepskin Co.*, 1996–NMSC–032, ¶ 29, 121 N.M. 710, 917 P.2d 1382.

{18} Civil conspiracy consists of showing "(1) that a conspiracy between two or more individuals existed; (2) that specific wrongful acts were carried out by the defendants pursuant to the conspiracy; and (3) that the plaintiff was damaged as a result of such acts." *Silva v. Town of Springer*, 1996–

NMCA–022, ¶ 25, 121 N.M. 428, 912 P.2d 304. "Unlike a conspiracy in the criminal context, a civil conspiracy by itself is not actionable, nor does it provide an independent basis for liability unless a civil action in damages would lie against one of the conspirators." *Ettenson*, 2001–NMCA–003, ¶ 12, 130 N.M. 67, 17 P.3d 440 (internal quotation marks and citation omitted). "Without an actionable civil case against one of the conspirators, however, an agreement, no matter how conspiratorial in nature, is not a separate, actionable offense." *Id.*

{19} The VanderVossens rely heavily on *Ettenson* for the proposition that a claim of conspiracy cannot lie "unless a civil action in damages would lie against one of the conspirators." *Id.* (internal quotation marks and citation omitted). The VanderVossens and the trial court read this to mean that, once the City Defendants were found to be immune, then there could be no civil action *in damages* against one of the co-conspirators, and therefore, the conspiracy falls away as a matter of law. We disagree. *Ettenson* did not involve a situation in which the co-conspirators were immune under the TCA. *See id.; see also State v. Wenger*, 1999–NMCA–092, ¶ 10, 127 N.M. 625, 985 P.2d 1205 (stating that cases are not authority for propositions not considered) *rev'd on other grounds sub nom. State v. Johnson*, 2001–NMSC–001, 130 N.M. 6, 15 P.3d 1233. In addition, and more importantly, a claim of civil conspiracy is a claim seeking to impute liability from one co-conspirator to another. *Ettenson*, 2001–NMCA–003, ¶ 12, 130 N.M. 67, 17 P.3d 440. Consequently, even if the City Defendants cannot be made to respond in damages for their actions in furtherance of the conspiracy, liability for those actions can be imputed to the VanderVossens if Plaintiffs can prove the existence of a conspiracy between the VanderVossens and the City Defendants.

{20} As our Supreme Court said in *Armijo v. National Surety Corporation*, "[t]he gist of the civil action for conspiracy is the act or acts committed in pursuance thereof—the damage—not the conspiracy or the combination." 58 N.M. 166, 177–78, 268 P.2d 339, 346 (1954) (internal quotation marks and citation omitted). We find it significant that this observation refers to "damage" rather than "damages." The operative focus for determining whether liability may be imputed is on the acts and the injury resulting from those acts, not on whether a given conspirator may be held liable for damages.

{21} Thus, if Plaintiffs can prove that the VanderVossens conspired with the City Defendants and that the City Defendants took actions constituting malicious abuse of process, the City Defendants' actions can be imputed to the VanderVossens, who will then be jointly and severally liable for Plaintiffs' resulting damages. We find support for this view in a recent case involving another type of vicarious liability, *Juarez v. Nelson*, 2003–NMCA–011, 133 N.M. 168, 61 P.3d 877. In that case, we held that the dismissal of a medical malpractice claim against a doctor pursuant to the Medical Malpractice Act's statute of repose could not be asserted by the doctor's employer as a defense to vicarious liability. *Id.* ¶ 2. We concluded that "a judgment against a plaintiff and in favor of an employee-defendant does not preclude an action against the employee's principal where the judgment in the action against the employee was based solely on a defense that was personal to the employee." *Id.* ¶ 28; *see also Restatement (Second) of Judgments* § 51(1)(b) (1982) (same). We see no reason why this principle should not apply under the circumstances in the present case. As the statute of repose in *Juarez* shielded the employee from liability, the TCA similarly shields the City Defendants from liability, not from suit. *See Allen v. Bd. of Educ.*, 106 N.M. 673, 675, 748 P.2d 516, 518 (Ct.App. 1987) (explaining that the TCA "provides a defense to liability, but not absolute immunity from suit"). The City Defendants' immunity defense is personal to them and cannot be raised as a defense by the VanderVossens.

{22} The VanderVossens rely on *Bauer v. College of Santa Fe*, 2003–NMCA–121, 134 N.M. 439, 78 P.3d 76, and cases from other jurisdictions for the proposition that "where the underlying claim fails as a matter of law, there can be no derivative liability under the doctrine of civil conspiracy." We are not persuaded. In *Bauer* and the other cases

cited by the VanderVossens, the underlying claim failed on the merits. *See, e.g., Banc One Capital Partners Corp. v. Kneipper,* 67 F.3d 1187, 1194–95 (5th Cir.1995) (stating that if alleged tort underlying a conspiracy is determined not to have occurred, there can be no liability for conspiracy); *Applied Equip. Corp. v. Litton Saudi Arabia, Ltd.,* 7 Cal.4th 503, 28 Cal.Rptr.2d 475, 869 P.2d 454, 463 (1994) (concluding that as a matter of substantive law, a party to a contract may not be liable under a conspiracy theory for interference with the contract); *Bauer,* 2003–NMCA–121, ¶¶ 12, 15, 16, 134 N.M. 439, 78 P.3d 76 (holding that no claim for civil conspiracy would lie where summary judgment was properly granted on underlying breach of contract claim). Here, there has been no determination on the merits of whether the City Defendants actually engaged in the acts in which they are alleged to have conspired. *Cf. Juarez,* 2003–NMCA–011, ¶ 28, 133 N.M. 168, 61 P.3d 877 (explaining that exoneration of a servant operates to exonerate the employer only when the exoneration is on the merits of the claim against the servant).

{23} The VanderVossens further argue that permitting Plaintiffs' conspiracy claim would result in the City Defendants remaining involved in the litigation as "hypothetical" parties, which would defeat the TCA's goals of protecting government entities from functioning without the threat of suit. We do not agree. The City Defendants will not be parties, hypothetical or otherwise, to this litigation because they are immune from liability. Although they may be called as witnesses, the TCA does not protect government actors from the courts' subpoena power. It is Plaintiffs' burden to demonstrate that the City Defendants' actions were wrongful and may serve as a basis for the VanderVossens' imputed liability. The VanderVossens may defend themselves by establishing that the City Defendants' actions were proper and did not result in any injury to Plaintiffs. This is no different from the burdens imposed in comparative negligence cases where the parties must deal with evidence of the negligence of non-party tortfeasors. *See Bartlett v. N.M. Welding Supply, Inc.,* 98 N.M. 152, 159, 646 P.2d 579, 586 (Ct.App.1982) (explaining that non-party tortfeasors must be included in the apportionment of comparative fault), *superseded in part on other grounds by* NMSA 1978, § 41–3A–1 (1987).

{24} In summary, if Plaintiffs are able to prove the elements of a civil conspiracy, including the element that the City Defendants carried out specific wrongful acts in furtherance of the conspiracy, the liability for those acts may be imputed to the VanderVossens despite the City Defendants' immunity from liability. We hold that Plaintiffs' claim of civil conspiracy against the VanderVossens is not barred as a matter of law, and it is for a jury to evaluate the legitimacy of the claim.

{25} The VanderVossens make an additional argument, apparently raised but not ruled on below, that Plaintiffs failed to state a claim for civil conspiracy in their complaint. We disagree. The complaint contains a count entitled "Conspiracy/Joint Participation," and contains allegations throughout suggesting that all Defendants agreed and combined to commit various wrongful acts. That is sufficient. *See Valles v. Silverman,* 2004–NMCA–019, ¶ 28, 135 N.M. 91, 84 P.3d 1056 (explaining that a complaint states a claim for civil conspiracy if the allegations are such that we can infer the existence of a conspiracy).

CONCLUSION

{26} For these reasons, we affirm the trial court's dismissal of the City Defendants. We reverse the trial court's summary judgment on the conspiracy count against the VanderVossens, and remand for proceedings consistent with this opinion.

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

I CONCUR: JONATHAN B. SUTIN, Judge.

IRA ROBINSON, Judge (concurring in part and dissenting in part).

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

{28} I would not recognize a grant of immunity from liability for the Mayor, or any of the City Defendants who are accused of malicious conduct by intentionally carrying out their personal and political vendettas

against their political adversaries. I do not believe that the law should or does provide them with a place to safely hide from civil prosecution under the Tort Claims Act.

{29} Those with whom the City Defendants conspire to accomplish their wrongful goals do not escape liability. Neither should the City Defendants. I therefore dissent.

{30} I am convinced that New Mexico ought to follow those states that do not recognize immunity for public employees or officials who are guilty of malicious acts. *See Aspen Exploration Corp. v. Sheffield,* 739 P.2d 150, 158 (Alaska 1987) (stating that "[u]nder a rule of qualified immunity, a public official is shielded from liability only when discretionary acts within the scope of the official's authority are done in good faith and are not malicious or corrupt"); *Trimble v. City & County of Denver,* 697 P.2d 716, 729 (Colo.1985) (stating that "an official performing discretionary acts within the scope of his office enjoys only qualified immunity. He is shielded from liability for civil damages only insofar as his conduct is not willful, malicious or intended to cause harm"); *Podruch v. State Dep't of Pub. Safety,* 674 N.W.2d 252, 254 (Minn.Ct.App.2004) (stating that "[t]he doctrine of official immunity protects from personal liability a public official charged by law with duties that call for the exercise of judgment or discretion unless the official is guilty of willful or malicious wrong"); *Huber v. N.C. State Univ.,* 163 N.C.App. 638, 594 S.E.2d 402, 408 (2004) (stating that "[p]ublic official immunity does not protect a public official from liability based on corrupt or malicious actions").

{31} The TCA also mentions malice in the indemnity section. *See* § 41–4–4(E). That section provides that a government entity has the right to indemnification from a public employee for sums expended in defending the employee or paying a judgment if the employee "acted fraudulently or with actual intentional malice causing the bodily injury, wrongful death or property damage." *Id.* Although this section is somewhat puzzling because the public employee must have been sued and suffered a judgment, it shows the legislature's disdain for a public employee who demonstrates the same malice that I find so despicable.

{32} The majority believes that there is no clear indication that the legislature wanted to waive immunity for a public official, other than a law enforcement officer, who misuses the enforcement machinery of government.

{33} I would rely on *Oldfield v. Benavidez,* 116 N.M. 785, 867 P.2d 1167 (1994), which explains that opposing these policies is the concern that sovereign immunity can result in unfairness and deny the public the right to any redress for the abuse of government power. I certainly share this concern when public officials misuse their governmental authority and power to the point of maliciousness.

{34} Where these same officials misuse the machinery of government and do so maliciously, they shatter the public trust and injure those who they are sworn to protect. The majority believes the legislature has resolved the conflict presented in this case in favor of granting public officials broad latitude to proceed without fear of lawsuits. I suspect that is why public officials do wrong—because they have no such fear.

{35} The majority relies on *McBrayer,* which dealt with a university instructor who lured a student to his apartment and sexually assaulted her. This Court upheld that public employee's immunity from prosecution. I do not agree with the holding in *McBrayer.* I ask the question: "Are these public officials or employees serving the public interest or violating it?"

{36} The majority states that the "City Defendants' wrongful motive is simply irrelevant, as long as there is 'a connection between the public employee's actions at the time of the incident and the duties the public employee was requested, required or authorized to perform.' " Majority Opinion ¶ 10 at 862. I cannot agree that wrongful motive is simply irrelevant. I would hold that malicious actions by a public official disconnect him from his scope of public duty.

{37} Let me be quite clear. I appreciate the difficulty of serving as a public official whether elected or appointed. It may well be that the legislature drew a line in the sand

keeping members of the public from harassing and frivolously suing public officials. But once a public official crosses over that line and commits malicious acts against others, he loses that cloak of immunity.

CONCLUSION

{38} I concur with the majority in reversing and remanding the trial court's summary judgment on the conspiracy count against the VanderVossens.

{39} For the reasons stated above, I respectfully dissent from the majority's affirmance of the dismissal of the City Defendants under Tort Claims immunity.

2005-NMCA-074

113 P.3d 867

STATE of New Mexico, Plaintiff–Appellee,

v.

Clara NOTAH–HUNTER, Defendant–Appellant.

No. 23,877.

Court of Appeals of New Mexico.

April 1, 2005.

Certiorari Denied,
Nos. 29,181,29,162,
June 6, 2005.

Patricia A. Madrid, Attorney General, Ann M. Harvey, Assistant Attorney General, Santa Fe, for Appellee.

John Bigelow, Chief Public Defender, Sue A. Herrmann, Appellate Defender, Santa Fe, for Appellant.

OPINION

CASTILLO, J.

{1} Defendant appeals from the district court's order, upon appeal from magistrate court, determining that Defendant was guilty of the offense of aggravated driving while under the influence of intoxicating liquor and affirming the magistrate court judgment. Defendant raises three issues on appeal: (1) whether the district court erred in finding that reasonable suspicion justified the officer in stopping Defendant's vehicle, (2) whether the district court erred in admitting the breath alcohol test results, and (3) whether the district court erred in finding that the breath test taken nearly ninety minutes after the stop justified the aggravated DWI finding. We affirm in part and reverse and remand for entry of judgment convicting Defendant of DWI.

I. BACKGROUND

{2} Officer Whitman of the McKinley County Sheriff's Department stopped Defendant's vehicle in Thoreau, New Mexico, on the night of February 13, 2001. After administering two field sobriety tests, which Defendant was unable to perform, the Officer placed Defendant under arrest and took her to the McKinley County Detention Center for a breath test. Defendant's first sample indicated 0.17, and the last sample showed a concentration of 0.16. Defendant was charged and later convicted of per se aggravated DWI under NMSA 1978, § 66–8–102(D)(1) (1999). Additional pertinent facts are set out in our discussion of the issues.

II. DISCUSSION

A. Jurisdiction

{3} In its answer brief, the State asserts that this Court does not have jurisdiction to hear Defendant's appeal. Citing *State v. Brinkley,* 78 N.M. 39, 40, 428 P.2d 13, 14 (1967) (holding that where a notice of appeal is filed one day late, the Supreme Court is without jurisdiction to hear the ap-

pellant's appeal), the State first argues that Defendant's notice of appeal was filed one day late and that she has therefore "failed to perfect" her appeal. The New Mexico Supreme Court later modified this rule to "make it clear that timely filing of a notice of appeal is not an inflexible jurisdictional requirement in all cases." *Aragon v. Westside Jeep/Eagle,* 117 N.M. 720, 722, 876 P.2d 235, 237 (1994). In *State v. Duran,* 105 N.M. 231, 233, 731 P.2d 374, 376 (Ct.App.1986), this Court held that in criminal cases, "failure to file a timely notice of appeal . . . constitutes ineffective assistance of counsel *per se*" and that such an appeal would be considered timely. We therefore consider Defendant's appeal to be timely, despite the late filling.

{4} Relying on *State v. Ball,* the State also contends that this Court lacks jurisdiction because Defendant entered a guilty plea in the magistrate court. 104 N.M. 176, 185, 718 P.2d 686, 695 (1986) (affirming a district court's dismissal of de novo appeals from the metropolitan court on the basis that no right to appeal exists under the New Mexico Constitution when a defendant enters a guilty plea). Defendant has demonstrated that the magistrate court filed the judgment and sentence on the wrong form, thus giving the impression that Defendant pled guilty. The magistrate court acknowledged the error and filed an amended judgment and sentence reflecting that the guilty verdict was the result of a bench trial. Defendant properly moved to supplement the record on appeal to clarify the judgment, and that motion was granted. The record no longer supports the State's argument.

B. Reasonable Suspicion to Stop Defendant

{5} Asserting that Officer Whitman lacked reasonable suspicion when he stopped her vehicle, Defendant appeals the district court's denial of her motion to suppress evidence. The district court's decision regarding a motion to suppress involves mixed questions of fact and law. *State v. Urioste,* 2002–NMSC–023, ¶ 6, 132 N.M. 592, 52 P.3d 964. We review the facts in the light most favorable to the prevailing party and defer to the district court's findings of fact that are supported by substantial evidence. *Id.* The district court's application of law to the facts is reviewed de novo. *State v. Attaway,* 117 N.M. 141, 145–46, 870 P.2d 103, 107–08 (1994).

{6} Defendant argues that the district court's decision was not supported by substantial evidence. She testified that she was not speeding and was not driving in the middle of the road, and she contends that the Officer had no reason to stop her vehicle when he simply had a hunch that she was speeding. The Officer testified that "[t]here was light snow falling and the road surfaces were wet." While he acknowledged that the centerline was difficult to see, he stated that Defendant's car was "going faster than the posted speed limit of twenty-five" and was "traveling down the center of the roadway." In his opinion, a safe speed, given the existing road conditions, would have been between fifteen and twenty miles per hour. The Officer could not get a radar reading and unsuccessfully attempted to pace Defendant's vehicle. When Defendant slowed down, the Officer engaged his emergency lights, and Defendant stopped her vehicle.

{7} The district court, as the sole judge of the credibility of the witnesses and the weight to be given the evidence, was entitled to believe the Officer and to find, as the court did, that his observations were sufficient to warrant a belief that an offense was occurring. *See State v. Salas,* 1999–NMCA–099, ¶ 10, 127 N.M. 686, 986 P.2d 482. As we have previously held, a police officer may stop a vehicle if he has an objectively reasonable suspicion that the motorist has violated a traffic law. *State v. Vargas,* 120 N.M. 416, 418–19, 902 P.2d 571, 573–74 (Ct.App.1995). Viewing the evidence in the light most favorable to the prevailing party, we find that reasonable suspicion existed for the stop. *See State v. Ingram,* 1998–NMCA–177, ¶ 5, 126 N.M. 426, 970 P.2d 1151.

C. Substantial Evidence for Conviction of Per Se Aggravated DWI

1. Nexus

{8} Defendant next argues that the district court erred in convicting her of aggra-

vated DWI based on breath alcohol tests that were performed "nearly ninety minutes after the stop" without evidence relating the test results to the amount of alcohol in her system at the time she was driving. We clarify the evidence regarding timing. The record indicates that the arrest was at 10:32 p.m. and that the BAC machine logged the first result at 11:54 p.m. Thus, in our analysis, we will use one hour and twenty-two minutes as the lag time.

{9} This issue was preserved by Defendant in her closing argument when she directed the district court's attention to *State v. Baldwin,* 2001–NMCA–063, ¶ 2, 130 N.M. 705, 30 P.3d 394 (holding that if BAC results are marginal and are obtained after a significant lag in time, additional evidentiary requirements are necessary to relate the results to the amount of alcohol in the defendant's body at the time of driving).

{10} Defendant asserts, and the State does not contest, that the evidentiary nexus requirement outlined in *Baldwin* for per se DWI cases should also apply to the crime of per se aggravated DWI. We agree. Both crimes require a minimum alcohol concentration at the time of driving; and additionally, the Uniform Jury Instructions for both offenses require that the minimum alcohol concentration relate to the time the "defendant operated a motor vehicle." *See* UJI 14–4503, –4506 NMRA.

{11} New Mexico law has primarily dealt with the evidentiary nexus in per se DWI cases. *See State v. Martinez,* 2002–NMCA–043, 132 N.M. 101, 45 P.3d 41; *State v. Christmas,* 2002–NMCA–020, 131 N.M. 591, 40 P.3d 1035; *Baldwin,* 2001–NMCA–063, 130 N.M. 705, 30 P.3d 394; *State v. Cavanaugh,* 116 N.M. 826, 867 P.2d 1208 (Ct.App. 1993). *But see State v. Burke,* 1999–NMCA–031, ¶ 2, 126 N.M. 712, 974 P.2d 1169 (reversing an aggravated DWI conviction where the state conceded absence of relation-back evidence supporting BAC results), *overruled on other grounds by State v. Torres,* 1999–NMSC–010, ¶ 20, 127 N.M. 20, 976 P.2d 20. As we noted in *Baldwin,* "[t]iming is an essential element of the crime[,]" requiring the state to demonstrate a nexus between a borderline BAC and the time that the " 'defendant operated a motor vehicle.' " 2001–NMCA–063, ¶ 8, 130 N.M. 705, 30 P.3d 394 (quoting UJI 14–4503). Establishing a nexus is important because the "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 (internal quotation marks and citation omitted).

{12} We find this reasoning equally applicable to per se aggravated DWI. Therefore, when a defendant is charged with per se aggravated DWI on the basis of a BAC result of 0.16 or marginally higher that is obtained after a significant lag in time, the State must demonstrate a sufficient nexus between the BAC result and the driver's alcohol content at the time of driving. This can be accomplished by introducing additional corroborating evidence. As in *Baldwin,* we do not attempt to provide a comprehensive list of the forms such evidence may take. *Id.* ¶ 2. Certainly, properly admitted "expert testimony relating the test result back in time to the time of driving" would be included. *Id.* In *Baldwin,* we commented that "a police officer's observation of significant incriminating behavior on the part of the driver[ ]" would also provide evidence of nexus. *Id.* In cases of aggravated DWI, however, we have concerns about the type of behavior that would allow a reasonably logical inference that a driver had at least a 0.16 BAC at the time of driving, versus some other score. To support a criminal conviction, such an inference must be logical and cannot be just surmise. *Cavanaugh,* 116 N.M. at 829–30, 867 P.2d at 1211–12 (observing that circumstantial evidence can be the foundation of a conviction if the inferences of guilt are based on logic and not just surmise). This issue is not before us today, and we therefore decline to address it in detail. We do question, however, whether a 0.16 BAC can properly be corroborated by behavior evidence alone.

2. Standard of Review

{13} When 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. The Court is not required 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) (internal quotation marks and citation omitted). 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.

3. Analysis

{14} A conviction for per se aggravated DWI, under Section 66–8–102(D)(1), requires that the court find beyond a reasonable doubt that Defendant "operated a motor vehicle" and that "[a]t that time[, D]efendant had an alcohol concentration of sixteen one-hundredths (.16) . . . or more." UJI 14–4506. In the present case, Defendant does not dispute that she was operating a motor vehicle. The BAC results were 0.17, followed by an invalid sample, which prompted another twenty-minute observation period. The last sample indicated a level of 0.16. The district court convicted Defendant of per se aggravated DWI on the basis of the BAC results.

{15} We next review the evidence in light of a lapse of one hour and twenty-two minutes between the driving and the test results. In *Baldwin,* we found that a lag of more than two hours was significant enough to require additional corroborating evidence to relate a marginal BAC level to the time of driving. 2001–NMCA–063, ¶ 2, 130 N.M. 705, 30 P.3d 394. This Court observed in *Martinez* that courts having "reversed DWI convictions based upon a lack of relation-back evidence have generally done so when the lapse of time between the time of driving and the time of BAC testing is at least two hours." 2002–NMCA–043, ¶ 12, 132 N.M. 101, 45 P.3d 41. However, in *Baldwin,* we acknowledged the lack of legislative guidance to assist courts in defining the amount of time beyond which a BAC result would no longer be considered prima facie evidence. 2001–NMCA–063, ¶ 19, 130 N.M. 705, 30 P.3d 394.

{16} This Court further addressed the issue in *Christmas,* where we recognized 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." 2002–NMCA–020, ¶ 23, 131 N.M. 591, 40 P.3d 1035. In that case, the delay was less than one hour, and we commented that "[i]t is difficult to envision a reasonable delay of anything less than an hour." *Id.* ¶ 25. Consequently, this Court outlined a "sliding scale" approach for application of the *Baldwin* principles, which included analysis of pertinent factors like "how long . . . the delay [is]; how much the BAC test results exceed the statutory limit; and the existence of other corroborating behavioral evidence." *Christmas,* 2002–NMCA–020, ¶ 24, 131 N.M. 591, 40 P.3d 1035. In other words, the greater the inference of guilt, the less need for relation-back evidence. *Id.*

{17} In the present case, the delay of one hour and twenty-two minutes is more than the threshold level articulated in *Christmas* but less than the two-hour rule of thumb described in *Baldwin.* The first BAC result was at 0.17, slightly above the statutory limit, and the last result was at the threshold limit of 0.16. Our analysis therefore turns on whether there was sufficient corroborating evidence to lead to a conviction. Defendant argues that the evidence is not sufficient for a conviction on per se aggravated DWI, while the State urges that the evidence meets the *Baldwin* test.

{18} At trial, the Officer testified that after pulling Defendant over, he could smell a "strong odor" of alcohol and noticed that

Defendant's speech was slurred. Defendant admitted that she had been drinking and that she staggered and leaned on the car for support. The Officer administered the finger-count and one-legged-stand field sobriety tests, which Defendant failed. The State, however, did not offer any evidence that this behavior indicated anything more than general intoxication at an unknown level. In fact, Officer Whitman only testified that this behavior indicated to him that "the subject was intoxicated." The State did not provide expert testimony to address the issue, and this Court is not convinced that such behavior evidence is indicative of intoxication at the 0.16 level. In fact, this same behavior matches observations of intoxication at the 0.08 level described in many of our previous cases. *See, e.g., Martinez,* 2002–NMCA–043, ¶¶ 3–5, 132 N.M. 101, 45 P.3d 41; *Christmas,* 2002–NMCA–020, ¶¶ 3–6, 131 N.M. 591, 40 P.3d 1035; *Baldwin,* 2001–NMCA–063, ¶ 4, 130 N.M. 705, 30 P.3d 394.

{19} On balance, with marginal BAC results from a test administered one hour and twenty-two minutes after driving, and without corroborating evidence to substantiate that Defendant was actually driving with a BAC of 0.16 or greater, we reverse the conviction for per se aggravated DWI.

D. Remand for Entry of Judgment on DWI

{20} Defendant argued that the behavior evidence in this case, while "insufficient to support a conviction for aggravated" DWI, "may be relevant to the question of whether a person was driving while impaired." In closing remarks at trial, Defendant requested a not guilty verdict "or[,] in the alternative[, a holding] that [the State] failed to prove aggravated [DWI] and[, instead,] it's . . . non-aggravated [DWI]." We now turn to the question of whether this Court can remand the case to the district court for entry of judgment convicting Defendant of DWI under Section 66–8–102(A), which states that "[i]t is unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this state."

1. Lesser Included Offense

{21} Our courts have determined that under certain conditions a defendant can be convicted of a lesser included offense that was not part of the original charging document. *See State v. Meadors,* 121 N.M. 38, 41, 45, 908 P.2d 731, 734, 738 (1995); *State v. Hernandez,* 1999–NMCA–105, ¶¶ 24–25, 127 N.M. 769, 987 P.2d 1156. In *Meadors,* the New Mexico Supreme Court surveyed the analytical approaches used to determine whether one offense is a lesser included offense of the other. 121 N.M. at 42, 908 P.2d at 735. The *Meadors* Court described the least flexible and most straightforward approach as the " 'strict elements' " test. *Id.* Under this test, the "statutory elements of the lesser offense are a sub-set of the statutory elements of the greater offense such that it would be impossible ever to commit the greater offense without also committing the lesser offense." *Id.*

{22} While the Court went on to define a "cognate approach" in order to give flexibility to the "strict elements" test, that approach is unnecessary here because the present case meets the "strict elements" test. Defendant could not have committed per se aggravated DWI without also committing DWI. As this Court has stated, "the offense of aggravated DWI itself is not a different crime [from] DWI, but rather only an enhanced 'degree' of the DWI offense." *State v. Heinsen,* 2004–NMCA–110, ¶ 23, 136 N.M. 295, 97 P.3d 627, *cert. granted,* 2004–NMCERT–008, 136 N.M. 492, 100 P.3d 198. The "strict elements" test is therefore met, and Defendant can be convicted of the lesser included offense of DWI.

2. Sufficiency of Evidence for DWI Conviction

{23} While DWI can be proven either through a defendant's alcohol concentration or his/her behavior, we analyze this case under the behavioral prong because we do not need to go further. A conviction for DWI, under Section 66–8–102(A) and UJI 14–4501 NMRA, requires the fact-finder to find beyond a reasonable doubt that Defendant "operated a motor vehicle" and that

> [a]t the time, [D]efendant was under the influence of intoxicating liquor[;] that is, as a result of drinking liquor[, D]efendant 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 person and the public.

UJI 14–4501. As we detailed in paragraphs 6 and 18 above, there is substantial evidence that Defendant was driving while intoxicated.

{24} In *State v. Gutierrez,* this Court upheld a bench trial DWI conviction based on behavior evidence alone and stated that the defendant "was not convicted of having a particular blood-alcohol level" but was "convicted of the more general offense of driving while intoxicated." 1996–NMCA–001, ¶ 4, 121 N.M. 191, 909 P.2d 751. In that case, the defendant smelled of alcohol, had bloodshot eyes, failed field sobriety tests, and admitted to drinking alcohol and smoking marijuana. *Id.* In addition, there was evidence that the defendant's vehicle was weaving into other traffic lanes. *Id.* This Court held that even if the BAT card results had not been admissible, the defendant's DWI conviction under Section 66–8–102(A) was fully supported by the "overwhelming" behavior evidence. *Id.* Similar evidence was presented in Defendant's case: Defendant smelled of alcohol, had slurred speech, admitted to drinking alcohol, failed field sobriety tests, and was speeding while driving down the middle of the road. Based on the analysis in *Gutierrez,* we conclude that sufficient evidence existed to find Defendant guilty of the lesser included offense of driving while intoxicated in violation of Section 66–8–102(A).

3. Appellate Authority Regarding Lesser Included Offense

{25} The New Mexico Supreme Court has stated that "appellate courts have the authority to remand a case for entry of judgment on the lesser included offense and resentencing rather than retrial when the evidence does not support the offense for which the defendant was convicted but does support a lesser included offense." *State v. Haynie,* 116 N.M. 746, 748, 867 P.2d 416, 418 (1994). In *Haynie,* the Court reversed a conviction for first-degree murder because of insufficient evidence and remanded for entry of judgment and resentencing for the lesser included offense of second-degree murder. *Id.*

{26} In *State v. Villa,* 2004–NMSC–031, ¶ 15, 136 N.M. 367, 98 P.3d 1017, the New Mexico Supreme Court further defined the boundaries for appellate application of the direct-remand rule. The narrow question before that court was "whether, following reversal of a conviction due to insufficient evidence, an appellate court may remand for entry of judgment of conviction and resentencing for a lesser[ ]included offense, where the jury had not been instructed on that lesser offense at trial." *Id.* ¶ 8. No remand for entry of judgment on the lesser included offense of attempt was allowed "because a conviction of an offense not presented to the jury would deprive the defendant of notice and an opportunity to defend against that charge and would be inconsistent with New Mexico law regarding jury instructions and preservation of error." *Id.* ¶ 1.

{27} The present case is distinguishable from *Villa* in several ways. First, *Villa* addressed the direct-remand rule in the context of a jury trial, whereas we are dealing here with a bench trial. In bench trials, we do not look to jury instructions, but rather to the charging document. Second, notice to the defendant of the lesser included charges, as defined by *Meadors,* was a key issue in *Villa,* where both sides pursued an "all-or-nothing trial strategy" and neither the state nor the defendant requested jury instructions on the lesser included offense of attempt. 2004–NMSC–031, ¶¶ 12, 14, 136 N.M. 367, 98 P.3d 1017 (internal quotation marks omitted). Here, as described above, there was sufficient notice under *Meadors,* given that aggravated DWI necessarily encompasses the lesser included charge of DWI. Additionally, Defendant requested that the district court consider the lesser charge of DWI, thus indicating her awareness that the lesser charge was included.

{28} Last, the *Villa* Court was concerned that even if notice had been adequate, there would be a problem with convicting the defendant of a charge that "he did not in fact

defend at trial." 2004–NMSC–031, ¶ 13, 136 N.M. 367, 98 P.3d 1017. The defendant in that case was not given an opportunity to provide evidence that addressed the elements of the lesser charge. *Id.* Unlike the defendant in *Villa,* Defendant in the present case offered a defense to evidence of her impaired behavior. Cross-examination of Officer Whitman elicited testimony that Defendant's speech was understandable, and the Officer was also questioned as to whether he actually administered one of the field sobriety tests. Although Defendant apparently conceded by the end of the trial that the behavior evidence did support a finding of impairment, the record demonstrates that some defense was presented.

{29} The *Villa* Court observed that "[i]n deciding whether direct remand is appropriate[,] . . . the inquiry is whether the interests of justice would be served by ordering a new trial." *Id.* ¶ 9. The Court cited *Haynie* as an example of a case where the interests of justice would not have been served by remanding for a new trial. *Villa,* 2004–NMSC–031, ¶ 9, 136 N.M. 367, 98 P.3d 1017. The Court found it significant that the defendant in *Haynie* had argued for conviction on a lesser offense and that the jury was provided with the proper instructions on that offense. *Villa,* 2004–NMSC–031, ¶ 9, 136 N.M. 367, 98 P.3d 1017. As in *Haynie,* Defendant here argued for conviction on the lesser offense. Jury instructions were not given because Defendant's conviction was based on a bench trial. Consequently, the interests of justice would not be served by remanding this case for retrial. We therefore remand to the district court for entry of judgment against Defendant for DWI under Section 66–8–102(A).

E. Certification of the BAC Machine

{30} Defendant also argues that the State failed to provide evidence of the BAC machine's certification and thus did not lay a proper foundation for admission of the BAC results. Given that our remand is based on non-per se DWI, we do not rely on the BAC results; therefore, there is no need to evaluate the admission of this evidence. We reach no conclusion on the merits of Defendant's argument on this issue.

III. CONCLUSION

{31} We affirm the district court's denial of the motion to suppress on the ground that the Officer had reasonable suspicion to stop Defendant's car. Lacking sufficient corroborating evidence to substantiate that Defendant was driving with a BAC of 0.16 or greater, we reverse the conviction for per se aggravated DWI and remand this case for entry of judgment and sentencing on a charge of simple DWI.

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

FRY, J., concurs.

ROBINSON, Judge (specially concurring).

ROBINSON, Judge (specially concurring).

{33} I agree with the result reached by the majority. I do not agree with the way it was reached.

{34} The majority bases its affirmance of Defendant's DWI conviction on so-called behavioral evidence alone, forsaking the BAC evidence. I am troubled by that.

{35} I have no doubt that the reason the legislature passed the Implied Consent Act, NMSA 1978, §§ 66–8–105 to—112 (1978, as amended through 1993), was to give some consistency, objectivity, and standardization to DWI enforcement and prosecution.

{36} If we rely upon field sobriety tests alone as the majority does here, administered by different police officers in each and every case, we sacrifice objectivity, consistency, and standardization. What may seem to be a "strong" odor of alcohol on a driver's breath to one police officer, may not be strong to another police officer. What may seem to be "bloodshot" eyes to one officer, may look less so, or not at all, to another officer. What may seem to be "slurred" speech to one officer, may not to another officer, especially if the individual speaks with a foreign accent, or if for any reason whatsoever it is difficult to understand what he is saying.

{37} This Court considered a DWI case where a police officer testified that the defendant refused to participate in the field sobriety tests requested by that officer, thus imputing consciousness of guilt to the defendant. The officer did not tell the court, as was later evidenced by a videotape taken by the officer, that the defendant had a brace on his leg. So much for objectivity! *See State v. Sanchez,* 2001–NMCA–109, 131 N.M. 355, 36 P.3d 446.

{38} For many years, one of the most often used field sobriety tests was the Horizontal Eye Gaze Nystagmus Test, commonly referred to as the HGN Test. Recently, this Court has questioned its scientific validity under a *Daubert* analysis. *See Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *see also State v. Munoz,* 2004–NMCA–103, 136 N.M. 235, 96 P.3d 796.

{39} The arresting officer testified that he checked the logs to determine that the machine had been calibrated within five days prior to his administration of the test and that the logs showed that the machine was in working order. He also explained that the machine appeared to be in working order, that he was trained in using the machine, and that he administered the test according to his training, thus satisfying the foundational requirement of *State v. Smith,* 1999–NMCA–154, ¶ 10, 128 N.M. 467, 994 P.2d 47.

{40} *State v. Onsurez,* 2002–NMCA–082, 132 N.M. 485, 51 P.3d 528, was decided several months after this case. It held that the State must show that a breathalyzer machine has been certified by the State Laboratories Division "in cases where the defendant properly preserves the objection." *Id.* ¶ 13. In order to preserve an issue for appeal, a party must make a timely objection that specifically apprises the trial court of the error that is claimed and invokes an intelligent ruling thereon from the court. *See State v. Jacobs,* 2000–NMSC–026, ¶ 12, 129 N.M. 448, 10 P.3d 127. Here, Defendant did not properly preserve her objection.

{41} I agree with the State that the breathalyzer machine was properly used, and the evidence of the breath test, while not reliable to show aggravated DWI, does show at least a BAC 0.08 level for simple DWI. I do not feel confident resting a conviction on field sobriety tests alone. I would rely also on the BAC results.

{42} The majority relies on *Gutierrez* for a conviction in our case based upon behavioral evidence. But, in *Gutierrez,* there was evidence that Defendant was weaving into other traffic lanes, and Defendant narrowly missed hitting a truck. Defendant smelled of alcohol and had bloodshot, watery eyes; Defendant also failed three field sobriety tests; and Defendant admitted drinking alcohol and smoking marijuana. From this evidence, the officers concluded that Defendant was intoxicated. 1996–NMCA–001, ¶ 4, 121 N.M. 191, 909 P.2d 751. In our case, the behavioral evidence is not as strong or convincing as in *Gutierrez.*

{43} Under the facts of this case, there are essentially two ways for Defendant to be convicted of simple, not aggravated, DWI. One way that Defendant could be convicted of DWI is to be in violation of Section 66–8–102(A), which states that "[i]t is unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this state." *Id.* This violation could be demonstrated by behavioral evidence of the physical appearance, actions, and mannerisms displayed by Defendant at the time of arrest. The second way that Defendant could be convicted of DWI is for a violation of Section 66–8–102(C)(1), which states that it is unlawful for "a person who has an alcohol concentration of eight one hundredths or more in his blood or breath to drive a vehicle within this state." *Id.*

{44} I would first note that if the majority found a level of at least 0.08, no behavioral evidence is necessary to support it since that constitutes a presumption of guilt for DWI. However, Section 66–8–110 states:

> B. When the blood or breath of the person tested contains:
>
> . . . .
>
> (2) an alcohol concentration of more than five one-hundredths but less than eight one-hundredths, no presumption shall be made that the person either was or was not under the influence of intoxi-

cating liquor. However, the amount of alcohol in the person's blood may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor.

§ 66–8–110(B)(2). We have a different situation here. If Defendant had a breath alcohol test result of 0.04 to 0.08, there is no presumption one way or the other. But, under this subsection, "the amount of alcohol in the person's blood may be considered *with other competent evidence* in determining whether the person was under the influence of intoxicating liquor." *Id.* (emphasis added).

{45} So, when a defendant is in that middle range of BAC, 0.04 to 0.08, the statute invites us to add other kinds of evidence, like slurred speech, bloodshot eyes, stumbling, or the results of field sobriety tests, to the BAC results, in order to determine if Defendant was driving while intoxicated. There is nothing in the statutes that would prevent us from adding behavioral evidence to a BAC of 0.08, especially if Defendant has presented evidence to challenge the level of intoxication. Furthermore, there was neither a refusal to take the breathalyzer test, nor an accident which could justify an aggravated DWI.

{46} Since the majority has reduced the level or degree of conviction from aggravated, down to simple DWI based upon blood/breath alcohol (BAC) level, it seems to me that they cannot disregard BAC evidence and analyze the case only on behavioral evidence.

{47} A BAC level of at least 0.08 for simple DWI is indeed a lesser included offense of aggravated DWI, which requires a BAC of at least 0.16. There cannot be any aggravated DWI based upon behavioral evidence alone. How can we then conclude that simple DWI based upon behavioral evidence is a lesser-included offense of aggravated DWI based upon a specific BAC level of at least 0.16?

{48} I would not rely upon behavioral evidence alone, which is just too subjective to receive my stamp of approval. I, therefore, combine the behavioral evidence with the "reduced" BAC level of 0.08 to reach an affirmance of Defendant's conviction of the lesser included offense of simple DWI.

2005-NMCA-070

113 P.3d 877

STATE of New Mexico, Plaintiff–Appellee,

v.

Gilbert TORRES, Jr., Defendant–Appellant.

No. 24103.

Court of Appeals of New Mexico.

April 7, 2005.

Patricia A. Madrid, Attorney General, M. Anne Kelly, Assistant Attorney General, Albuquerque, for Appellee.

Todd Hotchkiss, Frechette & Associates, P.C., Albuquerque, for Appellant.

OPINION

WECHSLER, J.

{1} Defendant appeals his convictions for second degree murder and tampering with evidence. On appeal, Defendant argues that plain error occurred due to his trial counsel's failure to file a motion to suppress evidence because the police did not obtain a search warrant prior to collecting evidence from Defendant's home. In the alternative, Defendant argues that his counsel was ineffective in failing to file the motion. Additionally, Defendant argues that the trial court erred in allowing a witness to testify to a statement made by the victim over Defendant's hearsay objection, that it erroneously admitted testimony of two police officers, and that statements made by the prosecutor during opening statements and closing arguments constituted fundamental error. After the State filed its brief, Defendant filed a motion to supplement the record and to allow the State the opportunity to address the supplemental record in further briefing. We now deny the motion and affirm.

Factual and Procedural History

{2} On December 3, 2001, police officers responded to a possible suicide call at Defendant's home. Officer Dino Roden, one of the responding officers, testified that he could see inside through a glass storm door as he approached the home. He noticed debris and broken pottery on the floor and blood on the carpet. As Officer Roden was about to open the door, Defendant approached and stated "well she finally did it." Officer Roden informed Defendant that he had been dispatched to investigate a suicide and asked where "she" was. Defendant informed the officer that the victim, Defendant's estranged wife, was in the back bedroom.

{3} Officer Roden and Officer Joshua Perea, who arrived shortly after Officer Roden, located the victim in the back bedroom on the bed. She was dead with an apparent shotgun wound to her chest. She had a four-to-five-inch gash on her upper left thigh from which blood flowed up rather than down. Her hands were badly lacerated, and her right thumb, which was missing, was later found beneath a night stand. She had blood stains on the bottom of one of her feet. There were also marks on her throat and around the back side of her neck, as well as evidence of retinal hemorrhaging. The officers saw a 12–gauge shotgun leaning next to the victim. It had a badly damaged barrel that "was peeled back like a banana." There was a wooden backscratcher next to the shotgun. They also saw pieces of shrapnel from the shotgun barrel on the wall in the bedroom and pieces of duct tape and fibers of blue cloth attached to the shotgun. There were shredded pieces of a potato on the ceiling, the victim's body, and the shotgun.

{4} After making these observations, the officers cleared the house, called New Mexico state police crime scene investigators, and set up crime scene tape. Officer Perea stated that Defendant did not appear upset at this point, and, in fact, went outside and began drinking a beer.

{5} The officers questioned Defendant's neighbors. Witnesses stated that they heard yelling coming from Defendant's residence, followed by a loud noise, and that they observed a man exit the residence and throw a bag over the fence into another yard approximately ten minutes before the officers arrived. Upon searching the area described by the witnesses, the officers recovered a blue towel "covered with duct tape." The officers also located a piece of duct tape underneath the bed where the victim was found and a roll of duct tape in one of the other rooms. The evidence indicated to the officers that Defendant had strangled the victim, then used the duct tape to attach the towel to the butt of the weapon and to secure a potato to the end of the barrel, presumably as a silencer. The evidence also indicated to police that Defendant had staged the suicide scene.

{6} Dr. Jeff Nine, a forensic pathologist with the Office of the Medical Investigator, found metal fragments, pieces of duct tape, and potato fragments in the vicinity of the shotgun wound. He testified at trial that the wounds on the victim's hands indicated that her hands were in front of the barrel of the weapon, but not necessarily grabbing it, as it was fired. He concluded that the victim died from a shotgun wound to her chest. Howev-

er, he also stated that she had been beaten and strangled prior to being shot, but he did not know if the strangulation rendered her unconscious. When questioned regarding the possibility of the victim having committed suicide, Dr. Nine stated: "I don't believe there is any way she could [have] done this [by] herself."

{7} Shortly after the police responded to the incident, Defendant was transported to police headquarters for questioning; he was not yet under formal arrest. Photographs of Defendant, taken at the police station, showed bloodstains on his clothing and a cut on his right hand. There was also blood on Defendant's boot. While awaiting questioning, Defendant stated, "I can't believe she did that." Defendant waived his rights under *Miranda v. Arizona,* 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and consented to giving a videotaped statement to police. He stated that the victim had a long history of drug abuse. He also stated that she had threatened to commit suicide previously and that she had pointed the shotgun at Defendant's friend on a prior occasion. When initially questioned by police, Defendant reiterated his account that the victim had committed suicide following an argument with Defendant. However, when confronted with physical evidence that was inconsistent with suicide, Defendant varied his story, stating that he and the victim had struggled over the gun in the bedroom and that it had accidentally discharged.

{8} At some point after the interview, the police obtained a search warrant and "processed the scene." Defendant was formally arrested, indicted, and charged with first degree murder and tampering with evidence. After a jury trial, Defendant was convicted of second degree murder and tampering with evidence.

Plain Error

{9} Defendant argues that plain error occurred due to his counsel's failure to file a motion to suppress evidence because police officers searched his residence without a warrant. We may take notice of plain errors affecting substantial rights even though a defendant did not object to the errors at trial. *State v. Gutierrez,* 2003–NMCA–077, ¶ 19, 133 N.M. 797, 70 P.3d 787. The plain error doctrine is not as strict as the doctrine of fundamental error in its application. *State v. Paiz,* 1999–NMCA–104, ¶ 28, 127 N.M. 776, 987 P.2d 1163. Therefore, "we need not determine that there has been a miscarriage of justice or a conviction in which the defendant's guilt is so doubtful that it would shock the conscience of the court to allow it to stand." *State v. Lucero,* 116 N.M. 450, 453, 863 P.2d 1071, 1074 (1993). Nevertheless, because the plain error rule is an exception to the general rule that parties must raise timely objection to improprieties at trial, plain error is to be used sparingly. *Paiz,* 1999–NMCA–104, ¶ 28, 127 N.M. 776, 987 P.2d 1163. The plain error rule only applies to errors in evidentiary matters. *Gutierrez,* 2003–NMCA–077, ¶ 19, 133 N.M. 797, 70 P.3d 787. We apply the rule only if we have "grave doubts about the validity of the verdict, due to an error that infects the fairness or integrity of the judicial proceeding." *Id.*

{10} Defendant relies on the United States Supreme Court's holdings in *Flippo v. West Virginia,* 528 U.S. 11, 14, 120 S.Ct. 7, 145 L.Ed.2d 16 (1999) (per curiam), and *Mincey v. Arizona,* 437 U.S. 385, 390, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), in arguing that the officers' failure to secure a search warrant until December 4, 2001 and his counsel's failure to file a motion to suppress evidence affected his substantial rights so as to cause plain error. As Defendant acknowledges, *Flippo* dealt with the denial of the defendant's motion to suppress based on a "murder scene exception" to the Fourth Amendment. *Flippo,* 528 U.S. at 12–14, 120 S.Ct. 7. The Court reversed the lower court, and relying on *Mincey,* found that there was no murder scene exception and that there were no exigent circumstances present. *Id.* The defendants in *Flippo* and *Mincey* did not argue that plain error occurred or that their counsel was ineffective for failing to file a motion to suppress, because counsel in both cases filed pretrial motions to suppress. *See Flippo,* 528 U.S. at 12, 120 S.Ct. 7; *Mincey,* 437 U.S. at 389, 98 S.Ct. 2408. Therefore, the Supreme Court did not have to perform

the completely different analysis necessary to determine whether plain error occurred when the evidence was admitted by the trial court.

{11} Because plain error does not occur in a vacuum, we interpret Defendant's argument to mean that the trial court committed plain error in failing to suppress evidence *sua sponte.* No New Mexico case has directly addressed this issue. However, in analogous circumstances, the Tenth Circuit in *United States v. Meraz–Peru,* 24 F.3d 1197 (10th Cir.1994), used an approach we consider persuasive. The defendant in *Meraz–Peru* claimed that his conviction for possession of marijuana should be reversed on appeal because he was stopped without reasonable suspicion. *Id.* at 1198. He never filed a motion to suppress the evidence at his trial, and the court analyzed the issue for plain error. *Id.* In affirming the defendant's conviction, it stated that "[a] reliable appellate determination concerning the [merits of a motion to suppress] is not possible in the absence of factual findings." *Id.* It reasoned that when "the error defendant asserts on appeal depends upon a factual finding the defendant neglected to ask the district court to make, the error cannot be 'clear' or 'obvious' unless the desired factual finding is the only one rationally supported by the record below." *Id.* (internal quotation marks and citation omitted).

{12} Similarly, in this case, the factual finding that the police unconstitutionally searched Defendant's home is not the only one rationally supported by the record. On the contrary, the facts in the record indicate that Defendant called the police reporting the alleged suicide and that he may have consented to their presence in his home. During his taped statement to the police, Defendant stated "I called . . . first and said [the victim] shot herself. . . . I called the police and you were there." Agent Ortiz stated at trial that he was suspicious and that he knew they were "going to need a search warrant." During the cross-examination of Agent Ortiz, Defendant's counsel stated: "But prior to that search warrant [Defendant] had given consent to search his house, correct?" Agent Ortiz responded in the affirmative. The record does not otherwise give us an indication of the validity of the search warrant. Therefore, because a finding that the police illegally searched Defendant's home is not the only one rationally supported by the record, there was no plain error.

Ineffective Assistance of Counsel

{13} Defendant additionally argues that his trial counsel was ineffective because no reasonable strategy existed for his counsel's failure to file a motion to suppress evidence. To prevail on this argument, Defendant has the burden to establish a prima facie claim of ineffective assistance. *State v. Roybal,* 2002–NMSC–027, ¶ 19, 132 N.M. 657, 54 P.3d 61. Defendant may only establish a prima facie claim by showing that his counsel's performance fell below the performance of a reasonably competent attorney and that his counsel's deficient performance prejudiced Defendant. *Patterson v. LeMaster,* 2001–NMSC–013, ¶ 17, 130 N.M. 179, 21 P.3d 1032. Within the context of a failure to file a motion to suppress evidence, a defendant must establish that the facts support the motion and that a reasonably competent attorney could not have decided that the motion was unwarranted. *Id.* ¶ 19. To determine whether the facts support the motion, we evaluate the facts present in the record. *See Roybal,* 2002–NMSC–027, ¶ 19, 132 N.M. 657, 54 P.3d 61 (stating that "[i]f facts necessary to a full determination are not part of the record, an ineffective assistance claim is more properly brought through a habeas corpus petition"); *see also State v. Wilson,* 117 N.M. 11, 18, 868 P.2d 656, 663 (Ct.App.1993).

{14} Similar to our analysis of Defendant's plain error claim, the record is devoid of facts from which we could determine the effectiveness of Defendant's counsel with regard to whether Defendant consented to a search or when a search warrant was required. Defendant argues that the State merely claimed "perfunctorily at trial that [Defendant] consented to the warrantless search of his residence." Our review of the record indicates that the issue regarding consent was simply never raised. We agree

with Defendant that the State has the burden to show that the search of Defendant's home fell under an exception to the warrant requirement imposed by the Fourth Amendment. *See State v. Mann,* 103 N.M. 660, 663, 712 P.2d 6, 9 (Ct.App.1985). However, the State's burden does not arise until Defendant puts facts into issue questioning the validity of the search. *Id.*

{15} *Flippo* does not require us to conclude that counsel's failure to file a motion to suppress was per se unreasonable as Defendant argues. *See Flippo,* 528 U.S. at 13, 120 S.Ct. 7. As we previously stated, the defendant in *Flippo* filed a motion to suppress evidence. *Id.* Defendant appears to be arguing the merits of a motion to suppress evidence he never made. Instead, Defendant must first point to facts in the record that indicate his counsel's failure to file the motion makes this one of those "rare" cases of prima facie ineffective assistance of counsel. *Cf. State v. Baca,* 1997–NMSC–059, ¶ 25, 124 N.M. 333, 950 P.2d 776.

{16} This case is also distinguishable from *Patterson,* upon which Defendant relies for the proposition that a reasonably competent attorney would not have decided that the motion was unwarranted. In *Patterson,* the defendant argued that his counsel was ineffective for failing to file a motion to suppress evidence obtained during a "showup" identification. *Patterson,* 2001–NMSC–013, ¶ 15, 130 N.M. 179, 21 P.3d 1032. Our Supreme Court, in reversing the defendant's conviction, relied on facts contained in the record which supported the motion to suppress. *Id.* ¶ 26 ("It is likely that there was factual support for a motion to suppress the identifications."). The Court stated that the record indicated that the showup identification was highly suggestive and likely "lacked the indicia of reliability necessary to outweigh the suggestiveness of that procedure." *Id.* The Court went on to state that there were not any facts in the record "which might have led a reasonably competent attorney not to file a motion to suppress." *Id.* ¶ 27.

{17} As we have discussed, the record in this case indicates that Defendant's trial counsel believed Defendant had consented to the entry of police into his home. It also implies that Agent Ortiz was immediately suspicious and at some point realized that a search warrant would be needed. However, except to the extent that Defendant apparently called the police to report the suicide and let them in when they arrived, we cannot determine from the record the extent of Defendant's consent or the time the police needed to obtain a warrant. *See, e.g., State v. Duarte,* 1996–NMCA–038, ¶ 25, 121 N.M. 553, 915 P.2d 309 (stating that a failure to file a non-meritorious motion is not ineffective assistance); *State v. Baca,* 115 N.M. 536, 544, 854 P.2d 363, 371 (Ct.App.1993) (stating that trial counsel's strategy and tactics will not be second-guessed on appeal).

{18} Moreover, even if Defendant could show that his counsel's performance fell below that of a reasonably competent attorney, he has also not shown that his counsel's failure to file the motion prejudiced his defense such that "there was a reasonable probability that the outcome of the trial would have been different." *State v. Reyes,* 2002–NMSC–024, ¶ 48, 132 N.M. 576, 52 P.3d 948. Defendant argues that he was prejudiced because (1) he was not inclined to enter a plea, (2) the evidence was not strong, and (3) "the motion to suppress 'was crucial because it could have excluded key evidence.' " A warrant was obtained to search Defendant's home, and Defendant fails to state with any specificity which evidence, if any, police collected prior to obtaining the warrant. Given this lack of specificity, Defendant's allegation of prejudice amounts to a mere assertion. *See In re Ernesto M., Jr.,* 1996–NMCA–039, ¶ 10, 121 N.M. 562, 915 P.2d 318 (stating that "[a]n assertion of prejudice is not a showing of prejudice"). We reject Defendant's claim of ineffective assistance of counsel.

Hearsay Issue

{19} Defendant additionally argues that the trial court erred in allowing Officer Perea to testify to a statement made by the victim. Officer Perea testified that he was dispatched on a domestic violence call to Defendant's residence on October 14, 2001, nearly two months prior to the incident at issue.

Because it was Defendant's home and Defendant indicated he wanted the victim to leave, Officer Perea escorted the victim off the premises. As she was leaving, the victim stated, "next time you guys see me you're going to find me dead." The State responded to Defendant's hearsay objection by arguing that the statement addressed the victim's state of mind and was allowed under Rule 11–803(C) NMRA.

{20} Defendant argues for the first time in his reply brief that we must address the applicability of the United States Supreme Court's recent holding in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), with regard to this issue. Essentially, Defendant argues that the victim's statement to Officer Perea was "testimonial" under *Crawford* and therefore must be barred because its admission violated Defendant's Sixth Amendment right to "confront and cross examine the witness." However, at trial, Defendant did not base his objection to the testimony on constitutional grounds, but only objected to the testimony at issue on hearsay grounds. The question of whether a defendant was denied the right to confrontation "may not be raised for the first time on appeal." *State v. Lucero,* 104 N.M. 587, 590–91, 725 P.2d 266, 269–70 (Ct. App.1986) (refusing to reach confrontation clause issue founded on general hearsay objection and argument that the statement at issue did not fall within any exception to the hearsay rule). An objection raising the question must be "sufficiently specific to alert the trial court to the claimed constitutional errors." *Id.* at 591, 725 P.2d at 270. Like *Lucero,* Defendant's hearsay objection was too broad to raise a confrontation clause issue. *See id.* The district court was only required to rule on the objection Defendant made: that the statement was not admissible under the Rule 11–803(C) hearsay exception. *See Lucero,* 104 N.M. at 591, 725 P.2d at 270.

{21} As to the issue of whether the district court correctly ruled that the statement was admissible under Rule 11–803(C), we review the admission of hearsay testimony under an exception to the hearsay rule for abuse of discretion. *State v. McClaugherty,* 2003–NMSC–006, ¶ 17, 133 N.M. 459, 64 P.3d 486; *State v. Mora,* 1997–NMSC–060, ¶ 51, 124 N.M. 346, 950 P.2d 789. A trial court abuses its discretion when its "ruling is clearly against the logic and effect of the facts and circumstances of the case." *State v. Simonson,* 100 N.M. 297, 301, 669 P.2d 1092, 1096 (1983).

{22} The State offered the testimony as a hearsay exception under Rule 11–803(C). Rule 11–803(C) states:

> **Then existing mental, emotional or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant's will.

{23} Rule 11–803(C) is applicable in situations in which a defendant puts an alleged victim's state of mind at issue by arguing self-defense or suicide. *State v. Baca,* 120 N.M. 383, 389, 902 P.2d 65, 71 (1995); *see also State v. Swavola,* 114 N.M. 472, 478, 840 P.2d 1238, 1244 (Ct.App.1992) (stating that an utterance by the victim is relevant to the victim's state of mind under Rule 11–803(C) when the defendant argues self-defense and the statement tends to reduce the likelihood that the victim was the initial aggressor). Defendant took such an approach in this case. His statements to police raised issues of suicide, accidental shooting, and self-defense. He requested and received jury instructions for self-defense and second degree murder. The statement "the next time you guys see me you're going to find me dead" was offered to show that the victim feared Defendant and was unlikely to attack him or commit suicide. Yet, due to its ambiguity, the statement arguably helped Defendant as much as it did the State because the jury could have just as easily interpreted the statement to mean the victim intended to commit suicide. Despite its ambiguity, the statement was relevant to the issues of suicide and self-defense, and the court did not abuse its discretion in admitting it.

{24} This case is not like *Baca.* In that case, a young victim had made the statement that she feared her father. *Baca,* 120 N.M. at 389, 902 P.2d at 71. Our Supreme Court held that the statement was not admissible under Rule 11–803(C) because it was not offered to show the victim's state of mind and was therefore irrelevant and prejudicial. *Baca,* 120 N.M. at 389, 902 P.2d at 71. The Court expressed concern that the statement created a substantial risk that the jury could consider the victim's fear as "somehow reflecting on [the] *defendant's* state of mind rather than the victim's." *Id.* at 389–90, 902 P.2d at 71–72 (internal quotation marks and citation omitted). The defendant in *Baca* did not raise the issue of self-defense.

{25} Defendant, in his reply brief, argues that there is a reasonable probability that he was prejudiced by the statement because the State used it to headline its closing argument. However, we cannot say that the trial court abused its discretion in allowing the statement given the admissibility of the statement under Rule 11–803(C) and the wide latitude afforded prosecutors and defense counsel during closing argument. *See State v. Venegas,* 96 N.M. 61, 63, 628 P.2d 306, 308 (1981).

{26} Based on *State v. Woodward,* 121 N.M. 1, 908 P.2d 231 (1995), the dissent would hold that the statement is best construed as the victim's belief that Defendant was going to kill her and is therefore inadmissible hearsay. In *Woodward,* an appeal of a conviction of first degree murder and other charges, a psychologist testified that the victim had told him that the defendant "is going to kill me." *Id.* at 8–9, 908 P.2d at 238–39. Our Supreme Court, relying on *United States v. Joe,* 8 F.3d 1488 (10th Cir. 1993), distinguished a statement that a victim was afraid from a statement that the defendant would kill the victim. *Woodward,* 121 N.M. at 9, 908 P.2d at 239. It held that the former was admissible as a "statement of then-existing mental, emotional, or physical condition," but that the latter was inadmissible because it was a "statement of memory or belief." *Id.* (internal quotation marks and citation omitted). However, Defendant did not raise this distinction in the trial court and does not argue it on appeal. We therefore do not address it. *See State ex rel. Human Servs. Dep't v. Staples,* 98 N.M. 540, 541, 650 P.2d 824, 825 (1982) (stating that appellate courts risk "overlooking important facts or legal considerations when they take it upon themselves to raise, argue, and decide legal questions overlooked by the lawyers who tailor the case to fit within their legal theories" in cautioning this Court against ignoring the arguments presented and searching for alternative grounds for a decision) (internal quotation marks and citation omitted); *State v. Ferguson,* 111 N.M. 191, 196, 803 P.2d 676, 681 (Ct.App.1990) ("Courts should not take it upon themselves to raise, argue, and decide legal issues overlooked by the lawyers."). In addition, we note that there was no issue in *Woodward* as to self-defense or suicide.

Agent Ortiz's Opinion Testimony

{27} At trial, Agent Ortiz was accepted as an expert in blood stain pattern analysis and crime scene reconstruction without objection. At the beginning of his testimony, Agent Ortiz stated that "Crime Scene Reconstruction is to evaluate the evidence at the scene. Gather physical evidence and you evaluate it to determine to arrive at a conclusion as to what occurred, what happened at the scene." He also testified that blood splatter analysis will "assist you in supporting or refuting any statements by witnesses or defendants." He stated that the evidence did not support Defendant's assertion that the victim walked down the hallway to the bedroom because there were no carpet fibers on the bottom of her bare feet. On the contrary, Agent Ortiz stated that the evidence supported the conclusion that the victim was carried into the bedroom. He also stated that there were pieces of duct tape and potato on the victim, indicating that those substances were covering the barrel of the shotgun. Agent Ortiz was also able to track the trajectory of the flight of the victim's thumb and opined that she was propped up on the bed when she was shot.

{28} Agent Ortiz concluded that the victim could not have committed suicide because the lacerations on her hands indicated that they were near the barrel when the shotgun

was fired, and therefore, she could not have pulled the trigger. He opined that the covering of the weapon with duct tape and a towel, in addition to the presence of the potato, were all consistent with an effort to prevent gunshot residue from depositing on the person who fired the weapon. He stated that Defendant's claim that the victim committed suicide was not consistent with the physical evidence. Defendant did not object to these statements. Agent Ortiz then gave a synopsis as to the manner in which he believed the crime occurred based on the evidence. Defendant objected and the court asked the prosecutor to "move along." Agent Ortiz opined that Defendant fired the shotgun and used the potato as a silencer and then called the police because of the loud explosion. He stated that "physical evidence does not lie" and that the evidence indicated the victim was killed deliberately.

{29} Defendant argues that the trial court erred in overruling his objections to Agent Ortiz's testimony. We review the trial court's admission of Agent Ortiz's testimony for abuse of discretion and we will not disturb its evidentiary ruling absent a clear abuse of that discretion. *State v. Stanley,* 2001–NMSC–037, ¶ 5, 131 N.M. 368, 37 P.3d 85.

{30} Defendant relies on *Lucero* in support of his argument that the trial court erred in admitting the testimony because Agent Ortiz "improperly commented directly on the credibility of [Defendant]." *Lucero* is distinguishable from this case. The expert witness in *Lucero* was a psychologist who examined one of the complaining witnesses. *Lucero,* 116 N.M. at 451, 863 P.2d at 1072. The expert testified that the complaining witness exhibited symptoms of post traumatic stress syndrome caused by sexual abuse. *Id.* at 451–52, 863 P.2d at 1072–73. The expert also commented directly on the credibility of the complaining witness in stating that the complaining witness was consistent both in identifying the defendant as the abuser and in referring to the rooms in which the alleged abuse occurred. *Id.* at 452, 863 P.2d at 1073. The expert also inappropriately commented on the demeanor of the complaining witness, which the expert claimed changed when the complaining witness talked about the alleged sexual abuse she had endured. *Id.* The expert testified that "if the complainant were not telling the truth, she probably would have reacted differently than she did." *Id.*

{31} Our Supreme Court held that the trial court committed plain error in admitting the testimony and stated that an expert commenting on the credibility of the alleged victim of sexual abuse was improper. *Id.* at 455, 863 P.2d at 1076. The Court, relying on *State v. Alberico,* 116 N.M. 156, 861 P.2d 192 (1993), stated that the expert's testimony was improper because it went outside the bounds of admissible testimony concerning post traumatic stress disorder, which it stated was identical to post traumatic stress syndrome. *Lucero,* 116 N.M. at 454, 863 P.2d at 1075. It reasoned that "[w]hile PTSD testimony may be offered to show that the victim suffers from symptoms that are consistent with sexual abuse, it may not be offered to establish that the alleged victim is telling the truth; that is for the jury to decide." *Id.* (internal quotation marks and citation omitted).

{32} In this case, Agent Ortiz, as a qualified crime scene reconstructionist, gave his opinion as to the credibility of Defendant's version of events. He did not directly bolster the testimony of any of the State's other witnesses. We agree with the State that *State v. Landgraf,* 1996–NMCA–024, 121 N.M. 445, 913 P.2d 252, is directly on point. The defendant in *Landgraf* had been charged with multiple crimes for causing an automobile crash in which three people died. *Id.* ¶ 1. The prosecutor offered the testimony of police officers who stated that the defendant's "complex motor reactions demonstrated deliberation." *Id.* ¶ 20. We stated that the defendant had misconstrued *Alberico* and acknowledged that our Supreme Court had "recognized and acknowledged the continuing validity of its prior decisions that expert testimony is admissible even if it touches upon an ultimate issue to be decided by the trier of fact." *Id.* (internal quotation marks and citation omitted). We further stated that the jury is "free to disregard any or all such opinion testimony" and had been so instructed. *Id.*

{33} Agent Ortiz's testimony was similar to that of the police officer in *Landgraf.* His testimony touched upon the ultimate issue to be decided by the trier of fact, whether Defendant was being truthful in his assertions that the victim committed suicide or attacked him. The jury was instructed that it could entirely disregard the testimony of any or all expert witnesses. Therefore, we cannot characterize the trial court's admission of Officer Ortiz's testimony as "clearly untenable or not justified by reason." *See Stanley,* 2001–NMSC–037, ¶ 5, 131 N.M. 368, 37 P.3d 85 (internal quotation marks and citation omitted).

{34} Defendant additionally asserts that Officer Perea's testimony also inappropriately interpreted the evidence to implicate Defendant. We do not reach this issue because Defendant did not brief it. *State v. Desnoyers,* 2002–NMSC–031, ¶ 11, 132 N.M. 756, 55 P.3d 968 (stating that issues not argued and supported by authority deemed abandoned). Similarly, Defendant argues that his "constitutional rights to a fair trial and a jury trial under the Sixth Amendment to the U.S. Constitution and Article II, § 14 of the New Mexico Constitution were violated" because of the admission of Agent Ortiz's statements. However, Defendant cites to no authority and also fails to brief the manner in which either constitution was implicated. *See Desnoyers,* 2002–NMSC–031, ¶ 11, 132 N.M. 756, 55 P.3d 968. We find no error in the trial court's admission of the testimony.

Prosecutor's Assertions During Opening Statement

{35} Defendant additionally argues that assertions made by the prosecutor during opening statement constitute fundamental error. At the end of his opening statement, the prosecutor asserted:

> Just as you have taken an oath and have raised your hand to fairly and truly judge this case, on behalf of the people of the State of New Mexico, I promise you that Ms. Garcia and myself will conduct our case as fairly and as honestly and as truthfully as possible.

{36} Because Defendant did not object to this statement, we only review for fundamental error. *State v. Gonzales,* 113 N.M. 221, 229, 824 P.2d 1023, 1031 (1992); *State v. Diaz,* 100 N.M. 210, 212, 668 P.2d 326, 328 (Ct.App.1983). The doctrine 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." *State v. Dartez,* 1998–NMCA–009, ¶ 21, 124 N.M. 455, 952 P.2d 450 (internal quotation marks and citation omitted). In the context of analyzing a prosecutor's alleged improper statements, "fundamental error arises when the prosecutor engages in misconduct that compromises the defendant's right to a fair trial." *State v. Rojo,* 1999–NMSC–001, ¶ 55, 126 N.M. 438, 971 P.2d 829.

{37} Defendant's reliance on *Diaz* and *Baca* is also misplaced with regard to this issue. We agree with Defendant that it is improper for a prosecutor to "precondemn a defendant on the basis of the authority he represents." *Diaz,* 100 N.M. at 213, 668 P.2d at 329; *Baca,* 120 N.M. at 392, 902 P.2d at 75. However, the prosecutor's conduct in this case did not rise to the same odious level as the cases upon which Defendant relies.

{38} In *Diaz,* the prosecutor stated:

> The taxpayers pay me, pay the judge, even pay Mr. Lane, and they're gonna pay you for being here two days.
>
> Please remember ladies and gentlemen, that I represent the State, and just like [the defendant] is represented by Mr. Lane, I represent you and all the other people in the Sixth Judicial District which covers three counties. You are my clients. I'm here to protect your rights. I'm here to protect the security of your homes, your places of business. The people of New Mexico come in here and presented this case to you * * *.
>
> When you start putting judges on trial, Supreme Court Justices, prosecutors who represent the people * * *.
>
> Just remember, the style of this case is State of New Mexico versus [the defendant] * * *. And the people of this dis-

> trict ask you to find him guilty of both counts.

Diaz, 100 N.M. at 213, 668 P.2d at 329. In holding that error occurred requiring reversal, we stated that the prosecutor's improper statements were "substantial" and that he had made "overextensive references to the authority he represents." *Id.* at 213, 215, 668 P.2d at 329, 331. In addition, we stated that it was the combined effects of these comments in addition to the prosecutor's other pronounced and persistent misconduct which likely had "a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." *Id.* at 215, 668 P.2d at 331 (internal quotation marks and citation omitted).

{39} In *Baca*, the prosecutor improperly told the jury that he had a higher ethical duty than defense counsel because he, as a prosecutor, was "bound by law to seek the truth," whereas the defendant's counsel, as a criminal defense attorney, was not. *Baca*, 120 N.M. at 392, 902 P.2d at 74. Our Supreme Court, in reversing the defendant's convictions based on cumulative error, admonished the state to avoid making the same improper statements on remand. *Id.* However, it did not factor these comments into its cumulative error determination and expressly stated that they did not amount to fundamental error. *Id.*

{40} In this case, the prosecutor did not engage in the extensive and egregious misconduct admonished in *Diaz* and *Baca*. He merely stated that he promised to present his case "honestly" and as "truthfully" as possible. While arguably improper, the prosecutor's statements during opening statement were not fundamental error.

Prosecutor's Statements During Closing Argument

{41} During the State's rebuttal closing argument, the prosecutor personally admonished Defendant, stating that Defendant "continues to disgrace and deface her memory. Shame on you, Gilbert Torres! And I hope you feel my outrage. I hope that as a society . . . ." Defense counsel objected, and the trial court told the prosecutor to "tone it down." The prosecutor then stated:

> And as a society we should feel outraged. We are a nation of law, not of men. The true test of our greatness is how well we treat the least of our citizens. The true test of our greatness is how we uphold the principle that everybody's entitled to life, liberty and the pursuit of happiness.

Defendant argues, relying on *Diaz*, 100 N.M. at 214, 668 P.2d at 330, *Ferguson*, 111 N.M. at 194, 803 P.2d at 679, and *State v. Vallejos*, 86 N.M. 39, 42, 519 P.2d 135, 138 (Ct.App. 1974), that the trial court erred in overruling Defendant's objection to the prosecutor's statements. We disagree.

{42} Because Defendant objected to the statements, we review for abuse of discretion. *State v. Clark*, 1999-NMSC-035, ¶ 52, 128 N.M. 119, 990 P.2d 793. Our Supreme Court has stated:

> The prosecution is allowed reasonable latitude in closing argument. The district court has wide discretion to control closing argument, and there is no error absent an abuse of discretion or prejudice to defendant. . . . The question on appeal is whether the argument served to deprive defendant of a fair trial.

State v. Chamberlain, 112 N.M. 723, 729, 819 P.2d 673, 679 (1991) (citations omitted). The defendant in *Ferguson* objected to the prosecutor's statement of "I think you should return . . . a guilty verdict, for a crime here. Yes." *Ferguson*, 111 N.M. at 195, 803 P.2d at 680. The defendant immediately moved for a mistrial arguing that the words "I think" in reference to the verdict the jury was to give was an improper injection of personal opinion into the case by the prosecutor. *Id.* In upholding the trial court's grant of the motion for mistrial, we stated that a key component of our reasoning was that the standard of review was deferential to the trial court. *Id.* (stating that deferring to the trial court in these situations makes sense because "[t]he trial court judge was present, and therefore she was in a better position to resolve this question than we are"). We acknowledged that the trial court could have reasonably decided either way on the issue and therefore affirmed its ruling. *Id.* at 196, 803 P.2d at 681.

{43} In this case, Defendant objected to the prosecutor's statement and the trial court expressed its concern. Defendant did not move for a mistrial or request any curative instruction to the jury. The trial court did not abuse its discretion by not taking further action.

{44} This case is also distinguishable from *Diaz* and *Vallejos.* In both of those cases, the prosecutors made multiple improper comments, and we based our holdings on cumulative error. *Diaz,* 100 N.M. at 215, 668 P.2d at 331; *Vallejos,* 86 N.M. at 42, 519 P.2d at 138. Moreover, in this case, the State presented evidence that Defendant tried to cover up the incident, repeatedly attempted to portray the victim in a negative light by referring to her drug use, and changed his story at least twice when questioned about the shooting by police. It would not have been an abuse of discretion for the trial court to have ruled that the prosecutor's statements that Defendant continued to disgrace the victim's memory were a fair comment on the evidence. *See State v. Lamure,* 115 N.M. 61, 67, 846 P.2d 1070, 1076 (Ct.App.1992) ("Comments on the evidence are not error or fundamental error."). Given the facts of this case and our deferential standard of review, the trial court did not abuse its discretion in allowing counsel's statements during closing argument.

Cumulative Error

{45} Finally, Defendant's claim of cumulative error also fails because the trial court did not commit the many errors Defendant claims were cumulative. *State v. Perea,* 2001–NMCA–002, ¶ 26, 130 N.M. 46, 16 P.3d 1105.

Conclusion

{46} For the foregoing reasons, we affirm Defendant's convictions for second degree murder and tampering with evidence.

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

PICKARD, J., concurs.

MICHAEL E. VIGIL, Judge (concurring in part and dissenting in part).

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

{48} I concur with the majority opinion in all respects except its conclusion that the victim's hearsay statement that, "next time you guys see me you're going to find me dead" was admissible under Rule 11–803(C) as a state of mind exception to the hearsay rule. I conclude that the statement was not admissible into evidence under Rule 11–803(C) and that its admission into evidence constituted reversible error.

{49} Police Officer Joshua Perea was the second officer to arrive at Defendant's home on December 3, 2001. He was also the State's second witness. Before Officer Perea was asked about the events of December 3, 2001, he testified about an incident which occurred on October 14, 2001, nearly two months before. Officer Perea testified he was back-up on a domestic violence call to Defendant's home involving Defendant and the victim. "[W]e walked into the house and the house was kind of [in] disarray. Looked like a fight had taken place." Officer Perea related that Defendant and the victim had both been drinking and Defendant was stating that he wanted the victim out of the house, that he was tired of her, and did not want a relationship with her anymore. The following then occurred:

> [PROSECUTOR]: Uh, did you get an opportunity to speak with [victim] that day in October?
>
> OFFICER PEREA: I don't recall speaking with her. I was there listening as she was making comments on who did. I know we did give her some uh, information about places that she could stay to get out of there. Anything from a hotel to a domestic shelter.
>
> [PROSECUTOR]: And is there anything that she directly said that evening.
>
> [DEFENSE COUNSEL]: Objection your Honor, hearsay.
>
> [PROSECUTOR]: Goes to victim's state of mind.
>
> JUDGE: Overruled, go ahead.
>
> [PROSECUTOR]: Okay and can you tell us what was said that evening?

OFFICER PEREA: After they were done loading the car with the stuff, we were all getting ready to leave and she was getting off from the couch, just before she got up she made a statement uh, next time you guys see me you're going to find me dead.

[PROSECUTOR]: And how did she appear to you that evening?

OFFICER PEREA: She seemed kind of groggy, like she wasn't really upset, she wasn't hyperactive like I honestly she may have possibly be[en] under the influence of something, but I wasn't completely sure.

[PROSECUTOR]: Do you know if she smelled like alcohol that evening or?

OFFICER PEREA: Yes she had been drinking.

[PROSECUTOR]: And did you ask anything of her son in response?

OFFICER PEREA: Her son was going off I believe the whole time. He made a comment, come on Gilbert tell them how you are threatening to get your hells angels friends to kill my mom or something like that.

[DEFENSE COUNSEL]: Judge.

JUDGE: Sustained.

[DEFENSE COUNSEL]: I and I move that that be stricken and that the jury disregard that statement.

JUDGE: It will be stricken and the jury will disregard it.

[PROSECUTOR]: Any thing else you did in response to the call in October of 2001?

OFFICER PEREA: Just made sure that she left the residence.

[PROSECUTOR]: And did Gilbert Torres ask her to leave that night?

OFFICER PEREA: Yes.

It was in the foregoing context during the State's case in chief before any statements of Defendant were admitted into evidence that the victim's hearsay statement, "next time you guys see me you're going to find me dead" was admitted as substantive evidence.

{50} The admission or exclusion of hearsay evidence lies within the discretion of the trial court. *State v. Balderama*, 2004–NMSC–008, ¶ 46, 135 N.M. 329, 88 P.3d 845 ("We review the trial court's admission of hearsay statements for an abuse of discretion."). I conclude that admission of the evidence was erroneous and therefore an abuse of discretion. *See State v. Brown*, 1998–NMSC–037, ¶ 39, 126 N.M. 338, 969 P.2d 313 (stating an abuse of discretion in admitting evidence may occur when its admission is "obviously erroneous." (internal quotation marks and citation omitted)).

{51} The evidence was admitted under Rule 11–803(C), which provides that certain evidence is not excluded by the hearsay rule which includes:

> C. Then Existing Mental, Emotional or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant's will.

Id.

{52} This rule allows a declarant's out of court statement of her then-existing state of mind or emotion to be admitted into evidence. However, as the majority agrees, the victim's statement is ambiguous. At best, it is only a declaration ("next time you see me I'll be dead"). In context, the victim might have been asserting to Officer Perea that the next time he saw her she would be dead because Defendant's "hells angels friends" were going to kill her. The statement is not an expression of a state of mind or emotion (such as "I am afraid"). The statement was therefore not admissible. Rule 11–802 NMRA ("Hearsay is not admissible except as provided by these rules or by other rules adopted by the Supreme Court or by statute.").

{53} The hearsay statement was inadmissible for the additional reason that it was irrelevant. "For an extrajudicial statement of a declarant's state of mind to be admissible, the state of mind must be relevant." *Baca*, 120 N.M. at 389, 902 P.2d at 71. The state of mind evidence must prove or negate

action or inaction of the declarant that is relevant to the case. The victim's state of mind may be relevant in issues of "(1) self defense (rebutted by extrajudicial declarations of the victim's passive state of mind), (2) suicide (rebutted by statements inconsistent with a suicidal bent), and (3) accident (rebutted by victim's fear of placing self in way of such harm)." *Id.* The majority suggests that the victim's statement was relevant because it related to a claim of suicide and self defense. I disagree.

{54} The State alleged that Defendant killed the victim with a deliberate intent, and charged him with first degree murder. To prove its case of first degree murder the State introduced two recorded statements Defendant gave to the police. Initially, Defendant contended that he and the victim had argued, victim cut her leg on broken pottery, and she went into the bedroom. Defendant first claimed he heard the shotgun blast come from the bedroom as he sat at his computer. He told the officers about her problems with drugs and the law and claimed she had threatened suicide before. When Defendant was confronted with the physical evidence that was inconsistent with a suicide, and the officers told him they did not believe him, his story changed and he gave a second statement. He now said that while they were arguing the victim pulled the shotgun and she was shot accidentally when he tried to take it away from her. He denied any knowledge of the duct tape, blue towel, or potato, but subsequently admitted he put the towel on the gun trigger, claiming he did so to keep the victim from firing the shotgun. The State introduced these statements into evidence during its case in chief *after* Officer Perea testified as part of its effort to prove first degree murder. Defendant did not testify. However, Defendant introduced evidence of an incident in which the victim allegedly pulled the shotgun on another person to corroborate the self defense claim his attorney later made in closing argument. Under the circumstances, the victim's statement "next time you see me I'll be dead" did not tend to prove or disprove whether she killed herself. Furthermore, because of its inherent ambiguity, it did not tend to prove or disprove whether the victim attacked defendant two months later, or whether she was accidentally killed. *Cf. Swavola,* 114 N.M. at 478, 840 P.2d at 1244 (stating that the victim's statement that he desired to reconcile with Defendant was relevant where self defense asserted because it reduced the likelihood he was the first aggressor).

{55} The statement is most easily construed as a belief by the victim that Defendant was going to kill her. "In general, where state of mind testimony is sought to be used in an attempt to demonstrate the truth of the underlying facts rather than solely to show state of mind, the evidence must be excluded." *Baca,* 120 N.M. at 389, 902 P.2d at 72 (quoting *United States v. Brown,* 490 F.2d 758, 763 n. 10 (D.C.Cir. 1973)). The rule itself *excludes* the admission of "a statement of memory or belief to prove the fact remembered or believed." Rule 11–803(C). In *Woodward,* 121 N.M. at 1, 908 P.2d at 231 the defendant was convicted of killing his estranged wife. Over his objection the victim's statement to a psychologist "[he] is going to kill me" was admitted into evidence. *Id.* at 8–9, 908 P.2d at 238–39. The Supreme Court held this was a "statement of memory or belief" rather than a statement of then-existing mental, emotional, or physical condition, and inadmissible. *Id.* at 9, 908 P.2d at 239. *Woodward* explains that while Rule 11–803(C) allows the admission of a declarant's then existing mental or emotional condition, the reason why the declarant has the state of mind is not admissible. The example given by the Supreme Court is from *Joe,* 8 F.3d at 1492–93, in which the defendant was convicted of killing his estranged wife. Eight days before the murder, she saw a doctor who treated her for rape. During the treatment, she told the doctor she was afraid because the defendant had threatened to kill her. *Id.* at 1491. Our Supreme Court approved the *Joe* holding that the first part of the statement that she was afraid was admissible as statement of then-existing mental, emotional, or physical condition but the statement that the defendant would kill her was a prohibited "statement of memory or belief." *Id.* at 1493; *Woodward,* 121 N.M. at 9, 908 P.2d at 239. *See also Baca,* 120 N.M. at 389, 902 P.2d at

71 (stating that while Rule 803(C) "allows hearsay statements that show the declarant's then existing mental condition, the rule does not permit evidence explaining why the declarant held a particular state of mind.") (citing *United States v. Liu,* 960 F.2d 449, 452, (5th Cir.1992) (a witness could properly testify that the declarant (the defendant) "was scared" and that he had a fear of getting killed, but not why)).

{56} I also conclude that the erroneous admission of the victim's hearsay statement was not harmless error. *See State v. McClaugherty,* 2003–NMSC–006, ¶ 32, 133 N.M. 459, 64 P.3d 486; *State v. Morales,* 2002–NMCA–052, ¶ 24, 132 N.M. 146, 45 P.3d 406. In *Baca,* the defendant's three-year-old daughter was found with defendant's dead wife. The State presented evidence that the defendant killed his wife then drove his dead wife and daughter to a remote area, where he ran over them. 120 N.M. at 386, 902 P.2d at 68. The daughter saw a social worker who was allowed to testify that the daughter made a nonverbal statement by nodding her head "yes" that she was afraid of her father when he asked her if she was afraid of him. *Id.* at 387, 902 P.2d at 69. Our Supreme Court held that admission of the hearsay statement was not only improper, but prejudicial, because of the danger that the jury would consider the statement as reflecting on the defendant's state of mind as a true indication of his intentions, actions, or culpability, rather than the victim's. *Id.* at 389–90, 902 P.2d at 71–72. Where there is a strong likelihood that the jury will make such an inference, "injurious prejudice" is "particularly evident." *Id.* (quoting *Brown,* 490 F.2d at 766). The prosecutor's opening words in closing argument were: "[Victim's] prophesy came true: 'The next time you see me you are going to find me dead.' She told Officer Josh Perea of the Los Lunas Police Department. And sure enough, the next time Josh Perea saw [Victim], he saw her dead." The prosecutor then highlighted the physical evidence which it argued demonstrated a first degree murder and Defendant's inconsistent statements about what occurred, while referring to the hearsay statement again. The inadmissible evidence was therefore used to demonstrate that Defendant killed the victim and to show his state of mind, not the victim's. This was not harmless error. *Baca,* 120 N.M. at 390, 902 P.2d at 72 (holding that the use of a hearsay statement was an attempt to demonstrate something other than the victim's state of mind and that it was unfairly prejudicial). In light of the foregoing conclusions, I need not address whether, or to what extent, *Crawford* applies.

{57} I would reverse Defendant's conviction and remand for a new trial excluding the victim's hearsay statement. Since the majority disagrees, I dissent.

2005-NMCA-073

114 P.3d 303

Joanne M. BELSER, Plaintiff–Appellant,

v.

Feidhlim O'CLEIREACHAIN, M.D., Defendant–Appellee.

No. 24,380.

Court of Appeals of New Mexico.

March 17, 2005.

Certiorari Denied, No. 29,216, June 6, 2005.

Christal K. Grisham, Albuquerque, for Appellant.

Ruth O. Pregenzer, Jennifer Davis Hall, Miller Stratvert, P.A., Albuquerque, for Appellee.

OPINION

WECHSLER, Judge.

{1} Plaintiff Joanne Belser appeals the district court's order granting the motion of Defendant Dr. Feidhlim O'Cleireachain (Defendant) to lift a stay and dismiss without prejudice Plaintiff's medical malpractice complaint. The court had entered a stipulated order staying the proceedings until thirty days after the Medical Review Commission (MRC) rendered a decision on Plaintiff's

claim. Defendant filed the motion in question after Plaintiff did not file an application with the MRC. Because the statute of limitations had run, the dismissal without prejudice effectively dismissed the case on a permanent basis. We affirm the district court's action on the basis that Plaintiff did not file the application within a reasonable time.

Factual and Procedural History

{2} Plaintiff filed her complaint against Defendant and Presbyterian Healthcare Services (Presbyterian) one day before the expiration of the limitations period contained in the Medical Malpractice Act. NMSA 1978, § 41–5–13 (1976) (setting a period of three years from the act of malpractice to bring action under the Act). The complaint alleges, and Defendant admits in his answer, that Defendant had hospital privileges with Presbyterian; thus the Medical Malpractice Act applied. After Defendant's answer, Defendant's attorney suggested a stipulation to stay the proceedings in lieu of a motion to dismiss so that Plaintiff could proceed before the MRC. The court entered an order upon the parties' stipulation that "the proceedings herein shall be stayed until thirty days after the Medical Review Commission renders its decision with regard to plaintiff's claim against [Defendant]." Despite an inquiry by Defendant's attorney approximately two months after the stay Plaintiff did not proceed before the MRC. Defendant filed his motion to lift the stay and dismiss the complaint approximately four months after the stay was granted. Although Defendant's memorandum in support of his motion to dismiss argued the court's lack of subject matter jurisdiction and statute of limitations, the motion and the memorandum set forth the facts relating to Plaintiff's inaction in filing an application with the MRC. Defendant again argued this inaction at the hearing on the motion. The court scheduled a presentment hearing, and Plaintiff filed a motion to vacate the presentment order. The court granted Defendant's motion to dismiss. On appeal, Plaintiff essentially argues, as she did in her motion to vacate the presentment order, that the district court erred (1) in vacating the stay because the stay was based on a contract of the parties that was not breached, and (2) in dismissing the complaint because a MRC decision was not a necessary predicate for the complaint under *Rupp v. Hurley,* 2002–NMCA–023, 131 N.M. 646, 41 P.3d 914, and because the court should have considered alternatives to dismissal.

District Court's Authority Over the Stay

{3} We do not agree with Plaintiff that the parties' contract, if one exists, binds the district court. A district court has control over proceedings before it. Our Supreme Court has held that a district court has the discretion to grant and lift a stay of proceedings. *See Segal v. Goodman,* 115 N.M. 349, 357–58, 851 P.2d 471, 479–80 (1993). Plaintiff would limit *Segal* to its facts: the grant of a presumably opposed motion to stay enforcement of a judgment permitted by Rule 1–062(A) NMRA, which authorizes proceedings to enforce a judgment "unless otherwise ordered by the court." However, Plaintiff's argument ignores the inherent authority of the district court to manage the cases before it. *See State v. Ahasteen,* 1998–NMCA–158, ¶ 28, 126 N.M. 238, 968 P.2d 328 (stating that the district court has the inherent power to control its docket, which is the power to "supervise and control the movement of all cases on its docket from the time of filing through final disposition") (internal quotation marks and citation omitted). The authority to stay proceedings is incidental to the court's inherent management authority. *See Landis v. N. Am. Co.,* 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 (1936) (stating that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort"). It does not matter that the stay was initiated by a stipulation. Unless otherwise indicated in the Rules of Civil Procedure, the court, not the parties, controls the movement of cases on its docket within its discretion. *See generally Ahasteen,* 1998–NMCA–158, ¶ 28, 126 N.M. 238, 968 P.2d 328 (noting the inherent authority of the district court to control its docket).

{4} The district court did not abuse its discretion by lifting the stay in this case. As

interpreted by Plaintiff, the stipulated order stayed the district court proceedings indefinitely until she pursued, and the MRC acted upon, her application with the MRC. Indeed, according to Plaintiff, she did not even have an obligation under the stay to file an application with the MRC. This reading of the stipulated order removes from the district court all control of the proceedings before it. The district court could reasonably have construed its own order to avoid such loss of control of its proceedings and to require Plaintiff to have filed an application with the MRC within a reasonable time. The district court acted within its discretionary inherent authority in the control of its cases to require Plaintiff to act within a reasonable period of time to pursue her claim, after Plaintiff had failed to do so.

{5} Plaintiff's reliance on *Ottino v. Ottino,* 2001–NMCA–012, 130 N.M. 168, 21 P.3d 37, is misplaced. In *Ottino,* we concluded that the district court may enforce, as a matter of contract, a post-minority child support agreement entered into by divorcing parties, even though the court did not have the authority to order such support as part of its statutory jurisdiction over divorce matters. *Id.* ¶¶ 14–16. We recognized that the court's ability to enforce a contract is independent from its ability to order child support, so that the court could give recognition to the parties' agreement that exceeded the court's independent authority. *Id.* In this case, however, Plaintiff argues that the district court did not have any authority except to recognize the parties' agreement, as interpreted by Plaintiff. Yet, as we have discussed, the district court had full and independent authority to act on its own with regard to a stay, and the parties invoked this authority by requesting a court order.

District Court's Authority to Dismiss

{6} Plaintiff additionally argues, relying on *Rupp,* that the district court did not have the authority to dismiss her complaint. The Medical Malpractice Act provides that a medical malpractice action against a health care provider qualifying under the Act may not be filed in court "before application is made to the medical review commission and its decision is rendered." NMSA 1978, § 41–5–15(A) (1976). The plaintiff in *Rupp* had filed her district court complaint and MRC application two days before the expiration of the statute of limitations under Section 41–5–13. *Rupp,* 2002–NMCA–023, ¶¶ 4–5, 131 N.M. 646, 41 P.3d 914. Following the Supreme Court's opinions in *Otero v. Zouhar,* 102 N.M. 482, 484, 697 P.2d 482, 484 (1985), *overruled in part on other grounds by Grantland v. Lea Regional Hospital,* 110 N.M. 378, 380, 796 P.2d 599, 601 (1990), and *Jiron v. Mahlab,* 99 N.M. 425, 426, 659 P.2d 311, 312 (1983), this Court held that the plaintiff could maintain her lawsuit even though it was filed before there was a MRC decision. *Rupp,* 2002–NMCA–023, ¶¶ 1, 13–16, 131 N.M. 646, 41 P.3d 914. We considered the early-filed complaint to be valid because an application with the MRC "is not a jurisdictional prerequisite to filing a medical malpractice complaint in district court." *Id.* ¶ 16.

{7} Plaintiff bases her argument on dicta in *Rupp* that states:

> 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.

Id. ¶ 21. Plaintiff argues that the dismissal was not appropriate because it "eviscerated her cause of action" and did not consider less drastic alternatives. She contends that the district court should have followed the general policy of deciding cases on their merits. *See Universal Constructors, Inc. v. Fielder,* 118 N.M. 657, 659–60, 884 P.2d 813, 815–16 (Ct.App.1994).

{8} Plaintiff's argument distorts *Rupp.* In *Rupp,* the defendants did not raise their argument concerning the time of the filing of the MRC until fours years after the MRC

decision. *Rupp,* 2002–NMCA–023, ¶¶ 7, 19, 131 N.M. 646, 41 P.3d 914. We stressed that the plaintiff's early filing of the complaint did not prejudice the defendants, who were "in no worse position now than they would have been" if the plaintiff had filed her complaint after the MRC decision. *Id.* ¶ 19. In this case, the district court ordered its dismissal when the stay had been in effect for more than eight months. The surgery at issue had occurred more than four years and two months earlier. Defendant argued at the hearing on the motion to dismiss that he was prejudiced by the delay. *Rupp* does not contemplate the type of inaction that occurred in this case.

{9} Moreover, the district court dismissed the complaint without prejudice, as proposed in *Rupp. See id.* ¶ 21. After the dismissal without prejudice, Plaintiff was unable to pursue her claim because the statute of limitations had expired. Although the dismissal without prejudice had the final effect of permanently dismissing the case, the district court had already utilized an alternative to dismissal by entering the stay. The district court has the inherent authority, in its discretion, to "dismiss a case for failure to prosecute when it is satisfied that plaintiff has not applied due diligence in the prosecution" of the case. *Prieto v. Home Educ. Livelihood Program,* 94 N.M. 738, 742, 616 P.2d 1123, 1127 (Ct.App.1980). As we have discussed, the stipulation did not give Plaintiff the unbridled discretion to elect when to submit an application to the MRC. Plaintiff did not take any action after the stay to pursue her claim. The district court did not abuse its discretion, or disregard *Rupp,* by dismissing the complaint.

Conclusion

{10} The district court did not abuse the discretion entailed within its inherent authority or the requirements of *Rupp* in dismissing this case. We affirm its order.

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

SUTIN and KENNEDY, JJ., concur.

2005-NMCA-068

114 P.3d 306

H–B–S PARTNERSHIP, a New Mexico general partnership; Arnold Horwitch; Burton Horwitch; Elliott Horwitch; and Stuart C. Sherman, Plaintiffs–Appellants/Cross–Appellees,

and

NZ EDP, Ltd. Co., a New Mexico limited liability company, Intervenor,

v.

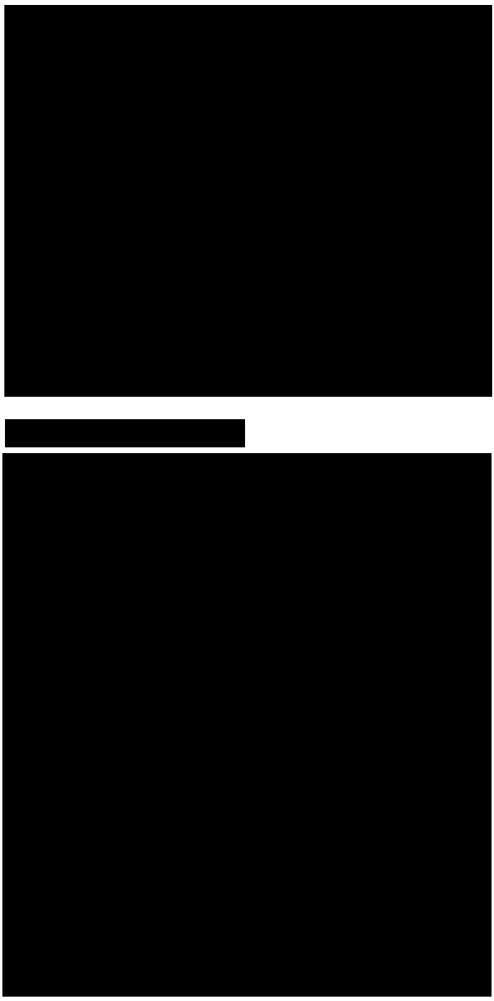
AIRCOA HOSPITALITY SERVICES, INC., a Delaware corporation, Defendant–Appellee/Cross–Appellant.

No. 23,746.

Court of Appeals of New Mexico.

April 4, 2005.

Certiorari Denied, No. 29,186, May 31, 2005.



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OPINION

BUSTAMANTE, Chief Judge.

{1} This case involves the interpretation of a right of first refusal (ROFR) provision in a limited partnership agreement. The district court decided the ROFR was triggered when the corporate great-great-grandparent of one of the general partners was sold in a stock transfer transaction. Defendant appeals the district court's basic decision that the ROFR was triggered. Plaintiffs and Defendant below both appeal from the district court's calculation of the price required to exercise the ROFR. We affirm.

FACTS AND PROCEEDINGS

{2} We first provide an overview of the relevant corporate and partnership structures.[1] The El Dorado Partnership (EDP) is a New Mexico limited partnership formed in 1984 for the purpose of acquiring an interest in the El Dorado Hotel (the Hotel) in Santa Fe, New Mexico. EDP owns a 25% interest in another partnership, Guardian Santa Fe Partnership, which actually owns the Hotel. EDP has three partners: Defendant Aircoa Hospitality Services, Inc. (AHS) is a Delaware Corporation and owns a 40% general partnership interest. NZ EDP, Ltd. Company (NZ) is a New Mexico limited liability company which also owns a 40% general partnership interest. Not a party to the action initially, NZ intervened as a Plaintiff seeking to enforce the ROFR. Plaintiff H–B–S Partnership (H–B–S) is a New Mexico limited partnership which in turn owns a 20% limited partnership interest in EDP. H–B–S was the original plaintiff in this action.

{3} The issues in this case revolve around the ROFR language of the EDP Partnership Agreement. The relevant provisions of the agreement provide:

> 9.1 *Offer to Other Partner.* Except as provided in section 9.6, if at any time a Partner proposes to sell, assign, or otherwise dispose of all or any part of his interest in the Partnership, such Partner ("Offeror") shall first make a written offer to sell such Partnership interest to the other Partners on the same terms and conditions on which the Offeror proposes to transfer the Partnership interest. Such offer shall state the name of the proposed transferee and all the terms and conditions of the

1. As a visual aid to understanding, we attach two organizational charts. Appendix 1 shows the corporate/ownership structure just prior to the sale. Appendix 2 depicts the structure after the sale.

proposed transfer, including the price to the proposed transferee, and shall be accompanied by a copy of the offer from the proposed transferee if available.

9.2 *Acceptance of Offer.* The other Partners shall have the right for a period of 30 days after receipt of the offer from the Offeror to elect to purchase all of the Partnership interest offered. In exercising their right to purchase such Partners may divide the offered interest in any manner to which they all agree and in the absence of agreement, the offered interest shall be divided among such other Partners in such group in proportion to their relative Sharing Ratios; provided, however, the right to purchase shall not be effective unless such Partners elect to purchase all of the Partnership interest offered. To exercise its right to purchase, a Partner shall give written notice to the Offeror. Upon exercise of a right to purchase and provided the right is exercised with respect to all of the Partnership interest offered, the purchase shall be closed and payment made on the same terms as applicable to the offer received by the Offeror from the proposed transferee.

9.3 *Failure to Accept Offer.* If the other Partners do not elect to purchase all of the Partnership interest offered in accordance with the provisions of sections 9.2, the Offeror may transfer the offered interest to the proposed transferee named in the offer to the other Partners. However, if that transfer is not made within 90 days after the end of the 30 day period provided for in section 9.2, a new offer shall be made to the other Partners and the provisions of this Article 9 shall again apply.

9.4 *Cash Equivalents.* If the proposed offer under section 9.1 is for consideration other than cash or cash plus deferred payments of cash, the purchasing Partners may pay the cash equivalent of such other consideration. The Offeror and the purchasing Partners shall attempt to agree upon a cash equivalent of such other consideration. If they cannot agree and such disagreement continues for a period of ten business days, any of such Partners may, by five days' written notice to the others, initiate arbitration proceedings for determination of the cash equivalent in Denver, Colorado, according to the rules and practices of The American Arbitration Association with respect to a sole arbitrator. The arbitrator shall determine the cash equivalent without regard to income tax consequences to the Offeror as a result of receiving cash rather than other consideration. The purchasing Partners may give notice of election to purchase to the Offeror within ten days after the arbitrator's decision, if they choose to purchase the interest.

9.5 *Direct and Indirect Transfers.* For purposes of this agreement, restrictions upon the sale, assignment or disposition of a Partner's interest shall extend to any direct or indirect transfer including, without limitation: (a) an involuntary transfer such as a transfer pursuant to a foreclosure sale; (b) a transfer resulting by operation of law, or as a result of any merger, consolidation or similar action; and (c) the transfer of an equity interest in a Partner which is a corporation, partnership or other entity if the transfer of the equity interest results in a change in control of such corporation, partnership or other entity. The transfer of a limited partner interest in a Partner which is a limited partnership shall not be considered to result in a change in control of such limited partnership for purposes of the prior sentence.

9.6 *Permitted Transfers.* Notwithstanding the above, the following transfers shall be permitted without first offering the interest to the other Partners or otherwise complying with this Article 9.

(a) A transfer of all or a portion of a Partner's interest in the Partnership to (i) any partner of a Partner who or which has such status as of the date of this Agreement, including any shareholders or partners of such partner, (ii) an affiliate of such Partner, (iii) a limited or general partnership, provided that the transferor is a general partner of such transferee partnership and such transferee partnership shall be subject to the restrictions on transfer provided in this agreement; (iv) a revocable living trust established by a Partner who is

a natural person; (v) the spouse, parents, and lineal descendants of the transferor and any partnership or corporation in which such persons own all of the equity interest; or (vi) the estate, beneficiaries and legatees of a Partner who is a natural person or any partner of a Partner;

. . . .

(c) Horwitch shall have the right to sell all or any part of its interest in the Partnership to such transferees as it determines; provided that such sales are made as part of a single offering pursuant to Regulation D of the Securities Act of 1933, as amended, and sales are made to not more than seven "nonaccredited" investors. . . .

(d) No permitted transferee of a Partner under this section 9.6 shall be admitted as a Partner in the partnership without the written consent of all of the remaining General Partners. . . .

{4} Article 2.7 provides:

2.7 *Affiliate.* An "affiliate" of a Partner is a person or entity that controls, is controlled by or is under common control with such Partner. A person or entity that has a 20 percent or more interest, directly or indirectly, in another person or entity shall be conclusively deemed to be a controlling person.

{5} H–B–S's complaint arose when AHS's corporate great-great-grandparent was sold. As reflected in Appendix 1, AHS was the last in a chain of wholly-owned subsidiaries beginning with Richfield Holding Corporation I (RHC I). The identities of the purchasing entity (or entities) is not germane to our analysis. Suffice it to say that after the sale RHC I was wholly owned by a new corporate parent and AHS acquired a new great-great-great-grandparent, CDL Hotels, Inc. (CDL). *See* Appendix 2. The district court detailed the sale in its findings of fact and none of the parties question its ruling in this regard.

{6} The terms of the proposed sale were first outlined in a Memorandum of General Agreement in which the seller proposed to sell a 100% equity interest in RHC I "including its interest in . . . the assets more specifically detailed in Schedule 'A'." Among the scheduled assets was a "40% equity interest in the El Dorado Partnership, Limited." The final purchase agreement included a schedule of all entities being transferred including the seller's interest in EDP. One of the "Minimum Condition[s]" to the final purchase agreement was receipt of a "Consent to transfer of Shares and [W]aiver of Right of First Refusal" from William Zechendorf, Jr. and "Horwich [sic] Brothers Number Three." Zechendorf and the Horwitch Brothers Number Three (a general partnership) were the named partners in the Agreement and Certificate of Limited Partnership for EDP. They are the predecessors in interest to H–B–S and NZ.

{7} H–B–S was first informed of the proposed sale by a "Form of Consent of [EDP]," which it received from AHS on December 2, 1999, for "review and comment." The relevant part of the consent form read:

D. The Outside Partners [HBS and NZ EDP] understand that certain indirect owners of [AFS] plan to transfer their interests in [AFS] to CDL Hotels USA, Inc. or its affiliates ("*CDL*") . . . [and] the Outside Partners hereby agree as follows:

. . . .

(c) The right of first refusal granted to the Outside Partners under Article 9 of the Partnership Agreement, to the extent it may be construed to apply, is hereby expressly waived in connection with the transfers of interests described above.

H–B–S demanded AHS provide it with a written offer on the same terms and conditions as required by Articles 9.1 and 9.5 of the EDP Agreement, and notified AHS that it fully intended to enforce the ROFR. AHS denied that it was selling "or otherwise disposing of its interest" in EDP or that any interest of its owner, Richfield Hospitality Services, Inc. (RHS), was being transferred. On December 15, 1999, H–B–S was advised that "the parties intend to go forward with the closing of the [RHC I] transaction . . . subject to any right of first refusal H–B–S may have." The sale closed on December 17, 1999.

{8} On that same day, H–B–S filed its complaint seeking actual and punitive dam-

ages, as well as specific performance for the alleged breach of partnership agreement and breach of the implied covenant of good faith and fair dealing. NZ was permitted to intervene. It sought a declaratory judgment, specific performance for breach of partnership agreement, and damages for AHS's breach of fiduciary duty and breach of the good faith duty.

{9} The case was tried to the bench. The parties testified regarding the effect of the sales transaction. After the transfer, the purchaser replaced many of the sold entity's officers and directors; but the same officers and directors served in each entity from RHC I down to and including AHS. The controller of the RHC group of affiliates reported directly to the new owner. The new owner supervised the United States hotel operations, including decisions on budgeting, capital spending, investments, sales and purchases, as well as decisions for the hiring and firing of executive officers, and dispute resolutions.

{10} Each side's accounting expert disputed the starting point for the valuation of AHS's 10% interest in the Hotel.[2] H–B–S's expert, Thomas Burrage, relied on an appraisal performed by PKF Consulting, a firm that the seller and new owner agreed would value the underlying assets involved in the transfer. He testified that the exercise price of $5.3 million for the interest should be based on the market value of the Hotel's real and personal property. AHS's expert, Carl Alongi, opined that the exercise price should be based on the Hotel's business value, the real and personal property plus the value of the contract for the management of the hotel, which PKF Consulting appraised at $5.9 million. Alongi made various adjustments to this figure to arrive at a net exercise price of $3,967,977.

{11} The district court entered judgment for H–B–S and NZ against AHS for specific performance. Relying on Alongi's calculations, it set the exercise price at $3,967,977, less distributions from EDP to AHS since trial, and interest from April 22, 2002. In determining the exercise price, the court denied AHS's request to credit it for money paid to EDP after the closing in settlement of another lawsuit between the partners. The district court dismissed the breach of good faith duty, breach of fiduciary duty, and punitive damages claims. This appeal followed. We only concern ourselves with the right of first refusal and valuation questions, as the dismissal of the other claims is not appealed by any party.

DISCUSSION

I. The Right of First Refusal

{12} The first issue is whether the district court erred in concluding that the sales transaction triggered the ROFR. At the trial's end, the district court observed that the contract was unambiguous and that the ROFR provision was intended to be broadly applied under the language of Article 9.5 to any direct or indirect transfer. Applying that intent to the corporate structure involved (a "single shareholder really at each level up through the level of the sale"), the court indicated that "a reasonable reading of the contract, keeping in mind the purpose that was sought to be protected by this language, indicates that this type of transaction is covered." The district court entered the following findings on this issue:

> 12. Prior to December 17, 1999, Regal International and its affiliates indirectly owned more than a twenty percent interest in AHS. AHS was a wholly owned subsidiary of Regal International and its affiliates.
>
> . . . .
>
> 15. The [CDL] transaction closed on December 17, 1999.
>
> 16. After December 17, 1999, Millennium & Copthorne and its affiliates indirectly owned more than a twenty percent interest in AHS. AHS was a wholly owned subsidiary of Millennium & Copthorne and its affiliates.
>
> . . . .
>
> 18. The Form of Consent indicated that the "indirect owners" of AHS intended to transfer their interest in AHS to CDL.

2. The 10% interest is based on the 40% equity interest AHS held in EDP which in turn held a 25% interest in Guardian Santa Fe Partnership, the actual owner of the Hotel.

. . . .

26. The transaction between Regal International and CDL did not result in a direct transfer of the interest of AHS in EDP; the transfer of the interest in EDP was indirect.

{13} Based on these findings, the district court concluded:

3. All provisions of the EDP Agreement at issue in this case are unambiguous.

4. The EDP Agreement creates a right of first refusal as to the direct or indirect transfer of the partnership interest.

5. The right of first refusal is effectuated when there is an indirect transfer of an equity interest in a Partner which is a corporation and that transfer results in a change in control of such corporation.

6. The CDL transfer triggered the right of first refusal under the EDP Agreement.

7. The sale of Regal International's equity interest in AHS was an indirect transfer of the equity interest of AHS in EDP.

. . . .

11. Plaintiffs are entitled to specific performance of their right of first refusal.

{14} AHS agrees that the ROFR provisions are unambiguous. The focus of their argument is that there was no "transfer" of its stock or its partnership interest in EDP that could trigger the ROFR provisions, as a matter of law. Arguing for a narrow construction of the ROFR provision because it is a restraint on the alienation of stock, AHS gives three reasons for reversal. First, it urges us to apply the rule that the sale of stock in a subsidiary is not a sale of the subsidiary's assets; when a subsidiary is sold by a parent, the subsidiary retains ownership of its assets. *See Capital Parks, Inc. v. S.E. Adver. & Sales Sys., Inc.*, 30 F.3d 627, 629 (5th Cir.1994); *Engel v. Teleprompter Corp.*, 703 F.2d 127, 131 (5th Cir.1983); *LaRose Mkt., Inc. v. Sylvan Ctr., Inc.*, 209 Mich.App. 201, 530 N.W.2d 505, 507 (1995); *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 644–45 (Tex.1996). AHS argues that, since only stock in its corporate great-great-grandparent was sold, the transfer did not affect any of that corporation's assets or the assets of its subsidiaries, down to and including its ownership interest in AHS and its interest in EDP. As such, AHS argues, the district court erred in finding that the new owner indirectly owned more than a 20% controlling interest in AHS and that the sale resulted in an indirect sale of any equity interest in AHS or an indirect transfer of its interest in EDP.

{15} Second, although it conceded at oral argument that there was a change of control, AHS contends that since there was no transfer of any equity interest or ownership, a change of control by itself cannot trigger the ROFR. *See Capital Parks, Inc.*, 30 F.3d at 629; *Engel*, 703 F.2d at 135. AHS construes Article 9.5 to require a showing that there was a transfer of a Partner's interest before the issue of control becomes relevant.

{16} Third, AHS argues that the district court disregarded the doctrine of corporate separateness in finding that the ROFR applied to a corporate structure involving a "single shareholder really at each level up through the level of the sale." It contends that "[m]ere control by the parent corporation is not enough to warrant piercing the corporate veil. Some form of moral culpability attributable to the parent . . . is required." *Scott v. AZL Res., Inc.*, 107 N.M. 118, 122, 753 P.2d 897, 901 (1988). AHS asserts that no evidence of improper purpose was shown warranting a piercing—or "reverse piercing"—of five levels of corporations in order to hold AHS liable for the sale of the stock of a remote parent.

{17} H–B–S responds that the corporate veil theory is a false issue, since AHS agreed to be bound by the ROFR in the event 20% or more of its stock was indirectly transferred to an upstream corporation. H–B–S argues that since it seeks to impose liability on AHS alone for its contractual and partnership promises and commitments, no veil piercing or reverse piercing is required.

{18} H–B–S focuses on Article 9 of the partnership agreement, which it argues "was drafted broadly to discuss [transfers] that are not permitted and narrowly to discuss the transactions that are permitted." H–B–

S concedes that Article 9.5 required it to prove: (1) the seller's intent to transfer its equity interest in AHS, (2) that AHS was a corporation or a partnership, and (3) that the transfer resulted in a change of control of AHS. According to H–B–S, a change of control was established in three ways: under the express terms of the partnership agreement; under Generally Accepted Accounting Principles or "GAAP"; and from direct evidence of a change in AHS's officers and directors, along with a change in the ultimate authority to make financial and employment decisions.

{19} Appellate courts review a district court's interpretation of an unambiguous contract de novo. *Campbell v. Millennium Ventures, LLC,* 2002–NMCA–101, ¶ 15, 132 N.M. 733, 55 P.3d 429. Contracts are interpreted to "give force and effect to the intent of the parties." *Medina v. Sunstate Realty, Inc.,* 119 N.M. 136, 138, 889 P.2d 171, 173 (1995). We consider the plain language of the relevant provisions, giving meaning and significance to each word or phrase within the context of the entire contract, as objective evidence of the parties' mutual expression of assent. *Id.; Montoya v. Villa Linda Mall, Ltd.,* 110 N.M. 128, 130, 793 P.2d 258, 260 (1990). A reasonable construction of the usual and customary meaning of the contract language is favored. *Id.*

{20} We agree with AHS and the district court that the ROFR provisions are unambiguous; however, we reject AHS's argument in favor of a narrow construction of its terms. AHS urges us to apply a strict or narrow construction of the ROFR on the theory that all restrictions on the alienation of corporate stock should be strictly construed because they are disfavored. *See Kerr v. Porvenir Corp.,* 119 N.M. 262, 264, 889 P.2d 870, 872 (Ct.App.1994). We would be more apt to adopt AHS's position if the ROFR here was similar to that examined in *Kerr,* but it is not. Rather, the ROFR here is essentially identical to the provision we enforced in *Lorentzen v. Smith,* 2000–NMCA–067, ¶¶ 17–18, 129 N.M. 278, 5 P.3d 1082. In *Lorentzen,* we accepted the proposition that a right of first refusal should not be deemed a restraint of alienation as the term is used in the Restatement of Property so long as the provision describes a reasonable price and sets a reasonable time for exercise of the right. *See id.;* Restatement (Second) of Property: *Donative Transfers* § 4.4 cmt. a (1983). Here, Article 9 of the partnership agreement does no more than give other partners a chance for thirty days to buy, for the same price, what the selling partner is already willing to sell to a third party. We see no improper restraint in this arrangement. As such, we see no reason to construe this contract any differently than any other agreement.

{21} The bare language of Article 9 in the Partnership Agreement is extremely broad. In fact, we cannot imagine how the language of a ROFR could be broader. The purchase option is triggered under Article 9.1 if "a Partner proposes to sell, assign, or otherwise dispose of all or any part of his interest in the Partnership." As explained in Article 9.5, the ROFR is triggered by "any direct or indirect transfer including, without limitation: .... the transfer of any equity interest in a Partner which is a corporation, ... if the transfer ... results in a change in control of such corporation." Use of the phrases "any direct or indirect transfer" and "without limitation" clearly evinces a desire by the parties to maximize the reach of the ROFR. Similarly, reference to "the transfer of any equity interest in a Partner" indicates an intent to include changes in stock ownership in partners by sale. This intent is made all the more clear given that transfers by "merger, consolidation or similar action" are separately covered in Article 9.5(b). We agree with the district court that the language and structure of Article 9.5 evince an intent that the ROFR was to be triggered by all changes in ownership of AHS and AHS's corporate body.

{22} AHS concedes that a change in control occurred as a result of the sale, but insists that a "transfer" has not—perhaps cannot—be proven in this case because change of control has no effect on ownership of the subject entity. We agree with AHS that Article 9.5 required H–B–S to show both a transfer and a change of control. We disagree that a "transfer" within the meaning of this ROFR does not include a stock sale

by a remote parent corporation. "Transfer" is itself broadly defined by Article 9.5 to encompass "any direct or indirect transfer" of an equity interest by or in a partner "without limitation." "Transfer" must be interpreted within the context of the ROFR. Given the broadness of the ROFR in general, it must comport with the spirit of the provision to interpret "transfer" broadly. This interpretation of the word is consonant with the general legal definition of "transfer." Interestingly, the concepts of transfer and change of control are inter-related. Black's Law Dictionary defines the verb "transfer" as, "1. To convey or remove from one place or one person to another; to pass or hand over from one to another, esp. to change over the possession or control of." *Black's Law Dictionary* 1536 (8th ed.2004). Black's defines the noun "transfer" as "1. Any mode of disposing of or parting with an asset or an interest in an asset.... The term embraces every method—direct or indirect ... of disposing of or parting with property or with an interest in property." *Id.* at 1535. Thus, the general legal definition of "transfer" is quite broad, and there is no reason why it could not be applied to the sale of stock of the remote corporate parent of a series of wholly-owned subsidiaries in the context of this ROFR and this case.

{23} Since AHS is a wholly-owned subsidiary, a transfer of its stock by its parent would constitute a direct transfer of an "equity interest in a Partner" within the meaning of the ROFR. Transfer of the stock of AHS's corporate parents necessarily constitutes an indirect transfer of an "equity interest *in* a Partner." Since the restriction is "without limitation," the ROFR is triggered regardless of whether the transaction is two or even five tiers removed, so long as it results in a change of that control of AHS. Again, AHS concedes control changed after the sale.

{24} The broad language of the ROFR reflects the common purpose of preferential purchase rights in partnership agreements "to prevent the intrusion of an uninvited outsider." *Oregon RSA No. 6, Inc. v. Castle Rock Cellular of Oregon Ltd. P'ship,* 840 F.Supp. 770, 775 (D.Or.1993). Comparing the transfers permitted by the ROFR confirms an intent to bind the vertical corporate structure of AHS. Article 9.5 restricts transfers that are involuntary, by operation of law, by merger, and by direct or indirect sales of stock in a partner that is a corporation or partnership. But Article 9.5 does not restrict a "transfer of a limited partner interest in a Partner which is a limited partnership." Moreover, transfers to "insiders" are expressly permitted under Article 9.6: with the consent of the other partners, a partner can transfer his interest to a partnership in which he is a partner, or a corporate partner can transfer its interest to an affiliate (a subsidiary or parent corporation as defined in Article 2.3 of the partnership agreement). The intent of these provisions is to prevent a transfer of interest to a non-affiliate, directly or indirectly, without the partners' consent. That undesired scenario is precisely what occurred in the sale of AHS's corporate parents. The preliminary and final sales agreements listed AHS's interest in EDP and the Hotel as assets being sold. The practical effect of this transaction was that H–B–S and NZ had a new controlling partner. "[A] sale is made for purposes of a right of first refusal when there is a transfer for value of a significant interest in the subject property to a stranger who thereby gains substantial control over the subject property." *Williams Gas Processing–Wamsutter Co. v. Union Pac. Res. Co.,* 25 P.3d 1064, 1072 (Wyo.2001) (internal quotation marks and citations omitted). This definition mirrors Article 9.5's requirements, and this transaction met those requirements.

{25} We, of course, recognize the general rule that a sale of a subsidiary by a parent corporation is not a sale of the subsidiary's assets, unless the assets are actually transferred. *Capital Parks, Inc.,* 30 F.3d at 629; *Engel,* 703 F.2d at 131; *LaRose Mkt., Inc.,* 530 N.W.2d at 508; *Tenneco Inc.,* 925 S.W.2d at 644–45. Our ruling does no violence to that rule. The dispositive factor in the cases relying on this general rule is the actual terms of the particular ROFR provisions involved. In every instance where the plain terms of the contract limited the ROFR to sales of assets, the courts narrowly interpreted the right and applied the general rule

so that the ROFR was not triggered. *See Capital Parks, Inc. v. Southeastern Adver. & Sales Sys, Inc.*, 864 F.Supp. 14, 15–16 (W.D.Tex.1993) (order), *aff'd by Capital Parks, Inc.*, 30 F.3d at 628 (holding that ROFR for the "purchase of all the . . . stock or substantially all of the operating assets of [defendant's] wholly-owned subsidiary" was not triggered under the provision's plain language where shareholders proposed to sell parent to outside corporation because the right was triggered *only* by an offer to purchase the subsidiary's stock or assets (internal quotation marks omitted)); *Engel*, 703 F.2d at 128, 130, 132, 134–35 (finding that a merger between the surviving parent corporation of defendant subsidiary and an outside corporation was not a transfer of the subsidiary's stock under the plain words of the contract which limited the ROFR to instances when "stockholders propose to sell or otherwise dispose of all or any part of his shares . . . of the corporation"); *Tenneco Inc.*, 925 S.W.2d at 642, 644, 646 (holding that a sale of stock in a corporation to an outsider did not trigger shareholders' purchase option since the option was limited to the sale of an "Ownership Interest" which referred to corporate assets; further, the option did not contain a "change-of-control" provision which the court stated would have restricted sales of stock); *LaRose Mkt., Inc.*, 530 N.W.2d at 507–08 (deciding that the sale of a corporate lessor's stock was not a "sale" of real property triggering lessees' ROFR to purchase the property where plain language limited the option to a " 'bona fide offer to purchase [the] premises' ").

{26} If the ROFR in this case did not include Article 9.5, these cases would apply with full force and we would hold that the ROFR had not been triggered. Article 9.1 speaks generally of a partner selling its "interest in the Partnership." By itself this language refers only to assets and does not readily invoke coverage of sales of the seller's corporate family. Such general language would most appropriately be interpreted in accordance with the general rule AHS relies on. But the ROFR is not limited to Article 9.1, and the addition of Article 9.5 makes other case law more apropos.

{27} In *Continental Cablevision v. United Broadcasting Co.*, the agreement broadly granted the plaintiff

> a [ROFR] to acquire all or any part of the assets . . . (the "System Assets"), [and] a [ROFR] to acquire the shares of stock of [defendant] constituting its controlling capital stock interest (the "Control Stock") in each instance before the System Assets or any shares of the Control Stock may, *directly or indirectly*, be sold or transferred to any third person or persons.

873 F.2d 717, 718 (4th Cir.1989) (emphasis added). The appellate court agreed with the district court that "it would be 'illogical' not to consider a transfer of the parent as an indirect transfer of the wholly-owned subsidiary's controlling capital stock interest[,]" where the object of the agreement was as much affected by an indirect sale of a parent's stock in its subsidiary as a direct sale of stock by the subsidiary. *Id.* at 719.

{28} We find *Continental Cablevision* persuasive in the context of this case. The contract terms here control our decision. In light of the broad language of Article 9.5, expressly restricting both indirect and direct transfers of equity interests, and the clear intent to restrict corporate sales to outsiders, we conclude that the parties bargained for a broader ROFR than parties to whom the general rule has been applied. The general rule will hold true in most cases, but can be trumped by contract language. "New Mexico . . . has a strong public policy of freedom to contract that requires enforcement of contracts unless they clearly contravene some law or rule of public morals." *Berlangieri v. Running Elk Corp.*, 2003–NMSC–024, ¶ 20, 134 N.M. 341, 76 P.3d 1098 (internal quotation marks, citation, and emphasis omitted). We hold that this transaction triggered the ROFR under the express terms of Article 9.5. Because we hold that the parties are bound by their agreement, the corporate separateness doctrine is inapplicable.

II. The District Court's Valuation is Reasonable and is Supported by Substantial Evidence

{29} At the trial's end, the district court advised the parties that it expected to grant

H–B–S specific performance for breach of a contract. The court explained that since AHS failed to abide by the terms of the agreement, it was difficult to determine the purchase price of its interest. The only reasonable approach in the district court's view was to base the exercise price on the parties' valuation of the underlying assets, the Hotel. The court agreed with AHS's expert, Alongi, that the starting point for the valuation was $5.9 million or 10% of the "business value" of the Hotel, rather than with H–B–S's expert Burrage who opined that the market value of the real and personal Hotel property reflected the actual value assigned by the parties. The court also agreed with Alongi's adjustments and set the exercise price at $3,967,977.

{30} In its findings, the district court adopted this view and elaborated:

> 23. AHS did not make an offer to sell its interest in EDP to the other partners of EDP at any time at or near the closing of the transaction involving Regal and CDL.
>
> 24. AHS did not provide H–B–S with information regarding the terms and conditions of the CDL transaction prior to closing the transaction.
>
> 25. The Securities Purchase Agreement sets forth the terms of the transaction....
>
> 26. The transaction ... did not result in a direct transfer of the interest of AHS in EDP; the transfer of the interest in EDP was indirect.
>
> 27. Prior to closing, Millennium & Copthorne commissioned the accounting firm of PKF Consulting to value the hotel properties.
>
> 28. Both Regal ... and CDL used the appraisals performed by PKF Consulting to value the interests sold and to calculate the aggregate purchase price.
>
> 29. Through the use of the appraisals and certain adjustments, it is possible to determine the value of the interest of AHS in EDP to the buyer in the CDL transaction. The value of the interest to the buyer represents the best assessment of the actual terms and conditions of the sale for purposes of the EDP Agreement.
>
> 30. As of the time of trial, the value of the interest of AHS in EDP to the buyer was $3,967,977.00 less any distributions received by AHS subsequent to trial. The calculation of this value is set forth in Exhibit 101 and in the testimony of [AHS's expert,] Carl Alongi.
>
> 31. The proper exercise price under the EDP Agreement is $3,967,977.00 less any distributions received by AHS since trial plus interest at 8 3/4% from April 22, 2002.

{31} H–B–S appeals the court's decision to adopt the seller's post-closing valuation of the interest purchased as a starting point for determining the exercise price. It maintains that the purchase accounting method is contrary to the express terms of Article 9.1, which require a partner to offer its shares to partners on "the same terms and conditions it proposed" to sell the interest, *before* the transfer occurs. According to H–B–S, Article 9.1 and general ROFR law dictate that the exercise price should be the market price; the price set by the buyer and seller at the time the sale is negotiated. It contends that the best and only evidence of how the parties valued the property is: (1) the formula used to calculate the aggregate purchase price set forth in Section 2.2 of the Purchase Agreement; (2) PKF Consulting's appraisal of the real property value of the Hotel; and (3) the General Accounting Memorandum, "memorializing the actual intentions of the Buyer and Seller at the time of their negotiations" to base the purchase price on the fair value of the "real estate." H–B–S's expert opined that the appraisal for the real property was $5.3 million. Adding the value of the management contract held by the seller created the business value figure of $5.9 million, which was the starting point for valuation put forth by AHS's expert. Although the buyer acquired the Hotel and the management contract, H–B–S urges that the management contract should not be included in the exercise price, since it has no ROFR in the contract, and it is of no value to H–B–S.

{32} On the contrary, AHS urges that H–B–S has not shown how the district court abused its discretion in weighing the evidence and fashioning an equitable remedy.

AHS argues that the record contains no evidence of the actual negotiations or terms of the proposed sale indicating the value of its partnership interest in EDP. According to AHS, the evidence shows that the buyer booked the value of the 10% interest in the Hotel at $5.9 million and accorded the management contract no separate value. As such, it defends the district court's equitable discretion in determining that this was a fair starting point.

{33} Urging de novo review, H–B–S asserts that the district court committed a legal error in applying a purchase accounting standard rather than a fair market value standard as required by the contract. We disagree. There is no contract question. As all parties agree, the EDP contract dictates that, the "Partner ("Offeror") shall first make a written offer to sell such Partnership interest to the other Partners on the same terms and conditions on which the Offeror proposes to transfer the Partnership interest." Because AHS did not comply with the ROFR, there is no direct evidence of the value assigned to the Hotel at the time of the offer. When the district court ruled, it was faced with predictably conflicting evidence. From that evidence the district court had to fashion an equitable remedy. The district court decided that "[t]he value of the interest [in the Hotel] to the buyer represents the best assessment of the actual terms and conditions of the sale for purposes of the EDP Agreement." In this context, valuation methodology is not explicitly controlled by the ROFR. The district court had leeway in reconstructing the "terms and conditions" on which AHS's interest in EDP was transferred. This does not present a legal question of contract interpretation. Rather, it is an issue of discretion and substantial evidence.

{34} We give broad deference to the district court when interpreting and weighing the evidence. *See McCauley v. Tom McCauley & Son, Inc.*, 104 N.M. 523, 527, 724 P.2d 232, 236 (Ct.App.1986). We "review the record to determine whether the evidence supports the court's findings, and apply the substantial evidence test." *Id.* In reviewing for substantial evidence, we view the evidence in the light most favorable to the prevailing party and disregard evidence or inferences to the contrary. *Weidler v. Big J Enters., Inc.*, 1998–NMCA–021, ¶ 30, 124 N.M. 591, 953 P.2d 1089. "Substantial evidence is 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).

{35} The district court's decision that Alongi's testimony was the best assessment of the contract terms is supported by substantial evidence. In the final Purchase Agreement, the seller expressly agreed to sell its interests for a purchase price based on a post-closing valuation of the underlying assets, and in accordance with GAAP. Under Section 2.2 of the Purchase Agreement, the parties agreed that the preliminary purchase price was "$640,000,000[ ] *plus* Adjusted Working Capital plus the Intercompany Note Amount" but they also agreed that the final purchase price was "subject to post-Closing adjustment as set forth in Section 2.6." Under Section 2.6, the buyer was to prepare and deliver to the seller, subject to its objections and in compliance with GAAP, an audited balance sheet, adjusted working capital computation, an audited income statement for the entities as of September 30, 1999, and a draft income statement through closing. Section 2.11 of the Purchase Agreement provided, "[t]he Purchase Price shall be allocated using a method which shall be reasonably agreed to among the Parties and consistent with the appraisal report of PKF Consulting and all Parties shall file all relevant Tax Returns in a manner which shall be consistent with such allocation."

{36} In accordance with the Purchase Agreement, the buyer's parent company retained PKF Consulting to prepare an appraisal of the Hotel. The appraisal set the market value in the real and personal property at $53.1 million and the market value inclusive of business operations at $58.9 million. The seller's 10% share was $5.3 and $5.9 million, respectively.

{37} Also in accordance with the Agreement, an accounting firm (KPMG) performed a post-closing audit and prepared a "Purchase Accounting Memo." An accounting

partner at KPMG who audited the buyer's valuation testified that the Purchase Accounting Memo described how the buyer allocated the purchase price. It indicates that

> M & C [buyer] began with the purchase price and assigned values to the non-hotel assets purchased (ie [sic] the management company assets, investments accounted for under the equity method of accounting, current assets, liabilities and other identifiable assets & liabilities) with the balance of the purchase price assigned to the hotel assets purchased (land, building, fixtures).

KPMG found that the buyer assigned no value to the management company and contracts since it was a break-even business and the contracts were cancelable with notice and without penalty.

> M & C has represented that they did not pay any amounts for these businesses and the purchase price was determined based on the fair value of the real estate. From M & C's point of view, they have an existing management company infrastructure in place and did not need or want this business when they acquired it from Regal. They had to acquire this business to get the deal done with Regal.

The buyer assigned a value of $3,859,000 to its investment in the Hotel (10% interest). For auditing purposes, KPMG recalculated the seller's assigned value using PKF Consulting's $5.9 million appraisal and determined that the buyer's "assigned values appear reasonable."

{38} In addition, the buyer's senior vice-president of finance who participated in the purchase price allocation for the Hotel interest, testified that the estimated fair market value and purchase price of the interest was $5.9 million. The buyer's documents list $5.9 million as its valuation of EDP's interest. Significantly, Alongi's adjusted exercise price through December 17, 2001, which started with the $5.9 million, was $3,854,821, a value that is strikingly close to the buyer's own "assigned value" as of December 31, 2000.

{39} Although the isolated statement that the buyer bought "only the real estate" lends support to H–B–S's argument for the $5.3 million exercise price, the Purchase Accounting Memo, when read in its entirety, the supporting documents, and the non-expert and expert testimony support the district court's conclusion that the best assessment of the actual terms and conditions of the transaction is that the purchase price for the Hotel was based on its business value of $5.9 million. Aside from the H–B–S expert's use of the $5.3 million price taken from the PKF Consulting appraisal, H–B–S presented no other evidence supporting the $5.3 million exercise price. In fact, the sole witness for the $5.3 million price conceded that starting at $5.9 in the valuation of a 10% interest in the Hotel was not unreasonable.

III. $695,638.27 "Capital Contribution" for Settlement

{40} In determining the exercise price, the district court declined AHS's request to credit it $695,638.27 paid to EDP and distributed to H–B–S pursuant to a settlement agreement resolving a separate lawsuit between the parties. The district court deemed it inconsistent to factor in these funds and determined that it was impossible to value the funds which, in any event, "would only be available at dissolution."

{41} AHS argues that it is entitled to be reimbursed for any capital imbalances under Article 6.2 of the EDP Agreement. Since settlement occurred after closing, AHS contends that the buyer was actually liable for the amount and that money was included in the purchase price. According to AHS, fairness dictates that H–B–S should not be paid twice. AHS cites no evidence that the buyer agreed to pay any of the legal obligations between EDP partners as such, or that the purchase price was adjusted specifically to account for the settlement payment.

{42} Both the district court's valuation and its equitable remedy are reviewed under an abuse of discretion standard for substantial evidence. *Collado v. City of Albuquerque*, 2002–NMCA–048, ¶ 21, 132 N.M. 133, 45 P.3d 73; *Sanchez v. Saylor*, 2000–NMCA–099, ¶ 12, 129 N.M. 742, 13 P.3d 960. We agree with the district court.

{43} The district court perceived its task to be enforcement of the ROFR. Article 9.1 of the ROFR generally requires a selling

partner to offer to sell "to the other Partners on the same terms and conditions on which the [selling partner] proposes to transfer the Partnership interest." The district court undertook to reconstruct the value ascribed to the Hotel (and thus EDP's interest in the Hotel) in the sale by the buyer and seller. The district court relied on the allocated valuations agreed to between the seller and buyer. The aggregate price was to be adjusted for working capital accounts and intercompany notes. No one argues it was not. From the district court's viewpoint, the number it derived was the best estimate available post-sale for the terms on which the selling partner (AHS) proposed to "transfer its Partnership Interest." Further adjustments designed to enforce a settlement achieved post-sale would be inconsistent with enforcement of the ROFR as of the sale date. We cannot disagree with the district court's logic.

CONCLUSION

{44} We hold that the sale of AHS's corporate great-great-grandparent was an "indirect transfer" of equity interest in AHS within the meaning of this contract triggering the ROFR. Further, we affirm the exercise price set by the district court.

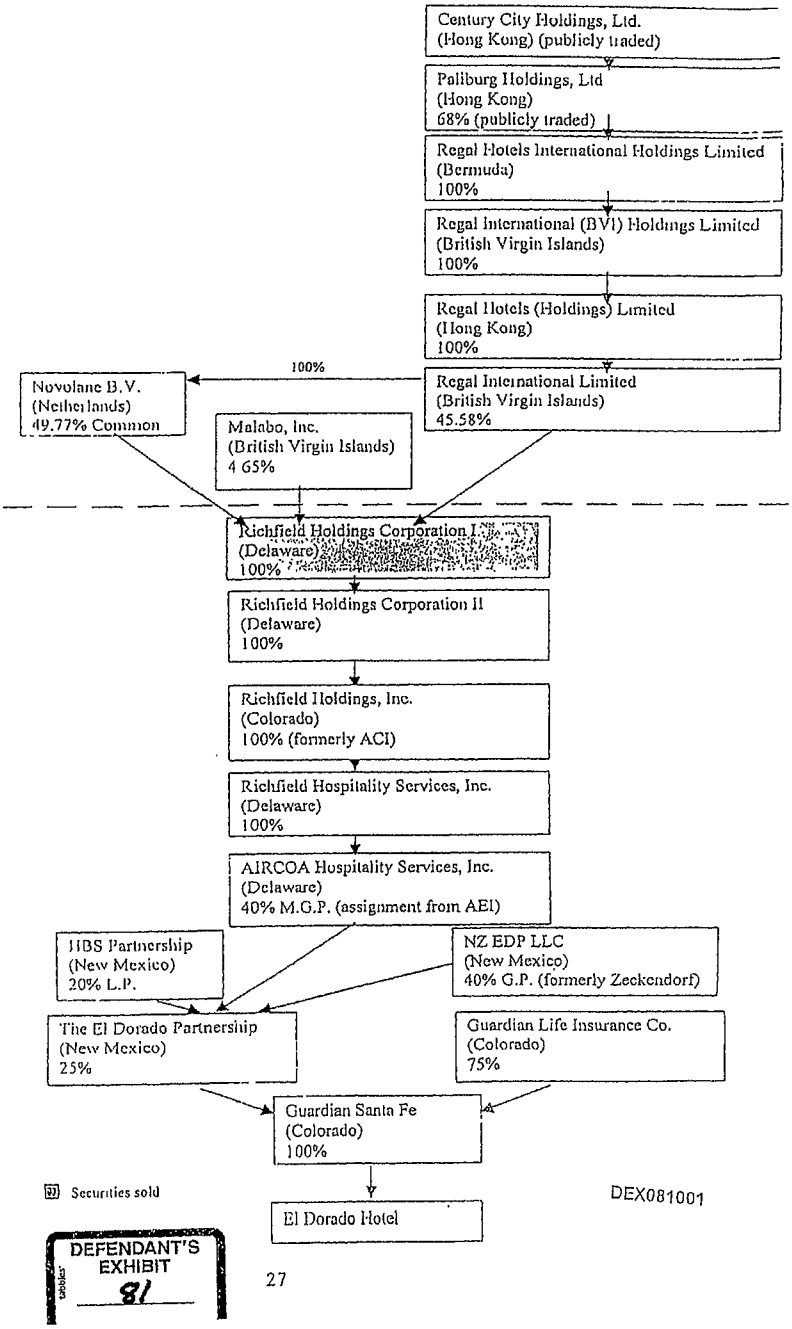
{45} **IT IS SO ORDERED.**

WE CONCUR: CYNTHIA A. FRY and RODERICK T. KENNEDY, Judges.

[redacted]

APPENDIX 1

ORGANIZATION BEFORE 1999 SALE
OF STOCK OF RICHFIELD HOLDINGS CORPORATION I



DEX081001

DEFENDANT'S EXHIBIT
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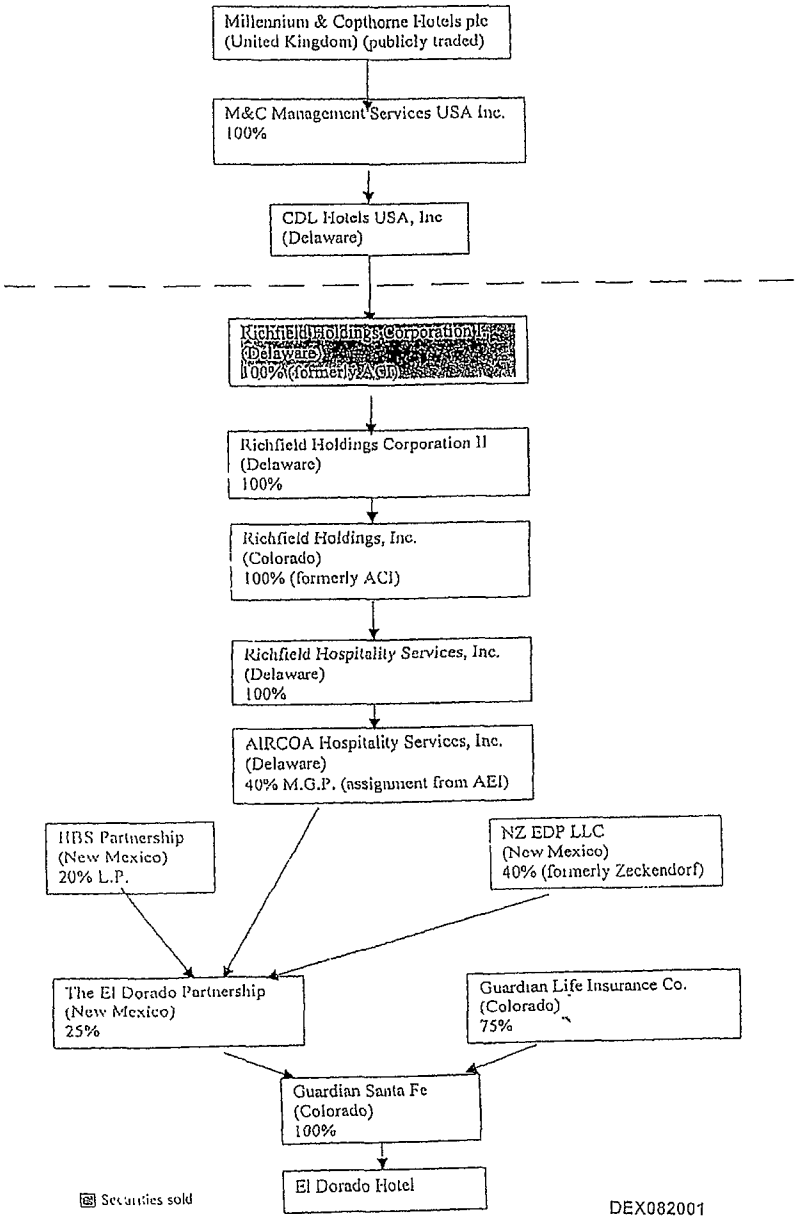
APPENDIX 2

ORGANIZATION IMMEDIATELY AFTER 1999 SALE
OF STOCK OF RICHFIELD HOLDINGS CORPORATION I



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DEFENDANT'S EXHIBIT
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2005-NMCA-069

114 P.3d 322

Cari I. AGUILERA, Plaintiff–Appellant,

v.

BOARD OF EDUCATION, Hatch Valley Public Schools, Defendant–Appellee.

No. 23895.

Court of Appeals of New Mexico.

April 6, 2005.

Certiorari Granted, 29,190, June 2, 2005.

William L. Lutz, Martin, Lutz, Roggow, Hosford & Eubanks, P.C., Las Cruces, for Appellant.

Robert D. Castille, Castille & Ortiz, LLC, Los Alamos, for Appellee.

OPINION

VIGIL, J.

{1} This case requires us to decide whether a school board can discharge a certified school teacher before her current employment contract expires solely because of a reduction in force (RIF). We hold that it cannot because a RIF is not "just cause" to discharge a teacher under the existing statutory scheme. We therefore reverse the arbitrator's decision and remand for proceedings consistent with this opinion.

{2} The employment of school personnel is governed by the School Personnel Act, (the Act) which is now codified at NMSA 1978, §§ 22–10A–1 to –39 (2003) by virtue of 2003 N.M. Laws ch. 153, which amended, repealed, enacted, and recompiled several provisions of the Act. The Act as it existed prior to the 2003 changes controls the resolution of this dispute. *See* NMSA1978, §§ 22–10–1 to –27 (1975, as amended through 2002).

Herein we will refer to the 2003 statutory citations where provisions of the 2001 School Personnel Act were not changed, but were simply recodified by the 2003 legislation.

BACKGROUND

{3} Cari Aguilera (Aguilera) was employed by the Board of Education, Hatch Valley Public Schools (School Board) as an art teacher at Hatch High School for the 2000–2001 and 2001–2002 school years. At the end of the 2002 school year in May, the School Board agreed to employ her for a third consecutive year, but at Hatch Middle School rather than Hatch High School. *See* § 22–10A–22 (directing that "[o]n or before the last day of the school year of the existing employment contract" the school board "shall serve written notice of reemployment or termination on each certified school instructor employed by the school district" and providing that "[a] notice of reemployment shall be an offer of employment for the ensuing school year"). Aguilera delivered a timely written acceptance of the offer, which resulted in a binding employment contract being created for the 2002–2003 school year. Section 22–10A–23(B) ("Delivery of the written acceptance of reemployment by a certified school instructor creates a binding employment contract between the certified school instructor and the local school board ... until the parties enter into a formal written employment contract."). The formal written contract between Aguilera and the School Board was signed on September 5, 2002.

{4} The offer to employ Aguilera, and her acceptance of the offer, occurred when funding for the Hatch Valley Public School System was not in place for the upcoming year. In May 2002, the Hatch Valley Public School System was aware it was about to lose substantial federal funds for a program that had existed for several years and that program had a termination date in July 2002, and it was also made aware in May 2002 that there would be substantial short falls or decreased funding from the State Equalization Guarantee Funding Program. On September 16, 2002, the School Board learned that the Hatch Valley Public School System would receive approximately $1,215,000 less for the 2002–2003 school year than it had during the previous school year. Due to this reduction, the School Board approved a RIF of school personnel on September 23, 2002. As part of the RIF, the School Board elected to eliminate the Hatch Middle School art program on September 30, 2002. The following day, the Superintendent of Hatch Valley Public Schools sent Aguilera a letter notifying her that he intended to discharge her because her position would be eliminated on October 30, 2002.

{5} Aguilera exercised her statutory right to a hearing before the School Board, challenging her discharge. A hearing was held on November 14, 2002, and the School Board upheld the decision of the Superintendent. Aguilera then appealed the School Board's decision to an independent arbitrator.

{6} Despite some initial confusion about the applicable statutes, the parties subsequently agreed that the Superintendent's letter to Aguilera was sent to her pursuant to Section 22–10A–27(A) (stating that to discharge a certified school employee, the superintendent shall serve written notice of intent to discharge on the employee, stating in the notice the cause for the recommendation, and advising the employee of the right to a discharge hearing before the local school board); that Aguilera properly requested a hearing before the School Board pursuant to Section 22–10A–27(B) (providing that a school employee who receives a notice of intent to recommend discharge may request a hearing before the local school board); that the School Board held a discharge hearing pursuant to Section 22–10A–27(C) through (J) (prescribing the procedures for the local school board to follow in conducting a discharge hearing, and requiring the local superintendent to prove by a preponderance of the evidence that, at the time of the notice of intent to recommend discharge, the superintendent had just cause to discharge the employee); and that the appeal of the School Board's decision would be held before an arbitrator pursuant to Section 22–10A–28 (providing for an appeal de novo to an independent arbitrator by a certified school employee who is aggrieved by a decision of a local school board).

{7} On February 20, 2003, the arbitrator heard Aguilera's appeal. Following the hearing, the arbitrator stated this appeared to be a case of a qualified individual "with an excellent work history with the Hatch Valley Public School System" losing her job "as a result of a failure on management's part to get its financial house in order." He recognized that the School Board was required to establish just cause to discharge Aguilera by a preponderance of the evidence and that the applicable statute defines "just cause" as "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 22–10A–2(F). While the arbitrator found that there was "clearly" no just cause to discharge Aguilera as defined in the statute, the arbitrator nevertheless concluded that "there was unfortunately just cause as defined by the authorized RIF policy of the Hatch Valley Public School system due to the loss of funding." Aguilera appeals the arbitrator's decision. *See* § 22–10A–28(M) (providing that an appeal from the arbitrator's decision is taken by filing notice of appeal as provided by the rules of appellate procedure); *see also Bd. of Educ. v. Harrell,* 118 N.M. 470, 485, 882 P.2d 511, 526 (1994) (holding that Section 22–10–17.1(M), now codified as Section 22–10A–28(M) is unconstitutional to the extent that it limits the right of appeal to cases "where the decision was procured by corruption, fraud, deception or collusion" (internal quotation marks omitted)).

STANDARD OF REVIEW

{8} We determine whether substantial evidence supports the arbitrator's factual findings, and we review his conclusions of law de novo. *See Harrell,* 118 N.M. at 486, 882 P.2d at 527 (holding that under compulsory arbitration statutes due process is satisfied by substantial evidence review of findings of fact and de novo review of questions of law). The construction of a statute is a question of law subject to de novo review. *Santa Fe Pub. Schs. v. Romero,* 2001–NMCA–103, ¶ 10, 131 N.M. 383, 37 P.3d 100 ("We interpret statutes de novo.").

DISCUSSION

{9} On appeal, Aguilera contends that the Act prohibits the discharge of an employee unless there is just cause to do so and that the School Board did not have just cause under the Act to discharge her. The School Board responds that (1) proper construction of the Act allows the School Board to discharge Aguilera for reasons other than just cause as defined in the Act, (2) strong policy considerations support the ability of the School Board to discharge employees for financial reasons, and (3) terminating the employment of school employees pursuant to a RIF has been judicially approved.

A. Discharge Under the School Personnel Act

{10} Our principal objective in interpreting a statute "is to determine and give effect to 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 (internal quotation marks and citation omitted). The "primary indicator" of the legislature's intent is the plain language of the statute, and we are to give the words used in the statute their ordinary meaning unless the legislature indicates a different intent. *Alba v. Peoples Energy Res. Corp.,* 2004–NMCA–084, ¶ 17, 136 N.M. 79, 94 P.3d 822. Where the legislature defines words used in the statute, we must interpret the statute according to those definitions. *Southwest Land Inv., Inc. v. Hubbart,* 116 N.M. 742, 743, 867 P.2d 412, 413 (1993); *see* 2A Norman J. Singer, *Statutes & Statutory Construction* § 47:07, at 227–28 (6th ed. 2000) ("As a rule a [statutory] definition which declares what a term means is binding upon the court.").

{11} The Act is very specific and precise in describing when a school board can discharge a certified teacher with whom it has an existing contract. We focus our attention on the statutory definitions of "discharge" and "just cause."

{12} Under the Act, the "discharge" of a certified school employee is the "act of severing the employment relationship . . . prior to the expiration of the current employment contract." Section 22–10A–2(A). Since the

School Board ended Aguilera's employment prior to the expiration of her contract, it "discharged" her. *See Romero,* 2001–NMCA–103, ¶ 11, 131 N.M. 383, 37 P.3d 100 (determining that since the school board severed employment relationship of certified school employee before current contract expired, discharge provisions of the Act applied).

{13} Moreover, the Act directs that a school board "may discharge a certified school employee only for just cause." Section 22–10A–27(A). It defines "just cause" as a "reason that is rationally related to an employee's competence or turpitude or the proper performance of [her] duties and that is not in violation of the employee's civil or constitutional rights." Section 22–10A–2(F). Pursuant to the plain terms of the statute, it was incumbent upon the School Board to demonstrate by a preponderance of the evidence to the arbitrator that Aguilera's "discharge" was based upon her performance, competence, or turpitude. *See In re Termination of Kibbe,* 2000–NMSC–006, ¶ 14, 128 N.M. 629, 996 P.2d 419 (holding that evidence failed to prove a relationship between competence or ability to teach or coach and the conduct did not involve moral turpitude). The arbitrator found that Aguilera never "had any negative reports in terms of job performance, competence or suggestion of moral turpitude, or ever failed to properly perform [her] duties while employed by the Hatch Valley Public School System." This finding is undisputed and not challenged by the School Board. Therefore, the statutory basis to "discharge" Aguilera is lacking, notwithstanding the RIF. *See Byrd v. Greene County Sch. Dist.,* 633 So.2d 1018, 1025 (Miss.1994) (holding that the "school district's eleventh hour realization of its financial predicament was not good cause for recission of teacher's already renewed contract" in absence of statutory authority to do so).

{14} An examination of the statutory evolution of the applicable statutes reinforces our conclusion. In 1921, the Supreme Court noted that except when a complaint was made that a teacher was afflicted with tuberculosis, there was no statutory provision for dismissal of a teacher. *Tadlock v. Sch. Dist. No. 29 of Guadalupe County,* 27 N.M. 250, 256, 199 P. 1007, 1009 (1921). Under these circumstances, the general rule was that "there exists in the employing agency an implied power to dismiss the teacher for *adequate cause.*" *Id.* (emphasis added). We assume but do not decide that lost revenues, such as in this case, could constitute "adequate cause." *See Funston v. Dist. Sch. Bd.,* 130 Or. 82, 278 P. 1075, 1076–77 (1929) (holding that dismissal of a teacher is permissible when the dismissal is not personal to the teacher, but results from her position being abolished in good faith by reason of a program of economy whereby the position is abolished).

{15} In 1941, the legislature for the first time adopted a statute addressing discharge of a certified school teacher, stating, "[n]o teacher having a written contract shall be discharged except upon *good cause.*" 1941 N.M. Laws ch. 202, § 3 (emphasis added). The statute did not define "discharge" and it did not define "good cause." We assume that "discharge" meant to dismiss from employment during the term of a contract. We also continue to assume that lost revenues, such as in this case, could constitute "good cause" under this statute. *See also Funston,* 278 P. at 1077.

{16} In 1967, the legislature decreed that a local school board could discharge a certified school teacher during the term of a written employment contract only after "finding *cause* for discharging the person *pursuant to the employment contract* with the person *or* finding *any other good and just cause* for discharging the person." 1967 N.M. Laws ch. 16, § 119 (emphasis added). Again, the statute did not define "discharge" and it did not define "cause." Our assumptions as to the meanings of these words in the statute remain. Changes were made to the statute in 1975, but the foregoing provisions were not affected. The prerequisite of "finding *cause* for discharging the person *pursuant to the employment contract* with the person *or* finding *any other good and just cause* for discharging the person" before a discharge could occur during the term of

the employment contract remained. 1975 N.M. Laws ch. 306, § 12 (emphasis added).

{17} In 1990, the legislature revisited the issue. It now simply stated that a board could discharge a certified school teacher "during the term of his written employment contract *only for good and just cause.*" 1990 N.M. Laws ch. 90, § 4 (emphasis added). The legislature now defined "discharge" to mean "the act of severing the employment relationship with an employee prior to the expiration of the current employment contract." 1990 N.M. Laws ch. 90, § 1. However, it still did not define "just cause." We therefore continue to assume that as of 1990, lost revenues, such as in this case, could constitute "just cause." *See Smith v. Bd. of Educ.,* 334 N.W.2d 150, 152 (Iowa 1983) (stating that a school district's declining enrollment and budgetary constraints may constitute "just cause" not to renew a teacher's contract); *Laird v. Indep. Sch. Dist. No. 317,* 346 N.W.2d 153, 156 (Minn.1984) (stating substantial reduction in enrollment was sufficient basis for placing teacher on "unrequested leave"); *Funston,* 278 P. at 1077; *Adams v. Clover Park Sch. Dist. No. 400,* 29 Wash. App. 523, 629 P.2d 1336, 1340 (1981) (holding that a school district can elect not to renew a teacher's contract because termination of the position is required by budgetary concerns); *see also Lee v. Giangreco,* 490 N.W.2d 814, 818 (Iowa 1992) (noting that "just cause" for termination of a teacher's contract may turn on budgetary constraints).

{18} This all changed in 1991. The requirement of "just cause" for terminating a certified school teacher's contract during the term of the employment contract remained, and the definition of "discharge" was not changed. 1991 N.M. Laws ch. 187, §§ 3, 7. However, the legislature for the first time defined "just cause," stating it "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." 1991 N.M. Law ch. 187, § 3, now codified as Section 22–10A–2(F). This was the state of the law when Aguilera was discharged by the School Board on October 30, 2002. A RIF was not included in the definition of "just cause."

{19} The School Board argues that a provision of the Act which requires contracts with certified school personnel to be on forms approved by the state board allows for a broader meaning of "cause." Section 22–10A–21(A) requires all contracts between a school board and certified school personnel to "be in writing on forms approved by the state board." These forms must "contain and specify" certain items, including "the *causes for termination* of the contract." *Id.* (emphasis added). Since the statute refers to "causes" instead of the statutory definition of "just cause" set forth in Section 22–10A–2(F), the School Board argues that the legislature intended to allow the discharge of an employee for reasons in addition to statutory "just cause." However, Section 22–10A–21(A) refers to "causes for termination" not "causes for discharge," and the argument overlooks the difference between a "termination" and a "discharge." In contrast to a "discharge," a "termination" is "in the case of a certified school employee, the act of not reemploying an employee for the ensuing school year and, in the case of a non-certified school employee, the act of severing the employment relationship with the employee." Section 22–10A–2(D). Aguilera was not "terminated"; she was "discharged."

{20} The School Board also argues that Aguilera was properly discharged pursuant to an express provision in the contract she signed. In pertinent part, the contract states, "[t]his contract and the parties hereto are and shall continue to be subject to applicable laws of the State of New Mexico" and that

> *[t]his contract may also be cancelled by the Board for cause not personal to the Instructor when a reduction in personnel is required* as a result of decreased enrollment or a decrease or revision of educational programs or insufficient legislative appropriation or authorization being made by the State and/or federal government for the performance of this contract, in accordance with the New Mexico Statutes and

any applicable rules and regulations of the State and Local Boards of Education.

(Emphasis added.)

{21} Aguilera's contract is a form certified school instructor contract approved and promulgated by the state board pursuant to Section 22–10A–21(A). It is set forth in 6.66.2.8 NMAC (2000). The form is derived from State Board of Education Regulation No. 72 25, Certified School Instructor Contract, filed January 8, 1973; and State Board of Education Regulation No. 88–1, Certified (Licensed) School Instructor Contract, filed February 2, 1988, as set forth in the history at the end of 6.66.2.8 NMAC. The statutory evolution we have set forth above in Paragraphs 15–18 establishes that in 1973 and 1988, "just cause" was not statutorily defined and a loss of funds might constitute "just cause." According to the statutes in existence at that time, a RIF could be a "cause" for discharge "pursuant to the employment contract." However, "just cause" was specifically defined by the legislature in 1991, and a RIF was not included. Amendments made to 6.66.2.8 NMAC in Amendment 1 to State Board of Education Regulation No. 88–1, Certified (Licensed) School Instructor Contract, filed April 3, 1992, apparently did not take into account the requirements made in 1991 that a discharge could occur only for "just cause" with a specific definition of "just cause" that did not include a RIF.

{22} On its face, it appears that there is a direct conflict between the employment contract form and the statute which directs that Aguilera could only be "discharged" for "just cause." The state board has no authority to promulgate a regulation that conflicts with a statute. *See N.M. Pharm. Ass'n v. State,* 106 N.M. 73, 75, 738 P.2d 1318, 1320 (1987) (stating a board "has no power to adopt a rule or regulation that is not in harmony with [its] statutory authority"); *accord* 1A Norman J. Singer, *Statutes & Statutory Construction* § 31:2, at 713–14 (6th ed.2002) (stating that "the provisions of the statute will prevail in any case of conflict between a statute and an agency regulation"). In fact, 6.66.2.3 NMAC states that the statutory authorities for its adoption are Section 22–10A–21 and NMSA 1978, § 22–2–1 (2003). Section 22–2–1 expressly states that the state board "is the governing authority and shall have control, management and direction of all public schools, *except as otherwise provided by law.*" (Emphasis added.) Therefore, to the extent that the model contract provisions conflict with the Act they are void and unenforceable.

{23} For all the foregoing reasons, we hold that without "just cause" as defined by the Act, the School Board was without authority to discharge Aguilera.

B. Public Policy

{24} The School Board also argues that public policy dictates that it be allowed to cope with changes in student enrollment and funding at the beginning, middle, or end of the school year by allowing it to discharge a certified school employee for reasons other than a teacher's performance, competence, or turpitude. The School Board argues that this public policy will be violated if Section 22–10A–27(A) is read to require "just cause" as defined in Section 22–10A–2(F).

{25} The state board has plenary authority over the public schools "except as otherwise provided by law." *See* § 22–2–1(A) ("The state board is the governing authority and shall have control, management and direction of all public schools, except as otherwise provided by law."). The state board adopted 6.67.3.6 NMAC (2000), which allows a local school board to discharge or terminate licensed school personnel pursuant to a RIF, but it must be "in accordance with the Public School Code." 6.67.3.8 NMAC (2000). The present case involves solely discharge, not termination, and we address only the issue of discharge. The Act, with the limiting definition of "just cause" in relation to discharge is part of the Public School Code. NMSA 1978 § 22–1–1 (2004) (stating NMSA 1978, Chapter 22, may be cited as the Public School Code). We do recognize that a local school board may add or abolish teaching positions in performing its fiscal responsibilities. *See* NMSA 1978, § 22–5–4(C) (2004) (stating local school board has power to "review and approve the school district budget"); *Howard v. W. Baton Rouge Parish Sch. Bd.,* 843 So.2d 511, 514 (La.Ct.App.2003) ("A parish school board has broad responsibilities in administering the public schools.

Included is the power, when acting in good faith, to consolidate positions or to abolish them."); *Adams,* 629 P.2d at 1340 ("The determination of educational goals, programs and curricula is a matter within the broad discretion of the school board. To establish these goals or to meet the financial conditions of the district, the board may add or eliminate teaching positions." (citations omitted)). Nothing we say herein prohibits a RIF that complies with the applicable statutes.

{26} However, the legislature has identified which public policies will be favored by defining the conditions under which a discharge may be implemented. Our Supreme Court has recognized that the "purpose of the Certified School Personnel Act [is] to promote a sound public policy of retaining in the public school system teachers who have become increasingly valuable by reason of their experience." *Atencio v. Bd. of Educ.,* 99 N.M. 168, 170, 655 P.2d 1012, 1014 (1982). The "Certified School Personnel Act" was renamed the "School Personnel Act" in 1991. 1991 N.M. Laws ch. 187, § 2. The statutes here are clear and unambiguous in advancing this public policy of retaining experienced public school teachers. In the face of such a clear statutory expression of public policy, we do not second guess, but enforce, the policy choice made by the legislature. *See Anthony Water & Sanitation Dist. v. Turney,* 2002-NMCA-095, ¶ 10, 132 N.M. 683, 54 P.3d 87 ("[I]f the meaning of a statute is clear, this Court is not to second guess the policy choice made by the legislature."); *Benavidez v. Sierra Blanca Motors,* 122 N.M. 209, 214, 922 P.2d 1205, 1210 ("[I]t is the particular domain of the legislature, as the voice of the people, to make public policy .... Courts should make policy ... only when the body politic has not spoken." (internal quotation marks and citation omitted) (alteration in original)); *State ex rel. State Eng'r v. Lewis,* 121 N.M. 323, 325, 910 P.2d 957, 959 (Ct.App. 1995) ("If 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."). There are valid policy considerations in favor and against assuring teachers their employment contracts will be honored during their terms except for reasons based upon their performance, competence, or turpitude. We find the following language from *Byrd,* 633 So.2d at 1024–25 particularly instructive:

> The premises underlying a contract between a school district and a teacher are indistinguishable from any other employment contract. The district promises to employ the teacher for a given term, subject to the terms of that contract. As consideration, the teacher promises to perform his job for the duration of the contract.... Were we to accept the District's argument [that it could rescind a teacher's already renewed contract because of its financial predicament], teacher's contracts would be vulnerable to recission any time a school district found itself in financial straits. The legislature has not so provided.... It is within the province of the legislature to determine what effect, if any, a district's financial woes may have on teacher contracts and to grant the authority to amend those contracts accordingly.

(Citation omitted.) We perceive no mistake or absurdity that warrants departing from the plain language of the Act. We therefore reject the School Board's public policy argument. Whether the Board's public policy argument should be applied to a termination based on a RIF is a question that is not before us, and we express no opinion on it.

C. Judicial Endorsement of Reductions-in-Force

{27} Finally, the School Board argues that precedent prohibits us from reaching the result we do because RIFs have previously been judicially sanctioned and approved. We disagree because the precedent cited did not present the issue which confronts us here and because the School Board fails to consider the statutory framework underlying that precedent.

{28} The School Board cites *New Mexico State Board of Education v. Abeyta,* 107 N.M. 1, 751 P.2d 685 (1988), *Penasco Independent School District No. 4 v. Lucero,* 86 N.M. 683, 526 P.2d 825 (Ct.App.1974), and *Swisher v. Darden,* 59 N.M. 511, 287 P.2d 73 (1955), *superceded by statute on other grounds as stated in Sanchez v. Bd. of Educ.,* 80 N.M. 286, 454 P.2d 768 (1969). However, all of these cases dealt with the discharge of a tenured teacher when the local board re-

fused to renew the contract of the tenured teacher for a subsequent school year under a RIF policy; none of them dealt with discharging a teacher during an existing contract under a RIF policy, as in this case. *Abeyta*, 107 N.M. at 2, 751 P.2d at 686; *Swisher*, 59 N.M. at 513, 287 P.2d at 74; *Lucero*, 86 N.M. at 683–684, 526 P.2d at 825–26. Furthermore, the issue in *Abeyta* was whether it was lawful and reasonable for a RIF policy not to require a staff realignment which might have retained a tenured teacher when such a realignment would seriously affect the educational program; and the issue in *Swisher* and *Lucero* was whether the evidence established that as a result of the RIF, no position was available for which the tenured teacher was qualified. *Abeyta*, 107 N.M. at 3, 751 P.2d at 687; *Swisher*, 59 N.M. at 515, 287 P.2d at 76; *Lucero*, 86 N.M. at 684, 526 P.2d at 826. These cases are therefore not applicable.

{29} Even more important, as we have already pointed out in our discussion of the statutory evolution of the applicable statutes, the underlying statutory framework was different when *Abeyta*, *Swisher*, and *Lucero* were decided. In 1991, the legislature for the first time defined what constitutes "good cause." As we have already discussed, we are obligated to apply that statutory definition in this case.

D. Aguilera's Other Arguments

{30} Aguilera also argues that the arbitrator denied her a de novo hearing and that he erroneously concluded that her discharge was effective on October 31, 2002. However, because we conclude that the School Board exceeded its statutory authority by discharging Aguilera without just cause, we need not reach these arguments.

CONCLUSION

{31} We reverse the arbitrator's decision and remand for further proceedings consistent with this opinion.

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

PICKARD and SUTIN, JJ., concur.

2005-NMCA-075

114 P.3d 329

Margie GRINE, on behalf of and as surviving spouse of Gary C. Grine, deceased, Claimant–Appellant,

v.

PEABODY NATURAL RESOURCES, dba Lee Ranch Coal Company, and Old Republic Insurance Company, Employer/Insurer–Appellees.

No. 24,354.

Court of Appeals of New Mexico.

April 8, 2005.

Certiorari Granted, No. 29,196, June 2, 2005.

[redacted]

[redacted]

[redacted]

Gerald A. Hanrahan, Albuquerque, for Appellant.

Katherine E. Tourek, French & Associates, P.C., Albuquerque, for Appellees.

OPINION

CASTILLO, J.

{1} In this workers' compensation case, we review the dismissal of Worker Gary Grine's claim, based on the determination that the heart attack he suffered on the job did not arise out of or occur in the course and scope of his employment. We must first decide the threshold issue of an employer's right to choose a health care provider for a worker when the employer has denied the worker's claim. Because we hold that NMSA 1978, § 52–1–49 (1990), authorized the employer in this case to select a health care provider for Worker, notwithstanding employer's denial of Worker's claim, and because the testimony of the provider furnished the requisite evidence that work-related stress factors did not contribute to or trigger the heart attack, we affirm the dismissal of Worker's complaint with prejudice.

I. WORKER'S ISSUES ON APPEAL

{2} Worker suffered his heart attack on October 2, 2000, filed his claim for benefits on July 16, 2001, and died a little more than a year later, on June 21, 2002. Margie Grine (Margie), Worker's surviving spouse, was substituted as Claimant to continue to assert Worker's claims and to assert her own claims to death benefits. Margie is the appellant in the case; however, for purposes of this appeal, we will refer to her as Worker.

{3} Worker appeals from the Workers' Compensation Administration (WCA) to this Court for review of the compensation order that dismissed Worker's complaint with prejudice. This appeal is taken against Worker's employer, Peabody Natural Resources, dba Lee Ranch Coal Company, and its insurer, Old Republic Insurance Company (together referred to as Appellees). On appeal, Worker argues (1) that there was ample evidence that work-related stress triggered Worker's heart attack and that the Workers' Compensation Judge (WCJ) erred as a matter of law in requiring a higher standard of proof; (2) that under whole record review, the evidence supports the conclusion that numerous work-related stress factors contributed to or triggered Worker's heart attack and that the WCJ's decision to the contrary was clearly against logic and reason; (3) that pursuant to Section 52–1–49 of the Workers' Compensation Act (Act), NMSA 1978, §§ 52–1–1 to –70 (1929, as amended through 2004), the WCJ erred by permitting Appellees to switch Worker's treating physician; (4) that the WCJ erred by allowing Appellees' treating physician to testify, in violation of Section 52–1–51(C) of the Act; and (5) that Worker's rights to due process, equal protection, and a fair trial were violated by the wrongful actions of the current WCA director. We organize Worker's issues into three: health care providers, causal link between the heart attack and employment, and violation of constitutional rights. The facts related to each issue are contained in the appropriate section.

II. DISCUSSION

A. Appellees' Referral to Dr. Shadoff and the Admission of His Report and Deposition

{4} We first address the issue related to health care providers. We begin with the

pertinent facts. Although Worker was not aware of it, his heart attack occurred during his shift on October 1–2, 2000. After obtaining permission to leave work because he was feeling bad, Worker left work shortly after 1:30 a.m. on October 2, drove himself home, and went to sleep. On the morning of October 2, Worker saw Margie's doctor, Dr. Cubine, because Worker thought he was still experiencing heartburn. Dr. Cubine did not diagnose Worker's heart attack. Rather, she felt that Worker had stomach problems, ordered an upper GI to be performed in ten days, and gave Worker some medicine to drink. He still did not feel well, and on the evening of October 3, 2000, he went to the emergency room at Cibola Hospital in Grants, and it was determined that he had suffered a heart attack. Worker was then airlifted to the Heart Hospital of New Mexico in Albuquerque. He was treated for coronary artery disease the following morning, and an angioplasty was performed. Initially, Worker sought treatment from the Heart Hospital of New Mexico, the New Mexico Heart Institute, and his own physician, Dr. Orchard. On July 16, 2001, more than nine months after the heart attack, Worker filed a workers' compensation complaint. Up to the time of the filing of the complaint, Appellees had not directed any of Worker's health care.

{5} Appellees denied liability. In its October 17, 2001, answer to Worker's complaint, Appellees set forth a number of affirmative defenses—denying that Worker was hurt on the job, that there was any causal link between disability and accident, and that Worker's heart condition was work related or aggravated at work. Appellees requested that Worker's complaint be dismissed in whole. The WCA assigned Judge Joan O'Connell as the WCJ to hear Worker's case.

{6} Appellees raised the issue of health care providers by filing a motion in limine to exclude all medical records of the Heart Hospital of New Mexico, the New Mexico Heart Institute, and Dr. Orchard or, in the alternative, to allow a second opinion or an independent medical examination. After a hearing on December 10, 2001, the WCJ denied Appellees' request for an independent medical evaluation, a second opinion, or appointment of an expert witness but did allow Appellees to select a health care provider to treat Worker. In its order, the WCJ concluded that under Section 52–1–49(B), Appellees did not initially select a health care provider for Worker because it had denied liability for Worker's injuries. The WCJ further concluded that Worker had selected his own health care provider for the alleged injury of October 2, 2000: Dr. Orchard and physicians at the Heart Hospital of New Mexico and the New Mexico Heart Institute. The WCJ also concluded that no conflict existed between authorized medical providers and that an independent medical examination was therefore not authorized. Appellees' right to select a health care provider to treat Worker was based on a "reservation of rights," allowing Appellees to select a health care provider without admitting the compensability of the claim under the Act. In addition, the WCJ concluded that Appellees must pay for any medical care offered to Worker under Section 52–1–49 and that the records of such care would be admissible under Section 52–1–51(C). In reaching this conclusion, the WCJ observed that two of the purposes behind Section 52–1–49 are (1) to ensure that each party may select a doctor to provide medical care and inform the WCJ about relevant medical issues and (2) to limit the number of medical providers who may treat Worker, in order to prevent expensive and time-consuming litigation.

{7} Understanding the order to have allowed Worker to have already made the choice of first health care provider, Appellees issued a notice of change of health care provider to Worker on January 16, 2002. Appellees wanted Worker to be treated by Dr. Shadoff. Worker objected to this notice and asserted that Appellees made the initial selection of physicians or waived its right to do so under Section 52–1–49 and 11.4.4.11 NMAC (2005). Additionally, Worker stated that by denying his claim to benefits, Appellees had no right to change treating physicians under Section 52–1–49. Thus, Worker requested that Appellees' attempt to change treating physicians be denied.

{8} Based on the WCJ's conclusion that Appellees' initial selection of a health

care provider was Dr. Shadoff, the WCJ issued an order sustaining Worker's objection to Appellees' notice of change and ordered Worker to cooperate with the treatment offered by Dr. Shadoff. We conclude that because Appellees' choice of health care provider was its initial choice under Section 52–1–49(B), there was no need for Appellees to execute a notice of change under Section 52–1–49(C). Further, the WCJ referred to 11.4.4.11(C)(2)(c) NMAC, which characterizes medical treatment provided to a worker before the employer's written decision under Section 52–1–49(B) as "authorized health care."

{9} Worker contends that because Dr. Shadoff is not a properly authorized health care provider under Section 52–1–49, his testimony concerning Worker's heart attack under Section 52–1–51(C) is not admissible and that the WCJ could therefore only rely on the testimony of expert Dr. Orchard. We agree with Worker that determination of this issue is pivotal to this case. Section 52–1–51(C) states that "[o]nly a health care provider who has treated the worker pursuant to Section 52–1–49 ... may offer testimony at any workers' compensation hearing concerning the particular injury in question." If Dr. Shadoff were not a qualified health care provider, the WCJ would not be able to rely on his testimony.

{10} This determination depends on the meaning of the language in Section 52–1–49. "Interpretation of statutory language is a question of law[, which] this Court reviews de novo." *Ramirez v. IBP Prepared Foods,* 2001–NMCA–036, ¶ 10, 130 N.M. 559, 28 P.3d 1100; *see Bajart v. Univ. of N.M.,* 1999–NMCA–064, ¶ 7, 127 N.M. 311, 980 P.2d 94. "In interpreting the meaning of a statute, we endeavor to give effect to the legislature's intent." *Ramirez,* 2001–NMCA–036, ¶ 10, 130 N.M. 559, 28 P.3d 1100. We observe that the workers' benefit system in New Mexico is based on "a mutual renunciation of common law rights and defenses by employers and employees alike." NMSA 1978, § 52–5–1 (1990). The legislature has declared that the Act is not remedial and is not to be construed to favor one party over another. *Id.* "[W]e examine the wording of the statute and consider the statute's history and background." *Ramirez,* 2001–NMCA–036, ¶ 10, 130 N.M. 559, 28 P.3d 1100.

{11} Section 52–1–49 states in pertinent part:

> A. After an injury to a worker and subject to the requirements of the Workers' Compensation Act ..., and continuing as long as medical or related treatment is reasonably necessary, the employer shall, subject to the provisions of this section, provide the worker in a timely manner reasonable and necessary health care services from a health care provider.
>
> B. The employer shall initially either select the health care provider for the injured worker or permit the injured worker to make the selection. Subject to the provisions of this section, that selection shall be in effect during the first sixty days from the date the worker receives treatment from the initially selected health care provider.
>
> C. After the expiration of the initial sixty-day period set forth in Subsection B of this section, the party who did not make the initial selection may select a health care provider of his choice. Unless the worker and employer otherwise agree, the party seeking such a change shall file a notice of the name and address of his choice of health care provider with the other party at least ten days before treatment from that health care provider begins. The director shall adopt rules and regulations governing forms, which employers shall post in conspicuous places, to enable this notice to be promptly and efficiently provided. This notice may be filed on or after the fiftieth day of the sixty-day period set forth in Subsection B of this section.

Section 52–1–49(A)–(C).

{12} In 1990, the Act was rewritten, and the pertinent sections concerning the selection of a health care provider were changed. *Ramirez,* 2001–NMCA–036, ¶¶ 11–12, 130 N.M. 559, 28 P.3d 1100. "In making these revisions, the legislature set forth an orderly process for the treatment and examination of injured workers that gives both parties the opportunity to control the medical treat-

ment." *Id.* ¶ 12. "The legislature has provided a procedure for when a party does not agree with the choice of a health care provider." *Id.* ¶ 16. "Section 52–1–49 mandates that an employer ... provide an injured worker reasonable and necessary health care services and establishes the procedures by which the worker's health care provider is selected and changed." *City of Albuquerque v. Sanchez,* 113 N.M. 721, 723, 832 P.2d 412, 414 (Ct.App.1992).

{13} We agree with Worker that neither the Act nor our case law specifically states whether a denial of a claim prohibits an employer from selecting a health care provider. However, based on our review of the statute and regulations, Section 52–1–49 must be read to allow the employer and the worker each to make a selection of a health care provider at some point in a case. The employer's right to make this selection would be eliminated if we were to adopt Worker's interpretation of the statute. We also find support in a WCA regulation, which characterizes medical treatment provided to the worker before the employer's written decision under Section 52–1–49(B) as "authorized health care." 11.4.4.11(C)(2)(c) NMAC. This regulation contemplates allowing an employer to exercise its rights under Section 52–1–49(B), even though the worker may have already obtained medical treatment before the employer makes its choice under the statute. *See* 11.4.4.11(C)(2)(c) NMAC. Accordingly, we find no error in the WCJ's determination that Dr. Shadoff was Appellees' initial selection of a health care provider and that his testimony was properly admitted.

B. Causal Link Between Worker's Heart Attack and His Employment

{14} Worker presents two arguments regarding the cause of his heart attack. First, he argues that under whole record review, the evidence supports Dr. Orchard's opinion that work-related stress factors contributed to or triggered Worker's heart attack and that the WCJ erred by deciding otherwise. Worker also contends that the WCJ erred as a matter of law by requiring proof that the stress precipitating Worker's heart attack must have been "acute stress." Appellees assert that there was substantial evidence to support the WCJ's decision and that the WCJ did not base its determination solely on the acute-stress issue. As in Section A, we begin with the facts pertinent to this issue.

{15} From 1985 until the heart attack, on October 2, 2000, Peabody Natural Resources (Employer) employed Worker as a blade operator at Employer's coal mine, located in a remote area about forty-one miles west of Grants, New Mexico. A blade is a heavy-equipment vehicle, somewhat similar to a bulldozer. The blade vehicle is used to cut and maintain roads for huge haul trucks that transport dirt from the excavation site to a dump site. The vehicle is about twenty feet high and weighs several tons. A blade operator generally drives the vehicle back and forth over the haul roads to keep the road surface in good condition for the haul trucks. A blade operator primarily blades roads that are approximately one half to one mile long with a width of 120 to 140 feet. The blade has an automatic transmission, with a climate-controlled cabin area, where the operator sits and manipulates the blade vehicle. When operating, the blade is moving at approximately six miles per hour. Employer has not experienced any blade rollovers, and the operators are not in fear of such a rollover. Nor are blade operators in fear of avalanches. A blade operator has not killed any person on the ground at Employer's mine.

{16} For several years prior to October 2, 2000, Worker was required to work for twelve hours per day for four consecutive days. He would then have four days off, unless directed to work overtime. During the first two four-day periods, Worker was required to work from 7:00 a.m. to 7:00 p.m. After two four-day periods, he was then required to work from 7:00 p.m. to 7:00 a.m. for the following two four-day periods. Worker's schedule rotated every two four-day periods thereafter. Worker had been on the rotating four-day schedule for several years. His work hours remained about the same while he was on this schedule. For example, Worker worked 1,481.5 hours from January 3, 1999, to October 3, 1999, and he worked

1,487 hours from January 2, 2000, to October 1, 2000. While at work, Worker was entitled to a thirty-minute lunch break, though he stated that he usually ate his lunch while operating his blade. Although he was never told by Employer that he could not take breaks, Worker typically worked his twelve-hour shift with few or no breaks, which he considered stressful. Employer did not enforce any regular system of fifteen-minute rest breaks. Worker claimed that the long hours were stressful and confused his body.

{17} Worker had to commute to work. In order to arrive at work by 7:00 a.m./p.m., Worker had to leave his home by 5:30 a.m./p.m. He would return home by 8:00 a.m./p.m. Thus, including commuting time, Worker worked approximately 14.5 hours a day during his work periods. Worker asserted that because of this long work schedule, he became sleep deprived, fatigued, and physically and emotionally stressed.

{18} Employer had mandatory overtime, and as an hourly employee, Worker was required to work mandatory overtime. Mandatory overtime begins with volunteers who want to get their overtime out of the way, and then a rotation occurs in which employees who have not signed up for the overtime get assigned to the remaining overtime. Employer attempts to keep the amount of overtime even for all employees. Worker did not volunteer for overtime; consequently, he was sometimes assigned overtime without much advance notice. Worker asserted that the required overtime was stressful.

{19} In late June 2000, Worker's immediate supervisor, Ernest Ortiz (Ortiz), informed Worker that he had some vacation days remaining and that he needed to schedule some time off from work soon. Worker understood that he had four days available and took time off from work the following week. When Worker returned to work, he was informed that he needed to report immediately to the new production manager, Carl McMinn (McMinn). McMinn accused Worker of taking an unearned and unauthorized day of vacation time, thereby stealing money from the company. Worker maintained that McMinn threatened to fire him if he missed one more day of work. McMinn acknowledged that he had this heated exchange of words with Worker and admitted he was angry and raised his voice while speaking to Worker; however, McMinn considered Worker to be a good friend and a person who helped him learn the coal business. This confrontation upset Worker, and he asserted that he continued to brood over this incident until his heart attack. In fact, Worker contended that he lived in fear of losing his job if he missed even one day of work for any reason. That said, Worker did report to work every day after the exchange with McMinn; however, Worker did go home on sick leave in early September 2000 after 1.5 hours of work. He also knew Employer had no history of firing workers for taking sick days. Worker interacted with McMinn on a friendly basis between July and September 2000.

{20} Worker was scheduled to work the 7:00 p.m. to 7:00 a.m. shift on October 1–2, 2000, the day of his heart attack. He was not feeling well but, despite the advice from Margie, did not call in sick and went to work. On the night of October 1, Worker complained of heartburn to some co-workers. Ortiz testified he saw Worker standing outside his blade and smoking a cigarette, though Worker denied that he had been smoking. Worker said he was having stomach problems and had just vomited. When Ortiz asked if Worker wanted to go home, he responded that he felt okay and that he wanted to continue to work. Worker testified that subsequently he was not feeling well at all and that his attempts to notify Ortiz were unsuccessful.

{21} In fact, Worker suffered a heart attack in the late hours of October 1 or the early hours of October 2. He radioed Ortiz around midnight for assistance. There was no response. Worker radioed again, and still no assistance was provided. Finally, around 1:30 a.m., Worker drove his blade to the change house and spoke directly to Ortiz. Worker informed Ortiz that he was not feeling well, and Ortiz essentially told him to go home and not to bother him. Employer did not provide any on-site medical treatment to Worker. Worker returned home. The facts regarding the provision of subsequent health

care to Worker are explained above, in section II of this opinion.

{22} After Worker's death, the matter of his complaint came before the WCJ for a hearing on June 13, 2003. The main question was whether there was a causal link, as a matter of reasonable medical probability, between Worker's heart attack on October 2, 2000, and his employment. After considering all the evidence and arguments, including the depositions and records of both Dr. Orchard and Dr. Shadoff, the WCJ entered findings of fact, upon which it concluded that Worker's "heart attack on October 1–2, 2000, did not arise out of, or occur in the course and scope of, Worker's employment with Employer." The WCJ found that Worker was not under any unusual emotional or physical stress from his work hours. Further, the WCJ determined that "[t]here is no causal link between the Worker's heart attack and employment as a matter of reasonable medical probability" and dismissed Worker's complaint with prejudice. Worker appeals from this decision.

1. Standard of Review

{23} Our standard of review is upon the whole record. *Garcia v. Borden, Inc.*, 115 N.M. 486, 491, 853 P.2d 737, 742 (Ct.App.1993). Under whole record review, this Court "views the evidence in the light most favorable to the agency decision but may not view favorable evidence with total disregard to contravening evidence." *Nat'l Council on Comp. Ins. v. N.M. State Corp. Comm'n*, 107 N.M. 278, 282, 756 P.2d 558, 562 (1988) (internal citation omitted). We must "find evidence that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency." *Id.* "Substantial evidence on the whole record is such evidence that demonstrates the reasonableness of the administrative decision." *Herman v. Miners' Hosp.*, 111 N.M. 550, 552, 807 P.2d 734, 736 (1991). If "substantial evidence supports the findings of the hearing officer, an appellate court will not disturb those findings on appeal." *Id.*

2. Work-Related Stress

{24} NMSA 1978, § 52–1–28(B) (1987) requires that "[i]n all cases where the employer or his insurance carrier deny that an alleged disability is a natural and direct result of the accident, the worker must establish that causal connection as a probability by expert testimony of a health care provider." In this case, the burden was therefore on Worker to provide medical evidence showing that his heart attack and death was a "medically probable result of the work-related stress." *Herman*, 111 N.M. at 552, 807 P.2d at 736. In *Oliver v. City of Albuquerque*, 106 N.M. 350, 352, 742 P.2d 1055, 1057 (1987), our Supreme Court noted that when a preexisting condition is aggravated by employment-related stress, the requirement of a work-related injury is met. Although there is no requirement that a worker must prove "that stress was the only factor causing the . . . heart attack," a worker must "show that the heart attack more likely than not was the result of stress." *Herman*, 111 N.M. at 553, 807 P.2d at 737; *see also Bufalino v. Safeway Stores, Inc.*, 98 N.M. 560, 565, 650 P.2d 844, 849 (Ct.App.1982).

{25} Here, the WCJ was faced with conflicting medical evidence. Dr. Orchard continued to treat Worker until his death, and Dr. Orchard believed that while Worker had coronary artery disease caused by plaque that had built up in his arteries, work-related stress was a factor that triggered Worker's heart attack. In Dr. Orchard's February 15, 2001, letter, he stated the following:

> The circumstances of [Worker's] work at [the time of the heart attack] were such that he was under extreme stress, both mental and physical, and long hours. The conditions that he worked under, while not being the sole cause for his heart attack, certainly may have been a precipitating factor. . . . [I]t is a likely probability that [Worker's] work conditions may have precipitated his myocardial infarction, although of course would not have been responsible for the plaque that was the original culprit.

{26} Dr. Orchard also testified that he did not review Worker's prior medical rec-

ords, did not talk about Worker's work in great detail, and was not familiar with Worker's work history, the nature of his job, or his employment records. Further, Dr. Orchard testified (1) that a heart attack can occur without any precipitating factors; (2) that he did not know of any acute-stress event on October 1, 2000, involving Worker; (3) that based on Worker's long-standing work schedule, Dr. Orchard could not say stress was the event that caused the heart attack on October 2, 2000; and (4) that he did not discuss Worker's heart attack as being work-related until January 2001.

{27} Dr. Shadoff met with Worker once and concluded, as had Dr. Orchard, that Worker had coronary artery disease. However, based on a review of all of Worker's medical records, his history of risk factors for heart attack, such as smoking and diabetes, his work environment and work history, and medical literature, Dr. Shadoff determined to a reasonable degree of medical probability that the October 2, 2000, heart attack was not work related, but rather was a random event.

{28} Dr. Shadoff testified that Worker's schedule would not be a stressful event that would trigger a heart attack "because this was the kind of cycle that he had [ ] been working for a number of years." Dr. Shadoff further stated that Worker's fear of being fired for taking time off after McMinn admonished Worker was not a stressful event that caused his heart attack. Rather, Worker may have had a chronic sense of stress. Therefore, Dr. Shadoff disagreed with Dr. Orchard's opinion that "[i]f the events [the argument with McMinn and long work hours] as [Worker] told them to me are accurate, then I feel that there is a medical probability that the stress of those circumstances precipitated this heart attack and his eventual death." The disagreement was based on a reasonable medical probability. Based on medical studies and other literature, Dr. Shadoff stated that the temporal relationship between the physical or emotional stress and the triggering of myocardial infarction is important and that Worker's attack was a random event. Dr. Shadoff testified that he might concur with Dr. Orchard's opinion on causation if Worker's heart attack had occurred within twenty-four hours of his being threatened with termination by McMinn and being accused of stealing a day's pay from Employer. Instead, Dr. Shadoff tied the heart attack to risk factors, such as smoking, diabetes, and Worker's continued risky behavior, even though he had been advised to stop smoking and watch his diet. While Dr. Shadoff only met with Worker on one occasion, the doctor did review Worker's prior medical records and understood the nature of Worker's job.

{29} Where there is conflicting evidence from both experts, it is within the discretion of the WCJ to reach a determination of medical probability. *See Bufalino,* 98 N.M. at 565, 650 P.2d at 849. Reviewing the record as a whole shows that there was sufficient evidence to support the WCJ's conclusion that as a matter of reasonable medical probability, there was no causal link between Worker's heart attack and his employment.

{30} The WCJ's findings of fact demonstrate that the WCJ disbelieved Worker's testimony that he was stressed. Further, the WCJ found that Dr. Orchard was not familiar with Worker's job conditions or his past medical history. Therefore, the WCJ relied on Dr. Shadoff's testimony that Worker's hours and the incident with McMinn did not cause the heart attack and that smoking and diabetes were significant risk factors. In addition, Dr. Orchard agreed that a person achieves equilibrium if he performs a task over and over and that it is "very hard to say that chronic stress will cause a heart condition." Thus, the WCJ agreed with Dr. Shadoff that Worker's heart attack was a "random event to a reasonable degree of medical probability." "The rule is established that where conflicting medical testimony is presented as to whether a medical probability of causal connection existed between myocardial infarction and work being performed, the trial court's determination will be affirmed." *Id.* at 565, 650 P.2d at 849.

3. Acute Stress

{31} Worker additionally argues that the WCJ erred in basing its determination solely

on the lack of an acute-stress event occurring within a short time before Worker's heart attack. We disagree with Worker's characterization of the WCJ's determination. As described above, the WCJ did consider a number of factors, including Worker's contention that the long work hours and his confrontation with McMinn contributed to the heart attack. The following evidence was presented on this contention. Worker testified that in the last five years of his employment, there was nothing different in the physical work he had been doing; however, he did feel that more was expected of him. As far as the work schedule and long hours, Worker stated that he did not realize he was experiencing stress from working his "four-on, four-off" work schedule until after his October 2, 2000, heart attack. Further, Worker testified that he thought the stressful event he alleged in his complaint was the incident with McMinn. Moreover, during the May 14, 2001, telephonic interview, when Worker was asked whether he had been doing anything stressful at work or had been involved in any argument prior to the heart attack, he responded, "O[ ] my god, no. We all got along good. I mean, even the boss." Thus, the record demonstrates that the WCJ considered evidence of Worker's alleged stress but was not persuaded. Although the WCJ addressed acute-stress factors in its decision, we do not read the dismissal to be based on a requirement that only events of acute stress can cause a heart attack. The WCJ's conclusion was general in nature: Worker failed to establish that the cause of his heart attack was work-related stress. We therefore reject Worker's argument that the WCJ held him to a higher standard of proof.

C. Violation of Worker's Rights by the WCA Director

{32} Worker argues that his rights to due process of law, to equal protection under the law, and to a fair trial before an independent and impartial judiciary, as well as other fundamental and statutory rights, were violated by the wrongful actions of the current WCA director and the structure of the WCA. Worker also contends that the Act itself is unconstitutional, but he does not present any argument that the WCJ who heard the case acted unfairly, arbitrary, capriciously, or with bias. *See Colonias Dev. Council v. Rhino Envtl. Servs., Inc.*, 2003-NMCA-141, ¶¶ 35-47, 134 N.M. 637, 81 P.3d 580 (discussing the alleged bias of the hearing officer when the plaintiff argued that the hearing officer's bias violated the plaintiff's constitutional right to due process and a fair hearing). Nothing in the briefs supports Worker's contention that he received an unfair trial. Worker's argument that his constitutional rights were violated by the staff appointment procedure is a political question and is not justiciable. *See State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 24, 128 N.M. 154, 990 P.2d 1277 (discussing that generalized insinuations of governmental wrongdoing did not set forth a clear legal duty to perform the actions the plaintiffs sought). The legislature is responsible for enacting laws that set forth the terms for the administration of the workers' compensation scheme. Worker provides no legal support for the contention that the Act and its administration are unconstitutional, and we presume the Act is constitutional. *Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, ¶ 10, 122 N.M. 524, 928 P.2d 250.

III. CONCLUSION

{33} For the foregoing reasons, we affirm the WCJ's decision.

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

BUSTAMANTE, C.J. and ALARID, JJ., concur.

2005-NMCA-071
114 P.3d 339

Lynn MONTGOMERY, Dr. Robert Wessely, and Dr. Catherine Harris, Protestants–Appellants,

v.

NEW MEXICO STATE ENGINEER, Appellee,

and

Lomos Altos, Inc. and Garden Path Associates, Applicants–Appellees.

No. 24,297.

Court of Appeals of New Mexico.

April 12, 2005.

Certiorari Granted, 29,202, June 2, 2005.

Mary E. Humphrey, Connie Odé, Humphrey & Odé, P.C., El Prado, for Appellants.

DL Sanders, Chief Counsel, Hilary Lamberton, Special Assistant Attorney General, Office of the State Engineer, Santa Fe, for Appellee State Engineer.

Maria O'Brien, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Catherine F. Davis, Hunt & Davis, P.C., Albuquerque, for Appellees Lomos Altos, Inc. and Garden Path Associates.

OPINION

PICKARD, J.

{1} Lomos Altos, Inc. and Garden Path Associates (Applicants) submitted three applications to change the point of diversion and purpose of use for their surface water rights in Valencia County to groundwater rights in Sandoval County. The State Engineer conducted a hearing on the applications. Although Protestants argued that the applications should be denied, the State Engineer granted the applications. Protestants appealed the decision to the Sandoval County district court. The district court, upon its de novo review of the State Engineer's decision to approve the applications and upon cross-motions for summary judgment, granted summary judgment in favor of Applicants. Protestants appeal the district court's granting of summary judgment.

{2} Protestants argue that the district court (1) did not apply the correct law when it determined that the applications were not for new appropriations of surface water or groundwater, (2) erred in granting Applicants' motion for summary judgment because a genuine issue of material fact existed regarding the water rights associated with the springs located within the move-to area, (3) did not apply the correct law in determining that Applicants' transfer of water rights would not impair water rights within the move-to area, (4) erred by not allowing a trial to proceed on the issues of public welfare and conservation, and (5) improperly denied Prot-

estants' motion for summary judgment. We hold that the district court correctly applied the law in determining that these applications were not for new appropriations, correctly determined that no genuine issue of material fact existed concerning the water rights associated with the springs within the move-to area, and correctly applied the law regarding the issue of impairment. Furthermore, because Protestants did not respond to Applicants' assertion that no genuine issue of material fact existed regarding the issues of conservation and public welfare, the district court correctly granted Applicants' motion for summary judgment concerning these issues. Finally, we conclude that the court correctly denied Protestants' motion for summary judgment. Accordingly, we affirm.

FACTS AND PROCEEDINGS

{3} Applicants filed three different applications with the State Engineer to transfer a total of 15.05 acre-feet per year of existing water rights from Valencia County, the move-from site, to Sandoval County, the move-to site. The applications sought a permit from the State Engineer to change the purpose of use of Applicants' water rights. Applicants wanted to change the use from surface water rights utilized primarily for irrigation in Valencia County to groundwater rights used for domestic purposes in Sandoval County. Both the move-from and move-to sites are located within the Middle Rio Grande Basin.

{4} Protestants own and use surface water rights in the Placitas area of Sandoval County. Upon receiving notice of the applications, Protestants informed the Office of the State Engineer that they objected to the granting of the applications. Protestants' objections were based on their contention that the applications, if approved, would be detrimental to public welfare, would be contrary to conservation, and would impair their existing water rights. By order of the State Engineer, all three applications were consolidated and a hearing was held to determine if the applications should be approved. After a full evidentiary hearing, at which Protestants argued that the applications should not be granted, the Office of the State Engineer approved the applications. In its order approving the applications, the State Engineer found that the applications would not be detrimental to the public welfare of the state, would not be contrary to the conservation of water within the state, and would not impair existing water rights from their source. Protestants filed a timely appeal to the Sandoval County district court and subsequently filed a motion for summary judgment. Applicants filed a response to Protestants' summary judgment motion, and they also filed a cross-motion for summary judgment. After a hearing, the district court entered an order granting Applicants' cross-motion for summary judgment and denying Protestants' motion. The district court ruled that the applications were approved in accordance with the report and recommendations of the State Engineer's hearing examiner, but made no separate findings of its own. Protestants appeal from this order. Additional facts appear below as they pertain to this decision.

DISCUSSION

{5} We will begin our analysis by discussing whether the applications should be considered a new appropriation of ground or surface water, or whether the applications should be regarded as a transfer of Applicants' water rights. We will then address Protestants' argument that the district court erred in finding no genuine issue of material fact as to how certain water rights should be considered by the State Engineer when making an impairment determination, after which, we will discuss Protestants' contention that the State Engineer misapplied the law regarding the issue of impairment. We will then proceed with a discussion of whether the issues of public welfare and conservation were appropriately decided by the district court's summary judgment order. We will conclude by analyzing whether the district court should have granted Protestants' motion for summary judgment.

ISSUE ONE: The district court applied the correct law when it determined that the applications were not for new appropriations of surface water or groundwater.

{6} Protestants challenge the district court's ruling that the applications sought a transfer of water rights. Specifically, Prot-

estants argue that the effect of groundwater pumping pursuant to the applications will result in new depletions of surface water at the move-to site, and these new depletions constitute a new appropriation of surface water as a matter of law. Protestants further argue that, since the surface waters of the Rio Grande stream system are fully appropriated and the State Engineer has expressly forbidden any new surface water appropriations from the Rio Grande, the applications must be denied. Although Protestants do not challenge the fact that the groundwater of the Middle Rio Grande Area has not been fully appropriated, Protestants also argue that the applications should be considered as new appropriations of groundwater.

{7} We review the question of whether the district court properly interpreted the applicable law de novo. *See Gallegos v. State Bd. of Educ.,* 1997–NMCA–040, ¶ 11, 123 N.M. 362, 940 P.2d 468 (holding that this Court is "not bound by the conclusions of law reached by the trial court, and the applicable standard of review for such issues is de novo"). We will first discuss whether these applications were for new appropriations of surface water, and then turn our attention to the issue of whether the applications were for new appropriations of groundwater.

A. *The applications were not for new appropriations of surface water.*

{8} In New Mexico, applications seeking new appropriations of surface water must meet different requirements than applications requesting a permit to transfer the location of existing surface water rights. NMSA 1978, § 72–5–7 (1985), which governs applications seeking new appropriations of surface water, requires the State Engineer to reject an application if the State Engineer determines that there is no unappropriated water available. The State Engineer can also reject an application under Section 72–5–7 if the State Engineer finds that the application would be detrimental to public welfare or contrary to conservation of water within the state.

{9} In contrast, NMSA 1978, § 72–5–23 (1985), which governs applications seeking to transfer surface water rights, does not require the State Engineer to make a determination that there is unappropriated water available. However, a transfer application may not be approved unless the State Engineer finds that the transfer will not be detrimental to existing water rights. *Id.* Additionally, Section 72–5–23 requires the State Engineer to find that the transfer application will not be detrimental to public welfare or contrary to conservation within the state.

{10} In this case, the district court affirmed the State Engineer's findings that the applications were requests to transfer existing surface water rights in order to receive a permit for groundwater use. Protestants contend that the applications should be considered new appropriations of surface water since all parties have agreed that new depletions of surface water will occur at the move-to site if the applications are approved. We do not agree.

{11} Protestants rely primarily on *Durand v. Reynolds,* 75 N.M. 497, 406 P.2d 817 (1965), to support their argument that new depletions of surface water at a move-to site may constitute a new appropriation of surface water. In *Durand,* the State Engineer denied an application for a permit to transfer surface water rights at one location to groundwater rights at another location. *Id.* at 498, 406 P.2d at 817–18. In that case, the move-from site and the move-to site shared the same source of water, yet no evidence was entered indicating that water from the source flowed evenly to both sites. *Id.* at 500, 406 P.2d at 819. Protestants rely on the following language from *Durand:*

> It is applicants' position that they are merely exchanging rights to X number acre-feet of water in the "Nine–Mile Draw" (Move–From) area for X number acre-feet of water at the proposed well location (Move–To) sites. They contend that since there is a common source, the "valley fill," they cannot impair existing rights.... Applicants did not prove that the water in the "Nine–Mile Draw" area flows evenly to the site of the proposed well locations! To the contrary, the record yields expert testimony that certain amounts of the water that would be taken

> by the proposed wells never contributed to the water taken in the "Nine–Mile Draw" area. Assuming such to be true, the effect of applicants' application, if granted, would be to grant a new appropriation to water in which they did not previously have any rights.

Id. at 500–01, 406 P.2d at 820 (internal quotation marks and citations omitted). Protestants argue that this principle announced in *Durand* is applicable to the case at hand. Yet, in *Langenegger v. Carlsbad Irrigation District,* 82 N.M. 416, 483 P.2d 297 (1971), *limited on other grounds by State ex rel. Martinez v. City of Roswell,* 114 N.M. 581, 587, 844 P.2d 831, 837 (Ct.App.1992), our Supreme Court found the language quoted above from *Durand* was unsupported dictum. The *Langenegger* Court stated:

> If this language found in the *Durand* decision means a change in point of diversion can legally be accomplished only if the waters to be taken from a proposed point of diversion are identical with the waters that have been taken from a presently established point of diversion, then there could be very few, if any, changes in points of diversion.

Id. at 420, 483 P.2d at 301. The Court went on to conclude that the owner of water rights has the inherent right to transfer the location of those water rights, "subject only to the requirement that the rights of other water users not be injured or impaired thereby," even if the waters between the two points of transfer do not flow evenly. *Id.* at 420–21, 483 P.2d at 301–02.

{12} In the present case, unlike *Durand,* the State Engineer has promulgated specific guidelines that apply only to groundwater applications within the Middle Rio Grande. The guidelines cover an area known as the Middle Rio Grande Administrative Area (MRGAA). Because both the move-from and move-to sites in the present case are located within the MRGAA, all parties agree that the guidelines apply to the applications submitted by Applicants. Unlike the situation presented in *Durand,* the guidelines expressly state that all areas within the MRGAA are hydrologically connected and that a groundwater applicant must obtain and transfer surface water rights located within the MRGAA in order to offset the adverse effects the groundwater use may have on the surface flows of the Rio Grande stream system. In *Durand,* the factual basis for the Court's ruling was that the transfer of water rights from the move-from site to the move-to site was not sufficient to offset the new depletions at the move-to site and there would therefore be an impairment, as the State Engineer found in that case. *Id.* at 500–01, 406 P.2d at 820. Yet, within the MRGAA, the State Engineer has found that because of the hydrological connection of the area, an adequate offset of surface water rights in one area of the MRGAA is sufficient to offset any depletions caused by groundwater use in another area of the MRGAA. *See Stokes v. Morgan,* 101 N.M. 195, 202, 680 P.2d 335, 342 (1984) (holding that the "special knowledge and experience of state agencies should be accorded deference").

{13} Additionally, the Court in *Durand* held that the applicants in that case were requesting a new appropriation of surface water because the water at the move-to site never contributed to the water at the move-from site. *Id.* at 500–01, 406 P.2d at 819. Yet, in this case, Protestants agree that the move-from site is part of the middle Rio Grande stream system. Protestants further conceded below that "the groundwaters in the move-to area are hydrologically connected to the Rio Grande and that the underground waters contribute to the flow of the Rio Grande, thus constituting a part of the source of the stream flow." Thus, in this case, unlike the situation that was presented in *Durand,* the water at the move-to site contributed to the waters at the move-from site.

{14} Protestants do not challenge that the water rights held by Applicants are valid. Protestants also do not challenge the State Engineer's finding that the surface water rights transferred by Applicants were sufficient to offset any adverse effects upon the Rio Grande. Therefore, we find this case to be distinguishable from *Durand* and conclude that, under the circumstances of this case, new depletions of surface water at the

move-to site do not constitute a new appropriation of surface water.

B. *The applications were not for new appropriations of groundwater.*

{15} Protestants also contend that the applications, as a matter of law, should be regarded as new groundwater appropriations. Protestants argue that, while groundwater applications in the MGRAA require transfer of valid water rights in an amount sufficient to offset any adverse effects to the surface flow of the Rio Grande, the applications, if approved, grant a new appropriation of groundwater. We do not agree.

{16} As we have previously noted, the guidelines administering groundwater applications within the MRGAA require a transfer of sufficient surface water rights prior to granting a permit for new groundwater use. Because of this requirement, the State Engineer handles applications for a new use of groundwater within the MGRAA as an application to change the point of diversion and purpose of use of the existing water rights. Protestants agree that the State Engineer has handled groundwater applications within the MGRAA in this manner dating back to at least 1975. In New Mexico, the State Engineer has construed Section 72–5–23 and NMSA 1978, § 72–5–24 (1985), as the statutes governing a "change in the point of diversion, or the place or the purpose of use of a valid water right." Sections 72–5–23 and –24 control the transfer of water rights in New Mexico.

{17} In this case, as has been his practice for nearly thirty years, the State Engineer construed the applications as requests to transfer surface water rights and not as new appropriations of groundwater. Long-standing administrative constructions of statutes by the agency charged with administrating them are to be given persuasive weight, and should not be lightly overturned, since there is a statutory presumption that the orders of the State Engineer are the proper implementations of the water laws. *See* NMSA 1978, § 72–2–8(H) (1967). Moreover, the more long-standing the State Engineer's interpretation of a statute without amendment by the legislature, the more likely the State Engineer's construction reflects the legislature's intent. *In re Application of Sleeper,* 107 N.M. 494, 498, 760 P.2d 787, 791 (Ct.App.1988).

{18} Our Supreme Court has also construed statutes governing a change in point of diversion and purpose of use as a transfer of water rights, rather than the granting of a new appropriation. In *In re Application of Brown,* 65 N.M. 74, 332 P.2d 475 (1958), the Supreme Court held:

> Statutes governing a change in point of diversion or a change in well location do not grant; rather they restrict the right of an appropriator to change his point of diversion or well location. In the absence of statutory procedures to effectuate such changes, the water user may change his point of diversion or well location at will, subject to the requirement that other water users will not be injured thereby.

Id. at 78, 332 P.2d at 477 (emphasis and citation omitted).

{19} In this case, the district court concluded that the applications were for transfers of existing surface water rights. As we have discussed, the district court's ruling regarding this issue is supported by the long-standing practice of the agency that administers the water laws, as well as current law in New Mexico. Therefore, we conclude that the district court did not misapply the law when it determined that the applications, as a matter of law, requested a transfer of existing surface water rights, rather than new appropriations of groundwater.

{20} The guidelines provide that applications requesting a permit for groundwater use will be approved if the applications will not impair existing water rights. Section 72–5–23 provides that a transfer of surface water rights may be granted where there is a finding that the applications will (1) not be detrimental to existing water rights, (2) not be detrimental to the public welfare, and (3) not be contrary to conservation of water within the state. Therefore, in the present case, Applicants had the burden of proof to show that the applications would not impair or be detrimental to existing water rights, would not be detrimental to public welfare,

and would not be contrary to water conservation within the state. We find no merit in Protestants' argument that the State Engineer had to find unappropriated water before approving the applications. It is true that a new appropriation of surface water requires a finding of unappropriated water. NMSA 1978, § 72–5–6 (1985). Yet, a transfer of water rights only requires the State Engineer to make a finding of the three factors noted above.

ISSUE TWO: No genuine issue of material fact existed in determining if the water rights associated with the springs are less than the estimated yield of the springs.

{21} Protestants argue that the district court erred in granting summary judgment because a genuine issue of material fact existed regarding whether the water rights associated with springs at the move-to area were less than the estimated yield of the springs from which Protestants obtain their surface water. Protestants contend that the State Engineer did not consider all declared water rights in determining the yield of the Rosa de Castillo spring and the San Franciso spring.

{22} We review de novo whether there is a genuine issue of material fact precluding summary judgment. *Self v. United Parcel Serv., Inc.*, 1998–NMSC–046, ¶ 6, 126 N.M. 396, 970 P.2d 582. We do not rule on issues of fact but rather determine if disputed issues of material fact exist. *Blauwkamp v. Univ. of N.M. Hosp.*, 114 N.M. 228, 231, 836 P.2d 1249, 1252 (Ct.App.1992). We consider the evidence in the light most favorable to the nonmoving party. *LaMure v. Peters*, 1996–NMCA–099, ¶ 13, 122 N.M. 367, 924 P.2d 1379. The movant must make a prima facie case showing that it is entitled to summary judgment and then "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). Once a movant has made a prima facie showing, the non-movant must show the court that a material or genuine issue of fact is present. *Spears v. Canon de Carnue Land Grant*, 80 N.M. 766, 768, 461 P.2d 415, 417 (1969).

{23} The first step of our analysis is to determine if Applicants made a prima facie showing that the water rights associated with the springs are less than the estimated yield of the springs. *See Roth*, 113 N.M. at 334, 825 P.2d at 1244. In making this determination, we must first turn to NMSA 1978, § 72–7–1(E) (1971), which provides that in a de novo appeal of a State Engineer's order, the district court may consider evidence that was introduced at the hearing before the State Engineer. Here, Applicants made their prima facie case that the water rights associated with the springs were less than the annual yield of the springs by entering into evidence a memorandum from Jesse Ward, water resource manager for the Water Rights Division of the State Engineer's office. The memorandum indicated that Ward had researched the water rights associated with the springs and had determined that the water rights associated with the springs appear to be much less than the estimated yield of the springs combined. Ward reached this conclusion although he acknowledged that the State Engineer had declarations on file indicating rights to use water from the springs to a greater extent than historically used. Yet, in determining that the water rights associated with the springs were less than the annual yield of the springs, Ward only considered the amount of water actually being used by the declarants. The State Engineer's order approving the applications found that the estimated yield of the springs far exceeded the water rights associated with the springs.

{24} On appeal, Protestants do not challenge the State Engineer's finding that the annual yield of the springs far exceeded the water needed to irrigate the historically irrigated acres of land. Yet, Protestants do argue that the State Engineer erred in concluding that the water rights associated with the springs were only the amount of water needed to irrigate this smaller number of acres. Protestants assert that Ward had a duty to consider the amount of water actually claimed on the declarations, rather than the amount of water being placed in use by the

declarants. Protestants cite to *Templeton v. Pecos Valley Artesian Conservancy District*, 65 N.M. 59, 332 P.2d 465 (1958), where our Supreme Court held that each time a water right permit is granted, the State Engineer must "consider all prior appropriations to determine if there are any unappropriated waters." *Id.* at 69, 332 P.2d at 471.

{25} Apart from the fact that this is not a *Templeton* case as Protestants admit, since the groundwater of the MRGAA is not fully appropriated, we conclude in this case that the State Engineer did consider all prior appropriations and did measure the water rights as required by New Mexico law. The New Mexico Constitution provides that beneficial use is the basis, the measure, and the limit of the right to the use of water. N.M. Const. art. XVI, § 3. The concept of beneficial use "requires actual use for some purpose that is socially accepted as beneficial." *State ex rel. Martinez v. McDermett*, 120 N.M. 327, 330, 901 P.2d 745, 748 (Ct.App. 1995). "An intended future use is not sufficient to establish beneficial use if the water is not put to actual use within a reasonable span of time." *Id.* Here, the State Engineer, through Ward, utilized aerial photographs dating back to 1935 and determined that, although the declarations claimed a right to use water from the springs to irrigate a larger number of acres of land, water had only been beneficially used to irrigate a much smaller number of acres of land. We conclude that the State Engineer's method of measuring water rights associated with the springs is in accordance with New Mexico law and find no genuine issue of material fact in dispute regarding the district court's ruling that the annual yield of the springs far exceeds the water rights associated with the springs. Therefore, the district court did not err on this ground in granting Applicants' motion for summary judgment.

{26} Furthermore, we find no merit in Protestants' argument that the State Engineer adjudicated as forfeited or abandoned the water rights of individuals who had declarations of water rights on file, yet were not putting the water to beneficial use. The record is completely devoid of any such finding by the State Engineer. The State Engineer measured water rights by the amount of water being placed in beneficial use and did not measure water that was declared but was not being beneficially used. In so doing, the State Engineer was not declaring that water rights did not exist, but simply following the basis of measurement as required by the New Mexico Constitution. *See* N.M. Const. art. XVI, § 3. As our Supreme Court stated in *State ex rel. Erickson v. McLean*, 62 N.M. 264, 308 P.2d 983 (1957):

> Water appropriators and appropriations on each of the artesian basins of the state are numerous. The State is vitally concerned in every appropriation. The need for water is imperative, and often the supply is insufficient. Such conditions lead inevitably to many serious controversies, and demand from the state an exercise of its police power, not only to ascertain rights, but also to regulate and protect them.

Id. at 272, 308 P.2d at 988.

{27} Here, the hearing before the State Engineer's office was not for the purpose of adjudicating forfeitures or abandonments of water rights; rather it was a proceeding to determine whether the applications would impair or be a detriment to existing water rights, be detrimental to public welfare, or be contrary to the conservation of water within the State. Although certain findings by the State Engineer could be grounds for a conclusion that certain water rights had been forfeited or abandoned, the State Engineer did not draw such a conclusion. Thus, we rule that the State Engineer's findings were not an adjudication of forfeiture or abandonment of declared water rights that are not being put to beneficial use.

{28} Protestants did not offer any evidence apart from the declarations to rebut Applicants' prima facie case that the actual water rights associated with the spring were far less than the estimated yield of the springs. While it is true that NMSA 1978, § 72–1–3 (1961) provides that declarations "shall be prima facie evidence of the truth of their contents," "prima facie" simply permits the establishment of a fact if it is not rebutted. *Goodman v. Brock*, 83 N.M. 789, 792–

93, 498 P.2d 676, 679–80 (1972). Where, as here, the declarations were rebutted, they are insufficient to create an issue of fact because they are insufficient to satisfy any burden of proof. *See State ex rel. Martinez v. Lewis,* 118 N.M. 446, 449, 882 P.2d 37, 40 (Ct.App.1994). Therefore, the district court properly concluded that there existed no genuine issue of material fact precluding summary judgment insofar as the sufficiency of the yield of the springs is concerned.

ISSUE THREE: The district court did not err when it concluded that the applications would not impair existing water rights.

{29} Protestants claim that the district court erred by not finding that the applications would impair existing water rights. Protestants specifically argue that (1) any new depletion of surface water in a fully appropriated stream, as a matter of law, is per se impairment unless there is an offset of surface water at the move-to site, and (2) a genuine issue of material fact existed as to whether the depletions at the Rosa de Castillo spring, San Francisco springs, and Harris springs are de minimis.

A. *The district court correctly determined that a new depletion of surface water at the move-to site in a fully appropriated stream system is not per se impairment.*

{30} Protestants claim that the district court erred when it determined that a new depletion of surface water in a fully appropriated stream system is not per se impairment as a matter of law. Protestants specifically argue that any new depletion of surface water at the move-to site, no matter how small, constitutes impairment unless the Applicants offset the new depletions by obtaining and retiring surface water rights located at the move-to site. Protestants are confusing depletion effects on the stream system as a whole with depletion effects at the particular site.

{31} In partial response to this argument, we once again point to our Supreme Court's decision in *Langenegger,* which concluded that there would be very few, if any, transfers of water rights if the waters transferred were required to be identical. 82 N.M. at 420, 483 P.2d at 301. In this case, the State Engineer has issued guidelines determining that a transfer of surface water rights within the MRGAA is sufficient to prevent adverse effects upon the surface flow of the MRGAA. Our Supreme Court has held that the "special knowledge and experience of state agencies should be accorded deference." *Stokes,* 101 N.M. at 202, 680 P.2d at 342. The State Engineer ruled that the amount of water rights transferred exceeded the amount that Applicants would be allowed to pump plus any depletion effects to the Rio Grande stream system as a whole. Protestants have not challenged these findings 59–61 of the State Engineer's order, either below or on appeal, and they have not contended that their claimed issue of fact as to depletion effects, which we discuss below, applies to prevent summary judgment on the aspect of the State Engineer's order that deals with the effect of the transfer on the surface flow of the Rio Grande stream system as a whole.

{32} We are not persuaded by Protestants' argument that "under the relevant law and unique facts of this case, *any* new depletion of surface water, however small, would result in per se impairment." In considering groundwater, our Supreme Court has held that "[t]he lowering of a water table in any particular amount does not necessarily constitute an impairment of water rights of adjoining appropriators." *Brown,* 65 N.M. at 80, 332 P.2d at 479; *Mathers v. Texaco, Inc.,* 77 N.M. 239, 245, 421 P.2d 771, 776 (1966). In *Mathers,* the Court was faced with a decline of groundwater in a non-rechargeable basin. *Id.* at 245, 421 P.2d at 776. The Court held that the lowering of water levels in the wells of the protestants did not constitute impairment because such a result is inevitable if the water is to be put to beneficial use and to be made available to more than one appropriator. *Id.* at 245–246, 421 P.2d at 776. Furthermore, the *Mathers* Court found no impairment in that case even though the protestants suffered economic losses due to the State Engineer's approval of groundwater applications. *Id.* at 246, 421 P.2d at 776 (finding that the protestants

would have an increase in pumping costs and a lowering of pumping yields due to the granting of the applications).

{33} Our Supreme Court has also held that "[n]o impairment does not necessarily mean no change in conditions." *Stokes,* 101 N.M. at 201, 680 P.2d at 341 (internal quotation marks and citation omitted). Furthermore, this Court has also rejected the argument that a finding of impairment is required where the protestants' contend that they "need all the water they can get." *Sleeper,* 107 N.M. at 499, 760 P.2d at 792 (internal quotation marks omitted). In this case, Protestants make the same arguments that have been rejected by our appellate courts in the two cases mentioned above. Protestants argue that a change of condition to surface water at the move-to site is per se impairment, and that they need all the water they can get due to drought conditions. As our courts have held against these two arguments, we hold that the district court was correct to conclude that new depletions of surface water at the move-to site is not per se impairment.

{34} In response to Protestants' contention that new depletions of surface water will interfere with declarants whose priorities to water rights are senior to those of Applicants, we conclude that if the diversions of surface water become so great in relation to the supply of surface water so "that priorities must be asserted in order to protect the rights of senior appropriators, then the senior appropriators must enforce their rights in a proper manner, and, if necessary, in a proper proceeding." *Langenegger,* 82 N.M. at 422, 483 P.2d at 303.

B. *The district court correctly granted summary judgment because there is no genuine issue of material fact as to whether the applications would impair existing water rights.*

{35} Protestants argue that the district court erred when it granted summary judgment in favor of the Applicants because genuine issues of material fact were in dispute. Protestants contend that there was a genuine issue of fact as to whether the depletions to the Rosa de Castillo spring, Harris springs, and San Francisco springs were de minimis. We agree with Protestants that an issue existed regarding whether the depletions to the springs were de minimis; yet we find this issue was not material and therefore the district court did not err when it granted Applicants' motion for summary judgment. *Tapia v. Springer Transfer Co.,* 106 N.M. 461, 463, 744 P.2d 1264, 1266 (Ct. App.1987) (holding that summary judgment was proper even though disputed facts remain, if those facts are not material).

{36} Our review of the cases does not suggest that a finding of no impairment by the State Engineer must be based on a determination that there will be a de minimis effect on water levels that will be impacted by approval of an application. In *Brown,* the Court found no impairment where an application to change the location of a well caused a draw down of 3.9 feet in the protestant's well. 65 N.M. at 80, 332 P.2d at 479. The question of whether an application will impair existing rights is one that must be decided upon the facts of each case. *Mathers,* 77 N.M. at 245, 421 P.2d at 776.

{37} The material issues that were relevant to this case were whether the applications impaired existing water rights, were a detriment to public welfare, and were contrary to conservation of water within the State. *See* § 72–5–23. In this case, as will be discussed later, Applicants met their burden of proof in establishing that the facts supported a ruling as a matter of law that the Applications were not detrimental to public welfare or contrary to conservation of water within the state. Applicants also established their prima facie case that the applications would not impair existing rights through the affidavit of Ward, which concluded that the applications would not impair existing water rights. Yet, Protestants argue on appeal that a material issue of fact exists because there is a dispute as to the level of depletions at the move-to site. Having already noted that our Supreme Court has held in the case of groundwater rights that "[t]he lowering of a water table in any particular amount does not necessarily constitute an impairment of water rights of adjoining appropriators," *Brown,* 65 N.M. at 80,

332 P.2d at 479; *Mathers,* 77 N.M. at 245, 421 P.2d at 776, we determine that Protestants' argument, in and of itself, does not present an issue of material fact.

{38} In this case, viewing the evidence in the light most favorable to Protestants, the yield of the springs is sufficient to provide for the water rights being put to beneficial use by Applicants and Protestants, as well as other owners of water rights at the move-to site. Protestants did not challenge the findings of the State Engineer, which concluded that the annual yield of the springs as a whole is 291.4 acre-feet per year, that the historically irrigated acreage is 23, and that the current applications are to change the point of diversion of 15 acre-feet per year for a total amount of pumping by Applicants of approximately 30 acre-feet per year. Protestants' expert determined the surface flow of the springs would be depleted by 8.819 acre-feet per year after 100 years of groundwater pumping by Applicants. Thus, Protestants' own expert predicted that after 100 years of groundwater pumping at the rate contemplated by the applications in this case, the surface flow of the springs will be depleted by less than five percent and there will still be hundreds of acre-feet of water produced by the springs. Therefore, we find that viewing the evidence in the light most favorable to Protestants, no genuine issue of fact exists as to whether the applications would impair existing water rights at the move-to site.

ISSUE FOUR: The district court did not err in granting summary judgment on the issues of public welfare and conservation.

{39} Protestants argue that the district court erred in granting summary judgment in favor of the Applicants due to Protestants' being entitled to a trial on the issues of public welfare and conservation. Protestants filed a summary judgment motion in district court, which, in part, stated:

> In this case, approval of the applications hinge on three criteria: 1) there can be no impairment to existing water rights; 2) the changes must not be detrimental to the public welfare; and 3) the changes may not be contrary to conservation. See [sic] NMSA 1978, § 72–5–23, § 75–12–3. This motion is concerned only with the first criterion, namely whether approval of the applications will impair existing rights.

Applicants filed a response to Protestants' motion for summary judgment and also filed a cross-motion for summary judgment. Applicants' motion for summary judgment argued that the State Engineer properly analyzed and considered all relevant factors, including whether the applications would impair existing water rights, be detrimental to public welfare, or contrary to conservation of water within the state. Applicants also noted that Protestants had not challenged the State Engineer's determination regarding the issues of public welfare and conservation. Therefore, Applicants argued that because the State Engineer had properly analyzed and considered all relevant factors, the district court should affirm the State Engineer's approval of the applications.

{40} Protestants did not address the issues of public welfare or conservation of water in their response to the Applicants' motion for summary judgment. Protestants also did not address the issues in oral arguments, although both issues were raised by Applicants in their cross-motion for summary judgment. To preserve an issue for review on appeal, it must appear that the appellant fairly invoked a ruling of the district court on the same grounds argued in the appellate court. *Woolwine v. Furr's, Inc.,* 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct.App.1987). Because Protestants did not do this, we conclude that the district court did not err in granting final summary judgment on the issues of public welfare and conservation.

ISSUE FIVE: The district court did not err in denying Protestants' motion for summary judgment.

{41} Protestants argue that the district court erred when it failed to grant Protestants' motion for summary judgment. Protestants claim that under the circumstances of this case, there is per se impairment to the water rights at the move-to location, because it was undisputed that the applications would lead to new depletions of surface water at the

move-to site and that the surface water of the Rio Grande stream system is fully appropriated. Having already held against the Protestants on this argument, we conclude that the district court did not err in denying Protestants' motion for summary judgment. Although no genuine issues of material fact exist in this case, Protestants were not entitled to summary judgment as a matter of law. *Self,* 1998–NMSC–046, ¶ 6, 126 N.M. 396, 970 P.2d 582.

CONCLUSION

{42} For these reasons, we hold that no genuine issues of material fact exist in this case, and that the district applied the correct law in granting summary judgment in favor of the Applicants. Accordingly, we affirm.

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

WECHSLER, J., concur.

RODERICK T. KENNEDY, Judge (concurring in part and dissenting in part).

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

{44} I respectfully dissent. In a developing legal climate where we are coming to recognize that water is a necessity in limited supply, the courts should encourage definitive measurement in calculating water availability, should provide clear and consistent parameters for defining terms like "impairment," and should take on their duties of de novo review with a critical eye and willingness to independently review the evidence before them.

{45} The Majority is correct in holding that the applications are not for new water appropriations, and that a new depletion at the move-to site is not per se impairment of that source of water. I concur fully with these holdings. Also, it is apparent in this case that Protestants concede other matters that limit the scope of the controversy significantly, which the Majority Opinion correctly addresses. Therefore, my disagreement is limited to discussing what I consider to be sufficient issues of material fact that should have precluded summary judgment and merited a full and proper de novo review of the case.

New Mexico Constitution Is Not a Water Gauge

{46} The salient question is whether "the State Engineer did consider all prior appropriations and did measure the water rights as required by New Mexico law" in coming to its decision. *Templeton*'s application is broader than the Majority suggests, simply because it holds that "the State Engineer can only grant permits to appropriate waters which are not already appropriated," and that permits granted are "subject to the rights of all prior appropriators from the same source." 65 N.M. at 69, 332 P.2d at 472. *Templeton* fully recognized the duty to appropriate water so as not to impair existing rights. *Id.* To do so then requires ascertaining the existence and effect of such existing rights.

{47} To accomplish this assessment requires a conceptual jump by the Majority. While the Constitution states that "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water," New Mexico Constitution, art. XVI, § 3, beneficial use has little utility as a unit of measurement. In the Majority Opinion, we fail to answer the question of how to deal with rights that are adjudicated not to exist (albeit only for purposes of this case) for lack of beneficial use. To hold that "all prior appropriations" were considered and measured by the State Engineer in its process of granting Applicants' permits, the Majority relies on the State Engineer's determinations that not all existing water rights to the springs have been beneficially used, and therefore does not count them against the springs' yield. These rights should have been counted. Impairment for this case is something that happens to the Protestants' springs, not the broad water system as a whole. The calculus of determining whether total effect on the springs would be accounted for by their yield lessened by existing rights plus what will be drawn by Applicants' wells cannot ignore water rights that have not been properly extinguished.

{48} So in this case, "although the [existing] declarations claimed a right to use water from the springs to irrigate a larger number

of acres of land," those rights, though not held by anyone to be abandoned, forfeited, or otherwise extinguished, were not counted because of Ward's determination that water from the springs "had only been beneficially used to irrigate a much smaller number of acres of land" than the total number represented by all water rights that exist.

{49} The State Engineer in its response to Protestants' motion for summary judgment explicitly said that his "determinations regarding impairment, or lack thereof, do not constitute adjudications." Forfeiture of water rights may occur after four years of no beneficial use, but forfeiture of rights requires notice and action from the State Engineer. NMSA 1978, § 72–12–8(A) (2002). No such process has been undertaken to extinguish the prior rights in question for lack of beneficial use of the allocated water since 1863, 1907, 1935, or any other year. Absent such action, I urge that the declared rights should be taken into account when calculating demand.

{50} The Majority's Opinion thus goes to great lengths in opposite directions, stressing that the uncalculated rights are not abandoned, forfeited, or adjudicated, while ratifying findings of the State Engineer that ignore such rights. When the Majority agrees with this conclusion, it must then appear to the reader to adjudicate those water rights by dicta. I disagree that these rights can be ignored in calculating demand for the springs' water, and urge that the complete picture should be presented before impairment of a source can be evaluated accurately.

{51} The State Engineer cannot have it both ways. We hold that Protestants' assertion of impairment was rebutted by the State Engineer's showing regarding anticipated demand against yield of the springs. For the Majority Opinion to adopt findings that rights not concerned in this action do not exist for calculating demand versus yield in the spring, while explicitly stating that we do not regard them as forfeited or abandoned by legal definition, is contradictory. Otherwise, we appear to impermissibly expand the comment in *McLean*, 62 N.M. at 272, 308 P.2d at 988, that "[r]egulation ... is not confiscation," to a holding that power to regulate implies a power to ignore existing rights. The Majority's holding that the State Engineer's findings were not an adjudication requires an explanation as to what the findings really are. Flatly, other rights exist that were considered by the State Engineer to be unimportant to the question of impairment of the springs. Such a determination is therefore at least an incomplete process, at most a credulous statement given how extensively we try to explain how little those rights matter. In this regard, the Majority Opinion fails to deliver its reason clearly enough and makes unwarranted assumptions based on unwarranted findings. Because the rights exist, and were not subtracted from the springs' output, we do not know, for instance, if the Applicants' well might still have had a negligible effect on the springs upstream. Taking all the unextinguished rights into account so as to assure a calculation based on fact, not assumption, would generate facts sufficient to ultimately survive or support summary judgment. That process was short-circuited in this case.

"Impairment" Is a Functional Definition, Not a Policy

{52} The Majority Opinion states that "Protestants are confusing depletion effects on the stream system as a whole with depletion effects at the particular site." To the Majority, this precludes the issue of impairment of the springs from being sufficiently material as to preclude summary judgment. I believe that the significance flows in exactly the opposite direction—namely that the stream system as a whole is not where impairment is the issue. I am not convinced that whether a system that is "hydrologically connected" in the entire MRGAA answers this case's problem of small location-specific springs being impaired by groundwater pumping for a 106–unit residential development. Relinquishing surface rights in Valencia County might not have much to do with making sure there is enough water in Las Huertas Canyon to feed a spring. Under our case law, impairment of water rights is a factual question to be resolved on a case-by-case basis.

{53} The Majority cites a number of cases, such as *Brown,* 65 N.M. at 80, 332 P.2d at 479, and *Mathers,* 77 N.M. at 245, 421 P.2d at 776, to show that in some circumstances depletion does not equal impairment. The cases cited all stand for the proposition that a global approach and evaluation (the very antithesis of a per se rule) is required to assess the impairment question, not a concentration on a single factor. The Majority Opinion does not go in this direction, taking instead a narrow approach rejected by other cases. For example, *Brown* discussed the lowering of a water table, but that was a groundwater-only case; well location was one factor the court said had to be considered along with all the characteristics of the aquifer. 65 N.M. at 80, 332 P.2d at 479. *Brown* did not involve a surface-for-groundwater transfer, but drilling a well under existing rights in a different location and applying for the move after the fact. *Id.* at 76, 332 P.2d at 476. That a "draw[ ]down of 3.9 feet in the water table" did not *necessarily* constitute impairment in that case is not a basis for inferring anything beyond what *Brown* actually said: "all characteristics of the particular aquifer must be considered *along with* well locations." *Id.* at 80, 332 P.2d at 479 (motion for rehearing) (emphasis added). There were many variables in the *Brown* equation, which, if applied, might well lead to a better-developed factual basis in a de novo trial for a conclusion as to whether Protestants' rights were actually impaired.

{54} Our prior cases demonstrate the depth of de novo review that I feel this case should have received below. As the Majority Opinion points out, *Mathers* dealt with a non-rechargeable basin. 77 N.M. at 245, 421 P.2d at 776. *Mathers* said that a declining water level is to be expected when one pumps from a finite basin. *Id.* at 246, 421 P.2d at 776. *Mathers* held that the lowering water level alone is insufficient for impairment of others' rights while lamenting that "a definition of 'impairment of existing rights' is not only difficult, but an 'attempt to define the same would lead to severe complications.' " *Id.* at 245, 421 P.2d at 776 (citation omitted). *Stokes,* on the other hand, dealt with the encroachment of salty water resulting from increased pumping at the move-to location. 101 N.M. at 201, 680 P.2d at 341. There, the impairment was the expected increase in salinity; though not minimal, the court held that there was no impairment. *Id. Sleeper* is similarly uninstructive—the statement the protestants made there, that they "need[ed] all the water they [could] get," showed nothing. 107 N.M. at 499, 760 P.2d at 792. The issue was not what the protestants wanted, but whether the applicants were retiring adequate water rights (established with some particularity by the applicants) in the Rio Brazos basin. *See id.*

{55} Next, *Langenegger* allowed the owner of surface rights to drill a well upstream in an aquifer that gave water to his surface source so as to pre-capture the water that would eventually get into the Pecos River. 82 N.M. at 419, 483 P.2d at 300. In this case, could Applicants capture surface water before it recharged the source of their wells? Saying that Protestants can later sue if their springs are truly impaired does not obviate today's responsibility of a full exposition of whether existing rights plus the new use would impair the springs. Our saying that " '[n]o impairment' does not necessarily mean 'no change in conditions' " only underscores to me the possibility that if things were given an opportunity for real review, the possibility for change in the springs' flow could be more honestly evaluated. *See Stokes,* 101 N.M. at 201, 680 P.2d at 341 (internal citation omitted). Overwhelmingly in these cases, a review of all factors involved supported the calculus of impairment. We owe no less breadth of inquiry to the case before us.

{56} Further, the Majority Opinion needs to say what impairment is in general, since we say the effect on the springs is not de minimis. Once we hold that more than a de minimis effect exists, we should encourage district courts, in de novo review, to undertake an evaluation of just what might be impairment of the prior rights. The effect on the springs is a material issue, and one that the Majority Opinion concedes may be more than de minimis. *See Spencer v. Health Force, Inc.,* 2005–NMSC–002, ¶ 26, 137 N.M. 64, 107 P.3d 504 ("Genuine issues of material fact . . . preclude summary judg-

ment."). The issue is the springs, not the stream system.

Is Trial De Novo Inconsistent with Summary Judgment Based on Administrative Findings?

{57} I am manifestly unsure in a case like this, with so many facts left undetermined, whether summary judgment was appropriate. This uncertainty is compounded by my examination of a district court's de novo review of State Engineer decisions. Under the New Mexico Constitution, art. XVI, § 5, a proceeding appealing the State Engineer's ruling "shall be de novo as cases originally docketed in the district court." This provision established the district court's power "to find facts[,] ... to form conclusions based upon those facts, and to enter enforceable judgments, orders and decrees supported by those facts and conclusions." *In re Application of Carlsbad Irrigation Dist.*, 87 N.M. 149, 151–52, 530 P.2d 943, 945–46 (1974). Our Supreme Court has said that in its de novo review, the district court considers the evidence presented to the State Engineer then it "*also* hears additional evidence, and is not called upon to determine whether the engineer or the board of water commissioners erred ... but must form its own conclusion and enter such judgment as the proof warrants and the law requires." *Id.* at 150, 530 P.2d at 944 (internal quotation marks and citation omitted) (emphasis added). This has been called "pure de novo review." *Clayton v. Farmington City Council*, 120 N.M. 448, 453–54, 902 P.2d 1051, 1056–57 (Ct.App.1995) (emphasis omitted). *Carlsbad Irrigation District* also recognized that de novo review may concern the same ultimate issues and facts as were determined by the State Engineer, and that the district court's findings and those below may well be very similar. 87 N.M. at 152, 530 P.2d at 946. Such a similarity did not mean "that the district court did not consider the evidence anew." *Id.* The district court "could and should have recited the substance of its judgment, rather than merely affirming the findings and decision of the Engineer," but the district court's failure to do so there did not necessarily deprive the protestants of a de novo review. *Id.* Unfortunately, in the instant case as opposed to *Carlsbad Irrigation District*, no new evidence was taken, and the case was resolved by summary judgment. We cannot know if the district court fulfilled the aspirations stated in *Carlsbad Irrigation District*.

{58} The district court in its de novo review should demonstrate that it has independently decided the case on the facts before it, not affirm by summary judgment the assumptions the State Engineer makes to justify its ultimate decision. This is particularly so where the decision is based on ignoring water rights that are not abandoned, forfeited, or adjudicated not to exist. Those rights should specifically be taken into account or there is a material question of fact as to impairment of the springs.

2005-NMCA-076

114 P.3d 354

STATE of New Mexico, Plaintiff–Appellee,

v.

Nathan VAUGHN, Defendant–Appellant.

No. 24,630.

Court of Appeals of New Mexico.

April 13, 2005.

Certiorari Denied, No. 29,209, June 6, 2005.

Patricia A. Madrid, Attorney General, Santa Fe, Jacqueline R. Medina, Assistant Attorney General, Albuquerque, for Appellee.

D. Eric Hannum, Albuquerque, for Appellant.

OPINION

FRY, J.

{1} Defendant appeals his conviction for aggravated driving while under the influence of intoxicating liquor or drugs on three grounds: (1) the trial court acquitted him of aggravated DWI during the proceedings and therefore violated double jeopardy protections when it found him guilty later on in the same proceedings; (2) the trial court incorrectly interpreted the applicable statutory provisions on refusal to submit to testing by holding that Defendant refused to comply even though he had provided one breath sample; and (3) it is fundamentally unfair and a violation of substantive due process to admit a breath sample into evidence while also finding Defendant guilty of refusing to provide a breath sample. For the reasons that follow, we are not persuaded by Defendant's first two arguments. We do not reach Defendant's due process argument because it is insufficiently developed. We therefore affirm Defendant's conviction.

BACKGROUND

{2} Defendant was arrested after failing field sobriety tests and was taken to Bernalillo County Detention Center, where he was asked to provide breath samples approxi-

mately sixty minutes after he had been driving. The arresting officer testified that after Defendant successfully blew the first test, he could see his score of 0.16 and was advised of what his score was. The officer testified that Defendant then took a deep breath and pretended to blow into the machine for a second and third test resulting in readings of "insufficient sample" and "no sample introduced" respectively. The officer testified that the Intoxilyzer breath-test device was working properly, that it had been certified and passed its own internal calibration and diagnostic tests and, finally, that there was no need to replace the disposable mouthpiece since it had worked on the first sample. There was conflicting testimony at trial regarding whether Defendant's actions were intentional. The officer testified that Defendant was argumentative during the testing, and the officer felt Defendant's failure to blow a second sample was intentional. Defendant testified that he neither refused to blow into the device nor refused to follow the officer's instructions, and that he could not hear the officer's instructions due to a hearing impairment.

{3} Defendant was charged with aggravated DWI based on both the breath alcohol content (BAC) score of 0.16, often referred to as a per se DWI violation, and based upon his refusal to provide sufficient breath samples. *See* NMSA 1978, § 66–8–102(D)(1) (2004) (defining aggravated DWI as driving with a BAC of 0.16 or higher); § 66–8–102(D)(3) (defining aggravated DWI as refusing to submit to chemical testing as provided for in the Implied Consent Act if the court determines the person operated a motor vehicle while under the influence of liquor or drugs). Defendant was tried and convicted in a bench trial in metropolitan court (the trial court) on the aggravated DWI charge. In so holding, the trial court noted that after consideration of the testimony, it generally did not find Defendant credible.

{4} During the course of the trial, the trial court made oral and written statements that Defendant contends constituted an acquittal of the refusal basis for aggravated DWI. We discuss these statements more fully below in conjunction with the discussion of double jeopardy.

{5} Defendant appealed to the district court. The district court rejected his double jeopardy and due process claims, and affirmed his conviction on grounds that there was sufficient evidence to find that Defendant had refused to submit to testing and that he had driven while intoxicated in violation of Section 66–8–102(D)(3). The district court concluded that there was insufficient evidence to support a conviction under the per se provision of Section 66–8–102(D)(1) because the State did not produce any corroborative evidence relating the sixty-minute-old 0.16 BAC score back to the time of driving, particularly where the officer testified that the Intoxilyzer device had a 0.02 margin of error. Since the State does not appeal this holding, we do not consider it further. Therefore, the refusal provision of Section 66–8–102(D)(3) is the only basis upon which Defendant's conviction of aggravated DWI can stand. We address the refusal basis after considering Defendant's double jeopardy argument.

DISCUSSION

Double Jeopardy

{6} Defendant argues that the trial court acquitted him of the refusal basis for aggravated DWI when it issued oral and written rulings during the course of the trial. Defendant invokes both the United States and New Mexico double jeopardy clauses. U.S. Const.Amend. V; N.M. Const. art. II, § 15; NMSA 1978, § 30–1–10 (1963) (stating that double jeopardy claims are not waived and can be raised at any time before or after entry of a judgment). We conclude that Defendant did not preserve his claims under the state constitution as our case law requires, pursuant to *State v. Gomez,* 1997–NMSC–006, ¶¶ 22, 23, 122 N.M. 777, 932 P.2d 1.

{7} Under *Gomez,* we first consider whether the state constitution has been held to provide greater protection under similar circumstances than the federal constitution. *State v. Lynch,* 2003–NMSC–020, ¶ 13, 134 N.M. 139, 74 P.3d 73. Although our Supreme Court has interpreted our double jeopardy clause more expansively than its

federal counterpart in three situations, no case has applied an expansive interpretation to the acquittal aspect of double jeopardy, the circumstance presented by this case. *Id.* ¶ 15 (giving protection from greater charges for the same conduct after a conviction on lesser charges); *see State v. Nunez,* 2000–NMSC–013, ¶¶ 17–18, 27, 129 N.M. 63, 2 P.3d 264 (holding that, unlike under the federal constitution, a civil forfeiture is punishment under the New Mexico double jeopardy clause); *State v. Breit,* 1996–NMSC–067, ¶¶ 35–36, 122 N.M. 655, 930 P.2d 792 (providing more protection where mistrial is provoked by prosecutorial misconduct). Therefore, in order to preserve a claim under the state constitution, Defendant would have had to raise this claim in the trial court and provide a basis to interpret the state constitution differently. *Lynch,* 2003–NMSC–020, ¶ 13, 134 N.M. 139, 74 P.3d 73. Defendant first raised his claim under the state double jeopardy clause in his appeal to the district court, so that claim is not preserved.

{8} Turning to the federal constitution, such claims are reviewed de novo and need not be raised in the trial court to be preserved. *State v. Rowell,* 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995); *State v. Attaway,* 117 N.M. 141, 145, 870 P.2d 103, 107 (1994); § 30–1–10. Generally, the federal double jeopardy clause has been held to offer three core protections: (1) protection against a second prosecution for the same offense after an acquittal, (2) protection against a second prosecution for the same offense after a conviction, and (3) protection against multiple punishments for the same offense. *State v. Angel,* 2002–NMSC–025, ¶ 7, 132 N.M. 501, 51 P.3d 1155. Defendant in this case is impliedly focusing on the first protection, which is intended to prevent the government from "harassing citizens by subjecting them to multiple suits until a conviction is reached, or from repeatedly subjecting citizens to the expense, embarrassment and ordeal of repeated trials." *Id.* ¶ 15 (internal quotation marks and citation omitted). Jeopardy begins or attaches when the trier of fact is empowered to decide guilt or innocence and jeopardy terminates upon an acquittal, a conviction, or with certain types of mistrial. *County of Los Alamos v. Tapia,* 109 N.M. 736, 737, 790 P.2d 1017, 1018 n. 1 (1990). Since the fact-finder in this case was empowered to find Defendant guilty, jeopardy had attached; our task is to determine when jeopardy terminated, at which point Defendant would be protected from any further prosecution for the same offense.

{9} Under the doctrine of double jeopardy, a verdict of acquittal is given "absolute" protection to guarantee finality of that verdict because the defendant's interest in such finality is "at its zenith[.]" *Id.* at 742, 790 P.2d at 1023. Also, "[o]nce an accused is actually, and in express terms, acquitted by a court, the finality of that judgment will not yield to any attempts to dilute it." *Id.* at 741, 790 P.2d at 1022. The United States Supreme Court has said that it is "the most fundamental rule" that a defendant cannot be re-tried after a verdict of acquittal, even if that verdict is egregiously erroneous, *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 571, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977), and that acquittals have "special weight" under double jeopardy analysis. *Tibbs v. Florida,* 457 U.S. 31, 41, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). This Court has recently held that such double jeopardy protection is triggered by a jury verdict of acquittal even if the verdict was issued erroneously and the jury issued a new verdict within a matter of minutes. *State v. Rodriguez,* 2004–NMCA–125, ¶ 14, 136 N.M. 494, 100 P.3d 200, *cert. granted,* 2004–NMCERT–10, 136 N.M. 542, 101 P.3d 808 (explaining that the jury had been discharged after issuance of the verdict and the jury could have been subject to outside influences before being reassembled). After an acquittal, any type of fact-finding proceeding going to elements of the charged offense violates the federal double jeopardy clause. *Smalis v. Pa.,* 476 U.S. 140, 142, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986); *see Sanabria v. United States,* 437 U.S. 54, 75, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978) (holding that no exceptions permit a retrial once the defendant is acquitted). The Supreme Court has also instructed that what constitutes an acquittal "is not to be controlled by the form of the judge's action. Rather, we must determine whether the ruling of the judge, whatever its

label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged" and the focus is on "substance as well as form." *Martin Linen Supply Co.*, 430 U.S. at 571–72, 97 S.Ct. 1349 (internal quotation marks and citations omitted).

{10} Defendant claims that comments made by the trial court during his trial and a written order the judge issued both constituted acquittals. We set out the comments and order in the context in which they were given.

{11} In his closing argument on June 2, 2003, Defendant contended that the breath score alone was insufficient to support a conviction as a matter of law. After the State noted that Defendant was charged in the alternative with refusal, Defendant argued that the per se provision and the refusal provision are mutually exclusive, contending that once a breath score is in evidence it is contrary to logic for the State to claim the Defendant refused to submit to testing.

{12} When the trial court issued its initial decision on June 3, 2003, it stated "Mr. Vaughn, I'm going to find you guilty of the aggravated DWI on the basis of the breath score, *not on the basis of the refusal,* although I do think that alternatively that could have been argued as well." (Emphasis added.) Defendant contends this oral statement operated as an acquittal on the refusal basis for aggravated DWI. The trial court then issued its sentence for that decision, saying, "I'm going to go ahead and sentence your client to the first offender program. There is a mandatory 48 hours associated with the aggravated."

{13} Defendant moved for reconsideration of the decision on the ground that the State failed to adduce testimony relating the breath score back to the time of driving. Defense counsel also mentioned that he had not found any authority specifically on whether a defendant can be guilty of refusal after providing one sample. The trial court agreed to review the relation back issue urged by Defendant and scheduled a hearing on the motion for reconsideration on Friday, June 6, 2003. The trial court stated, "The aggravation I'm going to *support with a subsequent order,* which will then at that time, if I do find that, I will order that he turn himself in.... And I'll *defer the aggravation,* and consider it on the motion to reconsider on Friday." (Emphasis added.) The trial court also issued a written form titled "Sentencing Order—DWI First Offender Program." The trial court checked the box for Defendant "having been found guilty" of "[d]riving while intoxicated, first offense," although the form does not indicate which statutory provision was violated. The trial court noted on the form that the parties were to return in three days for the "Mo to reconsider Agg." Defendant claims this form was both a judgment of acquittal and a deferred sentence that precluded later imposition of jail time.

{14} Following the hearing on the motion for reconsideration, the trial court rejected Defendant's contention that the per se charge was not supported by sufficient evidence. During this final session, the trial court commented, "I think it's to your client's benefit that I find in this particular case that it was the point one six *as opposed to the refusal* because of the status of his license." (Emphasis added.) Defendant claims this comment also operated as an acquittal of the refusal basis for aggravated DWI. The written judgment filed after this hearing stated, "Aggravation found—Defendant guilty at trial of Agg DWI[.]"

{15} In determining whether any of the trial court's actions constituted an acquittal that terminated jeopardy, we look first to New Mexico law. The general rule in New Mexico is that an oral ruling by a trial court is not final and, with only limited exceptions, it is not binding. *State v. Diaz,* 100 N.M. 524, 525, 673 P.2d 501, 502 (1983) ("It is well established that an oral ruling by the trial court is not a final judgment, and that the trial court can change such ruling at any time before the entry of written judgment."). There are limited exceptions to this general rule, such as for oral declarations of mistrial, *State v. Reyes–Arreola,* 1999–NMCA–086, ¶ 10, 127 N.M. 528, 984 P.2d 775, and the oral granting of a new trial, *State v. Ratchford,* 115 N.M. 567, 570–71, 855 P.2d 556, 559–60 (1993).

{16} Defendant raises two distinctions that he claims preclude the application of the general rule that oral rulings are not binding and that justify application of double jeopardy protection in this case: (1) the trial court issued a written ruling instead of just an oral ruling, and (2) oral acquittals are recognized by other jurisdictions and should be treated differently than oral statements regarding sentencing. We address and reject each contention in turn.

The June 3, 2003 Order Did Not Constitute an Acquittal

{17} Defendant places great emphasis on the sentencing order issued by the trial court on June 3, 2003, three days before the final judgment and sentence. Defendant argues that this written order puts this case beyond the reach of *Diaz* because in that case our Supreme Court focused on the lack of a filed written judgment. *Diaz,* 100 N.M. at 525, 673 P.2d at 502. Defendant characterizes this order as either a written judgment of acquittal, which precluded the subsequent finding of guilt on aggravated DWI, or as a written deferment of sentence, which precluded the later imposition of a sentence of confinement. The State responds that the sentencing order was a "partial" judgment and sentence.

{18} We agree with the State and conclude that this order was interlocutory and not binding. Both the content of this order and the context in which it was given convince us that it was interlocutory and neither terminated jeopardy nor imposed a sentence upon Defendant. As the State notes, this order was not a final judgment and sentence because it expressly contemplated further proceedings on the issue of aggravation, and therefore did not "dispose[ ] of" all issues of law and fact "to the fullest extent possible" under traditional finality rules. *State v. Candy L.,* 2003–NMCA–109, ¶ 5, 134 N.M. 213, 75 P.3d 429 (internal quotation marks and citations omitted). Although this order was signed and filed, because it expressly continued the proceedings to determine guilt, the trial court had not terminated the proceedings. Looking to the touchstone of *Martin Linen Supply Co.,* we ask if the substance of this order represented "a resolution, correct or not, of some or all of the factual elements of the offense." 430 U.S. at 571, 97 S.Ct. 1349. If anything, this order was a resolution of guilt of simple DWI and made it clear that the proceedings would continue while the trial court contemplated guilt on the charge of aggravated DWI. Such an interlocutory order, even if written and filed, does not terminate jeopardy because it so clearly was not a resolution of the charge for which Defendant was being tried. This order also does not operate as an acquittal of aggravated DWI under the metro court rules since it is not a judgment of "not guilty" on that charge. Rule 7–701 NMRA ("If the defendant has been acquitted, a judgment of not guilty shall be rendered.").

{19} New Mexico cases address similar circumstances in the context of sentencing. Where a defendant is on notice that the trial court's oral sentence was not final, he has no reasonable expectation of finality. *State v. Rushing,* 103 N.M. 333, 706 P.2d 875 (1985). Double jeopardy considerations "exist to protect a defendant's expectations of finality without providing . . . [him] with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be." *Id.* at 335, 706 P.2d at 877 (internal quotation marks and citation omitted); *see also Angel,* 2002–NMSC–025, ¶ 15, 132 N.M. 501, 51 P.3d 1155 (holding that a defendant's expectations of finality after entering a no-contest plea were outweighed by state's right to a "full and fair opportunity" to convict criminals). Here, where Defendant specifically asked the court to make its order not final by requesting reconsideration, it is inconsistent for Defendant to point to the order as final or to claim he had an expectation of finality in that order.

{20} Defendant also advances an argument that the June 3, 2003 order was final because, under *Diaz,* oral judgments are not final but written judgments are final. Defendant appears to view this as a strictly binary situation—that an order must either be oral and not final or written and final. We disagree because not all written orders are final. *See Smith v. Love,* 101 N.M. 355, 356, 683 P.2d 37, 38 (1984); *State v. Durant,*

2000–NMCA–066, 129 N.M. 345, 7 P.3d 495; *Levenson v. Haynes*, 1997–NMCA–020, ¶ 10, 123 N.M. 106, 934 P.2d 300 (describing a written order as interlocutory and subject to modification or reconsideration by the trial court); *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 119 N.M. 29, 37, 888 P.2d 475, 483 (Ct.App.1994) (stating that a letter is a non-final order or judgment, and that final orders must be formal and contain decretal language). Defendant's logic that the order must be final because it is in writing is strained in this case, where the written document clearly indicates on its face that the proceedings are continuing.

{21} Defendant further argues that this order was an acquittal on the refusal basis for aggravated DWI, apparently under the theory that it somehow finalized or solemnized the trial court's oral comment "guilty of the aggravated DWI on the basis of the breath score, *not on the basis of the refusal*, although I do think that alternatively that could have been argued as well." (Emphasis added.) This argument is speculative since the form simply indicates a determination of guilt for "[d]riving while intoxicated, first offense." It is unclear from Defendant's argument how this initial order operates as an acquittal on the refusal basis apart from simply being "a writing." As noted above, not all writings by a judge are final orders. As Defendant has no persuasive or clear argument on how the June 3, 2003, writing could operate as a final verdict of acquittal, we reject it as being without merit or support in the record.

{22} We also reject Defendant's contention that the June 3, 2003 order imposed a deferred sentence, which would bar any later sentence of confinement under *State v. Lopez*, 99 N.M. 791, 795–96, 664 P.2d 989, 993–94 (Ct.App.1982) (holding that a court has no power to impose jail time as a condition of a deferred sentence). Because this order was interlocutory, it was neither a judgment of guilt on aggravated DWI nor a sentence for that charge. This order, therefore, did not impose a deferred sentence upon Defendant and the trial court was free to impose any authorized sentence, including the forty-eight consecutive hours of confinement, on June 6, 2003.

Oral Rulings of Acquittal Are Not Binding

{23} Defendant next contends that an oral ruling going to guilt or innocence should be binding because its constitutional gravity is greater than an oral ruling regarding sentencing. He directs us to out-of-state authority holding that oral rulings can terminate jeopardy. *See Lowe v. State*, 242 Kan. 64, 744 P.2d 856, 857–58 (1987) (holding that an oral acquittal terminates jeopardy and bars any further action for that offense). *But see United States v. Wash.*, 48 F.3d 73, 79 (2nd Cir.1995) ("An oral grant of a motion for acquittal is no more than an interlocutory order, which the court has inherent power to reconsider and modify . . . prior to the entry of judgment.") (internal quotation marks omitted) (quoting *United States v. LoRusso*, 695 F.2d 45, 52–53 (2nd Cir.1982)). We are not persuaded and decline the invitation to import such a rule into New Mexico for three reasons.

{24} First, Defendant has not meaningfully distinguished this case from the general rule in New Mexico that oral rulings are ineffective and are not final judgments. *Smith*, 101 N.M. at 356, 683 P.2d at 38 (stating that a written order that is never filed is equivalent to an oral ruling and therefore is not a final judgment); *Diaz*, 100 N.M. at 525, 673 P.2d at 502 (holding that a court is free to change an orally pronounced sentence until a written judgment is filed). The two current exceptions to this rule are not implicated in this case. The *Ratchford* exception is limited to an oral grant of a new trial being effective to defeat automatic denial provisions built into the rules of criminal procedure. 115 N.M. at 570–71, 855 P.2d at 559–60. The cases involving discharge of a jury can be distinguished because in those cases the proceedings were terminated and the fact-finder was discharged by the oral comments of the judge, while here, proceedings were ongoing and the court expressly reserved ruling on the aggravated DWI charge. *Rodriguez*, 2004–NMCA–125, ¶ 14, 136 N.M. 494, 100 P.3d 200 (holding that oral discharge of jury terminated jeopardy);

Reyes-Arreola, 1999-NMCA-086, ¶ 10, 127 N.M. 528, 984 P.2d 775 (holding that oral declarations of mistrial which discharge the jury "are unlike other oral decisions by the trial court, which are not binding and are subject to change until a final written order or judgment is entered").

{25} Defendant also makes no argument why finality for purposes of appeal should be different from finality for a criminal verdict in terms of terminating jeopardy. This court has held that "in criminal cases, the judgment is final for the purpose of an appeal when it terminates the litigation on the merits and leaves nothing to be done but [enforcement]." *Durant*, 2000-NMCA-066, ¶ 5, 129 N.M. 345, 7 P.3d 495 (internal quotation marks and citations omitted). We see no reason to differentiate between finality for purposes of a verdict (termination of jeopardy) and finality for purposes of appeal.

{26} Second, permitting oral acquittals would require us to clarify what words used by a trial court would or would not constitute an acquittal—an exercise with serious practical and conceptual difficulties. After surveying cases from other jurisdictions in this area, it is clear that those courts that allow jeopardy to terminate upon an oral ruling have had to make subtle, fine-line distinctions, including: (1) which words are sufficiently final, (2) whether words have hung in the air for long enough to solidify into irrevocable orders, (3) whether parties did or did not reasonably rely on such rulings to their detriment, and (4) whether an interactive dialogue with the court truly communicated an acquittal on the merits. *See generally State v. Collins*, 112 Wash.2d 303, 771 P.2d 350, 353 (1989) (en banc) (concluding that in light of their experience with oral acquittals the superior rule was to only allow a final written order terminating jeopardy); *Barnes v. State*, 9 S.W.3d 646, 649 (Mo.Ct.App.1999) (concluding that when the judge changed her mind on an oral ruling during a few minutes of conversation, jeopardy had been terminated, contrary to the judge's understanding that he was hearing argument).

{27} Discouraging courts from engaging in open dialogue with the parties or forcing judges to constantly issue disclaimers that all oral rulings are tentative and under advisement is not a practical way to guarantee the verdict finality that double jeopardy seeks to protect. We approve of an approach similar to that adopted by Utah and conclude that a bright-line rule rejecting oral acquittals is practical, clarifies the expectations of the parties, and supports the double jeopardy doctrine's protections of verdict finality. *See State v. Gerrard*, 584 P.2d 885, 887 (Utah 1978) (stating that a court could reverse an orally issued sentence without violating double jeopardy and that the appropriate review was for inherent unfairness that constituted an abuse of discretion).

{28} Third, acceptance of the concept of oral acquittals would dilute double jeopardy's core focus on verdict finality with concerns about trial process. Those courts that find jeopardy terminated by oral rulings often slide into concerns about prejudice in the trial process, which is not the focus of double jeopardy doctrine. *See Brooks v. State*, 308 Ark. 660, 827 S.W.2d 119, 123 (1992) (stating that "prejudice is clear" when a defendant is deprived of an opportunity to know the charges against him during trial). In the adversarial and high-stakes dynamic of an ongoing criminal trial, it is understandable that a defendant would seize a favorable statement or decision and seek to freeze such a ruling. This is not the purpose of double jeopardy protection. It is crucial to distinguish between fairness in the trial process and finality in the trial result. Double jeopardy protection is aimed at ensuring finality in the results of a trial, particularly where a defendant is acquitted, so that an acquitted defendant has secure and peaceful "repose." *Tapia*, 109 N.M. at 742, 790 P.2d at 1023.

{29} In New Mexico, the result of a trial, traditionally, is the final written judgment and sentence, and not oral rulings during the trial. *Diaz*, 100 N.M. at 525, 673 P.2d at 501; Rule 7-701 ("[A] written judgment and sentence shall be signed by the judge and filed."). While some courts tend to merge trial prejudice (trial process) into double jeopardy protections (trial result), it is more faithful to the doctrine to differentiate between an acquittal that would terminate

jeopardy (and implicate the highest level of double jeopardy protection) from a judge's management of the process of a trial. An example of a trial process concern is where a judge's oral statements lead a defendant to believe a charge or element of the case is not in play prior to presentation of defense witnesses or argument. Such prejudicial errors during the process of a trial are best dealt with through existing guarantees of fundamental trial fairness, such as the doctrine of fundamental error, and not via double jeopardy doctrine. *See State v. Barber,* 2004–NMSC–019, ¶ 16, 135 N.M. 621, 92 P.3d 633 (explaining that the doctrine of fundamental error acts as a check on the judicial process, and that an error in the trial process that shocks the conscience may require a reversal regardless of the apparent guilt of the accused).

{30} We conclude that neither the trial court's oral comments nor its interlocutory order subjected Defendant to the harassment of a second prosecution after a verdict of acquittal. Therefore, the double jeopardy clause of the United States Constitution was not violated. *Angel,* 2002–NMSC–025, ¶¶ 7, 15, 132 N.M. 501, 51 P.3d 1155.

The Trial Court's Oral Ruling Did Not Constitute Fundamental Error

{31} Defendant's final argument regarding double jeopardy seems to be that he was prejudiced at trial by the oral ruling on June 3, 2003, because he understood the court's oral ruling to be an acquittal of the refusal theory and therefore did not address refusal in his motion for reconsideration. This claim is weak because refusal had been part of the original charge, and Defendant addressed refusal in his case-in-chief when he testified that he had difficulty hearing the instructions given to him and did not refuse to blow into the device. As noted, the fact-finder did not find Defendant credible. Defendant also undertook research to find any relevant case law to support his argument on refusal, even after the oral statements by the trial court, and Defendant continued to argue against the refusal basis, both before and after the purported oral acquittals.

{32} As described above, the doctrine of fundamental error is the more appropriate tool to guard against prejudice from oral rulings during trial. In such an analysis, Defendant would have to show that the oral statements by the trial court caused "fundamental unfairness" in his trial. *Barber,* 2004–NMSC–019, ¶¶ 18–20, 135 N.M. 621, 92 P.3d 633 (internal quotation marks omitted). The record here shows there was no prejudice to Defendant because his defense on refusal was not curtailed in fact, nor was his trial fundamentally unfair.

The Implied Consent Act, the DWI Statutes, and Applicable Regulations

{33} Defendant contends the trial court incorrectly interpreted the aggravated DWI statute, Section 66–8–102(D), and the Implied Consent Act, NMSA 1978, § 66–8–107 (1993), when it held that Defendant refused to comply with the test after he had provided one breath sample. We review issues of statutory interpretation de novo. *Rowell,* 121 N.M. at 114, 908 P.2d at 1382; *Bd. of Comm'rs of Doña Ana County v. Las Cruces Sun–News,* 2003–NMCA–102, ¶ 19, 134 N.M. 283, 76 P.3d 36. The primary goal is to ascertain legislative intent, indicated by the plain language of the statute. *Id.* When "the statute's language is clear and unambiguous, we give the statute its plain and ordinary meaning and refrain from further interpretation." *Id.* A statute defining criminal conduct must be strictly construed, *Santillanes v. State,* 115 N.M. 215, 221, 849 P.2d 358, 364 (1993), and agency rules and regulations are construed in the same manner as statutes. *Bokum Res. Corp. v. N.M. Water Quality Control Comm'n,* 93 N.M. 546, 549, 603 P.2d 285, 288 (1979) (applying rules of statutory construction to agency regulations); *N.M. Dep't of Health v. Ulibarri,* 115 N.M. 413, 416, 852 P.2d 686, 689 (Ct.App.1993) (applying rules of statutory construction to administrative agency rules). All portions of statutes are read in connection with every other part to produce a harmonious whole. *Gen. Motors Acceptance Corp. v. Anaya,* 103 N.M. 72, 76, 703 P.2d 169, 173 (1985).

{34} The question presented is whether the legislature intended that a driv-

er could provide one breath sample and still be guilty of refusing to comply with the testing regime established by the Implied Consent Act and the implementing SLD regulations. Although this result may seem counterintuitive, we conclude that it was clearly intended by the legislature.

{35} The DWI statute, Section 66–8–102(D)(3), references testing under the Implied Consent Act. § 66–8–107. The Implied Consent Act then refers to the Public Health Act, NMSA 1978, § 24–1–22 (2003), which directs the SLD to establish testing procedures. The SLD has promulgated regulations for alcohol testing of blood and breath pursuant to the Implied Consent Act. 7 NMAC 33.2.1 to –18 (2001).

{36} The DWI statute states, in pertinent part, that a person commits aggravated DWI if he "*refuse[s] to submit* to chemical testing, *as provided for in the Implied Consent Act* ... and in the judgment of the court, based upon the evidence of intoxication presented to the court, was under the influence of intoxicating liquor or drugs." § 66–8–102(D) (emphasis added). The Implied Consent Act then states that any driver in the state has consented "to chemical *tests* of his breath or blood or both, approved by the scientific laboratory division ... pursuant to the provisions of [the Public Health Act] ... for the purpose of determining the drug or alcohol content of his blood if arrested for [DWI]." § 66–8–107 (emphasis added). The SLD regulations contain these definitions:

> [A] "sample" [is] a quantity of a subject's blood or exhaled breath to be analyzed for the presence of alcohol.... All *samples* should be of sufficient volume so that complete analysis ... may be performed. The breath test operator should make a good faith attempt to collect and analyze *at least two (2) samples of breath.*

7 NMAC 33.2.7(Q) (emphasis added).

> "Test" ... [i]n the case of breath, "test" means the analysis of *breath samples* for alcohol or other chemical substances or both.

7 NMAC 33.2.7(R) (emphasis added).

{37} The definitions portion of the SLD regulations clearly anticipate two breath samples, either expressly or by use of the plural "samples." Similarly, the breath sample collection regulation envisions either two or three samples, yet allows one sample to be analyzed, stating:

> (1) *Two breath samples shall be collected* and analyzed by certified Operators.... The *two breath samples* shall be taken not more than 15 minutes apart. If the difference in the results of the *two samples* exceeds 0.02 grams per 210 liters (BrAC), a *third sample* of breath or blood shall be collected and analyzed. If the subject declines or is physically incapable of consent for the *second or third samples,* it shall be permissible to analyze *fewer samples.*
>
> (2) *Samples* of the subject's breath shall be collected and analyzed pursuant to the procedures prescribed by, and employing only devices approved and certified by, [SLD].

7 NMAC 33.2.12(B)(1), (2) (emphasis added).

{38} It is clear from the SLD definitions and procedures that a correctly administered breath test will consist of two samples or, in some cases, three samples. The provision allows analysis of "fewer" samples (one sample) in the case of inability or refusal, but the directive to the operator is clear that two samples are to be collected. It is reasonable to conclude that the requirement for two samples is for greater accuracy, but if only one can be obtained, the process is deemed sufficiently accurate to analyze that one sample. This is in order to allow for effective prosecution of those drunk drivers who will provide only one sample; if the suspect is injured or unconscious the State may obtain a blood sample under the Implied Consent Act. NMSA 1978, § 66–8–108 (1978) (stating that a suspect who physically cannot refuse due to injury, unconsciousness, or death has consented to testing). *See also State v. Munoz,* 2004–NMCA–103, ¶ 5, 136 N.M. 235, 96 P.3d 796 n. 1 ("In New Mexico, a single breath test *consists of two samples* .... If the subject declines or is unable to give two samples, fewer are permitted for a valid test." (emphasis added)).

{39} Defendant contends that the words "[a driver consents] to chemical *tests* of his breath or blood *or both*" in the Implied

Consent Act must be read together with the later-occurring phrase "[a] *test* of blood or breath or both ... shall be administered at the direction of a law enforcement officer." § 66–8–107 (emphasis added). He contends the plural "tests" refers not to multiple samples, but rather to the option of the police officer to seek both blood or breath tests. It would be a counterintuitive reading for the word "tests" to refer not to "breath or blood" yet refer to "both"—had the Legislature intended only one test of each type at the option of the police, it could have easily said "[a driver consents] to a *test* [ ] of his breath or blood or [a *test* of] both." Defendant's reading is also countered by the express language of the SLD regulations which mandates two samples, 7 NMAC 33.2.12(B), and this Court's observation that the word "test" of breath under the SLD regulations actually consists of multiple samples, so the use of the singular "test" does not refer to one sample. *Munoz,* 2004–NMCA–103, ¶ 5, 136 N.M. 235, 96 P.3d 796.

{40} Finally, Defendant argues that because the SLD regulations allow the analysis of a single sample, providing just one sample results in compliance with the statutes and regulations. This runs counter to the language of the aggravated DWI provision that a person is guilty if he "refuse[s] to submit to chemical testing, *as provided for in the Implied Consent Act.*" § 66–8–102(D)(3) (emphasis added). Since the Implied Consent Act references the authority of SLD to define testing, and SLD has clearly defined correct testing of breath as the collection of two samples, providing one sample is not submitting to testing "as provided for" in the Act or as designated by SLD. The plain language of the relevant statutes and regulations indicate legislative intent to motivate suspects to take the test and to punish those who do not take the breath test correctly. § 66–8–102(D), (E) (punishing an intoxicated driver who refuses to submit to chemical testing). Those who provide one sample therefore have refused to take the test as designed by the SLD. The legislature has made it clear that in those cases the single sample can still be used against Defendant. 7 NMAC 33.2.12(B)(1). As noted, here the fact-finder believed the officer's testimony that Defendant wilfully evaded a second sample, unlike a situation where injury to mouth or lungs could prevent a suspect from providing a breath sample, in which case, presumably, the police would seek a blood sample. *See generally In re Abel G. Suazo,* 117 N.M. 785, 787, 877 P.2d 1088, 1090 (1994) (stating that where suspect had failed to produce enough air for breath sample readings, subsequently blaming injury to his mouth, but later agreed to a blood test, that the later consent did not cure the initial refusal).

{41} Our conclusion is also supported by similar cases in which this Court has held that anything short of full and unequivocal consent is a refusal except in very limited circumstances. *Fugere v. State, Taxation & Revenue Dep't,* 120 N.M. 29, 34, 897 P.2d 216, 221 (Ct.App.1995) (stating that any type of conditional consent is a refusal to take the test, and collecting cases on conditional consent); *In re Abel G. Suazo,* 117 N.M. at 793, 877 P.2d at 1096 (defining a five-part test for when an initial refusal can be cured by a later consent and holding that such consent must be given within a matter of minutes). While criminal statutes must be construed against the State, the plain language of the statutes here indicates the legislature's intent to require that DWI suspects provide two breath samples and that those who, without reasonable justification, provide one sample have failed to take the test "as provided for in the Implied Consent Act." § 66–8–102(D)(3).

Due Process

{42} Defendant claims it violates the due process clauses of both the federal and state constitutions to convict him of refusing to provide a sample when a sample is used against him. Defendant makes this claim in one sentence without any citation to authority or analysis on how due process was violated by the facts of this case. This Court will not consider an argument that lacks citation to any legal authority in support of that argument. *Santa Fe Exploration Co. v. Oil Conservation Comm'n,* 114 N.M. 103, 108, 835 P.2d 819, 824 (1992); *State v. Chandler,* 119 N.M. 727, 733, 895 P.2d 249, 255 (Ct.App.1995). Where a party cites no au-

thority to support an argument, we may assume no such authority exists. *In re Adoption of Doe,* 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984).

CONCLUSION

{43} For the foregoing reasons, we affirm Defendant's conviction.

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

ALARID, J., concurs.

ROBINSON, Judge (concurring in result only).

2005-NMCA-066

114 P.3d 367

STATE of New Mexico ex rel. CHILDREN, YOUTH AND FAMILIES DEPARTMENT, Petitioner–Appellee,

v.

SHAWNA C., Respondent–Appellant,

and

In the Matter of Lakota C., a Child.

No. 24625.

Court of Appeals of New Mexico.

April 20, 2005.

Rebecca J. Liggett, Children's Court Attorney, N.M. CYFD, Santa Fe, for Appellee.

Nancy L. Simmons, The Law Offices of Nancy L. Simmons, P.C., Albuquerque, for Appellant.

OPINION

FRY, J.

{1} Both Shawna C. (Mother) and Benjamin O. (Father) appeal the district court's adjudication that each parent abused and neglected their infant daughter (Child). We combined the appeals due to the shared record and related issues and in order to resolve Child's status in one opinion. We conclude that the district court properly could have determined that clear and convincing evidence showed Mother neglected Child. We conclude that there was insufficient support for a finding of abuse or neglect as to Father. Finally, we hold that the abuse and neglect statute is not so vague as to violate substan-

tive due process protections under the United States Constitution.

BACKGROUND

{2} We requested that the parties brief the issue of whether an abuse and neglect adjudication is a final, appealable order that would provide this Court with jurisdiction to hear such an appeal. Recently, we confirmed that this Court does have jurisdiction to hear appeals of abuse and neglect adjudications because such determinations are sufficiently final to justify our review. *State ex rel. Children, Youth & Families Dep't v. Frank G.*, 2005-NMCA-026, ¶ 39, 137 N.M. 137, 108 P.3d 543, *cert. granted*, Sup.Ct. No. 29,042 [Vol. 44, No. 11 SBB 21, 2005 WL 937479 (Feb. 21, 2005)]. While we review the initial determination of abuse and neglect, the district court retains continuing jurisdiction for the required periodic reviews of the child's custody. *Id.* ¶ 42; *see* NMSA 1978, § 32A-4-25.1 (1997) (providing that a permanency hearing shall take place within six months of the initial review with subsequent hearings to be held every three months as needed). Therefore, we have jurisdiction to consider both Mother's and Father's appeals as long as this appeal is not made moot by further actions of the district court.

{3} The Children, Youth and Families Department (CYFD) initiated the present action by filing a petition alleging abuse and neglect and an affidavit for an ex parte custody order. The following basic facts are set out in CYFD's abuse and neglect petition, CYFD's affidavit for custody, CYFD's predispositional study, and testimony at the adjudication hearing held in late 2003. Mother and Father are not married, do not live together, and by Child's birth were no longer in an ongoing relationship. Child was born at a hospital in early 2003. The day after Child's birth, the hospital staff notified CYFD of concerns for Child's safety due to heated arguments between Mother and Father, Mother's odd behavior and apparent inability to care for Child, and Mother's revelation that several of her prior children had been removed from her involuntarily. A CYFD social worker responded but opted not to file an abuse and neglect petition and released Child to Father, pending a mental health evaluation of Mother.

{4} When Child was one month old, Mother apparently contested custody before the domestic relations court. The domestic relations court gave legal custody to Child's paternal grandmother (Grandmother), concluding that Father was not a suitable caretaker based in part on the court clinician's view that he lacked empathy and parenting ability and had a criminal record. That court reportedly ordered that Grandmother take drug tests and not leave Child unattended with Father, and that both Mother and Father attend a consultation at the Court Clinic.

{5} Child then lived with Grandmother and Father from April 2003 to August 2003, during which time no reports of abuse or neglect were received by CYFD; Child attended day care and was being seen by a pediatrician during this time. After a home visit by CYFD to Grandmother's home, the social worker reported that the "house was suitable" for Child. During these four months, Mother was not living with Child and was preparing to move out of New Mexico.

{6} Grandmother tested positive in August 2003 for use of controlled substances and, although the details are not clear from the record, the matter again came before the domestic relations court. That court determined that Child should be placed in protective custody and initiated an emergency referral to CYFD. Child has been in foster care since that time, with visitation provided for both parents. Additional facts relating to Mother and Father are set out below in connection with analysis of the adjudication of each parent.

ANALYSIS

Sufficiency of the Evidence to Support Adjudication

{7} Both parents challenge the sufficiency of the evidence underlying the district court's adjudication that they abused or neglected Child. To meet the standard of proof in an abuse or neglect proceeding, the fact finder must be presented with clear and convincing evidence that the child was

abused or neglected. NMSA 1978 § 32A-4-20(H) (1999); *In re Melissa G.*, 2001-NMCA-071, ¶ 12, 130 N.M. 781, 32 P.3d 790. "For evidence to be clear and convincing, it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true." *In re Termination of Parental Rights of Eventyr J.*, 120 N.M. 463, 466, 902 P.2d 1066, 1069 (Ct.App.1995) (internal quotation marks and citation omitted). Our standard of review "is a narrow one" and we may not re-weigh the evidence. *Id.* "Our standard of review is therefore whether, viewing the evidence in the light most favorable to the prevailing party, the fact finder could properly determine that the clear and convincing evidence standard was met." *Id.* Although the record in this appeal contains descriptions of events taking place after the adjudication of abuse and neglect, such as permanency plan hearings, our review is limited to a determination of whether the district court could have found that the parents abused or neglected Child based upon the evidence before it. We therefore disregard any of the evidence contained in the record that arose after the adjudication of abuse and neglect.

{8} In adjudicating Child as abused or neglected at the hands of both parents, the court found that three statutory definitions of abuse or neglect were shown by clear and convincing evidence: NMSA 1978, § 32A-4-2(B)(1) (1999) (stating that "[an] 'abused child' [is one] . . . who is at risk of suffering serious harm because of the action or inaction of the child's parent" (internal quotation marks omitted)); Section 32A-4-2(E)(2) (stating that "[a] 'neglected child' [is one] who is without proper parental care and control or subsistence, education, medical or other care or control necessary for the child's well being because of the faults or habits of the child's parent" (internal quotation marks omitted)); and Section 32A-4-2(E)(4) (stating that "[a] neglected child [is one] whose parent . . . is unable to discharge his responsibilities to and for the child because of . . . mental disorder or incapacity"). We summarize the evidence before the district court as to each parent and then assess the findings made by the district court in light of that evidence.

Mother

{9} In its petition alleging abuse and neglect and its affidavit for custody, CYFD stated that its investigation showed that "[M]other has serious mental health problems to the extent that the staff at the hospital . . . did not believe that . . . [M]other could appropriately respond to the needs of the baby," and that Mother "continues to have serious mental health issues and is unstable." The petition recounted the fights at the hospital and Mother's departure from New Mexico to Missouri. The affidavit detailed Mother's "extensive criminal history and mental health concerns" as the reason why the domestic relations court decided not to place Child with Mother. CYFD's investigative social worker reported that in his interview with Mother, she was visibly upset, discussed moving away, and disclosed that several of her older children had been taken away from her, but that she "could not give specifics" about those instances. Mother later stated that five of her older children had been removed from her involuntarily. The social worker reported that Mother refused to meet with a therapist at the hospital, as requested by the staff, that she inappropriately entered other patients' rooms, and that the hospital staff believed Child would be in danger if left with Mother. CYFD concluded that Mother's mental health history would endanger Child. Finally, the petition recounted the domestic relations hearing at which the guardian ad litem (GAL) and court clinician recommended that Child be placed with CYFD.

{10} CYFD ordered a psychological evaluation of Mother, particularly to assess any impact of her mental health on her ability to parent. The psychologist met with Mother in one session to evaluate her by means of a diagnostic interview and selected tests, but he did not observe Mother interacting with Child. The psychologist testified at the adjudication hearing that due to Mother's limitations, he was not able to administer some of the test instruments, which require a sixth-grade reading level. He testified that Moth-

er functions at the "extremely low range of intellectual functioning" and had "serious risk factors" in terms of "overall cognitive and neurological functioning." The psychologist related Mother's IQ scores as 55 for verbal, 62 for performance, and 55 for post-scale IQ. He testified that such scores would not necessarily render a person generally, nor Mother in particular, incompetent to parent, but he would have "reservations" about such a parent's ability.

{11} In addition, the psychologist found Mother tested at a "high moderate range" of depression, although he found that parents typically have some level of depression once a child is removed from them. The psychologist diagnosed Mother as having: (1) dysthymic disorder, due to her long-term, moderate depression; (2) adjustment disorder with anxiety; (3) cognitive disorder, not otherwise specified, due to her apparent neurologic deficits; (4) mild mental retardation; and (5) personality disorder, not otherwise specified, with borderline features. The psychologist testified that the most significant factors to his diagnosis of the personality disorder were Mother's history of having five children previously taken involuntarily, her self-reported difficulty in maintaining good relationships, and her overall lifestyle of being unhappy and "reactive," instead of proactive, to situations. The psychologist concluded that Mother's testing indicated a risk of poor judgment and poor impulse control, and generally he "would be concerned [about] the safety of any child placed with her[,] particularly an infant," although he stated that he did not know whether Mother was currently unable to care for Child.

{12} Prior to the adjudication, CYFD issued a pre-dispositional study regarding Mother's visitation with Child, which took place three times per week. CYFD concluded that Mother "does not appear to have an understanding of [Child's] need[s] or how to appropriately care for her needs." This conclusion was based upon Mother's attempts to feed Child solid food before Child could eat it, overfeeding Child, excessive changing of Child's diaper, and inability to comfort Child. This report contained CYFD's assessment that Mother would not be "able to safely care for [Child]."

{13} Mother testified at the adjudication hearing and stated that she loved Child and could care for her. She testified that she had an apartment, which CYFD had visited and deemed safe, and that she had income from Social Security disability. She noted that she had not ever abused Child, had never even had custody of her, and that she very much wanted to raise Child.

{14} The district court found that: (1) Mother's conduct at the hospital indicated that she was not able to care for Child; (2) her mental health interferes with her ability to care for Child; (3) Mother has a history of prior involuntary terminations of parental rights; and (4) her "situation, mental health diagnosis and history create a significant risk of serious harm" if Child were placed in her care.

{15} We conclude that the totality of the evidence presented supports the court's findings and judgment. On appeal and at trial, Mother emphasized that she has not abused Child and has not had an opportunity to actually demonstrate her parenting skills with Child. While this is true, we note that she has had an opportunity to demonstrate her abilities with five older children. Her admission of involuntary termination of her parental rights to those older children operates as clear and convincing proof of that fact. *In re State ex rel. Children, Youth & Families Dep't v. Amy B.*, 2003–NMCA–017, ¶ 12, 133 N.M. 136, 61 P.3d 845. While this fact is not determinative for a finding of abuse and neglect, it is considered an aggravated circumstance under the Abuse and Neglect Act (the Act) in the context of termination of parental rights, as a basis to forego reunification efforts. § 32A–4–2(C)(4) (stating that "aggravated circumstances include those circumstances in which the parent, guardian or custodian has[ ] had his parental rights over a sibling of the child terminated involuntarily" (internal quotation marks omitted)). Using the prior involuntary terminations as background, we conclude that Mother has been provided a reasonable opportunity, without success, to demonstrate her ability to parent. *Amy B.*, 2003–NMCA–

017, ¶ 16, 133 N.M. 136, 61 P.3d 845 (noting the "very real relationship between the past conduct and the current abilities" to parent). Contrary to her contention, Mother need not be given the opportunity with this particular child if there is a substantial risk of harm. *In re Termination of Parental Rights of Sherry C. & John M.*, 113 N.M. 201, 208, 824 P.2d 341, 348 (Ct.App.1991) (stating that a court could use neglect of a mother's older children to determine that she could not care for a child that had been removed from her care at birth); *In re I.N.M.*, 105 N.M. 664, 668, 735 P.2d 1170, 1174 (Ct.App.1987) (explaining that "a parent does not have the privilege of inflicting brutal treatment upon each of his children in succession before they may individually obtain the protection of the state" (internal quotation marks and citation omitted)). Mother has been provided with the opportunity to interact with Child in visitation, and observations on her inability to provide basic care for Child caused CYFD to conclude that Mother was not able to "appropriately care for [Child's] needs." The testimony about Mother's erratic behavior, mental illness, and cognitive limitations further supports a conclusion that her mental incapacity greatly limits her ability to parent.

{16} Construing the evidence in a light supporting the judgment, we conclude that the fact finder could have found the evidence clearly and convincingly demonstrated that Mother was unable to effectively parent due to her mental disorder and incapacity, which meets the definition of neglect under Section 32A–4–2(E)(4) (defining "neglected child" as a child whose "parent . . . is unable to discharge [her] responsibilities to and for the child"). We affirm the judgment on this basis and need not decide whether abuse under Section 32A–4–2(B)(1) (defining "abused child" as a child "at risk of suffering serious harm") or neglect under Section 32A–4–2(E)(2) (defining "neglected child" as a child "without proper parental care [or] control") were proven.

Father

{17} Father also met, for one session, with a CYFD-selected psychologist, but the psychologist never observed Father interacting with Child. The psychologist testified at the adjudication hearing that some tests would not be valid due to Father's incomplete responses or due to Father's lack of candor. The psychologist assessed Father as being highly dominant, which the psychologist associated with "high need for control, high need for power[,] and poor interpersonal function[,]" and mentioned a connection between such dominance and domestic violence and child abuse. He testified that Father also scored high within the mania category, which raised concerns about impulse control and paranoia. The psychologist based his concern regarding Father's impulse control on Father's prior criminal convictions as well as the argument at the hospital. He testified, "[I]f somebody has been involved in a crime and antisocial behavior, it just raises questions in my mind about the ability to raise a child . . . . [P]eople who commit crimes tend to be more self[-]centered and not have a great deal of empathy for others." He testified that it is not generally possible to teach a person to be empathetic. Even with the assumption of a five-year period in which Father had had no criminal convictions, the psychologist's opinion was unchanged because such criminal acts are indicative of personality disorders, which are resistant to change. The psychologist described Father as angry and oppositional, and the psychologist felt the anger was part of Father's character and not just due to losing custody of Child.

{18} The psychologist diagnosed Father as having: (1) adjustment disorder with anxiety, which was not unusual given the situation with CYFD; (2) a principal diagnosis of schizotypal personality disorder; (3) narcissistic personality disorder "primarily because [he] didn't hear any awareness [from Father] of how this situation might be affecting [Child]"; and (4) antisocial personality disorder. The psychologist concluded that he had "very strong reservations about placing a child in [Father's] care," that if a bonding and interaction study was done "right now, [Father] would probably not do well," and that Child was at the stage where empathy from a caregiver was "vitally important" to Child's development. He based his conclusions on his view that Father lacked suffi-

cient empathy to be able to read a child's cues or facilitate attachment, and had high indicators of dominance and need for control, which "broadly correlate" with child abusers and domestic violence perpetrators. In addition, the psychologist feared how "[Father's] anger might impact the child." He also felt Father was evasive in the area of substance abuse. The psychologist recommended that Father meet with a child development specialist who could actually observe Father interacting with Child and give instruction on how to parent, and that Father receive ongoing psychiatric care.

{19} The court clinician of the district court testified as to her involvement with the case, which she described as varying from being a passive observer to providing information to the district court about the parties. The clinician testified that she did not observe Father with Child, other than perhaps once in passing. She concluded that Father, Mother, and Grandmother could not make "a whole parent" even if "you put all three of them together," although they all clearly loved Child and were not responsible for their poor upbringing and personal histories. The clinician felt that, despite the recent period in which Father went without criminal activity, Father's criminal history "raise[d] concern" for her. The court had before it a report of Father's criminal history, which includes three felony convictions in the period from 1993 to 1995, and then five misdemeanor convictions from 1995 to 1999. There were a number of arrests or dismissed cases from 1993 to 2000 that did not result in convictions, and a 2002 arrest for domestic assault initiated by Mother that was dismissed. The court asked Father about his criminal history, which he had described in testimony as "several years ago," to which the court replied, "It's not that many years ago." Finally, Father testified that he has a full-time job, was no longer living with Grandmother, had a suitable apartment, and would like to raise his daughter.

{20} The court found that: (1) in his meeting with the court clinician, Father showed a lack of awareness of Child's needs and lack of empathy that would interfere with his ability to care for Child; (2) Father's mental illnesses would put Child at risk of serious harm if placed with Father; (3) Father's criminal history, lack of candor with the court about that history, and his failure to prevent placement of Child with Grandmother (who tested positive for use of controlled substances) indicate his inability to care for Child; and (4) Father's actions and inactions placed Child at risk of serious harm.

{21} Father has had no other children and has had no prior allegations of child abuse or neglect. We find it significant that the first person to make a pronouncement on his inability to interact properly and "with empathy" with Child was the court clinician, who did not observe him more than momentarily with Child. The psychologist found Father "lacked empathy" and could not respond to Child's cues, but the psychologist did not observe Father with Child and based his assessment on a single session in which Father failed to describe the situation's impact on Child. Those who actually observed Father interacting with Child commented positively. This includes the CYFD investigative social worker and the CYFD employees who observed his visitation, who stated, "[Father] appears to be able to care for the basic needs such as feeding and changing." The suggestion that Father permitted or allowed Grandmother's drug use around Child was supported only by a positive urinalysis. There was no testimony that Grandmother actually took care of Child while under the influence, had neglected Child, or had drugs around Child. Father did, for some period, take care of Child without incident, including taking her to day care and her pediatrician. The court clinician alleged that Father failed to follow the domestic relations court's stipulations, but there is no contention that these violations constituted abuse or neglect.

{22} Even when we view the evidence in the light most favorable to the State, the evidence is insufficient to support the district court's conclusion that Father abused or neglected Child. The State's evidence consisted of the following: (1) testimony of the court clinician and the psychologist, neither of whom observed Father with Child, who found Father to be not empathetic enough;

(2) allegations that Father is angry, either at CYFD and Mother, or generally; (3) the psychologist's opinion noting that Father's personality traits are "broadly correlated" with those who may be violent, although there was no evidence of Father's being violent to Child; and (5) Father's criminal history, which rendered him presumptively at risk as a parent, in the psychologist's view. This evidence does not meet a clear and convincing standard, instantly tilting the scales in the affirmative, for any of the statutory definitions. Evidence of Father's somewhat aged criminal history, his anger, his mental health issues as diagnosed by the psychologist, and the fact that he "permitted" Grandmother to care for Child while Grandmother ingested drugs, while not reflecting exemplary behavior, does not support anything more than a vague inference of future harm. Such an inference provides an insufficient basis for finding either neglect or abuse within the meaning of the statute. We therefore reverse the district court's judgment that Father abused or neglected Child.

Constitutionality of the Abuse and Neglect Act

{23} Mother contends that the abuse and neglect statute is so vague as to violate due process protections under the Fourteenth Amendment, particularly for the mentally disabled. In connection with this argument, Mother also contends that the district court effectively based its finding of abuse or neglect upon Mother's character and mental deficiency "standing alone," without any showing of actual errors or omissions in Mother's parenting. We dispose of this latter concern and then address the core void-for-vagueness argument.

{24} We review a challenge to the constitutionality of a statute de novo. *State v. Laguna,* 1999–NMCA–152, ¶ 24, 128 N.M. 345, 992 P.2d 896. To the extent Mother asks us to interpret the Act, that also presents a question of law that is reviewed de novo on appeal. *State v. Rowell,* 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995). A void-for-vagueness attack need not be preserved to enable our review. *Laguna,* 1999–NMCA–152, ¶ 23, 128 N.M. 345, 992 P.2d 896.

{25} Mother appears to be claiming that the Act permits an improper "status" judgment, which in the criminal context would violate the Eighth Amendment's ban on cruel and unusual punishment. *See Robinson v. California,* 370 U.S. 660, 666–67, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) (stating that criminalizing the status of being addicted to narcotics violates the Eighth Amendment); *see also Powell v. Texas,* 392 U.S. 514, 533, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968) (limiting *Robinson* to statuses and finding that being drunk while in public did involve an actus reus).

{26} Mother argues that she "committed no prohibited *act;* instead, her current mental state and her past conduct ... condemned her to lose custody." It is true that the psychologist suggested in his testimony that Mother's low IQ was a concern and his testimony could be construed to mean that her status alone may have been sufficient to remove Child from Mother. Similarly, Mother contends that "there is no statutory authority for taking custody of a child, based on perceived future harm, in the absence of some actus reus by a parent ... [and unless the] act or omission [is] affecting the child who is the current subject of ... proceedings." Mother is only partially correct. The State may indeed act based upon perceived future harm, and prior harm to other children may properly be considered as relevant to neglect or abuse of a different child. *In re I.N.M.* 105 N.M. at 668, 735 P.2d at 1174; § 32A–4–2(B)(1) (defining "abused child" as being "at risk of suffering serious harm").

{27} We agree with Mother that low IQ, mental disability, or mental illness alone are not sufficient grounds for a finding of abuse or neglect. *See In re Kidd,* 261 N.W.2d 833, 835 (Minn.1978) (explaining that in a termination context, mental illness alone is not "other conduct" detrimental to a child); *In re J.L.B.,* 182 Mont. 100, 594 P.2d 1127, 1136 (1979) ("[M]ental deficiencies alone do not justify termination if there is no evidence that the child is in some way harmed or likely to be harmed because of the parent's

condition."). We also agree with Mother that if the State fails to show any prior acts or omissions that constitute abuse or neglect and makes predictions of harm based solely on an unfavorable status, such as mental disability, then the State would fail to meet the statutory basis for abuse and neglect. However, we conclude that the Act does not permit a finding of neglect based solely upon the mental disability or mental illness of a parent.

{28} It is true that the Act defines a neglected child as one "who is without proper parental care and control ... *because of the faults or habits of the child's parent.*" § 32A–4–2(E)(2) (emphasis added). Despite the use of the emphasized phrase, however, neglect may not be viewed as the automatic result of a person's status. This phrase imposes a fault requirement in those cases where a parent fails or refuses to provide proper care for a child. This culpability requirement operates to exclude cases in which even an exemplary parent could not provide "proper parental care and control" due to circumstances beyond that parent's control or where a parent is acting reasonably. *See In re Melissa G.*, 2001–NMCA–071, ¶ 20, 130 N.M. 781, 32 P.3d 790 (stating that where a mother reasonably failed to notice harm to her child, but there was no evidence of mother's culpability, through either intentional or negligent disregard, the claim of neglect failed as a matter of law). One could hypothesize many situations in which a parent could not properly care for his or her child temporarily, yet the inability would not be due to the "faults or habits" of the parent, or a situation where a reasonable parent would fail to protect or aid a child due to lack of notice. In either case, there would be no culpability.

{29} By contrast, the fault requirement in Section 32A–4–2(E)(2) is absent from Section 32A–4–2(E)(4), which states that a parent's "incarceration, hospitalization or physical or mental disorder or incapacity" is a basis for neglect if that condition makes the parent "unable to discharge his responsibilities" as a parent. *See State ex rel. Children, Youth & Families Dep't v. Joe R.*, 1997–NMSC–038, ¶ 1, 123 N.M. 711, 945 P.2d 76 (stating that incarceration alone does not constitute neglect, as there must also be an inability to parent). Thus, the legislature has (1) imposed a culpability requirement in the section focusing on absence of "proper parental care and control or subsistence," Section 32A–4–2(E)(2), and (2) defined certain circumstances in Section 32A–4–2(E)(4) that, regardless of the culpability of the parent, may constitute neglect if, and only if, such a status causes the parent to be unable to discharge his or her parental responsibilities.

{30} An unfavorable personal status, such as low IQ, poverty, mental illness, incarceration, prior convictions, or addiction, is therefore relevant only to the extent that it prompts either the harms defined as abuse, or the neglect which is defined as the failure to provide "proper parental care and control" or an inability "to discharge his responsibilities to and for the child." *In re Adoption of J.J.B.*, 119 N.M. 638, 646, 894 P.2d 994, 1002 (1995) (stating that to comport with due process, parental unfitness must be shown "by proof of substantive criteria demonstrating parental inadequacy or conduct detrimental to the child"). While such statuses, particularly if extreme in nature, may well lead to neglect or abuse as defined by the Act, we emphasize that the focus should be on the acts or omissions of the parents in their caretaking function and not on apparent shortcomings of a given parent due to his or her unfavorable status. While no child would ask to have a poor, incarcerated, or addicted parent, poverty, incarceration, or addiction alone do not perforce equate to neglect as set out in the statute. *See State ex rel. Children, Youth & Families Dep't v. Joe R.* 1996–NMCA–091, ¶ 9, 122 N.M. 284, 923 P.2d 1169 (holding that father's conviction for murdering child's mother, and subsequent incarceration for life, did not establish neglect as a matter of law), *rev'd on other grounds*, 1997–NMSC–038, 123 N.M. 711, 945 P.2d 76. Thus, we conclude that the Act does not permit a court to find abuse or neglect based solely on a parent's status. Here, the State showed that Mother's status renders her unable to care for Child, and neglect was properly found under Section 32A–4–2(E)(4). The fact that this inability

may spring from a mental disability is relevant under Section 32A–4–2(E)(4) only because the State showed that Mother is "unable to discharge [her] responsibilities to and for the child." Since the statute requires a clear and convincing showing of an inability to parent in the specified circumstances, there is no basis for a court to find neglect solely based upon a parent's unfavorable status, and the district court did not do so in Mother's case.

{31} Mother also challenges the Act as being "void for vagueness" as applied to her. She claims that the phrases "without proper parental care ... because of the faults or habits of the child's parent" in Section 32A–4–2(E)(2), "unable to discharge his responsibilities ... because of ... mental disorder" in Section 32A–4–2(E)(4), and finally, "at risk of suffering serious harm" in Section 32A–4–2(B)(1), when read together, fail to give parents notice of what conduct is prohibited and vest "entirely too much discretion" in CYFD and the district court in determinations of parental unfitness. We summarize the void-for-vagueness doctrine, apply the doctrine to the Act, and conclude that it is not unconstitutionally vague.

{32} In the criminal context, due process requires that a statute be drafted so that it provides fair warning of the conduct sought to be proscribed and so it does not encourage arbitrary or discriminatory enforcement. *Kolender v. Lawson,* 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); *State v. Luckie,* 120 N.M. 274, 276, 901 P.2d 205, 207 (Ct.App.1995). A strong presumption of constitutionality underlies each statute, and the defendant has the burden to prove unconstitutionality beyond all reasonable doubt. *Laguna,* 1999–NMCA–152, ¶ 24, 128 N.M. 345, 992 P.2d 896. A claim of vagueness is analyzed according to the particular facts of each case. *Luckie,* 120 N.M. at 276, 901 P.2d at 207. A defendant will not succeed if the statute clearly applied to the defendant's conduct. *Laguna,* 1999–NMCA–152, ¶ 24, 128 N.M. 345, 992 P.2d 896.

{33} Although the void-for-vagueness doctrine typically arises in criminal cases, New Mexico courts have previously considered similar challenges to both abuse and neglect and termination of parental rights statutes. *In re Candice Y.,* 2000–NMCA–035, 128 N.M. 813, 999 P.2d 1045; *In re Doe,* 100 N.M. 92, 666 P.2d 771 (1983); *State ex rel. Health & Social Servs. Dep't v. Natural Father,* 93 N.M. 222, 598 P.2d 1182 (Ct.App. 1979). We first address the fair warning or notice aspect and then consider the arbitrary enforcement facet of the doctrine.

{34} In assessing whether a statute provides adequate notice, we ask if the statute "allows individuals of ordinary intelligence a fair opportunity to determine whether their conduct is prohibited." *Laguna,* 1999–NMCA–152, ¶ 25, 128 N.M. 345, 992 P.2d 896. "If the language makes the statute understandable and sensible, that is all that is necessary to uphold it as valid." *State v. Andrews,* 1997–NMCA–017, ¶ 11, 123 N.M. 95, 934 P.2d 289. In addition, the federal constitution does not require "impossible standards" of clarity in statutes, only that the language "convey[ ] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States v. Petrillo,* 332 U.S. 1, 7–8, 67 S.Ct. 1538, 91 L.Ed. 1877 (1947); *see Grayned v. City of Rockford,* 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (stating that "[c]ondemned to the use of words, we can never expect mathematical certainty from our language").

{35} In *Natural Father,* this Court addressed a vagueness challenge to the phrase "unable to discharge [his] responsibilities ... because of ... other physical or mental incapacity" in the predecessor statute to what is now Section 32A–4–2(E)(4). *Natural Father,* 93 N.M. at 225, 598 P.2d at 1185. There, we held that the words "mental incapacity" gave sufficient notice that the inability to discharge one's responsibilities as a parent because of mental incapacity constitutes neglect. *Id.* In 1987, the legislature expanded the definition, to what it is today, by adding the term "disorder" to mental incapacity and the phrase became "unable to discharge his responsibilities ... because of ... mental *disorder* or incapacity." NMSA 1978, § 32–1–3(L)(4) (1972, repealed 1978) (current ver-

sion at NMSA 1978, § 32A–4–2(E)(4) (1999) (emphasis added)). We consider that the addition of the term "disorder" did not make the statute any more vague; instead, it clarified the circumstances in which a parent's inability to function as a parent would constitute neglect without a showing of culpability.

{36} Mother's prior extensive history with abuse and neglect actions cuts substantially against her claim that she had no notice; her personal experience provided notice of what similar laws, if not those of New Mexico, proscribe. *See United States v. Corrow,* 941 F.Supp. 1553, 1562 (D.N.M.1996) (holding that, in an "as applied" challenge, a criminal defendant was on notice from his own experience with Navajo culture that certain Navajo artifacts had cultural significance and therefore he could not claim that the term "cultural patrimony" failed to give him notice of what types of items were protected). It is well settled that where a person is aware his or her conduct is approaching the line of prohibited conduct, he or she bears the risk of treading near the line. *Id.*

{37} Also persuasive to us is that our Supreme Court has found that language that is arguably substantially more vague meets constitutional requirements of specificity. *See In re Doe,* 100 N.M. at 93, 96–97, 666 P.2d at 772, 775–76 (holding that the phrase "the parent/child relationship has disintegrated" was not vague, and properly could be a basis for termination of parental rights). We conclude that Mother herself had adequate notice of what was prohibited in light of common understanding and practices regarding parental responsibilities, combined with her own experiences. She has not shown beyond a reasonable doubt that the Act failed to provide her with a fair opportunity to know that an inability to discharge her responsibilities due to mental disorder or incapacity constituted neglect. Similarly, she has not raised any serious doubt that the phrases "proper parental care" or "risk of serious harm" are not understandable and sensible when considered in light of common understanding and practices regarding parenting. A law's "[g]enerality is not the equivalent of vagueness." *Watso v. Dep't of Soc. Servs.,* 841 P.2d 299, 309 (Colo.1992) (en banc). We agree with a case cited in *Natural Father,* which states that when a statute "deals with children in need of care that they are not receiving[,] this may arise in so many ways that it would be impossible to state them all with great exactitude." *In re Minor Children of F.B.,* 323 S.W.2d 397, 401 (Mo.Ct.App.1959).

{38} Finally, we conclude that the Act does not encourage standardless or arbitrary enforcement of the law. The United States Supreme Court has noted that "the more important aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine-the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender,* 461 U.S. at 358, 103 S.Ct. 1855 (internal quotation marks and citation omitted). Where a law does not provide "minimal guidelines, a . . . statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.* (internal quotation marks and citation omitted). Since CYFD performs the law enforcement function under the Act, we therefore ask whether the relevant portions of the Act provide it with "*carte blanche*" that would permit "arbitrary or standardless enforcement power." *Laguna,* 1999–NMCA–152, ¶ 33, 128 N.M. 345, 992 P.2d 896.

{39} In our view, the phrases "without proper parental care and control . . . because of the faults or habits of the child's parent" in Section 32A–4–2(E)(2), "unable to discharge his responsibilities . . . because of . . . mental disorder" in Section 32A–4–2(E)(4), and "at risk of suffering serious harm" in Section 32A–4–2(B)(1) provide adequate standards to guide CYFD in its enforcement activities and do not invite or encourage arbitrary enforcement. Law enforcement always "requires the exercise of some degree of police judgment." *Grayned,* 408 U.S. at 114, 92 S.Ct. 2294. We are not faced here with anything like the kind of sweeping laws that have been struck down because they provide "no standards" to guide law enforcement and permit enforcers to effectively do as they please. *See Papachristou v. City of Jacksonville,* 405 U.S. 156, 170, 92 S.Ct. 839, 31

L.Ed.2d 110 (1972) (stating that where there are no standards governing the exercise of the discretion granted by a law, "the scheme permits and encourages an arbitrary and discriminatory enforcement"). In addition, our prior decisions do not reveal a chronic overreaching or propensity by CYFD to use the Act as an arbitrary basis to act against parents based upon mere disapproval of their lifestyle. The Act's language is broad enough to cover the myriad harms that may confront children, but not so broad and standardless to give CYFD carte blanche to file petitions against any parent it chooses. *See In re J.L.B.*, 594 P.2d at 1135 (upholding the Montana neglect act because there was no pattern of over-broad interpretation and the language was broad enough to include important harms to children).

CONCLUSION

{40} We affirm the finding of abuse or neglect as to Mother and reverse the finding of abuse or neglect as to Father. We also conclude that the challenged portions of the Abuse and Neglect Act are not so vague as to violate constitutional protections as applied to Mother.

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

BUSTAMANTE, C.J. and CASTILLO, J., concur.

2005-NMCA-072

114 P.3d 379

STATE of New Mexico, Plaintiff–Appellee,

v.

Carlos J. MALDONADO, Defendant–Appellant.

No. 23,637.

Court of Appeals of New Mexico.

April 20, 2005.

Certiorari Granted, No. 29,206, June 6, 2005.

Patricia A. Madrid, Attorney General, Santa Fe, Steven S. Suttle, Assistant Attorney General, Albuquerque, for Appellee.

John B. Bigelow, Chief Public Defender, Susan Roth, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

ALARID, J.

PROCEDURAL HISTORY

{1} Defendant was charged by grand jury indictment with conspiracy to commit trafficking in methamphetamine by manufacturing, contrary to NMSA 1978, §§ 30–28–2 (1979) and 30–31–20(A)(1) (1990); or alternatively, with attempted trafficking in methamphetamine by manufacturing, contrary to NMSA 1978, § 30–28–1 (1963) and Section 30–31–20(A)(1). Defendant filed a motion to quash the indictment, arguing, inter alia, that the Legislature intended the conduct charged in the indictment to be punished as either possession of drug paraphernalia pursuant to NMSA 1978, § 30–31–25.1 (2001) or as possession of drug precursors pursuant to NMSA 1978, § 30–31B–12(A) (2004). Defendant ultimately abandoned the argument based on the drug precursor statute. The district court denied Defendant's motion to quash the conspiracy count, concluding that tablets containing pseudoephedrine are not drug paraphernalia. The district court granted Defendant's motion to quash the attempted trafficking count, reasoning that Defendant's actions were "mere preparatory acts and not an overt act in furtherance of the crime alleged."

{2} The case proceeded to trial on the conspiracy count. Testimony by the State's witnesses established that on July 27, 2001, a private security officer at a Wal–Mart store in Las Cruces, New Mexico, observed Defendant concealing in his trousers the contents of four boxes of medicine, each containing 96 non-prescription pseudoephedrine tablets in blister packaging. Defendant purchased an additional box of tablets. When Defendant left the store without paying for the four concealed boxes of tablets, the security officer detained Defendant and called the police. Mark Sanchez, a Dona Ana County deputy sheriff assigned to the Las Cruces/Dona Ana County Metro Narcotics division, responded. Agent Sanchez advised Defendant of his *Miranda* rights. Defendant agreed to talk with Agent Sanchez.

{3} According to Agent Sanchez, Defendant told him that he had heard that the tablets could be used to manufacture methamphetamine. Agent Sanchez recalled Defendant telling him that Defendant had planned to sell them to a person named "Guero" for five dollars a box. Defendant denied manufacturing methamphetamine or using the drug. According to Agent Sanchez, Defendant admitted that he had sold tablets to Guero in the past and that he was aware that Guero used the tablets to manufacture methamphetamine. According to Agent Sanchez, Defendant told him that Guero would call "out of the blue," asking if Defendant had any tablets to sell. In the course of his investigation, Agent Sanchez was unable to locate Guero.

{4} After the close of the State's case-in-chief, Defendant moved for a directed verdict. Defense counsel argued that:

> I think getting the pills to give to Guero, knowing what he's going to do with them is different from saying the defendant and Guero had an agreement to manufacture methamphetamine together, which is what the State has to prove. And they don't have evidence of that. Right now, it's an arm's length transaction. That's all they have. They've got an arm's length transaction.

The district court denied Defendant's motion for a directed verdict, reasoning as follows:

> Well, you're implying some kind of financial interest in the operation above and beyond the profit on the pills. I don't see that as an element in trafficking, not under the UJI. I think the fact that he stated that he had done this in the past, the jury could infer that he's part of this operation.
>
> . . . .

Or they could decide that there is not—that the State hasn't proved its elements beyond a reasonable doubt, which are arguments going to the weight of evidence, not the sufficiency of the evidence.

{5} Defendant testified in his defense that:

> I happened to see the pills, and I just remembered that I knew somebody that would give me some money for them. So I just—I was—I bought the box because that's all I could afford. Then I took the rest.

When asked how he came up with the plan for selling the tablets, Defendant testified that:

> I was just visiting the guy that I know Danny, and I happened to meet his little brother [Guero], and he told me if I ever ran into these pills, he'd give me like two or three dollars more for them.

{6} Defendant denied having previously sold tablets to Guero. Defendant denied telling Agent Sanchez that he was aware that the tablets were used to make methamphetamine. Defendant denied having a plan with Guero to manufacture methamphetamine. On cross-examination, Defendant conceded that it was "strange" that Guero was willing to pay Defendant more than the tablets cost. Defendant again denied having told Agent Sanchez that he knew that pseudoephedrine was used to make methamphetamine.

{7} At the conclusion of the presentation of evidence, defense counsel requested an instruction on possession of drug paraphernalia. The State objected. The district court refused the instruction, explaining that the State had not charged Defendant with possession of drug paraphernalia and that "[the court] can't give an instruction on something that has not been charged." The jury was instructed on the offense of conspiracy to traffic in methamphetamine by manufacture. The jury returned a verdict of guilty on the charge of conspiracy to traffic in methamphetamine by manufacture. Defendant appeals. We reverse.

DISCUSSION

{8} After this case was assigned to a panel, we sua sponte requested briefing on the question of whether the conduct proved by the State falls within the statutory definition of conspiracy. We did so to explore a matter implicating fundamental rights of an accused: whether Defendant's conviction rests on evidence of conduct that does not constitute a crime. *See State v. Maes,* 2003–NMCA–054, ¶ 5, 133 N.M. 536, 65 P.3d 584; *State v. Gabriel M.,* 2002–NMCA–047, ¶ 9, 132 N.M. 124, 45 P.3d 64.

{9} Defendant's conviction presents a recurring question in the law of conspiracy: does a defendant whose only involvement is supplying generally available goods or services become a co-conspirator merely because he knows that the goods or services he provides may or will be used by another for a criminal purpose? *See generally* 2 Wayne R. LaFave, *Substantive Criminal Law* § 12.2(c)(3) (2003). This is a question of statutory construction, subject to de novo review. *See State v. Barragan,* 2001–NMCA–086, ¶ 22, 131 N.M. 281, 34 P.3d 1157 (recognizing that review of the sufficiency of the evidence supporting a conviction may require a court to engage in statutory construction in determining whether evidence viewed in the light most favorable to the State constituted the charged offense); *State v. Rael,* 1999–NMCA–068, ¶ 5, 127 N.M. 347, 981 P.2d 280 (recognizing that review of a district court's denial of a motion for directed verdict may turn upon resolution of matters of statutory interpretation, subject to de novo review).

{10} New Mexico law defines the crime of conspiracy as "knowingly combining with another *for the purpose of committing a felony* within or without this state." Section 30–28–2(A) (emphasis added).[1] Our Su-

1. The Legislature enacted the predecessor to Section 30–28–2 in 1919. 1919 N.M. Laws ch. 31, § 1, ch. 31, § 1 provided:

> Any person or persons who shall knowingly combine with any other person or persons for the purpose of committing a felony, within or without this state; or any person or persons who shall knowingly unite with any other person or persons, whose object is the commission of a felony or felonies, within or without this state, shall, on conviction, be fined not less than twenty-five dollars, nor more than five

preme Court has interpreted this statute to require proof of two mental states: (1) the intent to agree and (2) the intent to commit the offense that is the object of the conspiracy. *State v. Trujillo,* 2002–NMSC–005, ¶ 62, 131 N.M. 709, 42 P.3d 814. No New Mexico case has considered whether the twin intent requirements of a conspiracy can be established by evidence that the defendant agreed to sell goods to another, knowing that the other might use the goods for an illegal purpose.

{11} We are reluctant to extend Section 30–28–2(A) to an otherwise lawful sale of goods. It is not at all clear to us that in ordinary usage a seller "agrees" with a purchaser's intended use of goods or services simply by engaging in an arm's length sale. Similarly, we are not persuaded that a defendant-seller shares a purchaser's intent to commit a crime merely because the defendant had knowledge of the purchaser's intended use of those goods or services at the time of the sale. In this context, knowledge of the other's criminal objective is not necessarily equivalent to an intention to bring about the objective. 1 LaFave, *supra,* § 5.2(b), at 342–43 n. 9 (citing conspiracy as an area of criminal law where there may be "good reason" for distinguishing between knowledge and intent); 2 LaFave, *supra,* § 12.2(c)(3) at 280 (observing that intent rather than mere knowledge of the unlawful object is usually required to establish a conspiracy). As Judge Hand aptly observed in reversing convictions for conspiring to operate an illegal still:

> It is not enough that [the defendant] does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use[.] ... We may agree that morally the defendants at bar should have refused to sell to illicit distillers; but, both morally and legally, to do so was toto coelo different from joining with them in running the stills.

United States v. Falcone, 109 F.2d 579, 581 (2d Cir.1940) (rejecting the argument that sellers of sugar, yeast, and five-gallon cans became conspirators with the buyers merely because the sellers knew that the buyers intended to use the goods to illegally distill liquor), *aff'd,* 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940); *see also Jacobs v. Danciger,* 328 Mo. 458, 41 S.W.2d 389 (1931) (holding that a contract for the sale of brewing hops is not rendered unenforceable on the ground of illegality by the seller's knowledge that the buyer intended to resell the hops in kits to be used in the manufacture of "home brew"; rejecting the argument that the seller's "mere knowledge" of the buyer's intended use was sufficient to establish the vendor's participation in a conspiracy to violate the National Prohibition Act).

{12} In the present case, a rational factfinder could have found that Guero offered to purchase over-the-counter medications containing pseudoephedrine from Defendant at two or three dollars above the retail price of the drugs; that on one or two prior occasions Defendant sold tablets containing pseudoephedrine to Guero; that Defendant was aware that over-the-counter medications containing pseudoephedrine were used to manufacture methamphetamine; that Defendant believed that Guero manufactured methamphetamine; and that Defendant was in possession of approximately 500 tablets containing pseudoephedrine that Defendant intended to sell to Guero.

{13} Section 30–28–2(A) does not clearly and unequivocally alert a person in Defendant's position to the possibility of prosecution and punishment for conspiracy to manufacture methamphetamine. The rule of lenity constrains us "to narrowly construe a penal statute to give clear and unequivocal warning in language that people generally would understand concerning actions that would expose them to penalties." *Gabriel M.,* 2002–NMCA–047, ¶ 20, 132 N.M. 124, 45 P.3d 64. We are confronted with "an insurmountable ambiguity ... regarding the intended scope" of Section 30–28–1(A). *State v. Davis,* 2003–NMSC–022, ¶ 14, 134 N.M. 172, 74 P.3d 1064 (observing that the rule of lenity should be applied after other principles of statutory construction fail to eliminate a reasonable doubt as to legislative intent).

thousand dollars, or imprisoned in the state prison not less than one year nor more than fourteen years, or both in the discretion of the court.

We hold that the phrase "knowingly combining with another for the purpose of committing a felony" does not criminalize the conduct proved by the State in this case.

{14} Our opinion should not be understood as invariably insulating suppliers of goods or services from liability for conspiracy. In appropriate cases, evidence of otherwise lawful sales of goods or services combined with other factors may suffice to demonstrate the defendant's purposeful combination with the buyer in unlawful conduct. *Cf. Direct Sales Co. v. United States,* 319 U.S. 703, 63 S.Ct. 1265, 87 L.Ed. 1674 (1943) (distinguishing *Falcone,* 109 F.2d 579; upholding conspiracy conviction of vendor of morphine sulphate). Our opinion also should not be understood as suggesting that the Legislature lacks the power to criminalize sales of goods or services when the seller knows that the purchaser intends to use the goods or services to commit a crime.[2]

{15} We offer a few comments in response to Judge Sutin's dissent.

{16} The concept of substantial evidence is meaningless unless it is linked to a specific definition of a crime. Expand the definition of the crime and evidence that might otherwise be insufficient becomes "substantial." A court cannot decide whether the State has come forward with substantial evidence of a conspiracy without expressly or implicitly engaging in statutory construction of the conspiracy statute. Defining the outer boundary of the statute prior to conducting substantial evidence review is particularly important where, as here, the prosecution's theory of its case pushes the concept of conspiracy to its theoretical limits.

{17} A trial court "has the right, and it is its duty," to withdraw a case from the jury and direct a verdict for a defendant when the State has failed to come forward with substantial evidence that the defendant committed the offense charged. *State v. Tipton,* 57 N.M. 681, 682, 262 P.2d 378, 378 (1953). When a trial court improperly fails to direct a verdict for the defendant it is our responsibility to correct the error by doing on appeal what the trial court failed to do at trial, and we are not precluded from correcting the trial court's error in even submitting the case to the jury by the fact that a jury has found against the defendant.

{18} As *Falcone* and *Direct Sales Co.* demonstrate, there is no clear consensus as to whether the crime of conspiracy has been defined to criminalize the state of mind of a defendant who sells available goods to another knowing that the purchaser will use the items for a criminal purpose. The important question in this case, in our view, is not whether Judge Hand's decision in *Falcone* or Justice Rutledge's opinion in *Direct Sales Co.* represents the better view, nor is it whether as a matter of public policy the legislature ought or ought not penalize as a conspiracy the type of conduct at issue in this case. Rather, the dispositive question is whether the language employed by the Legislature clearly evinces an intention to extend the definition of conspiracy to the conduct at issue in the present case. This is a question of statutory construction which it is the duty of courts,[3] not juries, to resolve: "Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the Constitution, is time barred, *or fails to come within the statutory definition of the crime.*" *Griffin v. United States,* 502 U.S. 46, 59, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991) (emphasis added).

{19} Judge Sutin would have the reader of his dissent believe that he is merely engaging in substantial evidence review. In reality, the dissent turns upon its implicit adoption of a relaxed definition of the state of

2. We note that at least two states have adopted criminal facilitation statutes that clearly and unequivocally eliminate the requirement that the defendant share the co-conspirator's intent to commit a crime. Ky.Rev.Stat. Ann. § 506.080 (Michie 1995); N.Y. Penal Law, §§ 115.00 to 115.08 (McKinney 2004).

3. Juries do not work from the actual language adopted by the Legislature; they are provided with paraphrases of the Criminal Code in the form of UJIs approved by the Supreme Court. As with any paraphrase, there is the danger that the meaning communicated by the original text will be lost.

mind required to establish a conspiracy and the importation of this definition into Section 30–28–2. In the guise of deferring to hypothesized jury inferences, the dissent blurs the crucial distinction between merely *knowing* that the purchaser may commit a felony and sharing the purchaser's *purpose* to commit a felony. The dissent tailors the law of conspiracy to fit the State's evidence.

{20} We emphasize that we are not asserting that Judge Hand's approach as articulated in his opinion in *Falcone* necessarily represents the better view (although it does have the virtue of maintaining a clear distinction between knowing and intentional conduct).[4] We merely recognize that Judge Hand's approach represents a view of the state of mind required to establish the crime of conspiracy that is entirely reasonable and that is at least as valid as the approach taken by the Supreme Court in *Direct Sales Co.* As far as we can tell, there is no legislative history to speak of to shed light on the meaning of Section 30–28–2. Traditional rules of statutory construction do not compel us to choose one approach over another. In such a case, the rule of lenity directs us to resolve doubts in favor of the accused by applying the narrower definition of the offense to the defendant. Our application of the rule of lenity to ambiguous statutory language does not, of course, preclude the Legislature from responding to our construction by enacting a statute that eliminates the statutory ambiguity and that unequivocally criminalizes the conduct in question.

{21} For the reasons set forth above, we reverse Defendant's conviction.

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

ROBINSON, J., concurs.

SUTIN, Judge (dissenting).

SUTIN, Judge (dissenting).

{23} I fall readily in line with Judge Learned Hand's general concern, expressed in *United States v. Falcone,* about "prosecutors [who] seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders." 109 F.2d 579, 581 (2d Cir.1940), *aff'd,* 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940). "That there are opportunities of great oppression in such a doctrine is very plain." *Falcone,* 109 F.2d at 581. New Mexico's conspiracy statute, NMSA 1978, § 30–28–2(A) (1979), provides elastic substance for prosecutorial overreach. However, I am unable to concur in the majority's approach and result.

{24} I agree that, with no history of similar transactions, a court might hold that, as a matter of law, a seller of innocent goods cannot be prosecuted for merely knowing that the goods sold will be used for a felonious purpose. But the evidence in the present case of past transactions permits a jury to reasonably infer the intent necessary to convict. Thus, the issue on review becomes one of sufficiency of the evidence. I do not see how the majority can draw lines where it does both on the facts and the applicable standard of review with the historical evidence. Nor do I think the cases the majority cites in support of the de novo standard of review, involving statutory interpretation with invocation of the rule of lenity used to reach the result the opinion reaches, should be employed in this case.

{25} In this case the majority focuses on the Second Circuit's opinion in *Falcone. See* Majority Opinion ¶ 11. The majority's purpose appears to be the same as that stated by the Second Circuit in *Falcone* as being to circumscribe the scope of "comprehensive indictments" in order to avoid the "opportunities of great oppression" created by conspiracy statutes. *Falcone,* 109 F.2d at 581; *see* Majority Opinion ¶¶ 11, 13. I do not read

4. The dissent seems to us to overstate the degree to which the Supreme Court in *Direct Sales Co.* qualified *Falcone.* Consider the following language from *Direct Sales Co.:*

> A considerable degree of carelessness coupled with casual transactions is tolerable outside the boundary of conspiracy. There may be also a fairly broad latitude of immunity for a more continuous course of sales, made either with strong suspicion of the buyer's wrongful use or with knowledge, but without stimulation or active incitement to purchase.

319 U.S. at 712 n. 8, 63 S.Ct. 1265.

the Second Circuit *Falcone* case, particularly as discussed in the United States Supreme Court in both *Falcone,* 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128, and *Direct Sales v. United States,* 319 U.S. 703, 705–13, 63 S.Ct. 1265, 87 L.Ed. 1674 (1943), as persuasive authority under our facts.

{26} The subject of Judge Hand's concern in *Falcone* was the sale of lawful goods such as sugar and yeast to distillers operating illicit stills. 109 F.2d at 580. The Second Circuit stated the question to be "whether the seller of goods, in themselves innocent, becomes a conspirator with—or, what is in substance the same thing, an abettor of—the buyer because he knows that the buyer means to use the goods to commit a crime." *Id.* at 581. The Court's answer was that if the law was to "impose[ ] punishment [based on conspiracy] merely because the accused did not forbear to do that from which the wrong was likely to follow," the accused's "attitude towards the forbidden undertaking must be more positive." *Id.; see also Falcone,* 311 U.S. at 207, 61 S.Ct. 204 (reiterating the same).

{27} The seller-defendants in *Falcone* were not, it appears, charged with conspiracy with or aiding and abetting any particular distiller to engage in illicit distilling, but rather were charged as being part of, or co-conspirators in, a conspiracy among distillers. *Falcone,* 311 U.S. at 206, 208–10, 61 S.Ct. 204 (clarifying the issue to be "whether one who [with *knowledge of a conspiracy to distill illicit spirits*] sells materials with knowledge that they are intended for use or will be used in the production of illicit distilled spirits may be convicted as a co-conspirator with a distiller *who conspired* with others to distill the spirits in violation of the revenue laws." (emphasis added)). The evidence came up short on whether the seller-defendants knew of that conspiracy. *Id.* at 206, 210, 61 S.Ct. 204. Thus, the Second Circuit's holding of lack of sufficient evidence must be read in light of the actual issue in that case: sufficiency of the evidence of a seller's knowledge of, and thus participation in, a conspiracy among distillers to engage in illicit distilling.

{28} Three years after the Supreme Court's decision in *Falcone,* the Court decided *Direct Sales,* 319 U.S. 703, 63 S.Ct. 1265, 87 L.Ed. 1674. The Court in *Direct Sales* noted that the parties were "at odds concerning the effect of the *Falcone* decision as applied to the facts proved in [*Direct Sales*]." *Direct Sales,* 319 U.S. at 705, 63 S.Ct. 1265. "The salient facts [were] that Direct Sales sold morphine sulphate to Dr. Tate in such quantities, so frequently and over so long a period it must have known he could not dispense the amounts received in lawful practice and was therefore distributing the drug illegally. Not only so, but it actively stimulated Tate's purchases." *Id.*

{29} In *Direct Sales,* the defendant attempted to escape conspiracy liability by arguing that its sales to Dr. Tate were no different than the sales in *Falcone* by the seller-defendants to distillers knowing that the distillers would use the goods in illegal distillation. *Direct Sales,* 319 U.S. at 708, 63 S.Ct. 1265. The Court in *Direct Sales* took very specific issue with the defendant's interpretation and application of *Falcone.* The Court pointed out that the evidence in *Falcone* failed to establish that the seller-defendants "knew of the distillers' conspiracy." *Id.* at 708–10, 63 S.Ct. 1265. The Court distinguished *Falcone,* stating that, unlike the circumstances in *Direct Sales,* in *Falcone* "[t]here was no attempt to link the supplier and the distiller in a conspiracy inter sese." *Id.* at 708, 63 S.Ct. 1265. Significantly in terms of *Falcone*'s application to *Direct Sales,* the Court stated:

> Petitioner obviously misconstrues the effect of the Falcone decision in one respect. This is in regarding it as deciding that one who sells to another with knowledge that the buyer will use the article for an illegal purpose cannot, under any circumstances, be found guilty of conspiracy with the buyer to further his illegal end. The assumption seems to be that, under the ruling, so long as the seller does not know there is a conspiracy between the buyer and others, he cannot be guilty of conspiring with the buyer, to further the latter's illegal and known intended use, by selling goods to him.
>
> The Falcone case creates no such sweeping insulation for sellers to known illicit

> users. The decision comes down merely to this, that one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally. The Government did not contend, in those circumstances, as the opinion points out, that there was a conspiracy between the buyer and the seller alone. It conceded that on the evidence neither the act of supplying itself nor the other proof was of such a character as imported an agreement or concert of action between the buyer and the seller amounting to conspiracy. This was true, notwithstanding some of the respondents could be taken to know their customers would use the purchased goods in illegal distillation.

319 U.S. at 709, 63 S.Ct. 1265.

{30} It is *Direct Sales,* not *Falcone,* that must lead the way under the facts of the present case. The majority in this case cites *Direct Sales* under a "*cf.*" signal and is otherwise silent on its applicability. There can be little question, however, at least from the view of the United States Supreme Court, that there is a significant distinction to be made between the two cases, and that *Falcone* does not create a "sweeping insulation for sellers to known illicit users." *Direct Sales,* 319 U.S. at 709, 63 S.Ct. 1265.

{31} The present case cannot properly be decided based on the view that, as a matter of law, the New Mexico conspiracy statute did not criminalize Defendant's conduct. In my view, the conspiracy statute can be applied to reach a seller of otherwise innocent goods when, as in the present case, the seller knows the buyer, knows that the buyer intends to use the goods for a felonious purpose, intends to financially profit from illicit activity using the goods sold, and has engaged in similar past transactions. Under such circumstances, a jury is entitled to draw reasonable inferences that the defendant intended to facilitate or promote the illicit venture through his investment in order to personally profit from the venture's success. When a seller of goods observes that his past sales of goods for illicit ventures resulted in his further sales of the same goods for further illicit ventures, that seller can be reasonably viewed as participating in the venture, with a stake in the venture. The extent of the investment, minimal or substantial, should weigh on the minds of the jury, not the court. *See State v. Armijo,* 90 N.M. 10, 11, 558 P.2d 1149, 1150 (Ct.App.1976) ("The size, frequency and manner of the transactions ... were evidence sustaining defendant's conviction for conspiracy ... to traffic in heroin. The jury could properly conclude that the heroin defendant supplied ... was for resale.").

{32} As drawn, Section 30–28–2(A) could not, without interpretation, stand as a basis for conviction. Our Supreme Court read into the statute two mental states required for its application: not only an intent to agree, but also "an intent to commit the offense that is the object of the conspiracy." *State v. Trujillo,* 2002–NMSC–005, ¶ 62, 131 N.M. 709, 42 P.3d 814 (internal quotation marks and citation omitted); *State v. Baca,* 1997–NMSC–059, ¶ 51, 124 N.M. 333, 950 P.2d 776. This interpretation, of course, added elements and thus proof requirements not all that plain from reading the statute. In conspiracy prosecutions under Section 30–28–2(A), a convicted defendant's appeal will likely include an attack on the sufficiency of the evidence. *See, e.g., State v. Roper,* 2001–NMCA–093, ¶¶ 7–9, 131 N.M. 189, 34 P.3d 133; *State v. Mariano R.,* 1997–NMCA–018, ¶¶ 4–7, 123 N.M. 121, 934 P.2d 315. However, even with our Supreme Court's and our own attempts in the various cases that come before us to scrutinize the sufficiency of the evidence, the majority sees the case before us as one requiring, as a matter of policy, the conspiracy statute to be limited in scope through further judicial interpretation. Under the facts of the present case, I see the issue as sufficiency of the evidence.

{33} Under UJI 14–2810 NMRA, a defendant and another person must both agree together and intend to commit a crime. The committee commentary states that "[t]he offense is complete when the defendant combines with another for felonious purpose" and "[n]o overt act in furtherance of the conspira-

cy need be proved." *Id.; State v. Davis,* 92 N.M. 341, 344, 587 P.2d 1352, 1355 (Ct.App. 1978). "Intent is subjective and is almost always inferred from other facts in the case, as it is rarely established by direct evidence." *State v. Sparks,* 102 N.M. 317, 320, 694 P.2d 1382, 1385 (Ct.App.1985). The agreement required "can be nothing more than a mutually implied understanding that can be proved by the cooperative actions of the participants involved." *Roper,* 2001–NMCA–093, ¶ 8, 131 N.M. 189, 34 P.3d 133. "This mutually implied understanding may be established by circumstantial evidence." *Davis,* 92 N.M. at 342, 587 P.2d at 1353.

{34} On the occasion in question in this case, Defendant bought and stole from one store almost 500 pseudoephedrine over-the-counter pills, known as Sudafed tablets, for the purpose of selling the pills. He knew the pills were a necessary ingredient in the manufacture of methamphetamine. He sold them to a person he knew and who he knew wanted the pills to manufacture methamphetamine. Defendant's purpose was to make money off the sale transaction. Defendant had engaged in the same sale transactions with the same buyer in the past.

{35} Under the language of the statute, a jury could find that Defendant "knowingly combin[ed] with another for the purpose of committing a felony." § 30–28–2(A). That is, even applying existing judicial interpretation of the statutory elements, a jury could reasonably infer from the evidence that Defendant knew, from past experience selling to the buyer, of the buyer's intent to use the pills to manufacture methamphetamine, thereby intending to agree to the sale for that use. In addition, a jury could reasonably infer that Defendant intended to facilitate the manufacture of the illicit drug, and wanted to see the illicit manufacturing venture successful because of the possibility of being asked to engage in further, similar transactions, through which he could make some money and thereby personally profit. A rational jury could believe that the buyer would not engage Defendant to obtain a large number of pseudoephedrine pills and to sell them to the buyer if the buyer simply wanted a long-term supply of allergy medication.

{36} Courts in racketeering cases, in which the term "'enterprise' ... is one of those subjects that the more it is explained—at least in the abstract—the more elusive it becomes," have held that "an enterprise must be more than an individual who conducts his own affairs through a pattern of racketeering." *State v. Rael,* 1999–NMCA–068, ¶¶ 11, 16, 127 N.M. 347, 981 P.2d 280 (internal quotation marks and citations omitted). Similarly, a conspirator must be more than an individual who has done nothing more than sell a lawful product knowing that it will be used for a felonious purpose. In the present case, however, there was evidence of Defendant's knowledge as well as his past and continued involvement in sales and personal profit.

{37} Also, like racketeering cases, where the court interprets the statute to require specific elements to be proven in order to establish the existence of an enterprise, and then examines whether the evidence of an enterprise was sufficient to convict the defendant of racketeering, *id.* ¶¶ 10–15, in the present case, based on court interpretation of the elements required for conviction under the conspiracy statute, and based on the evidence, this Court should examine whether the evidence of intent was sufficient to convict Defendant of conspiracy. *Cf. State v. Mora,* 1997–NMSC–060, ¶¶ 25–28, 124 N.M. 346, 950 P.2d 789 (determining that the appellate court could not say as a matter of law whether a particular felony was inherently dangerous to human life because the decision was necessarily fact-specific and for the jury to decide, subject to appellate review for sufficiency of the evidence, and holding that it was proper for the jury to determine whether the crime of criminal sexual contact was inherently dangerous for purposes of felony murder and that the verdict could be overturned only upon a showing of insufficient evidence); *State v. Barragan,* 2001–NMCA–086, ¶¶ 25–27, 131 N.M. 281, 34 P.3d 1157 (following discussion of the Court's interpretation of the word "structure" in the burglary statute to include a separately secured area of a building otherwise open to

the public, and also the Court's interpretation of the possession of burglary tools statute as not requiring that a defendant be convicted of burglary in order to be held liable for possession, holding that there was sufficient evidence to support a finding that the defendant intended to use a device to make an unauthorized entry of a structure).

{38} I realize that the majority's concern rests on the consequences of permitting a jury under these circumstances to infer a guilty intent to commit the unlawful manufacture of methamphetamine. That concern more particularly is that the State can drag into the web of conspiracy legitimate vendors of lawful products simply because the vendor has been informed that the product will be used for illegal, felonious purposes, where the vendor does not have a stake in the illegal operation other than having received the shelf or legitimate market price of the product at the time of the sale. This case, however, does not involve a conspiracy charge against an employee of a recognized, legitimate retail store, or against the store itself, prosecuted because an employee involved in a sale was told by a customer that the product would be used for felonious purposes. I suspect we would be hard pressed to find a case that would permit a conviction under that circumstance.

{39} So the question is, what more is required for prosecution and conviction? The dividing line would appear to be the extent to which the seller of the innocent product, knowing that the buyer intends to use the product for a felonious purpose, intends to personally profit from continued successful illicit ventures using the product sold. The majority determines that the conspiracy statute is unclear and invokes the rule of lenity. Logically then, no matter the extent of the evidence of continuous sales, the majority would still conclude lack of statutory clarity, and invoke the rule of lenity, as opposed to treating the issue as one of sufficiency of the evidence. Yet at the same time, the majority sends a mixed signal by its warning that its determination "should not be understood as invariably insulating suppliers of goods or services from liability for conspiracy," and, further, that there may be instances in which sale of lawful goods, "combined with other factors may suffice" as sufficient evidence to convict for conspiracy. Majority Opinion ¶ 14.

{40} The underlying principle behind the majority's decision to abandon sufficiency of the evidence as the basis on which to determine the validity of the jury's verdict of guilt and to determine instead that the wording of the statute "does not criminalize the conduct proved by the State in this case," Majority Opinion ¶ 13, is that, pursuant to the rule of lenity, this Court should view the statute as failing to adequately alert and give clear and unequivocal warning to Defendant of the possibility of prosecution and punishment for conspiracy to manufacture methamphetamine. *See id.* Thus, the majority's view that the statute does not criminalize Defendant's conduct is, in effect, a policy decision made along these lines: The statute does not tell a person to what extent his or her knowledge and conduct will suffice as unlawful conduct. Therefore, the Court will look at the circumstances of each case and determine whether, applying the rule of lenity, the statute criminalizes the conduct in question. Therefore, in the present case, the Court will determine that the statute does not criminalize the conduct, even though, under the wording of the statute, even as interpreted by our Supreme Court, a jury might rationally infer that Defendant's knowledge, conduct, and intent were sufficient to show intent to facilitate and profit from the manufacture of illegal drugs. It may be that in another case, with other evidence, the statute does criminalize the conduct, in which case the question would then become whether the evidence was sufficient to convict.

{41} The problem with the majority's approach is determining the point at which the statute does criminalize conduct similar to that of Defendant. What evidence is sufficient to permit the jury to draw inferences and conclude guilt? The answer, it seems to me, is that the requisite intent can be inferred from evidence of past sales from which the seller personally profited, the inference being that if the seller engaged in and profited from past sales, knowing the illegal use to be made of the product, and the seller continues to sell expecting the same thing, it is highly probable that the seller

intends to facilitate the illegal operation in order to personally profit from it and to personally profit from future illegal operations. It is not this Court's role to measure the point on the scale at which the number of past sales, the amount of product sold, and the amount of consideration received, tip the balance to permit jury consideration of guilt.

{42} I do not see the benefit or, for that matter, the propriety, of attempting through policy to draw a line between criminal and non-criminal conduct at any point other than perhaps where the only evidence before the jury is that the seller knows that the buyer intends to use the product for an illegal purpose. When there is evidence of ongoing transactions, such as there were in *Direct Sales,* the issue ought to be one of whether there is sufficient evidence for a rational jury to infer that the seller has a stake in the success of the illegal use of the sold, otherwise legal, product, such that the seller intends to personally profit from the ongoing success of illegal ventures. There should be no question that the conspiracy statute criminalizes one who has a stake in the success of an illegal venture by investing capital to assist in making the venture successful with the expectation of ongoing personal profit from not only the present illegal venture subject to the immediate prosecution, but also, based on past experience, from future similar illegal ventures.

2005-NMCA-077

114 P.3d 389

Walter S. HENDERSON, Jr. and Bertha L. Henderson, Husband and Wife, Plaintiffs–Appellants,

v.

CITY OF TUCUMCARI, Defendant–Appellee.

No. 24,660.

Court of Appeals of New Mexico.

April 20, 2005.

Certiorari Denied, No. 29,217, June 6, 2005.

Walter S. Henderson, Jr., Tucumcari, Pro Se Appellants.

Emily A. Franke, Carlos G. Martinez, Butt Thornton & Baehr, PC, Albuquerque, for Appellee.

OPINION

WECHSLER, J.

{1} In this appeal, we address NMSA 1978, § 3–18–5 (1977), which allows municipalities to deal with ruins, rubbish, wreckage or debris, by requiring the owner to clean up the property. Under the statute, if the owner fails to ameliorate any problem, the municipality may do so and obtain a lien against the property. *See* § 3–18–5(F)(3). The City of Tucumcari was not satisfied with Plaintiffs' efforts and cleaned up Plaintiffs' property. Plaintiffs sued, contending that the City crew was overzealous and removed everything, including cars Plaintiffs contend are valuable because they are "antique," "collectable," "vintage," or "restorable." The district court dismissed Plaintiffs' complaint for failure to state a claim under Rule 1–012(B)(6) NMRA, ruling that Plaintiffs failed to comply with statutory deadlines. We address whether the failure to follow the time deadlines in Section 3–18–5 requires dismissal. We also address issues concerning the statute of limitations under the Tort Claims Act, NMSA 1978, §§ 41–4–1 to 41–4–27 (1976, as amended through 2004) (TCA). We reverse, holding that the time deadlines in Section 3–18–5 do not apply to this action and that, on the current state of the record, Plaintiffs' lawsuit is not barred by the statute of limitations.

Background

{2} Section 3–18–5(A) provides:

> Whenever any building or structure is ruined, damaged and dilapidated, or any premise is covered with ruins, rubbish, wreckage or debris, the governing body of a municipality may by resolution find that the ruined, damaged and dilapidated building, structure or premise is a menace to the public comfort, health, peace or safety and require the removal from the municipality of the building, structure, ruins, rubbish, wreckage or debris.

A copy of the resolution must be served on the owner or occupant of the property or an agent (of the owner). *See* § 3–18–5(B). The owner then has ten days either to begin ameliorating the problem or to file a written objection to the resolution with the municipal clerk, asking for a hearing. *See* § 3–18–5(C). If an objection is filed, the governing body must set a hearing and act on the objection. *See* § 3–18–5(D)(1). "Any person aggrieved by the determination of the governing body may appeal to the district court . . . within twenty days after the determination." Section 3–18–5(E)(2). If the owner does not timely begin ameliorating the problem, the governing body may do the work and obtain a lien against the property for the "reasonable cost" of doing the work, and may foreclose the lien. *See* § 3–18–5(F)(3). The statute requires that the premises be left in a

"clean, level and safe condition, suitable for further occupancy or construction." *See* § 3–18–5(H).

{3} Plaintiffs owned an automobile salvage business. Their home, which was also on the property, burned down. The City, under the aegis of Section 3–18–5, passed a resolution on March 23, 2000, declaring the property to be a menace. Plaintiffs did not dispute the City's determination or the necessity of cleaning up the property. Plaintiffs made some efforts to comply, but assert that the City was not satisfied with their efforts.

{4} Plaintiffs contend that they had salvaged materials from the fire-damaged building that could be reused. They also contend that sidewalks, a cement slab floor, and a gas pipeline from a propane tank remained. Plaintiffs claim that during the last week of July and the first week of August 2001, approximately sixteen months after the resolution, the City brought dump trucks and a large tractor with a front-end loader to the property. They claim that the City then removed everything, including topsoil, leaving nothing behind.

{5} The list of removed items is lengthy. It includes personal property such as hoods from 1955–57 pickup trucks, one hundred hubcaps, ten axles from Model T Fords, and a wide variety of other, similar items. Plaintiffs contend that the City removed property worth over $69,000.

{6} Plaintiffs posit the question on appeal as "whether a municipality can take top soil, usable improvements or valuable merchandise along with wreckage, ruins, rubbish or debris." Their view is that "[t]he law giving a city power to do a condemnation and then remove ruins, wreckage, rubbish or debris does not remove the duty to use care in doing so." The City likely believes that having declared the entire property a menace, it had the right to remove all of the items. We do not determine the merits of Plaintiffs' issue, nor do we address any defenses or other potential arguments the City may have. Although the parties briefed the issue of immunity under the TCA, the issue is premature for decision in this appeal of the grant of a motion to dismiss on unrelated grounds.

Standard of Review

{7} A motion to dismiss for failure to state a claim under Rule 1–012(B)(6), "tests the legal sufficiency of the complaint, accepting all well-pleaded factual allegations as true." *Derringer v. State*, 2003–NMCA–073, ¶ 5, 133 N.M. 721, 68 P.3d 961. Dismissal is warranted when the law does not support a plaintiff's claim under any set of facts subject to proof. *Id.* We review a district court's ruling on Rule 1–012(B)(6) motions de novo. *Derringer*, 2003–NMCA–073, ¶ 5, 133 N.M. 721, 68 P.3d 961. The application of the TCA is also reviewed de novo. *Godwin v. Mem'l Med. Ctr.*, 2001–NMCA–033, ¶ 23, 130 N.M. 434, 25 P.3d 273.

Time Deadlines Under Section 3–18–5

{8} The City argues that Plaintiffs' district court action did not follow the time deadlines in Section 3–18–5. The City believes that, after Plaintiffs were unhappy with the remediation project, Section 3–18–5 provided Plaintiffs' sole recourse and required them to follow the short time deadlines in the statute. Instead, Plaintiffs did not file their lawsuit for approximately two years after the project. The City also argues that Plaintiffs were late because they did not file their lawsuit within the two-year limitations period in the TCA. The district court's order reflects that it dismissed the case because Plaintiffs "failed to comply with any of the deadlines provided in the New Mexico Statutes."

{9} In interpreting Section 3–18–5, we must determine legislative intent. *See Key v. Chrysler Motors Corp.*, 121 N.M. 764, 768–69, 918 P.2d 350, 354–55 (1996) (stating that when interpreting statutes, a reviewing court must seek to give effect to the intent of the legislature). Our starting point is the plain language of the statute. *See State ex rel. Helman v. Gallegos*, 117 N.M. 346, 352, 871 P.2d 1352, 1358 (1994) (noting the general rule that if the meaning of a statute is clear it must be applied as written).

{10} The statute is easily understood and its purpose is clear. It deals with blighted or hazardous property and gives the owner the first opportunity to address any problems. *See* § 3–18–5(A),(B). If the owner does not comply with a governing body's request to

ameliorate the problems, the statute allows the governing body to address the problem. *See* § 3–18–5(F). It provides for a process, allowing the owner to request a hearing on the governing body's resolution declaring the property to be a menace to the public comfort, health, peace, or safety. *See* § 3–18–5(A), (D)(1). After that hearing, any aggrieved person may appeal the governing body's "determination" to the district court within twenty days. *See* § 3–18–5(E)(2).

{11} Reading Sections 3–18–5(A), (B), and (C) together, it is obvious that the first step in the process that must be appealed to the governing body within ten days is a governing body's resolution declaring a property to be a menace. The governing body then must set a hearing and "determine if its resolution should be enforced or rescinded." Section 3–18–5(D)(1), (3). The governing body's "determination" may then be appealed to the district court within twenty days. Section 3–18–5(E)(2). Consequently, the time limits in Section 3–18–5 apply to a limited and well-defined set of circumstances: the adoption of the initial resolution declaring the property to present a blight or hazard, and the governing body's subsequent "determination," after a hearing, on the correctness of the initial resolution. In this narrow context, the statute's procedures, and short time deadlines, make perfect sense.

{12} Because Plaintiffs did not contest the City's resolution, there was no reason to follow the procedure in Section 3–18–5. The avenue provided for Plaintiffs in Section 3–18–5 was not the sole and exclusive avenue for any problems or complaints Plaintiffs had about the City's actions, regardless of the time of the actions or the type of problems involved. The decisions made by workers during the remediation project do not constitute the "resolution" mentioned in Sections 3–18–5(A), (B), (C), or (D). Nor do the decisions made by the workers during the remediation project constitute a "determination," as that term is narrowly used in Section 3–18–5(E) or (F). Plaintiffs' lawsuit is one of negligence, which is not the subject of Section 3–18–5. Consequently, the time deadlines in Section 3–18–5 are inapplicable, Plaintiffs were not late, and they could properly file their action in district court, where negligence claims are commonly heard.

{13} Plaintiffs' lawsuit also claimed that the amount of the lien imposed by the City was unreasonable and overcharged by $2010. Plaintiffs complained that the City charged them for work that was done on adjoining property they did not own. They complain they should not have been charged for work performed in taking their valuable property that they assert should not have been taken. They also complain that the City had not charged based on the actual cost of doing the work, but rather on the customary rental value of the machinery used.

{14} Once again, we disagree that the City's setting of the amount of the lien is a "resolution" or "determination" that is governed by the time limits in Section 3–18–5. Section 3–18–5(F)(3) allows for a lien but does not discuss any procedures for dealing with a claim that a lien is unreasonable or incorrectly calculated. The City argues that Section 3–18–5 provides the sole remedy because Plaintiffs could contest the amount of the lien if and when the City sought to foreclose on the property under Section 3–18–5(F)(3), following the procedures of the statutory foreclosure process of NMSA 1978, §§ 3–36–4 to 3–36–5 (1965) and § 3–36–6 (1977). However, the procedures of Sections 3–36–4 through 3–36–6, by which a city may attach and foreclose upon a lien, do not provide a procedure to challenge the amount of the lien imposed. Nothing in these procedures indicates that the legislature intended that property owners should have to wait for foreclosure before being able to address alleged problems with a lien. We agree with Plaintiffs that they can contest the amount of the lien in the district court action, especially because the lien issues are linked with the negligence issues.

Statute of Limitations

{15} Plaintiffs filed their lawsuit on July 31, 2003. The City argues that the lawsuit was late because it was filed more than two years after the "occurrence" resulting in damage. *See* § 41–4–15(A) (requiring lawsuits brought under the TCA to be "commenced within two years of date after the occurrence resulting in loss, injury or death"). Plaintiffs' complaint alleges that the work took place in the last week of July

and into the first week of August 2001. The City does not appear to dispute this factual claim, but argues that the clean-up work was "commenced" in the last week of July 2001 and therefore the trigger for the statute of limitations was the date the work began and no other date.

{16} We do not agree with the City's argument. Under the TCA, the statute of limitations begins to run when the injury manifests itself and is ascertainable. *See Long v. Weaver*, 105 N.M. 188, 191, 730 P.2d 491, 494 (Ct.App.1986). Plaintiffs' allegation about the time the work was performed and when the time the injury manifested itself presents a factual matter that must be resolved. *See id.* at 191–92, 730 P.2d at 494–95; *Eoff v. Forrest*, 109 N.M. 695, 699, 789 P.2d 1262, 1266 (1990) (indicating that summary judgment is not appropriate when genuine issues of fact are present). The record does not suggest that the court resolved these factual issues. If Plaintiffs are correct that the work and its alleged damage continued into August, Plaintiffs' lawsuit may have been timely filed. *See Aragon & McCoy v. Albuquerque Nat'l Bank*, 99 N.M. 420, 424, 659 P.2d 306, 310 (1983) (stating that a cause of action may sometimes accrue on several different dates, and it is the last event that starts the statute of limitations period running). It is not clear whether the court dismissed this action based on a failure to follow the time deadlines in Section 3–18–5 or the statute of limitations, or both. However, if the court based its ruling on the failure to comply with the statute of limitations, its dismissal would be inappropriate on the current state of the record.

Conclusion

{17} We conclude that Plaintiffs' lawsuit is timely. We reverse and remand for further proceedings.

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

BUSTAMANTE, C.J. and SUTIN, J., concur.

2005-NMCA-078

114 P.3d 393

STATE of New Mexico, Plaintiff–Appellee,

v.

Mark MONTOYA, Defendant–Appellant.

No. 24,060.

Court of Appeals of New Mexico.

April 21, 2005.

Certiorari Denied, No. 29,214, June 6, 2005.

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

John Bigelow, Chief Public Defender, Kathleen T. Baldridge, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

PICKARD, J.

{1} The important issue in this case is whether this Court's holding in *State v. Morales,* 2002–NMCA–016, ¶¶ 5–11, 131 N.M. 530, 39 P.3d 747, that trial courts may designate certain offenses as serious violent ones, limiting defendants' opportunity for good time credit, without running afoul of defendants' jury trial rights, survives recent Unit-

ed States Supreme Court cases further refining the opinion in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). We hold that it does survive recent Supreme Court decisions, although for different reasons. Finding the other issues raised by Defendant to be without merit, we affirm his convictions and sentence.

BACKGROUND

{2} Defendant was convicted of vehicular homicide committed while driving while intoxicated (DWI) and child abuse. He raises five issues on appeal: (1) whether the evidence was sufficient to convict him of vehicular homicide because there was insufficient evidence that he was impaired at the time of driving; (2) whether there was sufficient evidence to allow the trial court to designate the offense as a serious violent offense pursuant to the Earned Meritorious Deduction Act, NMSA 1978, § 33-2-34 (2004) (EMDA); (3) whether the EMDA's allowing the trial court to find the facts that underlie the serious violent offense designation for offenses listed in Section 33-2-34(L)(4)(n) violates Defendant's constitutional rights under *Apprendi;* (4) whether the trial court abused its discretion in refusing to change the venue; and (5) whether the trial court abused its discretion in admitting evidence that a blood test showed alcohol in Defendant's blood when the trial court denied admission of the amount of alcohol because the test was taken more than four hours after Defendant was driving. We state the facts in our discussion of the particular issues.

Sufficiency of the Evidence of Impairment

{3} The standard of review for sufficiency of the evidence has been often stated. We must determine whether a rational jury could have found each essential element of the crimes charged to be established beyond a reasonable doubt, when viewing the evidence in the light most favorable to the State and indulging all inferences in favor of the verdict. *State v. Carrasco,* 1997-NMSC-047, ¶¶ 10-11, 124 N.M. 64, 946 P.2d 1075. This Court does not 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) (internal quotation marks and citation omitted). When a defendant argues that the evidence and inferences present two equally reasonable hypotheses, one consistent with guilt and another consistent with innocence, our answer is that by its verdict, the jury has necessarily found the hypothesis of guilt more reasonable than the hypothesis of innocence. *State v. Chandler,* 119 N.M. 727, 732, 895 P.2d 249, 254 (Ct.App.1995). Our Supreme Court has recently stated that the evidence is not to be reviewed with a divide-and-conquer mentality, *State v. Graham,* 2005-NMSC-004, ¶ 13, 137 N.M. 197, 109 P.3d 285, as though we were the finders of the facts. We do not reweigh the evidence or substitute our judgment for that of the jury. *State v. Mora,* 1997-NMSC-060, ¶ 27, 124 N.M. 346, 950 P.2d 789.

{4} The evidence presented below was that Defendant was the driver of a pick-up truck in which a woman and two children were with him in the cab, which was designed to hold three people, and that none of the children were restrained with child restraints. They were driving after dark on a mesa, where the road was relatively straight, except where it turned near the accident. There were wild animals seen and killed on the winding road leading up to the mesa, but no such animals on the mesa itself. Defendant's truck went off the road at the turn; in the opinion of the investigating officers, Defendant failed to negotiate the turn, overcorrected, left the road, and rolled over. One of the children was ejected during the roll-over, and she died at the scene. There was a partially empty, fresh beer bottle lying on the ground along the path the truck took as it rolled over.

{5} Defendant claimed that he swerved to avoid an animal, but there was testimony that there were no signs of braking and no animal tracks or other evidence of animals in the wet dirt in the vicinity. Defendant was evasive about the subject of drinking to police and passers-by who had stopped to give assistance. He smelled like alcohol, and at least one witness said that he had bloodshot eyes and slurred speech, and another witness said Defendant was leaning against the wom-

an from the truck and rolling around in some fashion. He ultimately admitted to having had "one or two beers." Defendant would not submit to a blood draw authorized by a warrant at first, adopting a fighting stance and telling the officers that they would "have to take [him] down." Upon being threatened with taser guns, he eventually submitted to the blood test, and alcohol was present in his blood. This was four hours after the accident. An officer opined that Defendant's conduct showed that he was driving while intoxicated.

{6} Based on the evidence of impairment demonstrated to the people who saw Defendant right after the accident, his evasiveness about his drinking and his initial refusal to submit to the warrant ordering the blood test, the evidence contradicting his claim about swerving to avoid an animal, the alcohol in his blood four hours after the accident, and the officers' opinions, a rational jury could easily have found beyond a reasonable doubt that Defendant was impaired by alcohol, and his impairment made him less able to the slightest degree to exercise the clear judgment and steady hand necessary to handle a vehicle safely. *See* UJI 14–243 NMRA. The evidence was more than sufficient to support the verdict of homicide by vehicle.

Sufficiency of Evidence of Serious Violent Offense

{7} In *Morales,* 2002–NMCA–016, ¶¶ 12–16, 131 N.M. 530, 39 P.3d 747, in addition to finding the statute constitutional, we also construed the statute and explained the sort of findings that a trial court must make to designate the offenses listed in Section 33–2–34(L)(4)(n) as serious violent ones such that defendants would be limited to four days per month of good time credit, instead of the thirty days per month otherwise available. We held that a court must find that the offenses were "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." *Id.* ¶ 16. In fact, we gave an example of the offense at issue here and explained the ways in which it could be viewed as a serious violent offense or not:

> 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.

Id. ¶ 15. In this case, after emphasizing Defendant's prior convictions, the trial court stated:

> And I am also prepared to find that based on the priors, not based on the age of the victim, although I know that is a very emotional component of this case, that this does qualify as being a serious violent offense; and I'll make the finding that over the course of the period of 15 years your history shows that you have not brought what appears to be a drinking problem under control[ ], that except for what I believe is one court ordered time, you really have not availed yourself of treatment to bring the problem under control, and this has made you a danger to others who are out on the road. And it's this danger that ultimately resulted in the death of Santana Sanchez. I am going to recognize that this differs from the *Morales* case to that extent, and falls somewhere within that spectrum I talked about, how those DWIs have been considered in that case.
>
> That will be the finding.

As the trial court recognized, this case falls somewhere in between the two extremes described in *Morales,* and the question we must answer is whether the trial court could have found that it crossed over the line into being a serious violent offense.

{8} Subsequent cases have established that the trial court need not express its findings in the *Morales* language as long as the findings are consistent with the *Morales* standard. *State v. Cooley,* 2003–NMCA–149, ¶¶ 18–19, 134 N.M. 717, 82 P.3d 84. And in *State v. Wildgrube,* 2003–NMCA–108, ¶¶ 34–38, 134 N.M. 262, 75 P.3d 862, we affirmed a

serious violent offense designation in circumstances that cannot be meaningfully distinguished from those in the case at bar. In *Wildgrube,* a substantial record of alcohol-related offenses, including four arrests resulting in two convictions for DWI, satisfied the standard of knowledge. *Id.* ¶ 37. The defendant's behavior of continuing to drink and drive on the occasion in question while looking away from the road to do something else satisfied the standard of recklessness. *Id.* ¶¶ 37–38. We reviewed the trial court's actions in designating the offense as a serious violent one for abuse of discretion. *Id.* ¶ 34. A trial court will abuse its discretion when its decision is not supported by substantial evidence. *Brooks v. Norwest Corp.,* 2004–NMCA–134, ¶ 7, 136 N.M. 599, 103 P.3d 39.

{9} We, therefore, review the facts and circumstances before the trial court. In this case, the showing at sentencing was of a defendant who had a fifteen-year history of DWI arrests (five) and convictions (three), more than the defendant in *Wildgrube,* and for which Defendant had served seven, thirty, and ninety days. Letters from Defendant's family noted that nothing had worked to keep Defendant from drinking. The trial court knew about the excluded evidence of Defendant's blood alcohol concentration (BAC), which was. 10 approximately four hours after the accident. The trial court stated that Defendant's long history of a drinking problem, with him having done nothing to bring it under control, made him a danger to others that ultimately resulted in a death.

{10} Under these circumstances, we believe that the *Morales* standard is met. Defendant raises no issue concerning the physical violence aspect of the *Morales* standard. The knowledge aspect is shown by the long, prior history of a drinking problem. The recklessness is exhibited by Defendant's continuing to drive drunk after several prior encounters with the law and doing so in a particularly heedless manner—with two children in the car, at least one of whom was not restrained sufficiently to keep her from being ejected and killed. There was no abuse of discretion in this case because the facts supported the designation of the offense as a serious violent one.

Survival of *Morales*

{11} The *Apprendi* doctrine states, "[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." *State v. Wilson,* 2001–NMCA–032, ¶ 12, 130 N.M. 319, 24 P.3d 351 (internal quotation marks and citation omitted). We held in *Morales* that this doctrine did not apply to the question of whether a defendant would be entitled to earn four days or thirty days of credit per month under the discretionary subsection of the EMDA. The majority decision in *Morales* was grounded in part on the rationale of *Wilson,* which has since been shown to have been erroneous. *See Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *State v. Frawley,* 2005–NMCA–017, 137 N.M. 18, 106 P.3d 580, *cert. granted,* 137 N.M. 266, 110 P.3d 74 (2005). Thus, this rationale for the result in *Morales* has not survived.

{12} However, there was a separate concurrence in *Morales,* 2002–NMCA–016, ¶¶ 21–25, 131 N.M. 530, 39 P.3d 747 (Bustamante, J., specially concurring), written by the same judge who dissented in *Wilson,* 2001–NMCA–032, ¶¶ 45–59, 130 N.M. 319, 24 P.3d 351 (Bustamante, J., concurring in part and dissenting in part). This separate opinion agreed with the result in *Morales* on the basis that the EMDA has a similar effect on defendants' sentences as the mandatory minimum scheme that was upheld by the Supreme Court in *McMillan v. Pennsylvania,* 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), which was not called into doubt by *Apprendi,* 530 U.S. at 487, 120 S.Ct. 2348 n. 13.

{13} For the reasons stated in that separate concurrence, which has not been called into doubt by subsequent cases, the *Morales* holding, that a judge is permitted to make the finding of serious violent offense triggering the limitation of earned credit to four days, does survive. *Apprendi* itself acknowledged that it did not overrule *McMil-*

lan and "limit[ed] its holding 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—a limitation identified in the *McMillan* opinion itself." *Apprendi,* 530 U.S. at 487, 120 S.Ct. 2348 n. 13. *Blakely* also pointed out that *McMillan* "involved a sentencing scheme that imposed a statutory *minimum* if a judge found a particular fact" and the Court therein "specifically noted that the statute does not authorize a sentence in excess of that otherwise allowed for [the underlying] offense." *Blakely,* 542 U.S. 296, 124 S.Ct. at 2538 (internal quotation marks and citation omitted) (alteration in original). Finally, the Court in *United States v. Booker,* —— U.S. ——, 125 S.Ct. 738, 746–47, 749, 752, 756, 160 L.Ed.2d 621 (2005), repeatedly emphasized that it is sentences beyond the "statutory maximum" or "maximum sentence[s]" imposed by the judge not based solely on the facts found by the jury or admitted by the defendant with which the *Apprendi* doctrine is concerned (internal quotation marks and citation omitted).

{14} In this case, the effect of the EMDA is not to change anything with regard to any maximum sentence. Defendant's sentence for his fourth DWI offense that resulted in a death was twelve years—six years for the underlying crime and two years added for each prior DWI, pursuant to NMSA 1978, § 66–8–101(C) and (D) (1991) and NMSA 1978, § 31–18–15(A)(5) (1999). This was the basic sentence without any aggravating factors. *See* § 66–8–101(C) and (D); § 31–18–15.

{15} What changed by virtue of the EMDA was the amount of time that Defendant could earn as a credit on his sentence by participating in programs while incarcerated. The amount of good time it was possible to earn was changed from thirty days per month to four days per month. *See* § 33–2–34(A)(1), (2). If the "practical net effect of the EMDA is to impose a mandatory increased minimum sentence," we continue to believe that the "EMDA and Pennsylvania statutes [at issue in *McMillan*] are not precisely the same, but their effect is substantively identical." *Morales,* 2002–NMCA–016, ¶ 24, 131 N.M. 530, 39 P.3d 747 (Bustamante, J., specially concurring). Neither *Apprendi* nor subsequent cases have cast any doubt on the *McMillan* rationale, and they continue to be limited to sentence beyond the statutory maximum, which is not at issue in this case. Accordingly, we hold that the factors that the EMDA allows the judge to find in order to limit credit under Section 33–2–34(L)(4)(n) do not have to be found by the jury beyond a reasonable doubt.

Change of Venue

{16} Defendant contends that the trial court abused its discretion in refusing to change the venue after Defendant made a showing of extensive pretrial publicity that included media reports on his BAC results that were excluded from evidence by the trial court. However, the trial court conducted extensive individual voir dire and struck many members of the venire. Moreover, Defendant does not show that there was any problem with any of the jurors seated for his trial, and he does not contend that he was denied his right to a fair and impartial jury.

{17} As in *State v. Barrera,* 2001–NMSC–014, ¶¶ 14, 18, 130 N.M. 227, 22 P.3d 1177, the question here is whether the trial court abused its discretion in failing to change venue, not whether Defendant presented enough evidence that the trial court would have been within its discretion to change venue. As in *Barrera,* because Defendant's showing was of the latter variety and because the trial court took care to seat a fair and impartial jury, we cannot say that discretion was abused. *See id.* ¶ 18.

Admission of Blood Alcohol Evidence

{18} As previously indicated, the trial court excluded evidence of Defendant's BAC of. 10, but allowed evidence that Defendant had alcohol in his blood. The basis of the trial court's decision was the pretrial presentation of testimony by an expert who said that the BAC score only indicated Defendant's BAC at the time of the test, four hours after the accident, and that while retrograde extrapolation could determine his BAC at the time of the accident, in this case, there was too much room for error. Accordingly, the trial court excluded the BAC score, finding that it would be unduly prejudicial,

but allowed the State to inform the jury that Defendant did have alcohol in his blood when tested because such evidence was relevant, and when combined with the other evidence in the case, it provided corroborating evidence of impairment.

{19} Defendant contends that the trial court abused its discretion in this ruling because the absence of relation-back testimony applies equally to the presence of alcohol and the exact amount thereof. We disagree.

{20} Defendant relies on *State v. Baldwin,* 2001–NMCA–063, ¶ 8, 130 N.M. 705, 30 P.3d 394, but *Baldwin* does not go as far as Defendant suggests. *Baldwin* was concerned with a prosecution for driving with a particular BAC, *id.* ¶ 7, and the evidence was that the defendant's BAC was precisely at that particular level two hours after the accident, *id.* ¶ 4. *Baldwin* was not a case involving the admission or exclusion of evidence, but it was instead a case about whether the evidence was sufficient to convict the defendant of the specific crime charged. *Id.* ¶¶ 23–24.

{21} In this case, in contrast, at issue is whether certain evidence ought to be excluded. The basis of the trial court's pretrial ruling was not that the evidence of the .10 BAC had no bearing on the issues in the case; instead, it was that with the jury's common knowledge of .08 being the legal limit and without evidence of how the .10 related back to the time of driving, the evidence would be unduly prejudicial. However, the evidence of alcohol in Defendant's system four hours after the accident provided some evidence of alcohol in his system at the time of the accident inasmuch as there was no testimony of drinking after the accident. Evidence does not have to conclusively prove a proposition to be relevant. It is enough that the evidence have some tendency to make a fact in issue more or less probable than it would be without the evidence. *See* Rule 11–401 NMRA.

{22} The fact that the trial court excluded evidence of the actual result of the test on Rule 11–403 NMRA grounds did not mandate that evidence of the presence of alcohol was also too prejudicial. The admission or exclusion of evidence is reviewed for abuse of discretion. *State v. Brown,* 1998–NMSC–037, ¶ 32, 126 N.M. 338, 969 P.2d 313. The essence of a discretionary ruling is that it be not illogical, not unreasonable, and not contrary to facts and circumstances before the trial court. *See Bursum v. Bursum,* 2004–NMCA–133, ¶ 25, 136 N.M. 584, 102 P.3d 651 ("An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." (internal quotation marks and citation omitted)). In this case, not only can we not say that the trial court abused its discretion, but it appears to us that the trial court exercised a sound discretion and one, indeed, that was favorable to Defendant.

CONCLUSION

{23} We affirm Defendant's convictions and sentence.

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

BUSTAMANTE, C.J. and VIGIL, J., concur.

2005-NMCA-079

114 P.3d 399

STATE of New Mexico, ex rel., Patricia A. MADRID, Attorney General, and New Mexico State Game Commission of the State of New Mexico, Plaintiffs–Appellants,

v.

UU BAR RANCH LIMITED PARTNERSHIP (a Nevada limited partnership), Western States Management Services, Ltd. (a Nevada limited liability corporation), and any other persons unknown, claiming any right, title, estate, lien, or interest in the real property described in the complaint adverse to Plaintiffs' ownership, or any cloud on Plaintiffs' title, Defendants–Appellees.

Nos. 23,418, 24,055.

Court of Appeals of New Mexico.

April 25, 2005.

Certiorari Denied, No. 29,231, June 6, 2005.

Patricia A. Madrid, Attorney General, David K. Thomson, David A. Stevens, Alvin Garcia, Assistant Attorneys General, Santa Fe, Bennett S. Cohn, West Palm Beach, FL, for Appellants.

Henry M. Bohnhoff, William G. Gilchrist, IV, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, for Appellees.

OPINION

ROBINSON, J.

{1} The Court has decided to revise the opinion filed on March 8, 2005. Therefore, the opinion is hereby withdrawn and the following opinion is substituted. The Motion

for Rehearing filed on March 23, 2005, by Defendant UU Bar Ranch Limited Partnership, is hereby denied.

{2} In this appeal, we are called upon to determine who is the rightful titleholder to a road that provides access to the Whites Peak area of state trust lands in Colfax County. The State of New Mexico and the New Mexico State Game Commission (collectively referred to as Plaintiff) appeal the district court's judgment quieting title in favor of UU Bar Ranch Limited Partnership (Defendant). For the reasons that follow, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

{3} The real property at issue in this case is a 2.6 mile stretch of dirt road (the Road) that lies completely within the exterior boundaries of Defendant's ranch. Prior to statehood, the Territory of New Mexico owned the Road as part of the system of territorial public roads, and the Road was recognized as part of El Camino Real and the Mountain Branch of the Santa Fe Trail. When New Mexico became a state in 1912, all of the Territory's real property interests, including the Road, were transferred to the State of New Mexico pursuant to our state constitution. The Road came to be designated on most maps as a part of State Highway 21, which was a north/south route from Cimarron south through Rayado to Ocate. The Road itself enjoyed continuous use by hunters during the hunting season, and occasional use by others, for access to state trust lands until 1997.

{4} On October 24, 1985, as part of an effort to reduce the number of unmaintained roads that were part of the state highway system, the State Highway Department executed a declaration of vacation and abandonment for a 4.7 mile segment of State Highway 21. Contemporaneously with the abandonment of the 4.7 mile portion of Highway 21, the Highway Department executed a quitclaim deed that Plaintiff argued conveyed the Road to the Game Commission. Ultimately, the district court found that the 4.7 mile abandoned segment of Highway 21 included the Road, but that the quitclaim deed did not include the Road.

{5} At trial, and now on appeal, the parties expend significant effort arguing about whether the Highway Department's abandonment of the Road was conditioned on a successful administrative transfer of the Road by quitclaim deed to the Game Commission, so that access to the Whites Peak area would remain open to the public. In addition, even assuming that the Highway Department intended to administratively transfer the Road to the Game Commission, the parties vigorously dispute whether the evidence established that the description in the quitclaim deed included the Road. As we will discuss later in this opinion, we need not decide whether the district court correctly concluded that the quitclaim deed did not convey the Road to the Game Commission. Regardless of the effect or intent of the deed, between 1985 and 1997, neither the Game Commission, nor the Game and Fish Department, acting as the Game Commission's agent, asserted any ownership of, control over, or interest in the Road.

{6} In the summer of 1997, Defendant began to investigate whether it was the exclusive owner of the Road. In September and October of 1997, the Game and Fish Department, with the participation of representatives from the Highway Department and Attorney General's Office, investigated whether the Game Commission was the owner of the Road. On October 17, 1997, and November 15, 1997, the Game and Fish Department and the Governor issued respective letters disclaiming any ownership interest by the Game Commission in the Road, concluding instead that the Road was abandoned and privately owned. In a subsequent letter dated November 21, 1997, the Secretary of the State Highway Department also wrote that the Road was abandoned. Upon the completion of its investigation in the fall of 1997, Defendant concluded that it was the exclusive owner of the Road and, therefore, built and locked a gate at the northern terminus of the Road. Since the fall of 1997, Defendant has had exclusive possession of the Road.

{7} In response to Defendant's actions, the Attorney General filed a petition on behalf of the State of New Mexico seeking

declaratory and injunctive relief. Because the district court ruled that the Attorney General lacked standing in her own right to pursue injunctive relief, the Attorney General's Office filed an amended complaint naming the State of New Mexico and the Game Commission as Plaintiffs. The amended complaint no longer sought injunctive relief, but instead sought to quiet title to the Road. Defendant's answer asserted a number of affirmative defenses, including lack of standing, estoppel, waiver, laches, and abandonment. Defendant also asserted counterclaims for its own declaratory relief and damages for inverse condemnation.

{8} Because the Attorney General filed the amended complaint without joining the Highway Department, Defendant reasserted a motion to dismiss for lack of standing. However, because Plaintiff was no longer seeking injunctive relief, but simply were trying to establish title to the Road, the district court denied the motion believing that Plaintiff did have standing to proceed. Nevertheless, the district court ultimately ruled against Plaintiff and quieted title to the Road in Defendant.

{9} In quieting title to the Road in Defendant, the district court concluded that the Highway Department had abandoned the Road. The district court further concluded that the disputed quitclaim deed did not convey title to the Road to the Game Commission. Accordingly, as a result of the abandonment of the Road, the district court ruled that fee simple title to the Road reverted to Defendant through its predecessor in interest, who owned the abutting land at the time the Road was purportedly abandoned. The district court also ruled that waiver, acquiescence, equitable estoppel, and laches precluded Plaintiff from asserting any claim to the Road. The district court subsequently awarded Defendant its costs. In these consolidated appeals, Plaintiff challenge the district court's quiet title judgment and award of costs.

DISCUSSION

{10} As we explain below, the district court erred in concluding that the Road was abandoned in accordance with New Mexico law. Therefore, without a legally effective abandonment of the Road, the district court's conclusion that the Road reverted to Defendant cannot stand because title remains with the State. And because we conclude that Defendant has no basis for asserting title to the Road, we also conclude that the district court erred in ruling that Plaintiff were equitably barred from asserting a claim to the Road. Finally, we need not decide whether the disputed quitclaim deed was an effective transfer of title to the Road from the Highway Department to the Game Commission because, without a legally-effective abandonment, title remains with the Highway Department who is free to convey, or reconvey, title as it sees fit.

STANDARD OF REVIEW

{11} To the extent that this appeal requires us to review the sufficiency of the evidence to support the district court's quiet title judgment, we view the evidence in the light most favorable to the district court's findings, indulge all reasonable inferences in support of the district court's decision, and disregard all evidence to the contrary. *See Martinez v. Martinez*, 1997–NMCA–096, ¶ 10, 123 N.M. 816, 945 P.2d 1034. To the extent that our review of the district court's quiet title judgment requires us to interpret a statute, that is a question of law that we review de novo. *See Morgan Keegan Mortgage Co. v. Candelaria*, 1998–NMCA–008, ¶ 5, 124 N.M. 405, 951 P.2d 1066; *see also Cooper v. Chevron U.S.A., Inc.*, 2002–NMSC–020, ¶ 16, 132 N.M. 382, 49 P.3d 61 ("The meaning of language used in a statute is a question of law that we review de novo.").

A. *The Road was not legally abandoned.*

{12} Plaintiff argue that the district court erred in ruling that the Highway Department legally abandoned the Road when it executed a formal declaration of vacation and abandonment of the Road on October 24, 1985. Plaintiff does not dispute that the Highway Department wanted to relinquish its own control over the Road. However, as noted above, the parties disagree about whether the Highway Department's attempted abandonment of the Road was conditioned

on an administrative transfer of the Road to the Game Commission that would ensure continued public access to the Whites Peak area via the Road. But we need not decide whether the district court correctly resolved that dispute because, regardless of the Highway Department's intent, we agree with Plaintiff that the attempted abandonment was legally ineffective under the relevant statutory law governing the procedures for abandoning public roads in New Mexico.

{13} Plaintiff generally assert that the purported abandonment was not undertaken in accordance with the relevant statutes and specifically argue that (1) the purported abandonment was not approved by the State Board of Finance as required by statute, (2) the purported abandonment was not approved by the State Highway Commission, (3) Defendant was barred by the statute of limitations from using the purported abandonment as a means for claiming title to the Road, (4) the purported abandonment would violate the anti-donation clause of our state constitution, and (5) the purported abandonment is barred by the doctrine of estoppel by deed. We find Plaintiff's argument regarding the need for Board of Finance approval dispositive and, therefore, need not address their other anti-abandonment arguments.

{14} At the time that the Highway Department sought to abandon the Road, NMSA 1978, § 13-6-2(A) (1984) provided that:

> Any state agency or local public body is empowered to sell or otherwise dispose of real or personal property belonging to the state agency or local public body. No sale or disposition of real or personal property having a current resale value of more than two thousand five hundred dollars ($2,500) shall be made by any state agency or local public body unless the sale or disposition has been approved by the state board of finance.

{15} Initially, we note that there was no argument below, nor in the briefs on appeal, that Section 13-6-2 is inapplicable because the resale value of the real property comprising the Road would be less than $2,500. *See State v. Thomson*, 79 N.M. 748, 749-50, 449 P.2d 656, 657-58 (1969) (declining to affirm quiet title on a basis that was not argued below or in briefs on appeal); *see also Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154 (noting that an appellate court will not affirm the trial court on a fact-dependent ground that was not decided by the trial court). However, Defendant's motion for rehearing nonetheless asserts that we should affirm on this basis because it would not be unfair to Plaintiff to do so. *See id.* (recognizing that an appellate court may affirm on a ground not relied upon by the trial court if it would not be unfair to the appellant to do so). In particular, Defendant maintains that it would not be unfair to affirm on this basis because it was Plaintiff's burden to prove a value over $2,500. Defendant also alleges there was evidence in the record from which this Court could infer that the value of the Road was less than $2,500. We are unpersuaded by both of Defendant's contentions.

{16} First, we reject Defendant's contention that it was Plaintiff's burden to prove the value of the Road was more than $2,500. Plaintiff's complaint sought to quiet title in the Game Commission based on the quit claim deed regardless of whether the Road was simultaneously abandoned. In contrast, Defendant's counterclaim for quiet title relied on invalidating the deed and establishing an otherwise valid abandonment of the Road. Therefore, we believe the burden was on Defendant, not Plaintiff, to prove a valid abandonment.

{17} Second, even assuming that it otherwise would not be unfair to Plaintiff to affirm if the value of the Road was less than $2,500, we disagree with Defendant's contention that there is enough evidence in the record to establish that the value of the Road was in fact less than $2,500. Defendant suggests that we could infer a value less than $2,500 because there was evidence that Defendant's ranch was worth about $131 per acre. Defendant believes it would be appropriate to simply multiply the acreage of the Road by $131 to arrive at a value less than $2,500. However, to do so would require us to infer that the land encompassing the Road was comparable to the adjacent land encom-

passing the ranch. However, as the protracted battle over title to the Road demonstrates, there is every reason to believe that the intrinsic value of the Road is higher than the ranch land, especially given that the Road is critical to access to state trust lands.

{18} In short, Plaintiff did not have the opportunity to demonstrate that the value of the Road was not comparable to the value of the ranch land, and any finding to that effect would, in all likelihood, require credibility determinations and inferences that should have been made by the district court in the first instance and were not. As such, we are loathe to affirm the district court on grounds not considered by that court because it would be unfair to Plaintiff to do so. Accordingly, we conclude that Section 13–6–2 does apply under the circumstances of this case.

{19} Moreover, it is undisputed that the Highway Department did not obtain Board of Finance approval for the abandonment of the Road. Therefore, we hold that the lack of Board of Finance approval invalidated the attempted abandonment of the Road. *See N.M. Dep't of Health v. Compton,* 2000–NMCA–078, ¶ 11, 129 N.M. 474, 10 P.3d 153 (recognizing that "when the language of a statute is clear and unambiguous, it must be given effect by the courts" and in general " 'use of the word "shall" ... imposes a mandatory requirement' ") (quoting *Redman v. Bd. of Regents,* 102 N.M. 234, 238, 693 P.2d 1266, 1270 (Ct.App.1984)); *see also* NMSA 1978, § 12–2A–4(A) (1997) (" 'Shall' and 'must' express a duty, obligation, requirement or condition precedent.").

{20} Defendant asserts that Board of Finance approval was not required for a number of reasons. First, Defendant suggests that because NMSA 1978, § 67–2–6 (1975) specifically authorizes the abandonment of state highways its procedures should override the procedural requirements in Section 13–6–2 for the general sale or disposition of state property. *See generally State ex rel. Schwartz v. Sanchez,* 1997–NMSC–021, ¶ 8, 123 N.M. 165, 936 P.2d 334 (recognizing the principle of statutory interpretation that favors the application of the more specific statute over the more general statute). However, the general/specific rule of statutory construction is only applicable when the two statutes are in conflict. *See generally Citizens for Incorporation, Inc. v. Bd. of County Comm'rs,* 115 N.M. 710, 716, 858 P.2d 86, 92 (Ct.App.1993) (holding that the general/specific rule of statutory construction "applies only when the statutory provisions are conflicting"); *State ex rel. Stratton v. Gurley Motor Co.,* 105 N.M. 803, 805, 737 P.2d 1180, 1182 (Ct.App.1987) (holding that "[i]n order for a specific statute to prevail over the general, there must exist conflicting statutory provisions ... such that a necessary repugnancy cannot possibly be harmonized"). For the reasons that follow, we conclude that the statutes can be harmonized with each other, and that the general/specific rule of statutory construction does not aid Defendant. Section 67–2–6 provides that:

> Property or property rights acquired by purchase or condemnation by the state or any commission, department, bureau, agency or political subdivision of the state for public road, street or highway purposes shall not revert until such property or property rights are vacated or abandoned by formal written declaration of vacation or abandonment which has been duly declared by the state or any commission, department, institution, bureau, agency or political subdivision of the state in whom the property or property right has vested. The right to abandon and vacate shall exist regardless of whether the public road, street or highway was created by the legislature or otherwise.

{21} While it is true that Section 67–2–6 does specifically address the abandonment and vacation of public roads, the statute simply requires a "duly declared" written abandonment. The statute is silent regarding what constitutes a "duly declared" abandonment. In fact, it is not entirely clear whether the procedure for abandonment contained in Section 67–2–6 is applicable in this case since the Road was not acquired through purchase or condemnation. In short, although Section 67–2–6 does give the State the right to abandon or vacate a public road, the statute is less than clear on the procedure to be used.

{22} Given the ambiguity in Section 67–2–6, we cannot say that Section 67–2–6 should be applied to the exclusion of Section 13–6–2. Instead, we conclude that both statutes must be construed and applied together to give effect to legislative intent. *See Quantum Corp. v. State Taxation & Revenue Dep't,* 1998–NMCA–050, ¶ 8, 125 N.M. 49, 956 P.2d 848 (recognizing that a statute whose construction is in question should "be read in connection with other statutes concerning the same subject matter"); *see also Key v. Chrysler Motors Corp.,* 121 N.M. 764, 768–69, 918 P.2d 350, 354–55 (1996) ("In interpreting statutes, we seek to give effect to the Legislature's intent, and in determining intent we look to the language used and consider the statute's history and background."). Accordingly, Board of Finance approval was required to effectuate the abandonment of the Road.

{23} Defendant relies on *Walker v. Coleman,* 540 So.2d 983 (La.Ct.App.1989) as support for its general/specific argument. In *Walker,* a state agency attempted to sell an unused public road pursuant to a statute that generally allowed the state agency to sell public property. *Id.* at 984. The court invalidated the sale because the statute specifically addressing the disposition of abandoned roads only provided for reversion of such roads to the contiguous landowners. *Id.* at 986. We find *Walker* distinguishable from this case because, as discussed above, Section 67–2–6 and Section 13–6–2 complement, rather than conflict with one another, unlike the statutes at issue in *Walker.*

{24} Defendant also contends that Section 13–6–2 is inapplicable because the abandonment of a public road is not a "disposition" within the meaning of the statute. Defendant suggests that a "disposition" is only the "act of transferring something to another's care or possession." BLACK'S LAW DICTIONARY 484 (7th ed.1999). Under that definition, Defendant maintains that an abandonment does not constitute a disposition because the government's interest in the Road is simply extinguished and nothing is transferred. We disagree with this view of Section 13–6–2 for two reasons. First, we believe that a "disposition" does encompass an abandonment under a plain reading of the statute. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 654 (3rd ed.1971) (defining "disposition" to include relinquishing or ridding oneself of control). Disposition is equated with surrender or abandonment elsewhere in the law. *See Reeves v. Jenkins,* 439 P.2d 941, 945 (Okla.1968) (stating that "[a] bankruptcy receiver ordinarily has no power to surrender, abandon, or make some other disposition of property"); *see also Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers,* 1998–NMSC–020, ¶ 27, 125 N.M. 401, 962 P.2d 1236 (recognizing that the plain language of a statute is the primary indicator of legislative intent). Second, Defendant cannot simply ignore the fact that if the Road were truly abandoned, title to the Road would revert to another, which we assume, without deciding, would be Defendant as the abutting landowner. Thus, even under Defendant's restrictive interpretation of the term "disposition," an abandonment would have the effect of transferring possession of the Road to another. Accordingly, we reject Defendant's contention that Section 13–6–2 is inapplicable to abandonments.

{25} Finally, Defendant points to evidence in the record that, since at least 1980, the Highway Department had not sought Board of Finance approval in connection with any of its state highway abandonments. Defendant also notes that the Highway Department's 1982 abandonment guide does not list Board of Finance approval as one of the steps in the abandonment checklist, and the Highway Department would only seek Board of Finance approval for the abandonment of state highways that were originally created through the purchase of a right-of-way. In short, since there was evidence indicating that the Highway Department believed it did not need Board of Finance approval to abandon state highways, Defendant argues we should defer to the Highway Department's interpretation of the statute it is charged with administering. *See Atlixco Coalition v. Maggiore,* 1998–NMCA–134, ¶ 30, 125 N.M. 786, 965 P.2d 370 (recognizing that courts will generally defer to an agency's interpretation of an ambiguous statute or regulation

that it is charged with administering if it implicates the agency's expertise).

{26} Furthermore, " 'it is the function of the courts to interpret the law,' and courts are in no way bound by the agency's legal interpretation." *Chavez v. Mountain States Constructors,* 1996–NMSC–070, ¶ 21, 122 N.M. 579, 929 P.2d 971 (quoting *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n,* 120 N.M. 579, 583, 904 P.2d 28, 32 (1995)). And given our conclusion that the legislature intended to require Board of Finance approval at the time that the Highway Department attempted to abandon the Road, we are not persuaded that we should defer to a purported agency interpretation that would be contrary to legislative intent. *See High Ridge Hinkle Joint Venture v. City of Albuquerque,* 1998–NMSC–050, ¶ 6, 126 N.M. 413, 970 P.2d 599 (declining to defer to an agency interpretation of an ordinance that was contrary to legislative intent).

{27} For all of the foregoing reasons, we therefore hold that the lack of Board of Finance approval prevented the Highway Department from executing a legally valid abandonment of the Road. And without the abandonment of the Road, even the district court acknowledged that the Road could not revert to Defendant, or its predecessor in interest, because title to the Road remained with the State regardless of which state agency was responsible for managing and maintaining the Road.

{28} We recognize that Defendant believes Plaintiff lacked standing to pursue a quiet title action that would declare title to the Road in the Highway Department. However, the amended complaint only sought to quiet title in the Game Commission and the Game Commission is a party to this action. We agree with the district court's conclusion that Plaintiff therefore had standing to proceed. We need not decide whether standing would exist in this case to quiet title in the name of the Highway Department because that is not the relief Plaintiff requested. We do note, however, that no one has disputed that title to the Road was held by the Highway Department prior to the failed abandonment. Presumably, then, title would remain with the Highway Department unless Defendant could show that it could establish title to the Road through some other means than reversion by abandonment.

B. *Defendant Cannot Establish Title Based on Waiver, Laches, and Estoppel.*

{29} Having concluded that the district court erred in quieting title in favor of Defendant in light of the ineffective abandonment of the Road, we turn now to Defendant's claims based on waiver, laches, and estoppel. Defendant maintains that by failing to negate the letters from the Game and Fish Department and the Governor, the Game Commission's actions amount to a waiver by acquiescence of the right to claim title to the Road. Since the purported abandonment of the Road is an ineffective means for Defendant to claim title to the Road through reversion, Defendant's waiver by acquiescence claim is an apparent attempt to secure title through alternate means. However, New Mexico case law specifically "hold[s] that title to state land cannot be obtained pursuant to the doctrine of acquiescence." *Stone v. Rhodes,* 107 N.M. 96, 99, 752 P.2d 1112, 1115 (Ct.App.1988); *see also Deaton v. Gutierrez,* 2004–NMCA–043, ¶ 16, 135 N.M. 423, 89 P.3d 672. Similarly, Defendant's affirmative defense of laches cannot be used as a means for establishing title to the Road. *Id.* ¶¶ 24–25 (rejecting an attempt to establish title through the affirmative defense of laches where the defendant failed to establish a right to title through adverse possession, acquiescence, or deed). Furthermore, it is well settled that a claimant must rely on the strength of its own title and not claimed weaknesses of his adversary when seeking to quiet title. *See Tres Ladrones, Inc. v. Fitch,* 1999–NMCA–076, ¶ 15, 127 N.M. 437, 982 P.2d 488; *Martinez,* 1997–NMCA–096, ¶ 12, 123 N.M. 816, 945 P.2d 1034; *Union Land & Grazing Co. v. Arce,* 21 N.M. 115, 152 P. 1143 (1915).

{30} To the extent that Defendant also attempts to establish title through a claim of equitable estoppel, we question whether title could be established through such means for the same reason that other affirmative defenses are an inappropriate

means for establishing title. Specifically, Defendant's estoppel argument is premised on the same governmental statements and inaction that formed the basis for the waiver by acquiescence claim rejected above. We fail to see how Defendant can establish title through an otherwise improper means simply by changing the name of the claim. Moreover, estoppel generally cannot be premised on the opinions, or advice of government officials, that are contrary to law. *See Rainaldi v. Pub. Employees Ret. Bd.*, 115 N.M. 650, 658, 857 P.2d 761, 769 (1993) (noting that courts have refused to allow estoppel against the state when the use of estoppel is based on the advice of a government official that contradicts a statute or would permit an act that is contrary to law). Although Defendant characterizes the disclaimers of interest in the Road by the Game and Fish Department and Governor as statements of fact, abandonment of the Road was a matter of opinion dependent on a legal interpretation of what was required by New Mexico statutes to abandon a public highway. As set forth above, the statutory requirements for abandoning the Road were not met, and Defendant cannot circumvent those statutory requirements by relying on ostensible assurances to the contrary by government officials.

C. *Defendant's Costs*

{31} Given our reversal of the district court's judgment quieting title in favor of Defendant, we also reverse the district court's award of costs to Defendant and remand for reconsideration of the question of costs.

CONCLUSION

{32} Because the district court erred in quieting title to the Road in Defendant on the basis of the Highway Department's ineffective abandonment of the Road, we reverse the district court's quiet title judgment. And since Defendant cannot otherwise establish title through waiver by acquiescence, laches, or estoppel, we need not decide whether the quitclaim deed from the Highway Department to the Game Commission was an effective conveyance of title, since title remains with the State in any event. *See Srader v. Verant*, 1998–NMSC–025, ¶ 40, 125 N.M. 521, 964 P.2d 82 (providing that the appellate court generally will not decide academic or moot questions); *see also In re Will of Coe*, 113 N.M. 355, 362, 826 P.2d 576, 583 (Ct.App. 1992) (noting that the function of quiet title decree is not to confer title, but merely to confirm pre-existing title).

{33} We note additionally that the record indicates that the Highway Department may have executed a second quitclaim deed in an apparent attempt to correct any deficiencies in the first quitclaim deed. We express no opinion on the effect of that deed, but simply note that as the apparent current titleholder to the Road, the Highway Department would remain free to convey, or reconvey, the Road to whomever it chooses.

{34} In light of our disposition, we need not address the remainder of the arguments raised by the parties on appeal. Because the district court apparently did not resolve the balance of Defendant's counterclaims in light of its decision to quiet title to the Road in Defendant, we leave it to the sound discretion of the district court to dispose of Defendant's outstanding counterclaims to the extent necessary.

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

KENNEDY and VIGIL, JJ., concur.

2005-NMCA-080

114 P.3d 407

STATE of New Mexico, Plaintiff–Appellee,

v.

Mark REYES, Defendant–Appellant.

No. 24,739.

Court of Appeals of New Mexico.

May 3, 2005.

Patricia A. Madrid, Attorney General, Santa Fe, Steven S. Suttle, Assistant Attorney General, Albuquerque, for Appellee.

John Bigelow, Chief Public Defender, Sheila Lewis, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

BUSTAMANTE, Chief Judge.

{1} Defendant Mark Reyes appeals from the district court's decision that he is not competent to proceed as his own counsel, and that he did not knowingly and intelligently waive his right to counsel. Based on the following, we reverse the district court's decision.

FACTUAL AND PROCEDURAL BACKGROUND

{2} On June 5, 2000, the State filed a criminal information charging Defendant with attempted first-degree murder, retalia-

tion against a witness, receipt, transportation, or possession of a firearm by a felon, and tampering with evidence. Richard Gallagher, a public defender, was appointed to represent Defendant and entered his appearance on June 6, 2000. Defendant immediately wrote a letter to the district court requesting that he be allowed to represent himself in his trial and that Gallagher be removed as his counsel. Defendant stated that Gallagher did not represent him properly in Defendant's previous trial, and that he had shown himself again to be misrepresenting Defendant by not allowing his witnesses to speak in court. Gallagher then filed a motion to substitute counsel or in the alternative to allow Defendant to proceed pro se.

{3} Hearings on Defendant's motion to represent himself were scheduled and rescheduled, and the matter was brought up at a pre-trial conference. However, the matter was not resolved for various reasons, and the district court did not conduct a hearing on Defendant's complaints, even when Gallagher alerted the district court to Defendant's dissatisfaction with counsel and his wish to represent himself. After a hearing in early September where the district court praised Gallagher for his perseverance in continuing to represent Defendant, there was no further discussion regarding Gallagher's representation. Defendant was represented by Gallagher at his jury trial and was found guilty of attempted first-degree murder and receipt, transportation, or possession of a firearm by a felon.

{4} After the judgment and sentence was entered, Defendant wrote another letter to the district court requesting court transcripts and noting that his motion to dismiss Gallagher was never ruled upon by the district court. Defendant appealed his convictions for attempted first-degree murder and felon in possession of a firearm, contending that the district court erred in failing to conduct a hearing concerning his interest and ability to represent himself or replace Gallagher at trial pursuant to *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). In a memorandum opinion, we held that the district court violated Defendant's Sixth Amendment right to counsel by failing to conduct a *Faretta* hearing to determine whether Defendant knowingly, intelligently, and voluntarily waived his right to counsel. Defendant's case was remanded to the district court for a *Faretta* hearing.

{5} The district court held a *Faretta* hearing on October 31, 2003. At the hearing, Defendant was questioned by his defense counsel at that time, Jesse Cosby (Cosby), the prosecutor, and the district judge. Among other things, Defendant expressed his unwavering desire to proceed pro se even if it was potentially detrimental to his defense. Counsel and the district judge discussed with Defendant the rules of proceeding pro se and Defendant's familiarity with the trial setting and some court procedure, and they explored Defendant's criminal history. Defendant requested standby counsel, and stated that Cosby would be acceptable. The district court determined, however, that under factors set forth in *Faretta*, Defendant was not competent to represent himself or conduct himself in conformity with the rules of evidence and courtroom procedures. The district court concluded that "Defendant's waiver of counsel, while voluntary, is not knowing and intelligent, and therefore inadequate." This appeal followed.

DISCUSSION

Standard of Review

{6} Our Supreme Court has stated that whether a defendant made a valid knowing, intelligent, and voluntary waiver of his constitutional rights " 'is a question of law which we review de novo.' " *State v. Martinez*, 1999–NMSC–018, ¶ 15, 127 N.M. 207, 979 P.2d 718 (quoting *United States v. Toro–Pelaez*, 107 F.3d 819, 826 (10th Cir.1997)); *State v. Padilla*, 2002–NMSC–016, ¶ 18, 132 N.M. 247, 46 P.3d 1247; *State v. Plouse*, 2003–NMCA–048, ¶ 21, 133 N.M. 495, 64 P.3d 522 (stating that we review de novo whether the district court violated a defendant's right to counsel by failing to adequately determine whether his decision to waive counsel and represent himself was made voluntarily, knowingly, and intelligently).

The Right to Self–Representation

{7} *Faretta* states that "[w]hen an accused manages his own defense, he relin-

quishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits." *Faretta,* 422 U.S. at 835, 95 S.Ct. 2525 (holding that the Sixth Amendment accords a criminal defendant the right to proceed without counsel when he or she voluntarily and intelligently waives his or her right to counsel and elects to proceed pro se). In so holding, *Faretta* also states that a defendant must be made aware of the risks that go along with self-representation. *Id.* at 832, 835. Our Supreme Court followed *Faretta* in *State v. Chapman,* 104 N.M. 324, 327, 721 P.2d 392, 395 (1986), by recognizing that a defendant must be "accorded the right of self-representation when he or she is able to make a knowing and intelligent waiver of counsel." Therefore, "[i]n a case where a defendant wishes to represent himself, the district court must determine if the defendant is making a 'knowing and intelligent' waiver of counsel and understands fully the dangers of self-representation." *State v. Rotibi,* 117 N.M. 108, 110, 869 P.2d 296, 298 (Ct.App.1994) (quoting *State v. Castillo,* 110 N.M. 54, 57, 791 P.2d 808, 811 (Ct.App.1990)); *see also Chapman,* 104 N.M. at 327, 721 P.2d at 395 (stating that in a case where a defendant wishes to represent himself, the trial court must determine if he is making a knowing and intelligent waiver of counsel and fully understands the potential pitfalls of self-representation); *State v. Lewis,* 104 N.M. 218, 220, 719 P.2d 445, 447 (Ct.App.1986).

{8} A "knowing and intelligent" waiver of the right to counsel requires a showing that "a defendant who elects to conduct his own defense has some sense of the magnitude of the undertaking and the hazards inherent in self-representation." *Castillo,* 110 N.M. at 57, 791 P.2d at 811; *see also United States v. Padilla,* 819 F.2d 952, 956 (10th Cir.1987) (stating that the task of assessing the defendant's understanding of the requirements and risks of self representation initially falls on the trial court, which "must bear in mind the strong presumption against waiver"). While, "[t]here are no fixed guidelines to determine whether a defendant has 'knowingly and intelligently' waived the right to counsel," we have created certain instructions for the district courts to follow at a *Faretta* hearing. *Rotibi,* 117 N.M. at 110, 869 P.2d at 298.

{9} To determine whether a defendant is making a voluntary, knowing, and intelligent waiver, "the court must inform itself regarding a defendant's competency, understanding, background, education, training, experience, conduct and ability to observe the court's procedures and protocol." *Chapman,* 104 N.M. at 327, 721 P.2d at 395; *Castillo,* 110 N.M. at 57, 791 P.2d at 811 (citing authority for the proposition that the question of an intelligent waiver of the right to counsel turns not only on the state of the record but on the circumstances of the case, and the trial court must consider the "defendant's age and education, previous experience with criminal trials, and representation by counsel before trial"). Further, in *Castillo,* we determined that the trial court must: (1) make "[a] showing on the record . . . that a defendant . . . has some sense of the magnitude of the undertaking and the hazards inherent in self-representation"; (2) "insure that [a] defendant has been informed of the nature of the charges, the statutory offenses included within them, the range of allowable punishments, possible defenses or mitigating factors that might be available to the defendant"; and (3) "admonish [a defendant] that [those who proceed pro se] will be expected to follow the rules of evidence and courtroom procedure." *Id.* at 57, 791 P.2d at 811; *see Rotibi,* 117 N.M. at 111, 869 P.2d at 299; *see also Sanchez v. Mondragon,* 858 F.2d 1462, 1467 (10th Cir.1988) (stating that assuming a defendant voluntarily chooses self-representation, the trial court must ensure that the defendant has been informed of the nature of the charges, the statutory offenses included within them, the range of allowable punishments, possible defenses or mitigating factors that might be available to the defendant, and it must also admonish the defendant that he or she will be expected to follow the rules of evidence and courtroom procedure); *see generally Von Moltke v. Gillies,* 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948).

{10} The district court should take special care to advise the defendant as to the ramifications of proceeding pro se. In ascertaining whether a defendant is aware of the potential pitfalls of self-representation, appellate courts have suggested that defendants should be informed of at least the following:

> (1) that presenting a defense is not a simple matter of telling one's story, but requires adherence to various technical rules governing the conduct of a trial; (2) that a lawyer has substantial experience and training in trial procedure and that the prosecution will be represented by an experienced attorney; (3) that a person unfamiliar with legal procedures may allow the prosecutor an advantage by failing to make objections to inadmissible evidence, may not make effective use of such rights as the voir dire of jurors, and may make tactical decisions that produce unintended consequences; (4) that there may be possible defenses and other rights of which counsel would be aware and if those are not timely asserted, they may be lost permanently; (5) that a defendant proceeding pro se will not be allowed to complain on appeal about the competency of his representation; and (6) that the effectiveness of his defense may well be diminished by his dual role as attorney and accused.

3 Wayne R. LaFave et al., *Criminal Procedure* § 11.5(c), at 574–75 (2d ed.1999) (internal quotation marks and footnotes omitted).

{11} In *Godinez v. Moran,* 509 U.S. 389, 400, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993), the Supreme Court noted that "the defendant's technical legal knowledge is not relevant to the determination whether he is competent to waive his right to counsel, and . . . although the defendant may conduct his own defense ultimately to his own detriment, his choice must be honored" (internal quotation marks and citations omitted). "The one certain guideline is that the defendant is not required to have the competency and skill of an attorney to proceed pro se." *Rotibi,* 117 N.M. at 110–111, 869 P.2d at 298–99; *see Faretta,* 422 U.S. at 836, 95 S.Ct. 2525 ("[Defendant's] technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself."). *Faretta* holds only that a defendant choosing self-representation must do so "competently and intelligently." *Id.* at 835, 95 S.Ct. 2525. The Supreme Court stated that a defendant's "technical legal knowledge" is "not relevant" to the determination whether he is competent to waive his right to counsel. *Id.* at 836, 95 S.Ct. 2525. Thus, while "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts," a criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation. *Id.* at 834, 95 S.Ct. 2525.

{12} The Supreme Court in *Faretta* held that "[i]n forcing Faretta, under these circumstances, to accept against his will a state-appointed public defender, the California courts deprived him of his constitutional right to conduct his own defense." *Id.* at 836, 95 S.Ct. 2525. We have similarly held that "[w]here a defendant has timely voiced such request [to represent him or herself pro se] and a waiver of court-appointed counsel is knowingly and intelligently undertaken, counsel may not thereafter be forced upon an appellant." *Lewis,* 104 N.M. at 221, 719 P.2d at 448.

Defendant Voluntarily, Knowingly, and Intelligently Waived His Right to Counsel at the *Faretta* Hearing

{13} "The question of whether Defendant's waiver of counsel was knowing and intelligent is contingent on the facts and circumstances of the case." *Plouse,* 2003–NMCA–048, ¶ 27, 133 N.M. 495, 64 P.3d 522. We conclude in accordance with our case law that Defendant voluntarily, knowingly, and intelligently waived his right to counsel. In this case, the *Faretta* hearing included all of the *Castillo* requirements. Defendant testified that he is thirty-years-old. He stated that he dropped out of high school in the eleventh grade and earned his GED in 1996 while he was incarcerated, and that he had no problems with the English language. He stated that he has had previous experience with the criminal justice system since he was a teenager in that he had been charged with previous felonies and knew what occurred

during a jury trial. He was aware of and understood the charges against him and the extent of punishments and possible range of sentences and enhancements, should he be found guilty of the charges.

{14} Defendant clearly acknowledged the negative aspects of self-representation. This was discussed at the hearing and Defendant had discussed the matter with his appointed counsel, Cosby, prior to the hearing. Defendant clearly stated that he understood the dangers of self-representation. He acknowledged that there are a lot of procedures, obstacles, and limitations that he will not be able to overcome because he is not an attorney and he is incarcerated. He stated that he knew he needed to educate himself about the rules of evidence. Defendant acknowledged that he is

> subjecting myself to losing this case just because I'm representing myself, but I do have an understanding of general court procedure and I pretty much understand that I'm going to be limited in a lot of things in handling my case and that I'm responsible for my own defense and preparation of all my paperworks [sic] and that's regardless of my situation in county jail.

{15} Defendant recognized that there is a problem of testifying and also being his own attorney and that if he proceeded pro se, he would not take the stand. He also was aware of the difficulty in arguing a case and remaining neutral by acknowledging that there was a potential problem with neutrality of evidence and that he would be subject to sanctions if he does not follow court decorum. He was aware of the risk involved in comporting with rules of the district court and that he would be subject to sanctions, including contempt of court, if he failed to conduct himself properly. Cosby admonished Defendant that the prosecutor could take advantage of him because of his lack of understanding and experience with the rules of evidence. Defendant stated that he understood that he would "take that risk" and be responsible for familiarizing himself with court rules and procedures. He knew he would have to make his own record for appeal in order to preserve issues and that by receiving a new trial he would waive his right to appeal his convictions from his first trial in which Gallagher represented him.

{16} Defendant testified that he was never adjudicated mentally incompetent. He was evaluated three times at the Las Vegas Medical Center forensic unit for mental competency to stand trial, and he was always determined competent to stand trial. Defendant stated he was not evaluated for competency in this case. Defendant stated that he was not taking any medication at the time and had no physical impairment or mental restrictions. Defendant stated that he had never ceased in requesting to proceed pro se.

{17} The prosecutor asked Defendant if he knew the difference between leading and non-leading questions and the difference between relevant and irrelevant questions. Defendant indicated that he had researched best evidence and hearsay rules, that he "understand[s] everything that is written in the books," and that while he lacked access to legal materials due to his incarceration, he had the rules on evidence, search and seizure, and general discovery and had some understanding of this material. Finally, Defendant indicated his willingness to accept standby-counsel should the district court determine that it would be appropriate.

{18} Defendant's *Faretta* hearing reveals that in this case, Defendant was clearly advised of the possible hazards and disadvantages of self-representation. He understood the ramifications of proceeding pro se, and he was aware of the charges and possible punishments. Defendant demonstrated that he had a rudimentary understanding of courtroom procedure, the rules of evidence, and rules of the court. He expressed a willingness to comply with court decorum. Defendant's request to represent himself was unequivocal, unwavering, coherent, and calm.

{19} As such, the district court erred in determining that Defendant did not knowingly, and intelligently waive his right to counsel. We have stated that:

> once it has been determined that the waiver of counsel was "knowingly and intelligently" made by a defendant, . . . the court had no alternative but to allow Defendant to proceed on his own. To add an addi-

> tional test of competency to conduct the trial would effectively take away the right to reject counsel and proceed pro se. Other than defendants trained in the law, few would possess the skills to conduct an effective defense. This is the reason defendants wishing to represent themselves are given the *Castillo* warnings. We note that the trial court has the option of terminating self-representation when a defendant deliberately engages in serious and obstructive misconduct. Further, the court has the right to appoint standby counsel to aid the accused at such time as the accused requests help or to be available to represent the accused if termination of self-representation is necessary.

Rotibi, 117 N.M. at 111, 869 P.2d at 298.

{20} As stated above, the fact that Defendant is not an attorney nor has the training or skills of an attorney, should not prevent Defendant from representing himself. Defendant was given the *Castillo* warnings, and the district court conducted a detailed hearing on the issue. While the district court determined that Defendant "at best [has] the superficial understanding" of legal proceedings, according to law, this is not sufficient to prevent Defendant from proceeding pro se even if it is at his own peril.

{21} In this case, Defendant's request to proceed pro se was clear and unequivocal throughout the proceedings. *See* LaFave, *supra* § 11.5(d) at 581. LaFave notes that "[o]nce a clear and unequivocal request is made, *Faretta* suggests only three possible grounds for denying that request." LaFave, *supra* at 582–83. First, *Faretta* stressed that the request in that case was made " 'well before the date of trial.' " *Faretta,* 422 U.S. at 807, 95 S.Ct. 2525; LaFave, *supra.* Here, Defendant made his request before trial began. Second, *Faretta* noted that " 'the trial judge may terminate self-representation by a defendant who . . . engages in serious and obstructionist misconduct.' " *Faretta,* 422 U.S. at 834 n. 46, 95 S.Ct. 2525; LaFave, *supra* at 583. In this case, Defendant was not misbehaving, and was not disruptive in the course of seeking to obtain self-representation, and was agreeable to going along with the district court's rulings. Third, LaFave states that by requiring a valid waiver of counsel as a prerequisite for self-representation, *Faretta* recognized the authority of a trial court to refuse to permit self-representation when, despite its efforts to explain the consequences of waiver, a defendant is unable to reach the level of appreciation needed for a knowing and intelligent waiver. LaFave, *supra* at 584. *Faretta* also makes clear, however, "that a defendant does not need legal expertise nor unusual intelligence to meet its standard of awareness of the dangers and disadvantages of self-representation." LaFave, *supra.*

{22} Our review of the record and proceedings below reveals that the district court erred when in deciding that Defendant was not competent to represent himself, and that Defendant's decision to waive counsel, while voluntary, was not knowing and intelligent. *Cf. Plouse,* 2003–NMCA–048, ¶¶ 20–31, 133 N.M. 495, 64 P.3d 522 (providing a detailed analysis of the record which supported the district court's determination that the defendant's waiver of counsel was knowing and intelligent); *Rotibi,* 117 N.M. at 110–11, 869 P.2d at 298–99.

CONCLUSION

{23} We remand this case to the district court for a new trial, at which time Defendant may proceed pro se with standby counsel per his request at the *Faretta* hearing.

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

ROBINSON and KENNEDY, JJ., concur.

2005-NMSC-016

114 P.3d 1050

David WAGNER, Worker–Appellee/Cross–Appellant,

v.

AGW CONSULTANTS, d/b/a Turner Environmental Consultants, and William M. Turner, individually and as trustee, Employer–InsurerAppellants/Cross–Appellees.

No. 28,348.

Supreme Court of New Mexico.

May 24, 2005.

As Corrected June 29, 2005.

Duhigg, Cronin, Spring & Berlin, P.A. Nancy C. Wagner, Albuquerque, NM for Worker–Appellee/Cross–Appellant.

James R. Beam Albuquerque, NM, for Employer–Insurer–Appellants/Cross–Appellees.

William M. Turner, Pro Se.

Michael B. Browde Albuquerque, NM, McGinn & Carpenter, P.A., Randi McGinn,

Albuquerque, NM, for Amicus Curiae New Mexico Trial Lawyers Association.

Robert M. Aurbach, Special Assistant Attorney General, Albuquerque, NM, for Amicus Curiae Worker's Compensation Administration.

OPINION

CHÁVEZ, Justice.

{1} Worker prevailed in a heavily litigated worker's compensation claim and was awarded $58,599 in medical expenses, plus $26,761 in past and future weekly benefits. At the hearing on attorney fees, the worker's attorney sought $61,125 in attorney fees, of which the worker would have been liable for $30,562. *See* NMSA § 52–1–54(J) (2003) (providing worker and employer shall share payment of attorney fees equally except as otherwise provided by the statute). Worker argued the $12,500 limitation on attorney fees in NMSA 1978, Section 52–1–54(I) (1993, prior to 2003 amendment) should not apply because such a limitation violated constitutional guarantees of equal protection and due process.[1] The Workers' Compensation Judge took judicial notice of the chilling effect of miserly fees on representation but found the $12,500 award for attorney fees to be reasonable.

{2} The employer appealed the worker's award to the Court of Appeals and the worker cross-appealed the attorney fee award. The Court of Appeals certified the issue of the constitutionality of the limitation on attorney fees and otherwise proposed affirming the compensation award. We accepted certification to decide whether the limitation on attorney fees in Section 52–1–54(I) of the Workers' Compensation Act violates Worker's state constitutional rights to equal protection and due process.

{3} We review the attorney fee limitation provision under rational basis scrutiny, as the record in this case fails to demonstrate that the limitation has a sufficient impact on important rights to trigger a higher level of scrutiny. We hold that the fee limitation is rationally related to legitimate government purposes, particularly those of maximizing the limited benefits workers may currently obtain through the workers' compensation system. On these facts, were we to declare the fee limitation unconstitutional, the worker's benefits of $26,761 would be insufficient to pay his share of the $61,125 in requested attorney fees. The $12,500 attorney fee limitation, which in this case limits the worker's share of attorney fees to $6,250, still allows the worker to take home $20,511 in benefits. Therefore, while we do not decide whether other provisions of Section 52–1–54 would pass constitutional muster, we uphold the fee limitation itself. We adopt and append the Court of Appeals' analysis to all other issues raised in this appeal and cross-appeal. *See Wagner v. AGW Consultants,* No. 22,370 (N.M.Ct.App. Oct. 24, 2003) (certification order).

BACKGROUND

{4} David Wagner (Worker) filed a claim for workers' compensation benefits against AGW Consultants, d/b/a Turner Environmental Consultants (AGW), a ground-water hydrology consulting firm where he was injured while employed as a geologist. After realizing that AGW was a business trust, Worker amended his complaint to add as a defendant William Turner, AGW's sole trustee, in the event that Turner was the real party in interest. Turner appeared pro se to challenge Worker's claim, while separate counsel represented AGW.

{5} Several issues were heavily litigated at trial, including the applicability of the Workers' Compensation Act (WCA) to AGW, whether Turner was a real party in interest, the extent of Worker's injury, and the constitutionality of the attorney fee limitation. Turner himself filed a significant number of the roughly 2,500 pages of pleadings, independent of post-judgment motions and this appeal. The Workers' Compensation Judge ("WCJ") noted that although the issues were

1. At the time of this case, Section 52–1–54(I) of the WCA limited attorney fees to $12,500. Section 52–1–54(I) was amended in 2003 to raise the attorney fee limitation to $16,500. NMSA 1978, § 52–1–54(I) (2003). Because this case was already pending at the time the statute was amended, this Opinion considers only the constitutionality of the pre–2003 fee limitation.

of average complexity, the case had the most extensive pleading record he had ever seen. At one point the WCJ stated on the record that had Turner been an attorney, the WCJ would have issued sanctions against him for repeatedly filing motions without merit. The WCJ did not initially enter findings of fact or conclusions of law regarding whether the parties engaged in bad faith, and therefore whether either party was entitled to additional attorney fees up to $2,500 under Section 52–1–54(I). On appeal the Court of Appeals retained jurisdiction but ordered the WCJ to enter findings and conclusions regarding the issue of bad faith. The WCJ found that some of Turner's pleadings were frivolous and without sound basis in law, but concluded that Turner's bad faith was irrelevant to awarding additional attorney fees under Section 51–2–54(I) because Turner was not Worker's employer. The WCJ ultimately found that Worker was an employee of AGW and that AGW was subject to the WCA, ordering AGW to pay Worker $58,599 in medical expenses and $26,671 in past and future weekly benefits.

{6} At the subsequent hearing on attorney fees, Worker's attorney claimed to have worked more than 400 hours, at $150 per hour, on the pre-trial and trial work. Worker's attorney argued the $12,500 statutory limitation on attorney fees was unreasonable in this case given the extraordinary amount of time involved, and that the limitation was unconstitutional due to its chilling effect on workers' ability to obtain adequate representation. Worker presented expert testimony that the fee limitation can be unfair and can make it uneconomical for attorneys to pursue certain time-consuming cases. AGW and Turner challenged the jurisdiction of the WCJ to declare Section 52–1–54 unconstitutional and did not present evidence in support of the fee limitation.

{7} The WCJ awarded Worker $12,500 in attorney fees and made the following findings: (1) Worker's attorney reasonably expended over 200 hours at an hourly rate of $175 per hour,[2] (2) the miserly fee limitation has a chilling effect on representation, and (3) $12,500 was a reasonable fee in this case. On certification, Worker argues the attorney fee limitation violates state equal protection and substantive due process, claiming that as applied, the limitation unconstitutionally infringes on the right to access the courts and the right to an appeal guaranteed in the New Mexico Constitution. AGW contends Worker does not have standing to challenge the fee limitation and that in any event the fee limitation is constitutional.

I. Worker Has Standing to Challenge Fee Limitation

{8} AGW claims Worker lacks standing to challenge the constitutionality of the fee limitation under *Mieras v. Dyncorp,* 1996–NMCA–095, ¶ 22, 122 N.M. 401, 925 P.2d 518, because the WCJ specifically found the $12,500 attorney fee to be reasonable and declined to find that Worker's attorney would have been entitled to a higher attorney fee but-for the limitation. We disagree.

{9} To have standing, Worker must either show, or the WCJ must explicitly find, that but for the fee limitation, reasonable attorney fees would have exceeded the awarded amount. *See Meyers v. Western Auto & CNA Ins. Cos.,* 2002–NMCA–089, ¶ 29, 132 N.M. 675, 54 P.3d 79; *cf. Mieras,* 1996–NMCA–095, ¶ 22, 122 N.M. 401, 925 P.2d 518 (holding the claimant had standing where the WCJ specifically found the value of the attorney's services to exceed the limitation). Although the WCJ found $12,500 to be a reasonable fee, the WCJ also found that Worker's attorney reasonably expended over 200 hours representing Worker at a fee of $175 per hour. While these findings appear inconsistent, the latter indicates at a minimum that but for the limitation, Worker's attorney would have been reasonably entitled to at least $35,000 in attorney fees even before this appeal. Unlike in *Meyers,* where the claimant lacked standing because he neither reached the fee limitation nor showed that he would have secured a higher attorney fee in the absence of the limitation, 2002–

2. Apparently the judge mistook Worker's attorney's fees for $175 an hour instead of the $150 hourly rate she requested.

NMCA–089, ¶ 29, 132 N.M. 675, 54 P.3d 79, here Worker not only reached the limitation, but the WCJ found that his attorney reasonably expended over 200 hours at $175 an hour, bringing him well over the limitation of $12,500.

{10} We note that the fact Worker is represented by counsel, who continues to honor her ethical duty to represent him, does not preclude standing in this case. *See* Rule 16–116(B)(5) NMRA 2005 (declining or terminating representation). In *Corn v. New Mexico Educators Fed. Credit Union,* the Court of Appeals held the claimant had standing to challenge the constitutionality of the unilateral limitation on workers' attorney fees although claimant continued to be represented by counsel. 119 N.M. 199, 202, 889 P.2d 234, 237 (Ct.App.1994), *overruled on other grounds in Trujillo v. City of Albuquerque,* 1998–NMSC–031, ¶ 32, 125 N.M. 721, 965 P.2d 305 (*Trujillo III*) (overruling *Corn* to the extent it adopted a fourth tier of scrutiny, while affirming *Corn's* holding and subsuming its "heightened rational basis" analysis under a "modern rational basis" standard). The WCJ in *Corn* found that but for the limitation, the claimant's attorney would have been entitled to nearly $20,000, and noted that although attorneys exceeded the limitation in only one of five hundred cases, the limitation caused workers to be at an unfair disadvantage compared to employers and significantly reduced the number of competent attorneys willing to take workers' compensation cases. *Id.* at 201, 208, 889 P.2d at 236, 243. Although the claimant in *Corn* was represented, the court found a significant risk of future injury because his attorney could withdraw during the appeals process if the lack of payment posed an unreasonable financial burden, which would have required claimant to "pursue matters of impairment and permanent disability without the aid of counsel." *Id.* at 202, 889 P.2d at 237.

{11} Thus, despite the fact that Worker is represented by counsel, he has shown that he is at risk of significant injury because of his inability to compensate a lawyer on appeal. Section 52–1–54 prohibits Worker from paying his counsel more than $12,500, either before the WCA or on appeal. *See* § 52–1–54(A), (I), (N) (making it unlawful to accept fees except as provided in the Act, punishable as a misdemeanor offense). The ethical rules allow Worker's lawyer to withdraw if the case poses an "unreasonable financial burden," and Worker would be unable to offer a new attorney any compensation on appeal. *See id.;* Rule 16–116(B)(5). This evidence certainly does not detract from Worker's having standing; if anything, it strengthens his argument. We hold Worker has standing to challenge the constitutionality of the fee limitation.

II. Rational Basis is the Appropriate Level of Scrutiny

{12} Before turning to the merits of the equal protection and due process challenges, we must identify the appropriate level of scrutiny for reviewing the challenged law. What level of scrutiny we use depends on the nature and importance of the individual interests asserted and the classifications created by the statute. *See Mieras,* 1996–NMCA–095, ¶ 24, 122 N.M. 401, 925 P.2d 518. Ordinarily we defer to the Legislature's judgment in enacting social and economic legislation such as the WCA. *See Corn,* 119 N.M. at 204, 889 P.2d at 239. So long as such legislation does not impact important rights or protected classes, it is upheld unless the challenger can show the provision at issue is not rationally related to a legitimate government purpose. *See Trujillo III,* 1998–NMSC–031, ¶¶ 14, 26, 125 N.M. 721, 965 P.2d 305; *Mieras,* 1996–NMCA–095, ¶ 30, 122 N.M. 401, 925 P.2d 518. If legislation impacts important but not fundamental rights, or sensitive but not suspect classifications, intermediate scrutiny is warranted and we require the State to demonstrate that the law is substantially related to an important government purpose.[3] *Mieras,* 1996–NMCA–

3. We emphasize that this standard requires *either* an important right *or* a sensitive class, contrary to what we may have suggested in dicta in *Trujillo III,* 1998–NMSC–031, ¶ 15, 125 N.M. 721, 965 P.2d 305, and *Richardson v. Carnegie Library Rest., Inc.,* 107 N.M. 688, 693, 763 P.2d 1153, 1158 (1988), *overruled on other grounds by Trujillo III,* 1998–NMSC–031, ¶¶ 18–21, 32, 125 N.M.

095, ¶ 26, 122 N.M. 401, 925 P.2d 518. If a law draws suspect classifications or impacts fundamental rights, we apply strict scrutiny and require the State to demonstrate that the provision at issue is closely tailored to a compelling government purpose. *See id.* ¶ 25.

{13} Worker and amicus New Mexico Trial Lawyers Association (NMTLA) urge us to review the attorney fee limitation under intermediate or strict scrutiny, arguing that the fee limitation impacts important or fundamental rights. They contend that certain claimants cannot obtain adequate representation because the fee limitation discourages lawyers from taking their cases, and that this lack of adequate representation threatens the meaningful exercise of two separate rights: (1) meaningful access to the courts as implied in the due process clause of the state constitution, *see* N.M. Const. art. II, § 18; *Richardson,* 107 N.M. at 696, 763 P.2d at 1161; and (2) the explicit constitutional right to an appeal in New Mexico. N.M. Const. art. VI., § 2. To warrant intermediate or strict scrutiny, Worker must first persuade us that at least one of these rights is "important" or "fundamental," and secondly that such a right is sufficiently impacted to warrant more than minimal scrutiny.

Worker Fails to Demonstrate the Impact on Important Constitutional Rights Is Sufficient to Trigger Intermediate Scrutiny

{14} New Mexico appellate courts have previously recognized that the right to access the courts and the right to an appeal are important, although not fundamental, rights for purposes of constitutional analysis. *See Trujillo III,* 1998–NMSC–031, ¶¶ 18–19, 125 N.M. 721, 965 P.2d 305; *Herndon v. Albuquerque Pub. Schools,* 92 N.M. 287, 288, 587 P.2d 434, 435 (1978); *Mieras,* 1996–NMCA–095, ¶¶ 48, 51, 122 N.M. 401, 925 P.2d 518 (Hartz, J., specially concurring). Because the right to access the courts and the right to an appeal are synonymous in the context of the workers' compensation system, as both are implicated when a litigant seeks to appeal an administrative decision to the judicial branch, we consider them collectively. *See Herndon,* 92 N.M. at 288, 587 P.2d at 435; *Trujillo III,* 1998–NMSC–031, ¶ 21, 125 N.M. 721, 965 P.2d 305; *Mieras,* 1996–NMCA–095, ¶¶ 48, 51, 122 N.M. 401, 925 P.2d 518 (Hartz, J., specially concurring). Any legislation shown to truly impact these appellate rights should be subjected to more than rational basis review. *See, e.g., Carson v. Maurer,* 120 N.H. 925, 424 A.2d 825, 830–32 (1980) (applying intermediate scrutiny to invalidate a statute that limited medical malpractice recovery, after holding the right to recover for personal injuries was an important right under the state constitution).

{15} Worker argues that the fee cap impacts workers' appellate rights because it discourages lawyers from taking complex or time-consuming cases, depriving those claimants of meaningfully exercising their appellate rights. Meaningful access to our appellate courts depends in part on an individual's ability to obtain adequate representation. *See Herndon,* 92 N.M. at 288, 587 P.2d at 435; *Mieras,* 1996–NMCA–095, ¶ 48, 122 N.M. 401, 925 P.2d 518 (Hartz, J., specially concurring) ("A statute that deprives someone of the ability to obtain adequate representation in litigation could, in a very real sense, deprive the person of a right of access to the courts."); *Corn,* 119 N.M. at 210, 889 P.2d at 245 (Apodaca, J., concurring). Whether representation is "adequate," however, depends on the circumstances, including the nature of proceedings and the ability of the other side to secure representation. *See United States Dep't of Labor v. Triplett,* 494 U.S. 715, 733–34, 110 S.Ct. 1428, 108 L.Ed.2d 701 (1990) (Marshall, J., concurring) (distinguishing the complexities and adversarial nature of the regulatory system for obtaining benefits under the Black Lung Benefits Act from the more informal Veter-

721, 965 P.2d 305 (adopting rational basis test as appropriate standard for reviewing equal protection challenge to damage cap, rather than the intermediate scrutiny standard used in *Richardson,* but upholding the result in *Richardson* under modern rational basis test). Both cases indicated that intermediate scrutiny is used when a statute impacts important rights *and* sensitive classes. *See Alvarez v. Chavez,* 118 N.M. 732, 736, 886 P.2d 461, 465 (Ct.App.1994); *Plyler v. Doe,* 457 U.S. 202, 223–24, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982).

ans Administration system at issue in *Walters v. Nat'l Ass'n of Radiation Survivors,* 473 U.S. 305, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985), such that the due process challenge in *Triplett* would have been successful had claimants shown the fee limitation deprived claimants of legal representation in proceedings under the Act); *Corn,* 119 N.M. at 207–08, 889 P.2d at 242–43.[4]

{16} In arguing that intermediate scrutiny applies, it is not enough to simply point to an important constitutional right; the challenger must show that the legislation in fact impacts the exercise of this right. *See Mieras,* 1996–NMCA–095, ¶¶ 48–52, 122 N.M. 401, 925 P.2d 518 (Hartz, J., concurring). To support their argument that the fee limitation makes it difficult for those with complex or highly contested cases to obtain representation, and that such a "chilling effect" effectively deprives these workers of their appellate rights, Worker and amicus NMTLA rely on testimony presented at trial about the impact of the fee limitation on representation. Worker's expert, a workers compensation attorney, opined that the number of New Mexico attorneys who exclusively represent claimants in workers' compensation proceedings have decreased to about two or three since the benefits scheme was restructured in 1991,[5] and that in light of this reduction in available benefits, the fee limitation can be unfair to workers' attorneys in some circumstances, may discourage claimants' attorneys from pursuing complex or time-consuming cases, and should be relaxed in particularly time-consuming cases.

{17} The record in this case is not meaningfully different from that in *Mieras,* where the Court of Appeals was unpersuaded that the fee limitation infringed on the right to access the courts by preventing a class of workers from obtaining adequate representation. *See Mieras,* 1996–NMCA–095, ¶¶ 27, 34, 122 N.M. 401, 925 P.2d 518; *see also id.* ¶¶ 49–52 (Hartz, J., specially concurring) (noting that claimant failed to show the cap actually prevented workers with complex cases from obtaining adequate representation). In *Mieras,* the claimant demonstrated that the limitation on attorney fees prevented her attorney from being compensated for the time he reasonably expended on behalf of his client. *Id.* ¶¶ 17–19. The claimant failed, however, to illustrate how the fee limitation resulted in workers being denied adequate representation, either in theory or fact. *Id.* ¶¶ 49–52 (Hartz, J., specially concurring). The court therefore applied rational basis review. *Id.* ¶ 27.

{18} As in *Mieras,* the record here fails to demonstrate that some claimants are unable to obtain representation in workers' compensation proceedings, either initially or on appeal, or that a decrease in available attorneys renders access to our appellate courts any less meaningful. Worker's expert did not directly attribute a decline in available lawyers to the attorney fee limitation, nor did Worker offer any direct evidence in support of this testimony. Rather, Worker's expert seemed to emphasize that the decline in lawyers representing workers was due to the overall reduction in benefits to injured workers. While the WCJ found a "chilling effect of miserly attorney fees on representation," the record fails to show that this chilling effect has impacted claimants' ability to access the courts sufficiently to trigger intermediate scrutiny of Section 52–1–54(I). *See Triplett,* 494 U.S. at 724, 110 S.Ct. 1428 (holding the affidavits of three lawyers,

4. The dissent maintains that representation is particularly important at the appellate level, Dissent, ¶¶ 48–49, and cautions that we "should not encourage parties to attempt the rigors of the appellate process unaided by counsel." Dissent, ¶ 62. In doing so, the dissent seems to minimize the significance of administrative hearings in workers compensation cases. In fact, it is at the workers compensation level that skilled counsel is most crucial to ultimately preserving benefits awarded to an injured worker. The better the quality of the record below, the greater the likelihood of prevailing on the merits on appeal, particularly given the Court of Appeals' efficient summary calendar process, supported by a skilled and dedicated Prehearing Division.

5. Amicus Workers' Compensation Administration alleges that in fact there was an increase in attorneys who represented workers before the WCA. Again, because this information is not in the record and was not subject to cross-examination to test its accuracy, we cannot rely on it. *See State v. Martin,* 101 N.M. 595, 603, 686 P.2d 937, 945 (1984) (appellate court cannot consider facts that are not of record).

which stated anecdotally that there were fewer qualified lawyers available to take black lung cases due to the attorney fee limitation, were "blatantly insufficient" to demonstrate that claimants could not obtain representation due to the fee limitation, even if assertions were left unrebutted); *see also Trujillo III,* 1998–NMSC–031, ¶¶ 19–23, 125 N.M. 721, 965 P.2d 305.

{19} Before finding that the fee limitation meaningfully impacts claimants' appellate rights, therefore, we would require more evidence in the record, such as testimony or data showing that workers with complex cases are unable to obtain representation due to the fee limitation. *See Triplett,* 494 U.S. at 723–24, 110 S.Ct. 1428. Our conclusion might also be different in a case in which, because of the fee limitation, a worker's lawyer were unable to continue representing the worker on appeal because of the unreasonable financial burden, thus relieving the lawyer of the ethical duty to continue representation, or a worker were dissatisfied with his attorney but could not afford to hire a new attorney on appeal. *See, e.g., Crosby v. State of New York, Workers' Compensation Bd.,* 57 N.Y.2d 305, 456 N.Y.S.2d 680, 442 N.E.2d 1191, 1194–95 (1982); *cf. Mieras,* 1996–NMCA–095, ¶ 34, 122 N.M. 401, 925 P.2d 518 (recognizing that the fee limitation "may under certain circumstances preclude any additional award of attorney fees for appellate legal services when the maximum limit has been attained for legal services rendered at the trial level," although those circumstances did not exist in that case).

{20} In seeking to elevate our review to intermediate scrutiny under the facts of this case, the dissent suggests a more "charitable" approach, even to the extent of selectively considering anecdotal information not of record. Dissent, ¶¶ 51–52. However, the facts and record of this case simply do not demonstrate how the fee limitation impacts the right to access the courts and the right to an appeal. Worker was free to appeal her case from the workers' compensation proceedings and did so. She continues to be represented by her counsel, whom we commend for her skilled and committed advocacy on behalf of her client, particularly in light of the volume of "frivolous and excessive" pleadings filed by the pro se litigant at the administrative level. Because this case fails to demonstrate that the fee limitation impacts important rights or sensitive classes, rational basis is the proper standard of review for reviewing the equal protection and due process challenges.

III. Equal Protection Challenge to Fee Limitation

{21} The New Mexico Constitution provides that no person shall be denied equal protection of the laws. N.M. Const. art. II, § 18. Like its federal equivalent, this is essentially a mandate that similarly situated individuals be treated alike, absent a sufficient reason to justify the disparate treatment. *See City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Garcia ex rel. Garcia v. La Farge,* 119 N.M. 532, 537, 893 P.2d 428, 433 (1995).

{22} In *Corn,* we evaluated an equal protection challenge to the WCA fee limitation and declared the fee limitation unconstitutional because it applied only to the worker's attorney. *Corn,* 119 N.M. at 209, 889 P.2d at 244. While *Corn* was pending, the Legislature partially corrected the inequality by amending the fee limitation provision to apply to both employers and workers. § 52–1–54(A) (1990). Nonetheless, the Legislature continues to treat workers and employers differently in a manner which may disparately affect workers' rights to access our appellate courts by requiring workers to obtain judicial approval for attorney fees without imposing the same requirement on employers under Section 52–1–54(C). Employers, through their insurance companies, are free to contract to pay their attorneys up to $12,500 for each workers compensation case, regardless of the work expended or any of the factors relevant to assessing reasonable fees for workers' attorneys. *Compare* Tex. Lab.Code Ann. §§ 408.221, 408.222 (Vernon 2005) (requiring agency or judicial approval of attorney fees for both claimants and employers). Further, employers' attorneys are compensated whether they win or lose, while workers' attorneys are only paid if they se-

cure benefits for the worker. *See* § 52–1–54(G). The statutory scheme may allow employers to absorb the cost of time-consuming cases by compensating their attorneys over the long run in a way that workers may not, and, as a result, may disparately impact the appellate rights of workers. However, because this issue was not raised and briefed by the parties below, we will not consider it for the first time on appeal. *See Richardson,* 107 N.M. at 692, 763 P.2d at 1157. Therefore, our inquiry is confined to whether the fee limitation in Section 52–1–54(I) distinguishes between similarly situated individuals, and if so whether Worker has demonstrated that the limitation is not rationally related to a legitimate government purpose.

{23} As applied, Section 52–1–54(I) creates two classes of workers compensation litigants: those who do and do not reach the limitation at the administrative stage, and consequently those who can and cannot lawfully pay an attorney a reasonable fee on appeal.[6] *See Yick Wo v. Hopkins,* 118 U.S. 356, 373–74, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (holding law violated equal protection as applied, although neutral on its face). Although Worker also urges us to recognize a class of workers with complex cases who are unable to obtain adequate representation because of the fee limitation, Worker fails to demonstrate both that this class exists and how he would be a member of such a class. Worker's case was not found to be unusually complex; rather, the record suggests the case was time-consuming because of the pro se litigant's frivolous and excessive pleadings.[7] Nonetheless, having determined that Section 52–1–54(I) does differentiate between two classes of workers compensation litigants, we must now decide whether such disparate treatment is rationally related to a legitimate government purpose. *See Trujillo III,* 1998–NMSC–031, ¶ 14, 125 N.M. 721, 965 P.2d 305.

{24} While our rational basis test is neither "toothless" nor a "rubber stamp" for challenged legislation, it nonetheless requires us to defer to the validity of the statute, with the challenger carrying the burden of persuasion. *See id.* ¶¶ 14, 30. To successfully challenge the statute under this standard of review, Worker must demonstrate that the classification created by the legislation is not supported by a "firm legal rationale" or evidence in the record. *See Corn,* 119 N.M. at 203–04, 889 P.2d at 238–39. This Worker fails to do.

Section 52–1–54(I) is Rationally Related to a Legitimate Government Purpose

{25} The WCA was enacted as an exclusive remedy for employees to subject employers to liability without fault for work-related injuries. *Mieras,* 1996–NMCA–095, ¶ 30, 122 N.M. 401, 925 P.2d 518. We have consistently stated our approval of the Legislature's principal objectives in enacting the WCA: (1) maximizing the limited recovery available to injured workers, in order to keep them and their families at least minimally financially secure; (2) minimizing costs to employers; and (3) ensuring a quick and efficient system. NMSA 1978, § 52–5–1 (1990); *see Archer v. Roadrunner Trucking Inc.,* 1997–NMSC–003, ¶ 7, 122 N.M. 703, 930 P.2d 1155; *Sanchez v. M.M. Sundt Constr. Co.,* 103 N.M. 294, 296–97, 706 P.2d 158, 160–61 (Ct.App.1985). We believe the first goal, maximizing a worker's recovery, is particularly important in the workers' compensation arena, where workers' ability to recover needed benefits is circumscribed by the legislation itself. *See Walters,* 473 U.S. at 321–22, 334, 105 S.Ct. 3180 (recognizing the rational government policy of maximizing claimants' awards in rejecting a procedural due process challenge to the ten dollar limitation on at-

6. In addition, as discussed above, by subjecting workers, but not employers, to judicial approval of reasonable attorney fees, Section 52–1–54 creates an additional classification of those who can and cannot lawfully contract to pay an attorney of their choice reasonable fees on appeal. Again, however, the facts and record of this case do not squarely present such an issue, nor was this particular classification discussed by the parties below. *See Richardson,* 107 N.M. at 692, 763 P.2d at 1157.

7. In this case, the WCJ may have been able to minimize the time expended by the attorneys by using appropriate sanctions to control the courtroom. *See* NMSA 1978, § 52–5–6(B) (2001). However, whether the WCJ was correct in his use of sanctions is not before us.

torney fees for those seeking benefits for service-connected deaths or disabilities in Veterans Administration proceedings); *cf. Mieras,* 1996-NMCA-095, ¶ 39, 122 N.M. 401, 925 P.2d 518 (Hartz, J., specially concurring) (describing the severe restrictions on recovery in workers' compensation actions).

{26} Worker does not challenge these government purposes for the attorney fee limitation, but rather argues that the fee limitation is not rationally related to these purposes. Contrary to Worker's argument, we find there to be a firm legal rationale, supported by the record of this case, to justify the $12,500 attorney fee limitation as a rational means to achieving the Legislature's goals. As we recognized in *Corn,* it is certainly rational for the State to minimize the role of attorneys in seeking to maximize claimants' awards quickly and efficiently. 119 N.M. at 208, 889 P.2d at 243. In addition, as we have already noted, the fee limitation is important to maximizing the limited benefits available to workers, particularly when workers must generally pay half of their attorneys' fees. *See* § 52-1-54(J); *Mieras,* 1996-NMCA-095, ¶ 38, 122 N.M. 401, 925 P.2d 518 (Hartz, J., specially concurring); *see also Corn,* 119 N.M. at 207, 889 P.2d at 242.

{27} In this case, Worker's $12,500 attorney fee award represented just under fifteen percent of Worker's total award, not including future medical benefits. This is well within the parameters that this Court has identified as generally appropriate for attorney fees in workers' compensation cases. *Woodson v. Phillips Petroleum,* 102 N.M. 333, 338, 695 P.2d 483, 488 (1985) (noting, *inter alia,* that in states that set attorney fees at some percentage of the worker's recovery, ten to twenty percent is generally considered to be an appropriate range). On the other hand, the fee proposed by Worker's attorney was $61,125, or 407.5 hours at $150 an hour. In contrast to the generally accepted ratio of attorney fees to total recovery, this proposed fee would have amounted to roughly seventy-two percent of the Worker's total award, not including time spent on appeal. Further, of the $85,360 that the WCJ awarded to Worker, only $26,761 was for actual compensation, while the bulk of the award was to cover Worker's medical expenses. Because Worker would have been liable for half of his attorney's proposed fee of $61,125, Worker's attorney fees would have exceeded his actual compensation. Were we to strike the fee limitation, Worker would be required to deplete his entire compensation award and dig into his own pocket to pay his attorney fees. While we do not pass on whether such attorney fees were reasonable in this case, these figures certainly suggest that the attorney fee limitation of $12,500 is a rational means to maximize a worker's take-home award.

{28} Worker points to no legal authority or evidence in the record to show the $12,500 fee cap is an arbitrary and irrational means to achieve the State's objectives. For instance, there is no evidence in the record to suggest either what percentage of claimants approach or reach the fee limitation at the administrative level, or the typical amount of time expended by attorneys either at the administrative level or on appeal in such cases, to somehow demonstrate that $12,500 is an irrational figure.[8] *Cf. Corn,* 119 N.M. at 208, 889 P.2d at 243 (finding that the WCA's data that less than one fifth of one percent exceeded the limitation undermined the State's rationale by showing a de minimus effect from the unilateral limitation). There is simply no evidence in the record to demonstrate that, other than in this particular case, $12,500 has been insufficient to cover workers' attorney fees at the administrative and appellate levels. The dissent proposes, as an alternative to the current scheme it describes as inflexible, that the Legislature maintain an attorney fee limitation but create a separate category of fees on appeal. Dissent, ¶ 60. The dissent does not necessarily quarrel with a fee limitation but disagrees on where to draw the line. It remains unclear what the dissent believes would be an appropriate limitation for appel-

8. According to amicus WCA, reasonable attorney fees would have exceeded the $12,500 limitation in only 1.5% of workers' compensation cases prior to 2003. Again, this information was not in the record, so it is of little use to us here.

late fees, presumably because of the lack of any evidence in the record to suggest what such a limit should be, or how this alternative would make the fee limitation more flexible. If the legislation provided for a limit of $10,000 in attorney fees at the administrative level and $2,500 on appeal, how would that make the scheme more flexible or less burdensome on the worker? The dissent also fails to address the fact that such fees would still reduce the worker's take-home award.

{29} We find nothing in Worker's argument to undermine the rationale that by limiting attorney fees at $12,500, Section 52–1–54(I) helps to maximize workers' take-home awards, minimize costs to employers and increase the efficiency of the system for the reasons discussed above.[9] Further, the fact that the Legislature increased the fee limitation to $16,500 in 2003 suggests to us that rather than setting the fee limitation arbitrarily, the Legislature continues to consider the role of attorney fees in order to maximize workers' awards while minimizing litigation costs. Because Worker fails to show the $12,500 fee limitation is not rationally related to a legitimate government purpose, his equal protection challenge must fail.[10]

IV. Due Process Challenge to Fee Limitation

{30} The due process clause in the New Mexico Constitution reads: "No person shall be deprived of life, liberty or property without due process of law . . .". N.M. Const. art. II, § 18. Substantive due process cases inquire whether a statute or government action " 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.' " *See State v. Rotherham,* 1996–NMSC–048, 122 N.M. 246, 259, 923 P.2d 1131, 1144 (quoting *United States v. Salerno,* 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (quoted authorities omitted)). Worker and amicus NMTLA argue the fee limitation unconstitutionally interferes with workers' substantive due process rights to access the courts and to an appeal by chilling qualified lawyers from taking their cases. Using the rational basis standard discussed in Section II, we uphold Section 52–1–54(I) under substantive due process unless Worker shows it is not rationally related to a legitimate governmental purpose. *Id.* ¶¶ 101–02.

{31} For the reasons stated above, Worker and amicus NMTLA fail to show that Section 52–1–54(I) is not rationally related to the legitimate government purposes. *See Triplett,* 494 U.S. at 723–24, 110 S.Ct. 1428 (holding that anecdotal evidence, in the form of attorneys' conclusions that a fee limitation would negatively impact the quality of representation or cause attorneys to leave the field of practice, was insufficient to prove due process violation); *Rhodes v. Indus. Comm'n,* 125 Idaho 139, 868 P.2d 467, 470–71 (1993). Under the facts and record of the present challenge, the fee limitation satisfies substantive due process as well as equal protection.

CONCLUSION

{32} We hold that under the record in this case, the WCA attorney fee limitation satisfies state guarantees of equal protection and due process. Section 52–1–54(I) is rationally related to legitimate government purposes, particularly the important goal of maximizing workers' recovery. Assuming the Legislature limits workers' recovery in a constitutional manner, the fee limitation is a rational means to advance this goal. We adopt the Court of Appeals' analysis and conclusions regarding the remaining issues that were raised on appeal. We affirm.

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

9. The WCA also argues that the fee limitation minimizes insurance costs, which keeps down insurance premiums, increases economic development and employment, and encourages employers to continue to support and follow the mandatory system. However, there is no evidence to support this in the record and we decline to find this to be a firm legal rationale.

10. This limited holding in no way suggests our belief that by requiring judicial approval for workers', but not employers', attorney fees, Section 52–1–54(C) rationally furthers the goals of minimizing costs to employers or maximizing workers' take-home awards.

WE CONCUR: PAMELA B. MINZNER, PATRICIO M. SERNA, and PETRA JIMENEZ MAES, Justices.

RICHARD C. BOSSON, Chief Justice (concurring in part and dissenting in part).

BOSSON, Chief Justice (concurring in part and dissenting in part)

{34} I concur in part and dissent in part. Under the facts of this case, I reluctantly agree that the attorney fee limitation in NMSA 1978, Section 52–1–54(I) (1993) of the Workers' Compensation Act (the Act) passes the rational basis test, and is therefore constitutional, for proceedings before the Workers' Compensation Administration (the Administration). I write separately to express my concerns regarding the effect of the attorney fee limitation on a worker's right to appeal.

{35} In my mind, the absence of any provision for attorney fees at the appellate level impermissibly burdens the constitutional rights of those workers with complex or time-consuming cases. I believe the Legislature's failure to allow additional fees in the limited number of cases that reach our courts after exhausting the cap is contributing to an intolerable decline in adequate representation in the field of workers' compensation law. While I am not yet convinced that this decline impacts workers' access to the courts to the point of violating due process and equal protection rights in administrative proceedings, I would reach a different result when analyzing the impact of the fee limitation on the right to appeal.

{36} In part, I disagree with the majority because I would apply intermediate scrutiny to the important right to have access to the judiciary for the purpose of an appeal. Under intermediate scrutiny analysis, I would find the cap unconstitutional. I also dissent because I am troubled with the way the majority presents the rational basis test. I think our courts, attorneys, and litigants in New Mexico would benefit from further elaboration.

Rational Basis Test

{37} To begin, I respectfully disagree with the rational basis test presented by the majority. Ever since we overruled the fourth tier of judicial scrutiny defined as heightened rational basis in *Trujillo v. City of Albuquerque,* we have avoided explaining what we meant by our so-called "modern articulation" of the rational basis test. 1998–NMSC–031, ¶ 32, 125 N.M. 721, 965 P.2d 305 (*Trujillo III*)(overruling, but "subsuming" the fourth tier of rational basis analysis applied in *Alvarez v. Chavez,* 118 N.M. 732, 738–39, 886 P.2d 461, 467–68 (Ct.App.1994) and *Corn v. New Mexico Educators Fed. Credit Union,* 119 N.M. 199, 202–04, 889 P.2d 234, 237–39 (Ct. App.1994)). I am afraid we continue to avoid explaining that test today in a way that will only perpetuate confusion.

{38} The majority professes that our rational basis test is one test, simultaneously deferential to the validity of the statute but not a "rubber stamp" or "toothless." Maj. Op. ¶ 24. The majority then explains the requirements of our rational basis test by using language from *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) that was referred to in *Corn,* 119 N.M. at 204, 889 P.2d at 239 (requiring legislative classifications to be supported by either a factual foundation or a firm legal rationale). The majority accepts that although *Corn* and *Alvarez* were overruled in *Trujillo, Trujillo* subsumed the "heightened rational basis" analysis from those cases in the modern rational basis test. Thus, in the majority's words: "To successfully challenge the statute under this standard of review, Worker must demonstrate that the classification created by the legislation is not supported by a 'firm legal rationale' or evidence in the record." Maj. Op. ¶ 24.

{39} I believe the language from *Cleburne* in fact creates a different test than the type of minimal scrutiny we usually associate with the rational basis test. *See City of Cleburne,* 473 U.S. at 455–60, 105 S.Ct. 3249 (Marshall, J., concurring) (noting that the Court's analysis was at odds with traditional rational basis by seeming to require that the legislature has the burden to prove an act was constitutional, that the Court could sift through the record to find a firm factual foundation for an act's policy, and that legislation could not

proceed incrementally). The traditional rational basis test is simply that the party challenging the legislation has the burden to prove "that the statute's classification is not rationally related to the legislative goal." *Trujillo,* 1998–NMSC–031, ¶ 14, 125 N.M. 721, 965 P.2d 305. "In rational basis scrutiny, 'a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.' " *State v. Druktenis,* 2004–NMCA–032, ¶ 112, 135 N.M. 223, 86 P.3d 1050 (quoting *FCC v. Beach Communications,* 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)).

{40} I do not object to giving our rational basis test more teeth in some situations, if we clearly identify what triggers heightened scrutiny, just as the Court of Appeals did in *Alvarez,* 118 N.M. at 740, 886 P.2d at 469 (applying heightened rational basis when legislation implicated a significant interest). But I do not believe it is desirable or appropriate to do so at the expense of the traditional deferential test. If the majority really intends to read *Trujillo* as adopting a single, but broader rational basis test, I think the Court should provide a detailed explanation.

{41} On the other hand, if this Court feels constrained by the traditional rational basis test, I would prefer not to follow the lead of the United States Supreme Court. *See, e.g., Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *Romer v. Evans,* 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); *City of Cleburne,* 473 U.S. 432, 105 S.Ct. 3249; *Hooper v. Bernalillo County Assessor,* 472 U.S. 612, 105 S.Ct. 2862, 86 L.Ed.2d 487 (1985). In a confusing array of cases, the Court professes to have only one rational basis test, but sometimes appears to apply heightened scrutiny. *See* Laurence H. Tribe, *American Constitutional Law* § 16–33, at 1614 (2d ed.1988) (concluding there is no coherent explanation for when heightened scrutiny is triggered). It seems to me that a better approach would be to give more flexibility to our intermediate scrutiny standard, and to forthrightly acknowledge that we are doing so.

Level of Scrutiny

{42} Equal protection challenges to legislative classifications that infringe on important, but not fundamental rights, or involve sensitive, but not suspect classes, must be analyzed under intermediate scrutiny. *See Alvarez,* 118 N.M. at 736, 886 P.2d at 465.

{43} This Court has recognized that the right of access to the courts is an implicit fundamental right. *See Richardson v. Carnegie Library Rest., Inc.,* 107 N.M. 688, 696, 763 P.2d, 1153, 1161 (1988), *overruled on other grounds by Trujillo,* 1998–NMSC–031, ¶ 32, 125 N.M. 721, 965 P.2d 305; *Otero v. Zouhar,* 102 N.M. 482, 486, 697 P.2d 482, 486 (1985), *overruled on other grounds by Grantland v. Lea Reg'l Hosp., Inc.,* 110 N.M. 378, 380, 796 P.2d 599, 601 (1990); *Jiron v. Mahlab,* 99 N.M. 425, 426, 659 P.2d 311, 312 (1983). In addition, and of utmost importance in this challenge to the attorney fee limitation, the right of one appeal is explicitly guaranteed by the New Mexico Constitution. N.M. Const. art. VI, § 2 ("an aggrieved party shall have an absolute right to one appeal").

{44} Of course, an individual's ability to have access to the judiciary to resolve legal claims is not endless. *See Jiron,* 99 N.M. at 427, 659 P.2d at 313. As the majority observes, our "courts have previously recognized that the right to access the courts and the right to an appeal are important, although not fundamental, rights for purposes of constitutional analysis." Maj. Op. ¶ 14.

{45} I believe that a worker's right to retain an attorney is one aspect of the right of access to the courts. *See Corn,* 119 N.M. at 210, 889 P.2d at 245 (Apodaca, J., specially concurring). A statute that deprives a class of persons "of the ability to obtain adequate representation in litigation could" deprive that class of a right of access to the courts. *Mieras v. Dyncorp,* 1996–NMCA–095, ¶ 48, 122 N.M. 401, 925 P.2d 518 (Hartz, J., specially concurring). "To the extent that the assistance of an attorney is necessary for the worker to obtain access to the courts, such assistance is entitled to special constitutional protection." *Id.* ¶ 42.

{46} As Worker argues, the fee cap discourages attorneys from taking complex or time-consuming workers' compensation cases. It also creates a risk that attorneys will have to abandon a case when they have exceeded the cap due to economic hardship. As a result of this chilling effect on representation, Amicus New Mexico Trial Lawyers Association claims Section 52–1–54(I) unfairly burdens claimants with complex or time-consuming cases and deprives them from meaningfully exercising the right to an appeal. Because I believe that adequate representation by an attorney is necessary to obtain meaningful access to the courts for an appeal from a workers' compensation proceeding, I would hold that this part of the equal protection challenge is entitled to intermediate scrutiny.

{47} The majority acknowledges that "[m]eaningful access to our appellate courts depends in part on an individual's ability to obtain adequate representation." Maj. Op. ¶ 15 (citing *Herndon v. Albuq. Pub. Sch.*, 92 N.M. 287, 288, 587 P.2d 434, 435 (1978); *Mieras*, 1996–NMCA–095, ¶ 48, 122 N.M. 401, 925 P.2d 518 (Hartz, J., specially concurring); *Corn*, 119 N.M. at 210, 889 P.2d at 245 (Apodaca, J., specially concurring)). The majority holds, however, that the attorney fee cap does not require intermediate scrutiny because Worker has not shown that any workers are prevented from obtaining adequate representation. *See* Maj. Op. ¶¶ 17–20.

{48} Unlike the majority, I would make a distinction between the administrative proceedings and appeals before our courts. In administrative proceedings before a workers' compensation judge, I am willing to agree that the attorney fee cap survives rational basis scrutiny. As the majority observes, whether representation is "adequate," "depends on the circumstances, including the nature of proceedings and the ability of the other side to secure representation." Maj. Op. ¶ 15. Given the nature of the workers' compensation system, which the Legislature designed as an administrative alternative for dispute resolution, it may be a rational legislative choice to limit attorney fees in order to discourage litigation, reduce costs, and ensure the quick delivery of benefits. *See Corn*, 119 N.M. at 204, 889 P.2d at 239 (stating that due process is a flexible concept when it comes to devising alternative processes for dispute resolution). Thus, vesting adjudicative power in administrative law judges does not, by itself, deny workers the right of access to the courts. *See Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 326, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985) (holding that an attorney fee limitation, even if it resulted in discouraging attorneys from representing claimants altogether, did not violate due process in a veterans' administrative proceeding which Congress wanted to keep as simple and informal as possible).

{49} In my opinion, however, this analysis changes for appeals before our courts. Unlike the United States Constitution, our State Constitution guarantees the absolute right to an appeal. *See* N.M. Const. art. VI, § 2. Thus, once a worker's case moves from the administrative setting to our courts, "the nature of the proceedings and the ability of the other side to secure representation" requires a more searching inquiry into whether representation is adequate. Maj. Op. ¶ 15. The cap prohibits workers, who have already received the statutory maximum for attorney fees, but are compelled to defend their benefit awards on appeal, from paying for necessary legal services, even out of their own pocket.[1] Thus, the cap forces a class of workers into a position of intolerable risk. They must rely on the good graces of their attorneys to continue representing them in litigation without hope of additional compensation. If these attorneys withdraw, or even worse cut corners, because they cannot af-

1. Section 52–1–54(I) "applies as a cumulative limitation on compensation for all legal services rendered in all proceedings," including representation before the courts on appeal. The Act makes it unlawful to accept fees except as provided; any person violating the attorney fee cap may be convicted of a misdemeanor, fined up to $500, and imprisoned for up to 90 days. Section § 52–1–54(A) & (N) (2003). As one state court noted in invalidating an attorney fee cap, most states with statutory limits on workers' compensation attorney fees allow fees to be increased when necessary, or do not make acceptance of additional compensation a crime. *See Irwin v. Surdyk's Liquor*, 599 N.W.2d 132, 142 n. 3 (Minn.1999).

ford to continue the representation due to economic hardship, this vulnerable class of workers may lose the very benefits they won during administrative proceedings.

{50} The majority declines to address the impact of the attorney fee limitation on appeals because it contends there is simply not enough evidence in the record to indicate that Worker was deprived from exercising his right to appeal. The majority relies on *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 723–24, 110 S.Ct. 1428, 108 L.Ed.2d 701 (1990). In *Triplett*, the United States Supreme Court rejected a claim that an attorney fee restriction violated access to the courts, concluding the challengers only presented anecdotal evidence that the fee limitation deprived them of legal representation. *Id.* at 724, 110 S.Ct. 1428. The Court ruled that the affidavits of three lawyers, which stated that there were fewer qualified lawyers available to take black lung cases, were "blatantly insufficient." *Id.* at 724–25, 110 S.Ct. 1428. Similar to *Triplett*, the majority would require more evidence in the record that workers with complex or time-consuming cases are unable to obtain representation because of the fee limitation. *See* Maj. Op. ¶ 19.

{51} The majority seems to require an enormous evidentiary burden before it is willing to apply intermediate scrutiny—either that a class of workers are completely unable to obtain representation or that an attorney actually withdraw from representation because of an unreasonable financial burden. I would be more charitable and recognize a class of workers exists whose right to appeal is burdened by the attorney fee cap.

{52} I believe the record and decisions of our courts have sufficiently indicated that the attorney fee limitation deters legal counsel from taking cases like this one. In *Triplett*, the Supreme Court applied a "heavy presumption of constitutionality" to an attorney fee regime enacted by Congress. 494 U.S. at 721, 110 S.Ct. 1428. The Court thus required those challenging the law to make "an extraordinarily strong showing" that the fee limitation violated due process. *Id.* at 722, 110 S.Ct. 1428. Unlike our case, *Triplett* did not involve the absolute right to an appeal guaranteed by our State Constitution.[2] Because of that difference, the Supreme Court could apply the rational basis test. In contrast, considering the importance of the rights involved, I believe Worker presented enough evidence to challenge the attorney fee cap. Worker presented an expert witness who testified that, since the implementation of the attorney fee cap, very few attorneys are practicing, and only a couple are specializing, in the field of workers' compensation law. The expert testified that attorneys are not representing workers in those cases in which the injury will not result in a large benefit award and the employer is uninsured. This testimony was not contested by the opposing parties. Anecdotally, we all know it to be true. In addition, the workers' compensation judge made a specific finding that the cap causes a chilling effect on legal representation. Our courts have previously acknowledged this chilling effect. *See Corn*, 119 N.M. at 207, 889 P.2d at 242 ("In fact, the cap appears to discourage representation of workers by counsel.").

{53} While it is true that Worker appears to have been fortunate enough to obtain legal representation before the Administration and our courts, he still represents a class of workers who face a burden not shared by other claimants or employers who seek to exercise their right to an appeal. For that reason, intermediate scrutiny is appropriate.

Intermediate Scrutiny Applied

{54} Under intermediate scrutiny, the burden is on the party maintaining the statute's validity "to prove that the classification is substantially related to an important govern-

2. Worker raises his claim under the New Mexico Constitution. Federal cases do not control when interpreting our State Constitution, but are used only to the extent they are persuasive. *See Alvarez*, 118 N.M. at 735, 886 P.2d at 464. Because the right to one appeal is a state constitutional right, I do not think federal cases are persuasive on this issue. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L.Rev. 489, 491 ("State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.").

ment interest." *Marrujo v. N.M. State Highway Transp. Dep't*, 118 N.M. 753, 757, 887 P.2d 747, 751 (1994) (quoted authority omitted). Thus, this Court must examine the governmental interests served by the attorney fee cap, and whether the statutory classifications bear a substantial relationship to any such important interests. *Corn*, 119 N.M. at 211, 889 P.2d at 246 (Apodaca, J., specially concurring).

{55} I have no problem accepting that the attorney fee cap is aimed at advancing important government interests. However, upon examining the impact of the cap on those workers who must participate in an appeal to preserve their hard-won benefits, I do not believe that the employer and the Administration have carried their burden of proving that the attorney fee cap is substantially related to the interests it was designed to address.

{56} Under intermediate scrutiny, a less restrictive means analysis is appropriate. *See Corn*, 119 N.M. at 211, 889 P.2d at 246 (Apodaca, J., specially concurring). Intermediate scrutiny requires a court to balance the importance of the government interests against the burdens imposed on the individual and society. *Id.* One way to assess this balance is for the court "to determine whether alternatives exist that would not burden protected interests as heavily as the classification scheme chosen." *Id.* (quoted authority omitted). Applying this analysis, it is clear to me that the Legislature could have advanced its goals in ways that would have burdened the right to an appeal less.

{57} The majority argues that by discouraging litigation, the attorney fee cap advances one of the purposes of the Act, which is to assure quick and efficient delivery of benefits to workers at a reasonable cost to employers. *See* Maj. Op. ¶ 26. In this case, I fail to see how the cap has prevented the employer from prolonging litigation through its own appeal. Worker was brought involuntarily to the judiciary, and had no choice but to defend his benefits. While I do not mean to suggest that an employer should not have a constitutional right to appeal a decision of a workers' compensation judge, I do think that in some situations the employer has nothing to lose by appealing a decision. If the worker's counsel is already bled dry by the attorney fee cap, then even if the employer loses on appeal, the employer will not have to pay any more of the worker's attorney fees.

{58} Meanwhile, the fee cap might not have the same effect on employers' attorneys. Paid if they win or lose, and not subject to judicial approval of fees, employers' counsel may be in a better position to prolong litigation through an appeal. If retained by an insurance company, employers' counsel may be able to offset losses incurred in one case due to the fee cap with gains from future cases. Usually, workers' attorneys are not similarly situated. In its practical effect, the fee cap provides employers with an unfair tactical advantage on appeal.

{59} In addition, the cap puts workers in a vulnerable position. Workers who can no longer pay their attorney on appeal might lose benefits won at the administrative level. Thus, at the appellate level, the attorney fee cap is not substantially related to legislative goals of reducing litigation and providing quick and efficient delivery of benefits.

{60} Reducing costs is another important purpose behind the attorney fee limitation. However, in my view, the evidence that only a few cases will exceed the cap, coupled with the fact that not all of those cases will go through an appeal, argues against the necessity of the cap in its present inflexible form.[3] There is no evidence in the record that making allowances for the few cases that deserve attorney fees in excess of the cap for the purposes of an appeal will harm the system. I acknowledge that actuarial uncertainty and insurance costs might rise if the cap were eliminated altogether. But under a less restrictive means analysis, there are other ways to address this potential problem. Instead of precluding a reasonable award altogether for appellate attorney fees, the Legislature could provide for some additional fees for appellate services. The Legislature could

3. The Administration states in its amicus brief that "less than 1.5 percent of all attorney fees for workers even potentially penetrated the cap" in 2001 and 2002.

cap those fees. I find it persuasive that many state legislatures allow workers an additional award of attorney fees on appeal, usually with restrictions.[4] Thus, an absolute prohibition on appellate fees is not substantially related to the important interest in reducing costs. The Legislature could advance this goal in less burdensome ways.

{61} The majority also finds that the statutory cap promotes the Legislature's interest in protecting workers' limited benefits. *See* Maj. Op. ¶ 27. In its present form, the Act holds the worker responsible for paying half of any fee awarded to his attorney. If the fee cap is overturned, then fewer net benefits will be available to the worker. I acknowledge the force of this argument. Protecting workers' benefits is an important government interest. However, I do not believe a prohibition on paying appellate attorney fees is substantially related to protecting workers in this situation. Rather, it threatens them with severe harm. Forced to defend their benefits on appeal, workers need adequate representation. Unlike any other appellate party I know of, those workers who have exceeded the cap must either rely on an attorney who is working for free, or proceed alone.

{62} We should not encourage parties to attempt the rigors of the appellate process unaided by counsel. As is evident from the conclusion of the workers' compensation judge that miserly attorney fees cause a chilling effect on representation, the cap discourages counsel from representing workers when there is no money available on appeal. In the extreme, attorneys may withdraw when continued representation will result in unreasonable financial burden. *See* Rule 16-116(B)(5) NMRA 2005; *Corn*, 119 N.M. at 202, 889 P.2d at 237. While any change to the fee cap may cost workers some money, an even greater threat awaits if workers respond inadequately on appeal. Without adequate representation, Worker could lose everything. As one treatise admonishes:

> Some legislatures, in their zeal to save claimants from diminution of their net benefits th[r]ough legal fees, carry restrictions on fees to the point where they may well injure claimants as a class both by hindering the growth of an able compensation bar and by making it economically impossible for claimants' lawyers to give the necessary time to the preparation of each case.

8 Arthur Larson & Lex K. Larson, *Workers' Compensation Law* § 133.07, at 133-44 (2003). As we have previously said,

> [w]e must avoid a policy or a practice which would discourage representation or the taking of appeals where counsel feels that an injured work[er] has been aggrieved at the trial court level. We must also preserve the right of an injured work[er] to have representation where the employer has appealed.

Herndon, 92 N.M. at 288, 587 P.2d at 435.

{63} While I recognize the legislative power to draw lines, there are better ways to accomplish the important government goals at stake than drawing the line at zero. The Legislature is free to set a reasonable limit on fees as long as it makes a reasonable provision for the possibility of fees incurred during appellate review. I also am confident that workers' compensation judges can determine reasonable supplemental awards that would compensate attorneys without unduly impairing workers' benefits.

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Oct. 24, 2003.

Appeal from the Workers' Compensation Administration

Gregory D. Griego, Workers Compensation Judge

4. *See, e.g.*, Alaska Stat. § 23.30.145(c) (Michie 2000); Ark.Code Ann. § 11-9-715(b)(1) (Michie Repl.2002); Colo.Rev.Stat. § 8-43-403(1) (2003); Or.Rev.Stat. § 656.382(2) (2001); S.D. Codified Laws Ann. § 62-7-36 (Michie 1993 rev.); Vt. Stat. Ann. tit. 21 § 678 (2003); Wash. Rev.Code Ann. § 51.52.130 (West 2002).

CERTIFICATION TO THE SUPREME COURT

FRY, Judge.

{64} AGW Consultants, d/b/a Turner Environmental Consultants, (AGW) appeals and David Wagner (Worker) cross-appeals from the compensation order and order concerning attorney fees from the Workers' Compensation Judge (WCJ). AGW raises six issues on appeal and Worker raises three issues in his cross-appeal. The issues raised in both appeals fall into two broad categories: those concerning Worker's entitlement to benefits, and those concerning the award of attorney fees to Worker.

{65} As to Worker's entitlement to benefits, AGW argues: (1) that AGW does not have the requisite three employees contemplated by NMSA 1978, § 52–1–6(A) (1990) of the Workers' Compensation Act (the Act) and therefore is not subject to the Act; (2) that the WCJ erred in determining that the accident arose out of and in the course of Worker's employment; (3) that the WCJ erred in determining that Worker's second fall was not an independent, intervening cause; (4) that the WCJ's finding that Dr. Gehlert was an authorized health care provider is not supported by substantial evidence; and (5) that the WCJ's finding that AGW is responsible for Worker's medical bills is not supported by substantial evidence. Worker argues in his cross-appeal (6) that the WCJ's determination of twenty percent loss of use for Worker's scheduled injury is not supported by substantial evidence.

{66} With respect to the issues concerning attorney fees, AGW argues that (1) the WCJ erred in the determination of the fee amount to be paid fifty-fifty. Worker argues that (2) the WCJ erred in rejecting Worker's request to find that AGW and Turner acted in bad faith, a finding that would have permitted an additional award of attorney fees pursuant to NMSA 1978, § 52–1–54(I) (2003). In addition, Worker argues (3) the $12,500 limit (cap) on attorney fees violates equal protection or due process or Worker's right of access to the courts.

{67} We certify the issue concerning the constitutionality of the attorney fee cap to the New Mexico Supreme Court. However, because the certification statute, NMSA 1978, § 34–5–14(C) (1972), and Rule 12–606 NMRA 2003 refer to the certification of "a matter" to the Supreme Court, we conclude that we must certify the entire case even if we wish only to certify one issue. *See Collins v. Tabet,* 111 N.M. 391, 404, 806 P.2d 40, 53 n. 10 (1991) (construing "matter" to mean the entire case). In an effort to assist the Supreme Court, we submit our analysis of the other issues, which we would affirm for the reasons that follow. *See State v. Wilson,* 116 N.M. 793, 796, 867 P.2d 1175, 1178 (1994) (attaching Court of Appeals' proposed opinion to Supreme Court's opinion on certification).

BACKGROUND

The Accident and Subsequent Medical Care

{68} AGW, a ground-water hydrology consulting firm, is a common-law business trust. William Turner is AGW's sole trustee. It is undisputed that at the time of the accident, AGW had two part-time employees, Worker and Todd McCabe. Whether Turner was a worker or employee of AGW is a disputed issue.

{69} On April 7, 1999, Worker and McCabe were sent to a particular water well, the S–10, to set up the equipment necessary for temperature readings to be taken of the well. Worker was climbing a ladder on the side of a water tank located near S–10, in order to fill a plastic tube with water so that the tube could be inserted in the S–10. The ladder came loose and Worker fell, breaking his left leg just above the ankle. His first treating physician, Dr. Felter, testified that Worker had "what we considered a compound fracture. That means part of the bone was sticking through the skin, and it was a highly comminuted fracture, which means in many pieces, and it involved the ankle joint itself."

{70} McCabe took Worker to Lovelace Medical Center, where Dr. Felter performed surgery. Worker was released two days later. His leg was in a cast at the time and he was instructed to use crutches, to avoid put-

ting weight on the injured leg, and to keep his leg elevated.

{71} Three days after his release from the hospital, Worker was at home, on crutches. He was reaching for a checkbook that was on top of a bookcase when he raised his arm, lost his crutch, swung on the remaining crutch, kicked out with his injured foot for balance, struck his unprotected toes on the bookcase, pivoted 180 degrees, and fell. He was taken to Lovelace and Dr. Felter performed additional surgery.

{72} Worker subsequently told Turner that he was dissatisfied with his care from Lovelace. Turner suggested another doctor, Dr. White, who suggested Dr. Legant. Turner drove Worker to meet with Dr. Legant. After the meeting, Worker had a second surgery in April and continued to receive medical care from Lovelace until August 1999. At that point Worker again called Dr. Legant, who referred Worker to Dr. Gehlert. At that time, there was concern that the fracture was not healing. Dr. Gehlert provided additional medical treatment, including a bone graft. Ultimately, the WCJ found that Worker incurred over $58,000 in medical bills and was unable to work for roughly a year. The WCJ also found that Worker reached maximum medical improvement (MMI) for the injury on June 5, 2000.

{73} Worker filed his claim on October 12, 1999. At that time he had not yet been released to return to work. He sought Temporary Total Disability (TTD) benefits, Permanent Partial Disability (PPD) benefits, attorney fees, disfigurement compensation, and payment of his medical bills. The complaint indicated the employer/respondent was AGW.

Pretrial Proceedings

{74} Two things happened during pretrial proceedings that bear on the issues raised on appeal. First, once it became clear that AGW was a business trust, Worker moved to amend his complaint by adding Turner as an Employer/Insurer, on the ground that Turner was the real party in interest. The WCJ granted the motion to amend.

{75} Second, AGW filed a motion to dismiss, based on the contention that Turner, as sole trustee of the business trust, was not within the definition of a "worker" and therefore could not be counted as an employee. Thus, AGW argued, AGW had only two employees, Worker and McCabe, and the Act did not apply. The WCJ denied the motion, finding that Turner was "in the same shoes" as a corporate executive and therefore would be treated as an employee. In support of this decision, the WCJ cited NMSA 1978, § 52–1–7(E) (2003).

Formal Hearing

{76} After the formal hearing, the WCJ filed a notice of proposed decision, and all parties filed proposed findings and conclusions. The WCJ then entered a compensation order, which, in pertinent part, found as follows. Worker was employed by AGW, a business trust, and not by Turner individually. Turner was an employee of the business. Worker's first injury arose out of and in the course of his employment. The second injury, the fall at home, was incidental to the normal activities of daily living and did not constitute an independent intervening cause. Dr. Gehlert was an authorized health care provider because Worker initially directed medical care, Turner suggested Dr. Legant, and Dr. Legant referred Worker to Dr. Gehlert. Worker was entitled to TTD benefits for roughly one year. Worker reached MMI June 5, 2000, and thereafter had a scheduled injury with a twenty percent loss of use. In addition, the WCJ ordered AGW to pay Worker's reasonable and necessary medical expenses.

{77} We discuss the factual and procedural background relevant to the award of attorney fees when we address the issues concerning that award.

DISCUSSION

Worker's Entitlement to Benefits

The WCJ Did Not Err In Determining That AGW Had Three Employees

{78} AGW contends that Turner, as the sole trustee of the business trust, was not an employee of AGW, relying on two arguments. First, AGW relies on authorities from other

jurisdictions concerning the nature of a business trust. Second, AGW maintains that whether a person is an employee depends on whether that person is subject to the control of another. Consequently, AGW argues, because there is no evidence that Turner's decisions were supervised or controlled in any way by anyone but himself, the WCJ's finding that Turner was an employee of AGW is not supported by substantial evidence.

{79} We review de novo the application of the law to the facts. *Hise v. City of Albuquerque,* 2003–NMCA–015, ¶ 8, 133 N.M. 133, 61 P.3d 842. We apply whole record review to the factual determination of the WCJ. *Herman v. Miners' Hosp.,* 111 N.M. 550, 552, 807 P.2d 734, 736 (1991). In applying whole record review, this Court reviews both favorable and unfavorable evidence to determine whether there is evidence that a reasonable mind could accept as adequate to support the conclusions reached by the fact finder. *Levario v. Ysidro Villareal Labor Agency,* 120 N.M. 734, 737, 906 P.2d 266, 269 (Ct.App.1995).

{80} AGW relies on *In re Hayes' Case,* 348 Mass. 447, 204 N.E.2d 277, 278–79 (1965), where the managing trustee of a business trust filed a claim for workers' compensation benefits after he was injured on the job. The Massachusetts Supreme Judicial Court held that a trustee of a business trust was not an employee of the trust and therefore was not entitled to bring compensation proceedings before the Industrial Accident Board. *Id.* at 280. However, under Massachusetts law, a business trust is not a legally separate entity from its trustees. *Id.* In this case, the parties have assumed that AGW is a separate and distinct entity.

{81} AGW also relies on federal cases holding that the trustees of a business trust are not employees within the meaning of that term as used in the Social Security Act. *United States v. Griswold,* 124 F.2d 599 (1st Cir.1941); *Loring v. United States,* 80 F.Supp. 781 (D.Mass.1948). Under federal law "the most important factor has been the existence of a right in some one [sic] else, either an individual or a collective entity, to control the employee in the performance of his work." *Loring,* 80 F.Supp. at 784; *see also Griswold,* 124 F.2d at 601 (explaining that employees are subject to supervision and control pursuant to the Social Security Act). However, New Mexico uses a different standard to determine whether an individual is a "worker" within the meaning of the Act.

{82} By statute, the provisions of the Act apply to employers of three or more workers. Section 52–1–6(A). The parties do not dispute that AGW is a separate legal entity and that it was an employer within the meaning of the Act. The Act defines a "worker" as "any person who has entered into the employment of or works under contract of service or apprenticeship with an employer.... The term 'worker' shall include 'employee' and shall include the singular and plural of both sexes." NMSA 1978, § 52–1–16(A) (1989).

{83} In determining whether a given individual is a worker, the label that the parties have attached to their relationship is not controlling. *Yerbich v. Heald,* 89 N.M. 67, 69, 547 P.2d 72, 74 (Ct.App.1976). Instead, the critical question is whether the individual has a contract of hire with the employer for wages or something of value that is like wages. *See Trembath v. Riggs,* 100 N.M. 615, 619, 673 P.2d 1348, 1352 (Ct. App.1983), *overruled on other grounds by Dupper v. Liberty Mut. Ins. Co.,* 105 N.M. 503, 734 P.2d 743 (1987). *Cf. Joyce v. Pecos Benedictine Monastery,* 119 N.M. 764, 766, 895 P.2d 286, 288 (Ct.App.1995) (stating that a religious novice is not an employee, largely because the novice does not exchange her service for wages); *Jelso v. World Balloon Corp.,* 97 N.M. 164, 168, 637 P.2d 846, 850 (Ct.App.1981) (explaining that an unpaid volunteer is not a worker or employee). In addition, the phrase "contract for hire" has been construed to require a mutuality of assent as well as an exchange of labor for wages or something similar. *Joyce,* 119 N.M. at 767, 895 P.2d at 289.

{84} In this case, the WCJ found that the business trust was created by a contract between Turner and his wife, Regina. Under the contract and supporting documents, Turner is the sole trustee. Trustees are paid reasonable compensation for their ser-

vices. The contract specifically provides that "Trustee(s) . . . are like employees and not personally liable when dealing with the Trust properties or matters." Turner signed a document accepting his appointment as trustee. In short, there is substantial evidence in the record supporting the WCJ's finding that Turner is an employee of AGW under the statutory definition of "worker" as interpreted by cases of this Court. The fact that Turner is not subject to the control of another in making decisions concerning AGW is irrelevant.

Worker's Accident Arose out of and Was in the Course of Employment

{85} All the remaining issues concerning Worker's entitlement to benefits are challenges to the sufficiency of the evidence. In reviewing a claim for sufficiency of the evidence, we review the record as a whole. *Lucero v. City of Albuquerque*, 2002–NMCA–034, ¶ 14, 132 N.M. 1, 43 P.3d 352. "In applying whole record review, this Court reviews both favorable and unfavorable evidence to determine whether there is evidence that a reasonable mind could accept as adequate to support the conclusions reached by the fact finder." *Levario*, 120 N.M. at 737, 906 P.2d at 269.

{86} AGW challenges the WCJ's finding that the first accident arose out of and was in the course of Worker's employment. An injury is in the course of employment if it is incurred when the employee is at a place where he may reasonably be and is engaged in doing something incidental to fulfilling the duties of his employment. *Edens v. N.M. Health & Social Servs. Dep't*, 89 N.M. 60, 63, 547 P.2d 65, 68 (1976). Similarly, an injury arises out of employment if it is a risk "to which the worker is subjected in the employment." *Losinski v. Corcoran, Barkoff & Stagnone, P.A.*, 97 N.M. 79, 80, 636 P.2d 898, 899 (Ct.App.1981).

{87} In support of its argument that Worker was not in the course and scope of his employment, AGW points to Turner's testimony that he had given Worker specific directions concerning how and where to fill the tube with water and that Worker did not follow those specific directions. We note, however, that the WCJ was not required to believe Turner's testimony on this issue. *See Powers v. Miller*, 1999–NMCA–080, ¶ 16, 127 N.M. 496, 984 P.2d 177 (explaining that the trier of fact is not required to believe any particular witness). More to the point, even if Worker did not follow Turner's instructions, that does not, by itself, establish that he was no longer in the course and scope of his employment at the time of the injury. Instead, the question is whether the deviation was so great that Worker was no longer doing anything to further his employer's business. *Frederick v. Younger Van Lines*, 74 N.M. 320, 325–27, 393 P.2d 438, 441–43 (1964); *see also* 1 Arthur Larson *The Law of Workmen's Compensation* § 19.50 (2003). It is undisputed that Worker was injured during work hours at a place that Worker was expected to be while attempting to set up the equipment necessary to take the well temperature measurements. Thus, substantial evidence supports the WCJ's finding that Worker's injury arose out of and was in the course of employment.

The Second Fall Was Not an Independent Intervening Cause

{88} AGW contends that Worker's fall at home while on crutches was an independent intervening cause and, therefore, AGW was not liable for any of the consequences of the second fall. AGW recognizes that this Court has previously held that "an injury resulting from the concurrence of a preexisting injury and the normal movements of everyday life is a 'direct and natural result' of the original injury." *Aragon v. State Corr. Dep't*, 113 N.M. 176, 181, 824 P.2d 316, 321 (Ct.App.1991) (internal citation omitted). In essence, AGW contends that the second fall was not the result of the normal movements of everyday life. Common sense tells us that moving around one's home is a normal activity of daily life. Indeed, banging one's foot against a stationary object is woefully common. Consequently, substantial evidence supports the WCJ's finding that Worker's fall was compensable. Moreover, we doubt whether *Aragon's* definition of independent intervening cause would

apply at any time before the worker has reached MMI for the accidental injury.

Dr. Gehlert Was an Authorized Health Care Provider

{89} AGW also challenges the finding that Dr. Gehlert was an authorized health care provider. AGW acknowledges that Turner was aware that Worker was dissatisfied with his treatment at Lovelace and that Turner suggested to Worker that he consult Dr. White. Dr. White informed Worker that he did not treat ankle injuries and referred Worker to Dr. Legant. Turner drove Worker to Worker's appointment with Dr. Legant. Later, Dr. Legant declined to accept Worker as a patient and referred Worker to Dr. Gehlert. This is substantial evidence supporting the WCJ's finding.

{90} It may be that AGW is arguing that Dr. Gehlert was not authorized because Worker failed to provide AGW with a notice of change of health care provider as required by NMSA 1978, § 52–1–49(C) (1990). We question whether an employer who refuses to pay for medical treatment at the time of the injury is nevertheless entitled to formal written notice of a worker's decision to change his health care provider. AGW acknowledges that Worker made the initial selection of health care provider and that AGW never sought to change his selection. AGW paid $2000 to Lovelace for Worker's initial care and thereafter refused to pay for any of Worker's medical care. AGW was well aware of Worker's dissatisfaction with Lovelace and encouraged Worker to see Dr. Legant. AGW did not come forward with any medical evidence that would have supported a determination that Dr. Gehlert's treatment was either unreasonable or unnecessary. Under these circumstances, Worker's failure to notify AGW that he was changing his health care provider is so minor that it does not justify the potentially drastic consequences that AGW seeks. *See Fuentes v. Santa Fe Pub. Sch.*, 119 N.M. 814, 816–17, 896 P.2d 494, 496–97 (Ct.App.1995) (discussing the legal doctrine of de minimis). Thus, we would hold that Worker's failure to notify AGW of his change of health care provider does not make Dr. Gehlert's treatment unauthorized.

Reasonableness and Necessity of Medical Bills

{91} AGW also argues that the WCJ erred in ordering it to pay Worker's medical bills. AGW contends that the finding of reasonableness and necessity is not supported by substantial evidence. However, AGW did not ask the WCJ to find that the medical bills or expenses were not reasonable and necessary. AGW's findings incorporated Turner's by reference. The only findings Turner asked for on this issue were, in essence, findings that Worker questioned the accuracy of the bills. Thus, AGW cannot challenge the sufficiency of the evidence to support the WCJ's finding. *Pennington v. Chino Mines,* 109 N.M. 676, 678, 789 P.2d 624, 626 (Ct.App.1990) (stating that "[t]he failure of a party to file a timely request for findings of fact ... precludes evidentiary review").

Twenty Percent Loss of Use

{92} Although Worker does not challenge the WCJ's determination that the scheduled injury section of the Act is applicable, he argues that the WCJ's finding of twenty percent loss of use of his left leg between the ankle and the knee is not supported by substantial evidence. Worker points out that Dr. Gehlert and Dr. Diskant both gave Worker a permanent partial impairment rating of forty-five percent for the left leg below the knee. However, the WCJ based his determination on loss of use rather than on the impairment rating.

{93} In *Lucero v. Smith's Food & Drug Centers, Inc.*, 118 N.M. 35, 37, 878 P.2d 353, 355 (Ct.App.1994), this Court held that it is not necessary to prove an impairment, as defined by NMSA 1978, § 52–1–24(A) (1990), in order to obtain scheduled injury benefits under NMSA 1978, § 52–1–43 (2003). Worker recognizes our holding, but contends that the concept of impairment rating is essential to determining permanent partial disability. We disagree. Benefits for scheduled injuries are not governed by the rules that apply to benefits for permanent partial disability.

See Baca v. Complete Drywall Co., 2002–NMCA–002, ¶ 24, 131 N.M. 413, 38 P.3d 181. Thus, we would affirm on this issue as well.

Issues Concerning Attorney Fees

The WCJ Correctly Split the Liability for Worker's Attorney Fees

{94} During pretrial proceedings, the WCJ ordered AGW to pay $2000 to Worker's attorney as a sanction. The order found that AGW had initially stipulated on the record that it had three employees and the Act applied, and that AGW had later argued its stipulation was incorrect or in error. The order awarded "a sanction in the form of an attorney fee of $2000" payable to Worker's attorneys, representing "the number of hours of work devoted to address this issue including time expended on this issue at two separate hearings before the Administration."

{95} Later, during the fee proceeding, the WCJ awarded Worker the maximum allowable attorney fee of $12,500, and Worker requested a finding that the $2000 previously awarded was a sanction that should not be credited against the attorney fee award. AGW countered that, pursuant to Section 52–1–54(J), it could only be required to pay half of $12,500 plus tax, or $6,613.28, and that the $2000 should be credited against the total amount it owed, leaving it owing $4,613.28. Instead, the WCJ credited the $2000 against the total fee of $12,500, and ordered AGW to pay half of $10,500.

{96} AGW contends the $2000 was simply a part of the total fee awarded to Worker, and pursuant to Section 52–1–54(J), "the payment of a claimant's attorney fees determined under this section shall be shared equally by the worker and the employer." Whether the award was a fee or a sanction is an issue of statutory construction, which is reviewed de novo on appeal. *Morgan Keegan Mortgage Co. v. Candelaria*, 1998–NMCA–008, ¶ 5, 124 N.M. 405, 951 P.2d 1066. We conclude the $2000 awarded by the WCJ was not awarded as a fee under Section 52–1–54, but as a sanction.

{97} We first note that Worker did not argue below or on appeal that the $2000 was awarded pursuant to Section 52–1–54(I) for AGW's bad faith claims processing or litigation conduct. Therefore, we do not consider this potential argument on appeal. *Pinnell v. Bd. of County Comm'rs*, 1999–NMCA–074, ¶ 14, 127 N.M. 452, 982 P.2d 503 (explaining that appellate court will not affirm on grounds not presented to the trial court when to do so would be unfair to the appellant).

{98} We turn now to an analysis of whether the $2000 was a fee or a sanction. A WCJ is authorized by statute to "enter noncriminal sanctions for misconduct" pursuant to NMSA 1978, § 52–5–6(B) (2001). *Carrillo v. Compusys, Inc.*, 2002–NMCA–099, ¶ 11, 132 N.M. 710, 54 P.3d 551. Section 52–5–6(B) specifically gives WCJs the power to

> preserve and enforce order during hearings; administer oaths; issue subpoenas to compel the attendance and testimony of witnesses, the production of books, papers, documents and other evidence or the taking of depositions before a designated individual competent to administer oaths; examine witnesses; enter noncriminal sanctions for misconduct; and do all things conformable to law which may be necessary to enable him to discharge the duties of his office effectively.

The order awarding the $2000 refers to the award as a "sanction" and it may reasonably be read as imposing the sanction due to AGW's misconduct in waffling on the applicability of the Act.

{99} In addition, given the fact that the WCJ did not order this $2000 to be split, it appears that the WCJ deemed the award to be a sanction. If the $2000 was awarded as a noncriminal sanction under Section 52–5–6(B), then it was not awarded as an attorney fee under Section 52–1–54, and none of the provisions of that section apply to the $2000. We would therefore affirm on this issue.

Bad Faith

{100} Worker requested additional attorney fees in the amount of $2500 pursuant to Section 52–1–54(I), which provides:

> The workers' compensation judge may exceed the maximum amount [of attorney fees] stated in this subsection ... if he

> finds that a claimant, an insurer or an employer acted in bad faith with regard to handling the injured worker's claim and the injured worker or employer has suffered economic loss as a result. However, in no case shall this additional amount exceed two thousand five hundred dollars ($2,500). As used in this subsection, "bad faith" means conduct . . . that amounts to fraud, malice, oppression or willful, wanton or reckless disregard of the rights of the worker or employer.

AGW also requested findings that Worker acted in bad faith. Because the WCJ made no findings at all regarding the bad faith of either party, we remanded the case and asked the WCJ to enter findings and conclusions on the issue.

{101} The WCJ found that, while some of Turner's filings were without a sound basis in law or fact, Turner was not Worker's employer and, therefore, Turner's bad faith was irrelevant. AGW was Worker's employer, and the WCJ found that AGW "did not file excessive, frivolous, or bad faith matters." Consequently, the WCJ concluded that AGW "did not engage in bad faith or unfair claims processing."

{102} This Court has treated bad faith in this context as a finding of fact subject to substantial evidence review. *Murphy v. Duke City Pizza, Inc.,* 118 N.M. 346, 349, 881 P.2d 706, 709 (Ct.App.1994); *Trujillo v. City of Albuquerque,* 116 N.M. 640, 646, 866 P.2d 368, 374 (Ct.App.1993). However, since those cases were decided, the law concerning mixed questions of law and fact has been extended to civil cases. *See, e.g., Ponder v. State Farm Mut. Auto. Ins. Co.,* 2000–NMSC–033, ¶¶ 6–7, 129 N.M. 698, 12 P.3d 960; *Souter v. Ancae Heating & Air Conditioning,* 2002–NMCA–078, ¶ 19, 132 N.M. 608, 52 P.3d 980. Therefore, "bad faith" is a mixed question of law and fact.

{103} Worker asserts a general argument that the "voluminous and repetitive filings of pleadings," the "repetitious and irrelevant examination" of witnesses, and the "unreasonable contestation of every claim set forth by Worker" establish AGW's bad faith. However, as Worker admits, most of this litigation excess was due to the conduct of Turner rather than AGW. Worker claims that AGW was equally guilty of Turner's bad faith conduct because it concurred in Turner's pleadings.

{104} We are not persuaded. The record shows that Turner filed fifty motions, and AGW did not file any pleadings indicating its concurrence in any of those motions. It is true that AGW adopted and incorporated by reference Turner's list of witnesses and exhibits and Turner's requested findings of fact and conclusions of law. However, we cannot say it was unreasonable for the WCJ to conclude that AGW's adoption of a small number of Turner's pleadings did not constitute "fraud, malice, oppression or willful, wanton or reckless disregard of the rights of the worker." Section 52–1–54(I). The purpose of the bad faith statutory provision is to punish and to deter others from the commission of like offenses. *Sanchez v. Wohl Shoe Co.,* 108 N.M. 276, 278, 771 P.2d 984, 986 (Ct.App.1989). The statute's purpose would be ill-served if AGW were punished for the pleadings it filed, which were appropriate and which raised colorable defenses, or for concurring in three of Turner's relatively innocuous pleadings.

{105} The WCJ made no findings regarding Worker's bad faith or lack of bad faith. Although AGW has not appealed the WCJ's determination that Worker did not act in bad faith, it filed a supplemental brief after remand arguing that the WCJ should have found that Worker acted in bad faith. AGW's argument comes too late; we do not consider contentions made for the first time in a reply brief or a supplemental brief. *Yount v. Millington,* 117 N.M. 95, 100, 869 P.2d 283, 288 (Ct.App.1993).

Constitutionality of the Cap on Fees

{106} Worker argues that the limitation on attorney fees set forth in Section 52–1–54(I) violates his constitutional rights of equal protection, due process, and access to the courts. The question of whether Section 52–1–54(I) violates a worker's rights of equal protection and due process has not been addressed by a New Mexico appellate court since our Supreme Court established heightened rational

basis analysis in *Trujillo v. City of Albuquerque,* 1998–NMSC–031, ¶ 32, 125 N.M. 721, 965 P.2d 305. The question of whether Section 52–1–54(I) violates a worker's right of access to the courts is a matter of first impression. Because these are "significant question[s] of law under the constitution of New Mexico or the United States" and "issue[s] of substantial public interest," Section 34–5–14(C)(1), (2), we certify them to the Supreme Court.

CONCLUSION

{107} For the foregoing reasons, we would affirm the WCJ's compensation order on all issues except that involving the constitutionality of Section 52–1–54(I), which we certify to the Supreme Court.

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

WE CONCUR: A. JOSEPH ALARID and CELIA FOY CASTILLO, Judges.

2005-NMCA-081

114 P.3d 1075

STATE of New Mexico,
Plaintiff–Appellee,

v.

Mario SANCHEZ, Defendant–Appellant.

No. 24,666.

Court of Appeals of New Mexico.

May 12, 2005.

Certiorari Denied, No. 29,250,
June 24, 2005.

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

John Bigelow, Chief Public Defender, Karl Erich Martell, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

CASTILLO, Judge.

{1} Mario Sanchez (Defendant) appeals the denial of his motion to suppress the crack cocaine seized from his pocket by an Albuquerque police officer. Defendant challenges the legality of the investigatory detention and subsequent pat down; he also contends that under the New Mexico Constitution, exigent circumstances were necessary for the legal seizure of the crack cocaine without a warrant. We conclude that Defendant's arguments are without merit, and we affirm.

I. FACTS AND BACKGROUND

{2} Defendant was indicted on one count of trafficking cocaine by possession with intent to distribute. After the district court denied Defendant's motion to suppress, he pled no contest, reserving for appeal the issue of whether the search and seizure violated his constitutional rights. At the hearing on the suppression motion, the parties stipulated to the facts contained in a pretrial interview with Officer Eric Brown. We detail the general facts below.

{3} Around 2:30 a.m. on September 15, 2001, police officers were dispatched to a "fight/party/disturbance" at a residence on Eucharist Street in Albuquerque. Officer Brown was one of the responding officers. He was aware that another officer at the scene had stopped a car with a driver who had been stabbed at the party by an unknown assailant. The victim was not cooperating and would not reveal who stabbed him. Officer Brown found the house littered with empty beer cans, bottles, marijuana pipes, and liquor; he saw broken glass and knocked-over furniture. He also saw blood and numerous weapons on the ground, as well as broken windows at the residence and in the cars located at the address. Officer Brown estimated at least fifty people fled the scene upon the arrival of the police. The officers performed a protective sweep of the residence and placed fifteen to twenty individuals from the residence on the curb in front of the residence. Several altercations occurred between the police and those detained in front of the house. According to Officer Brown, many of these people appeared to be drunk or high on drugs; they were yelling and screaming at the officers and wanted revenge. The detainees sometimes got up and tried to walk away, and some took fighting stances. All of this led Officer Brown to believe that his safety was threatened.

{4} He was one of several officers who swept the house and the backyard, where they proceeded to a shed at the back of the property. There were three people hiding inside the shed. Although Defendant initially refused to exit the shed when ordered to do so, he eventually came out. Once the individuals had exited the shed, Officer Brown patted them down. Based on statements concerning his training and extensive experience, Officer Brown described the basis for his immediate belief that a baseball-sized lump was bundled crack cocaine, which he seized from Defendant's pocket. Defendant was indicted and convicted after entering a no-contest plea. This appeal followed.

II. STANDARD OF REVIEW

{5} In this case, we have a mixed question of fact and law. We view the facts in the light most favorable to the State, as the prevailing party, and defer to the district court's findings of fact supported by substantial evidence. *State v. Urioste*, 2002–NMSC–023, ¶ 6, 132 N.M. 592, 52 P.3d 964. We review de novo the trial court's application of the law to those facts. *State v. Ochoa*, 2004–NMSC–023, ¶ 5, 135 N.M. 781, 93 P.3d 1286.

A. Preservation

{6} In Defendant's plea agreement, he reserved "the right to appeal the [c]ourt's denial of his suppression motion argued in this

case." Defendant's motion to suppress does not cite to the state constitution, except in a general manner and in relation to his arrest. At the suppression hearing, Defendant made three arguments: (1) there was no individualized, particularized suspicion for the investigatory detention; (2) there was no individualized, particularized suspicion for the pat down; and (3) there were no exigent circumstances allowing Officer Brown to remove the contents of Defendant's pocket without a warrant. As to his first two points, Defendant does not argue that the New Mexico Constitution should be interpreted differently from the United States Constitution. The State agrees that the lawfulness of Defendant's detention and weapons frisk under the Fourth Amendment was preserved. Thus, we analyze the validity of the investigatory detention and pat down under the Fourth Amendment.

{7} The State argues that Defendant never challenged the seizure of the crack cocaine under the Fourth Amendment and, further, that Defendant did not preserve any argument that the seizure was invalid under the state constitution, as required under *State v. Gomez,* 1997–NMSC–006, ¶¶ 20, 22, 122 N.M. 777, 932 P.2d 1 (requiring that a defendant set forth the basis on which any alleged violation of a right under the state constitution is based). We agree with the State that Defendant did not argue that his rights were violated under the federal constitution when the crack cocaine was removed from his pocket. As to the state constitution, however, Defendant appears to have preserved his argument. At the suppression hearing, Defendant took the position that New Mexico has not yet adopted the plain feel exception to the warrant requirement, as enunciated in *Minnesota v. Dickerson,* 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993) (holding that an officer may legally seize a concealed object during a pat down if the identity of the object as illegal contraband is "immediately apparent" to the officer). But he did not rely on New Mexico's not having adopted the plain feel doctrine, nor did he argue for or against its adoption. Defendant's contention was simply that in this case, the New Mexico Constitution requires proof of "exigent circumstances before . . . seizure without a warrant."

{8} On appeal, Defendant cites to *Dickerson* and assumes that New Mexico has adopted the doctrine. *See State v. Pierce,* 2003–NMCA–117, ¶ 22, 134 N.M. 388, 77 P.3d 292 (observing that New Mexico has not formally adopted the plain feel doctrine). *But see State v. Paul T.,* 1999–NMSC–037, ¶ 27, 128 N.M. 360, 993 P.2d 74 (recognizing the existence of the plain feel doctrine but stating that the matter was not preserved below). Consequently, Defendant does not assert that the material was removed from his pocket in violation of the Fourth Amendment to the United States Constitution. However, Defendant contends that his rights under Article II, Section 10, of the New Mexico Constitution were violated because the State did not show that there were exigent circumstances to justify the seizure of the pocket contents. Defendant's argument that the state constitution requires exigent circumstances was preserved. Accordingly, we do not address the plain feel doctrine, and we limit our analysis of the removal of the crack cocaine to Defendant's contention that under the New Mexico Constitution, Officer Brown needed to demonstrate exigent circumstances.

B. Detention and Pat Down

{9} Defendant agrees that it was reasonable for the police to think a crime had been committed on the property where the shed was located. As to the pat down, however, Defendant contends that Officer Brown had no reasonable individualized suspicion that Defendant had committed a crime and that the stop and detention were therefore not justified. We begin with the legality of the stop.

{10} The State's first argument is that no constitutional protections are involved in this case because Defendant was free to go. We disagree with the State's characterization of the encounter. A seizure occurs by either the "use of physical force" by an officer "or submission by the individual" to an officer's assertion of authority. *United States v. Harris,* 313 F.3d 1228, 1234 (10th Cir.2002). When "a police officer ac-

costs an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio,* 392 U.S. 1, 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In determining whether a reasonable person would have felt free to leave, we review all of the circumstances surrounding the encounter and focus on the following three factors: "(1) the conduct of the police, (2) the person of the individual citizen, and (3) the physical surroundings of the encounter." *State v. Jason L.,* 2000–NMSC–018, ¶ 15, 129 N.M. 119, 2 P.3d 856 (internal quotation marks and citation omitted). Defendant was discovered in the shed with two other persons. Officer Brown was accompanied by other police officers. All occupants of the shed were ordered out. The other occupants exited. At first, Defendant refused to come out of the shed; he then followed suit and complied with the order. In reviewing the three factors as applied to the facts in this case, we conclude that a reasonable person would not feel free to leave under the circumstances of this case. Thus, we continue our analysis.

{11} Police may make an investigatory stop in circumstances that do not rise to the level of probable cause for an arrest if the officers have a reasonable suspicion that the law has been or is being violated. *Terry,* 392 U.S. at 21–22, 88 S.Ct. 1868; *State v. Flores,* 1996–NMCA–059, ¶ 7, 122 N.M. 84, 920 P.2d 1038. The State must provide specific and articulable facts that, together with the rational inferences from those facts, reasonably warrant the intrusion. *See Jason L.,* 2000–NMSC–018, ¶ 21, 129 N.M. 119, 2 P.3d 856. There is no doubt that the Eucharist Street residence was a crime scene and that at least one violent crime had been committed. One person had been stabbed, and neither the perpetrator nor the weapon had been located at the time Officer Brown discovered Defendant in the shed. Defendant argues that since nothing pointed to his having done the stabbing, he should not have been detained. As found by the trial court, "[i]t was reasonable and proper [for the police] to investigate the people located at the crime scene[, and f]ailure to do so would likely cause the investigation to be deficient and negligent on the part of the officers." The trial court also found that Defendant was hiding in the immediate vicinity of the crime and was reluctant to comply with the officers' request to come out of his hiding place. We agree with the trial court's assessment of the situation. Officer Brown's detention of Defendant by requesting him to exit the shed for questioning was warranted under the circumstances.

{12} We now turn to the legality of the pat down. Our direction is found in *Pierce:*

> Police may initiate a protective patdown search for weapons if they have specific and articulable facts which they contend support their assessment of danger. The search must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby. A *Terry* search may not be expanded without probable cause into a search for evidence of a crime. If a protective search goes beyond that which is necessary to determine whether weapons are present, the fruits of the search are suppressed.

2003–NMCA–117, ¶ 9, 134 N.M. 388, 77 P.3d 292 (internal quotation marks and citations omitted).

{13} Defendant was hiding in the shed, and once his presence was discovered, he did not immediately exit the shed, as ordered by the police. While we agree with the trial court's assessment that Defendant's failure to exit the shed created a reasonable inference that Defendant harbored a consciousness of guilt regarding the crime that was being investigated, we do not rely on this conclusion for our holding. We look to the entire situation. The officers were faced with a chaotic situation: numerous participants had fled the scene, and those detained were acting in an aggressive manner. The premises resembled a battle scene—with blood, broken windows, and weapons lying around. Inside the house, the officers had observed empty beer cans, bottles, marijuana pipes, liquor, knocked-over furniture, blood, and broken glass. Officer Brown was aware that a stabbing had occurred and that neither the weapon nor the perpetrator had been located. In assessing the reasonableness of

the necessity for the pat down, we defer to Officer Brown's good judgment. *See Gomez,* 1997–NMSC–006, ¶ 40, 122 N.M. 777, 932 P.2d 1 (stating that we defer to the officer's good judgment in evaluating the existence of exigent circumstances).

{14} According to Defendant, there was no justification for the pat down before questioning because there was really no safety concern. In Defendant's view, it would have been impossible for him to have drawn a weapon from concealment before being overwhelmed by the officers. We disagree with Defendant's evaluation of the situation. An officer does not need to wait until he sees "the glint of steel before he can act to protect his safety." *State v. Cobbs,* 103 N.M. 623, 630, 711 P.2d 900, 907 (Ct.App.1985) (internal quotation marks and citation omitted).

{15} Under the circumstances of this case, we agree with Officer Brown's conclusion that a pat down search was necessary for his own protection, as well as for the protection of the other officers and other people in the area. Therefore, we hold that Officer Brown was justified in conducting a pat down of Defendant's person.

C. Removal of Pocket Contents

{16} Because Defendant does not argue a violation of his Fourth Amendment rights, we need not address the validity of the seizure under *Dickerson.* Nor do we get to the question of whether New Mexico should adopt the plain feel exception to the warrant requirement, since Defendant does not make this argument. Consequently, we limit our review to Defendant's contention that the removal of illegal contraband from his pocket during pat down should only be allowed if Officer Brown can demonstrate that exigent circumstances required the removal. Defendant relies on *Gomez,* 1997–NMSC–006, ¶¶ 33–40, 122 N.M. 777, 932 P.2d 1, and *Campos v. State,* 117 N.M. 155, 158–59, 870 P.2d 117, 120–21 (1994). In *Gomez,* our Supreme Court departed from established federal precedent in 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. *Gomez,* 1997–NMSC–006, ¶¶ 44, 46, 122 N.M. 777, 932 P.2d 1. Consequently, the existence of exigent circumstances is evaluated on a case-by-case basis, and only where an officer has reasonably determined that exigent circumstances exist will a warrantless search of an automobile be held valid. *Id.* ¶ 40. *Campos* deals with warrantless arrests. In that case, our Supreme Court held that in order to justify a warrantless arrest, "the arresting officer must show that the officer had probable cause to believe that the person arrested had committed or was about to commit a felony and some exigency existed that precluded the officer from securing a warrant." 117 N.M. at 159, 870 P.2d at 121. If an officer observes the person committing a felony, however, exigency will be presumed. *Id.*

{17} In arguing that *Gomez* applies to the facts of this case, Defendant has overlooked the different values that constitutional provisions like the Fourth Amendment and Article II, Section 10, are designed to protect. The search aspect of these provisions protects expectations of privacy, while the seizure aspect protects notions of possession, at least insofar as it applies to objects. *State v. Foreman,* 97 N.M. 583, 585, 642 P.2d 186, 188 (Ct.App.1982).

{18} The *Gomez* court was dealing with people's interest in privacy. The requirement of exigent circumstances, in addition to probable cause, gives a heightened level of protection to the privacy interest. Because the value of privacy is so important in New Mexico, this was entirely appropriate. But in this case, the privacy threshold has already been lawfully breached. We have held that the detention and pat down were lawful, and Defendant does not challenge Officer Brown's immediate identification of the cocaine. Since the privacy threshold was breached, the remaining value that Article II, Section 10, would protect is Defendant's interest in possessing his cocaine. But we have held in *Foreman* that Defendant has no such interest. 97 N.M. at 585, 642 P.2d at 188. Under these circumstances, there would be no point to giving a heightened level of protection to Defendant's privacy interest because he has no interest. *See*

Ochoa, 2004–NMSC–023, ¶ 8, 135 N.M. 781, 93 P.3d 1286 (allowing warrantless seizure of incriminating evidence observed in plain view during the course of a protective pat down); *State v. Ferguson*, 106 N.M. 357, 358, 743 P.2d 113, 114 (1987) (holding that warrantless seizure of contraband from an incarcerated defendant was proper). Had the evidence in Defendant's pocket not been contraband and instead been lawful objects suspected of being connected with a crime, a different result might obtain. However, we need not decide that question in this case. It is enough to hold that once Officer Brown knew Defendant had rocks of cocaine in his pocket, there was no need for exigent circumstances to allow their seizure without a warrant.

III. CONCLUSION

{19} We affirm the trial court's denial of Defendant's motion to suppress.

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

WE CONCUR: IRA ROBINSON and RODERICK T. KENNEDY, Judges.

[redacted]

2005-NMCA-086

115 P.3d 232

STATE of New Mexico, Plaintiff–Appellant,

v.

Ruben K. ARROYOS, Defendant–Appellee.

No. 24,300.

Court of Appeals of New Mexico.

May 23, 2005.

Patricia A. Madrid, Attorney General, Joel Jacobsen, Assistant Attorney General, Albuquerque, NM, for Appellants.

Lawrence Allred, Marc A. Lilley, Lilley Law Offices, Las Cruces, NM, for Appellee.

OPINION

ROBINSON, Judge.

{1} The State appeals from the district court's order suppressing evidence and dismissing the DWI charge against Ruben Arroyos (Defendant) where a Deputy Marshal of the Town of Mesilla stopped Defendant in the City of Las Cruces for erratic driving. On appeal, the State contends that the district court did not have authority to suppress and dismiss these charges, that the Deputy Marshal's stop was justified as a lesser intrusion than the citizen's arrest that he was entitled to make, and that he acted reasonably and within his authority. As discussed below, we reverse.

BACKGROUND

{2} On December 22, 2002, Deputy Marshal Lawrence Louick of the Town of Mesilla Marshal's Department observed Defendant's vehicle traveling west on University Avenue, which is within the boundary of the City of Las Cruces, not the Town of Mesilla. Initially, Deputy Marshal Louick observed Defendant make a wide right turn onto University Avenue, and observed Defendant's vehicle brake lights come on several times as he proceeded southbound on University Avenue. Deputy Marshal Louick followed Defendant's vehicle and, when Defendant turned southbound onto Stern Drive, the vehicle traveled to the left of the center line into the northbound lane for a significant distance before drifting back into the southbound lane. Deputy Marshal Louick then stopped Defendant and requested dispatch to send a Doña Ana County sheriff's deputy to the scene. While waiting for the sheriff's deputy, Deputy Marshal Louick approached Defendant, smelled alcohol on his breath, and had Defendant perform a finger-count test and recite the alphabet, which he recited only to the letter "D" and slurred his speech badly. At that time, Defendant admitted drinking alcohol. When Doña Ana County Sheriff's Deputy Timothy Girard arrived on the scene, Deputy Marshal Louick told him what had happened and then left. When Deputy Girard spoke to Defendant, he noticed that Defendant had bloodshot eyes, slurred speech, and smelled of alcohol. Deputy Girard had Defendant perform the "walk and turn" and the "one-leg stand" field sobriety tests, both of which Defendant failed. Deputy Girard then arrested Defendant for DWI. There is nothing in the record that leads us to believe that Deputy Girard relied upon Deputy Marshal Louick's finger test or alphabet test. But, instead, Deputy Girard relied upon the field sobriety tests that he administered and Defendant failed.

{3} Deputy Marshal Louick testified that he was employed by the Town of Mesilla as a deputy marshal, and has been certified by the State of New Mexico as a law enforcement officer. He also admitted that he had no other authorization as a law enforcement officer, and had not been cross-commissioned, appointed, or cross-designated as a special deputy sheriff of the County of Doña Ana. It is undisputed that, from the initial observation by Deputy Marshal Louick all the way to the location of the stop, Defendant's vehicle, at no time, was within the jurisdictional boundary of the Town of Mesilla. In district court, Defendant moved to suppress the evidence and dismiss the charges on the grounds that Deputy Marshal Louick lacked jurisdictional authority to stop him. The district court dismissed with prejudice the State's claims against Defendant, ruling that Deputy Marshal Louick was without authority to stop Defendant outside the town limits of Mesilla. The State appeals.

DISCUSSION

May a deputy marshal, who observes erratic driving behavior, initiate a traffic stop outside his jurisdictional territory, when he is neither cross-commissioned nor in fresh pursuit, and where a local sheriff's deputy subsequently arrives on the scene, handles the case, and makes the arrest?

{4} Defendant correctly observes that NMSA 1978, § 3–13–2 (1988) is a statutory grant of authority which is clear and limits Deputy Marshal Louick's jurisdictional territory within the Town of Mesilla. *See* § 3–13–2(A)(4)(d). It was undisputed that the traffic stop was made outside the limits imposed by Section 3–13–2. The State responds, however, that Deputy Marshal

Louick's stop was justified as a lesser intrusion than the citizen's arrest that he was entitled to make, and that he acted reasonably and within his authority. We agree.

{5} "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. Our courts recognize that a municipal police officer may not enforce the motor vehicle code beyond the territorial limits of the officer's jurisdiction, unless the officer is in fresh pursuit of a defendant fleeing the jurisdiction, or the officer has been cross-commissioned with such authority. *Inc. County of Los Alamos v. Johnson,* 108 N.M. 633, 634, 776 P.2d 1252, 1253 (1989); *see also* NMSA 1978, § 66–2–12 (1978); NMSA 1978, § 31–2–8 (1981). Any person, however, may arrest another upon good-faith, reasonable grounds that a felony had been or was being committed, or a breach of the peace was being committed in the person's presence. *State v. Johnson,* 1996–NMSC–075, ¶ 18, 122 N.M. 696, 930 P.2d 1148; *see also Downs v. Garay,* 106 N.M. 321, 323, 742 P.2d 533, 535 (Ct.App. 1987) (holding that a private citizen may arrest another person for breach of peace or a felony committed in the citizen's presence). In New Mexico, a breach of peace is considered "a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community." *State v. Florstedt,* 77 N.M. 47, 49, 419 P.2d 248, 249 (1966) (internal quotation marks and citation omitted). Our Supreme Court held that "a person driving while intoxicated is committing a breach of the peace." *State v. Rue,* 72 N.M. 212, 216, 382 P.2d 697, 700 (1963).

{6} This question is one of first impression in New Mexico. We can obtain some guidance from *State v. Ryder,* 98 N.M. 453, 649 P.2d 756 (Ct.App.) (*Ryder I*), *aff'd on different grounds,* 98 N.M. 316, 648 P.2d 774 (1982) (*Ryder II*). In that case, a Bureau of Indian Affairs officer (BIA officer) stopped non-Indians for running a stop sign on an Indian reservation. Because the BIA officer was not cross-commissioned as a New Mexico peace officer, he did not have the authority to issue a citation for a state traffic offense. *Ryder I,* 98 N.M. at 454, 649 P.2d at 757. Instead, he detained the non-Indians until a cross-commissioned officer arrived. *Id.* This Court held that since the BIA officer was without police authority in this case, his actions were converted into those of a "private citizen." *Id.* at 456, 649 P.2d at 759. Our Supreme Court took *Ryder* up on *certiorari,* and affirmed on different grounds, indicating that the BIA officer was permitted to stop the motorist for running the stop sign and could have given the motorist a federal ticket based on his violation of state law. The Court held that it was not unreasonable for the BIA officer to hold a motorist for ten minutes until a proper officer arrived. *Ryder II,* 98 N.M. at 318–19, 648 P.2d at 776–77. Nonetheless, that Court did not expressly disapprove our rationale that the BIA officer's actions were converted into those of a private citizen.

{7} Unlike our present case, evidence used to convict the defendants in *Ryder* was gathered by both the BIA officer and the proper cross-commissioned officer. Here, the evidence against Defendant was not gathered by Deputy Marshal Louick, but instead, Deputy Girard relied upon the field sobriety tests which he administered independently to arrest Defendant. We make this observation to illustrate that since our Supreme Court held the actions of the BIA officer to be reasonable under *Ryder,* then clearly, we must conclude the actions of Deputy Marshal Louick were reasonable here.

{8} We read Section 3–13–2 as granting police officers official powers within their own jurisdictions, not divesting the officers of their common law right as citizens to make arrests or detentions. Thus, for the protection of individual liberties, a police officer outside his jurisdictional territory, absent statutory exceptions, cannot invoke a citizen's arrest where the arrest in question is based on information not readily available to a private citizen. *See People v. Niedzwiedz,* 268 Ill.App.3d 119, 205 Ill.Dec. 837, 644 N.E.2d 53, 55 (1994) (stating that "[a] police officer exceeds his authority to make a citizen's arrest . . . when he uses the powers of his office to gather evidence unavailable to the private citizen outside his jurisdiction").

{9} In the present case, Deputy Marshal Louick did not use the power of his agency to obtain evidence unavailable to the private citizen. For instance, Defendant's erratic driving, constant braking, and crossing over the center line into the oncoming lane for a significant distance at 1:30 a.m. would have led any reasonable person, who observed these things, to conclude that Defendant was driving under the influence, which is a breach of the peace and likely to cause a violent collision. *See Florstedt,* 77 N.M. at 49, 419 P.2d at 249 (defining breach of the peace as "a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community" (internal quotation marks and citation omitted)). As a matter of public safety, we would expect no less from Deputy Marshal Louick.

{10} In support of its rationale, the State relies on *State ex rel. State v. Gustke,* 205 W.Va. 72, 516 S.E.2d 283 (1999). In *Gustke,* a uniformed police officer was driving his marked police vehicle home. *Id.* at 286. Outside the city limits, he saw a car being driven erratically by the defendant. *Id.* The officer contacted the county sheriff's office who had jurisdiction and went on to stop the vehicle himself. *Id.* Thereafter, a sheriff's deputy arrived and took over. The defendant was arrested for DUI. *Id.* The district court dismissed the drunk driving indictment because the police officer who made the stop was outside his agency's territory and did not have jurisdiction there. *Id.* at 286–87. The state petitioned its supreme court for a writ of probation, which was granted. *Id.* at 287. The court acknowledged that the police officer, who made the initial stop, did not have the authority to make the arrest where he did. *Id.* at 289. However, the court added that "[i]t has often been recognized that a police officer who is without *official* authority to make an arrest may nevertheless make the arrest if the circumstances are such that a private citizen would have the right to arrest either under the common law or by virtue of statutory law." *Id.* The court concluded that "[b]ecause the actions of [the officer] constituted a valid common law citizen's arrest, the circuit court erred in suppressing all evidence flowing from [the officer's] stop of [the defendant]." *Id.* at 293.

{11} Because Defendant's initial stop was justified as a lesser intrusion than the citizen's arrest Deputy Marshal Louick was entitled to make, and the investigation which led to Defendant's arrest was performed by Deputy Girard, who had jurisdictional authority, we conclude the district court erred in suppressing the evidence flowing from Deputy Girard's investigation, and we need not address the State's jurisdictional issue. *See, e.g., Edwards v. State,* 462 So.2d 581, 582 (Fla.Dist.Ct.App.1985) ("We cannot think of a more apt illustration of such breach of the individual and collective peace of the people . . . than to have a drunk driver at the wheel of a killing machine that is going all over the road and scaring oncoming drivers to death rather than killing them."); *Molan v. State,* 614 P.2d 79, 80 (Okla.Crim.App. 1980) ("This [c]ourt has held that a law enforcement officer outside his jurisdiction may make a citizen's arrest."); *State v. Johnson,* 661 S.W.2d 854, 859 (Tenn.1983) (acknowledging that a deputy acting outside of his territorial jurisdiction may be "limited to the authority of a private person" in making an arrest); *State v. Harp,* 13 Wash.App. 239, 534 P.2d 842, 844 (1975) (concluding that an officer acting outside of his territorial jurisdiction could make an arrest as a private citizen could make a felony arrest upon probable cause as a private citizen). Accordingly, we hold that a law enforcement officer acting outside of his or her territorial jurisdiction has the same authority to arrest as does a private citizen.

CONCLUSION

{12} The decision of the district court is reversed, and the cause is remanded to the district court with instructions to vacate the order of dismissal, and to reinstate the cause for a trial on the merits.

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

WE CONCUR: A. JOSEPH ALARID and LYNN PICKARD, Judges.

2005-NMCA-083

115 P.3d 236

STATE of New Mexico, Plaintiff–Appellee,

v.

Calvin PARSON, Defendant–Appellant.

No. 24,451.

Court of Appeals of New Mexico.

June 14, 2005.

Patricia A. Madrid, Attorney General, Santa Fe, NM, Jacqueline R. Medina, Assistant Attorney General, Albuquerque, NM, for Appellee.

John Bigelow, Chief Public Defender, Sheila Lewis, Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

SUTIN, Judge.

{1} Defendant Calvin Parson unlawfully transported elk heads. He appeals his convictions under felony statutes outlawing "transporting ... stolen or unlawfully possessed livestock or any unlawfully possessed game animal, or any parts thereof," NMSA 1978, § 30–18–6 (1963), and conspiring to commit that crime, *see* NMSA 1978, § 30–28–2(A) (1979). He grounds his appeal on the view that he should have only been charged with a misdemeanor under the more specifically applicable game and fish laws in NMSA 1978, §§ 17–2–7 and –20.3 (1979), and NMSA 1978, § 17–2–10 (1999). We agree with Defendant and reverse.

BACKGROUND

{2} In presenting its case, the State put on testimony regarding an unlawful, multi-million dollar elk head and antler trophy business. The testimony included a description of a joint investigation into waste of wildlife and illegal antler trade by the New Mexico Department of Game and Fish and the Colorado Division of Wildlife. In the investigation, Department personnel discovered the carcasses of two decapitated mature bull elk. The investigation led to a possible poacher by the name of Zach Romero and then to Defendant. Each was charged with a violation of Section 30–18–6 and charged with conspiracy to violate Section 30–18–6, pursuant to Section 30–28–2(A). These crimes are fourth degree felonies. §§ 30–18–6, 30–28–2(B)(3).

{3} The linking of firearm shell casings found at the sites of the killed elk with cartridges in Defendant's home, the linking of DNA from blood of the elk and blood found in Defendant's van, and testimony of Romero in Defendant's trial that the two shot the elk in question out of season and transported the elk heads, led to Defendant's convictions on both charges. Before he testified against Defendant, Romero pled guilty to the same charges.

{4} Defendant sought dismissal of the charges on the ground that he was improperly charged under Section 30–18–6 instead of under the game and fish laws. He argued that the felony statute under which he was convicted was a general statute, whereas the applicable misdemeanor game and fish statutes were the more specific, and that the State was required to prosecute him under the more specific statutes. Defendant's ar-

gument on this issue centered on *State v. Cleve*, 1999–NMSC–017, 127 N.M. 240, 980 P.2d 23, in which the Court held that NMSA 1978, § 30–18–1 (1963, repealed 1999) (amended 2001) (cruelty to animals), one of the many animal-related statutes in Article 18 of the New Mexico Criminal Code (Chapter 30), did not apply to Defendant's conduct in "snaring two deer." *Cleve*, 1999–NMSC–017, ¶ 37, 127 N.M. 240, 980 P.2d 23. The Supreme Court construed the words "any animal" in Section 30–18–1 to mean "domestic animals and wild animals in captivity," and determined that the conduct was covered under the more specific game and fish laws. *See Cleve*, 1999–NMSC–017, ¶¶ 34–37, 127 N.M. 240, 980 P.2d 23.

{5} The district court denied Defendant's motions to dismiss, distinguishing *Cleve* on the basis that Section 30–18–1 in *Cleve* and Section 30–18–6 in the present case were different statutes. In making the distinction, the Court focused mostly on the proscribed conduct of "transporting" a game animal or a part of a game animal in Section 30–18–6.

{6} Defendant asserts on appeal that: (1) Section 30–18–6 applies only to elk when elk are being raised as livestock, and not to free-roaming, wild elk and, therefore, the State failed to prove that Defendant stole livestock as defined by the statute; (2) under a plain meaning analysis, the State was required to charge Defendant under the game and fish statutes; and (3) if the plain meaning rule is inapplicable, then *Cleve's* determination of legislative intent that the game and fish laws are an exception to the animal-related statutes in Article 18 of the Criminal Code controls.

DISCUSSION

I. Standard of Review

{7} We decide the issues in this case based on statutory construction alone. Our review, therefore, is de novo. *See State v. Rowell*, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995).

II. The Statutes

{8} We preface our discussion of Defendant's points on appeal by discussing Chapter 30, Article 18 of our statutes, and by setting out the various statutes on which Defendant relies, together with a fuller discussion of *Cleve*.

Article 18

{9} Article 18 of Chapter 30 relates to "animals" generally. Several specific statutes relate to cruelty to animals and the seizure, disposition, and award of costs in connection with animals endangered from cruel treatment. *See* § 30–18–1; NMSA 1978, §§ 30–18–1.1, –1.2, –1.3 (1999). Several of the other sections in Article 18 expressly mention "livestock" or obviously cover livestock by referring to "cattle" or "cow." *See* NMSA 1978, § 30–18–3(C) (1963); NMSA 1978, §§ 30–18–4, –5, –6, –8, –12, –14 (1963, as amended through 2001). One of these sections relates to injury to livestock that is the property of another and defines "livestock" as "used in this section." *See* § 30–18–12(B). The definition there does not include the family cervidae or elk. *Id.* Section 30–18–14 authorizes livestock inspectors who are certified peace officers to enforce "criminal laws relating to livestock," including those in Article 18.

{10} Several provisions in Article 18 that do not expressly or exclusively relate to clearly domesticated animals such as livestock, cattle, dogs, equines (horse, pony, mule, donkey or hinny), are nevertheless obviously or likely meant to cover only domesticated animals. *See* §§ 30–18–3; –4(D), (E), (F); –6;–7; –15. Section 30–18–3 covers unlawful branding. Section 30–18–4 covers the unlawful disposition of animals that are owned or are the property of others. Section 30–18–6, which proscribes transporting "stolen" livestock and defines this as transporting "stolen or unlawfully possessed livestock or any unlawfully possessed game animal," by use of the word "stolen" implies the taking of property from another. *See Merriam Webster's Collegiate Dictionary* 1150 (10th ed.1996) (defining "steal" to mean "to take the property of another wrongfully"). Section 30–18–7 relates to misrepresentation of the pedigree of an animal. Section 30–18–15, the last section in Article 18, proscribes certain injections by personnel of an animal control service or facility, animal shelter, or humane society.

{11} Only two provisions in Article 18 use the words "game animal." Section 30–18–6, as indicated earlier in this opinion, proscribes the transporting of an unlawfully possessed game animal. Section 30–18–10 excludes from Article 18 proscriptions "the taking of game animals, game birds or game fish by the use of dogs" under certain circumstances.

The Livestock Code

{12} Defendant turns to the Livestock Code, NMSA §§ 77–2–1 to –18–4 (1869, as amended through 2004), which states that, "[a]s used in The Livestock Code ... 'animals' or 'livestock' means all domestic or domesticated animals that are used or raised on a farm or ranch, including ... farmed cervidae upon any land in New Mexico." § 77–2–1.1(A). Based on these definitions and pointing out that "cervidae" are elk and deer, Defendant contends that "game animals" as used in Section 30–18–6 do not include free-roaming animals.

Game and Fish Laws

{13} The game and fish laws are found in Chapter 17 of the statutes. *See* NMSA 1978, §§ 17–1–1 to 17–8–6 (1912, as amended through 2003). Defendant contends that the State's evidence established nothing more than that the elk in question were free-roaming, wild animals protected under the game and fish laws. Defendant cites, in particular, Sections 17–2–3(A)(4), –7, –10, and –20.3. Section 17–2–3(A)(4) lists certain "game mammals" as protected wildlife species. Among the game mammals listed is "the family Cervidae." *Id.* Under Section 17–2–7(A)(1) and (2), unless permitted under regulations or law, "it is unlawful to[ ] hunt, take, capture, [or] kill ... any game animal," and it is unlawful to "possess ... all or any part of any game animal." Section 17–2–10(A) states that it is a misdemeanor to violate any provision of Chapter 17 or any regulations "that relate to the time, extent, means or manner that game animals ... may be hunted, taken, captured, killed, possessed, sold, purchased or shipped." Section 17–2–20.3 states that the "illegal possession or transportation of big game during closed season" is a misdemeanor, and, further, that "taking or attempting to take big game during closed season," and "selling or attempting to sell big game or parts thereof" without a permit, are misdemeanors. § 17–2–20.3(A), (B), (D).

State v. Cleve

{14} In *Cleve*, only the cruelty to animals provision in Article 18, namely, Section 30–18–1, was at issue. *Cleve*, 1999–NMSC–017, ¶ 7, 127 N.M. 240, 980 P.2d 23. The defendant in *Cleve* was convicted of cruelty to animals under Section 30–18–1 and unlawful hunting under Section 17–2–7(A). *Cleve*, 1999–NMSC–017, ¶¶ 5–6, 127 N.M. 240, 980 P.2d 23. In regard to Section 30–18–1, the question in *Cleve* was whether "any animal" in that statute meant all animals, including game animals. 1999–NMSC–017, ¶¶ 7, 9, 127 N.M. 240, 980 P.2d 23. Interpreting Section 30–18–1, the Court read the three subsections of the statute as it then existed to "prohibit behavior that could only apply to domesticated animals or wild animals previously reduced to captivity[.]" *Cleve*, 1999–NMSC–017, ¶ 12, 127 N.M. 240, 980 P.2d 23. The Court concluded that "the Legislature intended that the phrase 'any animal' denote domesticated animals and wild animals in captivity throughout Section 30–18–1." *Cleve*, 1999–NMSC–017, ¶ 12, 127 N.M. 240, 980 P.2d 23. The Court also "conclude[d] that the Legislature enacted the entire [Article 18] with the exclusive purposes of controlling certain human behavior in relation to domesticated animals and protecting the property rights of the owners of domesticated or previously captured wild animals." *Id.* ¶ 13. Section 30–18–6 was among the statutes in Article 18 specifically referred to by the Court that paved the way for the Court's statement that, "[e]ach of these other statutes exclusively concern livestock and other animals possessed by humans[.]" *Cleve*, 1999–NMSC–017, ¶ 13, 127 N.M. 240, 980 P.2d 23. As to Section 30–18–1, in studying the context surrounding its enactment, the Court concluded that the Legislature intended to exclude wild animals from its protection. *Cleve*, 1999–NMSC–017, ¶ 15, 127 N.M. 240, 980 P.2d 23.

{15} The Court in *Cleve* then turned to game and fish laws, including the unlawful hunting statute under which the defendant was charged, Section 17–2–7. *Cleve,* 1999–NMSC–017, ¶¶ 16, 31, 29–34, 127 N.M. 240, 980 P.2d 23. The Court looked at these laws in the context of the general/specific rule of statutory construction. *Id.* ¶¶ 16–36. *Cleve* concluded "that the Legislature did not intend for Section 30–18–1 to apply to hunting activities contemplated by New Mexico's specific laws governing game and fish." *Id.* ¶ 18. The Court held:

> [T]he overall statutory scheme governing hunting and fishing demonstrates a legislative intent to preempt the application of Section 30–18–1 to game and fish with respect to conduct contemplated by game and fish laws. We believe that the general/specific statute rule therefore provides additional support for our interpretation of Section 30–18–1.

Id. ¶ 16. The Court further concluded that:

> [E]ven if the Legislature had intended to protect wild animals in Section 30–18–1, the Legislature, having dealt with the subject of the hunting of game animals more particularly in the game and fish laws, intended to create an exception from the cruelty-to-animals statute for hunting and fishing activity contemplated by game and fish laws.

Id. ¶ 35.

{16} The general/specific statute rule discussed and applied in *Cleve* was reconfirmed as a rule to "determine legislative intent in the context of potentially conflicting laws" in *State v. Santillanes,* 2001–NMSC–018, ¶ 11, 130 N.M. 464, 27 P.3d 456. The *Cleve* preemption analysis appears to have been disfavored in *Santillanes* as a label that "do[es] not serve [its] intended purpose of clarifying the general/specific statute rule." *Id.*

{17} The version of Section 30–18–1 addressed in *Cleve* was repealed in the 1999 legislative session and reenacted in the same session with significant changes and as a considerably more comprehensive statute. *See* 1999 N.M. Laws ch. 107, § 1; 2001 N.M. Laws ch. 81, § 1. *Cleve,* 1999–NMSC–017, 127 N.M. 240, 980 P.2d 23, filed March 11, 1999, does not mention this 1999 legislative activity. It would appear that the legislation was at least in part a reaction to this Court's 1997 decision in *Cleve,* which interpreted Section 30–18–1 to apply to wild animals including the deer that the defendant in that case snared. *See State v. Cleve,* 1997–NMCA–113, ¶ 13, 124 N.M. 289, 949 P.2d 672, *rev'd by* 1999–NMSC–017, 127 N.M. 240, 980 P.2d 23. The 1999 reenacted Section 30–18–1 covers, in part, negligently "killing without lawful justification . . . an animal[,]" "intentionally . . . mutilating, injuring or poisoning an animal[,]" and "maliciously killing an animal." § 30–18–1(B)(1), (E)(1), (2) (2001). The reenactment states, however, that the provisions of the section "do not apply to . . . fishing, hunting, falconry, taking and trapping, as provided in Chapter 17 NMSA 1978[.]" § 30–18–1(I)(1). The question is whether the change in Section 30–18–1 affects the precedential value of *Cleve.*

{18} We see nothing in the 1999 reenactment of Section 30–18–1 that reflects a legislative intent to cover the hunting, capturing, or killing of free-roaming, wild elk or the transporting of such elk after being hunted, captured, or killed. To the contrary, that section contains the express statement that the section's provisions do not apply to activities under Chapter 17. Chapter 17 is comprehensive regulatory legislation to protect free-roaming, wild game animals through State regulation of hunting, taking, capturing, killing, and possessing free-roaming, wild game animals, specifically including elk. *See* §§ 17–1–1, 17–2–1, –2, –3. We read the exclusion in Section 30–18–1(I)(1) to mean that Section 30–18–1 does not criminalize conduct regulated under Chapter 17. Thus, while Section 30–18–1 was substantially changed during the formation and filing of the *Cleve* opinion in 1999, we doubt that the Legislature was attempting to write Section 30–18–1 to apply to the hunting and killing of free-roaming, wild animals regulated under Chapter 17. Rather, we construe the legislative intent in enacting Section 30–18–1(I) to be in sync with the Supreme Court's analysis and holding in *Cleve.*[1]

1. We are not saying that *Cleve* forecloses any circumstance in which a person's cruelty to a

{19} We believe that *Cleve's* assessment that Article 18 was intended to cover only "domesticated or previously captured wild animals" remains valid. The fact that reenacted Section 30–18–1(A) expressly also excludes "insects" and "reptiles," and also expressly does not apply to the practice of veterinary medicine, or rodent and pest control, *see* § 30–18–1(I)(2), (3), does not raise a reasonable doubt as to the validity of *Cleve's* assessment of the legislative intent behind Article 18.

III. The Parties' Arguments

{20} In his appellate arguments, Defendant first asserts that Section 30–18–6 proscribes only the transportation of elk being raised as livestock, and bases this assertion on the various statutes in Chapters 17 and 77 discussed earlier in this opinion. He next relies on *Cleve's* general/specific legislative intent analysis, asserting that the State can charge him only with a more specific statute in Chapter 17. His third and final assertion is that if this Court were to conclude that Section 30–18–6 and statutes in the Chapter 17 game and fish laws give rise to legitimate, differing interpretations, requiring a contextual analysis (history, apparent object, statutes in pari materia), we are bound by *Cleve's* holding that the game and fish laws demonstrate a legislative intent to preempt application of Section 30–18–6.

{21} The State asserts that the words in Section 30–18–6 are plain and clear, making no distinction between farmed and free-roaming elk. The State argues that if the Legislature intended in Section 30–18–6 to exclude illegally possessed free-roaming, wild game, it could easily have expressed that intent in the statute. The State further argues that no provision in the game and fish statutes specifically addresses the acts of transporting unlawfully possessed game animal parts, whereas Section 30–18–6 does specifically address that activity. According to the State, Section 17–2–10 does not outlaw the *transporting* of trophy elk heads, and Section 17–2–20.3 does not outlaw the transporting of *parts*. The State's only substantive law-related reference to *Cleve* is one parenthetically indicating that *Cleve* is contrary to the State's view that "the [L]egislature's intentional use of the phrase (or game animals) in the transporting stolen livestock statute, as opposed to simply using the term or 'any animal' or 'livestock', supports that conclusion that the [L]egislature intended for the transporting stolen livestock statute to concern more than just animals possessed by humans."

IV. Defendant Was Chargeable Only Under the Game and Fish Laws

{22} Section 30–18–6 was originally enacted in 1963 as part of an "Act Providing for a Revised Criminal Code." *See* 1963 N.M. Laws ch. 303, § 18–6. The title and content of Section 30–18–6 have remained unchanged. The appearance of "game animal" in a statute titled "Transporting Stolen Livestock" that is surrounded by statutes intended for the most part, if not exclusively, to relate only to domesticated animals, gives appropriate pause in considering what animals the words "game animals" in that statute were meant to include. *See Harriett v. Lusk*, 63 N.M. 383, 388, 320 P.2d 738, 742 (1958) (stating that the title of an act may be utilized as an aid in determining legislative intent and to resolve doubts as to meanings); *Serrano v. Dep't of Alcoholic Beverage Control*, 113 N.M. 444, 447, 827 P.2d 159, 162 (Ct.App.1992) (stating that a legislatively enacted section heading may be useful in determining legislative intent in an ambiguously drafted statute). *Cleve* necessitates a cautious analysis. *Cleve* also provides the analytic basis for decision. The game and fish laws in Chapter 17 are expressly intended to cover free-roaming, wild game elk; the animal statutes in Article 18 of Chapter 30 are not. The game and fish laws more specifically apply to the elk and trophy-head hunting and transporting than do the animal statutes.

{23} As indicated earlier in this opinion, Section 17–2–3, which covers protected wild-

wild game animal can be prosecuted under Section 30–18–1. For example, a person who is not hunting or searching out free-roaming, wild elk might come across an injured elk and treat the animal in a manner proscribed under Section 30–18–1 and not covered under Chapter 17. It may be that such conduct is subject to prosecution under Section 30–18–1.

life species, specifically defines "game mammals" to include "all of the family Cervidae (elk and deer)." § 17–2–3(A)(4). Under Section 17–2–7(A)(1) and (2), it is unlawful to hunt, take, capture, kill, or possess any game animal except as permitted by regulations or other laws. Section 17–2–10(A) prescribes up to six months imprisonment for any person who violates a Chapter 17 provision "relat[ing] to the time, extent, means or manner that game animals . . . may be hunted, taken, captured, killed, possessed, sold, purchased or shipped." Further, Section 17–2–20.1(A)(1) and (A)(2) refers to the crimes of "illegal possession or transportation of big game," and "taking big game during closed season." Further, under Section 17–2–20.3(A), (B), (C), and (D), the following constitute misdemeanors: illegal possession or transportation of big game and the taking or attempting to take big game during closed season; and selling or attempting to sell big game or parts thereof, except by regulation of the State game commission.

{24} The evidence against Defendant proved that he transported the head of an elk. The State did not attempt to prove that the elk had been domesticated or was not a free-roaming, wild elk. The evidence was sufficient to charge Defendant with violating the game and fish laws. The Legislature intended the game and fish statutes to apply to Defendant's actions and did not intend Section 30–18–6 to apply to Defendant's actions. To the extent the public may be dissatisfied with only misdemeanor punishment for elk head trophy hunting and simultaneous carcass waste, the Legislature may want to consider increasing the penalty under the game and fish laws.

CONCLUSION

{25} We hold that Defendant could be convicted, if at all, only under the game and fish laws, and not under Section 30–18–6, for transporting heads of free-roaming, wild elk. We therefore reverse Defendant's convictions.

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Chief Judge and RODERICK T. KENNEDY, Judge.

2005-NMCA-085

115 P.3d 795

Samuel UPTON, as Personal Representative of The Estate of Sarah Renee Upton, Deceased; Renee Upton, Individually, and Samuel and Renee Upton, Jointly as the Parents of Sarah Renee Upton, Deceased, Plaintiffs–Appellants,

v.

CLOVIS MUNICIPAL SCHOOL DISTRICT, Defendant–Appellee.

No. 24,051.

Court of Appeals of New Mexico.

April 20, 2005.

Certiorari Granted, No. 29,226, July 1, 2005.

Stephen Doerr, Doerr & Knudson, P.A., Portales, NM, for Appellants.

Daniel J. Macke, Elizabeth L. German, Brown & German, Albuquerque, NM, for Appellee.

OPINION

WECHSLER, Judge.

{1} Section 41–4–6 of the Tort Claims Act, NMSA 1978, §§ 41–4–1 to 41–4–27 (1976, as amended through 2004) (TCA), provides a waiver of governmental immunity when damages flow from "the operation or maintenance of any building." This case requires us to address the "exceedingly fine" distinctions drawn by cases decided under this section. *See Baca v. State*, 1996–NMCA–021, ¶ 12, 121 N.M. 395, 911 P.2d 1199. Plaintiffs' fourteen-year-old daughter, Sarah, an asthmatic, was required by a substitute physical education teacher to continue exercising after she reported that she was having difficulty breathing and wanted to stop exercising. Shortly after the physical education class, she went to her next class, collapsed, and died. According to Plaintiffs, liability results from the school's indifference to Sarah's medical needs, as well as a fifteen-minute delay in calling an ambulance. The district court granted summary judgment, ruling that immunity had not been waived. We affirm.

Background

{2} In ruling on Defendant's motion for summary judgment, the district court accepted Plaintiffs' view of the facts, as well as the conclusion that Plaintiffs' daughter's death was the result of Defendant's negligence. There was evidence that, at the beginning of the school year, Sarah's mother informed the school of Sarah's asthma through an Individualized Education Plan. Sarah's mother also had spoken with Sarah's regular physical education teacher about the fact that exercise could initiate a potentially life-threatening asthma attack, and they agreed that Sarah would only engage in exercise she could do comfortably and could take breaks if necessary.

{3} On August 30, 1999, however, a substitute physical education teacher was teaching Sarah's physical education class. The class was more strenuous than usual. The students were required to run laps in the gym, followed by a version of a basketball game in which two students retrieved a basketball from the center of the court and then ran to opposite ends to see which one could make a basket first. Sarah ran about half the laps and walked the other half. She did two rounds of the basketball drill and then asked the teacher for permission to stop. The teacher denied permission and Sarah returned to the group, crying. According to several students, Sarah was having difficulty breathing and her face was red. Sarah may have done one more round of the game, but one of the other students stepped in for her on either the third or fourth round.

{4} At the end of the class, Sarah used a special inhaler as she walked to the locker room. She went to her next class, science, which started at 2:28 p.m., and very shortly after class began she collapsed on her desk, at approximately 2:29 p.m. The science teacher called the front office, and the teacher, along with another teacher, tried to administer two inhaler treatments. Sarah's mother was called. A licensed practical nurse who worked at the school arrived to help, checked Sarah's vital signs, and told the front office to call 911. Call logs indicated that 911 was called at 2:44 p.m., approximately fifteen minutes after Sarah had collapsed. Medical attempts to revive her were unsuccessful and she died from her asthma attack.

Standard of Review

{5} "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Self v. United Parcel Serv., Inc.*, 1998–NMSC–046, ¶ 6, 126 N.M. 396, 970 P.2d 582. We review the district court's grant of summary judgment de novo. *Id.* The applicability of the TCA is also reviewed de novo. *Godwin v. Mem'l Med. Ctr.*, 2001–NMCA–033, ¶ 23, 130 N.M. 434, 25 P.3d 273.

Section 41–4–6

{6} Plaintiffs contend that immunity has been waived under Section 41–4–6, which reads in pertinent part:

> The immunity granted pursuant to Subsection A of Section 41–4–4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful

> death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment or furnishings.

Our cases that interpret the phrase "operation or maintenance" contained within Section 41–4–6 have not limited its applicability strictly to defects in the physical building. *See Leithead v. City of Santa Fe,* 1997–NMCA–041, ¶ 5, 123 N.M. 353, 940 P.2d 459. Waiver may also be triggered if the facility is negligently operated or maintained in a way that creates an unsafe or dangerous condition on the property or in the immediate vicinity. *Id.* "[T]he critical question is whether the condition creates a potential risk to the general public." *Espinoza v. Town of Taos,* 120 N.M. 680, 683, 905 P.2d 718, 721 (1995); *see Baca,* 1996–NMCA–021, ¶ 9, 121 N.M. 395, 911 P.2d 1199. This case does not involve a building defect. Therefore, if Plaintiffs are to succeed, they must demonstrate that their daughter's death resulted from a dangerous or unsafe condition on the premises that created a potential risk to the general public.

{7} While we have admitted that the law in this area depends on "exceedingly fine" distinctions, *id.* ¶ 12, a survey of the cases animates the distinctions. On one hand are cases like *Seal v. Carlsbad Independent School District,* 116 N.M. 101, 860 P.2d 743 (1993), and *Leithead,* both swimming pool cases. *Seal* reversed a summary judgment granted on the ground of immunity based on a rationale that the claim was one of strict liability when the school district may have been negligent in failing to ensure the presence of a properly trained lifeguard and by failing to supply necessary safety equipment. *Seal,* 116 N.M. at 105, 860 P.2d at 747. *Leithead* found a waiver when the pool may have been operated without an adequate number of trained lifeguards, because "lifeguard services are so essential to the safety of a swimming pool that they seem akin to other kinds of safety equipment, such as lifelines and ladders, that are fundamental in making the premises reasonably safe for the swimming public." *Leithead,* 1997–NMCA–041, ¶ 15, 123 N.M. 353, 940 P.2d 459.

{8} Contrasted against these cases are cases like *Espinoza* and *Pemberton v. Cordova,* 105 N.M. 476, 734 P.2d 254 (Ct.App.1987). *Espinoza* held that immunity was not waived when a child fell off playground equipment while allegedly not being adequately supervised. *Espinoza,* 120 N.M. at 684, 905 P.2d at 722. *Pemberton* held that immunity was not waived when there was a fight between students and the claim was one of negligent supervision. *Pemberton,* 105 N.M. at 477–78, 734 P.2d at 255–56.

{9} Two prison cases, and a public housing case, also illustrate the dividing line. In *Callaway v. New Mexico Department of Corrections,* 117 N.M. 637, 642, 875 P.2d 393, 398 (Ct.App.1994), we held that immunity was waived when prison officials allowed known, dangerous gang members to roam loose among the general prison population. Similarly, in *Castillo v. County of Santa Fe,* 107 N.M. 204, 207, 755 P.2d 48, 51 (1988), immunity was waived when a public housing project allowed dogs to run loose, creating a dangerous condition and placing the public at risk. In *Archibeque v. Moya,* 116 N.M. 616, 619, 866 P.2d 344, 347 (1993), however, our Supreme Court held that immunity was not waived when prison officials erroneously classified a single inmate.

{10} These cases highlight the distinction between the creation of a dangerous condition that places the general public at risk, which results in a waiver, and negligent supervision, which does not. To avoid this distinction, Plaintiffs deny that their claim is one for negligent supervision. They argue that the school's failure to follow policy presents a danger to the general public, claiming that school officials did not follow policies in place designed to deal with medical emergencies. They further argue that the negligent conduct of the school employees "created the unsafe situation that resulted in the death of their daughter." To establish a danger to the general public, they also suggest that any "negligent supervision" and failure as to their daughter "applies to any and all of the students" in the Clovis School District.

{11} On these facts, we disagree. We consider this case closer to *Espinoza, Archibeque,* and *Pemberton,* than to *Seal* and *Leit-*

head. The school had a policy in place, which required calling a parent, notifying the front office, and summoning a nurse. The nurse and the principal were to call 911 if necessary. The issues in this case involve the school's failure to follow that policy for one child and its subsequent failure to respond to the child's medical emergency more quickly. The school's error, or errors, may have tragically affected Plaintiffs' daughter, but did not present a dangerous condition to the public at large. No matter how Plaintiffs seek to couch their theory, it remains a failure by the school to properly supervise their daughter. Accordingly, immunity has not been waived.

{12} Plaintiffs rely on *Gallegos v. School District of West Las Vegas,* 115 N.M. 779, 781–82, 858 P.2d 867, 869–71 (Ct.App.1993), for the proposition that decisions by school personnel constitute the operation of the school. *Gallegos* holds that the operation of a school bus includes the many decisions made by the bus driver and that the school district was not immune for any negligence by the driver. *Id.* at 781, 858 P.2d at 869. Plaintiffs argue that the substitute teacher, and those who failed to call 911 more quickly, were like the bus driver in *Gallegos* because operation of the school necessarily includes the myriad of decisions made by school personnel. We disagree that *Gallegos* governs the result in this case. *Gallegos* involved the operation of a school bus and was decided under the provision of the TCA waiving immunity for the negligent operation of a motor vehicle. *Id.; see also* § 41–4–5 (waiving sovereign immunity in the case of negligent torts committed by public employees who were "acting within the scope of their duties in the operation or maintenance of any motor vehicle, aircraft or watercraft"). It was not decided under Section 41–4–6. Additionally, Plaintiffs' argument is too broad. If any decision by school personnel constituted the "operation or maintenance of any building" under Section 41–4–6, immunity would be waived in virtually any situation. Our cases have not adopted this position and have instead made it clear that administrative or supervisory functions do not equate with the "operation of any building" or call for a waiver of immunity.

Conclusion

{13} The TCA attempts to resolve the tension between encouraging the exercise of governmental powers, free of fear of lawsuits, yet on the other hand recognizing that the government must be encouraged to act responsibly to protect the public against injury. *See Oldfield v. Benavidez,* 116 N.M. 785, 789, 867 P.2d 1167, 1171 (1994) (recognizing that the concept of immunity demonstrates the conflicting concerns of government officials seeking freedom from personal liability and harassing litigation, and injured persons seeking redress for the torts committed by government). Our job in interpreting the TCA is to determine the intent of the legislature. *See Cal. First Bank v. State,* 111 N.M. 64, 73, 801 P.2d 646, 655 (1990); *see also State ex rel. Taylor v. Johnson,* 1998–NMSC–015, ¶¶ 21, 30–31, 125 N.M. 343, 961 P.2d 768 (stating that it is the domain of the legislature to make public policy and to choose from the various options available those that are consistent with the policy chosen); *State ex rel. Helman v. Gallegos,* 117 N.M. 346, 352, 871 P.2d 1352, 1358 (1994) (stating that we must not second-guess the legislature's resolution of competing policies).

{14} As we have discussed, our cases have interpreted Section 41–4–6 to waive immunity when there is a dangerous condition that places the general public at risk, but hold that the government is immune for negligent supervision. This tragic case falls within the ambit of negligent supervision and, consequently, the school district is immune. Summary judgment is affirmed.

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

I CONCUR: MICHAEL D. BUSTAMANTE, Chief Judge.

JONATHAN B. SUTIN, Judge (specially concurring).

SUTIN, Judge (specially concurring).

{16} I concur in the opinion. My reason for writing separately is solely to express my view that the Legislature should consider a sovereign immunity waiver that covers negligence of primary and secondary school ad-

ministrators who fail to have a set and distributed policy in regard to children who are known to be at serious health risk if required to engage in physical exercise, and of school teachers who ignore or disregard the policy or who negligently interpret or administer it. There does not appear to have been any excuse for the school administrators and teachers in the present case not to have assured that Child was protected from having to engage in exercise that was dangerous to her health. This Court is appropriately hesitant under the current state of the case law and the manner in which the Legislature has worded provisions in the Tort Claims Act to interpret "operation of any building" to cover policy failures, failures of communication, or negligent decisions, such as those in this case.

{17} As the opinion indicates, this Court and the Supreme Court have tried to reasonably and carefully apply the Act to the facts of cases that come before us. As the opinion also indicates, to hold in favor of Plaintiffs would be to open a door that the Legislature likely has not intended be opened. Whether in or outside of the school setting, the world can be a dangerous place for high health risk children who are not protected. Outside of school, damages for negligent conduct resulting in harm to otherwise unprotected children known to be at risk are recoverable. At the very least, damages ought to be available for conduct by school administrators and teachers resulting in harm to unprotected, at risk children when the school personnel know a particular child needs protection but negligently or even intentionally fail to provide the protection necessary.

2005-NMCA-082

115 P.3d 799

Roddie CHAVARRIA and Norma Castaneda, Plaintiffs–Appellees/Cross–Appellants,

v.

FLEETWOOD RETAIL CORPORATION OF NEW MEXICO, Defendant–Appellant/Cross–Appellee.

Nos. 23,874, 24,444.

Court of Appeals of New Mexico.

May 6, 2005.

Certiorari Granted, No. 29,246, June 27, 2005.

Kyle W. Gesswein, Las Cruces, NM, Richard N. Feferman, Janet Santillanes, Albuquerque, NM, for Appellees/Cross–Appellants.

Edward Ricco, Jeffrey M. Croasdell, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, NM, for Appellant/Cross–Appellee.

OPINION

KENNEDY, Judge.

{1} Defendant appeals from a judgment awarding compensatory and punitive damages to Plaintiffs on their claims arising from the purchase of a mobile home, and from an order awarding attorney fees to Plaintiffs. Defendant challenges the trial court's (1) award of compensatory damages to Plaintiffs for fraud, conversion, and violation of the Unfair Practices Act (UPA), NMSA 1978, §§ 57–12–1 to –24 (1967, as amended through 2003); (2) award of punitive damages; (3) dismissal of Defendant's counterclaim without prejudice; and (4) award of attorney fees to Plaintiffs under the UPA and the Insurance Code. On cross-appeal Plaintiffs challenge the trial court's reduction of punitive damages and refusal to dismiss Defendant's counterclaim with prejudice. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. In light of our disposition, we need not address the cross-appeal.

BACKGROUND

{2} Plaintiffs purchased a mobile home from Defendant through its Las Cruces sales office. Devin Pike and Bob Lancaster were, respectively, the sales agent and the sales manager of the Las Cruces office who conducted the sale of a three-bedroom mobile home to Plaintiffs. Although GreenPoint Credit (Lender) initially qualified Plaintiffs for a loan to buy a four-bedroom mobile home, Defendant told Plaintiffs that their loan application had been declined by Lend-

er. Defendant then negotiated the sale of a three-bedroom mobile home to Plaintiffs. Pike and Lancaster falsified Plaintiffs' income and employment information in order to qualify them for a higher loan on the three-bedroom home, also forging Plaintiffs' signatures on a credit application and another loan document. The amount of the loan for the three-bedroom mobile home was virtually the same as the amount of the loan for the four-bedroom mobile home. Pike and Lancaster inflated the value of Plaintiffs' existing mobile home and agreed to accept the trade-in as a 10% down payment on the purchase. They included in the loan amount the cost of constructing a garage and decks that were never provided to Plaintiffs but were falsely certified to Lender as having been constructed. They misrepresented certain features to be included in the mobile home. The mobile home was delivered to Plaintiffs with numerous defects that were never remedied by Defendant.

{3} Plaintiffs filed an action against Defendant in district court, alleging fraud, conversion, violation of the UPA, breach of warranty, excessive charges on interim construction loans in violation of NMSA 1978, § 56–8–9 (1980), and unlicensed sale of insurance in violation of the Insurance Code. Defendant counterclaimed to collect on the promissory note executed by Plaintiffs. The case was tried to the court. Following a three-day trial, the trial court found in favor of Plaintiffs on their claims, dismissed Defendant's counterclaim without prejudice, and entered a judgment awarding Plaintiffs compensatory and punitive damages and other relief. The trial court also awarded attorney fees of almost $80,000 to Plaintiffs. Defendant's two appeals and Plaintiffs' cross-appeal followed, and have been consolidated.

DISCUSSION

Finality of Judgment

{4} The trial court entered a judgment awarding damages to Plaintiffs under three alternative theories of liability: fraud, conversion, and violation of the UPA. The judgment states in pertinent part:

> IT IS HEREBY ADJUDGED AND ORDERED:
>
> 1. Plaintiffs are awarded $9,500.00 in actual damages for Defendant's misrepresentations regarding the garage and decks, under the New Mexico [UPA]. Plaintiffs are awarded $17,900.00 in actual damages for fraud, regarding the garage, decks and trade-in. Plaintiffs are awarded $17,000.00 in actual damages for conversion, regarding the garage, decks and trade-in. *After passage of time for appeal, or when an appeal concludes, plaintiffs must elect a remedy and choose which one of these three damage awards to accept.*
>
> . . . .
>
> 3. Plaintiffs are awarded $150,000.00 in punitive damages for Defendant's fraud and $150,000.00 in punitive damages for Defendant's conversion, and $31,440.00 additional damages for Defendant's willful violations of the New Mexico [UPA]. *After passage of time for appeal, or when an appeal concludes, Plaintiffs must elect a remedy and choose whether to accept the additional damages for unfair trade practices, or to accept the punitive damages for fraud or the punitive damages for conversion.*

(Emphasis added.) The judgment therefore awards Plaintiffs alternative relief, subject to their election, following the conclusion of this appeal.

{5} On its face, the judgment does not appear final because as framed it leaves open the final remedy to be chosen by Plaintiffs. Generally, "an order or judgment is not considered final unless all issues of law and fact have been determined and the case disposed of by the trial court to the fullest extent possible." *Kelly Inn No. 102, Inc. v. Kapnison,* 113 N.M. 231, 236, 824 P.2d 1033, 1038 (1992) (internal quotation marks and citation omitted). "Where a judgment declares the rights and liabilities of the parties to the underlying controversy, a question remaining to be decided thereafter will not prevent the judgment from being final if resolution of that question will not alter the judgment or moot or revise decisions embodied therein." *Id.* at 238, 824 P.2d at 1040. In this case, an election made following the appeal would appear to "moot" decisions em-

bodied in the judgment on the alternative grounds of recovery not pursued to satisfaction by Plaintiffs. In addition, because an election would require Plaintiffs to decide which substantive theory it ultimately relies on for recovery, we would hesitate to construe it as a purely ministerial act. *See State v. Candy L.*, 2003–NMCA–109, ¶ 6, 134 N.M. 213, 75 P.3d 429 (recognizing that outstanding ministerial acts, involving no substantive determinations, do not defeat finality). Thus, due to our jurisdictional concerns, we requested supplemental briefing on the question of whether the judgment in this case is final and appealable. *See Khalsa v. Levinson*, 1998–NMCA–110, ¶ 12, 125 N.M. 680, 964 P.2d 844.

{6} We agree with the parties that this case does not present a typical election of remedies problem. "The essence of the doctrine of election of remedies is the conscious choice, with full knowledge of the facts, of one of two or more inconsistent remedies." *Naranjo v. Paull*, 111 N.M. 165, 169, 803 P.2d 254, 258 (Ct.App.1990) (internal quotation marks and citation omitted). The doctrine exists to prevent double recovery for a single wrong. *See Liddle v. A.F. Dozer, Inc.*, 777 So.2d 421, 422 (Fla.Dist.Ct.App. 2000). Thus, when one remedy depends on affirming a contract and another on repudiating the contract, the remedies are mutually exclusive, and the party seeking relief must elect one of them. *See Smith v. Galio*, 95 N.M. 4, 8, 617 P.2d 1325, 1329 (Ct.App.1980). The election of remedies doctrine does not apply when remedies are merely cumulative. *Williams v. Selby*, 37 N.M. 474, 476, 24 P.2d 728, 729 (1933). In this case, Plaintiffs were awarded alternative or concurrent damages, not inconsistent remedies. The judgment, by its terms, precludes double recovery because Plaintiffs must choose between alternative remedies and are entitled to but one satisfaction for their injuries. Therefore, the doctrine of election of remedies does not presently apply to this case.

{7} We further acknowledge that the judgment in this case is not one that adjudicates liability but leaves undecided the question of damages. Our courts have firmly held that such judgments are not final and appealable. *See, e.g., Valley Improvement Ass'n v. Hartford Accident & Indem. Co.*, 116 N.M. 426, 429, 863 P.2d 1047, 1050 (1993); *Principal Mut. Life Ins. Co. v. Straus*, 116 N.M. 412, 413–14, 863 P.2d 447, 448–49 (1993). Here, the judgment finally adjudicates the rights and liabilities of the parties and assesses damages against Defendant, which are quantified in the judgment. *See id.* (determining that a judgment that awards damages but fails to quantify them is not final). Thus, the judgment does not fall under the category of non-final judgments that leaves the award of damages unresolved.

{8} The judgment, however, does impose an election upon Plaintiffs that has yet to be exercised, thus making the judgment seemingly inconclusive. Some courts have held that a judgment awarding alternative or conditional relief subject to an election by the prevailing party is not final until an election has been made. *See, e.g., McKinney v. Gannett Co.*, 694 F.2d 1240, 1248–49 (10th Cir. 1982); *Mid–State Homes, Inc. v. Beverly*, 20 Ark.App. 213, 727 S.W.2d 142, 143 (1987). However, as Defendant notes, this approach has been criticized by the authors of one prominent treatise as "unfortunately formalistic," 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3915.3, at 292 n. 14 (2d ed.1992), since it ignores whether requiring an immediate election would "deflect an appeal, provide a better basis for appellate decision, or reduce the risk of further proceedings after appeal." *Id.* at 291.

{9} In this case, both parties argue that the judgment should be treated as final for purposes of appeal because doing so would promote the policies of avoiding piecemeal appeals and facilitating meaningful review of the appellate issues. *See Kelly Inn No. 102, Inc.*, 113 N.M. at 239–40, 824 P.2d at 1041–42. Plaintiffs explain that the trial court entered the judgment as it did to allow Plaintiffs full recovery while also permitting Defendant to raise all of its arguments on appeal. On appeal, Defendant challenges the trial court's compensatory damages awards under all three theories and also attacks the basis of the punitive damages award. On cross-appeal, Plaintiffs claim that the trial

court erred in reducing the amount of punitive damages. According to Plaintiffs, if a formal election of remedies were mandated by this Court prior to a consideration of the merits of the appeal, piecemeal appeals from multiple, successive judgments might result because Plaintiffs would be entitled to continue pursuing all remaining avenues of recovery until satisfaction of judgment is obtained. *See Uptegraft v. Dome Petroleum Corp.,* 764 P.2d 1350, 1355 (Okla.1988) ("Where the remedies are alternate or concurrent there is no bar until satisfaction of the judgment has been obtained. The plaintiff may pursue concurrent remedies at the same time until there is satisfaction of the judgment.").

{10} Defendant also points out that, aside from its elective nature, "the judgment in this case is not materially different from a judgment awarding relief to claimants who have prevailed on multiple, alternative theories allowing different amounts of monetary recovery." Defendant explains that the trial court "would ordinarily award judgment for the largest amount recoverable based on the most favorable theory on which the claimants had succeeded." The party appealing would then challenge the award under that theory, and the claimants would not only defend recovery on that basis but would argue that the award is affirmable under any theory of recovery considered below. *See Manoucheh-ri v. Heim,* 1997–NMCA–052, ¶ 13, 123 N.M. 439, 941 P.2d 978. Thus, according to Defendant, because all the same issues would come before the reviewing court in any event, remand for a formal election would serve no purpose and would only delay resolution of the issues on appeal.

{11} We appreciate the procedural complexities and the undue delay that remand for a formal election would likely cause in this case. Accepting the judgment as final would serve the purposes of preventing piecemeal appeals, promoting judicial economy, and facilitating meaningful review of the issues. *See Executive Sports Club, Inc. v. First Plaza Trust,* 1998–NMSC–008, ¶ 11, 125 N.M. 78, 957 P.2d 63. Because the concept of finality is "given a practical, rather than a technical, construction," *Kelly Inn No. 102, Inc.,* 113 N.M. at 236, 824 P.2d at 1038, we hold that the judgment in this case, while unorthodox in form and reserving a formal election until after appeal, is sufficiently final for purposes of appeal. *Cf. Cusumano v. Microsoft Corp.,* 162 F.3d 708, 712 (1st Cir. 1998) (discussing that "a court's retention of jurisdiction in order to facilitate the consideration of possible future relief does not undermine the finality of an otherwise appealable order"). In so holding, however, we express no opinion or preference regarding when an election between alternative but concurrent remedies should be made by a prevailing party. Our holding is limited solely to the particular judgment and the unusual circumstances in the case before us. We therefore turn to the merits of the appeal.

Compensatory Damages for Fraud

{12} The trial court awarded to Plaintiffs compensatory damages of $17,900 for fraud. This award was based on the trial court's findings that Defendant (1) fraudulently obtained the disbursement of $9,500 from Plaintiffs' loan by falsely certifying the construction of nonexistent garage and decks, and (2) fraudulently induced Plaintiffs to trade in their existing mobile home for a credit of $8,400, for which they received no value.

{13} Defendant does not challenge the trial court's finding that two of its employees committed fraud in the sale of the mobile home to Plaintiffs. Defendant, however, claims that Plaintiffs are not entitled to actual damages for fraud because they have made no payment on the promissory note held by Defendant, and thus have sustained no present financial injury. We disagree.

{14} As a result of Pike's and Lancaster's misrepresentations, Plaintiffs executed a promissory note in the principal amount of $82,688.75, covering the purchase price of the mobile home, the lot, the garage, the decks, and related expenses. Plaintiffs also signed a security agreement and mortgage to secure payment of the note. By signing the note, security agreement, and mortgage, Plaintiffs incurred a legal obligation in the amount of $82,688.75, plus interest. The note, security agreement, and mortgage were assigned by Lender to Defendant pursuant to a recourse agreement. Defendant has sought to enforce

Plaintiffs' financial obligation and filed a counterclaim in this action to collect on the note and foreclose the mortgage. Plaintiffs have been forced to defend the counterclaim, incurring legal expenses. By suing Defendant for fraud and seeking damages, Plaintiffs have opted to affirm, rather than rescind, the sale. *See Everett v. Gilliland,* 47 N.M. 269, 275, 141 P.2d 326, 330 (1943) ("It was the privilege of the plaintiff, thinking himself to have been defrauded, to determine his course of action. He could either bring an action to rescind the contract or affirm and sue for damages.").

{15} Thus, even though Plaintiffs have not yet paid on the promissory note, by signing the note and affirming the sale, they incurred an enforceable legal obligation and thus have sustained actionable damage for fraud. *See Anderson, Greenwood & Co. v. Martin,* 44 S.W.3d 200, 212 (Tex.Ct.App.2001) ("The word 'damage' should not be restricted to a monetary loss; that is, it need not be measured in money, but it is sufficient if the defrauded party has been induced to incur legal liabilities or obligations different from that represented or contracted for."); 37 Am. Jur.2d *Fraud and Deceit* § 275 (2001) (recognizing that a "false statement that results in actual damage to the plaintiff's economic or legal relationships will support an action for fraud"); 37 C.J.S. *Fraud* § 55, at 242–43 (1997) (explaining that "the fact that actual monetary loss has not yet occurred will not preclude recovery for fraud if such loss is inevitable, as where the defrauded party has incurred a binding legal obligation"); *cf. Sharts v. Natelson,* 118 N.M. 721, 725, 885 P.2d 642, 646 (1994) (defining "actual injury," for the purpose of determining when cause of action for attorney malpractice accrues, as "the loss of a right, remedy, or interest, or . . . the imposition of a liability" and noting that it is immaterial "whether future events may affect the permanency of the injury or the amount of monetary damages eventually incurred" (internal quotation marks and citation omitted)). Moreover, Defendant has taken affirmative action to collect on the note, causing legal injury to Plaintiffs. *Cf. Daniels v. Coleman,* 253 S.C. 218, 169 S.E.2d 593, 597 (1969) (holding that there is no legal injury or damage where the evidence established that the appellant had not sought to recover on the note and mortgage, and the note and the mortgage were returned to the appellees, but refused).

{16} Defendant further contends that the award of compensatory damages for fraud is premature because Defendant's counterclaim was dismissed without prejudice, and Plaintiffs' liability on the note now remains unresolved in another proceeding. Defendant claims that Plaintiffs' damages cannot be ascertained until their liability on the note is adjudicated. We note that Defendant has not informed us how this argument was preserved in the trial court. *See* Rule 12–216(A) NMRA; *Young v. Van Duyne,* 2004–NMCA–074, ¶ 9, 135 N.M. 695, 92 P.3d 1269 ("We are under no obligation to search the record to locate information in order to save a party from lack of preservation of issues."); *Woolwine v. Furr's, Inc.,* 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct.App.1987). However, even assuming that the issue was preserved, we conclude that Plaintiffs are entitled to recover damages for fraud even if the claim on the promissory note has not yet been determined. As we explained above, Plaintiffs sustained actual injury when they incurred the legal obligation on the note. Moreover, as Plaintiffs point out, the general rule is that damages for fraud are measured at the time of the transaction. *See Indus. Supply Co. v. Goen,* 58 N.M. 738, 741, 276 P.2d 509, 511 (1954) (explaining that New Mexico "adopts the general rule that the defrauded purchaser may recover the difference between the real and represented values of the property *at the time of the transaction*" (emphasis added)); *see generally* 37 Am.Jur.2d *Fraud and Deceit* § 275. When fraud is established, courts generally award the defrauded party the benefit of the bargain or "the difference between the real and the represented value of the property, regardless of the fact that the actual loss suffered might have been less." *Stewart v. Potter,* 44 N.M. 460, 464, 104 P.2d 736, 739 (1940). The purpose of benefit of the bargain damages is to compensate the defrauded party for amounts that would have been received if the situation had been as the de-

frauding party represented. In this case those damages can be ascertained or measured with reasonable certainty without considering Plaintiffs' liability on the promissory note. Although the damages awarded to Plaintiffs for fraud may ultimately be offset by the amount found to be owed on the promissory note, the unresolved claim on the note does not in any way preclude Plaintiffs' instant recovery of damages for fraud.

{17} Defendant additionally claims that the trial court erred in awarding compensatory damages of $8,400 for the loss of Plaintiffs' trade-in. Defendant claims that Plaintiffs are not entitled to damages for the trade-in because they received a credit of $8,400 for the trade-in, which was accepted as a down payment on the purchase. Plaintiffs, however, contend that because Defendant inflated the purchase price of the mobile home to obtain additional financing from Lender, they did not receive any value for the trade-in because that amount was offset by the inflated and fraudulent charges to Plaintiffs. Defendant counters that, insofar as the purchase price was inflated, it was done so by $9,500, the cost of the nonexistent garage and decks, for which Plaintiffs have already been compensated, and therefore the award of $8,400 constitutes double recovery. We agree that the additional award for the trade-in is duplicative of the award for the fraudulent inclusion of the garage and decks. We therefore reverse the award of $8,400 for the loss of the trade-in. *See generally Hale v. Basin Motor Co.*, 110 N.M. 314, 320, 795 P.2d 1006, 1012 (1990) ("New Mexico does not allow duplication of damages or double recovery for injuries received.").

{18} On appeal, we review the trial court's findings of damages to determine whether they are supported by substantial evidence. *Moody v. Stribling*, 1999-NMCA-094, ¶ 37, 127 N.M. 630, 985 P.2d 1210. "Substantial evidence is 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). "When determining whether a finding of fact is supported by substantial evidence, we review the evidence in the light most favorable to upholding the finding and indulge all reasonable inferences in support of the trial court's decision." *Robertson v. Carmel Builders Real Estate*, 2004-NMCA-056, ¶ 20, 135 N.M. 641, 92 P.3d 653.

{19} In arguing that substantial evidence supports the award of $8,400, Plaintiffs rely on three exhibits: a series of advance calculation sheets prepared by Defendant in the course of negotiating the sale of a mobile home to Plaintiffs. The first of the exhibits pertains to the four-bedroom mobile home Plaintiffs originally sought to buy, and the other two exhibits pertain to two different three-bedroom mobile homes, including the one that Plaintiffs ultimately bought. Plaintiffs point out that the loan amount for all three proposals was roughly the same, approximately $82,400, although the adjusted invoice amount and the selling price on each one varied, thus establishing that Defendant sold Plaintiffs the three-bedroom home for essentially the same price as the four-bedroom home. Plaintiffs claim that Defendant should have charged Plaintiffs $18,000 less for the three-bedroom home they purchased, since the adjusted invoice amount of the three-bedroom home was $24,064, as compared to $42,090 for the four-bedroom home. Plaintiffs argue that Defendant "could not make up that $18,000 difference with the $7,500 garage alone; they had to pad the deal to make it look like they were giving the $8,[4]00 trade-in value they promised when, in truth, Plaintiffs did not receive any actual value for the trade-in." They also argue that the fraud related to the trade-in was entirely independent of the fraud related to the garage.

{20} Plaintiffs, however, do not point to any testimony to support their view that Defendant inflated the price of the three-bedroom home by $18,000, and that the fraud related to the trade-in is distinct from the fraud related to the garage. Our review of the uncontradicted testimony at trial indicates that Defendant artificially inflated the trade-in allowance to induce Plaintiffs to purchase the home and then attempted to recoup the difference by fraudulently including in the amount of the loan the cost of the fictitious garage. In other words, the evidence establishes that the fraud related to

the trade-in and the fraud related to the garage are part of a single interconnected scheme.

{21} Because Plaintiffs did not have the cash to make the 10% down payment, they were allowed to trade in their existing mobile home and received a credit of $8,400 which was accepted as a down payment. Defendant assigned the NADA book value of $11,349 to the trade-in and subtracted the almost $3,000 that Plaintiffs still owed on the mobile home to arrive at the net amount of $8,400. However, the value assigned to the trade-in was substantially inflated because Defendant subsequently resold the mobile home for only about $1,500. According to the uncontradicted testimony of the district manager, William Kasprzyk, there was a "[d]irect correlation" between the allowance on the trade-in and the inclusion of the garage in the loan. He testified that to make up for the loss of profit on the trade-in, Defendant improperly generated additional funds by including in the amount of the loan the cost of constructing a fictitious garage on Plaintiffs' property.

{22} The trial court's findings of fact reflect that it accepted the evidence concerning the interrelationship between the trade-in and the garage. In particular, the trial court found that (1) Defendant inflated or misrepresented the value allocated to the trade-in; (2) Defendant "used the value and money from [the] non-existent, falsely-certified-as-completed garage to make up the difference between the value [Defendant] allocated to [Plaintiffs'] 1980 Melody trailer and the value [Defendant] reported to [Plaintiffs] and [Lender];" and (3) when Plaintiffs traded in their mobile home, Defendant intended to deprive them of $7,500 of the value of the mobile home, which was the same amount that the nonexistent garage cost. "Unless the district court makes findings of fact, or rejects specific uncontradicted testimony with reasons on the record, we presume the district court believed the uncontradicted evidence." *State v. Zamora*, 2005–NMCA–039, ¶ 8, 137 N.M. 301, 110 P.3d 517, cert. granted, 2005–NMCERT–004, 137 N.M. 455, 112 P.3d 1112. Moreover, "when a trial court makes specific written findings of fact that are supported by substantial evidence, those findings prevail over any inconsistent conclusions of law or an inconsistent judgment." *State v. Walker*, 1998–NMCA–117, ¶ 7, 125 N.M. 603, 964 P.2d 164; *see also El Paso Field Servs. Co. v. Montoya Sheep & Cattle Co.*, 2003–NMCA–113, ¶ 14, 134 N.M. 375, 77 P.3d 279. Therefore, because the trial court recognized the connection between the trade-in and the garage, and awarded Plaintiffs compensatory damages for the fraudulent inclusion of the garage and the decks, we conclude that the additional award for the loss of the trade-in amounts to double recovery. *See Cent. Sec. & Alarm Co. v. Mehler*, 1996–NMCA–060, ¶ 11, 121 N.M. 840, 918 P.2d 1340 ("The purpose of compensatory damages is to make the injured party whole by compensating it for losses."). Thus, we reverse the award of $8,400, but affirm the award of $9,500 under the benefit of the bargain measure of damages for fraud.

Compensatory Damages for Conversion

{23} Defendant further claims that the trial court erred in awarding to Plaintiffs compensatory damages for conversion. Because Plaintiffs would be entitled to no more than $9,500 in compensatory damages for conversion, even assuming that the claim was established, we need not address Defendant's conversion arguments. This is because the same double recovery limitation that was discussed in connection with fraud also applies to compensatory damages for conversion.

UPA Claims

{24} The trial court awarded $1,720 to Plaintiffs as actual damages for Defendant's unlicensed sale of property damage insurance to Plaintiffs. The award was made pursuant to the UPA and therefore was also subject to trebling. Defendant acknowledges that Pike and Lancaster were not licensed to sell insurance to Plaintiffs, in violation of NMSA 1978, § 59A–12–6(D) (1984), but claims there was no evidence connecting the unlawful insurance practice to the damages awarded to Plaintiffs. We agree.

{25} Section 57–12–10(B) of the UPA provides that any claimant "who suffers any loss of money or property, real or per-

sonal, *as a result* of any employment by another person of a method, act or practice declared unlawful by the [UPA] may bring an action to recover *actual damages* or the sum of one hundred dollars ($100), whichever is greater." (Emphasis added.) Thus, to obtain financial recovery under the UPA, Defendant's deceptive trade practice must have caused Plaintiffs to suffer actual damages. *See* UJI 13–1707 NMRA (instructing that plaintiffs "may recover damages proximately caused by the deception"); *see also Bogle v. Summit Inv. Co.*, 2005–NMCA–024, ¶ 36, 137 N.M. 80, 107 P.3d 520 (stating that "any person who suffers a financial loss as the result of another willfully engaging in an unfair trade practice may recover treble damages" under the UPA). However, as Defendant points out, the evidence presented at trial established that (1) property damage or hazard insurance was a requirement of the loan, as disclosed in the promissory note; (2) Plaintiffs wished to purchase the insurance from Defendant; (3) the price of the insurance was accurately disclosed to them; and (4) they received the policy for which they were charged. Plaintiffs do not directly respond to Defendant's claim of lack of causation or actual injury, asserting only that "Defendant cannot be allowed to profit from its own wrongdoing." We hold that the evidence is insufficient to establish that Plaintiffs sustained any actual injury as a result of the deceptive practice in question, and therefore reverse the award of damages for the sale of insurance.

{26} Defendant also challenges the award of damages under the UPA for additional utility charges, inconvenience, and aggravation arising from the defects in the mobile home. During trial, Plaintiffs stipulated, for purposes of resolving an evidentiary dispute, that their breach of warranty claim based on defects in the mobile home was separate from their UPA claim concerning the sales transaction itself. Moreover, when introducing testimony concerning the damages resulting from the defects in the mobile home, counsel for Plaintiffs argued that it was relevant to their breach of warranty claim. The trial court, however, awarded only equitable relief on Plaintiffs' breach of warranty claim. In light of Plaintiffs' stipulation during trial that their breach of warranty claim is in no way "subsumed into the [UPA]," we hold that the trial court erred in awarding damages under the UPA for the additional utility charges, inconvenience, and aggravation arising from the defects in the home. We, however, note that the award of UPA damages for Defendant's failure to deliver a home with certain custom features ordered by Plaintiffs remains unaffected, as those damages appear to relate to promises made by Defendant during the sale itself and thus are properly awarded under the UPA. Thus, we reverse the award of actual and treble damages related to the sale of insurance, and the award of actual and treble damages related to the additional utility charges, inconvenience, and aggravation.

Punitive Damages

{27} The purpose of punitive damages is to punish and deter wrongful conduct and thus requires evidence of a culpable mental state, combined with conduct that is willful, wanton, malicious, reckless, oppressive, or fraudulent. *Enriquez v. Cochran*, 1998–NMCA–157, ¶ 121, 126 N.M. 196, 967 P.2d 1136. In New Mexico, a principal may be held vicariously liable for punitive damages when it "has in some way authorized, ratified, or participated in the wanton, oppressive, malicious, fraudulent, or criminal acts of its agent." *Albuquerque Concrete Coring Co. v. Pan Am World Servs., Inc.*, 118 N.M. 140, 143, 879 P.2d 772, 775 (1994). "A corporation can ratify the acts of its agents by acquiescence in or acceptance of the unauthorized acts." *Id.* at 144, 879 P.2d at 776. However, the ratification must be accompanied by the principal's knowledge of the circumstances surrounding the agent's misconduct. *Id.; see also Beneficial Fin. Co. of N.M. v. Alarcon*, 112 N.M. 420, 424, 816 P.2d 489, 493 (1991) ("A party held to a ratification shall have had full knowledge of all the material facts concerning the transaction."); *Romero v. Bank of the S.W.*, 2003–NMCA–124, ¶ 19, 135 N.M. 1, 83 P.3d 288 (explaining that ratification occurs only when there is "full knowledge of all the material facts" and an "intent to ratify" the transaction, "either expressly or by conduct").

{28} Defendant claims that the trial court erred in imposing punitive damages because the evidence was inadequate to prove corporate misconduct by Defendant. The trial court awarded punitive damages on the basis that Defendant ratified the actions of Pike and Lancaster. The trial court found that Defendant ratified their conduct by (1) paying Pike his full commission on the sale of the mobile home to Plaintiffs, (2) not immediately terminating Lancaster upon discovering his and Pike's misconduct, (3) authorizing the construction of a fence in place of a garage on Plaintiffs' property without Plaintiffs' permission, and (4) advancing positions in the lawsuit that deny wrongdoing or responsibility.

{29} We conclude that the evidence upon which the trial court relied does not support ratification of Pike's and Lancaster's misconduct by Defendant. In urging us to affirm the trial court's award, Plaintiffs point to evidence that the paperwork submitted by the local sales representative and manager contained discrepancies and irregularities that should have been detected and investigated by Defendant, but were not. However, as a matter of law, inaction alone is not sufficient to establish ratification of an agent's conduct; ratification must be founded on knowledge of all facts material to the agent's unauthorized action, and not on negligence in failing to discover them. *See Albuquerque Concrete Coring Co.*, 118 N.M. at 144, 879 P.2d at 776 (explaining that something more than the defendant's "receipt of a document which supposedly represents culpable conduct must be shown to establish corporate complicity through authorization, ratification, or participation"); *Beneficial Fin. Co. of N.M.*, 112 N.M. at 424, 816 P.2d at 493; *Romero*, 2003–NMCA–124, ¶ 19, 135 N.M. 1, 83 P.3d 288. In this case, there is no evidence that Defendant had any knowledge of the circumstances surrounding the agents' fraud when the documentation in question was submitted and reviewed by the Albuquerque and Houston offices, or when the sales commission was paid to Pike.

{30} In support of ratification, Plaintiffs also rely on evidence that Defendant was aware of the problem of falsification in the mobile home industry, but ignored warnings by the Albuquerque zone office that local sales offices should not be allowed to submit financing documents directly to lenders, but should be required to have them reviewed and verified by the zone office. Although Defendant did not adopt the recommendation of the Albuquerque zone office, it is undisputed that Defendant instituted an alternative method of verification of sales information through a central finance office in Portland. Moreover, in response to the problems in the mobile home industry, Defendant had adopted a corporate policy expressly prohibiting dishonest acts by sales personnel, and in 1999 convened a nationwide "Call to Integrity" meeting of managers to specifically address the problem of fraud in the industry. In light of this evidence in the record, which appears to be undisputed, we conclude that Defendant's decision not to adopt the particular policy recommended by the Albuquerque zone office does not rise to the level of corporate indifference necessary to justify an award of punitive damages. *See McNeill v. Rice Eng'g & Operating, Inc.*, 2003–NMCA–078, ¶ 40, 133 N.M. 804, 70 P.3d 794 ("We know of no precedent, and Plaintiffs cite none, which requires companies to take every means available, no matter how costly or how feasible to avoid any potential economic injury, even if it knows or has reason to know such may be the consequence."); *cf. Clay v. Ferrellgas, Inc.*, 118 N.M. 266, 269–70, 881 P.2d 11, 14–15 (1994) (affirming award of punitive damages where company's negligent installation of propane conversion system in car, together with pattern of safety regulation violations by company, in the face of serious risks of danger, amounted to corporate indifference and reckless conduct).

{31} The trial court also based ratification on its finding that, when the fraud in the transaction was revealed to Defendant, the district manager directed the local sales manager to have a fence, instead of a garage, built on Plaintiffs' property without their permission. However, we are unable to find support in the record for the trial court's finding. Our review of the record indicates as follows. When Plaintiffs reported the defects in the home to Defendant, it sent district manager Kasprzyk to Las Cruces to

investigate. Upon inspecting Plaintiffs' home, Kasprzyk acknowledged the defects and poor condition of the home and arranged for repairs, which were apparently never done. Then when the falsification of Plaintiffs' loan first came to light, Kasprzyk again went to Las Cruces and saw that, contrary to the loan documents, there was no garage on Plaintiffs' property, which was too small to even fit a garage. After being apprised of the situation, the zone vice-president, Jim Gifford, asked Kasprzyk to find out what Plaintiffs wanted instead of the garage. Kasprzyk relied on Lancaster, as the local manager, to address the matter with Plaintiffs. During that meeting, Plaintiffs expressed a desire to use the money allocated to the garage to build a concrete slab, porch, and fence on the property instead. Without obtaining Plaintiffs' permission, Lancaster arranged to have a fence, which was worth less than $1,000, built on Plaintiffs' property. There is no evidence in the record, however, that this unauthorized act was done at Kasprzyk's direction. Rather, Kasprzyk believed that an agreement had been reached with Plaintiffs to substitute the fence for the garage. Where the district manager and the zone vice-president had no knowledge of the unilateral actions of Lancaster, and sought only to settle the controversy with Plaintiffs, we cannot conclude that it was reasonable to find ratification. *See Albuquerque Concrete Coring Co.*, 118 N.M. at 143, 879 P.2d at 775.

{32} The trial court also found that Defendant's failure to immediately terminate Pike and Lancaster amounted to ratification. However, it is undisputed that Pike was terminated by Defendant approximately two months later based upon similar misconduct in another sale, and that Gifford ordered that Lancaster be terminated after an investigation of his misconduct in this transaction, but Lancaster resigned before he could be fired. Thus, the cumulative conduct of employees in this case does not support a finding of ratification by Defendant. *See Clay*, 118 N.M. at 270, 881 P.2d at 15 (recognizing that culpable mental state required for award of punitive damages may be based on the cumulative conduct of employees). Rather, the evidence in the record supports Defendant's description of Pike and Lancaster as "renegade employees" whose egregious actions were neither ratified nor condoned by Defendant, but once discovered and investigated, were reasonably dealt with by their supervisors. *See Gillingham v. Reliable Chevrolet*, 1998–NMCA–143, ¶ 20, 126 N.M. 30, 966 P.2d 197 (explaining that "in order to impose punitive damages against an employer, its conduct must be found to be willful, reckless, or wanton, *apart from the conduct of its employee*" (emphasis added)); *cf. Coates v. Wal–Mart Stores, Inc.*, 1999–NMSC–013, ¶ 48, 127 N.M. 47, 976 P.2d 999 (upholding award of punitive damages against employer for intentional infliction of emotional distress where the conduct of one employee was witnessed and condoned "by high level supervisory personnel").

{33} In imposing punitive damages, the trial court also relied on Defendant's litigation conduct or defense of this lawsuit. New Mexico case law, however, does not appear to recognize a principal's litigation conduct as a basis for ratification for purposes of determining punitive damages. *See Albuquerque Concrete Coring Co.*, 118 N.M. at 144, 879 P.2d at 776 (refusing to recognize breach of contract and party's defense of contract claim "to the very end" as basis for punitive damages); *Burguete v. G.W. Bond & Bro. Mercantile Co.*, 43 N.M. 97, 105, 85 P.2d 749, 754–55 (1938) (indicating that opposing party's claims in litigation did not establish ratification since unresolved factual issues were for the court to decide); *In re Estate of Duncan*, 2002–NMCA–069, ¶ 25, 132 N.M. 426, 50 P.3d 175 (stating that the personal representative's decision to litigate issues in estate matter did not amount to ratification of lease since litigation itself was intended to sort out respective interests of the parties), *rev'd on other grounds, In re Estate of Duncan*, 2003–NMSC–013, ¶¶ 1, 24, 133 N.M. 821, 70 P.3d 1260. Thus, we decline to treat Defendant's position in this lawsuit as a basis for finding ratification by Defendant.

{34} Finally, Plaintiffs argue that the award of punitive damages should be affirmed because Lancaster, as local sales manager, was employed in a managerial capacity. In New Mexico, punitive damages may be imposed upon a principal if "the

agent was employed in a managerial capacity and was acting in the scope of employment." *Albuquerque Concrete Coring Co.*, 118 N.M. at 145, 879 P.2d at 777 (internal quotation marks and citations omitted). This theory, however, was not specifically included in Plaintiffs' requested findings and conclusions, and was not clearly raised by Plaintiffs until their response to Defendant's motion to amend judgment. *See Famiglietta v. Ivie–Miller Enters.*, 1998–NMCA–155, ¶ 21, 126 N.M. 69, 966 P.2d 777 (declining to review argument not made below). In imposing punitive damages, the trial court explicitly relied on Defendant's ratification of its employees' misconduct, and not the managerial capacity rule. An appellate court will not affirm the ruling of the trial court on a ground not relied upon by the trial court if doing so would be unfair to the appellant. *Meiboom v. Watson*, 2000–NMSC–004, ¶ 20, 128 N.M. 536, 994 P.2d 1154; *Pinnell v. Bd. of County Comm'rs of Santa Fe County*, 1999–NMCA–074, ¶ 14, 127 N.M. 452, 982 P.2d 503 (explaining that an appellate court will not assume the role of the trial court and delve into fact-dependent inquiries when opposing party has not had an opportunity to develop record in response and would therefore be prejudiced). Thus, we decline to address whether the managerial capacity rule applies under the facts of this case.

{35} We reverse the trial court's award of punitive damages against Defendant based on insufficiency of the evidence to support a finding of ratification by Defendant. Although an appellate court is required to view the evidence in the light most favorable to the prevailing party and indulge all reasonable inferences in support of the judgment, *Sunwest Bank of Albuquerque, N.A. v. Daskalos*, 120 N.M. 637, 639, 904 P.2d 1062, 1064 (Ct.App.1995), we conclude that no reasonable view of the evidence in this case supports a finding of ratification by Defendant. In light of our reversal of the punitive damages award, we do not address Plaintiffs' claim on cross-appeal that the trial court erred in reducing the award.

Dismissal of Defendant's Counterclaim Without Prejudice

{36} Defendant argues that the trial court erred in dismissing, without prejudice, its counterclaim to collect on the promissory note signed by Plaintiffs. At the close of the evidence, Plaintiffs moved for judgment on the counterclaim on the ground that Defendant failed to produce the original note and thus did not satisfy its burden of proof on the counterclaim. *See* NMSA 1978, § 55–3–308(a) (1992). They argued that because Defendant was not the original holder of the note, it was required to prove possession of the original note in order to collect payment, relying on the Arkansas case of *McKay v. Capital Resources Co.*, 327 Ark. 737, 940 S.W.2d 869, 871 (1997). Defendant argued below, and continues to argue on appeal, that Plaintiffs waived objection to the failure to produce the original note because the issue was not raised until the close of trial, and Plaintiffs had previously stipulated to the admissibility of all exhibits, including a copy of the note. Although Defendant admitted that it did not have the original note at trial, it allegedly obtained possession of the original note from Lender when it later moved for reconsideration. We agree that Plaintiffs waived any objection to the non-production of the original note at trial.

{37} Plaintiffs do not respond directly to Defendant's claim of waiver, but argue only that Defendant failed to meet its evidentiary burden under the Uniform Commercial Code. However, in a collection action, the failure to produce the original note or instrument may be waived or excused by stipulation or admission of the parties. *Recreation Servs., Inc. Defined Benefit Plan v. Utah Mortgage Co.*, 720 F.Supp. 124, 125 (N.D.Ill. 1989); *see also Tassock v. Hogan*, 272 Or. 694, 538 P.2d 910, 912 (1975).

{38} In this case, Plaintiffs admitted in their answer to the counterclaim that they signed the note. They admitted that the note was assigned to Defendant and that Defendant was the current owner of the note. The pretrial order does not indicate that Plaintiffs challenged Defendant's status as the owner or holder of the note. Moreover, unlike the situation in *McKay*, 940 S.W.2d at

869–70, Plaintiffs in this case stipulated to the introduction and use of the copy of the note in evidence at the start of the trial, acknowledging that it was an "original exhibit." When Plaintiffs moved for dismissal of the counterclaim at the close of evidence, Defendant and even the trial judge were surprised by Plaintiffs' objection. Under these circumstances, we conclude that Plaintiffs waived any challenge to Defendant's failure to produce the original promissory note. *See Recreation Servs., Inc. Defined Benefit Plan*, 720 F.Supp. at 125; *Tassock*, 538 P.2d at 912; *cf. Apodaca v. AAA Gas Co.*, 2003–NMCA–085, ¶ 58, 134 N.M. 77, 73 P.3d 215 (noting that party's contention on appeal that the opposing party failed to authenticate the file introduced into evidence ignores the fact that the party stipulated to the file's authenticity). We therefore reverse and remand for further proceedings on Defendant's counterclaim.

{39} Because we reverse on the basis of waiver, we need not address Defendant's remaining challenge to the dismissal of the counterclaim, which was admittedly not preserved below. We note that Defendant further argues that the trial court erred in ruling, following the dismissal of the counterclaim, that Defendant forfeited interest on the promissory note pursuant to NMSA 1978, § 56–8–9(D) (1980). Defendant admits that this issue was not raised below, but argues that it is an issue of general public interest which may be excluded from the preservation requirement. We disagree. Defendant's issue, which pertains to the particular terms of the financing in this case, is not likely to affect the public at large or a great number of cases and litigants in the near future. *See Azar v. Prudential Ins. Co. of Am.*, 2003–NMCA–062, ¶ 28, 133 N.M. 669, 68 P.3d 909. Thus, the public interest exception does not apply, and we decline to reach Defendant's argument raised for the first time on appeal. Finally, because we reverse and remand on Defendant's counterclaim, we need not address Plaintiffs' contention on cross-appeal that the counterclaim should have been dismissed with prejudice.

Award of Attorney Fees

{40} Defendant argues that the trial court erred in determining the amount of attorney fees to award to Plaintiffs under the UPA and the Insurance Code. The trial court awarded fees of approximately $80,000 to Plaintiffs. Defendant claims that the trial court failed to adequately apportion counsel's efforts between Plaintiffs' UPA claim and their other, non-fee generating claims. Specifically, Defendant contends that the trial court improperly awarded Plaintiffs attorney fees for their claims related to (1) the unlicensed sale of insurance under the Insurance Code, (2) the violation of statutory limits on interim construction loan charges, and (3) punitive damages against Defendant. Defendant acknowledges that it did not raise below its argument that Plaintiffs are not entitled to attorney fees under the Insurance Code. Because this issue was not preserved for review, we do not consider whether attorney fees were improperly awarded under the Insurance Code. *See* Rule 12–216(A); *Woolwine*, 106 N.M. at 496, 745 P.2d at 721 ("To preserve an issue for review on appeal, it must appear that [the] appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court.").

{41} "The trial court has broad discretion in setting attorney fees, and an award will not be reversed unless there is an abuse of discretion." *Robertson*, 2004–NMCA–056, ¶ 48, 135 N.M. 641, 92 P.3d 653. "A trial court abuses its discretion when its decision is contrary to logic and reason." *Roselli v. Rio Cmtys. Serv. Station, Inc.*, 109 N.M. 509, 512, 787 P.2d 428, 431 (1990).

{42} In awarding attorney fees to Plaintiffs, the trial court entered, in part, the following findings:

5. The litigation of this entire case centered around [Defendant's] misrepresentations.

6. The same conduct which pertained to the fraud claims also was the conduct that violated the [UPA].

7. All of the time and work performed by Plaintiffs' attorneys proving their fraud claim also was performed in proving the [UPA] claim.

8. The time and work performed by Plaintiffs' attorneys, proving entitlement to punitive damages under the fraud claim, also was performed in proving the entitlement to treble damages for willful [UPA] claim.

9. The time and work Plaintiffs' counsel spent litigating the arbitration issue pertained to all claims, including the [UPA] claim.

10. No additional time was spent on the arbitration issue that did not include the work spent on the [UPA] claim.

11. In their fee application, Plaintiffs' counsel already deleted the time they spent working on the breach of warranty claim, which was not compensable.

12. The commission of unfair trade practices was an element of the usury claim that required presentation of evidence at trial. Plaintiffs' success in proving the violations of the [UPA] was directly related to their success in prevailing under the New Mexico usury statute.

13. A portion of the work of Plaintiffs' counsel on their usury claim, primarily their work on the legal issues, is not compensable.

14. The portion of the work of Plaintiffs' counsel, on the Truth in Lending Act claim in the original complaint, is not compensable.

{43} When a plaintiff asserts a UPA claim along with a number of other distinct claims, the trial court must "separate the claims and determine the amount of time spent on each." *Jaramillo v. Gonzales*, 2002–NMCA–072, ¶ 41, 132 N.M. 459, 50 P.3d 554. Even when "some facts are common to all the claims," the trial court must still "separate the claims and the proofs required for each" to the extent possible. *Id.* ¶ 40. Thus,

> when the attorney's services are rendered in pursuit of multiple objectives, some of which permit an award of fees and some of which do not, the court must make a reasoned estimate, based either on evidence or on its familiarity with the case at trial, of the proportion or quantum of services that are compensable and award fees only for those services.

Economy Rentals, Inc. v. Garcia, 112 N.M. 748, 765, 819 P.2d 1306, 1323 (1991).

{44} We conclude that the trial court met its obligation of separating the claims and estimating with reason the proportion of services compensable under the UPA based on the evidence submitted and its familiarity with the case. Defendant claims that the trial court erred in awarding fees related to work done under the UPA that promoted the success of Plaintiffs' usury claim, which is not compensable. The trial court, however, may properly award fees for UPA work that overlaps factually with another claim. *See Jaramillo*, 2002–NMCA–072, ¶ 40, 132 N.M. 459, 50 P.3d 554. Here, the trial court found that proof of an unfair trade practice "was an element of the usury claim that required presentation of evidence at trial" and deducted from its fee determination a portion of the time spent on other aspects or legal issues related to the usury claim. We defer to the trial court's reasoned estimate of the amount of work attributable to the UPA in this regard.

{45} Defendant also argues that the trial court erred in finding that the proof required for punitive damages under common law fraud is the same as the proof required for treble damages under the UPA. According to Defendant, because entitlement to punitive damages requires an additional showing of Defendant's vicarious liability, the trial court's award of fees under the UPA should be reduced accordingly. We, however, have difficulty discerning any appreciable difference in the levels of proof between the two claims in this case, particularly in light of our determination that the evidence of Defendant's ratification is insufficient. Moreover, as this Court has pointed out in the past, "the same conduct that violates the UPA may also form the basis of another cause of action that permits an award of punitive damages." *McLelland v. United Wisconsin Life Ins. Co.*, 1999–NMCA–055, ¶ 11, 127 N.M. 303, 980 P.2d 86. Thus, we cannot say that the trial court's finding was "contrary to logic or reason." *Roselli*, 109 N.M. at 512, 787 P.2d at 431. We therefore affirm the award of attorney fees.

{46} Nonetheless, because we reverse the award of certain damages under the UPA as discussed above, we remand to the trial court with instructions to redetermine the amount of attorney fees to be awarded Plaintiffs without counting any time and work required of counsel on the unsuccessful portions of the UPA claim. *See Klinksiek v. Klinksiek*, 2005–NMCA–008, ¶ 29, 136 N.M. 693, 104 P.3d 559 (recognizing that remand for reconsideration of attorney fee award is appropriate when the trial court's order is reversed in part); *Rabie v. Ogaki*, 116 N.M. 143, 149, 860 P.2d 785, 791 (Ct.App.1993). The parties have apparently stipulated that remand is appropriate in such an event. Finally, in light of our reversal in part of the UPA claim, we deny Plaintiffs' request for appellate attorney fees.

CONCLUSION

{47} The judgment and orders of the trial court are affirmed in part and reversed in part, and the case is remanded for further proceedings in accordance with our opinion.

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

WE CONCUR: CYNTHIA A. FRY and CELIA FOY CASTILLO, Judges.

2005-NMCA-087

115 P.3d 816

Anthony ABEYTA, Worker–Appellee,

v.

BUMPER TO BUMPER AUTO SALVAGE and CNA Insurance Company, Employer/Insurer–Appellants.

No. 24,938.

Court of Appeals of New Mexico.

June 2, 2005.

John R. Westerman, Law Offices of John R. Westerman, Chartered, Farmington, NM, for Appellee.

Richard M. Padilla, Hatch, Allen & Shepherd, P.A., Albuquerque, NM, for Appellants.

OPINION

PICKARD, Judge.

{1} Employer appeals from an order of the worker's compensation judge (WCJ), which ordered Employer to pay 100% of Worker's attorney fees. The WCJ ordered Employer to pay 100% of Worker's attorney fees because the final compensation order that was awarded to Worker was worth a greater amount than Worker's initial offer for compensation. On appeal, Employer argues that the WCJ erred in awarding Worker 100% of his attorney fees because (1) Worker's initial offer was "ambiguous," (2) Worker failed to show that his offer was less than the amount awarded in the final compensation order, and (3) the circumstances of this case, including that Worker's attorney spent minimal time during the final settlement negotiations, are such that as a matter of law Worker should not have been awarded 100% of his attorney fees. We conclude that Worker's offer for compensation was not ambiguous. We also conclude that Worker's offer was less than the amount awarded in the final compensation order, which permitted the WCJ to award Worker 100% of Worker's attorney fees to be paid by Employer. Finally, we conclude that the WCJ did not abuse its discretion in awarding Worker 100% of his attorney fees to be paid by Employer. Accordingly, we affirm the decision of the WCJ.

FACTS AND BACKGROUND

{2} On January 6, 2000, Worker injured his back in the course and scope of his employment. After the injury to his back, Worker began to see Employer's health care provider, Dr. Frederick Mosley. In October 2000, Worker elected to change his health care provider and began to see Dr. Erich Marchand, although he continued to be evaluated periodically by Dr. Mosley. Worker began to receive temporary total disability (TTD) benefits from the date of his injury. However, both Worker and Employer continued to negotiate a final settlement regarding the actual TTD rate that Worker was owed and the amount of medical benefits to be paid to Worker.

{3} In March 2003, Worker submitted an offer to allow a compensation order to be taken. The offer included a TTD rate of $260 per week and a provision stating that Worker would not assert any claim for payment of medical bills for treatments Worker received in late 2002. The offer also included the following provision:

2. TTD benefits paid for the time period from the date of injury until . . . [maxi-

mum medical improvement (MMI)] as determined by Dr. Marchand.

{4} Employer rejected the offer because it claimed that paragraph two of the offer was too ambiguous. Subsequently, Employer submitted a counteroffer. Employer's counteroffer also included the TTD rate of $260 per week, which was the rate specified in Worker's offer. However, Employer's counteroffer differed from Worker's offer in two areas. First, Employer agreed in its counteroffer to pay for Worker's medical bills that Worker incurred in late 2002. Second, unlike Worker's offer, which specified that Dr. Marchand would determine Worker's MMI date, Employer's counteroffer did not provide for a specific doctor to set the MMI date, although it did provide that TTD would be paid until the MMI date.

{5} After Employer submitted its counteroffer, Employer and Worker continued to have discussions regarding the offers. Worker disputed the TTD rate of $260 per week in Employer's counteroffer. Employer subsequently withdrew its initial counteroffer and submitted a second counteroffer. Employer's second counteroffer included a higher TTD rate of $268.87 per week. On June 19, 2003, the WCJ entered a compensation order based on a stipulation of the parties. The stipulated compensation order stated that Worker accepted Employer's second counteroffer, and the WCJ adopted that offer as its compensation order.

{6} After the WCJ entered the final compensation order, Worker filed an application to the WCJ, in which Worker requested that Employer pay 100% of Worker's attorney fees. Worker based his application for attorney fees on NMSA 1978, § 52–1–54(F)(4) (2003), which reads as follows:

> F. After a recommended resolution has been issued and rejected, ... the ... claimant may serve upon the opposing party an offer to allow a compensation order to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued, subject to the following:
>
> ...
>
> (4) if the worker's offer was less than the amount awarded by the compensation order, the employer shall pay one hundred percent of the attorney fees to be paid the worker's attorney, and the worker shall be relieved from any responsibility for paying any portion of the worker's attorney fees.

Worker's application claimed that the final compensation order exceeded Worker's offer and, therefore, pursuant to Section 52–1–54(F)(4) he was entitled to have Employer pay 100% of his attorney fees. In its response to Worker's application, Employer argued that Worker's offer was too ambiguous to constitute an offer under Section 52–1–54(F)(4). Furthermore, Employer asserted that the final compensation order did not exceed Worker's offer because the final order did not allow Worker to determine the health care provider who would determine Worker's MMI date.

{7} The WCJ, after hearing oral arguments regarding Worker's application, found that Worker's offer was not so ambiguous as to render the offer unenforceable. Furthermore, the WCJ also found that the final compensation order exceeded Worker's offer by awarding Worker a higher TTD rate, as well as providing that Employer would pay Worker's medical bills incurred in late 2002. Thus, the WCJ granted Worker's application and entered an order directing Employer to pay 100% of Worker's attorney fees. Employer filed a motion to have the WCJ reconsider this order. After hearing arguments regarding Employer's motion for reconsideration, the WCJ denied the motion. In the order granting Worker 100% of his attorney fees and denying Employer's motion for reconsideration, the WCJ provided that Employer and Worker had stipulated that a reasonable attorney fee in this case was $11,750.

DISCUSSION

{8} We begin our analysis of this case by addressing Employer's contention that Worker's offer was so ambiguous as to render the offer invalid. We then proceed to analyze Employer's contention that the final compensation order did not exceed Worker's offer. We conclude with a short discussion concerning whether the fee shifting provision of Section 52–1–54(F)(4) should apply in this

case even though Employer worked diligently toward reaching a settlement with Worker.

Worker's Offer to Allow a Compensation Order to Be Taken Was Not Ambiguous

{9} Employer argues that it should not be responsible for 100% of Worker's attorney fees because Worker's offer to allow a compensation order to be taken was invalid due to an ambiguity within the offer. Specifically, Employer argues that paragraph two of Worker's offer was ambiguous because it did not specify the actual date that Worker would reach MMI. Employer argues that an ambiguous offer is not the type of offer contemplated by Section 52–1–54(F)(4) and therefore Employer should not be held to the fee shifting provisions of the statute. We review a WCJ's order awarding attorney fees for an abuse of discretion; however, the review of the application of law to the facts is conducted de novo. *Hise v. City of Albuquerque,* 2003–NMCA–015, ¶ 8, 133 N.M. 133, 61 P.3d 842. Therefore, an abuse of discretion can include a discretionary decision that is premised on a misapplication of the law. *Id.*

{10} Black's Law Dictionary defines "ambiguity" as "[a]n uncertainty of meaning or intention." Black's Law Dictionary 88 (8th ed.2004). Here, paragraph two of Worker's offer clearly set out Worker's intention and meaning. Worker intended Dr. Marchand to have sole control over determining Worker's MMI date and for the date to be set some time in the future. Employer asserts that paragraph two was ambiguous because Worker's MMI date was not specified. Yet, there is no basis for setting an MMI date if the healing process is still continuing. *Hall v. Dade County Sch. Bd.,* 492 So.2d 768, 770 (Fla.Dist.Ct.App.1986). Employer's second counteroffer, which eventually was adopted by the WCJ as the final compensation order, also did not include a specified MMI date. Furthermore, Employer's counteroffer acknowledged that Worker's healing process was continuing by providing that Dr. Marchand should determine Worker's MMI date after Worker completed "his course of prescribed physical therapy of approximately six (6) weeks." Yet, the counteroffer also provided that Worker's MMI date could be determined by a doctor other than Dr. Marchand. We conclude that Worker's offer was clear as to Worker's meaning and intent regarding the issues of the determination of Worker's MMI date and which doctor would determine the date.

{11} Our appellate courts have held that a document is ambiguous if it is susceptible to more than one reasonable interpretation. *Levenson v. Mobley,* 106 N.M. 399, 401, 744 P.2d 174, 176 (1987). However, in this case, the only reasonable interpretation of paragraph two is that Worker offered Employer a settlement based on Dr. Marchand having sole control of determining Worker's MMI date and that Dr. Marchand would determine Worker's MMI date at some time in the future. Although we acknowledge that Worker's offer posed a level of risk for Employer that Employer may not have been willing to take, we conclude that the language of the offer was not susceptible to more than one interpretation and therefore not ambiguous.

{12} Employer relies on *Aguilar v. Peñasco Independent School District No. 6,* 100 N.M. 625, 629, 674 P.2d 515, 519 (1984), as support for the proposition that in a worker's compensation case an ambiguous offer may be found to be invalid. Employer argues that in *Aguilar* the Supreme Court ruled that because of an ambiguity in the employer's offer of settlement, it could not be held that Worker had failed to collect compensation in excess of the amount offered. *Id.* This case, however, is distinguishable from *Aguilar.* In *Aguilar,* the Court held that the employer's offer of settlement was ambiguous, whereas in the present case, we have already determined that Worker's offer was not ambiguous. *Id.* Furthermore, in *Aguilar,* the ambiguity concerned the combining of medical expenses and attorney fees into one lump sum, which led to confusion as to what funds were earmarked for medical expenses as opposed to what funds were set aside for attorney fees. *See id.* In the present case, the language that Employer argues is ambiguous is simply a term of Worker's offer that Worker found most favorable to him and Employer found too risky to undertake.

{13} In *Leo v. Cornucopia Restaurant*, 118 N.M. 354, 362, 881 P.2d 714, 722 (Ct.App. 1994), we held that the purpose of Section 52–1–54(F) is to "encourage settlement of compensation cases by authorizing both parties to make offers of judgment, and by providing a financial sanction against a party that rejects an offer of judgment and fails to obtain a more favorable outcome at the formal hearing." We have since held that a compensation order entered pursuant to a settlement can be utilized when evaluating whether an offer of judgment has been met under Section 52–1–54(F). *Hise*, 2003–NMCA–015, ¶¶ 10–11, 133 N.M. 133, 61 P.3d 842. We hold that the purpose of Section 52–1–54(F) would be undercut by a determination that parties cannot enter into settlements where the MMI date is to be determined at a later date due to a worker's continuing healing process. Therefore, we rule that the WCJ did not err when he ruled that Worker's offer for a compensation order to be taken was not ambiguous and that Worker's offer was a valid offer pursuant to Section 52–1–54(F)(4).

The WCJ Did Not Err When He Determined that the Final Compensation Order Exceeded Worker's Offer for a Compensation Order to Be Taken

{14} Employer argues that the final compensation order did not exceed Worker's offer to allow a compensation order to be taken. Specifically, Employer contends that Worker's offer sought to gain control of which doctor would determine Worker's MMI date and that the final compensation order did not provide Worker with as much control. We agree with Employer that the final compensation order did not give Worker control of choosing the doctor who would determine Worker's MMI date; however, we disagree with Employer that the final compensation order in this case did not exceed Worker's offer. Although Worker gained less control of who would determine his MMI date in the final compensation order, we base our conclusion that the final compensation order exceeded Worker's offer on the provisions in the final order that awarded Worker the cost of medical bills that he incurred in late 2002 and that increased the compensation rate. Worker's offer did not include a claim for Worker's medical bills from late 2002. Our Supreme Court has held that past medical expenses are compensation for purposes of determining an award of attorney fees. *Bd. of Educ. v. Quintana*, 102 N.M. 433, 435, 697 P.2d 116, 118 (1985). Here, Worker's medical bills from late 2002 added up to $4,750.69. Because Worker's offer did not assert a claim for medical benefits, the final compensation order exceeded Worker's offer by the full $4,750.69.

{15} In addition, the TTD rate awarded to Worker in the final compensation order exceeded the TTD rate in Worker's offer for a compensation order to be taken. Worker's offer included a TTD rate of $260 per week, while the final compensation order awarded Worker a TTD rate of $268.87 per week. Worker below calculated the difference in these rates to be over $4,000 over the period of disability without dispute from Employer. Thus, the final compensation order exceeded Worker's offer by not only increasing Worker's TTD rate, but also by awarding Worker $4,750.69 in past medical bills.

{16} Because of these two amounts, the WCJ stated that Worker had "beat" the prior offer rejected by Employer. We understand Employer's position to be that these amounts pale in comparison to the victory Employer won by getting control over the MMI date. But the facts are that Dr. Marchand predicted an MMI date at a deposition taken two days before Worker's offer, and by the time of the hearing on attorney fees, it turned out that the MMI date was as Dr. Marchand had predicted. Under these circumstances, the WCJ could have viewed the MMI date dispute as a draw. Therefore, the WCJ could properly have found that the final compensation order exceeded Worker's offer to allow a compensation order to be taken.

Although Employer Worked Diligently to Reach a Settlement with Worker and Worker's Attorney Did Not Spend the Bulk of His Time During Settlement Negotiations, the Fee Shifting Provision of Section 52–1–54(F)(4) Is Still Applicable to Employer under the Circumstances in this Case

{17} Employer argues that the WCJ erred when he ordered Employer to

pay 100% of Worker's attorney fees because Worker failed to show that his attorney fees had increased between Worker's offer for a compensation order to be taken and Employer's second counteroffer. Citing *Woodson v. Phillips Petroleum Co.*, 102 N.M. 333, 339, 695 P.2d 483, 489 (1985), Employer contends the WCJ should have considered the time and effort expended by Worker's attorney in determining whether to require Employer to pay 100% of Worker's attorney fees. We disagree. The time and effort expended by an attorney is relevant to the amount of an attorney fee award, not to the fee-shifting scheme in Section 52–1–54(F). *See Woodson,* 102 N.M. at 339–40, 695 P.2d at 489–90 (holding that amount of attorney fee award was reasonable in light of the factors governing such an award, including the time spent by the worker's attorney).

{18} Employer claims that the record in this case indicates that between Worker's offer and Employer's second counteroffer, it was the effort of Employer that led to a settlement with Worker. Employer directs our attention to the holding in *Leo,* which concluded that the purpose of Section 52–1–54(F) was to encourage settlement. *Leo,* 118 N.M. at 362, 881 P.2d at 722. Therefore, Employer contends that because Employer was the party that attempted to effectuate a settlement in this case, we should reverse the WCJ's order awarding Worker 100% of his attorney fees to be paid by Employer as being inconsistent with the holding in *Leo.*

{19} Although we recognize that Employer worked in good faith with Worker to reach a settlement, we do not conclude that Employer's counteroffers were the only offers submitted that attempted to reach a settlement. Worker submitted an unambiguous, reasonable offer, which attempted to settle the case, albeit with terms favorable to Worker. Once Employer rejected Worker's offer, Employer became vulnerable to the fee shifting provision of Section 52–1–54(F)(4) if the final compensation order exceeded Worker's offer. Here, the final compensation order did exceed Worker's offer, and therefore the WCJ did not err in awarding Worker 100% of his attorney fees to be paid by Employer.

{20} We do not wish to be misunderstood as holding that the factors cited by Employer would not justify a WCJ's declining to award a worker 100% of his attorney fees under the circumstances of this case, where the facts relating to whether the amount Worker offered was less than the amount in the compensation order presented a close factual issue. Indeed, as the award of attorney fees in workers' compensation cases is discretionary, *Hise v. City of Albuquerque,* 2003–NMCA–015, ¶ 8, 133 N.M. 133, 61 P.3d 842, we believe it would have been well within the WCJ's discretion to consider Employer's reasonableness and the balance of what Worker gained during the settlement negotiations in the context of law that favors settlements, *see Leo,* 118 N.M. at 362, 881 P.2d at 722, and to have rejected Worker's request for 100% of his attorney fees. However, the question before us is not whether the circumstances of this case would have supported an opposite result. *See Hernandez v. Mead Foods, Inc.,* 104 N.M. 67, 71, 716 P.2d 645, 649 (Ct.App.1986), *limited on other grounds by Graham v. Presbyterian Hosp. Ctr.,* 104 N.M. 490, 492, 723 P.2d 259, 261 (Ct.App. 1986). It is whether the circumstances supported the WCJ's ruling. For all of the foregoing reasons, we cannot say that the WCJ erred as a matter of law.

CONCLUSION

{21} We affirm the order of the WCJ awarding Worker 100% of his attorney fees to be paid by Employer pursuant to Section 52–1–54(F)(4), and we remand the matter to the WCJ for proceedings on Worker's request for additional fees for this appeal.

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

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

2005-NMCA-088

115 P.3d 822

WILGER ENTERPRISES, INC., Plaintiff–Appellee,

v.

BROADWAY VISTA PARTNERS, a California Partnership; FHK Companies, a California Partnership; Nailman, Ltd., Co.; Edison Source d/b/a Edison Source Corp.; Sucon, Inc. d/b/a Suitt Contractor; KPT, Inc.; and Mid–State Erectors, Inc., Defendants–Appellants.

No. 24,747.

Court of Appeals of New Mexico.

June 6, 2005.

Julie J. Vargas, Hunt & Davis, P.C., Albuquerque, NM, for Appellee.

Robert A. Johnson, Johnson & Nelson, P.C., Albuquerque, NM, for Appellant Broadway Vista Partners.

David P. Gorman, Sheehan, Sheehan & Stelzner, P.A., Albuquerque, NM, for Appellant KPT, Inc.

Shay E. Meagle, Puccini & Meagle, P.A., Albuquerque, NM, for Appellant Sucon, Inc.

OPINION

VIGIL, Judge.

{1} Broadway Vista Partners (Owner) contends that the lien of Wilger Enterprises, Inc., (Contractor) is invalid because Contractor did not give Owner a written prelien notice of its right to claim a lien in the event of nonpayment under NMSA 1978, Section 48–2–2.1 (1993). We hold that Section 48–2–2.1 did not require Contractor to provide Owner with a prelien notice and affirm the district court order granting Contractor summary judgment on its complaint to foreclose its mechanic's lien.

BACKGROUND

{2} Owner and Furr's Supermarkets, Inc., agreed to build a shopping center on land owned by Owner in Albuquerque, New Mexico through the mechanism of a twenty-five year lease with options to renew for four additional periods of five years each. "As a material part of the consideration" to Owner, Furr's agreed to build a "48,000 square foot Furr's supermarket building together with sidewalks adjacent to the building, a loading dock and all on-site improvements." Furr's was also required to share in 71.11% of the costs for the "off-site improvements" which were to be installed by Owner. The "off-site improvements" Owner agreed to install included "traffic control devices, street paving, storm drains, curbs, curb cuts, gutters, median strips, sidewalks, street lights," and "necessary utilities to the property line of the Shopping Center." Since the lease provided that Owner would own the supermarket after Furr's constructed it, Owner agreed to reimburse Furr's for its costs to construct the supermarket up to a total of $3,017,522 in four periodic progress payments. During the construction, Furr's was to pay "interim rent" to Owner, which was adjusted upward as Owner installed the "off-site improvements" and made the periodic payments to Furr's. After construction was completed, Furr's was to pay rent to Owner plus "bonus rent," equal to one and one-half percent of Furr's gross sales each year that exceeded its gross sale during its fifth year of operation. The lease also required Furr's to purchase casualty and fire insurance during the lease term, naming Owner and Furr's as the insureds "as their respective interests may appear" and it also provided a formula for disbursing an award to the Owner and Furr's in the event of a total or partial condemnation of the premises.

{3} Furr's then contracted with Contractor to construct the supermarket. Before construction on the supermarket started, Furr's told Contractor that Owner was going to reimburse Furr's for the construction costs, which Contractor verified in a call to Owner. When Contractor sent Furr's its first pay request, Furr's asked Owner to make the progress payments directly to Contractor rather than reimbursing Furr's as specified in the lease. Everyone agreed. Under this arrangement, Owner paid the Contractor directly after Contractor submitted an application for payment to Owner, and the application was approved by the architect and the civil engineer hired by Furr's for the project. Owner made five payments to Contractor following this procedure. Owner refused to make two additional payments requested by Contractor because they would have resulted in Owner paying more than the $3,017,522 it was obligated to pay under its lease with Furr's.

{4} Contractor then recorded a Claim of Lien with the Bernalillo County Clerk and filed a complaint to foreclose its mechanic's lien on Owner's property to recover the amount due for its work on the supermarket. In ruling on cross-motions for summary judgment filed by Contractor and Owner, the district court granted Contractor's motion for summary judgment, and Owner appeals.

STANDARD OF REVIEW

{5} Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Rule 1-056(C) NMRA. The facts are not disputed. In particular, it is undisputed that Contractor never gave Owner a written prelien notice under Section 48-2-2.1. The issue presented is whether Contractor was required to provide Owner with a written prelien notice under Section 48-2-2.1 to have an enforceable mechanic's lien. We review this legal question de novo. *See Joslin v. Gregory*, 2003-NMCA-133, ¶ 6, 134 N.M. 527, 80 P.3d 464 (stating that application of a statute is a question of law when the facts are undisputed); *Blackwood & Nichols Co. v. N.M. Taxation & Revenue Dep't*, 1998-NMCA-113, ¶ 5, 125 N.M. 576, 964 P.2d 137 ("Construction of a statute is a question of law that we review de novo.").

DISCUSSION

{6} The prelien notice statute at Section 48-2-2.1(B) states:

> No lien of a mechanic or a materialman claimed in an amount of more than five thousand dollars ($5,000) may be enforced by action or otherwise unless the lien claimant has given notice in writing of his right to claim a lien in the event of nonpayment and that notice was given not more than sixty days after initially furnishing work or materials, or both, by either certified mail, return receipt requested, [f]ax with acknowledgement or personal delivery to:
>
> (1) the owner or reputed owner of the property upon which the improvements are being constructed; or
>
> (2) the original contractor, if any.

{7} However, a prelien notice does not have to be given to perfect "claims of liens made by mechanics or materialmen who contract directly with the original contractor" and an "original contractor" is defined as "a contractor that contracts directly with the owner." Section 48-2-2.1(A).

{8} Owner argues that Contractor's lien is unenforceable under the literal terms of the statute because Contractor failed to give Owner a written prelien notice of its right to claim a lien in the event of nonpayment as provided in the statute. Contractor responds that it is an "original contractor" and, properly construed, the statute does not require an "original contractor" to give an owner a prelien notice of its right to claim a lien in the event of nonpayment.

{9} We first determine whether Contractor is an "original contractor" under Section 48-2-2.1. Owner argues that because the written contract to build the Furr's supermarket was between Contractor and Furr's and not between Contractor and Owner, Contractor is not an "original contractor." We reject Owner's argument because nothing in the statutory definition of "original contractor" excludes a contract made by an owner with a contractor through an agent. *See Warshaw v. Pyms*, 266 So.2d 355, 357 (Fla.Dist.Ct.App.1972) ("An owner of real estate can become directly obligated to an engineer, for performance by the latter of services relating to his property, by a contract which is made with the engineer by the owner through an agent, as effectively as if the parties made such contract face-to-face."); *Armstrong v. Blackadar*, 118 So.2d 854, 861 (Fla.Dist.Ct.App.1960) ("Florida [law] does not preclude an owner of property from contracting through an agent for improvements to be made on his property so as to subject the property to a lien").

{10} Owner and Furr's were jointly engaged in the undertaking of constructing the supermarket for their mutual benefit. A joint venture "is generally considered to be a partnership for a single transaction," *Lightsey v. Marshall*, 1999-NMCA-147, ¶ 18, 128 N.M. 353, 992 P.2d 904 (internal quotation marks and citation omitted), and the relationship between Furr's and Owner established by the lease to construct the supermarket has the earmarks of a joint venture. "A joint venture exists when two or more parties (1) enter into an agreement, (2) to combine their money, property or time in the conduct of some particular business deal, (3) agree to share in the profits and losses of the venture jointly, and (4) have the right of mutual control over the subject matter of the enter-

prise or over the property." *Id.* ¶ 13 (internal quotation marks and citation omitted). In addition to the relationship created by the lease, Owner directly involved itself in the project when it agreed to pay Contractor directly instead of reimbursing Furr's as provided in the lease. Those payments were made only after approval was given by the civil engineer and architect hired by Furr's. The supermarket was constructed at the instance of Owner through Furr's and Owner directly paid Contractor for its work and materials. Under these circumstances, Owner could not disclaim liability for Contractor's lien under NMSA 1978, Section 48–2–11(1953) (allowing an owner to post a notice that he is not responsible for improvements made on his land within three days of learning of the construction, alteration, or repair, or intended construction, alteration, or repair). *See Arctic Lumber Co. v. Borden,* 211 F. 50, 51, 54–55 (9th Cir.1914) (stating that where the owner of land leased his property under a contract obligating the lessee to construct a building, and the lessee was held to be an agent of the owner, the owner was precluded from eluding liability by posting a notice of non-liability) (discussed with approval in *Skidmore v. Eby,* 57 N.M. 669, 672, 262 P.2d 370, 373 (1953)).

{11} In *Stroh Corp. v. K & S Dev. Corp.,* 247 N.W.2d 750, 751 (Iowa 1976), the owner of a vacant lot entered into a lease which required the lessee to construct a car wash and gasoline facility on the lot pursuant to plans approved by the owner at an estimated cost of $50,000. When the final construction costs were verified, the owner was to reimburse lessee up to the sum of $50,000. *Id.* The initial lease term was for fifteen years with options for two consecutive five-year terms. When completed, title to all the real estate improvements vested in lessor. *Id.* at 752. Lessee contracted with a contractor to construct the facility, which in turn subcontracted mechanical work to Stroh Corporation. Lessor paid lessee, who in turn paid the contractor. However, contractor did not pay Stroh Corporation, which then filed a mechanic's lien against lessor's lot, and subsequently successfully foreclosed on the lien. *Id.* Affirming, the Iowa Supreme Court held that in these circumstances, the lessee was lessor's agent. *Id.; see also Bay v. Barenie,* 421 N.E.2d 6, 7, 9 (Ind.Ct.App.1981) (stating that an excavator who enters into a subcontract with one partner of a land development partnership can recover from the partnership); *Seaboard Sur. Co. v. Richard F. Kline, Inc.,* 91 Md. App. 236, 603 A.2d 1357, 1362–64 (1992) (holding that subcontractor who contracted with joint venturer had a "direct contract" with the joint venture itself where it was undisputed that joint venturer was acting on behalf of and with the authority of the joint venture when contracting with the subcontractor); *Bell v. Tollefsen,* 782 P.2d 934, 938 (Okla.1989) (stating that when an agency exists between a landlord and tenant, the landlord's property interest may be subject to a mechanic's and materialman's lien for improvements and services provided to the tenant but holding that the landlord-tenant relationship alone did not create an agency); *Interiors Contracting, Inc. v. Navalco,* 648 P.2d 1382, 1387 (Utah 1982) (stating that a lease can create an agency between a lessor and a lessee under the mechanic's lien law when the improvement is for the benefit of the lessor and he is having the work done through his lessee).

{12} We agree with the reasoning of the foregoing authorities as applied to the facts of this case. We therefore hold that, for the purpose and in the application of the prelien notice statute, Section 48–2–2.1, and under the undisputed facts evidencing the relationships between Owner and Furr's, Owner and Furr's were joint venturers in the construction of the supermarket. As such, Contractor's contract with Furr's constituted as well a direct contract with Owner. Therefore, Contractor is an "original contractor" under Section 48–2–2.1.

{13} Next, we determine whether Section 48–2–2.1(B) requires an "original contractor" to give an owner a written prelien notice of its right to claim a lien in the event of nonpayment as a prerequisite to an enforceable lien. Our primary goal in interpreting the statute is to ascertain and give effect to the legislature's intent. To do so, we first look to the plain meaning of the words used in the statute. *See Hovet v. Allstate Ins. Co.,*

2004–NMSC–010, ¶ 10, 135 N.M. 397, 89 P.3d 69. This approach, however, does not always disclose the legislative intent:

> [The plain meaning rule's] 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. In such a case, it can rarely be said that the legislation is indeed free from all ambiguity and is crystal clear in its meaning. While . . . one part of the statute may appear absolutely clear and certain to the point of mathematical precision, lurking in another part of the enactment, or even in the same section, or in the history and background of the legislation, or in an apparent conflict between the statutory wording and the overall legislative intent, there may be one or more provisions giving rise to genuine uncertainty as to what the legislature was trying to accomplish. In such a case, it is part of the essence of judicial responsibility to search for and effectuate the legislative intent—the purpose or object—underlying the statute.

State v. Rivera, 2004–NMSC–001, ¶ 11, 134 N.M. 768, 82 P.3d 939 (quoting *State ex rel. Helman v. Gallegos,* 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994) (alteration in original)).

{14} A literal reading of Section 48–2–2.1(B) allows an original contractor, who by definition contracts directly with the owner, to give itself, and not the owner, written notice of its right to claim a lien in the event of nonpayment to perfect a lien that is subsequently filed of record under NMSA 1978, Section 48–2–6 (1979). Contractor argues, and we agree, that this hardly seems reasonable. Where there is an ambiguity in the statute, or where the literal meaning of the words renders the statute absurd or unreasonable, we construe the statute according to its purpose or object. *See Rivera,* 2004–NMSC–001, ¶ 13, 134 N.M. 768, 82 P.3d 939; *State v. Davis,* 2003–NMSC–022, ¶ 6, 134 N.M. 172, 74 P.3d 1064. To do so, we consider the history and background of the statute, including historical amendments. *See State v. Smith,* 2004–NMSC–032, ¶ 10, 136 N.M. 372, 98 P.3d 1022; *Rivera,* 2004–NMSC–001, ¶ 13, 134 N.M. 768, 82 P.3d 939.

{15} Since 1880, New Mexico law has provided persons who provide labor, services, or materials to improve real estate with a lien against the real estate improved to secure payment of the contract or agreed upon charge. The purpose of the lien is to "protect those who, by their labor, services, skill, or materials furnished, have enhanced the value of the property sought to be charged." *Hobbs v. Spiegelberg,* 3 N.M. 357, 363, 5 P. 529, 531 (1885). As applied to this case, the historical mechanism for imposing a lien has been straightforward. First, the statutes have provided that "[e]very person performing labor upon" a building or other improvement "or furnishing materials to be used in the construction, alteration, or repair" of a building or other improvement "has a lien upon the same for the work or labor done" for the specific contract or agreed upon charge when the labor or materials have been provided "at the instance of the owner of the building . . . or his agent." 1880 N.M. Laws ch. 16, § 2 (codified at NMSA 1978, Section 48–2–2 (1993)). Second, the statutes have stated that "[t]he land upon which any building, improvement, or structure, is constructed" is "also subject to the lien, if at the commencement of the work, or of the furnishing the materials for the same, the land belonged to the person who caused said building, improvement or structure to be constructed, altered, or repaired," but "if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien." 1880 N.M. Laws ch. 16, § 4 (codified at NMSA 1978, Section 48–2–4 (1993)). Finally, the statutes have provided that every such building or other improvement "constructed upon any lands with the knowledge of the owner" is "hel[d] to have been constructed at the instance of such owner" with the result that the owner's interest in the land "shall be subject to any lien" filed unless within three days after "obtain[ing] knowledge" of the "construction, alteration, or repair, or the intended construction, alteration, or repair" he gives notice that he will not be responsible "by posting a notice in writing to the effect, in some con-

spicuous place upon said land, or upon the building or other improvement situated thereon." 1880 N.M. Laws ch. 16, § 11 (codified at Section 48–2–11).

{16} As we have noted, the lien arises when the building or improvement is constructed, altered, or repaired "at the instance of the owner ... or his agent." To achieve the statutory purpose, New Mexico law has also provided since 1880 that "[e]very contractor, sub-contractor, architect, builder, or other person having charge ... of the construction, alteration or repair, either in whole or in part, of any building or other improvement ... shall be held to be the agent of the owner, for the purposes of this [section]." 1880 N.M. Laws ch. 16, § 2 (now codified at Section 48–2–2). The owner of the property is therefore in privity of contract by force of the statute with any person who supplies services or materials to any contractor or subcontractor of the building or improvement. *See Hobbs,* 3 N.M. at 363, 5 P. at 531. The owner would not otherwise be liable for the debt because he did not contract it. *Id.; see Vulcraft v. Midtown Bus. Park, Ltd.,* 110 N.M. 761, 765, 800 P.2d 195, 199 (1990) (reiterating that the purpose of the lien statute is "to protect those who, by their labor, services, skill, or materials furnished, have enhanced the value of the property sought to be charged," and that "statute creates privity of contract between the owner and those contributing to the enhancement of the property" (internal quotation marks and citation omitted)).

{17} Under New Mexico law, second, third, fourth, and beyond subcontractors, and virtually anyone dealing with them who perform work could therefore subject an owner's property to a lien. *Vulcraft,* for example, holds that where a business supplied raw material to a middleman, who in turn manufactured steel goods in accordance with project specifications pursuant to its contract with a general contractor but did no work at the site, the middleman could be classified as a "subcontractor" under Section 42–2–2, thereby creating a statute-based privity between the supplier and the owner, and entitling the supplier to file a lien. *Vulcraft,* 110 N.M. at 763, 765–66, 800 P.2d at 197, 199–200. *Vulcraft* adds:

> It also should be noted that our statute allows liens to be filed by materialmen or laborers performing at the instance of the owner or his agent, and defines statutorily certain entities as agents. A plain reading of Section 48–2–2 does not limit the agency relationship only to those enumerated entities. Accordingly, to be entitled to file a lien, a supplier or laborer can establish an agency relationship through alternative means without necessarily demonstrating that the middleman was a subcontractor or otherwise within the enumerated class of statutory agents.

Id. at 767, 800 P.2d at 201.

{18} In this context, the prelien notice statute, Section 48–2–2.1, entitled, "Procedure for perfecting certain mechanics' and materialmen's liens" was enacted in 1990. (The statute was amended in 1993 with changes that are not significant to our decision here. 1993 N.M. Laws ch. 252, § 2). As we construe the statute, an original contractor and its first level subcontractors are not required to give notice in writing of a right to claim a lien in the event of nonpayment. However, all third level and higher subcontractors and those in privity with them must give such a notice to the owner or original contractor or they will not have an enforceable lien. Our reasoning follows.

{19} On the one hand, all persons who perform labor upon or furnish materials to be used in the construction, alteration, or repair of a building are entitled to be paid. The statutory mechanism of creating privity between the owner and virtually anyone who does so, coupled with a right to impose a lien upon the owner's property to secure payment for the labor or materials, accomplishes this result. The result may be that the owner's liability may extend to suppliers and workers of which the owner may not or would not be aware. Fairness to the owner dictates that at a certain level, notice should be given to the owner that workers and suppliers may claim a lien in the event of nonpayment. This way, the owner at least knows who they are and has an opportunity insure that they are paid and thereby prevent a lien from

being filed against his property. This is consistent with one generally recognized purpose of a prelien notice requirement: "to warn the owner of the property against paying the original contractor while outstanding claims exist in favor of laborers and materialmen, and to give him the opportunity to discharge the debt before the lien is filed." Maurice T. Brunner, Annotation, *Who Is the "Owner" Within Mechanic's Lien Statute Requiring Notice of Claim,* 76 A.L.R.3d 605, 615, 1977 WL 45713 (1977). Section 48–2–2.1(D) accomplishes this purpose by requiring a written notice of a right to claim a lien in the event of nonpayment which shall contain:

> (1) a description of the property or a description sufficiently specific for actual identification of the property;
>
> (2) the name, address and phone number, if any, of the claimant; and
>
> (3) the name and address of the person with whom the claimant contracted or to whom the claimant furnished labor or materials, or both.

Id. Furthermore, the notice must be given "not more than sixty days after initially furnishing work or materials, or both, by either certified mail, return receipt requested, [f]ax with acknowledgement or personal delivery." Section 48–2–2.1(B).

{20} The statute itself determines at which level the notice must be provided to the owner. It specifically states that no prelien notice must be given for "claims of liens made by mechanics or materialmen who contract directly with the original contractor," Section 48–2–2.1(A), and "original contractor" is defined to mean "a contractor that contracts directly with the owner." *Id.* First level subcontractors—those who contract directly with the "original contractor"—are excluded from having to provide a written prelien notice. Anyone who does not contract directly with the "original contractor" is therefore required to provide a prelien notice as a prerequisite to having an enforceable lien.

{21} We therefore conclude that the legislature did not intend to require an original contractor to provide prelien notice. By definition, the owner contracts directly with the original contractor and therefore already knows all the information that is required to be provided by Section 48–2–2.1(D) in a written prelien notice. *See Dave Kolb Grading, Inc. v. Lieberman Corp.,* 837 S.W.2d 924, 936 (Mo.Ct.App.1992) ("An owner of property contracts with an original contractor and knows whether the original contractor has been paid; thus, the owner does not need notice of the filing of a lien."). Requiring the "original contractor" to comply with the prelien notice requirement but not subcontractors who contract directly with the "original contractor" makes no sense and serves no practical purpose. We therefore hold that the legislature did not intend Section 48–2–2.1 to require an "original contractor" to give a prelien notice to have an enforceable lien.

{22} Because we conclude that it was an original contractor, Contractor was not required to perfect its lien by providing Owner with written notice of its right to claim a lien against Owner's property. Therefore, we hold that the district court properly enforced Contractor's mechanic's lien.

CONCLUSION

{23} We affirm the order of the district court's granting Contractor's motion for summary judgment.

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

We concur: JONATHAN B. SUTIN and CYNTHIA A. FRY, JJ.