2006-NMSC-003

127 P.3d 537

STATE of New Mexico, Plaintiff-Respondent,

v.

Tremaine JERNIGAN, Defendant-Petitioner.

No. 28,525.

Supreme Court of New Mexico.

Dec. 16, 2005.

Rehearing Denied Jan. 20, 2006.

John Bigelow, Chief Public Defender, William A. O'Connell, Assistant Appellate Defender, Santa Fe, NM, for Petitioner.

Patricia A. Madrid, Attorney General, Margaret McLean, Assistant Attorney General, Santa Fe, NM, for Respondent.

Freedman Boyd Daniels Hollander & Goldberg P.A., Zachary A. Ives, Albuquerque, NM, Amicus Curiae, New Mexico Criminal Defense Lawyers Association.

OPINION

CHÁVEZ, Justice.

{1} Defendant was convicted of second-degree murder for the killing of Jerome Scott, attempted second-degree murder for the shooting of Chris Washington, and tampering with evidence. For these convictions, Defendant was sentenced to twenty-eight years in prison. His basic sentence of nineteen years and six months was enhanced by six years and six months based on the trial court's finding of aggravating circumstances.[1] Defendant contends that his convictions for both second-degree murder and attempted second-degree murder should be reversed because the trial court erred in refusing to instruct the jury on defense of another. As an additional ground for reversing his conviction for attempted second-degree murder, Defendant contends the trial court erred in refusing to instruct the jury on attempted voluntary manslaughter. Finally, Defendant contends that it was unconstitutional for the trial judge to enhance his sentence by finding aggravating circumstances based on facts not found by the jury. The Court of Appeals affirmed Defendant's convictions and sentencing. We granted Defendant's Petition for Certiorari.

{2} We hold that the evidence presented did not support Defendant's theories of defense of another for the shooting of Washington or the killing of Scott. As a matter of first impression, we hold that under limited circumstances attempted voluntary manslaughter is a crime in New Mexico. Because Defendant presented evidence of sufficient provocation for the shooting of Washington, and the jury was instructed on attempted second-degree murder with lack of sufficient provocation as an element, the district court should have instructed the jury on attempted voluntary manslaughter. Having refused the tendered attempted voluntary manslaughter instruction, we reverse Defendant's conviction for attempted second-degree murder and remand for a new trial. Finally, we hold that it was constitutional for the trial court to enhance Defendant's sentence based on aggravating circumstances found by the court and not a jury based on this Court's recent opinion in *State v. Lopez*, 2005–NMSC–036, 138 N.M. 521, 123 P.3d 754.

I. DEFENSE OF ANOTHER JURY INSTRUCTION

{3} Defendant argues the trial court erred in refusing to instruct the jury on defense of another for the shooting of Washington and killing of Scott. An instruction on defense of another should be given if "the evidence is sufficient to allow reasonable minds to differ as to all elements of the defense." *State v. Lopez*, 2000–NMSC–003, ¶ 23, 128 N.M. 410, 993 P.2d 727 (internal

1. The jury also found, beyond a reasonable doubt, that Defendant used a firearm in committing the second-degree murder against Scott and the attempted second-degree murder against Washington. *See* UJI 14–6013 NMRA. Each firearm enhancement carries a sentence increase of one year. NMSA 1978, § 31–18–16(A) (1993).

citation omitted); *see also State v. Coffin*, 1999–NMSC–038, ¶ 12, 128 N.M. 192, 991 P.2d 477 (stating that the possible existence of such a reasonable belief is why we recognize self-defense as a complete justification to homicide). Failure to instruct a jury on a defendant's theory of the case is reversible error. *State v. Brown*, 1996–NMSC–073, ¶ 34, 122 N.M. 724, 931 P.2d 69.

{4} To receive the defense of another instructions for the shooting of Washington and killing of Scott, Defendant would have had to present sufficient evidence there was an appearance that Jessica Runningwater ("Jessica") was in immediate danger of death or great bodily harm from Washington or Scott, and that Defendant's actions would have prevented such harm. *See* UJI 14–5184 NMRA. Defendant failed to present such evidence as to either the shooting of Washington or the killing of Scott.

{5} Defendant testified that on the night of the shooting, Washington came looking for Washington's girlfriend, Jessica, at the trailer where Defendant was partying with Jessica and others. Defendant testified that he was outside the trailer urinating when Washington and his friends arrived and entered the trailer. After hearing screams coming from inside the trailer, Defendant testified he reentered the trailer and saw "Washington . . . standing over [Jessica] hitting her in the head." Defendant testified he grabbed Washington by the arm and told him to stop beating Jessica, and that Washington ordered Jessica outside. Once outside, Defendant testified he saw Washington grab Jessica by the hair, hit her in the head again and then chase Jessica around the vehicles parked in front of the trailer. According to Defendant, because Jessica was screaming for his help, he told Washington, "you want to hit on the woman, hit on me." Defendant testified he then pushed Washington, who fell back away from him. After falling back, Defendant testified Washington came toward him "coming out of his waistline area" as though he were pulling a pistol. Defendant testified, "At first when we were all out there arguing, I thought it was just going to be a little scrap or scuffle . . . and that was it. But when I seen him go for the gun, I was scared." Defendant also testified, "In my mind, when I seen his hand go for his crotch area, I thought he had a pistol. That's the only reason I shot at him." Although the evidence shows Jessica was clearly at risk of some injury, it does not support the view that Defendant believed Jessica was in imminent danger of death or great bodily harm so as to warrant a defense of another instruction for the shooting of Washington.

{6} Even less testimony was offered by Defendant to support an instruction for defense of another for the killing of Scott. Defendant testified that "[Scott] wasn't the violent one. . . . Only reason I shot [Scott] is because he went to the car and he was coming back and . . . he looked like he had . . . a gun in his hand." This evidence does not support an instruction for defense of another for the killing of Scott, as it does not support any appearance of imminent death or great bodily harm to Jessica.[2]

{7} Viewing the evidence in the light most favorable to giving the requested instruction, *see State v. Hill*, 2001–NMCA–094, ¶ 5, 131 N.M. 195, 34 P.3d 139, we hold Defendant did not present sufficient evidence to allow reasonable minds to differ as to all elements of the defense of another. We affirm the trial court's decision not to instruct the jury on defense of another.

II. ATTEMPTED VOLUNTARY MANSLAUGHTER JURY INSTRUCTION

{8} Defendant was charged with attempt to commit murder against Washington. While the parties and the court were settling jury instructions, Defendant's attorney tendered an instruction entitled "attempt to commit the crime of manslaughter." However, the tendered instruction included only the elements for an "attempt to commit a felony" instruction. *See* UJI 14–2801 NMRA (requiring the State to prove beyond a reasonable doubt that: (1) the defendant intended to commit the crime; (2) the defendant began to do an act which constituted a substan-

2. On the other hand, both this evidence and that relating to the shooting of Washington do support a self-defense instruction, which the court gave at the request of Defendant.

tial part of the crime but failed to commit the crime; and (3) the attempt took place on a certain date). Defendant argued below, and now argues on appeal, that because the court was going to instruct the jury on attempted second-degree murder, there was evidence of sufficient provocation to entitle him to an instruction on "attempted manslaughter."

A. DEFENDANT ADEQUATELY PRESERVED THE ISSUE FOR REVIEW

{9} The State's primary argument is that Defendant failed to properly preserve this issue for review because his tendered instruction was an incorrect statement of the law. The instruction tendered by the Defendant was for "attempt to commit the crime of manslaughter." Thus, the State contends that since "attempted manslaughter" is not a crime in New Mexico, the tendered instruction was an incorrect statement of the law. Defendant claims that it was clear from the discussions that the attorneys and the judge knew he was asking for an "attempted voluntary manslaughter" instruction. The State points out that Defendant also did not tender an instruction defining the elements of attempted voluntary manslaughter. The trial court indicated that aggravated battery was the appropriate instruction and refused the tendered instruction.

{10} Generally, to preserve error on a trial court's refusal to give a tendered instruction, the Appellant must tender a legally correct statement of the law. *State v. Foster*, 1999–NMSC–007, ¶ 54, 126 N.M. 646, 974 P.2d 140. However, if the record reflects that the judge clearly understood the type of instruction the Defendant wanted and understood the tendered instruction needed to be modified to correctly state the law, then the issue is deemed preserved for appellate review. *Hill*, 2001–NMCA–094, ¶ 7, 131 N.M. 195, 34 P.3d 139. The rationale for allowing such flexibility regarding preservation is reinforced by the actual purpose of Rule 5–608(D) NMRA,[3] which is to alert the trial court to the defendant's argument. *See Hill*, 2001–NMCA–094, ¶ 7, 131 N.M. 195, 34 P.3d 139.

{11} The record in this case demonstrates that the judge understood Defendant was asking for an "attempted voluntary manslaughter" instruction. *See id.* The following discussion took place with respect to Defendant's requested instruction number 10, "attempt to commit the crime of manslaughter":

> Ms. Stevens (State's Attorney): I would strongly object to that. Manslaughter is simply—it's second-degree murder reduced because of provocation. There wouldn't be an attempted manslaughter. Would be an aggravated battery. Which is that he knew his acts created a strong probability of great bodily harm. That's aggravated battery.
>
> Mr. Mitchell (Defendant's Attorney): And I think in that instance manslaughter applies. And besides this is a case regarding provocation.
>
> Ms. Stevens: If you read the elements of manslaughter, though, there's no way to commit attempted manslaughter. Without it simply being aggravated battery.
>
> The Court: [A]ggravated battery . . . most accurately covers that situation. Rather than attempt to commit manslaughter a more appropriate (inaudible) would be aggravated battery. Defense requested instruction number 10 will be refused.

Because voluntary manslaughter is second-degree murder committed with sufficient provocation, UJI 14–220 NMRA; *see also State v. Gaitan*, 2002–NMSC–007, ¶ 11, 131 N.M. 758, 42 P.3d 1207, Ms. Stevens' comment that "[m]anslaughter is simply—it's second-degree murder reduced because of provocation" demonstrates that the State understood the discussion was about voluntary manslaughter. Additionally, Defendant's attorney stated this was a case about provocation. Because the parties were discussing the tendered instruction in the context of the issue of provocation, it is clear the judge understood Defendant was asking for an instruction on "attempted voluntary manslaughter."

3. Rule 5–608(D) reads "[F]or the preservation of error in the charge . . . a correct written instruction must be tendered before the jury is instructed."

{12} The fact that Defendant tendered a separate instruction for "attempt to commit the crime of involuntary manslaughter" is further evidence that the court understood Defendant was also asking for an instruction on attempted voluntary manslaughter. New Mexico recognizes two types of manslaughter: voluntary and involuntary. NMSA 1978, § 30–2–3 (1994); *State v. Alvarado,* 1997–NMCA–027, ¶ 3, 123 N.M. 187, 936 P.2d 869. Because New Mexico only recognizes two types of manslaughter, and in light of the additional instruction for attempted involuntary manslaughter requested by the Defendant, it is only logical that the court and the parties understood that Defendant's requested instruction number 10, "attempt to commit the crime of manslaughter," was an instruction for attempted voluntary manslaughter. Defendant's tendered instruction was not refused because Defendant failed to include the word "voluntary," but rather because the trial court was persuaded that the appropriate step-down instruction from attempted second-degree murder was aggravated battery.

{13} The present case is analogous to *Hill,* in which the Court of Appeals held the defendant had preserved his argument for a self-defense instruction for appellate review. 2001–NMCA–094, ¶ 7, 131 N.M. 195, 34 P.3d 139. The defendant in *Hill,* who was convicted of battery on a police officer, requested a self-defense instruction that was refused by the trial court. *Id.* ¶ 1. On appeal, the State argued the defendant failed to preserve the issue for review because the instruction he tendered did not accurately state the law with respect to self-defense against a peace officer. *Id.* ¶ 6. The Court of Appeals acknowledged that the self-defense instruction was flawed on its face. *Id.* ¶ 7. However, the court was persuaded that the trial court understood the type of instruction the defendant wanted. Because the trial court understood what instruction the defendant sought, the Court of Appeals explained that the trial court should have modified the instruction to correctly state the law. *Id.; see Gallegos v. State,* 113 N.M. 339, 341, 825 P.2d 1249, 1251 (1992) (concluding that the purpose of the Rule 5–608(D) language "is to allow the court an opportunity to decide a question whose dimensions are not open to conjecture or after-the-fact interpretation"). The Court of Appeals held that despite the fact the tendered self-defense instruction was flawed on its face, the defendant made a sufficient record to preserve review because the trial court understood what instruction the defendant sought and had the opportunity to modify the instruction to correctly state the law. *Hill,* 2001–NMCA–094, ¶ 7, 131 N.M. 195, 34 P.3d 139.

{14} We also reject the State's argument that Defendant did not preserve the issue when he failed to tender an instruction defining the elements of attempted voluntary manslaughter. It does not seem to us that the trial court was troubled by Defendant's failure to submit such an instruction. During discussions regarding Defendant's requested instruction number 9, "attempt to commit second-degree murder," in addition to objecting to the propriety of giving the instruction, the State pointed out that, as written, the instruction did not provide the elements of the crime. Once the trial court agreed to instruct the jury on attempted second-degree murder, the court modified Defendant's instruction to include the elements for attempted second-degree murder. Had the trial court believed it was appropriate to instruct the jury on attempted voluntary manslaughter, we are convinced the trial court would have modified the instruction to correctly state the law, by including all of the essential elements for the crime.[4] *See* UJI 14–2801 NMRA.

{15} The record reflects the judge understood Defendant wanted an attempted voluntary manslaughter instruction and had an opportunity to modify the instruction to correctly state the law, but did not give the tendered instruction because he believed aggravated battery to be the correct step-down

4. The use notes for the uniform jury instructions on attempt require a separate attempt instruction for each applicable felony. UJI 14–2801, use note 1. Each attempt instruction must be immediately followed by the essential elements of the felony, unless the elements are already listed in a separate instruction relating to the completed offense. *Id.*

instruction. Therefore, we hold that Defendant properly preserved the issue for appeal.

B. ATTEMPTED VOLUNTARY MANSLAUGHTER MAY BE A CRIME IN NEW MEXICO

{16} Jurisdictions that have considered whether attempted voluntary manslaughter exists are split. 40 Am.Jur.2d *Homicide,* § 48 (2004). Jurisdictions that recognize attempted voluntary manslaughter as a crime do so because if circumstances can mitigate an intentional killing, and reduce it from an intentional murder to voluntary manslaughter, it is logical to reduce an attempted intentional murder to attempted voluntary manslaughter when similar circumstances are present but the defendant fails to carry out his intent. *See People v. Van Ronk,* 171 Cal.App.3d 818, 217 Cal.Rptr. 581, 585 (1985) ("There is nothing illogical or absurd in a finding that a person who unsuccessfully attempted to kill another did so with the intent to kill which was formed in the heat of passion or which arose out of an honest but unreasonable belief in the necessity of self-defense."); *see also State v. Norman,* 580 P.2d 237, 240 (Utah 1978) *overruled on other grounds by State v. Standiford,* 769 P.2d 254 (Utah 1988); *State v. Barnes,* 162 Ariz. 92, 781 P.2d 69, 70 (Ct.App.1989); *State v. Rainey,* 154 N.C.App. 282, 574 S.E.2d 25, 30 (2002); *Kauffman v. State,* 729 So.2d 424, 425 (Fla.Dist.Ct.App.1999); *Ex parte Buggs,* 644 S.W.2d 748, 750 (Tex.Crim.App.1983) (en banc).

{17} Jurisdictions that refuse to recognize attempted voluntary manslaughter as a crime do so because they conclude it would be illogical to apply the crime of attempt, a specific intent crime, to the general intent crime of voluntary manslaughter. *See State v. Howard,* 405 A.2d 206, 212 (Me.1979) ("The crime of manslaughter . . . is predicated upon a different mental state from that found in the attempt statute. . . . Because of the discrepancy in culpable mental states between criminal attempt on the one hand and manslaughter on the other, the proffered crime of 'attempted manslaughter' is a logical impossibility."); *see also People v. Brown,* 21 A.D.2d 738, 739, 249 N.Y.S.2d 922 (N.Y.App. Div.1964); *Westbrook v. State,* 722 So.2d 788, 792 (Ala.Crim.App.1998); *State v. Loa,* 83 Hawai'i 335, 926 P.2d 1258, 1273 (1996); *People v. Martinez,* 81 N.Y.2d 810, 595 N.Y.S.2d 376, 611 N.E.2d 277, 278 (1993); *Curry v. State,* 106 Nev. 317, 792 P.2d 396, 397 (1990); *People v. Stevenson,* 198 Ill.App.3d 376, 144 Ill.Dec. 555, 555 N.E.2d 1074, 1078 (1990).

{18} Although we have implicitly recognized attempted voluntary manslaughter as a crime, we have never squarely held it exists in New Mexico. *See State v. Stampley,* 1999–NMSC–027, ¶ 48, 127 N.M. 426, 982 P.2d 477 (remanding for a new trial on the charge of attempted first-degree murder by deliberate killing, to include instructions on attempted second-degree murder by intentional killing and attempted voluntary manslaughter); *State v. Durante,* 104 N.M. 639, 643, 725 P.2d 839, 843 (Ct.App.1986) (finding defendant was not entitled to attempted voluntary manslaughter instruction when defendant created the provocation that would reduce the crime from murder to manslaughter). As in other jurisdictions that have specifically considered whether attempted voluntary manslaughter is a crime, our holding today turns on whether voluntary manslaughter is a specific intent or a general intent crime. We agree that it is illogical to apply attempt, a specific intent crime, to a general intent crime. *State v. Johnson,* 103 N.M. 364, 367–68, 707 P.2d 1174, 1177–78 (Ct.App.1985). Generally speaking, voluntary manslaughter is a general intent crime. *See State v. Beach,* 102 N.M. 642, 645, 699 P.2d 115, 118 (1985) (holding, as a matter of statutory definition, that voluntary manslaughter does not contain an element of intent to do a further act or achieve a further consequence). However, voluntary manslaughter is second-degree murder committed with sufficient provocation. *See State v. Aragon,* 35 N.M. 198, 292 P. 225 (1930). While second-degree murder is commonly held to be a general intent crime in New Mexico, *see State v. Campos,* 1996–NMSC–043, ¶ 38, 122 N.M. 148, 921 P.2d 1266, second-degree murder has been held to be a specific intent crime under limited circumstances. *Johnson,* 103 N.M. at 370, 707 P.2d at 1180 (holding that where a defendant fire bombed a mobile home intend-

ing to kill someone inside, but knowing that his act created the requisite probability of death or great bodily harm with respect to unknown persons inside, defendant's act could constitute sufficient evidence to convict him of attempted second-degree murder as to the unknown persons). Thus, for the same reasons that in some limited circumstances second-degree murder can be a specific intent crime, *see id.*, under similar limited circumstances voluntary manslaughter may also be a specific intent crime if provocation is at issue. Under such limited circumstances, it is logical to offer an attempted voluntary manslaughter instruction where the court finds it appropriate to offer an attempted second-degree murder instruction and sufficient provocation is an issue.

{19} The trial court in this case, over the State's objection, instructed the jury on attempted second-degree murder. An appropriate instruction for attempted second-degree murder would consist of an instruction on attempt, UJI 14–2801 NMRA, immediately followed by the elements for second-degree murder, UJI 14–210 NMRA. *See* UJI 14–2801 NMRA note 1; *Johnson*, 103 N.M. at 370–71, 707 P.2d at 1180–81. This sequence for instructing the jury on attempted second-degree murder adequately instructs the jury on attempted second-degree murder as a specific intent crime. *Id.* at 371, 707 P.2d at 1181. Here, we are persuaded the trial court instructed the jury on attempted second-degree murder as a specific intent crime. Otherwise, it would have been error for the court to instruct the jury on attempted second-degree murder, *see id.*, and the appropriate step-down instruction from attempted first-degree murder would have been aggravated battery. *State v. Meadors*, 121 N.M. 38, 44, 908 P.2d 731, 737 (1995).

{20} We hold that under limited circumstances, where attempted second-degree murder is offered as a greater-included offense and sufficient provocation is at issue in the trial, attempted voluntary manslaughter is a crime in New Mexico. Among the elements of the jury instruction for attempted second-degree murder was the requirement that the jury find "[t]he defendant did not act as a result of sufficient provocation." This language is included in a second-degree murder instruction *only* when provocation is an issue. UJI 14–210 NMRA, use note 1. When provocation is at issue, an instruction on voluntary manslaughter must be given. UJI 14–210 NMRA, use note 4. Therefore, the trial court should have instructed the jury on attempted voluntary manslaughter if it found evidence of sufficient provocation.

C. EVIDENCE OF SUFFICIENT PROVOCATION EXISTED TO SUPPORT AN ATTEMPTED VOLUNTARY MANSLAUGHTER INSTRUCTION

{21} We next determine whether there was evidence of sufficient provocation to support an attempted voluntary manslaughter instruction. Failure to instruct the jury on a lesser included offense of a charged offense is reversible error if: (1) the lesser offense is included in the greater, charged offense; (2) there is evidence tending to establish the lesser included offense and that evidence establishes that the lesser offense is the highest degree of crime committed; and (3) the defendant has tendered appropriate instructions preserving the issue. *Hill*, 2001–NMCA–094, ¶ 16, 131 N.M. 195, 34 P.3d 139 (internal citation omitted).

{22} Just as voluntary manslaughter is a lesser included offense of second-degree murder, *see State v. Duarte*, 1996–NMCA–038, ¶ 1, 121 N.M. 553, 915 P.2d 309 (noting that while defendant was charged with second-degree murder, he was convicted of the lesser included offense of voluntary manslaughter), we recognize that attempted voluntary manslaughter is a lesser included offense of attempted second-degree murder where sufficient provocation is at issue in the trial. As to the third requirement, we stated above that the Defendant has preserved the issue for appeal. The second requirement is the only remaining issue, so our analysis is limited to whether evidence of sufficient provocation was presented at trial to support the attempted voluntary manslaughter instruction.

{23} With regard to the second requirement, we consider whether "there is a rational view of the evidence that would lead

the jury to conclude beyond a reasonable doubt that Defendant committed the lesser included offense while still harboring a reasonable doubt that Defendant committed the charged offense." *See Hill*, 2001–NMCA–094, ¶ 17, 131 N.M. 195, 34 P.3d 139 (internal citation omitted). That Defendant here was convicted of attempted second-degree murder with regard to Washington is evidence that the jury rejected the State's argument that Defendant exhibited the requisite degree of intent necessary to convict him of attempted-first degree murder. Therefore, we need only consider whether there is evidence of sufficient provocation so that the jury could have concluded beyond a reasonable doubt that Defendant committed attempted voluntary manslaughter while still harboring a reasonable doubt that Defendant committed attempted second-degree murder.

{24} Sufficient provocation is defined as "any action, conduct or circumstances which arouse anger, rage, fear, sudden resentment, terror or other extreme emotions." UJI 14–222 NMRA. "The provocation must be such as would affect the ability to reason and to cause a temporary loss of self control in an ordinary person of average disposition." *Id.* Evidence of provocation exists to support a voluntary manslaughter instruction where the defendant feared the victim was attempting to get a gun with which to shoot the defendant, and the defendant acted to prevent the victim from getting the gun. *See State v. Wright*, 38 N.M. 427, 429, 34 P.2d 870, 871 (1934). Similarly, such evidence should also support an attempted voluntary manslaughter instruction.

{25} In this case, Defendant's testimony that he was scared when he believed Washington was reaching for a gun provides evidence of sufficient provocation to support an attempted voluntary manslaughter instruction. *See State v. Abeyta*, 120 N.M. 233, 240, 901 P.2d 164, 171 (1995) ("It is not unreasonable that the accused should be found guilty of voluntary manslaughter where the plea of self-defense fails.") (internal citations omitted). Defendant's testimony could not have been clearer when he stated "[W]hen I seen him go for the gun, I was scared," and "[i]n my mind, when I seen his hand go for his crotch area, I thought he had a pistol. That's the only reason I shot at him." Defendant further stated, "Where I'm from, somebody coming out of that area [the waistline] ... it's more than likely ... that they are going to shoot you." We note also that the judge instructed the jury on voluntary manslaughter regarding the killing of Scott, presumably based on Defendant's testimony that he thought Scott had a gun. Viewing the evidence in the light most favorable to giving the requested instruction, *Hill*, 2001–NMCA–094, ¶ 5, 131 N.M. 195, 34 P.3d 139, we hold Defendant presented evidence of sufficient provocation to support an attempted voluntary manslaughter jury instruction. Accordingly, we reverse Defendant's conviction for attempted second-degree murder with regard to Count II, and remand to the trial court for a new trial on this count.

III. SECTION 31–18–15.1 IS CONSTITUTIONAL

{26} The jury convicted Defendant of three crimes: (1) second-degree murder, a second-degree felony, which carries a basic sentence of fifteen years imprisonment; (2) attempted second-degree murder, a third-degree felony, which carries a basic sentence of three years imprisonment; and (3) tampering with evidence, a fourth-degree felony, which carries a basic sentence of eighteen months. NMSA 1978, § 31–18–15 (2003). After the trial, the State gave notice that it intended to seek enhanced sentences for each of the three counts against Defendant under NMSA 1978, § 31–18–15.1 (2003), based on several aggravating circumstances: (1) level of anger and ill will displayed toward the victims; (2) gang affiliation and criminal history from the age of 14; (3) avoiding prosecution by fleeing the jurisdiction, and using false aliases, birth dates and social security numbers; (4) inciting disorder and turmoil while incarcerated; and (5) showing no remorse. At the sentencing hearing, the State introduced testimony from Washington and two members of Scott's family, all of whom spoke of how the shooting impacted their lives, two Otero County Detention Center employees, who spoke of Defendant's non-

compliant behavior while in detention, a detective from Las Vegas, Nevada who testified about Defendant's use of aliases, and a Los Angeles County detective, who testified about Defendant's criminal history from 1993 to 1998. Of these witnesses, only Washington had testified at trial.

{27} The judge enhanced Defendant's sentences beyond the basic sentences authorized in Section 31–18–15 after finding seven aggravating factors: (1) Defendant hunted the victims; (2) Defendant fired multiple gun shots toward the victims; (3) Defendant was acting as an enforcer for a drug dealer; (4) Defendant was the aggressor and had violence on his mind all day; (5) Defendant's actions showed extreme anger and ill will toward the victims; (6) Defendant avoided prosecution by using aliases and by fleeing the jurisdiction; and (7) Defendant has failed to accept responsibility for his own actions or show remorse. Defendant's sentence was increased by six and one-half years due to the finding of aggravating circumstances.

{28} At issue here is whether the sentence enhancements authorized by Section 31–18–15.1 are constitutional in light of the United States Supreme Court's recent holdings in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). This Court recently held in *State v. Lopez*, 2005–NMSC–036, 138 N.M. 521, 123 P.3d 754, that Section 31–18–15.1 is constitutional. In doing so, we affirmed the Court of Appeals opinion in *State v. Wilson*, 2001–NMCA–032, 130 N.M. 319, 24 P.3d 351, which was relied on by the Court of Appeals in this case. Accordingly, we affirm the Court of Appeals on this issue.

CONCLUSION

{29} We hold Defendant did not present sufficient evidence to support a defense of another jury instruction for either the killing of Scott or the shooting of Washington. Therefore, we affirm Defendant's conviction for the second-degree murder of Scott. Defendant properly preserved the issue of whether he should have been given an attempted voluntary manslaughter instruction because the judge understood Defendant was asking for such an instruction, and the judge had an opportunity to modify the instruction to correctly state the law. Additionally, we hold that under limited circumstances, where attempted second-degree murder is offered as a greater-included offense and sufficient provocation is at issue in the trial, attempted voluntary manslaughter may be a crime in New Mexico. Defendant presented evidence of sufficient provocation to support an attempted voluntary manslaughter jury instruction. Therefore, we reverse Defendant's conviction for attempted second-degree murder with regard to Count II, and remand to the trial court for a new trial on this count. Finally, Section 31–18–15.1 is constitutional.

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

WE CONCUR: RICHARD C. BOSSON, Chief Justice, and PATRICIO M. SERNA, Justice.

PAMELA B. MINZNER, Justice (concurring in part and dissenting in part).

PETRA JIMENEZ MAES, Justice (concurring in part and dissenting in part).

MINZNER, J. (concurring in part and dissenting in part).

{31} I concur in part and dissent in part. I concur in affirming Defendant's conviction for second-degree murder. I respectfully dissent from the decision to reverse Defendant's conviction for attempted second-degree murder. I also concur in affirming the enhancement of Defendant's sentence pursuant to NMSA 1978, § 31–18–15.1 (1993). I would affirm both convictions from which Defendant has appealed, as well as the judgment and sentence. Because I concur in the analysis within Sections I and III of the Opinion, I will discuss only Section II.

{32} Although I agree with most of the analysis in Section II, I am not persuaded that Defendant was entitled to an instruction on attempted voluntary manslaughter. I would hold there was insufficient evidence of the extreme emotion, sufficient to cause a loss of self-control, on which UJI 14–222 NMRA 2006, defining provocation, instructs the jury. The Majority Opinion relies on the concept of imperfect self-defense, *see State v.*

Abeyta, 120 N.M. 233, 901 P.2d 164 (1995), but the Opinion seems to overlook the uniform jury instruction requirement that the action to which a defendant was responding aroused an extreme emotion. The Opinion describes Defendant's testimony as very clear, *see* ¶ 25, but there is no hint within that testimony that Defendant's ability to reason was affected. Unlike the testimony in *State v. Wright*, 38 N.M. 427, 34 P.2d 870 (1934), to which the Majority Opinion refers in ¶ 24, there was no testimony that Defendant was afraid of the victim, that he was afraid of being shot, or that he was unable to reason as a result of his fear.

{33} The Majority Opinion suggests and perhaps actually holds that the same facts that give rise to an instruction on self-defense will give rise to an instruction on provocation. Yet the concepts are different. *See generally State v. Parish*, 118 N.M. 39, 46, 878 P.2d 988, 995 (1994) ("Either the Defendant is guilty of having been provoked into voluntary manslaughter or he is innocent because he killed in self-defense."). In *Parish*, this Court noted the potential for confusion, but we suggested that if juries are instructed that they must acquit if they are satisfied a defendant acted in self-defense, then jury confusion on the difference between the effect of finding provocation and the effect of finding self-defense can be avoided. *Id.* at 47, 878 P.2d at 996.

{34} The Majority Opinion leads me to the conclusion that, in addition to the kind of instruction *Parish* recommends, recognition of attempted voluntary manslaughter requires us to approve new jury instructions. If facts that support imperfect self-defense always justify an instruction on provocation, we at least need an instruction on provocation that fits the circumstances in which, based on evidence supporting an imperfect self-defense claim, the jury should receive a step-down instruction from attempted second-degree murder to attempted voluntary manslaughter. *See generally* Leo M. Romero, *Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice*, 12 N.M. L.Rev. 747, 756 (1982) (arguing that our uniform jury instructions permit us to distinguish proof of sufficient provocation "when it serves as a mitigating defense to murder").

{35} Professor Romero notes, as he begins the discussion of our cases, that "[t]he evidence of provocation and heat of passion sufficient to require or merit an instruction on voluntary manslaughter in New Mexico is not clear." *Id.* at 752. He argues that we ought to distinguish the standard for determining whether there is enough evidence to support a voluntary manslaughter conviction when charged or tried separately from the standard for determining whether there is enough evidence to support giving an instruction on voluntary manslaughter as a lesser included instruction. *See id.* at 754–55. He also argues that constitutional due process actually requires recognizing the dual role of voluntary manslaughter, *id.* at 760, which is both a lesser included offense and a separate crime, "with additional and different elements from murder." *Id.* He concludes his article, however, with the following:

> Voluntary manslaughter could then operate as both a mitigating defense and a crime at the same time. The drafters of the Uniform Jury Instructions attempted such a compromise in the instructions on murder and voluntary manslaughter. Instructions, however, cannot change the statutory definition of voluntary manslaughter. The responsibility rests with the legislature. The homicide law in New Mexico should be revised to resolve the contradiction in the murder-manslaughter scheme.

Id. at 789.

{36} I am persuaded that we ought to recognize, as Professor Romero argues, the right to an instruction on voluntary manslaughter as a lesser included offense of second-degree murder in circumstances other than those in which the statutory definition of voluntary manslaughter has been satisfied. *See generally* NMSA 1978, § 30–2–3(A) (1994) (defining voluntary manslaughter as "manslaughter committed upon a sudden quarrel or in the heat of passion"). I also agree that we ought to recognize the existence of the crime of attempted voluntary manslaughter and concur in the analysis within Section II(B).

{37} I appreciate the careful way in which the Majority Opinion discusses the issue of

preservation within Section II(A). Nevertheless, I am not persuaded that the issue on which the Majority Opinion reverses Defendant's conviction for attempted second-degree murder was preserved. In *Abeyta*, this Court indicated that when both self-defense and imperfect self-defense are argued, an instruction clarifying the role of each should be given. 120 N.M. at 241, 901 P.2d at 172 (indicating the jury must be told that it must acquit if it finds a defendant acted in self-defense in order to avoid conflicting instructions). Such an instruction was not tendered in this case. In addition, as the Majority Opinion notes, one of the reasons we can conclude, on these facts, that attempted voluntary manslaughter is a lesser included offense is the fact that we believe second-degree murder of the intentional kind was the type on which the jury was instructed. *See* Maj. Op. ¶ 19. That fact is not something Defendant argued. In addition, Defendant's argument on appeal, and thus perhaps at trial, seems to rely not only on the evidence that he thought the victim had a gun, but also that he was provoked by the victim's treatment of Jessica Runningwater. Finally, the Majority Opinion reaches a conclusion about the availability of an instruction on provocation that seems to have required a different instruction than the instruction Defendant tendered. *See* Maj. Op. ¶ 8. Defendant tendered an instruction that would ask the jury a question I am not persuaded the evidence actually supports. He did not tender an instruction that would have asked the question the Majority Opinion concludes he was entitled to have answered.

{38} For these reasons, I concur in Sections I, II(B), and III. I respectfully dissent from Sections II(A) and II(C). I would affirm the convictions Defendant has challenged on appeal and the judgment and sentence entered on the jury's verdict. The majority being of a different view, I concur in part and dissent in part.

I CONCUR: PETRA JIMENEZ MAES, Justice.

2006-NMSC-002

127 P.3d 548

Kirk A. JUNEAU, Plaintiff–Appellant,

v.

INTEL CORPORATION, Defendant–Appellee.

No. 29,093.

Supreme Court of New Mexico.

Dec. 23, 2005.

Hannah Best & Associates, Hannah B. Best, Albuquerque, NM, for Appellant.

Gilkey & Stephenson, P.A., Duane C. Gilkey, Albuquerque, NM, for Appellee.

OPINION

BOSSON, Chief Justice.

{1} In this retaliation claim under the New Mexico Human Rights Act (NMHRA), NMSA 1978, §§ 28-1-1 to -15 (1969) (as amended through 2004), Plaintiff Kirk Juneau appeals from a summary judgment entered by the district court against him. The court also rejected Plaintiff's request for a jury trial. We conclude that Plaintiff presented sufficient evidence below to create genuine issues of material fact. We also hold that Plaintiff is entitled to a jury trial on his claim of retaliation. Accordingly, we reverse and remand.

BACKGROUND

{2} Plaintiff was employed at Intel as an equipment engineering technician. In June of 2001 Stephanie Cannaday, a co-worker of Plaintiff, reported to her superior, Judy Russell, that over the last few months she had been bothered by inappropriate conversations of a sexual nature that she had overheard around her work cubicle. Cannaday asked only that the conversations be stopped or that she be moved. After she complained, the conversations ceased.

{3} Intel's Human Resources Department launched a sexual harassment investigation into the allegations. Plaintiff was one of the people implicated by Cannaday. Plaintiff denies participation in the alleged conversations, and claims that he was included in the allegations only because Cannaday suspected him of having an extramarital affair of which she did not approve. Earlier, Cannaday had complained about a screen saver featuring women in bikinis on Plaintiff's work computer.

{4} Despite requests from his superiors during the course of the investigation that he admit to sexual harassment, Plaintiff steadfastly maintained his innocence. Although Plaintiff was present during some of the conversations in question, no one alleged that Plaintiff actually made any inappropriate remarks. According to Plaintiff, the Intel investigators prejudged him as guilty, and incorrectly interpreted his protestations of innocence as evidence of being uncooperative with the investigation and displaying a bad attitude. Additionally, Plaintiff argues that the investigators had contemplated his termination from the beginning, as a means of sending a strong message to other employees regarding the evils of sexual harass-

ment. In essence, Plaintiff claims that Intel was out to make an example of him.

{5} During the course of the investigation, Lin Harris, a Human Resources supervisor who knew Plaintiff from church, initiated a meeting with Plaintiff outside of work. Harris was a superior of the employees who were investigating the claim against Plaintiff. During the meeting, Harris allegedly threatened Plaintiff with repercussions if he continued to contest the allegations against him and pursued litigation. Harris denied these statements and claims the meeting was to discuss the two men's personal relationship. On the day after the meeting with Harris, August 14, 2001, Plaintiff received a permanent written warning regarding sexual harassment and attendance problems. Instead of accepting the warning, Plaintiff followed procedure and requested an open door investigation of the manner in which the Human Resources Department had conducted the sexual harassment investigation.

{6} Two weeks later, on August 30, 2001, despite the alleged threat from Harris, Plaintiff filed the present claim with the Equal Employment Opportunity Commission (EEOC). Shortly thereafter, beginning on September 6, Plaintiff's supervisor, Russell, began documenting claims of substandard performance on Plaintiff's part. On September 13, Russell was mistakenly advised that the EEOC complaint was specifically against her, and she immediately canceled her supervisory meetings with Plaintiff. A day later, on September 14, and acting against the advice of the Human Resources Department, Russell initiated the process for a second written warning regarding Plaintiff's work performance. Russell based the need for the warning on multiple alleged inadequacies including inconsistent performance, missed completion dates and lack of accountability. On December 4, Russell initiated a third warning, which according to Intel's established policy, would result in Plaintiff's termination. On January 23, the third written warning actually issued, and Plaintiff was terminated.

{7} On February 28, 2002, Plaintiff exhausted his administrative remedies with the New Mexico Human Rights Division and filed the present action in state court, claiming that Intel had retaliated unlawfully against him for having filed his complaint with the EEOC, among other reasons. Ultimately, Intel moved for summary judgment on Plaintiff's retaliation claim which the district court granted. Earlier, the district court had rejected Plaintiff's request for a jury trial as being untimely. Plaintiff appeals both rulings directly to this Court pursuant to Section 28–1–13(C) (1987) (amended 2005) (prior to 2005 appeals made directly to Supreme Court).

DISCUSSION

Summary Judgment

{8} "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; *see also* Rule 1–056(C) NMRA 2004. All reasonable inferences from the record should be made in favor of the nonmoving party. *Celaya v. Hall*, 2004–NMSC–005, ¶ 7, 135 N.M. 115, 85 P.3d 239. Summary judgment is reviewed on appeal de novo. *Id.*

{9} When considering a violation of the NMHRA, we have previously considered helpful federal burden-shifting methodology under Title VII of the Civil Rights Act of 1964. *See Smith v. FDC Corp.*, 109 N.M. 514, 517, 787 P.2d 433, 436 (1990). For a claim of unlawful discrimination, this Court has used the methodology from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Gonzales v. N.M. Dep't of Health*, 2000–NMSC–029, ¶¶ 20–22, 129 N.M. 586, 11 P.3d 550. Under the *McDonnell Douglas* framework, an employee bears the initial burden of demonstrating a prima facie case of discrimination, which then shifts the burden to the employer to provide a legitimate, non-discriminatory reason for the adverse employment action. *Gonzales*, 2000–NMSC–029, ¶ 21, 129 N.M. 586, 11 P.3d 550; *see also McDonnell Douglas* 411 U.S. at 802–05, 93 S.Ct. 1817 (same). The employee then has the opportunity to rebut the employer's proffered reason as pretextual or otherwise inad-

equate. *Gonzales,* 2000–NMSC–029, ¶ 21, 129 N.M. 586, 11 P.3d 550.

{10} On appeal, Intel defends summary judgment on the basis that Plaintiff failed to establish a prima facie case of discrimination, and even if he did, Intel then demonstrated legitimate, non-discriminatory reasons for all its actions. As we shall see, the core question before us is not whether Intel is ultimately proven correct on the merits, but whether the district court could make that determination on summary judgment without affording Plaintiff the benefit of a trial. The answer to that question depends on whether Plaintiff sufficiently presented evidence to the district court to establish "genuine issues of material fact" for resolution by a jury. *Self,* 1998–NMSC–046, ¶ 6, 126 N.M. 396, 970 P.2d 582; *see also* Rule 1–056.

{11} Plaintiff's claim of discrimination is linked, in turn, to his allegations of unlawful retaliation. The NMHRA, Section 28–1–7(I)(2), declares it an unlawful discriminatory practice for "any person or employer to . . . engage in any form of threats, reprisal or discrimination against any person who has opposed any unlawful discriminatory practice or has filed a complaint . . . under the Human Rights Act." Prohibited acts of "threats, reprisal or discrimination" are considered together under the general label of unlawful retaliation. To establish a prima facie case of retaliation, Plaintiff must show that (1) he engaged in protected activity, (2) he was subject to adverse employment action subsequent to, or contemporaneous with the protected activity, and (3) a causal connection exists between the protected activity and the adverse employment action. *Gonzales,* 2000–NMSC–029, ¶ 22, 129 N.M. 586, 11 P.3d 550.

{12} On appeal, Intel challenges the first and third elements of the prima facie case: both protected activity and causal connection. However, when Intel filed its motion for summary judgment in the district court, it did not adequately raise a challenge to the first element, whether Plaintiff was engaged in protected activity. Intel only made a passing reference in a footnote to concerns about whether protected activity had been shown, specifically arguing that "[i]t is doubtful that Plaintiff engaged in 'protected activity' because his discrimination charge was frivolous." However, Intel did not ask the court to take any action on the issue or award Intel any relief on that basis. To preserve an issue for appeal, a party must clearly raise the issue in the lower court " 'by invoking a ruling from the court on the question.' " *Ciup v. Chevron U.S.A., Inc.,* 1996–NMSC–062, ¶ 22, 122 N.M. 537, 928 P.2d 263 (quoting *State v. Hodge,* 118 N.M. 410, 418, 882 P.2d 1, 9 (1994)). Not having requested or received a ruling on the question of protected activity, Intel failed to preserve any such challenge for consideration by this Court.

{13} We assume, therefore, for purposes of summary judgment that Plaintiff has sufficiently demonstrated two out of the three elements of a prima facie case of retaliation. We assume that Plaintiff has shown protected activity, which includes his claim filed with the EEOC. And it is undisputed that Plaintiff has demonstrated a subsequent adverse employment action, namely Intel's termination of his employment. The remaining question is whether Plaintiff has made a prima facie case of the third element, which requires a causal connection between the two.

{14} According to Plaintiff, any retaliation began at the very inception of the sexual harassment investigation when Intel prejudged the allegations against him, and when Plaintiff refused to confess, Intel began looking for ways to make an example of him. Taken alone, these early events would not give rise to a Human Rights Act claim. The NMHRA protects against discriminatory treatment, not against general claims of employer unfairness. However, these early events can be considered as context for what followed. For example, Lin Harris' alleged threats of retaliation take on a new relevance once Plaintiff filed his formal complaint with the EEOC. After Plaintiff's complaint was filed, his supervisors allegedly made good on those threats by refusing to rate the quality of Plaintiff's work and his completion of tasks in a fair and objective manner. In effect, Plaintiff claims he was set up for termination.

{15} Intel denies any causal connection, denying any retaliation against Plaintiff when he maintained his innocence or when he filed with the EEOC. Intel claims legitimate, non-discriminatory reasons for its actions, including its decision to terminate him. On summary judgment, the non-movant may not rest on the pleadings, but must demonstrate genuine issues of material fact by way of sworn affidavits, depositions, and similar evidence. *Dow v. Chilili Coop. Ass'n*, 105 N.M. 52, 54–55, 728 P.2d 462, 464–65 (1986). Accordingly, we examine whether Plaintiff came forward with sufficient evidence in response to Intel's motion for summary judgment to create genuine issues of material fact that can only be resolved at trial.

Plaintiff's Case Against Summary Judgment

{16} On summary judgment, Plaintiff did not rest on his pleadings but presented evidence against Intel's motion. Plaintiff produced evidence showing, at least arguably, that some people at Intel contemplated terminating Plaintiff even before the sexual harassment investigation was completed. On August 8, 2001, Peg Feibig, who was investigating the sexual harassment charge, wrote in her notes: "How can we make the envi[ronment] safe for S[tephanie Cannady—the accuser]? Terminate K[irk Juneau]? He is showing no ownership/accountability." Plaintiff offers this statement as evidence that the Human Resources Department was contemplating termination even before its investigation was complete. Plaintiff further bolstered his position that the alleged harassment was only an excuse for his termination when he submitted to the district court Cannaday's testimony that all she wanted was for the conversations to stop or to be moved and that Plaintiff never made any sexual statements directly. Despite Intel's more benign explanation of the Feibig notations, we conclude that at trial a fact-finder could reasonably infer from this evidence that Intel's investigators may have prejudged Plaintiff, concluding that he had to show "accountability" for acts he denied committing.

{17} Plaintiff also demonstrated that Harris, a supervisor in the Human Resources Department and a member of Plaintiff's church, involved himself in the investigation. Harris arranged a meeting with Plaintiff at a local restaurant where, according to Plaintiff, he urged him to admit to being part of the harassment. Plaintiff testified that he was told to seek forgiveness for what he had done and that if he continued to pursue litigation and be defiant, "no rock would be left unturned." Harris acknowledged the meeting, but claimed it was only to see if he and Plaintiff were able to separate their friendship from what was going on at work and that he specifically refused to talk about what was going on at Intel. Again, a reasonable fact-finder could infer from this meeting, including its timing and its context, that Plaintiff was being threatened with retaliation if he continued to contest the allegations against him and filed a claim.

{18} After Plaintiff did file with the EEOC, the alleged retaliation only became more intense and continued over the ensuing months. When Plaintiff's supervisor found out about the EEOC claim, she was ready to issue him another written warning but was told to hold off at that point. Although Plaintiff had received critical work evaluations prior to his supervisor's discovery of the EEOC claim, the timing, frequency, and degree of criticism increased significantly after Plaintiff filed with the EEOC. Plaintiff testified on deposition that a co-worker, Mike Aloi, told him that Russell instructed Plaintiff's immediate supervisor, Jim Graff, to revise Plaintiff's task assignments to show them as incomplete, and thereby set Plaintiff up for termination. If admissible at trial, these statements would be clear evidence of retaliation.

{19} In addition to what Russell may have told third-parties, Plaintiff also testified that Russell complained directly to him, showing her hostility toward Plaintiff and his EEOC claim. In his deposition, Plaintiff testified that Russell stated the EEOC claim was "nonsense," and it was "such a headache," and she wished she did not have to deal with it. Russell showed her hostility by telling Plaintiff that he "created an extra workload for her," and that she had to "babysit" Plaintiff and spend enormous amounts of time

with Plaintiff, as opposed to the rest of the group under her supervision. Plaintiff provided direct evidence of Russell's hostility towards him. On December 5, 2001, when a letter from Plaintiff's attorney was read to Russell, she wrote in her notes the word "disgusting" in response to its contents. Arguably, all of Russell's remarks could be interpreted by the fact-finder as evidence of a retaliatory environment, animated by Russell's desire to get even with Plaintiff for filing the EEOC claim and including her in it.

Intel's Response: A Temporal Standard

{20} In addition to denying any causal connection between protected activity and Plaintiff's termination, Intel argues based on federal precedent that the time between Plaintiff's EEOC complaint and his termination, nearly five months, precludes a finding of causation. Intel also argues that the seven-week period between the complaint and Plaintiff's second written warning is insufficient by itself to establish causation. The United States Court of Appeals for the Tenth Circuit has held that if the adverse employment action has occurred within a short time after the protected activity, causation may be inferred from this evidence alone. *See Anderson v. Coors Brewing Co.,* 181 F.3d 1171, 1179 (10th Cir.1999) (discussing case law establishing that one and one half months between the protected activity and the adverse employment action may, by itself, establish causation, but three months is too long). Thus, when no other evidence of causation is available, a plaintiff in the Tenth Circuit may rely on an inference of causation arising from a short time period between the protected activity and the adverse employment action. *See, e.g., Meiners v. Univ. of Kansas,* 359 F.3d 1222, 1231 (10th Cir.2004) (holding that three months and one week was too long to establish causation by temporal proximity alone); *Richmond v. ONEOK, Inc.,* 120 F.3d 205, 209 (10th Cir. 1997) (a three-month period without additional facts would not be sufficient to establish causation); *Ramirez v. Okla. Dep't of Mental Health,* 41 F.3d 584, 596 (10th Cir.1994) (finding that one and one-half month period may be enough to show causation), *overruled on other grounds by Ellis v. Univ. of Kan. Med. Ctr.,* 163 F.3d 1186, 1194 (10th Cir. 1998).

{21} In response, Plaintiff argues that the temporal proximity of each of Intel's adverse actions, as opposed to his ultimate termination, establishes sufficient temporal proximity. *See Marx v. Schnuck Mkts., Inc.,* 76 F.3d 324, 329 (10th Cir.1996) (noting that the "close temporal proximity" standard should not be interpreted too narrowly where retaliatory actions began quickly after the employee filed his Fair Labor Standards claim). From the time Plaintiff filed his claim with the EEOC until the time he was terminated, Plaintiff argues that no more than six weeks passed without some type of adverse employment action. *See id.* at 329 (finding a causal connection when the original write up occurred shortly after filing the claim, but the termination occurred much later). Given the overall context of employer hostility that continued unabated during the entire five-month period, Plaintiff also argues the temporal standard is not relevant because there is other evidence of causation.

{22} We have not been asked in this case to adopt the Tenth Circuit's standards where temporal proximity is the only evidence of causation. In this case, Plaintiff presented other direct evidence of causation, and did not rely on temporal proximity alone. Thus, we decline to apply any temporal proximity analysis in this case or adopt a specific time period for inferring facts related to causation. In this case and unlike certain of the cases cited to us, temporal proximity is only one piece of the evidentiary formulation offered by Plaintiff. *See Meiners,* 359 F.3d at 1231; *Richmond,* 120 F.3d at 209. The fact-finder should be free to consider timing and proximity, along with all the other facts and circumstances, in deciding the ultimate issue of causation. We leave for another day the question of when the time between the employee engaging in protected activity and the employer taking adverse action might be sufficient to allow an inference of a causal connection between the two.

Justification and Pretext

{23} Since Plaintiff has made a prima facie case for retaliation under the

McDonnell Douglas formulation, the burden then shifts to Intel to come forward with a valid justification for the adverse treatment. *See McDonnell Douglas,* 411 U.S. at 802–03, 93 S.Ct. 1817. Once Intel provides a justification, the burden shifts back to Plaintiff to show the justification is merely pretext for a retaliatory motive. *See id.* at 804–05, 93 S.Ct. 1817. At the outset, we note that whether a proffered justification is legitimate, or is merely an excuse to cover up illegal conduct, is largely a credibility issue and often requires the use of circumstantial evidence. It is rare a defendant keeps documents or makes statements that directly indicate a retaliatory motive for terminating an employee. Issues such as this should normally be left exclusively to the province of the jury. Judges should not make credibility determinations or weigh circumstantial evidence at the summary judgment stage.

{24} Intel claims Plaintiff was terminated pursuant to its guidelines that provide for termination of an employee upon the receipt of three written warnings in a rolling twelve-month period. It argues Plaintiff received three written warnings within this period, and two of the warnings were solely related to his work performance, thereby justifying Plaintiff's termination. Intel goes on to argue that Plaintiff has failed to show a genuine issue of material fact that Intel's justification was pretext. We disagree.

{25} Plaintiff is not required to show disputed issues of fact for every element of the claim, *Bartlett v. Mirabal,* 2000–NMCA–036, ¶ 17, 128 N.M. 830, 999 P.2d 1062, and, in any case, Plaintiff has provided evidence from which a jury could conclude Intel's justification was pretext. Indeed, much of the evidence that establishes a genuine issue of fact for causation also demonstrates a factual dispute as to pretext. The record on summary judgment indicates Plaintiff received no discipline for performance issues until after his EEOC complaint was filed. Furthermore, Plaintiff argues the first written warning for sexual harassment was issued because he refused to admit guilt and insisted on pursuing the issue when confronted by Lin Harris. It will be for the factfinder to determine who to believe, Plaintiff or Harris, to determine if the written warning was valid or just retaliation for Plaintiff's actions. In regard to the other two warnings, the record reflects that his coworkers would disagree with the assessments made by his supervisors because they found Plaintiff to be a hard worker. Plaintiff argues this disagreement shows the warnings were merely pretext. Again, the jury must determine whether Plaintiff and his coworkers or Intel and its supervisors are to be believed. Finally, Plaintiff points to Russell's notes regarding the letter from Plaintiff's attorney concerning a potential lawsuit and referring to it as "disgusting." Intel argues, Russell was merely reacting to hyperbole in the letter. It is the province of the jury, not the judge, to interpret Russell's reaction as indicative of a retaliatory motive or not. Plaintiff has satisfied his burden to show there are disputed factual issues regarding Intel's justification.

Plaintiff Raises Genuine Issues of Material Fact

{26} For the reasons stated, we conclude that Plaintiff put forward sufficient evidence below to create genuine issues of material fact with respect to his retaliation claim against Intel. *Bartlett,* 2000–NMCA–036, ¶ 17, 128 N.M. 830, 999 P.2d 1062 (stating that the nonmoving party does not need to present enough evidence to support all elements of the case, only that one or two factual issues are contested). Construing, as we must, Plaintiff's allegations and proffered evidence in a light most favorable to Plaintiff, we conclude that a reasonable fact-finder could draw certain inferences and come to certain conclusions favorable to Plaintiff's claim. A reasonable fact-finder could conclude that Intel, acting unfairly, was out to make an example of Plaintiff almost from the very beginning, and that this contributed to Intel's negative reaction when Plaintiff filed his complaint with the EEOC. A fact-finder could then conclude that the EEOC complaint caused Intel to intensify its criticism of Plaintiff's work immediately after the claim was filed, setting him up for an eventual termination that had become preordained and inevitable.

{27} Of course, at trial a reasonable fact-finder could side with Intel and conclude just the opposite. We must not lose sight of the fact that Intel proclaims its innocence just as forcefully as Plaintiff did when faced initially with charges of sexual harassment. Trial is the only sure way to test these conflicting allegations, at which time the fact-finder can weigh the evidence and judge the credibility of the principal witnesses. It is well-settled in New Mexico that summary judgment is not an appropriate vehicle for courts to do either. *Bartlett*, 2000–NMCA–036, ¶ 38, 128 N.M. 830, 999 P.2d 1062.

Jury Trial

{28} Plaintiff filed his Human Rights Act complaint in state court on February 28, 2002, and it was served on Intel on May 1, 2002. Without filing an answer in state court, Intel removed the case to federal court and then filed its answer. Plaintiff's complaint did not request a jury, nor did he file a separate request in federal court.

{29} While the Human Rights Act complaint was pending in federal court, Plaintiff filed a separate federal action under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e–2 (2000), in which Plaintiff did request a jury. The federal magistrate consolidated the two complaints and placed them both on the federal docket for *jury* trials. Thereafter, the Human Rights Act complaint remained pending for jury trial, until November 5, 2002, when the federal court dismissed the EEOC case and remanded the Human Rights Act claim back to state court. Approximately six weeks after the remand, Plaintiff filed his jury demand in state court on December 16, 2002. The district court denied the request stating, "Plaintiff had ample opportunity to request a trial by jury, but failed [to] do so."

{30} The New Mexico Rules of Civil Procedure, Rule 1–038(A) NMRA 2005, requires that a demand for a jury trial be made within ten days after service of the last responsive pleading. Plaintiff failed to file a jury request in either state or federal court within the ten day rule. Notwithstanding that omission, Plaintiff points out that Intel's answer was never filed in state court, and that, while pending in federal court, the case was in fact scheduled for a jury trial, thereby rendering a jury demand superfluous. Upon remand to state court, Plaintiff argues that he filed his jury request within a reasonable period of time, and that Intel suffered no surprise or prejudice by the short six-week delay.

{31} Under Rule 1–039(A) NMRA 2005, if a jury demand is made after the ten-day period, the district court has discretion to determine whether to grant it. We review a district court ruling on the matter for abuse of discretion. *Alford v. Drum*, 68 N.M. 298, 303–04, 361 P.2d 451 (1961).

{32} In the case before us, the district court refused Plaintiff's jury demand because Plaintiff had "ample opportunity" to request a jury earlier and did not do so. Considered in the abstract, the court's consideration of the jury matter does not seem unreasonable. On its face, a delay of nearly nine months between filing the complaint and requesting a jury is excessive, and *without other mitigating circumstances* would certainly justify a judge's rejection of it. On closer scrutiny, however, the court's analysis seems incomplete in light of the rather unique circumstances of this case.

{33} When reviewing a district court's decision to deny a belated demand for a jury, several cases from other jurisdictions have looked at a variety of factors to determine if there was an abuse of discretion. For instance, in *Pinemont Bank v. Belk*, 722 F.2d 232, 238 (5th Cir.1984), the court found it was an abuse of discretion to deny a jury trial when all the parties and the court had in fact assumed the case would be tried to a jury, and no prejudice would result. Other courts look not only to the length of the delay in requesting a jury but also the reasons for the delay, whether the issues are suitable for a jury, whether granting the motion would result in disruption for the court or the opposing party, and whether the opposing party would be prejudiced. *Parrott v. Wilson*, 707 F.2d 1262, 1267 (11th Cir.1983); *see also Daniel Int'l Corp. v. Fischbach & Moore, Inc.*, 916 F.2d 1061, 1064 (5th Cir.1990) (utilizing the same factors).

{34} In our view, it is not just a question of whether Plaintiff had an "opportunity" to request a jury trial; it is undisputed that he did. Other factors, including the reason for the delay and whether prejudice will result, must be considered in order to constitute the proper exercise of discretion. *Cf. Carlile v. Cont'l Oil Co.*, 81 N.M. 484, 486, 468 P.2d 885, 887 (Ct.App.1970) (district court may abuse its discretion in failing to grant jury trial where opposing party is not prejudiced, the court is not delayed, and business of the court is not inconvenienced). Looking to these other factors, it is evident the district court should have granted the motion.

{35} In reality, during much of the procedural history of this case, Plaintiff had the opportunity to file but no real need. When the case was filed initially in state court, Intel removed the case before filing its answer, and therefore never triggered the ten-day limitation period in state court. During its pendency in federal court, the matter was already set for jury trial. A jury demand would have been perfunctory and unnecessary. It was only upon remand to state court, that Plaintiff had both the opportunity and the need.

{36} A delay of just under six weeks does not seem unreasonable, especially considering that discovery was just unfolding and no trial date had been set. Intel suffered no prejudice and appears to have been aware all along that a jury trial was not only anticipated but in fact scheduled, at least while the case remained in federal court. *Cf. Bates v. Bd. of Regents,* 122 F.R.D. 586, 589 (D.N.M. 1987) (where no prejudice would result to defendant and both parties assumed case was set for jury trial, plaintiff's motion was granted); *Aspen Landscaping, Inc. v. Longford Homes of N.M., Inc.*, 2004–NMCA–063, ¶ 12, 135 N.M. 607, 92 P.3d 53 (distinguishing *Bates* because both parties assumed case was to be tried before a judge, not a jury, until plaintiff belatedly requested a jury).

{37} On balance, given the fundamental importance of a jury trial in our jurisprudence, it appears arbitrary and unfair to Plaintiff for the district court to deny his jury request under these rather special circumstances. *See Hernandez v. Power Constr. Co.*, 73 Ill.2d 90, 22 Ill.Dec. 503, 382 N.E.2d 1201, 1204 (1978) (stating the court abused its discretion denying late jury demand, when, under the special circumstances of the case, it failed to "give proper recognition to the need to protect the 'jealously guarded right of trial by jury'" (quoted authority omitted)). Under these circumstances, the court abused its discretion. To rectify that abuse and in the overarching interest of fairness to both sides, we reverse this decision of the district court and remand for a jury trial.

CONCLUSION

{38} We reverse the summary judgment. We reverse the district court's ruling to deny Plaintiff's demand for a trial by jury, and we remand for further proceedings.

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

WE CONCUR: PATRICIO M. SERNA, and EDWARD L. CHÁVEZ, Justices.

PAMELA B. MINZNER and PETRA JIMENEZ MAES, Justices (specially concurring).

MINZNER, Justice (specially concurring).

{40} Although I concur in the result the Majority Opinion reaches, I believe the facts merit a somewhat different analysis. I do agree that there is sufficient evidence of a causal connection between the protected activity of filing a complaint and an adverse employment action to preclude summary judgment. I also agree that the trial court erred in denying Plaintiff's request for a jury trial. I am not persuaded that Plaintiff is entitled to rely on his actions prior to filing a complaint with the Equal Employment Opportunity Commission as evidence of protected activity nor that his employer should be viewed as having waived the right to challenge Plaintiff's reliance on those actions. My reasons for believing that Plaintiff is not entitled to rely on his actions prior to filing the complaint are as follows.

{41} Intel did not wave its protected activity arguments. Intel initially argued in its motion for summary judgment that there was no evidence showing a causal connection between the EEOC claim and Plaintiff's ter-

mination or any other adverse employment action. With this motion, I believe Intel conceded only that filing a complaint with the EEOC was protected activity. In response, Plaintiff argued that Intel retaliated, not only because he filed an EEOC complaint, but also because he denied involvement in harassment. In its reply, Intel clearly stated that the only issue before the court was whether Plaintiff was terminated "as a result of a discrimination charge he filed with the EEOC." Intel specifically argued that "Plaintiff's request for an open door investigation on August 7, 2001 was not 'protected activity.'" Intel also argued that even if Plaintiff had been terminated for refusing to admit he was involved in sexual harassment, this was "not impermissible retaliation in violation of the NMHRA and therefore not subject to the Court's review."

{42} I am not persuaded that Plaintiff's actions prior to filing the complaint with the EEOC were protected activity under the New Mexico Human Rights Act. The NMHRA prohibits discrimination in employment on specific grounds including race, age, religion, sex, physical or mental handicap, sexual orientation or gender identity. NMSA 1978, § 28–1–7(A) (2004). The Act also prohibits discrimination against any person who has "opposed any unlawful discriminatory practice or has filed a complaint, testified or participated in any proceeding under the Human Rights Act." § 28–1–7(I). Thus, the Act prohibits only certain types of discrimination; it does not prohibit all unfair or unreasonable employment actions. *Cf. Feliciano de la Cruz v. El Conquistador Resort and Country Club,* 218 F.3d 1, 8 (1st Cir. 2000) (holding that proof that termination was "unfair" is not sufficient to state a claim under Title VII; courts do not assess the merits or even rationality of employers' non-discriminatory business decisions); *Morrow v. Wal-Mart Stores, Inc.,* 152 F.3d 559, 564 (7th Cir.1998) ("Title VII prohibits discriminatory employment actions, not hasty or ill-considered ones.").

{43} There is no indication in the record that Plaintiff was protesting discriminatory treatment. He simply asserted that he had not had any inappropriate conversations, and any discipline would therefore be unfair. Similarly, Plaintiff's internal complaint regarding the sexual harassment investigation alleges that the investigators "prejudged" his case, and reached their conclusions without adequate evidence. Plaintiff did not assert that the investigators were biased because of his membership in a protected class. He simply claims that the investigation was unfair. The NMHRA ought not be construed to protect such a general claim.

{44} By including such a general claim within the scope of protected activity, we seem to me to create a troublesome and unnecessary difficulty for employers dealing with sexual harassment complaints. If an employer fails to take corrective action, that employer may be held responsible for a hostile work environment. If an employee suspected of involvement in sexual harassment is unhappy with the corrective action taken, that employee may perceive the employer to be retaliating for what the employee considers just criticism. I believe we ought not construe the NMHRA to protect resistance to a non-discriminatory investigation of a sexual harassment claim.

{45} However, even if Plaintiff's only protected activity was filing a complaint with the EEOC, Plaintiff appears to have met his prima facie burden by presenting some evidence suggesting that his EEOC complaint caused Intel's adverse employment action. Plaintiff offered evidence that he started receiving poor reviews and feedback after filing his complaint. He also provided direct evidence that his supervisors were aware of his complaint and were upset that it had been filed. A plaintiff can provide direct evidence of discrimination if he or she can demonstrate that there is a nexus between discriminatory comments, and the disputed employment decision. *Stover v. Martinez,* 382 F.3d 1064, 1077–78 (10th Cir.2004). The record shows that the same supervisor commented on the complaint, complained about having to "babysit" Plaintiff, and made the ultimate decision that resulted in Plaintiff's termination. She initiated disciplinary action shortly after the complaint was filed. Plaintiff has shown a nexus between the retaliato-

ry comments and the adverse employment action.

{46} Intel has offered a legitimate, non-discriminatory reason for Plaintiff's termination, showing that Plaintiff had a record of poor cooperation and communication skills, and had failed to complete many of the tasks he was assigned in a timely manner. The showing was not sufficient to support summary judgment as a matter of law because Plaintiff has presented sufficient evidence to allow a reasonable factfinder to conclude that concerns about Plaintiff's performance were a pretext for retaliation. While far from overwhelming, the evidence supporting Plaintiff's prima facie case would also allow a jury to conclude that Intel did not actually believe that Plaintiff's performance had deteriorated. For example, the evidence that Plaintiff's supervisor was aware of the complaint, considered it "disgusting," changed Plaintiff's review process, and initiated disciplinary proceedings shortly after learning of the complaint, could support the jury's conclusion that the complaint was the true motivation for disciplinary action. *See Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1323–24 (8th Cir.1994). Because I conclude that Plaintiff has made a sufficient showing to survive summary judgment, I concur in the result reached by the majority.

I CONCUR: PETRA JIMENEZ MAES, Justice.

2006-NMSC-004

127 P.3d 1111

Cary BATTISHILL, Plaintiff–Respondent,

v.

FARMERS ALLIANCE INSURANCE COMPANY, Defendant–Petitioner.

No. 28,812.

Supreme Court of New Mexico.

Jan. 9, 2006.

Atwood, Malone, Turner & Sabine, P.A., Cord D. Borner, Lee M. Rogers, Jr., Roswell, for Petitioner.

Templeman & Crutchfield, P.C., James E. Templeman, Lovington, for Respondent.

Montgomery & Andrews, P.A., Gary R. Kilpatric, Santa Fe, Meckler, Bugler & Tilson, L.L.P., Richard Hodyl, Jr., Chicago, IL, for Amicus Curiae Property Casualty Insurers Association of America.

OPINION

MINZNER, Justice.

{1} Appellant Farmers Alliance Insurance Company appeals from the Court of Appeals' opinion reversing summary judgment in its favor on Appellee Cary Battishill's claim under a homeowner's policy. *See Battishill v. Farmers Alliance Ins. Co.*, 2004–NMCA–109, 136 N.M. 288, 97 P.3d 620. The question on appeal is whether the policy section covering all risks except "vandalism and malicious mischief" excluded acts of arson. The Court of Appeals held that the phrase "vandalism and malicious mischief" did not encompass acts of arson because both terms were susceptible to different interpretations, *id.* ¶ 22, and because the structure of the policy, taken as a whole, supported an interpretation in favor of the insured. *Id.* ¶ 24.

{2} We conclude, contrary to the Court of Appeals, that the phrase "vandalism and malicious mischief," included acts of arson. The clarity of the exclusion in the all-risk section of the policy precludes an interpretation in favor of the insured.

FACTS

{3} Battishill is the owner of a rental house that was insured under a homeowner's hybrid policy issued by Farmers Alliance. The hybrid policy provides "all-risk" coverage on the dwelling itself and "named peril" coverage on personal property. The all-risk coverage insures against all risks causing physical loss to the dwelling, unless specifically excluded. The named perils coverage insures for "direct physical loss to [personal] property" caused by specific perils including "fire or lightning" and "vandalism or malicious mischief."

{4} It is undisputed that Battishill's house was partially damaged by a fire on or about June 24, 2002. The house had been vacant for more than thirty consecutive days prior to the fire, and did not contain any of Battishill's personal property. After an investigation, it was determined that the fire was incendiary in nature. Battishill filed a claim under his homeowner's insurance policy. Farmers Alliance denied coverage based on an exclusion in the policy for loss caused by "[v]andalism and malicious mischief if the dwelling has been vacant for more than 30 consecutive days immediately before the loss." *Id.* ¶ 4.

{5} The district court granted summary judgment in favor of Farmers Alliance, holding that the vacancy exclusion was unambiguous and excluded coverage. The Court of Appeals reversed the district court's decision and concluded that "a common and ordinary meaning of 'vandalism' " supports coverage, and therefore, "on a narrow construction of the exclusion" the insured was entitled to recover. *Id.* ¶ 25. In addition, the Court of Appeals held that the all-risk and named perils coverages were structurally similar

and that a reasonable insured "would read the policy as covering destruction by arson" even if the dwelling had been vacant for more than thirty consecutive days. *Id.*

DISCUSSION

A. Standard of Review and Burden of Proof

{6} We review both issues de novo. "The interpretation of an insurance contract is a matter of law about which the court has the final word." *Rummel v. Lexington Ins. Co.,* 1997–NMSC–041, ¶ 60, 123 N.M. 752, 945 P.2d 970. "[U]nder an all-risk policy, the insured must initially prove that the loss or damage was caused by some event or risk other than normal depreciation or inherent vice or defect." 1 ERIC MILLS HOLMES & MARK S. RHODES, HOLMES'S APPLEMAN ON INSURANCE, § 1.10, at 43 (2d ed.1996). In this case, it is undisputed that the damages were caused by arson; therefore, Battishill has met his burden. The burden then shifts to Farmers Alliance "to prove that the loss is not covered by evidence showing an exception, exclusion or other limitation applies." *Id.; see also id.* at 45 ("That the insurer has the burden of proof to prove no coverage under an all-risks policy is the American rule in all states, with the possible exception of Texas.").

B. "Vandalism and Malicious Mischief" as Ambiguous Terms

{7} The insurance policy at issue did not define "vandalism and malicious mischief" and it failed to mention arson. These terms are essential in determining whether the exclusion was applicable in this case. If arson constitutes "vandalism and malicious mischief," then the exclusion precludes coverage because it is undisputed that the dwelling was vacant for more than thirty consecutive days.

{8} The Court of Appeals stated that "an insurance policy is not rendered ambiguous merely because a term is not defined; rather, the term must be interpreted in its usual, ordinary, and popular sense." *Battishill,* 2004–NMCA–109, ¶ 11, 136 N.M. 288, 97 P.3d 620. We agree and hold that the common and ordinary meaning of "vandalism," "malicious mischief," and "arson" may be ascertained from a dictionary. *See, e.g., Estes v. St. Paul Fire & Marine Ins. Co.,* 45 F.Supp.2d 1227, 1229 (D.Kan.1999) (relying on Webster's Third New International Dictionary's definitions of "vandalism" and "arson" to determine that "[a]rson of a private dwelling clearly is within the plain and ordinary meaning of vandalism").

{9} Webster's Third New International Dictionary defines "vandalism" as "willful or malicious destruction or defacement of things of beauty or of public or private property." WEBSTER'S THIRD NEW INT'L DICTIONARY 2532 (2002). It defines "malicious mischief" as "willful, wanton, or reckless damage or destruction of another's property." *Id.* at 1367. "Arson" is defined as "the willful and malicious burning of or attempt to burn any building, structure, or property of another (as a house, a church, or a boat) or of one's own usu[ally] with criminal or fraudulent intent." *Id.* at 122. Burning is a form of damage, destruction, or defacement. From these definitions, we conclude that arson is a form of "vandalism and malicious mischief." *See Am. Mut. Fire Ins. Co. v. Durrence,* 872 F.2d 378, 379 (11th Cir.1989) (per curiam) ("[A] common sense interpretation of the insurance contract's 'Vandalism or Malicious Mischief' provision which contains the 'vacancy' exclusion, suggests that it would apply to a fire set in a vacant house by an unknown arsonist or vandal."); *Costabile v. Metro. Prop. & Cas. Ins. Co.,* 193 F.Supp.2d 465, 478 (D.Conn.2002) (predicting "that the Connecticut Supreme Court would conclude that arson . . . is a type of vandalism"); *United Capital Corp. v. Travelers Indem. Co. of Illinois,* 237 F.Supp.2d 270, 274 (E.D.N.Y.2002) ("Although there is somewhat conflicting case law on the issue, courts generally agree that the ordinary use of the word vandalism would include an arson."); *Brinker v. Guiffrida,* 629 F.Supp. 130, 136 (E.D.Pa.1985) ("Willfully and intentionally damaging a dwelling by setting it on fire is certainly damaging the dwelling by vandalism and malicious mischief, as well as arson.").

{10} Although the Court of Appeals recognized that arson may be considered a type of vandalism, it also reasoned that "apart from the dictionary, there exists a sense that the common and ordinary meaning of vandalism is something different than that of arson." *Battishill*, 2004–NMCA–109, ¶ 13, 136 N.M. 288, 97 P.3d 620; *see also id.* ¶ 17 ("While vandalism can also be read to generally and broadly mean willful or malicious destruction of a dwelling, its common and ordinary meaning is not necessarily or only defined that way."). The Court of Appeals noted that " 'arson' " and " 'vandalism' " have been described as " 'distinct perils' " in the general view of " 'ordinary business people.' " *Id.* ¶ 13 (quoting *MDW Enter., Inc. v. CNA Ins. Co.*, 4 A.D.3d 338, 772 N.Y.S.2d 79, 83 (2004)). We believe that it may be necessary to look beyond the dictionary definition to ascertain the common and ordinary meaning of a word or words in some cases; however, in this case, the dictionary provides appropriate common and ordinary definitions of "vandalism," "malicious mischief," and "arson."

{11} We are not persuaded a historical examination of the term "vandalism" is appropriate. The common and ordinary meaning of an undefined term should be based upon contemporary usage, where possible, because the issue is how a reasonable insured would understand the term at the time of purchase. *See, e.g., Gen. Accident Fire & Life Assurance Corp. v. Azar*, 103 Ga.App. 215, 119 S.E.2d 82, 85 (1961) ("Certainly it does not seem logical that the classic definition was intended by either the insurer or the insured in this case . . . ."). We agree with Farmers Alliance, who argued that "the ancient connotations of 'vandalism' have given way, in modern usage of the term, to a very broad meaning of the word that includes the destruction of property generally."

{12} Even if historically the term vandalism was limited to "behavior primarily directed at property having artistic, historical, architectural, literary, musical, personal or emotional significance or value" and to "damage that is not devastating," *Battishill*, 2004–NMCA–109, ¶¶ 17, 21, 136 N.M. 288, 97 P.3d 620, in contemporary usage, the terms vandalism and malicious mischief are not so limited. *See, e.g., Gen. Accident Fire & Life Assurance Corp.*, 119 S.E.2d at 84–85 ("[I]n ordinary usage [vandalism] is not limited to destruction of works of art, but has been broadened in its meaning to include the destruction of property generally."). Both definitions specify certain states of mind (willful, malicious, wanton, or reckless) and address certain types of results (destruction, defacement, or damage) to property, while neither definition limits the types of property or extent of damage.

{13} The Court of Appeals rejected contemporary usage because it did not believe that this usage was "correct in the context of dwelling insurance, purchased to insure against the dreaded risk of fire." *Battishill*, 2004–NMCA–109, ¶ 14, 136 N.M. 288, 97 P.3d 620; *see also id.* ¶ 21 ("[T]o a reasonable insured, the desire to have fire coverage, unquestionably extremely important for an insured, predominates."). We acknowledge that an insured's purposes in purchasing insurance are important considerations. Our interpretation of language within an insurance policy, however, is not based on a subjective view of coverage, but rather "our focus must be upon the objective expectations the language of the policy would create in the mind of a hypothetical reasonable insured who, we assume, will have limited knowledge of insurance law." *Computer Corner, Inc. v. Fireman's Fund Ins. Co.*, 2002–NMCA–054, ¶ 7, 132 N.M. 264, 46 P.3d 1264. When the terms used have a common and ordinary meaning, that meaning controls in determining the intent of the parties. We believe that contemporary usage provides the common and ordinary meaning that is appropriate on these facts.

{14} The common and ordinary meaning of the terms used in the all-risk coverage section results in broad coverage and a narrow exclusion. This section covers fire, including arson, as a form of direct physical loss to the dwelling, unless an enumerated exclusion is applicable. The exclusionary clause precludes coverage when the loss was caused by "[v]andalism and malicious mischief if the dwelling has been vacant for more than 30 consecutive days immediately before

the loss." *Battishill*, 2004–NMCA–109, ¶ 4, 136 N.M. 288, 97 P.3d 620. We have concluded that arson is a type of vandalism and malicious mischief. Moreover, the vacancy requirement was met. Consequently the exclusionary clause applies and precludes coverage. We next address the Court of Appeals' conclusion that when the policy is read as a whole, structural similarities between the all-risk and named perils coverage support a different interpretation.

C. Ambiguity Within the Policy as a Whole

{15} Battishill argues that the policy read in its entirety is ambiguous, requiring an interpretation in his favor. Although the Court of Appeals recognized that "[t]he all-risk and named-perils personal property coverages are clearly separate coverages with likely different underwriting analysis based on different risks," *Battishill*, 2004–NMCA–109, ¶ 23, 136 N.M. 288, 97 P.3d 620, it ultimately agreed with Battishill's contentions. The Court of Appeals identified structural similarities that supported construing the policy in his favor.

{16} We agree with the Court of Appeals that the two coverages are separate and distinct; however, we disagree with the Court's analysis of the structural similarities. It is not necessary to read the coverages together to construe the all-risk dwelling exclusion at issue, because the exclusion read alone is clear and unambiguous. *See Costabile*, 193 F.Supp.2d at 476–78 (holding the language providing all-risk coverage was unambiguous, while the language providing coverage against named perils was ambiguous). *But see United Capital Corp.*, 237 F.Supp.2d at 274–76 (recognizing that the ordinary use of the word vandalism would include an arson, the Court nevertheless concluded that the policy as a whole was ambiguous because fire and vandalism were listed separately in another section of the policy). Unless it is necessary to read the coverages together, we believe there is a risk of creating, rather than identifying, ambiguity.

{17} We recognize that it is the law in New Mexico that "an insurance policy which may reasonably be construed in more than one way should be construed liberally in favor of the insured." *Erwin v. United Benefit Life Ins. Co.*, 70 N.M. 138, 144, 371 P.2d 791, 794–95 (1962). However, that rule "applies only where the language in the policy is ambiguous." *Safeco Ins. Co. of Am. v. McKenna*, 90 N.M. 516, 520, 565 P.2d 1033, 1037 (1977). "Resort will not be made to a strained construction for the purpose of creating an ambiguity when no ambiguity in fact exists." *Id.* In this case, the language in the exclusion is clear and unambiguous. We only look to other sections in a policy for clarification, not in an attempt to create an ambiguity where none exists. *See, e.g., Rummel*, 1997–NMSC–041, ¶ 20, 123 N.M. 752, 945 P.2d 970 ("If any provisions appear questionable or ambiguous, we will first look to whether their meaning and intent is explained by other parts of the policy."). An "ambiguity does not exist simply because a controversy exists between the parties, each favoring an interpretation contrary to the other." 2 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 21:11 (3d ed.2005).

{18} Our cases provide some guidance in determining whether an ambiguity exists, but they do not support a conclusion of ambiguity in this case. "Ambiguities arise when separate sections of a policy appear to conflict with one another, when the language of a provision is susceptible to more than one meaning, when the structure of the contract is illogical, or when a particular matter of coverage is not explicitly addressed by the policy." *Rummel*, 1997–NMSC–041, ¶ 19, 123 N.M. 752, 945 P.2d 970. In this case, separate sections of the policy do not conflict with one another because the all-risk dwelling coverage and the named-perils coverage are separate and distinct coverages, each providing separate coverage for different risks to different property under different terms. "Vandalism" and "malicious mischief" have a common and ordinary meaning in contemporary usage. Both terms, by their definitions, include arson. The structure of the contract appears logical; the two sections can be read independently and provide a sensible result. Finally, although arson is not explicitly addressed by the policy,

arson is included within various terms used in the policy. For example, arson is included within the terms "fire," "vandalism," and "malicious mischief."

{19} For purposes of the all-risk coverage, fire, vandalism, and malicious mischief are included, unless an exclusion applies. We recognize that arson can be viewed as a type of fire, and arson can be viewed as a form of vandalism and malicious mischief. However, the fact that there is an overlap within the named perils section does not create an ambiguity within the all-risk section. *See Costabile*, 193 F.Supp.2d at 476; *cf. United Capital Corp.*, 237 F.Supp.2d at 277 (distinguishing *Costabile* on the basis that "the structure of the policy . . . provides no basis for limiting the ambiguity to only one type of coverage"). Fire, vandalism, and malicious mischief are not covered by the all-risk dwelling coverage as enumerated risks. Rather, it can be inferred that fire, vandalism, and malicious mischief are covered, unless they fit within an explicit exception. Therefore, even though arson is a form of fire, to which no exception applies, it is encompassed within the definitions of vandalism and malicious mischief, to which an exception does apply.

{20} The exclusion within the all-risks section is clear and unambiguous, and it should be applied as written. *See Costabile*, 193 F.Supp.2d at 478 ("The language of the policy in Coverages A and B is not ambiguous: the willful destruction of property is not covered if the building has been vacant or unoccupied for thirty consecutive days."); *see also* COUCH 3d § 21:11 ("[I]t is a well settled rule that the question of construction can only arise where the language of a policy is susceptible to more than one meaning, and that clear and unambiguous clauses must be accepted as the expression of the intent of the parties, and enforced by the courts as written."). We conclude that the policy read as a whole provides no basis for interpreting the exclusion in favor of Battishill.

CONCLUSION

{21} We reverse the Court of Appeals' conclusion that the common and ordinary meaning of "vandalism and malicious mischief" does not include "arson." We also reverse the Court of Appeals' holding that taken as a whole, the homeowner's insurance policy supports a construction in favor of Battishill. We conclude that the exclusion precluded coverage, and we affirm the district court's grant of summary judgment.

{22} IT IS SO ORDERED.

BOSSON, Chief Justice, SERNA, MAES and CHÁVEZ, Justices, concur.

2006-NMCA-006

127 P.3d 1116

STATE of New Mexico, Plaintiff–Appellee,

v.

Michael PITTMAN, Defendant–Appellant.

No. 24,671.

Court of Appeals of New Mexico.

Nov. 23, 2005.

Certiorari Granted, No. 29,584, Jan. 10, 2006.

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

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

OPINION

SUTIN, J.

{1} We consider the legality of a search of Defendant's car that occurred after Defendant was arrested, handcuffed, and placed in a patrol car. We conclude that under Article II, Section 10 of the New Mexico Constitution the search was illegal. We reverse the district court's denial of Defendant's motion to suppress and remand for further proceedings.

BACKGROUND

{2} Hobbs police officer Orin Tubbs saw Defendant's Cadillac pull out into traffic, on the opposite side of the roadway, from an apartment parking lot without stopping. He decided to stop Defendant, turned on his emergency equipment, and began a u-turn. As he did so, he saw Defendant pull into the parking area of an apartment building, park his car, quickly get out of the car, and lock the door. There were no other occupants in the car.

{3} Officer Tubbs pulled into the parking lot and asked for Defendant's license and registration. Defendant returned to his car, opened the passenger door, and retrieved the requested documents. The officer ran a wants and warrants check and discovered that there was an outstanding warrant for Defendant's failure to appear in municipal court. Based on that discovery, he arrested Defendant, handcuffed him, and put him in the rear seat of his patrol car.

{4} At that point, Defendant asked the officer to give the car keys to his grandmother, who Defendant said lived in the apartment complex. The officer took the keys, but chose instead to unlock Defendant's car and search it. He found a loaded .40 caliber handgun underneath the driver's seat. Officer Tubbs testified that at the time he searched the car, he did not feel he was in any danger, nor did he expect to find any evidence in the car related to the arrest for failure to appear.

{5} Defendant was charged with a traffic violation and with being a felon in possession of a firearm. He moved to suppress the evidence. The court denied the motion, whereupon Defendant entered a conditional no contest plea to the crime of felon in possession of a firearm reserving the right to appeal the suppression issue.

DISCUSSION

STANDARD OF REVIEW

{6} We review the denial of a motion to suppress by first reviewing the district court's factual determinations for substantial evidence in a light favorable to the prevailing party and then by reviewing the legal conclusions de novo. *State v. Garcia,* 2005–NMSC–017, ¶ 27, 138 N.M. 1, 116 P.3d 72; *see also State v. Attaway,* 117 N.M. 141, 144–46, 870 P.2d 103, 106–08 (1994) (addressing the district court's exigency determination, determining that the question "extends beyond fact-finding and implicates an assessment of broader legal policies that the New Mexico Constitution entrusts to the reasoned judgment of the appellate courts of this state," and concluding that the mixed question of fact and law involved in determining exigent circumstances "lies closest in proximity to a conclusion of law" and "that such determinations are to be reviewed de novo").

SEARCH INCIDENT TO ARREST

{7} The State seeks to validate the search of Defendant's car as a search incident to arrest. The United States Supreme Court in *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), held a search incident to an arrest justifiable as an exception to the warrant requirement under two rationales: the need to remove a weapon the arrestee might use to resist arrest or to escape, and the need to prevent the concealment or destruction of evidence. *Id.* at 762–63, 89 S.Ct. 2034. Those two rationales are

still applied. *Thornton v. United States,* 541 U.S. 615, 620, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004); *see State v. Martinez,* 1997-NMCA-048, ¶¶ 6-8, 123 N.M. 405, 940 P.2d 1200 (citing to *Chimel* in formulating the test to be used under the New Mexico Constitution regarding searches incident to arrest of a person in his home).

{8} *Chimel* described the spacial area of concern to be an area "into which an arrestee might reach." 395 U.S. at 763, 89 S.Ct. 2034. Application of this spacial limitation became problematic in later cases when the arrest involved an occupant of a vehicle, and over the years the Supreme Court widened the area of the arrestee's "reach" in considering his temporal and spacial relationship to the vehicle. *See Thornton,* 541 U.S. at 620, 124 S.Ct. 2127; *New York v. Belton,* 453 U.S. 454, 460, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981); *United States v. Robinson,* 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

{9} Underlying the weapon removal rationale for a search incident to an arrest is a very "legitimate and weighty" concern for officer safety. *See Knowles v. Iowa,* 525 U.S. 113, 117, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998) (internal quotation marks and citation omitted); *see also State v. Gutierrez,* 2004-NMCA-081, ¶ 11, 136 N.M. 18, 94 P.3d 18 (permitting a search of an automobile incident to arrest where the defendant reported that there was a weapon in the vehicle and a passenger had access to it under an officer safety rationale); *cf. State v. Paul T.,* 1999-NMSC-037, ¶¶ 10, 11, 14, 128 N.M. 360, 993 P.2d 74 (considering the *Terry* search circumstances "in light of a concern for officer safety").

{10} The evidence concealment/destruction rationale for a search incident to an arrest is based on the need to act quickly or else lose critical evidence of a crime which the police have probable cause to believe the suspect committed. *See Cupp v. Murphy,* 412 U.S. 291, 296, 301, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973) (Douglas and Brennan, JJ., dissenting in part) (determining, in accordance with *Chimel,* that a limited search to "preserve the highly evanescent evidence" under a detainee's fingernails to be appropriate, agreeing with the Court "that exigent circumstances existed making it likely that the fingernail scrapings ... might vanish if [the detainee] were free to move about"). When there is no such critical evidence to be found either on an occupant or in the vehicle, a search is unreasonable if purportedly done under the evidence concealment/destruction rationale. *See Knowles,* 525 U.S. at 119, 119 S.Ct. 484 (declining to extend the authority to conduct a search incident to an arrest "to a situation where the concern ... for destruction or loss of evidence is not present at all").

{11} "[*Belton*] ... held that when a police officer has made a lawful custodial arrest of an occupant of an automobile, the Fourth Amendment allows the officer to search the passenger compartment of that vehicle as a contemporaneous incident of arrest." *Thornton,* 541 U.S. at 617, 124 S.Ct. 2127. *Belton* became the Supreme Court's most influential case in *Chimel* automobile search situations. As set out in LaFave's treatise on search and seizure, "[g]iven the *Belton* majority's avowed purpose of foreclosing the need for case-by-case determinations of an arrestee's control of the car" and its abandonment of the *Chimel* "immediate control" requirement for a broader rule, many federal and state cases have held that a search of a car incident to arrest is valid even if the arrestee is safely placed in the police car. 3 Wayne R. LaFave, *Search and Seizure* § 7.1(c) at 517-18 & n. 89 (4th ed.2004) (citing cases and noting Justice Brennan's statement in his dissent in *Belton* that "the result would presumably be the same even if [the officer] had handcuffed Belton and his companions in the patrol car before placing them under arrest" (internal quotation marks omitted)).

{12} Interestingly, *Thornton* involved a vehicle search after the arrestee was handcuffed and placed in a patrol car. However, these facts were not pertinent to the issue addressed by the Supreme Court. *See Thornton,* 541 U.S. at 617, 124 S.Ct. 2127. In *Thornton,* the issue on certiorari was whether the rule in *Belton* "is limited to situations where the officer makes contact with the occupant while the occupant is inside the vehicle, or whether it applies as well

when the officer first makes contact with the arrestee after the latter has stepped out of his vehicle." *Thornton,* 541 U.S. at 617, 124 S.Ct. 2127. The Supreme Court held in *Thornton* that police may search an automobile as a search incident to arrest "even when an officer does not make contact until the person arrested has left the vehicle." *Id.* The Court permitted a search so long as an arrestee is "the sort of 'recent occupant' of a vehicle such as petitioner was here." *Id.* at 623–24, 124 S.Ct. 2127. Because it was outside the question on which the Court granted certiorari, the majority in *Thornton* declined to address the defendant's argument that the Court "should limit the scope of *Belton* to recent occupants who are within reaching distance of the car." *Thornton,* 541 U.S. at 622 n. 2, 124 S.Ct. 2127 (internal quotation marks omitted).

INTERSTITIAL AND NEW MEXICO CONSTITUTIONAL ANALYSES

{13} When a defendant, as here, appeals under both the federal and state constitutions, we apply the interstitial approach to constitutional analysis. *See State v. Gomez,* 1997–NMSC–006, ¶¶ 17, 19, 122 N.M. 777, 932 P.2d 1; *Gutierrez,* 2004–NMCA–081, ¶ 9, 136 N.M. 18, 94 P.3d 18. If the right being asserted is protected under the federal constitution, we need not reach the state constitutional claim. *Gomez,* 1997–NMSC–006, ¶ 19, 122 N.M. 777, 932 P.2d 1. If Defendant's rights are not fully protected under the federal constitution, we must then determine whether the state constitution provides broader protection. *See id.* We may diverge from federal precedent if distinctive state characteristics require a different result. *See id.* ¶¶ 19–20 (listing three independent reasons which justify departure from federal constitutional law precedent, including "a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics"). Based on *Belton, Thornton,* and the body of case law upholding vehicular searches incident to arrest as listed in LaFave, *supra,* at 517 n. 89, we think it apparent that Defendant is not likely to prevail under the federal constitution. We therefore examine New Mexico law.

{14} New Mexico law expresses a strong preference for a warrant. *Gomez,* 1997–NMSC–006, ¶ 36, 122 N.M. 777, 932 P.2d 1. When a defendant challenges the validity of a search, the State bears the burden of proving facts that justify a warrantless search. *See id.* ¶ 39 (stating that "a warrantless search of an automobile and its contents requires a particularized showing of exigent circumstances"). Under Article II, Section 10 of the New Mexico Constitution, our courts have provided criminal defendants greater protection against searches than that provided under the United States Constitution.[1] *See, e.g., State v. Cardenas–Alvarez,* 2001–NMSC–017, ¶ 12, 130 N.M. 386, 25 P.3d 225 (listing various situations in which we have interpreted our state constitutional search and seizure provision more expansively than federal precedent); *State v. Marquart,* 1997–NMCA–090, ¶ 16, 123 N.M. 809, 945 P.2d 1027 (same). In particular, we have departed from federal search and seizure precedent when automobiles are involved. *See Cardenas–Alvarez,* 2001–NMSC–017, ¶ 15, 130 N.M. 386, 25 P.3d 225; *Gomez,* 1997–NMSC–006, ¶¶ 39, 44, 122 N.M. 777, 932 P.2d 1. Significantly, in departing from federal precedent, our Supreme Court in *Cardenas–Alvarez* said that "[t]he extra layer of protection from unreasonable searches and seizures involving automobiles is a distinct characteristic of New Mexico constitutional law." 2001–NMSC–017, ¶ 15, 130 N.M. 386, 25 P.3d 225. This extra layer of protection for automobiles was again recognized and confirmed recently in *Garcia,* 2005–NMSC–017, ¶ 29, 138 N.M. 1, 116 P.3d 72. *Garcia* notes that federal precedent expansively allows for searches of and seizures from a car without a warrant, but that "New Mexico law departs from federal precedent on this issue" and that the state constitution "provides greater protection, requiring a warrant or the presence of exigent circumstances to remove evidence." *Id.*

1. According to LaFave, several states "have declined to permit searches in as broad a set of circumstances as *Belton* would authorize." *See* LaFave, *supra,* § 7.1(a), at 505 n. 24. *But see* LaFave, *supra,* § 7.1(c), at 517–18 nn. 89–93.

{15} Exigent circumstances embrace "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence." *Gomez,* 1997-NMSC-006, ¶ 39, 122 N.M. 777, 932 P.2d 1 (internal quotation marks and citation omitted); *accord Garcia,* 2005-NMSC-017, ¶ 30, 138 N.M. 1, 116 P.3d 72. New Mexico has rejected the federal bright-line rule authorizing a search of the passenger compartment of a vehicle pursuant to a search incident to arrest. *State v. Arredondo,* 1997-NMCA-081, ¶ 28, 123 N.M. 628, 944 P.2d 276, *overruled on other grounds by State v. Steinzig,* 1999-NMCA-107, ¶ 29, 127 N.M. 752, 987 P.2d 409; *see also Garcia,* 2005-NMSC-017, ¶ 29, 138 N.M. 1, 116 P.3d 72 (noting that federal precedent allows warrantless vehicle searches "based on a bright line automobile exception to the warrant requirement" and that the New Mexico Constitution provides greater protection). Rather, our law endorses a "fact-specific inquiry under the particular facts of this case." *Arredondo,* 1997-NMCA-081, ¶ 28, 123 N.M. 628, 944 P.2d 276.

THE SEARCH WAS UNLAWFUL

{16} Given that we have rejected *Belton*'s bright-line approach under the federal constitution, we now turn to the protections guaranteed under New Mexico's Constitution. Because of New Mexico's strong preference for a warrant, we hold that even after a valid arrest, one of *Chimel*'s two rationales must be present before an officer may search a vehicle without a warrant. Applying this extra layer of protection, neither *Chimel* rationale supported the search of Defendant's vehicle in this case. Defendant posed no danger to the officer's safety, and the officer knew of no evidence a search and seizure would preserve from destruction. *See Martinez,* 1997-NMCA-048, ¶¶ 7, 12, 13, 15, 123 N.M. 405, 940 P.2d 1200 (holding the search incident to an arrest in a bedroom of the defendant's home unlawful where the officers testified there was no threat to their safety, they did not sense immediate danger, and nothing indicated that the evidence seized was within an area from which the defendant "might gain possession of a weapon or destructible evidence," and noting that an officer's evaluation of danger is indicative of the facts at the time of the search (internal quotation marks and citation omitted)).

{17} In the present case, Defendant, handcuffed and secured in the patrol car, posed no danger to the officer. *See Ferrell v. State,* 649 So.2d 831, 833 (Miss.1995) (holding that where the defendant was arrested, handcuffed, and placed in the patrol car, the subsequent search of a container in his car was not incident to arrest because the officer could have no reasonable fear that the defendant might have access to a weapon); *cf. State v. Kaiser,* 91 N.M. 611, 613-14, 577 P.2d 1257, 1259-60 (Ct.App.1978) (holding that exigent circumstances did not exist to search the defendant's luggage where he had already been placed in custody). Nothing in the record indicates that the officer ever had any intention of searching the car until Defendant unexpectedly presented him with the keys. The facts belie danger or urgency.

{18} The State's reliance on *Gutierrez* and *Arredondo* is misplaced. In *Gutierrez,* the defendant, who was arrested, told the officer there was a handgun in his car, under circumstances where a passenger who was not arrested was near the car, and the gun was located between the passenger and the officer. 2004-NMCA-081, ¶ 11, 136 N.M. 18, 94 P.3d 18. We held that under those circumstances it was reasonable for the officer to search and seize the gun for safety reasons. *Id.* ¶¶ 11-12. In *Arredondo,* the defendant was stopped because he was suspected in connection with an assault involving a gun that had just been reported, thus, we held that the officer's reasonable belief that the suspect was armed and dangerous amounted to an exigent circumstance justifying the search. 1997-NMCA-081, ¶¶ 18-19, 123 N.M. 628, 944 P.2d 276.

{19} We are unpersuaded by the State's attempts to create a sense of danger and urgency by characterizing the grandmother as an unknown, possibly sinister person who might use the gun to try to help Defendant escape, or who might pose some danger to the public. During the suppression hearing,

no testimony was elicited about the grandmother's nature or the officer's judgment of her nature. Moreover, if the officer really feared possible consequences from delivering the keys to Defendant's grandmother, he had the option of keeping the car keys and transporting Defendant to jail.

{20} The State includes the public as an endangered target from the presence of the gun in the passenger compartment. We disagree. A gun in a car does not automatically constitute either danger or exigent circumstances. *See Garcia,* 2005–NMSC–017, ¶ 31, 138 N.M. 1, 116 P.3d 72. The presence of the gun in Defendant's locked car parked in the parking area of the grandmother's apartment complex, without more, did not create a danger to the public or exigent circumstances.

{21} The State also relies on Defendant's driving, conduct, and a prior conviction for conspiracy to commit armed robbery, to argue perceived danger or, at the very least, that the officer "possessed a reasonable concern" that Defendant might have hidden a weapon under the seat. We reject these arguments. The State has exaggerated Defendant's traffic offense. It asserts that the officer had observed "wildly inappropriate driving" and that Defendant had "raced" out of the parking lot into the street. The officer's actual testimony was that Defendant "didn't slow down" when entering the roadway. At most, we are presented with a garden variety traffic offense. We also disagree that Defendant's act of "carefully" obtaining required documents through the passenger side suggested that a weapon was in the car. Many people keep their documentation in the glove box, which is located on the passenger side. Moreover, the officer expressed no concern about the manner in which Defendant retrieved the documents.

{22} We also reject the State's assertion that, upon stopping Defendant, the officer learned through a computer check that Defendant had a prior conviction for a violent felony, and that this information could provide justification for the search. Officer Tubbs never testified that before his search of the car, he knew or relied on the fact that Defendant had been convicted of a violent felony. The State never argued in the district court that the officer's awareness of Defendant's criminal history was a reason to support a finding of any concern for danger. In support of its assertion, the State cites only to a criminal complaint against Defendant after his arrest. But the criminal complaint is far from clear on this point. The complaint discusses the computer check, but does not state when the computer check showing the prior conviction was conducted. The manner in which the complaint is written strongly suggests that the officer learned of the prior felony after he conducted the search. Additionally, in the suppression proceedings, the State never referred to or relied on the criminal complaint. Most importantly, regardless of when the officer learned of Defendant's prior conviction, the officer testified that he did not believe that Defendant presented a danger to him once he was handcuffed and placed in the patrol car.

{23} The State asserts that "[e]ven a handcuffed arrestee may be foolhardy enough to try to seize a nearby firearm." *Martinez,* 1997–NMCA–048, ¶ 7, 123 N.M. 405, 940 P.2d 1200. It argues that we should defer to the judgment of police officers, regarding danger, in a swiftly-developing situation. *See id.* ¶¶ 7–8 (stating that "we must be sensitive to the dangers to law enforcement officers in an unpredictable and highly charged situation"). We agree with these propositions, but they do not apply here. At the time of the search, the situation had been neutralized by handcuffing Defendant and placing him in the patrol car. The officer expressed no safety concern. This was not a swiftly-developing situation. Handcuffed and secured in the patrol car, Defendant had no realistic opportunity to escape, wrestle the car keys from the officer, rush over to his locked car, unlock the door, and seize the weapon from under the seat. The circumstances simply do not justify this search.

{24} Turning to the question of preservation of evidence, the State argues general rules with respect to the propriety of a search to assure that evidence left in a parked car or in a car released to someone else is preserved. However, the State does not tie the general rules to the facts in this

case. Here, the officer had no such evidence in mind. We do not see how the officer could have reasonably believed that evidence would be found in Defendant's car connected with his charge for failing to appear in court. *See Ferrell,* 649 So.2d at 833 (holding that search was not incident to arrest where the defendant was locked in the patrol car and the officer could have no reason to think that evidence related to the arrest for driving on a suspended license would be found in the car). Furthermore, if the officer was afraid that the grandmother might destroy evidence, he did not have to comply with Defendant's request that he give the keys to her, or he could have sought a warrant before searching the vehicle. *See Gomez,* 1997-NMSC-006, ¶ 44, 122 N.M. 777, 932 P.2d 1 (stating that "if there is no *reasonable* basis for believing an automobile will be moved or its search will otherwise be compromised by delay, then a warrant is required").

{25} We conclude that a departure from federal precedent is warranted in this case because of distinctive state characteristics, as noted in a sufficiently developed body of New Mexico case law. The State must justify a warrantless search of an automobile incident to arrest through articulated facts in the record showing a reasonable likelihood of either a potential danger or the concealment or destruction of evidence. Here, the officer engaged in exploratory rummaging after receiving keys that were to be delivered to Defendant's grandmother. The officer was not concerned about any danger Defendant might pose, and, in fact, Defendant posed no danger. Additionally, the State did not demonstrate that the car would contain any evidence related to Defendant's warrant for failure to appear. Nothing in the record reflects any knowledge on the officer's part of Defendant's felony record before the officer searched Defendant's vehicle. Under these circumstances, the search cannot be characterized as reasonable under Article II, Section 10 of the New Mexico Constitution.

THE DISSENT

{26} We have several observations in regard to the Dissent in this case.

{27} The Dissent states that the real issue in this case is whether the arresting officer misrepresented his intentions when he searched the car before delivering the car keys to Defendant's grandmother and whether the search was reasonable under the circumstances. Following this statement, the Dissent sets out its position in two sections, one called "search by deception," the other called "government's justification of an inventory search."

{28} A premise throughout the Dissent seems to be that the delivery of the keys after Defendant locked up his car constituted "consent" of some sort. The officer, however, never requested consent to search the car and Defendant never provided it. "[A] mere showing that an accused gave officers the keys to her car upon their request was insufficient to show a voluntary waiver of her Fourth Amendment rights." *Hall v. State,* 399 So.2d 348, 353 (Ala.Crim.App. 1981). Here we have neither a request nor any conversation concerning a search and no apprehension by Defendant that the officer would undertake a search once he had the keys.

{29} Under the "search by deception" section, the Dissent states that the officer conducted an inventory search. The Dissent also states that the search stemmed from Defendant's consent. The concerns we have with this aspect of the Dissent are: (1) the State nowhere asserts that the search the officer conducted was an inventory search; (2) there is no evidence that Defendant consented to any search whatsoever; and (3) after raising search by deception as an important issue, the Dissent actually concludes that search by deception does not violate the Fourth Amendment or the New Mexico Constitution.

{30} Under the "government's justification of an inventory search" section, the Dissent acknowledges that the State raises the issue for the first time on appeal that the officer could have conducted an inventory search. The State's argument below was that the search was valid because it was a search incident to an arrest. The Dissent nevertheless feels compelled to address the question, and to do so not based on any right of the State but rather based on a right of

Defendant, namely, Defendant's fundamental right of privacy. We do not see how Defendant's fundamental rights or general public importance justifies the Dissent's position, given the State's failure to preserve.

{31} The Dissent's ultimate determination is that the search was reasonable and justified because the officer had an "obligation to secure the car" and, in order to fulfill that obligation the officer "had to inventory its contents to avoid any liability from any claims that something valuable might be taken from the car." Based on *United States v. Prazak*, 500 F.2d 1216 (9th Cir.1974), the Dissent interprets Defendant's request to the officer to give the keys to his grandmother to instead be a request to park and secure his car. No facts in either *Prazak* or the present case support any such interpretation. Defendant's car was already parked where his grandmother resided and Defendant's only request was that the keys be delivered to his grandmother. The State did not argue below or on appeal this new theory that the Dissent raises.

CONCLUSION

{32} The district court erred when it failed to suppress the evidence gathered as a result of an unconstitutional search of Defendant's vehicle. We therefore reverse and remand for further proceedings consistent with this opinion.

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

KENNEDY, J., concurs.

ROBINSON, Judge (dissenting).

ROBINSON, Judge (dissenting).

{34} I am unable to concur in the holding of the Majority's opinion that the search of Defendant's car was unreasonable. In addition, while I do agree that under New Mexico law there is a significant body of case law affording greater protection for search cases, I write separately because the real issue in this case is not whether the search incident to a lawful arrest was justified, but rather, whether the search by the arresting officer was justified under the circumstances when Defendant gave him the car keys and he searched Defendant's car before delivering the keys to Defendant's grandmother.

SEARCH BY DECEPTION

{35} As the Majority points out, Officer Tubbs arrested Defendant and put him in the rear seat of his patrol car, after which Defendant asked Officer Tubbs to give his car keys to his grandmother, who lived in the apartment complex. Officer Tubbs took the car keys, but instead of taking the keys directly to Defendant's grandmother, he first conducted an inventory search of Defendant's car where he found a loaded .40-caliber handgun underneath the driver's seat.

{36} Under *Garcia*, New Mexico's state constitution "provides greater protection, requiring a warrant or the presence of exigent circumstances to remove evidence" to conduct a search incident to an arrest. 2005-NMSC-017, ¶ 29, 138 N.M. 1, 116 P.3d 72. As the Majority notes, Officer Tubbs testified that, at the time he searched the car, he did not feel he was in any danger, nor did he expect to find any evidence in the car related to the arrest. However, Officer Tubbs' search stems basically from Defendant's consent, not exigent circumstances. By voluntarily giving up his car keys to Officer Tubbs, any legitimate expectation of privacy to his car that Defendant may have had, ceased at that point.

{37} Arguably, Defendant was under the impression that Officer Tubbs was going to deliver the car keys to his grandmother and, when Officer Tubbs searched his car, he may have exceeded the scope of Defendant's consent. In other words, Officer Tubbs may have misrepresented his true intentions when he agreed to deliver Defendant's car keys to his grandmother. It is reasonable to conclude that the reason Defendant did not want the police to get custody of his car by impounding it is that he did not want them to find his gun in the car.

{38} Nonetheless, this Court has recognized that entry by deception does not violate the Fourth Amendment. *See, e.g., State v. Allen*, 114 N.M. 146, 835 P.2d 862 (Ct.App. 1992). In *Allen*, this Court held that an undercover officer's entry by deception into the home of the defendant convicted as an accessory in cocaine trafficking did not result

in breach of privacy and, thus, did not violate the defendant's rights under the state constitution or the Fourth Amendment. *Id.* at 147, 835 P.2d at 863. *Allen* reasoned that, since there was no forcible entry by the officer into Defendant's residence, by taking the officer into the house, "there was no breach of defendant's legitimate interest in privacy." *Id.*

{39} Here, like in *Allen*, Officer Tubbs gained access to Defendant's car through what might have amounted to deception, but certainly was not coercion or force. Furthermore, one's reasonable expectation of a privacy interest does not extend to an arrestee like Defendant, who voluntarily gives up his car keys to an arresting uniformed officer contemporaneously with his arrest. "[P]olice deception which [is] not coercive in nature will not invalidate a consent to search if the record otherwise shows the consent to have been voluntary." Matthew Bender, 1—8 *Search and Seizure* § 8.17 at 258 n. 262 (2004). Here, the officer did not demand that Defendant give him the car keys. Defendant did this voluntarily with the request that the officer deliver the keys to his grandmother. Since entry by deception into one's home does not violate the Fourth Amendment, it would not violate it by entry into a car where there is a lesser expectation of privacy. *See State v. Ryon*, 2005–NMSC–005, ¶ 23, 137 N.M. 174, 108 P.3d 1032 (stating that the constitutional distinction between vehicles and homes for purposes of search and seizure analysis turns on the privacy expectation; a lesser expectation of privacy attaches to a vehicle).

GOVERNMENT'S JUSTIFICATION OF AN INVENTORY SEARCH

{40} Furthermore, it has been held that officers may take reasonable steps to safeguard property in a vehicle which has not been seized. 3 Wayne R. LaFave, *Search and Seizure* § 7.4(b) at 658 n. 117 (4th ed.2004); *see, e.g., United States v. Prazak*, 500 F.2d 1216 (9th Cir.1974). In *Prazak*, the defendant was arrested for DWI. He requested that his car be parked and secured by an arresting officer. To secure the car, one officer, without arrestee's request or consent, removed a sport coat from the rear seat, locked the car doors, and opened the locked trunk to place the coat inside. When he opened the trunk, the officer discovered a zip gun. That court held that this type of search was not unreasonable. *Id.* at 1217.

{41} Although the State raises this issue for the first time on appeal, I am compelled to address it because this case involves Defendant's fundamental right of privacy and the reasonableness of Officer Tubbs' search under the Fourth Amendment of the United States Constitution and Article II, Section 10 of the New Mexico Constitution. *See State v. Pacheco*, 85 N.M. 778, 517 P.2d 1304 (Ct. App.1973); *see also* Rule 12–216(B)(1)–(2) NMRA 2005 (providing that questions involving jurisdiction, general public interest, fundamental error, or fundamental rights of a party are exceptions to the preservation requirement).

{42} When Defendant gave Officer Tubbs his car keys, he received constructive possession of Defendant's car and, therefore, it was under the control and custody of the officer, who is an agent of the city's police department. The government interests that make an inventory search reasonable to safeguard the property from loss or theft, and to protect the police or city from liability and false claims, justified the officer to conduct an inventory search of Defendant's vehicle. *See State v. Williams*, 97 N.M. 634, 637, 642 P.2d 1093, 1096 (1982) (holding that a warrantless inventory search of the defendant's car, following his arrest for armed robbery, and after discovery that the defendant's automobile was parked legally behind the grocery store, was reasonable). Furthermore, federal courts have adopted a similar rationale regarding inventory searches of vehicles seized after an arrest. *See United States v. Scott*, 665 F.2d 874 (9th Cir. 1981) (holding that the police procedures, in conducting an inventory of arrestee's legally parked car in order to protect the arrestee's belongings, was an appropriate caretaking function); *United States v. Staller*, 616 F.2d 1284 (5th Cir.1980) (upholding that a search, subsequent to police taking custody of the defendant's legally parked automobile, was a legitimate exercise of a caretaking function because of the risk to the car parked overnight in a mall parking lot).

{43} The Majority points out in *Hall v. State*, 399 So.2d 348, 353 (Ala.Crim.App.1981) that "a mere showing that an accused gave officers the keys to her car upon their request was insufficient to show a voluntary waiver of her Fourth Amendment rights." I agree with this statement under the facts presented in *Hall*. However, in *Hall*, appellant had refused several requests to allow the officers to search the trunk of his car but, afterwards, involuntarily submitted to a search based on the officers' threats. That court held that "[i]t is apparent that the appellant was *submitting* rather than *consenting* to the search." *Id.* at 354 (emphasis in original). That court added "in examining all the surrounding circumstances to determine if, in fact, the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *Id.* (internal quotation marks omitted). Thus, *Hall* is completely distinguishable from our case because, in *Hall*, the officer used coercive and threatening techniques to acquire appellant's consent or submission. In our case, Defendant voluntarily handed over his keys without any coercive actions from Officer Tubbs. Officer Tubbs never asked for the keys and never threatened Defendant, unlike *Hall*, where that defendant specifically refused a requested search. Here, Defendant's consensual relinquishment of control over his vehicle by voluntarily giving his keys to Officer Tubbs is what makes the ensuing search reasonable.

{44} The events of this case flow from one stage to another. Once Officer Tubbs received Defendant's consent to possession and control of the car by the keys being turned over to him, he had an obligation to secure the car. In order to secure the vehicle, he had to check out its contents to avoid any liability from any claims that something valuable might be taken from the car. Therefore, under *Prazak*, Officer Tubbs' actions were justified and constituted "a reasonable means of rendering the car and its contents secure." 500 F.2d at 1217.

{45} Whether the Majority's opinion labels this an inventory search, or a search incident to arrest, which I do not believe it was, does not really matter. At this point, the search was not constitutionally unreasonable and evidence of the gun seized should not be suppressed.

{46} I would affirm. I, therefore, respectfully dissent.

2006-NMCA-021

127 P.3d 1126

Cora MAES, Plaintiff–Appellee,

v.

AUDUBON INDEMNITY INSURANCE GROUP, Defendant–Appellant.

No. 25,298.

Court of Appeals of New Mexico.

Dec. 21, 2005.

Dennis T. Sanchez, Dennis Sanchez Law Office, Taos, Maureen A. Sanders, Sanders & Westbrook, P.C., Albuquerque, for Appellee.

Ann Maloney Conway, Deron B. Knoner, Miller Stratvert, P.A., Albuquerque, for Appellant.

OPINION

PICKARD, J.

{1} In this case, we decide whether the FAIR Plan Act, codified at NMSA 1978, §§ 59A–29–1 to –9 (1985, as amended through 1999), provides immunity from a suit for bad faith insurance practices and pre- and post-judgment interest brought by an insured against the servicing insurer of the New Mexico FAIR Plan. We decide that the Act does provide immunity, and we reverse the district court's denial of the insurance company's motion to dismiss.

BACKGROUND

1. The FAIR Plan

{2} Since the 1960s, many states have established FAIR ("fair access to insurance requirements") plans, which are "residual market" property insurance plans. 1 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance 3d* § 1:27 (1997) (internal quotation marks omitted). They are designed to pro-

vide insurance to property owners who are not able to obtain coverage in the normal market because their risks would be unprofitable for an insurance company to voluntarily assume. *Id.*

{3} The New Mexico FAIR Plan was created by the Legislature in 1985, and its purpose is to provide essential property insurance to this category of property owners. The FAIR Plan Act and the Plan's bylaws establish the following facts about the Plan's operations. Section 59A–29–2 authorizes all insurers who write essential property insurance in New Mexico to come together to form a FAIR Plan and to establish a not-for-profit underwriting association, which is known as the New Mexico Property Insurance Program ("NMPIP" or "the Plan"). All insurers who write essential property insurance in the state are required to be members of the Plan. Section 59A–29–3. Each member insurer shares in the Plan's losses and expenditures in an amount proportionate to that member's share of all essential property insurance policies written in the state.

{4} The Plan has a contract with Audubon Indemnity Insurance Group (Audubon), the defendant in this case, under which Audubon acts as the Plan's "servicing insurer." Under the Plan's bylaws, this means that Audubon services all FAIR Plan policies by issuing policies to approved applicants and adjusting claims. However, the bylaws also indicate that the Plan itself reviews all applications and decides whether a policy should be issued and that all premiums are remitted directly to the Plan. Moreover, once claims have been approved, the money paid to insureds comes from the Plan itself. Thus, the Plan completely "reinsures" all policies issued by the servicing insurer, and the servicing insurer acts in an essentially administrative capacity, bearing no actual risk.

{5} The FAIR Plan Act also provides a specific remedy for insureds. Any person "aggrieved by an action or decision of the administrators of the FAIR plan or the underwriting association or of any insurer as a result of its participation" has the right to appeal the action or decision to the Superintendent of Insurance. Section 59A–29–6. The Superintendent must hold a hearing and issue an order approving or disapproving the action or decision. *Id.* The Superintendent's decision may then be reviewed in district court by way of administrative appeal. *Id.*

{6} Finally, the Act provides for immunity under certain circumstances. Section 59A–29–7 states in relevant part:

> There shall be no liability on the part of, and no cause of action of any nature shall arise against, any member insurer, the association or its agents or employees, the governing committee or the superintendent or his representative for any action taken by them in the performance of their powers and duties under the FAIR Plan Act.

The dispute in the present case centers around the proper interpretation of this statute.

2. Facts

{7} Audubon is the servicing insurer for the FAIR Plan. Audubon issued a FAIR Plan property insurance policy to Plaintiff–Appellee (Maes) in March 2000. After a fire on her property, Maes made a claim with Audubon, which Audubon denied. In accordance with the scheme set forth in Section 59A–29–6, Maes then appealed the denial of coverage to the Superintendent of Insurance. The Superintendent held a hearing and decided that Audubon was required to pay the claim. After Audubon appealed to the district court, which upheld the Superintendent's order, Audubon paid the claim. Then, Maes filed a separate action against Audubon in district court, seeking pre- and post-judgment interest. She also sought compensatory and punitive damages for Audubon's alleged bad faith insurance practices and breach of the covenant of good faith and fair dealing. Audubon moved to dismiss the complaint, arguing that it was immune from suit under Section 59A–29–7. After the district court denied Audubon's motion, Audubon filed a petition for a writ of error with this Court. Audubon argued that this was an appropriate case in which to invoke the "collateral order" doctrine, which allows for appeal of non-final orders when, inter alia, the complaining party claims a right that will be effectively lost if the case is permitted to

proceed. *See Carrillo v. Rostro,* 114 N.M. 607, 613–14, 845 P.2d 130, 136–37 (1992). Because immunity from suit is such a right, *see Campos de Suenos, Ltd. v. County of Bernalillo,* 2001–NMCA–043, ¶ 15, 130 N.M. 563, 28 P.3d 1104, we granted Audubon's petition. We now reverse.

STANDARD OF REVIEW

{8} The parties dispute whether the district court's order should be treated as ruling on a Rule 1–012(B)(6) NMRA motion or a ruling on motion for summary judgment. Because materials outside the pleadings, such as the bylaws of the Plan and documents from the proceeding before the Superintendent and the earlier district court appeal, were considered by the district court, we treat it as a motion for summary judgment. *See* Rule 1–012(B). When the facts are undisputed, we review rulings on summary judgment de novo. *State Farm Mut. Auto. Ins. Co. v. Barker,* 2004–NMCA–105, ¶ 4, 136 N.M. 211, 96 P.3d 336. With the exception of one assertion contained in an affidavit that was before the district court, the material facts of the case are undisputed. Because we do not consider the affidavit, the only question that we must decide is whether Section 59A–29–7 provides the FAIR Plan's servicing insurer with immunity from suit. That is a purely legal question of statutory construction, which we review de novo. *See State v. McClendon,* 2001–NMSC–023, ¶ 2, 130 N.M. 551, 28 P.3d 1092.

DISCUSSION

{9} For convenience, we begin by reiterating the language of Section 59A–29–7:

> There shall be no liability on the part of, and no cause of action of any nature shall arise against, any member insurer, the association or its agents or employees, the governing committee or the superintendent or his representative for any action taken by them in the performance of their powers and duties under the FAIR Plan Act.

The statute presents us with two questions: (1) whether Audubon is an entity to which the statute applies and (2) whether Audubon's actions in this case were conducted as part of its "powers and duties" under the FAIR Plan Act.

{10} As to the first question, Audubon advances two theories. First, Audubon argues that the statute applies to it because of its status as a member insurer. We do not agree. As Maes points out, the FAIR Plan Act gives member insurers only two "duties": (1) to "become and remain a member of the FAIR plan and the underwriting association and comply with the requirements thereof," and (2) to "subscribe to the articles of agreement on file in the superintendent's office." Section 59A–29–3. While Audubon is a member insurer (as all insurers must be in order to maintain licensure to sell essential property insurance in New Mexico), all of its actions that are relevant to this case were undertaken in its capacity as the Plan's servicing insurer, not in its capacity as a member insurer. Thus, we agree with Maes that Audubon is not immune from suit in this case as a result of its being a member insurer.

{11} Second, Audubon argues that it is entitled to the statutory immunity because, as the servicing insurer, it is an agent of the FAIR Plan. New Mexico law defines an agent as "a person who, by agreement with another called the principal, represents the principal in dealings with third persons or transacts some other business, manages some affair or does some service for the principal, with or without compensation." UJI 13–401 NMRA. We agree that Audubon is the Plan's agent. Audubon has an agreement with the FAIR Plan to service the policies underwritten by the Plan, and Audubon is paid a fee for doing so. Thus, Audubon is an agent of the FAIR Plan because it both "manages some affair" and "does some service for" the Plan. *See* UJI 13–401.

{12} Maes argues that Audubon is collaterally estopped from asserting the agency relationship because, Maes alleges, the Superintendent in the initial administrative proceeding found that Audubon was not an agent of the Plan. In support of this argument, Maes cites to the Superintendent's finding number 9 which provides that, "[n]either the [NMPIP] nor the [FAIR] Plan are

authorized to appoint 'agents' to market insurance under the [FAIR] Plan." We take this statement to indicate only that the FAIR Plan does not appoint insurance agents who sell policies to consumers. We are supported in this reading by the next two findings in the Superintendent's order. In findings 10 and 11, the Superintendent stated that "[l]icensed insurance agents are acting as agents of and on behalf of an applicant when they submit applications to the [FAIR] Plan," and that "[t]he [FAIR] Plan does not have contracts with independent insurance agents or brokers." Thus, when reading finding 9, relied on by Maes, in the context in which it was written, we do not agree that the findings speak to the presence or absence of an agency relationship between the FAIR Plan and Audubon. Instead, we think these findings speak to the relationship between insureds and their agents on the one hand and the FAIR Plan on the other.

{13} We also note that for a party to be collaterally estopped from litigating a fact, that fact must have been actually litigated and necessarily determined in a prior proceeding. *Rex, Inc. v. Manufactured Hous. Comm.*, 2003–NMCA–134, ¶ 5, 134 N.M. 533, 80 P.3d 470. Because the only purpose of the proceeding before the Superintendent was to review Audubon's coverage decision, it would have been unnecessary to determine the legal relationship between Audubon and the FAIR Plan. Thus, even if the Superintendent had made a finding regarding the relationship, collateral estoppel would be inapposite. Because Audubon is under a contractual obligation to provide a service to the FAIR Plan, we hold that it is an agent of the Plan. As such, it is an entity to whom the statutory immunity applies.

{14} The second question presented in this appeal is whether Audubon's actions were "taken by [it] in the performance of [its] powers and duties under the FAIR Plan Act." *See* § 59A–29–7. Maes argues that the term "powers and duties" refers only to establishing and administering the FAIR Plan, and not to the actual issuance or servicing of insurance policies. Audubon argues that issuing and servicing policies are the servicing insurer's primary "duties" under the FAIR Plan Act. We agree with Audubon. Section 59A–29–4, which describes the authority of the Plan, states that the NMPIP has "authority on behalf of its members to cause to be issued property insurance policies." But because, under the Plan's bylaws, the Plan itself does not issue insurance policies, the Act necessarily contemplates that the Plan will contract with a servicing insurer who will issue and service policies. Thus, because Audubon plays a necessary role as the Plan's agent that helps to carry out the Plan's powers and duties, the issuance and servicing of policies are actions "taken by [Audubon] in the performance of [its] powers and duties under the FAIR Plan Act." *See* § 59A–29–7.

{15} Maes further asserts that the Plan's bylaws support a limited interpretation of the immunity statute because they do not provide for indemnification for actions taken by the servicing carrier. Maes seems to be arguing that (1) the statute clearly provides immunity for the Plan itself, (2) if the Plan indemnified the servicing carrier, that would indicate that the servicing carrier was simply acting as an instrumentality of the Plan and should thus get the benefit of the immunity statute, and (3) the fact that the Plan's articles and bylaws do not provide for such indemnity means that the servicing carrier is distinguishable from the Plan such that we should hold the immunity statute inapplicable to it. We reject this argument. First, we note that because all claims are ultimately paid by the Plan itself, there would be no logical reason for the Plan it indemnify the servicing carrier. Second, even if the Plan's articles or bylaws did provide indemnification for the servicing carrier, that would not change the effect of the immunity statute, which we have held applicable to the servicing carrier because it is the Plan's agent that helps to carry out the Plan's powers and duties under the Act.

{16} Maes also seems to argue that we should hold the immunity provision not applicable to Audubon because, even though the Plan ultimately pays any claims that are approved, it would not be liable for damages awarded as a result of the servicing carrier's breach of contractual obligations. We recognize that reinsurers like the Plan are gener-

ally liable only for claims paid out by the reinsured, and not for other types of damages. *See* 14 Eric M. Holmes & L. Anthony Sutin, *Holmes' Appleman on Insurance 2d* § 102.5(F), at 50–51 (2000) ("In the absence of a provision in the reinsurance contract providing coverage for 'bad faith' damages paid by the ceding insurer, . . . the reinsurer is not obligated to reimburse them."). However, we do not see the relevance of determining who would ultimately pay if Maes were allowed to proceed with her bad faith claims. The answer to that question would not alter our reading of the immunity statute, which states that "no cause of action of any nature shall arise" against the FAIR Plan or its agents. *See* § 59A–29–7. Because the language of the Act is "clear and unambiguous, we give the statute its plain and ordinary meaning and refrain from further interpretation." *State v. Vaughn,* 2005–NMCA–076, ¶ 33, 137 N.M. 674, 114 P.3d 354 (internal quotation marks and citation omitted). Thus, we agree with Audubon that all of Maes's claims are barred by the immunity statute.

{17} Maes also asserts that even if Audubon is protected by the immunity statute under certain circumstances, it is not protected from suits based on contract claims. In support of this argument, Maes cites *Moriarty Municipal Schools v. New Mexico Public Schools Insurance Authority,* 2001–NMCA–096, 131 N.M. 180, 34 P.3d 124. *Moriarty* involved a statutorily created entity, the Public Schools Insurance Authority, which provided insurance to public schools. *See id.* ¶¶ 2, 6. After a denial of coverage, Moriarty sued the Authority for breaches of contract, fiduciary duty, and the implied covenant of good faith and fair dealing. *Id.* ¶ 4. The Authority moved to dismiss the claims on the basis of sovereign immunity. *Id.* ¶ 9. This Court ruled that sovereign immunity was not applicable. *Id.* ¶ 26. Maes relies on the following language from *Moriarty:* "The Authority cannot escape the realm of contract. Receiving a premium, providing insurance coverage, and denying benefits indicate the existence of a valid, written, enforceable insurance contract . . . between the Authority and Moriarty . . . . Moriarty therefore states a claim . . . for breach of contract which is not barred by sovereign immunity." *Id.*

{18} We find *Moriarty* to be distinguishable from the present case in two ways. First, in *Moriarty,* the defendant relied on sovereign immunity, rather than a specific grant of statutory immunity as is present in this case. To overcome the sovereign immunity defense, the *Moriarty* plaintiff was only required to allege the existence of a valid written contract. *Id.* ¶ 18 ("Because the Authority is a state governmental entity, Section 37–1–23 [the statute codifying sovereign immunity for contract claims] requires Moriarty to prove the existence of a valid written contract and permits a Rule 1–012(B)(6) dismissal if Moriarty cannot allege such a contract in its complaint against the Authority."). Here, there is no dispute that a valid insurance contract existed between Maes and Audubon. But because the issue here is statutory immunity and not sovereign immunity, that fact does not help Maes.

{19} *Moriarty* is also distinguishable because the Court's primary concern in that case seems to have been that if Moriarty was barred by sovereign immunity from bringing its claims, it would have no avenue for relief whatsoever. *Id.* ¶ 20 ("The Authority made a unilateral determination of the extent of its . . . obligation, placing Moriarty at risk of inadequate recovery, with no adjudicatory process through which Moriarty could make a record supporting its position on the extent of the Authority's obligation."). Here, the FAIR Plan Act does provide a remedy—aggrieved individuals may appeal coverage decisions to the Superintendent, and they may then have the Superintendent's decision reviewed in the district court. Section 59A–29–6. Thus, *Moriarty* is not controlling. Because FAIR Plan insureds do have a remedy, we see no reason to disregard the explicit language of the immunity statute.

{20} The other case Maes relies on is similarly inapposite. In *Louie v. State,* 37 Or.App. 49, 586 P.2d 364 (1978), a FAIR Plan insured sued the Plan itself for denying coverage. An immunity statute was held not to bar the suit, which was considered a breach of contract action. *Id.* at 365–66. The *Louie* court relied on specific legislative history in-

dicating that the immunity provision was intended to apply to tort actions and not to the type of claim at issue in that case. *Louie,* 586 P.2d at 366. Moreover, we note that the Oregon FAIR Plan Act did not provide any remedy for coverage denials. Here, the FAIR Plan Act provided Maes with a remedy, which she exercised. *See* § 59A–29–6. Thus, *Louie* is distinguishable from the present case and, like *Moriarty,* provides us with no authority under which to depart from the clear language of our immunity statute.

{21} Finally, Maes urges us to hold the immunity statute inapplicable to Audubon on two public policy grounds. First, she argues that if Audubon is immune under these circumstances, then FAIR Plan insureds would be "at the utter mercy of the insurance companies" and would have "absolutely no recourse for bad faith conduct or breaches of contract, regardless of how egregious the conduct might be." Second, she argues that it would constitute discrimination between insureds in violation of the Insurance Code if FAIR Plan insureds are prohibited from suing their insurers for bad faith and interest while other insureds are permitted to do so. *See* NMSA 1978, § 59A–16–17(D) (1984) (prohibiting discrimination between similarly situated insureds as to terms and conditions of coverage).

{22} We decline to depart on policy grounds from the result dictated by the language of the immunity statute. In view of the statute's clear and broad language, it seems reasonable to us to assume that the Legislature chose to set forth the following compromise: property owners may obtain insurance when they might not otherwise be able to, and in addition, they are given a speedy administrative remedy including the opportunity for judicial review; in exchange, they are deprived of the right they would ordinarily have to sue their insurers for bad faith. *Cf. Morales v. Reynolds,* 2004–NMCA–098, ¶ 6, 136 N.M. 280, 97 P.3d 612 ("The [Workers' Compensation] Act fulfills [its] purpose through a bargain in which an injured worker gives up his or her right to sue the employer for damages in return for an expedient settlement covering medical expenses and wage benefits, while the employer gives up its defenses in return for immunity from a tort claim."). While it could be said that FAIR Plan Act compromise constitutes "discrimination" between different types of insureds, we find it to be a legitimate policy judgment by the legislature that we decline to second-guess. *See Benavidez v. Sierra Blanca Motors,* 122 N.M. 209, 214, 922 P.2d 1205, 1210 (1996) ("[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)).

{23} We also note that the situation faced by FAIR Plan insureds is likely not as dire as Maes portrays it to be. First, insureds will not be "at the utter mercy of the insurance companies," because they have the remedy provided for in Section 59A–29–6. We note that Section 59A–29–6 could well cover some of the items of damage Maes claims, but we do not decide that issue because Maes never made a timely claim for them either to Audubon directly or in the proceeding before the Superintendent. Second, because the servicing insurer for the FAIR Plan bears no actual risk and earns no concomitant profits, it would have less incentive than insurance companies might ordinarily have to engage in bad faith practices in order to deny claims. Finally, even though we have decided that there is no private cause of action in the district court for bad faith punitive damages against the FAIR Plan's servicing insurer, other enforcement mechanisms are available. For example, the Insurance Code gives the Superintendent the authority to investigate insurers and to bring appropriate actions against them. *See, e.g.,* § 59A–29–4.

CONCLUSION

{24} We hold that Audubon is immune from suit under the circumstances of this case, and we reverse the district court's denial of Audubon's motion to dismiss.

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

CASTILLO, J., concur.

ROBINSON, Judge (dissenting).

ROBINSON, Judge (dissenting).

{26} The Majority assumes that the Legislature made a compromise, whereby "property owners may obtain insurance when they might not otherwise be able to, and in addition, they are given a speedy administrative remedy including the opportunity for judicial review; in exchange, they are deprived of the right they would ordinarily have to sue their insurers for bad faith." (Majority Opinion, pg. 1132).

{27} I am afraid that this would be a rather bad compromise. What good is the property insurance if those who provide it to you can seriously harm you by exercising bad faith and you cannot get relief through the courts? Not a very good compromise. Not a very good trade-off, in my opinion. We would be sanctioning a system where property insurance companies would have no incentive to refrain from acting in bad faith.

{28} The Majority compares the trade-off between worker and employer in the workers' compensation statutes, citing *Morales.* That comparison fails because *Morales, Delgado v. Phelps Dodge Chino, Inc.,* 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148, and the very recent case of *Salazar v. Torres,* 2005-NMCA-127, 138 N.M. 510, 122 P.3d 1279 [Vol. 44, No. 48 SBB 24 (Dec. 5, 2005)], *cert. granted,* No. 29,476, 138 N.M. 587, 124 P.3d 565 (Nov. 7, 2005), follow the trend that our Supreme Court set over the last several years. That trend began with *Delgado,* when the Supreme Court allowed a plaintiff worker to bring a tort action in court against an employer who acted with such a complete disregard for the worker's safety, that it wipes away the employer/insurer's immunity. *See also Salazar,* 2005-NMCA-127, ¶ 16, 138 N.M. 510, 122 P.3d 1279 (stating that "the balance between the worker and the employer in the [Workers' Compensation] Act was designed for accidental events or acts, not willful or intentional acts"). Prior to *Delgado* and *Morales,* a worker could not sue an employer in court, but was trapped by the Workers' Compensation Act in an administrative review, even when the employer acted with malice.

{29} Let us assume that the Majority is correct in pronouncing Section 59A-29-7 clear and unambiguous. I, therefore, set forth the language of this statute again:

> There shall be no liability on the part of, and no cause of action of any nature shall arise against, any member insurer, the association or its agents or employees, the governing committee or the superintendent or his representative for any action taken by them in the performance of their powers and duties under the FAIR Plan Act.

Id.

{30} The Majority, in agreeing with Maes, states that "Audubon is not immune from suit in this case as a result of its being a member insurer." (Majority Opinion pg. 1129). It further states that all of Audubon's actions "that are relevant to this case were undertaken in its capacity as the Plan's *servicing insurer,* not in its capacity as a *member insurer.*" (Majority Opinion, pg. 1129) (emphasis added). I read Section 59A-29-7 where it provides immunity for "the association or its agents or employees" to mean the people who work for the association, not a servicing insurer.

{31} Nowhere in this clear and unambiguous statute do we find immunity from liability for a servicing insurer. The statute mentions a member insurer, but not a servicing insurer.

{32} Statutory provisions granting immunity from suit must be strictly construed. *See Armijo v. Dep't of Health & Env't,* 108 N.M. 616, 618, 775 P.2d 1333, 1335 (Ct.App. 1989); *see also Martinez v. City of Cheyenne,* 791 P.2d 949, 956 (Wyo.1990), *overruled on other grounds by Beaulieu v. Florquist,* 2004 WY 31, 86 P.3d 863 (Wyo.2004).

{33} The NMPIP Bylaws and Articles support a limited immunity interpretation of Section 59A-29-7. The NMPIP Bylaws provide indemnification to member insurers only as to their status as a member, or by reason of the insurer having personal representatives or employees serving on the governing committee, other committee or subcommittee, or officer or employee of the NMPIP.

{34} Even the indemnification for officers and employees of the NMPIP is limited to actions taken in connection with the administration, management, conduct, or affairs of the Program or the Committee. Nowhere in the Articles or Bylaws is there a provision to provide indemnification to the member insurers for actions taken in their capacity as servicing carriers. That failure to provide indemnification is consistent with the notion that the Program is not liable for the servicing carrier's liability arising from the contracts it enters into with its insureds.

{35} In its Reply Brief, Appellant calls this argument a "*non sequiter* [sic] with a faulty premise" because "the Program pays all costs and expenses incurred by the Servicing Insurer, and all losses are borne ... by the Member Insurers." Appellant finds no need for "an indemnification provision for the benefit of the Servicing Insurer, and the purported absence of one is irrelevant to the issue of immunity."

{36} This same logic could be used to find that there would be no need for indemnification language in the NMPIP Bylaws and Articles for member insurers in their capacity as a member, or having personal representatives or employees on the governing or other committees or officers of NMPIP.

{37} However, § 59A–29–7 already provides protection for these individuals or entities by granting them immunity.

{38} So, the language of the Bylaws and Articles demonstrates an intent to view member insurers differently than servicing insurers or carriers.

{39} It seems to me that immunity goes to the administrative matters and actions concerning the insurance pool or association, and not the matters of coverage. Audubon is neither an agent nor an employee of the NMPIP, the association set up under the Fair Plan Act.

{40} Audubon should not be immune from Maes' suit for bad faith insurance practices along with pre- and post-judgment intent. I would affirm the district court's denial of Audubon's motion to dismiss.

{41} I, therefore, respectfully dissent.

2006-NMCA-015
128 P.3d 476

William F. McNEILL, Marilyn Cates, and the Black Trust, Plaintiffs–Appellants,

v.

RICE ENGINEERING AND OPERATING INC., Rice Operating Company, Hobbs Salt Water Disposal System, whose General Partner is Rice Operating Company, et al., Defendants–Appellees.

No. 25,213.

Court of Appeals of New Mexico.

Nov. 22, 2005.

Certiorari Denied, No. 29,504, Feb. 1, 2006.

James P. Lyle, Law Offices of James P. Lyle, P.C., Albuquerque, Turner W. Branch, Branch Law Firm, Albuquerque, Robert Trenchard, Royce Hoskins, Trenchard & Hoskins, L.L.P., Kermit, TX, for Appellants.

Steven L. Tucker, Tucker Law Firm, P.C., Santa Fe, John M. Caraway, McCormick, Caraway, Tabor & Riley, LLP, Carlsbad, Franklin H. McCallum, Midland, TX, for Appellees.

OPINION

SUTIN, J.

{1} Appellees' motion for rehearing filed November 1, 2005, is denied. The formal opinion filed in this appeal on October 21, 2005, is withdrawn and this opinion is filed in its stead.

{2} This is the second appeal arising from a dispute over the disposal of salt water generated from oil and gas drilling. *See McNeill v. Rice Eng'g & Operating, Inc.*, 2003–NMCA–078, 133 N.M. 804, 70 P.3d 794. Salt water is a waste product from oil and gas drilling operations. It is disposed of in wells used to reinject the water into geological formations comparable to those from which the product originated. Plaintiffs, the appellants in this appeal, are owners of, and heirs and successors-in-interest to, lands called the McNeill Ranch (the Ranch). Defendants, the appellees in this appeal, are operators of a salt water disposal system called the Hobbs Salt Water Disposal System (the Disposal System). As part of the Disposal System, salt water was injected into a disposal well called Well E–15 (E–15) situated on the Ranch. The salt water was transported by pipeline from oil and gas drilling

operations participating in the Disposal System. This appeal primarily involves a statute of limitations bar of Plaintiffs' trespass and conversion claims relating to the disposal of salt water transported to E–15 by pipeline from off-site oil and gas drilling operations over a span of thirty-six years. We conclude that material issues of fact exist that mandate trial on the trespass claim and thus reverse the district court's grant of summary judgment in favor of Defendants as to that claim. We affirm the grant of summary judgment on Plaintiffs' other claims.

BACKGROUND

{3} E–15 was drilled in 1957 by Defendants' predecessor-in-interest Pan American Petroleum Corporation (Pan American). The Ranch was owned by Will Terry. Commensurate with drilling E–15, Pan American negotiated a Property Damage Release (the Release) with Terry. The parties dispute whether the Release related only to damages from the initial construction of the well and pipelines or whether the Release also covered the disposal of the salt water on the Ranch. In 1958 Defendant Rice Engineering and Operating, Inc. took over the operation of the Disposal System and negotiated a right-of-way with Terry for pipelines that would run over and through the Ranch. *Id.* ¶ 3.

{4} When Terry died in 1968, title to the Ranch passed into a testamentary trust in which Terry's daughters, including Muriel Terry McNeill, had interests. After the daughters' deaths years later, the Ranch passed to Plaintiffs, descendants of Terry, namely, William F. McNeill and Marilyn Cates, and to the Black Trust, a trust in which certain other descendants of Terry hold an interest. Plaintiff William F. McNeill occupied the Ranch under a lease from 1993 to 1995. Plaintiffs acquired title in 1995. Plaintiffs leased the Ranch to Paige McNeill, William F. McNeill's son, in November 1997. We refer to Plaintiffs' predecessors in interest as "Predecessors" in this opinion.

{5} Plaintiffs sued Defendants on October 27, 1998. In their complaint, Plaintiffs sued Defendants for subsurface trespass caused by the disposal of the salt water into E–15 and also for injury caused by leakage from the salt water pipeline on Plaintiffs' land. In November 2000, the district court granted partial summary judgment against Plaintiffs on the disposal claim on the limited ground that "the Release unambiguously granted [Defendants] the right to dispose of off-site salt water produced into Well E–15." *Id.* ¶ 9. Trial on the leakage claim resulted in a verdict in January 2001 in favor of Plaintiffs for $70,000. Plaintiffs appealed from the partial summary judgment. This Court in April 2003 reversed on the ground that genuine issues of material fact existed in regard to the effect of the Release. *Id.* ¶ 42. The Release, which we concluded was ambiguous, is fully set out in *McNeill.* *See id.* ¶ 15.

{6} On remand from the *McNeill* reversal, Plaintiffs continued their trespass and conversion claims, arguing the doctrine of fraudulent concealment and the discovery rule in order to avoid the bar of the four-year statute of limitation, NMSA 1978, § 37–1–4 (1880). The district court, in November 2003, again entered a partial summary judgment. The court determined that any trespass claim for damages occurring outside the four years preceding the filing of the complaint on October 27, 1998, was barred. The court also determined that there was no evidence of fraudulent concealment or any concealment of Defendants' activities in the operation of E–15. In addition, presumably based on Defendants' defense that Plaintiffs had to be in possession of the Ranch to assert their claims, the court held that "Plaintiffs' trespass claim ends when the ranch was leased to Paige McNeill on or about November 1, 1997." The court also entered summary judgment against Plaintiffs on their conversion claim.

{7} In the partial summary judgment, the court also stated:

> The Court finds an issue of material fact exists as to what was open and obvious to the previous owner(s) of the ranch and what he (they) knew, should have known or had constructive notice of regarding the operation of the E15 SWD Well. Summary Judgment is denied as to the claim of trespass.

Both parties appear to agree that the partial summary judgment disposed of the pre-October 27, 1994, claims.

{8} Following entry of this partial summary judgment, in a stipulated dismissal order, Plaintiffs released all claims and causes of action "in any way related, whether directly or indirectly, to the disposal and/or injection of produced waters in the E–15 Well from October 27, 1994 through the infinity of time." However, Plaintiffs expressly reserved their right to appeal from the court's unfavorable partial summary judgment, leaving open the possibility of pursuing claims dismissed in the partial summary judgment. Thus, the trespass claims in this case have been split into two groups based upon the date of the trespass: (1) Plaintiffs have settled with Defendants as to trespass claims arising on or after October 27, 1994 (four years prior to the filing of this suit); and (2) Plaintiffs reserved the right to appeal the district court's dismissal of any trespass claims arising prior to October 27, 1994. This is that appeal.

{9} There is no dispute that from 1958 through 2003 Defendants pumped into E–15 large amounts of salt water from oil and gas drilling operations outside the Ranch. Plaintiffs contend on appeal that this constituted a continuing trespass and continuing wrong, and through application of the doctrine of fraudulent concealment or the discovery rule that they can prove facts that would allow recovery of damages for that disposal. Plaintiffs further contend that summary judgment was improper because material facts are in dispute.

{10} In arguing that their conversion claim is viable, Plaintiffs assert Defendants intentionally failed to enter into a salt water disposal agreement with Predecessors for the disposal of the salt water. They further assert that Plaintiffs intentionally deprived Predecessors and Plaintiffs of compensation due them by exercising dominion over and converting to Defendants' own use money that was to be used to compensate Predecessors.

DISCUSSION

CONTENTIONS IN DETAIL

{11} Defendants assert that the single dispositive fact on appeal is that Plaintiffs acquired title to the Ranch in 1995. According to Defendants, Plaintiffs have no right to recover for tortious conduct that occurred before they acquired title. *See, e.g., Caledonian Coal Co. v. Rocky Cliff Coal Mining Co.*, 16 N.M. 517, 524, 120 P. 715, 717–18 (1911) (holding that the plaintiff seeking to recover value of coal removed from land "must show some property right or interest in the coal which is not established by possession of the land merely," since removal by trespass is "a permanent injury to the freehold, for which injury the owner of the fee is alone entitled to recover"). As a corollary, Defendants also contend that Plaintiffs are in no position to invoke the doctrine of fraudulent concealment or the discovery rule in order to escape the bar of the statute of limitations as to their claims to recover damages predating October 27, 1994, since they did not own the property until 1995.

{12} Further, Defendants assert that, even were Plaintiffs to have otherwise assertable claims, the continuing trespass theory cannot assist Plaintiffs because, under that doctrine, each injury gives rise to a new cause of action allowing a plaintiff to recover only for injuries that occurred within the statutory period. *See Valdez v. Mountain Bell Tel. Co.*, 107 N.M. 236, 239–40, 755 P.2d 80, 83–84 (Ct.App.1988) (holding causes of action for damage to home from water seepage caused by placement of utility pole in drainage ditch arose with each new, successive injury, with the statute of limitations beginning to run from the date of each injury); *Breiggar Props., L.C. v. H.E. Davis & Sons, Inc.*, 52 P.3d 1133, 1135 (Utah 2002) (involving debris dumped on land, and stating "[i]n the case of a continuing trespass or nuisance, the person injured may bring successive actions for damages until the nuisance [or trespass] is abated, even though an action based on the original wrong may be barred, but recovery is limited to actual injury suffered within the three years prior to commencement of each action" (internal quo-

tation marks and citation omitted) (alteration in original)).

{13} Defendants similarly assert that the continuing wrong theory does not assist Plaintiffs because their right to sue for installment payments commences to run from the time each installment is due. *See Plaatje v. Plaatje,* 95 N.M. 789, 790–91, 626 P.2d 1286, 1287–88 (1981) (holding cause of action based on breach of monthly obligation in divorce to pay retirement benefits accrued when each installment became due); *see also State ex rel. Pub. Employees Ret. Ass'n v. Longacre,* 2002–NMSC–033, ¶ 23, 133 N.M. 20, 59 P.3d 500 (citing *Plaatje* for the proposition that the statute of repose in *Longacre* could prevent recovery for the total amount of an obligation or liability owed without completely eliminating the right to recover where there was a "continuing wrong"). Defendants point out that even the continuing trespass cases relied on by Plaintiffs limited recovery to the statutory limitation period immediately preceding the filing of the complaint. *See United States v. Hess,* 194 F.3d 1164, 1176–77 (10th Cir.1999); *Nieman v. NLO, Inc.,* 108 F.3d 1546, 1559 (6th Cir. 1997); *City of Shawnee v. AT & T Corp.,* 910 F.Supp. 1546, 1562 (D.Kan.1995) (mem. & order).

{14} In regard to Defendants' standing-based defense that Plaintiffs cannot sue for injuries or damages occurring before they acquired title to the Ranch, Plaintiffs assert this argument was not raised in the district court and Defendants cannot raise the issue for the first time on appeal. Also, Plaintiffs contend that, if this issue is addressed, there exist genuine issues of material fact as to Plaintiffs' relationships to Predecessors and inheritance of Predecessors' rights and claims and thus Plaintiffs' right to assert claims of trespass and wrongdoing occurring during the previous ownership of the Ranch. Plaintiffs also indicate that facts in addition to these record facts would have been more fully developed to defeat Defendants' position had the issue been raised below.

{15} On the question of when the statute of limitations as to Plaintiffs' claims began to run, Plaintiffs assert that the statute did not begin to run with each disposal of salt water, but, rather, when the trespass was removed. They also assert that the statute did not begin to run as to their right to compensation until the wrong ceased, i.e., until final non-payment.

{16} Plaintiffs further assert that Defendants misunderstand Plaintiffs' continuing trespass and continuing wrong theories. Plaintiffs explain that Defendants' arguments and legal authority contemplate and address only circumstances in which trespass was open and obvious to or actually known by the party bringing suit and not continuing trespass and continuing wrong when there has been fraudulent concealment or where the discovery rule applies. Plaintiffs contend they presented evidence creating genuine issues of material fact, in that the evidence indicated Predecessors had insufficient notice and knowledge of the salt water disposal, Predecessors could not with reasonable diligence have discovered the trespass and wrong, and Defendants and their predecessor-in-interest concealed their activities. Last, Plaintiffs assert their conversion claim is viable.

{17} We first consider the preservation of the standing-based defense. We next turn to analyze the fraudulent concealment and discovery rule issues. Finally, we consider Plaintiffs' claim for conversion. We hold that Defendants did not preserve their standing-based defense. As to Plaintiffs' pre-October 27, 1994, trespass claims, we hold that the district court did not err in concluding Defendants did not fraudulently conceal their activities. However, we hold that because there exist genuine issues of material fact, Plaintiffs should be permitted to attempt to show that the discovery rule applies in trespass cases and to prove that, under the discovery rule, the statute of limitations did not begin to run until Plaintiffs knew or by the exercise of reasonable diligence should have known of the disposal complained of by them in this action. Finally, we hold that Plaintiffs' conversion claim was appropriately dismissed.

1. DEFENDANTS DID NOT RAISE THE DEFENSE OF STANDING BELOW

{18} In the district court, Defendants relied on the argument that Plaintiffs did not

have possession of the Ranch prior to 1993 and thus had no trespass claim before that date. This argument was essentially the same in their two motions for summary judgment. However, on appeal Defendants have abandoned that argument. Instead, Defendants argue that Plaintiffs cannot recover for trespass, continuing trespass, or continuing wrong occurring during the period before they acquired title to the Ranch. Defendants argue that Plaintiffs did not own the Ranch until 1995. Thus, Defendants argue that the district court properly granted summary judgment on Plaintiffs' pre-October 27, 1994, claims.

{19} Plaintiffs argue that Defendants did not preserve this argument below. We agree. All of Defendants' arguments below were addressed toward possession, not title or ownership.[1] We do not address defenses raised for the first time on appeal. Rule 12–216(A) NMRA ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked[.]"); *W. Farm Bureau Mut. Ins. Co. v. Barela*, 79 N.M. 149, 152, 441 P.2d 47, 50 (1968) (stating "in determining whether it was error to grant summary judgment, this court is limited to matters presented in the pleadings, affidavits and pre-trial depositions, and defenses cannot be invoked for the first time on appeal").

2. THE MERITS OF PLAINTIFFS' CONTENTIONS

A. THE ESSENCE OF PLAINTIFFS' CASE

{20} Plaintiffs' claims at issue are those for injuries that occurred between 1958 and October 27, 1994. For survival, the claims depend on establishing a tolling and accrual that starts the statute of limitations running for all of those claims at a point in time after October 27, 1994. Plaintiffs contend they can establish that post-October 27, 1994, point through proof of continuing torts with application of the fraudulent concealment doctrine, the discovery rule, or the law that sets the accrual date as to continuing torts to be the date of the last injury or the date the continuing tort is removed or is otherwise over and done with.

{21} Intermixed and perhaps material to both the trespass and conversion claims is Plaintiffs' contention that an oil and gas industry standard in relation to the disposal of salt water requires the party disposing of the salt water to negotiate a salt water disposal agreement with the surface owner that grants permission for the disposal. Plaintiffs state that, in the absence of such an agreement, the surface owner must be compensated. Not having obtained such an agreement, Plaintiffs contend, Defendants must pay compensation. In addition, Plaintiffs contend that at the very least, if Defendants had a right to use Plaintiffs' land, Defendants were required to exercise any right they had to use the land reasonably and an issue of fact exists as to whether Defendants exercised the right reasonably. Excessive use, Plaintiffs assert, is a trespass with or without an agreement. According to Plaintiffs, the industry standard, the violation of the standard, the concealment, the discovery, the nature (permanent, temporary, or continuing) of the trespass and wrong, the accrual date, and excessive use require resolution of genuine issues of material fact, precluding summary judgment.

B. THE TOLLING AND FRAUDULENT CONCEALMENT ISSUES

{22} Plaintiffs contend that they presented evidence which raised factual questions of fraudulent concealment since 1958 of the disposal of salt water originating off the Ranch and Predecessors' inability by the exercise of reasonable diligence to know they had a cause of action. Plaintiffs cite to various New Mexico fraudulent concealment cases. *See Cont'l Potash, Inc. v. Freeport–McMoran, Inc.*, 115 N.M. 690, 698, 858 P.2d 66, 74 (1993) (involving contracts granting rights to explore potash deposits); *Keithley v. St. Joseph's Hosp.*, 102 N.M. 565, 569, 698 P.2d 435, 439 (Ct.App.1984) (involving medical malpractice).

1. In their reply brief to their first amended motion for partial summary judgment Defendants in one place used the words "owned or had possession." However, Defendants did not argue the ownership issue or cite authority in support of such an issue.

{23} As to the fraudulent concealment doctrine, we have not seen, and Plaintiffs have not pointed out, anything in the record that raises a genuine issue of material fact as to whether Defendants engaged in fraudulent concealment. The elements of fraudulent concealment include intentional misrepresentation or concealment upon which there was detrimental reliance. *See Cont'l Potash, Inc.,* 115 N.M. at 698, 858 P.2d at 74 (stating elements of fraudulent concealment). The evidence Plaintiffs presented does not give rise to reasonable inferences tending to establish these elements. The absence of any salt water disposal agreement does not suggest that Defendants intentionally concealed anything from Plaintiffs or Predecessors. And Predecessors' lack of knowledge or understanding about the nature and extent of the disposal operation suggests nothing about either Defendants' intentions or Predecessors' reliance. Those factual contentions are insufficient to create a genuine issue of material fact of fraudulent concealment on Defendants' part. On a motion for summary judgment, "the party claiming that a statute of limitation should be tolled has the burden . . . to show at least a reasonable doubt as to the existence of a genuine factual issue on tolling of the statute[,]" sufficient to create reasonable doubt as to whether the statute ran as a matter of law. *Ocana v. Am. Furniture Co.,* 2004–NMSC–018, ¶ 12, 135 N.M. 539, 91 P.3d 58 (internal quotation marks and citations omitted). To avoid summary judgment, the "party opposing the motion should produce specific evidentiary facts that demonstrate a need for a trial on the merits." *Cates v. Regents of N.M. Inst. of Mining & Tech.,* 1998–NMSC–002, ¶ 24, 124 N.M. 633, 954 P.2d 65; *Collado v. City of Albuquerque,* 120 N.M. 608, 615, 904 P.2d 57, 64 (Ct.App.1995). We hold that the district court did not err in granting partial summary judgment dismissing Plaintiffs' claims that, for their success, rely on proof of fraudulent concealment.

C. THE ACCRUAL, CONTINUING TRESPASS AND CONTINUING WRONG ISSUES

{24} Plaintiffs' continuing trespass theory is that each disposal of off-site salt water was a trespass and each new disposal was an aggravation or continuation of the trespass. Under this theory, Plaintiffs assert that the statute of limitations began to run on the date of the latest disposal, i.e., the date of the latest trespass. Plaintiffs cite various types of cases to support this contention. *See City of Shawnee,* 910 F.Supp. at 1561–62 (applying the continuing trespass doctrine to the presence of a cable transmitting pulses of information and determining that the statute of limitations did not begin to run until the trespass was removed); *Vial v. S. Cent. Bell Tel. Co.,* 423 So.2d 1233, 1236 (La.Ct.App. 1982) (applying a continuing trespass theory to misplaced conduits and manholes, and stating that "[w]here the trespass is a continuing one . . . prescription does not begin to run until the offending object [conduits and manholes] is removed"); *see also Cassinos v. Union Oil Co. of Cal.,* 14 Cal.App.4th 1770, 18 Cal.Rptr.2d 574, 583 (1993) (mentioning "continuing nuisance which cannot be abated" in discussing a measure of damage in trespass case involving subsurface migration of off-site wastewater injected into an oil well); *Knight v. City of Missoula,* 252 Mont. 232, 827 P.2d 1270, 1277 (1992) (applying a continuing nuisance theory to creation, continuing use, and lack of maintenance of a road, and stating rule that where a "nuisance is of a temporary, continuing nature, the statute of limitations is tolled until the source of the injury is abated"). Plaintiffs assert further that they have shown at the very least that there exist genuine issues of material fact as to whether the trespass was continuing and as to what the date was of the last trespass.

{25} Plaintiffs' continuing wrong theory is the concept of tortious conduct causing a continuing or repeated injury which, like continuing trespass, gives rise to a cause of action that accrues when the wrong is "over and done with." They cite *Tiberi v. Cigna Corp.,* 89 F.3d 1423 (10th Cir.1996), and *Eli Lilly & Co. v. EPA,* 615 F.Supp. 811 (S.D.Ind.1985). *Tiberi* applied the continuing wrong doctrine in an action against an insurer for various torts including breach of

fiduciary duty in connection with termination of a contract. 89 F.3d at 1430. *Eli Lilly & Co.* applied the continuing wrong theory in a misappropriation of data action. *Eli Lilly & Co.* stated that "[t]he continuing wrongful conduct of the defendant toward the claimant which establishes a status quo of continuing injury may give rise to a continuing cause of action. Where the wrong is continuing, the statute of limitations does not begin to run until the wrong is over and done with." 615 F.Supp. at 822 (internal quotation marks and citations omitted). Drawing a similarity between the present case and continuing wrong cases involving contract obligations to make periodic payments, Plaintiffs contend that they can sue for all non-payments of compensation owed for each disposal of off-site salt water. They contend further that issues of fact exist as to whether the wrong was continuing, or was single with continuing effects, and as to when the wrong was completed.

{26} Barring application of the discovery rule for relief, the question is, when did the statute of limitations begin to run for pre-October 27, 1994, injuries? In applying the statute of limitations to bar Plaintiffs' claims, the district court necessarily determined either that the claims accrued upon the original trespass or that the statute began to run with respect to each new trespass as it occurred. Whichever approach taken by the district court, it must have decided that the statute ran its course before Plaintiffs filed their lawsuit. Plaintiffs contend the court erred because the statute did not begin to run until the last new trespass or wrong was over and done with or abated. This issue requires us to resolve a question of law and our review is de novo. *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.").

{27} The trespass or nuisance of which Plaintiffs complain is not the E–15 structure or injury caused by the structure, but rather the injection of salt water into the subsurface. The appellate briefs do not indicate whether the flow of salt water through the pipeline and into the well was continuous or intermittent. For the purposes of the issue, however, whether the flow was continuous or intermittent is irrelevant. The question is whether the flow could have been shut off, abating the alleged trespass. *See Valdez*, 107 N.M. at 239, 755 P.2d at 83 (reciting law that "[a] permanent structure or nuisance is one that may not be readily remedied, removed or abated at a reasonable expense, or one of a durable character ... costing as much to alter as to build"). We will assume, based on the briefs, that the salt water could be shut off, although the record lacks evidence as to the cost that would have to be incurred in shutting off the flow.

{28} We therefore see the injury in the present case as continuing or temporary, not permanent, in character. *See Hess*, 194 F.3d at 1176 (stating that continuing gravel extractions over years was a continuing or temporary trespass, and not a permanent or fixed trespass); *Valdez*, 107 N.M. at 240, 755 P.2d at 84 (holding that the statute of limitations begins to run from the date of each injury where a structure causes temporary but repeated injuries, in contrast to the statute running from the date of construction where the existence of the structure itself is the injury); *Haas v. Sunset Ramblers Motorcycle Club, Inc.*, 132 Ohio App.3d 875, 726 N.E.2d 612, 613–14 (1999) (defining a permanent nuisance as a completed tortious act with injury in the absence of any further activity by the tortfeasor and defining a continuing nuisance as ongoing tortious conduct "perpetually generating new violations").

{29} Under the circumstances in this case, we reject a theory or rule requiring a holding that Plaintiffs' cause of action for thirty-six years of continuing trespass or continuing wrong did not accrue until a disposal of salt water or a failure to compensate for a disposal occurred sometime after October 27, 1994. Although it appears, as Plaintiffs show, that some jurisdictions set the cause of action accrual date for a claim for damages for all injuries from the continuing trespass to be the date of the last injury, we think the better rule to apply in the present case is one that sets the accrual date as in *Hess*, *Valdez*, and *Haas*. The accrual date is the date of each particular injury which, for an intermittent injury, is the date of that discrete injury, or for a continuous injury, each new day.

Thus, Plaintiffs could theoretically avoid the statute of limitations bar only if their theories of fraudulent concealment or the discovery rule can operate to provide a date of accrual after October 27, 1994. Having held that Plaintiffs cannot rely on the doctrine of fraudulent concealment, they have only the discovery rule to advance. Therefore, unless Plaintiffs are able to apply the discovery rule to extend the date of accrual to after October 27, 1994, the district court did not err in granting partial summary judgment dismissing Plaintiffs' claims that, for their success, rely on proving a cause of action accrual date after October 27, 1994. We now turn to the discovery rule.

D. UNDER THE DISCOVERY RULE, WHETHER ISSUES OF FACT PRECLUDE SUMMARY JUDGMENT AS TO THE ACCRUAL DATE OF PLAINTIFFS' TRESPASS CLAIM

{30} Plaintiffs contend, citing various New Mexico discovery rule cases, that their evidence showed a continuing trespass, that they and their Predecessors were unable to discover, did not know, and with reasonable diligence could not have known of, the injury and the cause. *See Roberts v. Sw. Cmty. Health Servs.*, 114 N.M. 248, 257, 837 P.2d 442, 451 (1992) (involving medical malpractice); *Martinez–Sandoval v. Kirsch*, 118 N.M. 616, 620–21, 884 P.2d 507, 511–12 (Ct. App.1994) (involving sexual abuse by priest); *see also Apodaca v. Unknown Heirs*, 98 N.M. 620, 624, 651 P.2d 1264, 1268 (1982) (reciting the discovery provisions in NMSA 1978, § 37–1–7 (1880), that "[i]n actions for injuries to, or conversion of, property, the cause of action shall not be deemed to have accrued until the injury or conversion complained of shall have been discovered by the party aggrieved"). Applying the discovery rule, Plaintiffs assert that their evidence created genuine issues of material fact. Under the discovery rule, "the cause of action accrues when the plaintiff discovers or with reasonable diligence should have discovered that a claim exists." *Williams v. Stewart*, 2005–NMCA–061, ¶ 12, 137 N.M. 420, 112 P.3d 281 (internal quotation marks and citation omitted).

{31} Defendants sought summary judgment essentially based on several documents and affidavits regarding the documents. The documents collectively gave rise to an inference that Predecessors knew or reasonably could have discovered that the Disposal System involved transfer of salt water to E–15 from outside the Ranch's boundaries. In addition to the documentary evidence, Defendants presented an affidavit of the president of Rice Operating Company, Loy Goodheart. Goodheart, who was a field engineer with Rice Engineering in 1958, discussed how substantial the construction and installation of the Disposal System was and that it took about two years to complete. Pipelines were first laid out and then were buried. Goodheart stated that because the pipes were laid out beyond the boundaries of the Ranch, "the Terrys could see the construction of the disposal system went from beyond and through the boundary of their property." At no time did Predecessors object to the pipelines for E–15 gathering salt water from beyond the boundaries of the Ranch or take legal action to halt disposal or seek compensation on a per barrel basis.

{32} In opposition to Defendants' motion for summary judgment, Plaintiffs relied on the Release, under which salt water disposal would take place only if "production is encountered on the above described lands," and that the Release excluded "right-of-ways for salt water gathering system beyond the boundaries of this Trust," thereby, according to Plaintiffs, leading one to believe that no off-site salt water would be pumped into the Ranch. Plaintiffs further relied on an affidavit of Plaintiff William F. McNeill stating the following material facts:

> 4. I know that neither my grandparents nor my parents understood the nature and extent of the salt water disposal operations that were conducted on this property. From my earliest years growing up on the ranch (I was born on the ranch in 1943), I knew that there were numerous pipelines, tank batteries and other numerous miscellaneous items of equipment located on the ranch that had to do with oil and gas production. None of these were labeled with respect to their function or purpose.

There was no way to distinguish without specifically researching into the subject as to which pipes were being used for production, transport or disposal of oil, gas, or waste materials. In most instances the pipes that appeared above ground were only a small portion of what I presumed would be the total amount of pipe buried under the ground.

5. Neither my grandparents nor my parents had any knowledge that the Defendants were disposing of millions of barrels of produced water a year through the E–15 Well. In fact they did not know that salt water disposal operations of this or any magnitude were taking place in that Well. There is no record that I can find to show that the Defendants or their predecessors sought or obtained my families' permission to pump millions of barrels of liquid waste into our land for as long as they chose to do so without any compensation.

6. I discovered the true nature of what the Defendants were doing with the E–15 Well in 1995 when I discovered liquid waste dumped onto our property at the site. When I contacted the Defendants to ask what permission they had to do this, I was told they didn't need any permission. This event caused me to start looking into the situation. I was surprised and somewhat shocked when my investigation revealed that the Defendants had been disposing of (and presumably being paid for) almost unlimited amounts of liquid waste into our property without ever obtaining my families' permission to do so or ever compensating us for the damages incurred as a result of these operations.

{33} Plaintiffs also relied on an affidavit of their expert, Ronald Britton, which stated that while certain portions of the Disposal System are visible, "[a] good portion of the system exists underground" and the function of the valves, pipes, and other bits of equipment that are above ground is not open and obvious to the untrained eye. The affidavit also states that disposal systems are not open and obvious in any way, shape, or form. In addition, the affidavit states that there is no readily apparent means for lay people to know, from looking at the various above ground components that the system was being used to dispose of off-site salt water.

{34} Further, the Britton affidavit stated that the standard oil and gas industry practice required owners and operators of salt water disposal systems to obtain the consent of the surface owner through an agreement compensating surface owners for the right to dispose of the salt water into the land. The affidavit further stated that, under industry practice, without such an agreement an operator of a salt water disposal system would be in violation of the standard. These facts are corroborated in an affidavit of Jim Pierce, who indicated he was a "petroleum land man" and expert in petroleum land management.

{35} Plaintiffs also showed that Defendants had disposed of over sixty-six million barrels of salt water in E–15. They further showed that Defendants had separate salt water disposal agreements with other property owners, including Plaintiffs, and had paid others, for other disposal wells in the salt water system. In their answer brief, Defendants do not state where, if at all, they contended or the district court ruled that any affidavit statement was unworthy of consideration.

{36} If Plaintiffs were able, through application of the discovery rule, to prove a post-October 27, 1994, accrual date for claims for injury occurring from 1958, then Plaintiffs' October 27, 1998, lawsuit could not be barred under the four-year statute of limitations. We do not see where Defendants dispute this in their answer brief. Rather, Defendants' position is that, because of their lack of ownership of the Ranch until 1995, Plaintiffs had no claims until 1995 that could even be affected by a statute of limitations. It appears to us that there exist genuine issues of material fact as to whether the statute of limitations was tolled under the discovery rule.

{37} Assuming Plaintiffs can prove their tort claims and facts to support their tolling contention, the factual issues involve, at the very least, whether Predecessors, and Plaintiffs too, knew or by the exercise of reasonable diligence should have discovered before

October 27, 1994, that Defendants were using E–15 for the disposal of salt water. Further, nothing seems to have been developed below as to whether excessive reinjection of salt water into E–15 occurred and, if it did occur, whether it constituted a trespass or other tort and whether Predecessors or Plaintiffs knew or should have known of this activity.

{38} Summary judgment is inappropriate where there are genuine issues of material fact. *See* Rule 1–056(C) NMRA; *Self v. United Parcel Serv., Inc.,* 1998–NMSC–046, ¶ 6, 126 N.M. 396, 970 P.2d 582. "We construe reasonable doubts as to the existence of a genuine factual dispute in the nonmovant's favor." *Rivera v. Trujillo,* 1999–NMCA–129, ¶ 7, 128 N.M. 106, 990 P.2d 219. "Summary judgment is an extreme remedy that should be imposed with caution." *Ocana,* 2004–NMSC–018, ¶ 22, 135 N.M. 539, 91 P.3d 58. "If there is the slightest doubt as to the existence of material factual issues, summary judgment should be denied." *Id.* (internal quotations marks and citation omitted).

{39} Defendants can hardly be heard to complain in regard to this determination. Nowhere in their answer brief on appeal do they answer Plaintiffs' contentions as to the existence of genuine issues of material fact. Defendants rely solely on positions that Plaintiffs have no assertable claims because they did not acquire title until 1995 and that the "continuing" elements of the trespass and wrong theories were inapplicable.

{40} We get the impression from the two judgments issued by the district court that the court sees no basis on which Predecessors and Plaintiffs could not have been aware from 1958 to October 1994 that E–15 was being used for off-site salt water disposal. The ultimate outcome in this case may well be either that Predecessors or Plaintiffs knew of or should have discovered the disposal, or that Plaintiffs are unable to satisfy their burden to prove the opposite. However, Plaintiffs' evidence before the district court at the time of the partial summary judgment created genuine issues of material fact on the question of discovery. The court cannot look down the line and short circuit the result where such fact issues are presented.

E. CONVERSION ISSUE

{41} Plaintiffs claim that Defendants were paid money from participants in the Disposal System; that money Defendants were paid by participants in the Disposal System was owed to Plaintiffs but converted or diverted away from Plaintiffs; that Defendants took and kept money from Plaintiffs that belonged to Plaintiffs; that Defendants' use of E–15 brought Defendants enormous profits; that Defendants never obtained a salt water disposal agreement from Plaintiffs or Predecessors; and that Defendants intentionally deprived Plaintiffs of compensation Defendants owed Plaintiffs for the use of the land.

{42} Plaintiffs do not point to any factual basis in the record to support their claim that money paid to Defendants by participants in the Disposal System was earmarked for or even somehow indirectly owed to persons whose land Defendants used to dispose of salt water, including Plaintiffs and Predecessors. Nor do Plaintiffs point to any facts in the record to support any sort of legal duty on the part of Defendants to turn over or redirect funds it received from disposal operations to persons whose lands were used for disposal, including Plaintiffs and Predecessors.

{43} Moreover, Plaintiffs cite no legal authority applicable to the contentions they present. Plaintiffs cite general conversion law. *See Nosker v. Trinity Land Co.,* 107 N.M. 333, 338, 757 P.2d 803, 808 (Ct.App. 1988). General conversion law does not fit. Plaintiffs have presented no evidence indicating a right to possession of the money they claim. *See id.* Nor have they presented evidence indicating an unlawful exercise of dominion and control over money belonging to Plaintiffs in defiance or exclusion of Plaintiffs' rights as owner. *See id.* Plaintiffs' claim is little more than an assertion of an intentional design and refusal to pay money for the use of Plaintiffs' land, more akin to a claim for unjust enrichment. The claim does not fit under traditional conversion theory and Plaintiffs provide no remotely persuasive legal authority in support of their claim. We

conclude that summary judgment was properly granted on Plaintiffs' conversion claim.

CONCLUSION

{44} We reverse the district court's grant of partial summary judgment dismissing Plaintiffs' trespass claims for pre-October 27, 1994, injury to the Ranch, insofar as the dismissal precluded a trial on the issue of whether, under the discovery rule, Plaintiffs' trespass cause of action did not accrue and the statute of limitations as to Plaintiffs' trespass claim did not begin to run until a date after October 27, 1994. Nothing in this opinion is intended to preclude Defendants from asserting lack of standing on remand based on alleged lack of ownership. We affirm summary judgment as to all other claims that the judgment dismissed.

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

ALARID and FRY, JJ., concur.

2006-NMCA-016

128 P.3d 487

STATE of New Mexico, Plaintiff-Appellant,

v.

Clarence HARBISON, Defendant-Appellee.

No. 24,940.

Court of Appeals of New Mexico.

Nov. 28, 2005.

Certiorari Granted, No. 29,597, Feb. 2, 2006.

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Patricia A. Madrid, Attorney General, Santa Fe, M. Anne Kelly, Assistant Attorney General, Albuquerque, for Appellant.

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

OPINION

WECHSLER, J.

{1} The State of New Mexico appeals the district court's grant of Defendant's motion to suppress evidence. The State argues that the district court erred in granting the motion with regard to a rock of crack cocaine Defendant allegedly threw underneath a car before being handcuffed because Defendant was not seized by the arresting officer until he was placed in handcuffs and therefore Defendant abandoned the crack cocaine. The State also argues that Defendant's seizure was supported by reasonable suspicion. Because we believe, based on the totality of the circumstances, that the arresting officer had reasonable suspicion to briefly detain Defendant, we reverse the district court's grant of Defendant's motion to suppress evidence.

FACTUAL AND PROCEDURAL HISTORY

{2} On June 13, 2003, Albuquerque Police Department detectives from the Northeast Impact Team organized and executed an undercover "buy-bust" operation in northeast Albuquerque. The detectives chose the neighborhood in question because they had received "reports of the prevalence of drugs and drug dealing in the area." Six of the detectives involved in the operation, who were part of the "arrest team," were dressed in jeans, shirts, and black "tuck" vests that said "Albuquerque Police" with a badge on the front and the word "Police" on the back. The remaining team member, Detective J.R. Potter, who was undercover, wore plain clothes without any insignia identifying him as a detective. All of the detectives were driving unmarked police vehicles.

{3} The "buy-bust" operation consisted of Detective Potter posing as a drug purchaser by driving through the neighborhood and nodding at individuals on the corner. "[I]f he got a nod back, . . . he would turn around" and attempt to buy drugs from the individual. At approximately 9:22 p.m., Detective Ray Soto, one of the "arrest team" members, observed Detective Potter interacting with an individual. After pulling his vehicle away from the individual, Detective Potter, using his radio, informed Detective Soto and the rest of his team members that he had just made a cocaine "buy" from that individual. Detective Potter described the suspect as a "black male[,] gray sweatshirt, black pants." He also informed the detectives that the suspect's sweatshirt was emblazoned with the phrase: "Real Men Don't Need Directions" and gave a height estimate of the suspect. The suspect was later identified as Lawrence Clark.

{4} Within thirty seconds of Detective Potter's cocaine purchase, the remaining members of the "arrest team" arrived and observed a group of "eight to ten subjects"

near a building approximately fifty feet away from where the buy had occurred. In addition to this group standing outside, there was a female sitting inside a Bronco SUV and three males inside another car, all within the immediate vicinity in question. As the detectives approached the group of people who were standing by the building, Detective Soto testified that he could see a subject fitting the suspect's description among the group.

{5} Defendant, who was in the group, was not standing immediately next to Clark. They were described as being "at ten and two [o'clock] in relation to each other around the circle." The officers did not observe any interaction between Defendant and Clark. As the detectives got out of their vehicles, the group began to scatter. Detective Soto had his gun drawn. Clark attempted to run and was captured and placed under arrest.

{6} Defendant also departed from the group, in the opposite direction from Clark, in what Detective Soto described as a "slow run." Detective Soto pursued Defendant, with his gun drawn, shouting "Police; don't move. Please don't move." After Detective Soto told Defendant to get on the ground, Defendant stopped running and "went to his knees" in front of a car and "threw something under the car." Detective Soto placed Defendant in handcuffs and looked under the car to see what Defendant had thrown. He found a broken glass crack pipe, a lighter, and a small piece of what was later identified as crack cocaine. Detective Soto testified that as he turned around to face Defendant, he noticed that Defendant, while handcuffed, "had his finger on his coin pocket" and was trying to remove something. Detective Soto then reached into Defendant's pocket and retrieved a second rock of crack cocaine. Defendant was formally arrested and charged with possession of crack cocaine and drug paraphernalia.

{7} Defendant filed a motion to suppress evidence, arguing that Detective Soto lacked reasonable suspicion when he pursued and seized Defendant. After hearing argument, the district court granted Defendant's motion and entered the order from which the State now appeals.

STANDARD OF REVIEW

{8} The applicable standard of review of a ruling on a motion to suppress is "whether the law was correctly applied to the facts, viewing the facts in the light most favorable to the prevailing party." *State v. Joe,* 2003–NMCA–071, ¶ 6, 133 N.M. 741, 69 P.3d 251. We "must defer to the district court with respect to findings of historical fact so long as they are supported by substantial evidence." *State v. Jason L.,* 2000–NMSC–018, ¶ 10, 129 N.M. 119, 2 P.3d 856. We will indulge in all reasonable inferences in support of the district court's ruling and disregard all evidence and inferences to the contrary. *Id.* The issues of whether Defendant was seized and whether Defendant abandoned evidence prior to being seized by police detectives are legal issues that we review de novo. *See State v. Rector,* 2005–NMCA–014, ¶ 4, 136 N.M. 788, 105 P.3d 341 (reviewing de novo the issue of whether the defendant abandoned contraband prior to being seized by police officers); *State v. Walters,* 1997–NMCA–013, ¶ 8, 123 N.M. 88, 934 P.2d 282 ("Seizure under the Constitution is a question of law, but it is a question of fact whether a person was accosted and restrained in such a manner that a reasonable person in the same circumstances would believe he was not free to leave."). We review determinations of reasonable suspicion and probable cause de novo. *State v. Urioste,* 2002–NMSC–023, ¶ 6, 132 N.M. 592, 52 P.3d 964.

ABANDONMENT ARGUMENTS

{9} The State appears to argue that the initial encounter between Detective Soto and Defendant was consensual and therefore Defendant abandoned the evidence he allegedly threw under the car. As a result, the State's position appears to be that no seizure took place until Defendant was handcuffed. We do not agree. Our case law recognizes three types of encounters between police officers and citizens in the context of crime investigation. They are "consensual encounters, investigatory detentions, and arrests." *State v. Ryon,* 2005–NMSC–005, ¶ 20, 137 N.M. 174, 108 P.3d 1032. "Consent is an exception to the Fourth Amendment

probable cause and reasonable suspicion requirements that police often rely on to investigate suspected criminal activity." *Id.* To determine whether a police-citizen encounter is consensual, we consider "the totality of the circumstances surrounding the encounter [to ascertain whether] the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Walters*, 1997–NMCA–013, ¶ 12, 123 N.M. 88, 934 P.2d 282 (internal quotation marks and citation omitted).

{10} In this case, the record indicates that Detective Soto had his weapon drawn and pursued Defendant while commanding him to stop and get down on the ground. A reasonable person would not have felt free to leave in that situation. *See Jason L.*, 2000–NMSC–018, ¶ 17, 129 N.M. 119, 2 P.3d 856 (stating that the "use of aggressive language or tone of voice indicating that compliance with an officer's request is compulsory" by armed police officers, in addition to threatening presence of several officers, could be considered as factors in determining that a reasonable person would not feel free to leave) (internal quotation marks and citations omitted). The initial contact between Officer Soto and Defendant cannot be characterized as a consensual encounter.

{11} The State also argues that Defendant abandoned the drug paraphernalia and a crack rock because he fled from Detective Soto and therefore he was not seized until Detective Soto placed him in handcuffs. The crux of the State's argument is that *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), and *Rector* stand for the proposition that once a person flees from an officer, the person is not seized for Fourth Amendment purposes until the person is physically apprehended. However, our reading of *Hodari D.* and *Rector* does not lead us to the State's conclusion that Defendant was not seized until Detective Soto placed him in handcuffs.

{12} The defendant in *Hodari D.* was standing on a street curb, in a high crime area, when he saw an unmarked police cruiser approaching. *Hodari D.*, 499 U.S. at 622–23, 111 S.Ct. 1547. The defendant apparently "panicked" at the sight of the police cruiser and fled. *Id.* at 623, 111 S.Ct. 1547. One of the officers in the cruiser chased the defendant, and as he ran, noticed that the defendant discarded what was later determined to be a rock of crack cocaine. *Id.* The California Court of Appeal held that the defendant was seized when he saw the officer chasing him and that the seizure was unreasonable under the Fourth Amendment. *Id.* The issue in *Hodari D.* was whether a person who flees in the face of a "show of authority" by police has been seized or arrested for Fourth Amendment purposes. *Id.* at 625–26, 111 S.Ct. 1547. The United States Supreme Court held that a person is not seized for Fourth Amendment purposes when the person does not yield to a show of authority by police. *Id.* at 626, 111 S.Ct. 1547. As a result, the defendant in *Hodari D.* was not seized until he was tackled by the police officer who was chasing him. *Id.* at 629, 111 S.Ct. 1547. Therefore, the rock cocaine that the defendant had discarded while being chased was deemed to have been abandoned even though the officer concededly did not have reasonable suspicion to pursue him. *Id.* at 624 n. 1, 629, 111 S.Ct. 1547.

{13} This Court dealt with a similar issue in *Rector*, in which the defendant also discarded a rock of crack cocaine while being chased by police officers. *Rector*, 2005–NMCA–014, ¶ 3, 136 N.M. 788, 105 P.3d 341. The defendant also argued that the evidence should have been suppressed by the district court because the police officers lacked reasonable suspicion for an investigatory stop and because the officer's discovery of the cocaine was the result of an illegal seizure. *Id.* ¶ 1. Relying on *Hodari D.*, this Court stated that "a seizure requires either physical force . . . or, where that is absent, submission to the assertion of authority." *Rector*, 2005–NMCA–014, ¶ 6, 136 N.M. 788, 105 P.3d 341 (internal quotation marks and citation omitted). Therefore, we affirmed the district court's denial of the defendant's motion to suppress, stating that the defendant "neither submitted to the officers' show of authority nor was he physically restrained until he was grabbed and handcuffed by" the arresting officer. *Id.* ¶ 8.

{14} This case is not like *Hodari D.* and *Rector.* Defendant initially fled from Detective Soto at a "slow run" for less than one minute. As previously indicated, Detective Soto was pursuing Defendant with his gun drawn. In response to Detective Soto's command, Defendant stopped running and dropped to his knees. There is no question that Detective Soto was expressing a show of authority when he was chasing Defendant, while wearing his police vest, with his gun drawn, and commanding him "[p]lease don't move" and to get on the ground. *See United States v. Wood,* 981 F.2d 536, 539 (D.C.Cir. 1992) (stating that when presented with a question of whether a defendant was seized before being physically apprehended "we must determine (1) whether [the police officer] used a 'show of authority' to seize the appellant and (2) whether the appellant *submitted* to the assertion of authority"). It would appear from the record that Defendant was indeed obeying Detective Soto's command when he stopped running and began to kneel, and, at that time, he "submitted to the officers' show of authority" sufficiently to trigger a seizure for Fourth Amendment purposes despite not yet having been physically apprehended. *See Rector,* 2005–NMCA–014, ¶ 8, 136 N.M. 788, 105 P.3d 341.

{15} As we previously stated, we must defer to the district court's findings of historical fact. *Jason L.,* 2000–NMSC–018, ¶ 10, 129 N.M. 119, 2 P.3d 856. The district court found that "as [Defendant] went to his knees, he threw something under the car." Officer Soto testified that he did not know Defendant threw something until he heard "glass on the ground" after Defendant's knees hit the ground. Therefore, our deferential standard of review allows for the inference that Defendant knelt first and then discarded the contraband. *See id.* Because Defendant submitted to Detective Soto's authority when he stopped running and began to kneel, Defendant did not abandon the cocaine evidence prior to being seized as did the defendants in *Hodari D.* and *Rector.*

{16} This case is also not like *United States v. Lender,* 985 F.2d 151 (4th Cir.1993), upon which the State relies in making the argument that Defendant's conduct in stopping and kneeling was not a submission to Detective Soto's authority, but was instead, a "momentary halt." In *Lender,* two police officers patrolling an area known for high drug activity observed the defendant, who was in a group of four to five men, engaging in what appeared to be a drug transaction. *Id.* at 153. As the officers approached the group, it began to disperse. *Id.* When one of the officers asked the defendant to stop, he refused, instead telling one of the officers, "You don't want me; you don't want me." *Id.* As the defendant continued to walk away, "both officers observed him bring his hands to the front of his waist as though reaching for or fumbling with something in that area." *Id.* One of the officers again asked the defendant to stop, and as the defendant appeared to comply, "a loaded semi-automatic pistol fell from his waist to the ground." *Id.* Both the defendant and one of the officers simultaneously reached for the weapon. *Id.* The other officer immediately subdued the defendant, who was then arrested for carrying a concealed weapon. *Id.*

{17} In affirming the trial court's denial of the defendant's motion to suppress, the Fourth Circuit Court of Appeals stated that the defendant's "momentary halt on the sidewalk with his back to the officers" did not constitute "a yielding to their authority" for purposes of determining when he was seized. *Id.* at 155. Rather, the Court stated that the defendant's statements and fumbling prior to stopping, in addition to his conduct in immediately reaching for the pistol when it fell, were not consistent with conduct indicating he was yielding to the officers' authority. *Id.* The Court stated that the defendant's conduct was more "consistent with preparation to whirl and shoot the officers." *Id.*

{18} The record indicates that Defendant in this case did not exhibit conduct even remotely similar to that of the defendant in *Lender.* Defendant, in dropping to his knees, did nothing to indicate he was going to continue fleeing, much less attack Detective Soto. Instead, even though Defendant may have been attempting to deceive Detective Soto by discarding contraband, he was still seized because he complied with Detective Soto's command to cease running and

get down on the ground. *See In re A.T.H.*, 106 S.W.3d 338, 348–49 (Tex.Ct.App.2003) (holding that a juvenile was seized for Fourth Amendment purposes when he obeyed a police officer's order to place his hands above his head, even though he attempted to hide contraband, because the defendant "attempted to conceal a baggie while still complying with [the officer's] request").

REASONABLE SUSPICION

{19} Our determination that Defendant did not abandon the evidence he discarded does not end our inquiry. The State argues that the district court erred in granting Defendant's motion to suppress because Detective Soto's encounter with Defendant was supported by reasonable suspicion. As an initial point, Defendant argues that the State has waived this issue by conceding the point in its proposed findings of fact and conclusions of law, proposing a conclusion of law stating, "The police officers did not have reasonable suspicion to stop or detain the defendant." The State argues both that the concession was a typographical error and that the issue was preserved because the prosecutor and Defendant argued the issue below and because the district court ruled on the issue. We agree with Defendant that the State's proposed findings purport to concede the issue. However, the issue of reasonable suspicion was litigated at length at the motion to suppress hearing, and our review of the transcript and the record indicate that the district court made a ruling on the issue. Therefore, despite the State's curiously drafted findings and conclusions, we believe the issue was preserved for review. *See 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).

{20} We therefore address the issue of whether Detective Soto had reasonable suspicion to pursue and detain Defendant. In "appropriate circumstances, a police officer may detain a person in order to investigate possible criminal activity, even if there is no probable cause to make an arrest." *State v. Eli L.*, 1997–NMCA–109, ¶ 8, 124 N.M. 205, 947 P.2d 162 (internal quotation marks and citation omitted). Such "circumstances must arise from the [police] officer's reasonable suspicion that the law is being or has been broken." *Id.* (internal quotation marks and citation omitted). "A reasonable suspicion is a particularized suspicion, based on all the circumstances that a particular individual, the one detained, is breaking, or has broken, the law." *Jason L.*, 2000–NMSC–018, ¶ 20, 129 N.M. 119, 2 P.3d 856. The officer may not rely upon "[u]nsupported intuition and inarticulate hunches." *Id.* (internal quotation marks and citation omitted).

{21} The State argues that Detective Soto developed reasonable suspicion to detain Defendant because (1) Detective Soto testified that he was familiar with multiple-person drug sales, (2) Defendant was standing in a group of eight to ten individuals near where one of those individuals had recently sold crack cocaine to an undercover detective, (3) Defendant initially fled from Detective Soto, and (4) Clark fled in the opposite direction of Defendant. We agree with Defendant that "New Mexico has not dispense[d] with the requirement of individualized, particularized suspicion." *Jason L.*, 2000–NMSC–018, ¶ 21, 129 N.M. 119, 2 P.3d 856 (alteration in original) (internal quotation marks and citation omitted). In addition, "[a] person's mere propinquity to others independently suspected of criminal activity does not, without more, authorize a [seizure of the person] unless the officer has reasonable suspicion [of criminal activity] directed specifically at that person." *State v. Morris*, 276 Kan. 11, 72 P.3d 570, 580 (2003). However, in this case, Detective Soto had individualized conduct on the part of Defendant to factor into his reasonable suspicion determination based on Defendant's flight.

{22} The consideration of a defendant's flight from police officers as a factor in determining reasonable suspicion is an issue of first impression in New Mexico. The United States Supreme Court dealt with a similar issue in *Illinois v. Wardlow*, 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000), in a manner which we find instructive.

{23} In *Wardlow,* two police officers were driving through an area known for heavy narcotics trafficking when they noticed the defendant. *Id.* at 121, 120 S.Ct. 673. The officers were traveling as part of a four-car caravan because they anticipated finding a crowd "in the area, including lookouts and [narcotics] customers." *Id.* The officers noticed the defendant standing next to a building and holding an opaque bag. *Id.* at 121–22, 120 S.Ct. 673. The defendant looked in the officer's direction and fled. *Id.* at 122, 120 S.Ct. 673. The officers followed the defendant in their vehicle and observed him as he "ran through the gangway and an alley," and eventually caught up to and detained the defendant. *Id.* One of the officers "immediately conducted a protective patdown search for weapons because in his experience it was common for there to be weapons in the near vicinity of narcotics transactions." *Id.* The search yielded the discovery of a loaded .38-caliber pistol, which led to the defendant's arrest and subsequent conviction for unlawful use of a weapon by a felon. *Id.*

{24} The United States Supreme Court held that the officers had reasonable suspicion to briefly detain the defendant. *Id.* at 124–25, 120 S.Ct. 673. It reasoned that "it was not merely [the defendant's] presence in an area of heavy narcotics trafficking that aroused the officers' suspicion, but his unprovoked flight upon noticing the police." *Id.* at 124, 120 S.Ct. 673. It further stated that:

> Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.

Id. at 124–25, 120 S.Ct. 673. The Court also instructed that an individual has the right, when approached by a police officer who does not have reasonable suspicion, "to ignore the police [officer] and go about his business." *Id.* at 125, 120 S.Ct. 673. However, it stated that flight is not akin to a mere refusal to cooperate. *Id.* Instead, it stated that flight, at the very least, creates an ambiguity regarding the lawfulness of the individual's conduct and that officers, when confronted with such flight, are allowed to briefly stop the individual and resolve the ambiguity. *Id.* at 125–26, 120 S.Ct. 673. Moreover, the Court stated that reasonable suspicion "requires a showing considerably less than preponderance of the evidence." *Id.* at 123, 120 S.Ct. 673.

{25} Other federal and state jurisdictions have held that a defendant's flight need not necessarily be "headlong" as articulated in *Wardlow,* in order to be a factor in determining the presence of reasonable suspicion under the totality of circumstances. *See, e.g., United States v. Hauk,* 412 F.3d 1179, 1184, 1192 (10th Cir.2005) (relying on *Wardlow* in stating that police officers' observation of an unidentified individual entering the defendant's house, coupled with the defendant's attempt to retreat into his house and immediately "close the door" after responding to the officers' knock were factors in providing reasonable suspicion and justification for the officers' protective sweep of the defendant's home without a warrant); *People v. Rushdoony,* 97 P.3d 338, 342–43 (Colo.Ct.App. 2004) (relying on *Wardlow* in interpreting the defendant's behavior as flight when the defendant "immediately" backed away from a dumpster in which he was digging and moved toward his car when he was approached by police, and determining that the defendant's flight, coupled with the fact that there had been recent burglaries in the area and the lateness of the hour, justified a brief investigatory stop by police); *State v. Griffin,* 31 Kan.App.2d 149, 61 P.3d 112, 115–17 (2003) (relying on *Wardlow* in stating that the defendant's attempt to drive away from approaching police officers, late at night, in an area where one officer had observed unrelated drug transactions, and where known convicted drug offenders resided, was sufficient under the totality of circumstances to give rise to reasonable suspicion justifying a brief detention of the defendant); *State v. Cushing,* 2004 UT App 73, ¶¶ 3, 20, 88 P.3d 368

(relying on *Wardlow* in stating that the defendant's flight from a police officer, which began as "almost [jogging]" from a vehicle stop of an apparently intoxicated driver when he was the passenger, in a high crime area, justified pursuit and a brief investigatory detention of the defendant) (alteration in original), *cert. granted,* 90 P.3d 1041 (Utah 2004).

{26} In this case, the district court stated that Detective Soto and the APD Impact Team were conducting their "buy-bust" operation in an area known for "the prevalence of drugs and drug dealing." More significantly, Detective Soto approached a group of eight to ten people knowing that one of them had just committed a crime by selling drugs to an undercover police officer approximately one minute earlier. Defendant fled from Detective Soto in a "slow run" and initially disregarded Detective Soto's commands to stop running. Detective Soto articulated that he was familiar with multiple-person drug transactions and that he suspected Defendant of being a part of one, along with Clark and the other individuals in the immediate vicinity of Clark. He stated that he was familiar with situations where drug dealers were not working alone, but rather employed other individuals to "hold [drugs] for them" or act as lookouts. *See Griffin,* 61 P.3d at 116–17 (stating that a part of the totality of the circumstances analysis involves allowing "officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person") (internal quotation marks and citation omitted). Detective Soto also stated that he pursued Defendant because he and his fellow officers were outnumbered, and he was concerned that Defendant might pose a threat to the safety of the officers if allowed to leave the officers' line of sight.

{27} As stated in *Wardlow,* our totality of the circumstances analysis must not be guided by a requirement of "scientific certainty from . . . law enforcement officers where none exists." *Wardlow,* 528 U.S. at 125, 120 S.Ct. 673. Instead, we are to base our reasonable suspicion determination on "commonsense judgments and inferences about human behavior." *Id.* Indeed, the circumstances in this case indicate a stronger inference of Defendant's involvement in criminal activity than *Wardlow* because, in this case, known criminal activity had just taken place. In *Wardlow,* although the area was known for heavy drug trafficking, the officers had not just observed the commission of a crime. *See id.* at 121, 120 S.Ct. 673. It does not matter that Detective Soto did not actually see Defendant commit a crime or that the individual who actually sold narcotics to Detective Potter, Clark, was easily identifiable. The totality of the circumstances, indicating the existence of criminal activity and Defendant's flight from the group at the location of the criminal activity, gave rise to the reasonable inference that Defendant was also engaged in the criminal activity. Detective Soto was justified in pursuing Defendant and briefly detaining him for his own safety and to resolve the ambiguity created by Defendant's flight and subsequent refusal to heed directions. *See id.* at 125–26, 120 S.Ct. 673 (stating that flight, although by itself not necessarily indicative of wrongdoing may, when viewed in totality of the circumstances, give rise to reasonable suspicion allowing the officer to briefly detain the fleeing individual in order to "resolve the ambiguity"); *Hauk,* 412 F.3d at 1193 (stating that when viewed in the totality of the circumstances, facts giving rise to a concern for officer safety may justify a brief protective search of a defendant's home).

CONCLUSION

{28} When viewed under the totality of the circumstances, Detective Soto had reasonable suspicion to pursue and briefly detain Defendant based on Defendant's flight in conjunction with the known criminal activity that had just taken place at the location. Therefore, we reverse the district court's order granting Defendant's motion to suppress evidence.

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

FRY and ROBINSON, JJ., concur.

2006-NMCA-018

128 P.3d 496

Daniel HERNANDEZ, on behalf of himself and all other similarly situated account holders at Defendant bank, Plaintiff–Appellant,

v.

WELLS FARGO BANK NEW MEXICO, N.A., a national bank doing business in New Mexico, Defendant–Appellee.

No. 24662.

Court of Appeals of New Mexico.

Dec. 8, 2005.

The Bregman Law Firm, P.C., Sam Bregman, Eric Loman, Albuquerque, for Appellant.

Keleher & McLeod, P.A., W. Spencer Reid, Gary J. Van Luchene, Albuquerque, for Appellee.

OPINION

WECHSLER, J.

{1} Daniel Hernandez (Plaintiff) appeals from the trial court's order granting summary judgment in favor of Wells Fargo Bank New Mexico (Bank). Plaintiff argues that Bank's charging of overdraft fees violates the New Mexico Unfair Practices Act (UPA), NMSA 1978, § 57–12–2(E)(2) (2003). We hold that summary judgment was proper because Plaintiff failed to meet his burden to rebut Bank's prima facie evidence that the overdraft fee was not grossly disproportionate to the value received by Plaintiff and affirm.

FACTS AND PROCEDURAL BACKGROUND

{2} Plaintiff maintains a checking account with Bank, a nationally chartered bank. Plaintiff occasionally used a debit card to make purchases that are charged against his account. On more than one occasion, Plaintiff used his debit card for a purchase transaction when his checking account did not have sufficient funds. On such occasions, Bank approved the transaction, covered the difference, and charged Plaintiff an overdraft fee between $28 and $31. Most of the overdrafts were in amounts less than the overdraft fee. Plaintiff sued Bank under Section 57–12–2(E)(2), alleging that Bank's overdraft fees are extensions of credit that are unconscionable because of a gross disparity between the value received (Bank coverage of the overdrafts) and the price paid (the resultant overdraft fee).

{3} Bank moved for summary judgment, arguing that Plaintiff's UPA claim is preempted by the National Banking Act, 12 U.S.C. §§ 21–216 (2000) (NBA), and that the overdraft fees are not unconscionable as a matter of law. Bank's motion for summary judgment included an affidavit of Bank Vice President Victor A. Valdez and supporting documentation of a 1997 Account Agreement and a 1999 Account Agreement (Account

Agreements). The Account Agreements set forth Bank's rights to cover or to decline transactions, including electronic transactions when presented on insufficient funds, and to charge Plaintiff a resultant fee. Valdez's affidavit also referred to and attached a 2000 Consumer Account Fee and Information Schedule, which provided Plaintiff with information on available overdraft protection plans and overdraft fees. Plaintiff signed account applications in which he acknowledged having received and being bound by the Account Agreements and the Consumer Account Fee. In addition, Valdez's affidavit referred to attached bank statements in which Bank gave Plaintiff notice of his overdrafts, provided the amounts of the overdraft fees that Plaintiff agreed to pay, notified Plaintiff that it was Bank's policy to approve as many debit card transactions as possible, and offered Plaintiff the option to apply for overdraft protection.

{4} In response to Bank's motion for summary judgment, Plaintiff disputed receiving all of the above-noted documentation, disputed the reasonableness and justification for Bank's overdraft policies, and argued that preemption did not apply. The trial court granted summary judgment in Bank's favor, determining that there was no genuine issue of material fact with respect to Bank's statement of material facts, and that (1) federal law preempted Plaintiff's claim, and (2) as a matter of law, Bank was otherwise entitled to summary judgment.

STANDARD OF REVIEW

{5} Summary judgment is properly granted when no genuine issues of material fact exist "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 de novo the issue of whether the movant was entitled to judgment as a matter of law. *Id.* The movant must make a prima facie showing that summary judgment is merited. *Roth v. Thompson*, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992). Upon such a prima facie showing, the burden shifts to the party opposing summary judgment to show specific evidentiary facts in the form of admissible evidence that require a trial on the merits. *Id.* at 334–35, 825 P.2d at 1244–45; *Ciup v. Chevron U.S.A., Inc.*, 1996–NMSC–062, ¶ 7, 122 N.M. 537, 928 P.2d 263. General assertions of the existence of a triable issue are insufficient. *See Clough v. Adventist Health Sys., Inc.*, 108 N.M. 801, 803, 780 P.2d 627, 629 (1989) ("[M]ere argument or bare contentions of the existence of a material issue of fact is insufficient."); *Spears v. Canon de Carnue Land Grant*, 80 N.M. 766, 769, 461 P.2d 415, 418 (1969) ("Mere argument or contention of existence of material issue of fact ... does not make it so. The party opposing a motion for summary judgment cannot defeat the motion ... by the bare contention that an issue of fact exists, but must show that evidence is available ....") (citation omitted); *Schmidt v. St. Joseph's Hosp.*, 105 N.M. 681, 683, 736 P.2d 135, 137 (Ct.App.1987) (stating that "a general allegation without an attempt to show the existence of those factual elements comprising the claim or defense" is insufficient to overcome a motion for summary judgment) (internal quotation marks and citation omitted).

PLAINTIFF'S FAILURE TO MEET HIS BURDEN

{6} Section 57–12–2(E)(1), (2) defines an "unconscionable trade practice" as:

> [A]n act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts which to a person's detriment:
>
> (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or
>
> (2) results in a gross disparity between the value received by a person and the price paid.

{7} Plaintiff premises his claim on Bank's alleged violation of Section 57–12–2(E)(2), arguing specifically that Bank made an extension of credit that was unconscionable because it resulted in a gross disparity between the value received and the price paid. Plaintiff claims that the overdraft fees are excessive for the services rendered and that the

amount of the overdraft fees and the actual expenses incurred by Bank for processing Plaintiff's overdrawn debit transactions do not justify the amount of the fees imposed.

{8} As a national bank, Bank is subject to the NBA and regulations of the Office of the Comptroller of the Currency (OCC) under its authority to supervise and regulate federally chartered banks pursuant to the NBA. *See* 12 U.S.C. § 1 (2000). In connection with its motion for summary judgment, Bank presented evidence that it established its overdraft fees in accordance with sound banking principles under the OCC regulation pertaining to a national bank's adoption of customer fees. Specifically, Bank submitted Valdez's affidavit stating that the fees aid in offsetting Bank's costs in processing the overdrafts. Valdez stated that Bank's costs included resultant "postage and mailing costs, costs associated with time spent by [b]ank tellers or customer service representatives with account holders whose accounts are overdrawn, and, in some cases, costs related to collection activities to recover overdrawn amounts or write-offs of overdrawn amounts." Valdez indicated that the amount of the fees is designed, in part, to deter Bank customers from repeatedly overdrawing their accounts and to encourage them to keep track of their account balances. Additionally, Valdez stated that the amount of overdraft fees must remain competitive with that of other large banks to discourage customers who habitually overdraw their accounts from choosing Bank. He further stated that, as part of Bank's business plan and marketing strategy, Bank chooses to approve as many transactions as possible, both to provide a better experience for most customers "by avoiding public rejection in the grocery line," and to make the debit card more reliable for merchants. Lastly, Valdez stated that the overdraft fees contribute to its income and are at amounts that are competitive with other banking institutions, adding to the safety and soundness of banking practices. Putting aside any issue of whether Bank's actions complied with OCC regulation, Valdez's affidavit meets the requirements of a prima facie showing that there is no gross disparity between the value received by Plaintiff and the fee he paid for that value. *See Rivera v. Brazos Lodge Corp.*, 111 N.M. 670, 672, 808 P.2d 955, 957 (1991) ("A prima facie showing contemplates such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted. The movant need not demonstrate beyond all possibility that no genuine factual issue existed.") (citation omitted); *Oschwald v. Christie*, 95 N.M. 251, 253, 620 P.2d 1276, 1278 (1980) (discussing prima facie cases for summary judgment and concluding that the affidavit of the movant did make a prima facie case).

{9} In response to Bank's motion for summary judgment, Plaintiff argued that the overdraft fees were unconscionable as a matter of fact, unreasonable, and grossly higher than Bank's costs. He further argued that Bank's interests in deterrence of customer abuse and protection of its market position could best be accomplished by denying overdraft transactions or charging a reasonable fee. Plaintiff submitted his own affidavit in which he denied receiving both the 1997 Account Agreement and the Fee and Information Schedule. He also denied that his actions were the cause of the overdrafts. He further stated:

> 4. I do not believe that deterring overdrafts is the reason that Wells Fargo charges high overdraft fees.
>
> 5. I do not prefer to pay an extremely high overdraft fee than to have a transaction publicly denied. I also believe that many bank customers feel the same way I do.
>
> 6. I do not believe that Wells Fargo charges high overdraft fees in order to deter those who overdraft their accounts from banking with Wells Fargo. I believe that they could achieve this same goal by not approving overdrafts.
>
> . . . .
>
> 8. I believe that the overdraft fees charged by Wells Fargo are grossly unfair.

{10} The shortcoming of Plaintiff's response is that it does not counter Bank's motion and affidavit in a manner to place material facts at issue. Plaintiff makes only general statements expressing his contrary beliefs and arguments without rebutting Bank's evidence that its overdraft fees were not disproportionate. *See Martinez v. Metzgar*, 97 N.M. 173, 175, 637 P.2d 1228, 1230 (1981) ("Belief or opinion testimony alone, no

matter how sincere it may be, is not equivalent to personal knowledge.... Therefore, these statements do not create a genuine issue of material fact which would preclude summary judgment ....") (citation omitted); *Pedigo v. Valley Mobile Homes, Inc.,* 97 N.M. 795, 798, 643 P.2d 1247, 1250 (Ct.App. 1982) (noting that "factually unsupported opinion testimony" is "not sufficient to defeat a motion for summary judgment"). Regardless of whether Bank could have addressed overdrafts differently, the Valdez affidavit states that Bank approved the transactions based, in part, on concerns with public embarrassment for its customers. In establishing its fees, Bank considered more than its actual cost in providing the service in order to address deterrence, its competitive position, and the maintenance of its safety and soundness as a banking institution. Plaintiff's beliefs are not relevant except as to the value he received in a transaction. *See* § 57–12–2(E)(2); *see also Martinez,* 97 N.M. at 175, 637 P.2d at 1230; *Pedigo,* 97 N.M. at 798, 643 P.2d at 1250. His only statement in this regard is that he would prefer to be publicly denied approval than charged an overdraft fee. This statement, however, is only a general attack on the value he received. As with Plaintiff's other statements, it does not raise an evidentiary issue that there was a gross disparity between the overdraft fee and the benefit received. *See Bixby v. Reynolds Mining Corp.,* 113 N.M. 372, 374, 826 P.2d 968, 970 (1992) ("Conclusions that are stated in an affidavit, unsupported by any factual basis ... are not sufficient to raise issues of material fact. The opposing party must set forth more than mere argument.") (citation omitted); *Clough,* 108 N.M. at 803, 780 P.2d at 629; *Spears,* 80 N.M. at 769, 461 P.2d at 418; *Schmidt,* 105 N.M. at 683, 736 P.2d at 137.

{11} Plaintiff's argument in his response also does not directly address the issue of the disproportionate relationship of the overdraft fee to the value Plaintiff received. It is not enough to make the general statement that a reasonable jury could find in his favor. Plaintiff stresses the amount of his overdrafts in relation to the overdraft fee. However, the amount of the overdraft is not the focus of the overdraft fee. As contemplated by the Account Agreements, the overdraft fees are fees for the processing of Plaintiff's debit transactions made on insufficient funds. They are not interest or compensation for the use of money, transactions for which there is a direct relationship between the amount extended and the amount charged. *See Video Trax, Inc. v. NationsBank, N.A.,* 33 F.Supp.2d 1041, 1050 (S.D.Fla.1998) (holding that overdraft and not sufficient fund (NSF) fees, charged to compensate the bank for processing bad checks, are not imposed in connection with an extension of credit involving interest within the meaning of 12 U.S.C. § 85 and 12 C.F.R. § 7.4001(a) (1997), but arise from the terms of the deposit agreements); *First Bank v. Tony's Tortilla Factory, Inc.,* 877 S.W.2d 285, 287 (Tex.1994) (holding that a bank's fees for checks drawn on an account with insufficient funds do not constitute interest because the fees "are an additional charge supported by a distinctly separate and additional consideration, [for processing the overdrafts,] other than the simple lending of money").

{12} Although Plaintiff argues in his reply brief that there is a distinction between an overdraft check and an overdraft debit transaction, for the purposes of this opinion, we do not agree. When Plaintiff used his debit card beyond the cash balance that was in his checking account, Bank charged an overdraft fee for each item paid beyond the balance in Plaintiff's account. Plaintiff's use of the debit card was comparable to writing a check. *See Gale v. Hyde Park Bank,* 384 F.3d 451, 452 (7th Cir.2004) (recognizing that like a checking account, use of a debit card requires that the bank balance supports each new transaction regardless of whether the transaction is immediately posted).

CONCLUSION

{13} We affirm the trial court's grant of summary judgment on the merits of Plaintiff's unconscionability claim because Plaintiff did not meet his burden in responding to Bank's motion and affidavit.

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

SUTIN and CASTILLO, JJ., concur.

2006-NMCA-017
128 P.3d 500

STATE of New Mexico, Plaintiff–Appellee,

v.

Andrew John NICHOLS, Defendant–Appellant.

No. 25205.

Court of Appeals of New Mexico.

Dec. 8, 2005.

Patricia A. Madrid, Attorney General, Patricia Gandert, Assistant Attorney General, Santa Fe, for Appellee.

J. Robert Beauvais, P.A., J. Robert Beauvais, Ruidoso, for Appellant.

OPINION

SUTIN, J.

{1} Defendant was charged by a grand jury with committing seventeen counts of

various sexual offenses against his biological daughter (Victim). The offenses included criminal sexual penetration (CSP), attempted CSP, criminal sexual contact of a minor (CSCM), and incest. The indictment stated that the offenses occurred between October 1, 1995, and February 25, 2003, although in the separate counts, the State charged more narrow time frames. During some of this time, Victim was under the age of thirteen. Following the trial, the seventeen counts were consolidated into six: one count each of CSCM with a minor under the age of thirteen, incest, attempt to commit CSP, and attempt to commit incest, and two counts of CSP of a minor. Defendant was convicted of all six counts.

{2} Defendant appeals on four grounds: (1) whether there was sufficient evidence of attempted CSP and attempted incest where Defendant claims that Victim's testimony was not credible, (2) whether the district court erred in instructing the jury that it could convict Defendant of CSCM for touching Victim's breasts and/or her vagina, (3) whether the district court abused its discretion in allowing, under Rule 11-801(D)(1)(b) NMRA, a prior statement, which Defendant argues was not consistent with Victim's testimony at trial, and (4) whether Defendant was denied notice and the ability to defend because of the large time spans submitted in the jury instructions. We affirm.

BACKGROUND

{3} Victim testified that she was seven years old when her mother moved out of the house, and left her and her three brothers with Defendant, Victim's father. She testified that about six months after her mother left, Defendant started touching her inappropriately. Victim and her family lived in Roswell on and off from the time that Victim was seven until she was fourteen. During some of that time, Victim and her brothers lived in Artesia with Defendant's father, Defendant's stepmother, and his stepsister while Defendant lived in Arizona. Victim testified that no sexual misconduct occurred during this time in Artesia though Defendant visited her during that time. During the time in Artesia, Victim disclosed to Defendant's stepsister (Victim's stepaunt) that "John" had touched her and "made her put her mouth there." Victim's stepaunt believed that by "John" Victim was referring to Defendant, whose middle name is John and who is known as John. At trial, Victim never testified that oral sexual contact occurred.

{4} At some point, Defendant retrieved Victim and her brothers and moved them first to Arizona, then to Washington, then back to Roswell in April 2002, shortly after Victim turned fourteen. Victim testified that, after moving back to Roswell, Defendant committed CSCM and digital CSP on her approximately a dozen times. She also testified that Defendant committed penile CSP on her three times since moving back to Roswell. For two of the acts of CSP, Victim was unable to give a specific date. Two of Victim's brothers testified to seeing inappropriate contact between Defendant and Victim during this time period. As for the third instance of CSP, Victim testified that it happened on February 25, 2003, the day before she was taken into foster care. Victim testified in detail as to Defendant's conduct on this date. The incident was not witnessed by anyone else and Defendant denied that it ever occurred. He also generally denied having had any sexual contact with or penetration of Victim. We discuss the facts in more detail later in this opinion as necessary.

DISCUSSION

I. THE STATE PRESENTED SUBSTANTIAL EVIDENCE OF ATTEMPTED CSP AND ATTEMPTED INCEST

{5} Defendant first argues that the State failed to establish substantial evidence of counts four and five, charging attempted CSP under NMSA 1978, § 30-9-11 (2003), and attempted incest under NMSA 1978, § 30-10-3 (1963). These counts were based on the conduct that occurred February 25, 2003, the day before Victim was put into foster care. Defendant argues that "[t]he only evidence, direct or circumstantial, that [Defendant] attempted CSP or attempted incest on February 25, 200[3] was the directly controverted testimony of the alleged victim." Defendant argues that Victim's uncorroborated, contradictory testimony does not establish beyond a reasonable doubt that the

alleged attempted CSP and attempted incest occurred.

{6} Victim testified as follows: On the night of February 25, 2003, she had fallen asleep in her father's room watching TV. Her father's live-in girlfriend, Donna, was not at the house at the time. When she woke up, her father was on top of her and there were candles lit in the room. Her father then retrieved some condoms out of his closet and put one on his penis. Her father told her that he wanted to "come inside her." He then placed his penis inside her vagina and started pushing, and it was very uncomfortable and hurt. She tried to scream or make a noise but could not get a sound out. At one point she managed to push him off of her and she went running to the bathroom to get away from him. He then called her back to the bedroom and tried to pull her back onto the bed but she managed to escape his grip. Defendant said a second time that he wanted to come inside of her. Victim grabbed her pajamas, ran back to the bathroom, got dressed and went back to where she normally slept.

{7} On cross-examination, defense counsel elicited testimony from Victim establishing that the day after this incident she told a police detective that she had never seen any condoms at the house and that she had never seen a condom. Defendant raises other contradictions, including, for example, that Victim testified that Defendant told her not to attribute any sexual contact to him but to tell the police the sexual contact was by a boyfriend, whereas, on cross-examination Victim testified that she told the detective her father had never discussed the sexual contact with her; that Victim denied any inappropriate contact by her father and was not lying to protect him; and that she told the detective she was a virgin.

{8} Defendant's insufficiency of evidence point is based solely on his argument that Victim's testimony regarding attempted CSP and attempted incest was not sufficiently credible to permit the jury to find Defendant guilty beyond a reasonable doubt. Defendant also challenges the sufficiency of the evidence by questioning whether a reasonable person could think Defendant was not credible, viewing the evidence in a light most favorable to the State. For that proposition, he relies on *State v. Dominguez,* 115 N.M. 445, 455, 853 P.2d 147, 157 (Ct.App.1993), as citing the case of *State v. Sparks,* 102 N.M. 317, 694 P.2d 1382 (Ct.App.1985), which merely states that substantial evidence is evidence that is acceptable to a reasonable mind as adequate support for a conclusion and holds that the jury could reasonably have believed that the defendant acted in a particular manner. *Id.* at 320, 694 P.2d at 1385. Defendant's authority does not support his proposition. Defendant's standard is simply incorrect.

{9} "When determining the sufficiency of the evidence, the court views the evidence in a light most favorable to the verdict, considering that the State has the burden of proof beyond a reasonable doubt." *State v. Garcia,* 2005–NMSC–017, ¶ 12, 138 N.M. 1, 116 P.3d 72. We view the evidence in the light most favorable to the verdict and disregard any contrary evidence. *State v. Bennett,* 2003–NMCA–147, ¶ 19, 134 N.M. 705, 82 P.3d 72. "If evidence is in conflict, or credibility is at issue, we accept any interpretation of the evidence that supports the trial court's findings[.]" *State v. Wynn,* 2001–NMCA–020, ¶ 5, 130 N.M. 381, 24 P.3d 816. As an appellate court, we do not "substitute our judgment for that of the factfinder concerning the credibility of witnesses or the weight to be given their testimony." *State v. Sanders,* 117 N.M. 452, 457, 872 P.2d 870, 875 (1994). "An appellate court does not observe the demeanor of live witnesses, cannot see a shift of the eyes, sweat, a squirm, a tear, a facial expression, or take notice of other signs that may mean the difference between truth and falsehood to the fact finder." *Tallman v. ABF (Arkansas Best Freight),* 108 N.M. 124, 127, 767 P.2d 363, 366 (Ct.App.1988).

{10} In prosecutions for criminal sexual penetration, "[t]he testimony of [the] victim need not be corroborated" and lack of corroboration has no bearing on weight to be given to the testimony. NMSA 1978, § 30–9–15 (1975). The appropriate formulation of the sufficiency of the evidence test in CSP

cases was succinctly stated in *State v. Hunter*, 101 N.M. 5, 7, 677 P.2d 618, 620 (1984):

> While the evidence was conflicting, it was not incredible. The jury, as the trier of fact, was entitled to weigh this evidence. The jury simply believed the victims' testimony and the evidence supporting it over Defendant's assertions that the incidents had not occurred. This Court will not substitute its determination for that of the jury.

(Citation omitted.)

{11} While Victim's testimony may have been to some degree impeached, it was nonetheless in the province of the jury as factfinder to decide whether to believe the Victim. Here the jury obviously determined Victim's testimony to be sufficiently credible for conviction. We will not disturb that determination. We thus conclude that there was sufficient evidence of attempted CSP and attempted incest. We hold that the district court did not err in denying the motion for directed verdict as to counts four and five charging attempted CSP and attempted incest.

II. THE DISTRICT COURT DID NOT ERR IN INSTRUCTING THE JURY THAT IT COULD CONVICT DEFENDANT OF CSCM FOR TOUCHING "EITHER/OR" TWO DISTINCT PARTS OF VICTIM

{12} "The propriety of jury instructions given or denied is a mixed question of law and fact. Mixed questions of law and fact are reviewed de novo." *State v. Salazar*, 1997-NMSC-044, ¶ 49, 123 N.M. 778, 945 P.2d 996.

{13} The district court instructed the jury that in order to convict Defendant of CSCM of a child under the age of thirteen, it must conclude that Defendant touched or applied force "to the vagina and/or breast" of Victim. Defendant argues that the district court erred in submitting this instruction to the jury. Defendant maintains that use of the disjunctive "negated the unanimity required to convict the Defendant," citing *United States v. Powell*, 226 F.3d 1181, 1194–96 (10th Cir.2000), and *United States v. Daily*, 921 F.2d 994, 1001 (10th Cir.1990), *overruled on other grounds as recognized by United States v. Wiles*, 102 F.3d 1043 (10th Cir.1996) (holding that materiality is an element of perjury that must be found by a jury and that there was a structural error in not requiring the jury to find materiality), *judgment vacated by sub nom., United States v. Schleibaum*, 522 U.S. 945, 118 S.Ct. 361, 139 L.Ed.2d 282 (1997) (referring to *Johnson v. United States*, 520 U.S. 461, 465–67 (1997), holding that materiality is an element of perjury which must be found by a jury and that a plain error analysis, rather than a structural error analysis, applies to the question of whether the district court erred in not requiring the jury to find materiality when the issue was not preserved). Neither *Powell* nor *Daily* assists Defendant.

{14} Defendant quotes *Daily* as stating "when requesting a statute which specifies various ways in which a particular crime may be committed ... if the State alleges the several acts in the disjunctive, it fails to inform the Defendant of the act he is charged with committing and is insufficient." Defendant cut language out of *Daily* and thereby cut out what was stated in *Daily*. The actual language in *Daily* is a quote from 1 C. Wright, *Federal Practice and Procedure* § 125, at 372–74 (1982). *Daily*, 921 F.2d at 1001. It discusses variances between statutes and indictments, stating:

> Frequently a statute will specify various ways in which a particular crime may be committed. It is enough to allege one of these ways without negativing the others. Or the pleading may allege commission of the offense by all the acts mentioned if it uses the conjunctive "and" where the statute uses the disjunctive "or." But if the indictment or information alleges the several acts in the disjunctive it fails to inform the defendant which of the acts he is charged with having committed, and it is insufficient.

Id. Daily pertains to the language in an indictment, not a jury instruction. We do not accept Defendant's apparent, unexplained view that *Daily* supports his position that a disjunctive in a jury instruction is error.

{15} Similarly, Defendant appears to cite *Powell* as holding or indicating that a "jury instruction deprived Defendant of a unanimous jury verdict." In *Powell*, the jury was instructed that it could convict the defendant of kidnaping under 18 U.S.C. § 1201 (1998) (amended 2003), if it found that the defendant "seized, confined, inveigled, decoyed, kidnapped, abducted *or* carried away" the victim. *Powell*, 226 F.3d at 1189. The district court had also instructed the jury with a general "unanimity instruction," which stated "[y]our verdict must represent the collective judgment of the jury. In order to return a verdict, it is necessary that each juror agree to it. Your verdict, in other words, must be unanimous." *Id.* at 1194 n. 6. The defendant was convicted and argued on appeal that the lower court erred in not specifically instructing the jury that it must agree unanimously on the means of kidnaping. *Id.* at 1194–95. The appellate court reviewed the issue for plain error as it was not preserved below. *Id.* at 1194. The United States Court of Appeals, after noting that other federal circuit courts disagreed, held that there was not plain error and that the jury need not unanimously agree as to the means by which the act of kidnaping was committed. *Id.* at 1195–96. Thus, *Powell* holds the opposite of what Defendant contends, namely, that the jury instruction did not deprive Defendant of a unanimous verdict.

{16} Focusing only on the part of the body at issue in this case, we conclude that the two theories upon which the jury could convict Defendant of CSCM, namely: (1) touching or applying force to Victim's breasts, or (2) touching or applying force to her vagina, were simply alternative means by which Defendant could commit CSCM, rather than distinct elements of CSCM. The statute prohibits unlawful and intentional touching of the intimate parts of a child. NMSA 1978, § 30–9–13(A) (2003). "Intimate parts" are further defined as including the primary genital area and the breasts. *Id.* The jury instruction elaborates on what parts of the anatomy constitute the primary genital area and lists vagina. UJI 14–925 NMRA (use note 4). Thus, these two acts are merely two means of satisfying the same element, which is touching the "intimate parts" of a child. Finally, we note that the use note to the jury instruction directs the court to insert one or more of the body parts listed, without stating that the body parts must be listed in the conjunctive only. UJI 14–925 (use note 4). We conclude that the jury instruction did not erroneously negate the unanimity required to convict Defendant of CSCM. While we do not know whether the jury unanimously agreed on which of the alternative means by which Defendant committed CSCM, we do know that the jury unanimously agreed that Defendant committed CSCM, which is the controlling inquiry. *Cf. Salazar*, 1997–NMSC–044, ¶ 42, 123 N.M. 778, 945 P.2d 996.

{17} We conclude that the jury was not impermissibly instructed that it could convict Defendant of CSCM of a minor under the age of thirteen for touching Victim's breasts and/or vagina.

III. THE DISTRICT COURT DID NOT ERR IN ADMITTING PRIOR CONSISTENT STATEMENTS UNDER RULE 11–801(D)(1)(b) NMRA

{18} Victim testified that she had told her stepaunt and her stepgrandmother that her father had touched her in inappropriate places. She testified that she did not remember the details of the conversations. Later, over objection, the State elicited testimony from Victim's stepaunt that Victim told her that "John" had "made her put her mouth there." When the State asked the question which elicited this testimony, and before the stepaunt responded to the question, defense counsel objected on the grounds of hearsay and a bench conference was held about the testimony. The State responded that the testimony was offered as a prior consistent statement under Rule 11–801(D)(1)(b). The district court allowed the testimony on that ground. Defendant now argues that this statement was not consistent with Victim's trial testimony.

{19} In addition, the State elicited from the Victim's stepgrandmother that the stepaunt told her that Victim had told the stepaunt that Victim "had been played with with a hand and mouth in that area." Defendant did not object on any ground to this testimo-

ny during the trial, but on appeal argues that the statement was not a prior consistent statement. The State does not raise lack of preservation or suggest that the plain error standard should be applied to this issue, but rather proceeds to address this evidentiary issue under an abuse of discretion standard.

{20} We review evidentiary decisions by the district court for an abuse of discretion. *Salazar,* 1997–NMSC–044, ¶ 65, 123 N.M. 778, 945 P.2d 996. Under Rule 11–801(D)(1)(b), a prior consistent statement is not considered hearsay and is admissible to "rebut an express or implied charge of recent fabrication or improper influence or motive." *State v. Sandate,* 119 N.M. 235, 239, 889 P.2d 843, 847 (Ct.App.1994); *see* Rule 11–801(D)(1)(b). The prior consistent statement must have been made before the alleged motive to fabricate occurred. *State v. Casaus,* 1996–NMCA–031, ¶ 18, 121 N.M. 481, 913 P.2d 669. The statement must also be consistent with the statement made in court. *Sandate,* 119 N.M. at 239, 889 P.2d at 847. New Mexico has had only a few opportunities to develop a standard for determining whether a prior statement is consistent with a statement at trial. Our Supreme Court has decided that prior statements which vary slightly from testimony at trial are admissible as non-hearsay under Rule 11–801(D)(1)(b). *See Salazar,* 1997–NMSC–044, ¶ 67, 123 N.M. 778, 945 P.2d 996 (concluding that negligible differences in testimony from a prior statement are inconsequential). *Salazar* stated that "the primary inquiry is whether the [prior statement] and trial testimony were substantially similar as to all material facts presented." *Id.* However, prior statements cannot be used to "fill in the gaps left by the faulty memory of a witness who actually testifies at trial." *Sandate,* 119 N.M. at 240, 889 P.2d at 848.

{21} In this case, the State argued at trial that the stepaunt's statement was admissible to rebut Defendant's claim that Victim fabricated all allegations of molestation or sexual activity due to pressure from either the police or the State Health and Human Services Department. Defendant does not question whether the prior statement preceded the alleged motive to fabricate; he only argues that Victim's statement to her stepaunt was not consistent with Victim's testimony at trial. Defendant points out that Victim told her stepaunt that "John" had done this and did not say it was her father. He also points out that Victim never testified at trial as to any oral sexual contact.

{22} As to Victim's implication of "John" rather that "my dad" or "my father" in her prior statement, John is Defendant's middle name and Defendant goes by the name of John. In our view, given that Defendant's name is John, the statements are consistent with each other as to the perpetrator. The fact that Victim's younger brother is also named John does not negate the consistency when Defendant also went by John. Thus, we see no abuse of discretion based on the claimed discrepancy between the prior statement of Victim to her stepaunt about "John" and Victim's testimony at trial.

{23} The difference in the testimony regarding the oral sexual contact is more troubling. The stepaunt stated that Victim said that "John" had "made her put her mouth down there." The stepgrandmother mentioned oral contact as well as other contact. However, when Victim testified about what she told her stepaunt, Victim stated only that she told her that Defendant was touching her in inappropriate spots. Victim stated nothing at trial that would indicate she performed or attempted oral sexual contact, that oral sex was performed or attempted on her, or that she told her stepaunt anything about oral sexual contact.

{24} The question of whether the prior statements regarding oral sexual contact were "substantially similar" to Victim's trial testimony boils down to the level of specificity required; that is, whether the statements must be consistent as to every detail or consistent with the facts viewed more broadly. Viewed more broadly, the statements all show criminal sexual contact and to that extent they are consistent. Viewed more narrowly, there is a discrepancy.

{25} It may be that, in some cases, a more narrow view of the facts may be appropriate. That is, the distinction between oral and other sexual contact may, under other

circumstances, be significant enough for us to conclude that the district court abused its discretion in determining that a prior statement was a prior consistent statement. However, in this case, we believe that a broader view of the facts elicited in the statements is warranted given that Defendant's charge of fabrication is based on a broad-scale claim that there was never any sexual contact over the substantial periods of time to which Victim testified. Under the circumstances, we think the prior statements elicited from both the stepaunt and the stepgrandmother as having been made when Victim was twelve are similar enough to Victim's trial statement of sexual contact to pass abuse of discretion muster and thus to be admissible under Rule 11–801(D)(1)(b).

IV. DEFENDANT RECEIVED SUFFICIENT NOTICE OF THE CHARGES AGAINST HIM AND WAS NOT PREJUDICED BY THE JURY INSTRUCTIONS

{26} Finally, Defendant contends that the State denied him constitutional due process and the ability to defend against two of the charges because of the large time spans covered in the jury instructions and because the charges were given to the jury "with respect to the same time period and with no distinct difference in the alleged conduct." Count two charged Defendant with CSP based on sexual intercourse occurring between April 12, 2002, and February 24, 2003, approximately a ten-month span. Count six charged Defendant with CSP based on digital penetration occurring sometime between June 2002 and February 2003, approximately an eight-month span. Defendant relies on *State v. Baldonado,* 1998–NMCA–040, 124 N.M. 745, 955 P.2d 214, which sets out a multi-factor test to review the reasonableness of the State's efforts to narrow the time frame for the crimes charged in the indictment.

{27} Under Rule 12–216(A) NMRA, "[t]o preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked[.]" Case law instructs that "[i]n order to preserve an error for appeal, it is essential that the ground or grounds of the objection or motion be made with sufficient specificity to alert the mind of the trial court to the claimed error or errors, and that a ruling thereon then be invoked." *State v. Varela,* 1999–NMSC–045, ¶ 25, 128 N.M. 454, 993 P.2d 1280 (internal quotation marks and citation omitted). "The primary purposes of the preservation requirement are (1) to alert the trial court to a claim of error so that it has an opportunity to correct any mistake, and (2) to give the opposing party a fair opportunity to respond and show why the court should rule against the objector." *State v. Montoya,* 2005–NMCA–005, ¶ 7, 136 N.M. 674, 104 P.3d 540 (internal quotation marks and citation omitted), *cert. granted,* 2005–NMCERT–001, 137 N.M. 17, 106 P.3d 579.

{28} Defendant contends that he preserved this issue during his motion for directed verdict at the close of the State's case and again at the close of the evidence. During the motion for directed verdict, the State requested permission to amend the charges to include ten counts of CSP based on digital penetration from June 2002 through February 2003 based on Victim's testimony that Defendant committed digital CSP on her about once a month during that time period. Defendant responded that under *Baldonado* and the doctrines of fair notice and due process, the State should not be allowed to submit that number of charges based on Victim's testimony that digital penetration happened once a month. Rather, Defendant argued that one count of CSP during the time period would be fair and reasonable. The district court only allowed one count of penile CSP and one count of digital CSP to go to the jury for the time period at issue. Defendant expressed no objection at the time.

{29} Later, at the close of evidence, the district court asked Defendant if he had any objections to the State's proposed jury instructions. Even though Defendant asked for clarification that the jury instructions concerning digital and penile CSP for the time frames charged were based on a continuing course of conduct and span of time, Defendant made no objection to these instructions nor in any other way alerted the

court that he believed the instructions were erroneous. Defendant in fact stated that he was satisfied that the instructions correctly instructed the jury. We conclude that Defendant did not preserve his arguments that under *Baldonado* he did not receive fair notice of the charges against him and that there was a violation of due process because of the broad period of time covered in the instructions as submitted to the jury.

{30} Moreover, *Baldonado* sets out a detailed nine-factor test for determining whether the State could have set forth more specific dates in the indictment and whether the defendant faced any prejudice under the counts as charged. 1998–NMCA–040, ¶ 27, 124 N.M. 745, 955 P.2d 214. As noted in *Baldonado,* application of this test "requires trial courts to engage in a most delicate exercise. It demands judging at its best." *Id.* ¶ 28 (internal quotation marks and citation omitted). In the case at hand, Defendant made no argument as to how the *Baldonado* test weighed against the broad time period at issue. Defendant, for example, presented no argument or facts that he could have asserted a plausible alibi defense or that the State's efforts to narrow the time frame submitted to the jury were not thorough. Nor did Defendant request the district court to perform such an evaluation. We conclude that it would be inappropriate for us to analyze this issue without a properly developed record or a fairly invoked ruling by the district court. As Defendant has failed to preserve this issue, we will not address it on appeal.

CONCLUSION

{31} We affirm Defendant's convictions.

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

WECHSLER and ROBINSON, JJ., concur.

2006-NMCA-014

128 P.3d 508

STATE of New Mexico, Plaintiff–Appellee,

v.

INDIE C., Child–Appellant.

No. 25,309.

Court of Appeals of New Mexico.

Dec. 21, 2005.

Certiorari Denied, No. 29,621, Jan. 27, 2006.

Patricia A. Madrid, Attorney General, Santa Fe, M. Victoria Wilson, Assistant Attorney General, Albuquerque, for Appellee.

John Bigelow, Chief Public Defender, Kathleen T. Baldridge, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

PICKARD, J.

{1} This case requires us to decide whether the Delinquency Act, NMSA 1978, §§ 32A-2-1 to -33 (1993, as amended through 2005) (the Act) authorizes an initial commitment to the age of twenty-one of a child who has been adjudicated delinquent for first degree murder committed when the child was under fourteen years of age. Because the Act unambiguously gives the trial court the authority to order such a commitment, we affirm.

PROCEEDINGS BELOW AND STANDARD OF REVIEW

{2} Indie C. (Child) was adjudicated delinquent for first degree murder in connection with the stabbing death of Fabian Munoz, which occurred on July 4, 2004. At the time of the offense, Child was thirteen years old. Child argued that she should only receive a two-year commitment, subject to extensions as permitted by the Act. Instead, the trial court committed her to the custody of the Children, Youth and Families Department (CYFD) until she reaches the age of twenty-one. Child then submitted a motion arguing that the commitment was not authorized by the Act. The trial court denied the motion. Child advances the same argument on appeal. Child's argument presents a question of statutory interpretation, which we review de novo. *State v. Smith*, 2004-NMSC-032, ¶ 8, 136 N.M. 372, 98 P.3d 1022.

DISCUSSION

{3} In order to better explain Child's arguments, we begin with a brief overview of the dispositional scheme of the Act. While the Act has been amended since Child committed her offense, the amendments do not affect the issues in this case. Therefore, we cite to the 2005 versions of the relevant statutes. We quote them in their entirety in the appendix to this opinion.

{4} The Act provides for three categories of offenders: serious youthful offenders, youthful offenders, and delinquent offenders. *See* § 32A-2-3(C), (H), (I). The category into which a child is placed is based on the child's age and the offense committed. The category in turn determines the dispositions available to the trial court upon an adjudication of delinquency. Section 32A-2-3(H) defines a "serious youthful offender" as a fifteen to eighteen year old who is "charged with and indicted or bound over for trial for first degree murder." A serious youthful offender is treated as an adult and, if convicted as charged, sentenced pursuant to the adult statutes. NMSA 1978, § 31-18-15.3(D) (1993). Section 32A-2-3(I) defines a "youthful offender" as (1) a fourteen to eighteen year old who commits one of a list of enumerated offenses, (2) a fourteen to eighteen year old who commits a felony offense and has had three prior felony adjudications within the preceding three years, or (3) a fourteen year old who commits first degree murder. A youthful offender who is not amenable to rehabilitation may be sentenced as an adult. Section 32A-2-20(A), (B). Section 32A-2-3(C) defines a "delinquent offender" as any child who has committed a delinquent act but does not fit into either the serious youthful offender category or the youthful offender category.

{5} Section 32A-2-19(B)(1) provides the possible dispositions of a delinquent offender, giving the trial court authority to order any of the three following commitments:

> (a) a short-term commitment of one year . . . ;
>
> (b) a long-term commitment for no more than two years . . . ; [or]
>
> (c) if the child is a delinquent offender who committed one of the criminal offenses set forth in [Section 32A-2-3(I)], a commitment to age twenty-one[.]

{6} All commitments under the Act represent the maximum time that a child may spend in custody. A child must be released before the end of the commitment period "when it appears that the purpose of the order [of commitment] has been achieved

before the expiration of the period of the judgment." Section 32A–2–23(C). When a child is given a long-term commitment of two years, a court may, before the expiration of the commitment, extend the judgment for additional periods of one year upon a finding that extension is "necessary to safeguard the welfare of the child or the public safety." Section 32A–2–23(E). Such additional commitments may not extend past the date on which the child reaches twenty-one. *Id.*

{7} In this case, there is no dispute regarding Child's category—Child is a delinquent offender because she does not fit the requirements of either the serious youthful offender category or the youthful offender category. Because Child is a delinquent offender, Section 32A–2–19(B) provides the types of commitment that the trial court was authorized to impose. Child argues that an initial commitment to the age of twenty-one was not authorized under that section. We disagree.

{8} As indicated above, Section 32A–2–19(B)(1)(c) states that the court may order the commitment of a delinquent offender until age twenty-one if the offender has committed any of the offenses listed in Section 32A–2–3(I). One of the offenses listed in Section 32A–2–3(I) is first degree murder. Thus, because Child was adjudicated to have committed first degree murder, the trial court was authorized to order her committed until she reaches age twenty-one.

{9} Child provides several arguments against reading the statute in the way we have just set forth. For the following reasons, we reject Child's arguments.

{10} First, Child relies on *State v. Adam M.*, 2000–NMCA–049, 129 N.M. 146, 2 P.3d 883. While we do not agree with Child's interpretation of that case, we acknowledge that the case does contain language that, if taken out of context, would support Child's position. For example, in *Adam M.*, we said that "the Code does not enable the children's court to order any greater period than two years for an initial commitment at a dispositional hearing for a delinquent child." *Id.* ¶ 10. However, the issue before the Court in *Adam M.* was whether the Act provided "any authority for the children's court to order consecutive commitments for the same underlying behavior which is the subject of two separate petitions combined for disposition." *Id.* ¶ 6.

{11} Because we were not asked in *Adam M.* to consider whether the Act would authorize a commitment to age twenty-one for someone in Child's position, that case does not support Child's position here. *See Fernandez v. Farmers Ins. Co.*, 115 N.M. 622, 627, 857 P.2d 22, 27 (1993) (noting that cases are not authority for propositions not considered). We also note that *Adam M.* read as a whole does not support Child's position because, in examining the predecessor of Section 32A–2–19(B)(1), we stated that it allowed for the following types of commitment: "(1) a short-term commitment of one year; (2) a long-term commitment of no more than two years; or (3) *a commitment to age 21,* unless sooner discharged, for a delinquent offender who committed a serious offense specified in the Code or a youthful offender as designated in the Code." *Adam M.*, 2000–NMCA–049, ¶ 6, 129 N.M. 146, 2 P.3d 883 (emphasis added). For the foregoing reasons, we reject Child's argument that *Adam M.* precludes her commitment to age twenty-one.

{12} Child next argues that under Section 32A–2–3(I)(3), the relevant offense is not committing first degree murder, but is instead "being fourteen years old *and* committing first-degree murder." Thus, Child argues, she does not fall within that section because she was thirteen when the offense was committed. In support of this argument, Child notes that the section uses the word "and," i.e., it states that a youthful offender is a child who is "fourteen years of age *and* adjudicated for first degree murder." We do not find this argument persuasive.

{13} Section 32A–2–3 is the definitional statute for the entire Delinquency Act. The purpose of Section 32A–2–3(I) is to define the term "youthful offender." As explained, the category into which a child is placed is dependent upon both the child's age and the offense committed. Thus, the statute that defines a youthful offender necessarily refer-

ences both age and offense. However, Section 32A–2–19(B)(1)(c), under which Child was committed, only states that a delinquent offender who has committed one of the offenses listed in 32A–2–3(I) may be committed up to age twenty-one. It does not say that commitment to age twenty-one is authorized only for children who fit the definition of youthful offenders as set forth in Section 32A–2–3(I), i.e., children who are the requisite age *and* commit an enumerated offense.

{14} We also note that Child's reading of the statute would produce an absurd result in the following way. Section 32A–2–19(B)(1)(c) refers only to dispositions available for "delinquent offenders." By definition, a "delinquent offender" is a child who does not meet the requirements of either the serious youthful offender category or the youthful offender category. Section 32A–2–3(C). If a child was both fourteen and committed first degree murder (as Child argues should be necessary for Section 32A–2–19(B)(1)(c) to apply), then the child could not be a "delinquent offender" because he or she would by definition be a youthful offender. Thus, under Child's reading, Section 32A–2–19(B)(1)(c) would be rendered superfluous because no child could ever (1) be a delinquent offender and (2) meet the age and offense requirements of Section 32A–2–3(I). We refrain from reading statutes in a way that renders provisions superfluous. *State v. Rivera*, 2004–NMSC–001, ¶ 18, 134 N.M. 768, 82 P.3d 939.

{15} Child further notes that first degree murder is set apart in its own subsection (subsection 3), instead of being included with the other offenses enumerated in Section 32A–2–3(I)(1). She argues that this fact somehow supports her contention that the relevant offense for purposes of Section 32A–2–19(B)(1)(c) is first degree murder committed by a fourteen year old. We do not follow Child's logic. We note a much more plausible reason why first degree murder is listed in its own subsection instead of being lumped together with the offenses enumerated in Section 32A–2–3(I)(1). In defining the term "youthful offender," Section 32A–2–3(I)(1) references a number of offenses and states that a child who is fourteen to eighteen is a youthful offender when he or she commits one of those offenses. However, when a child who is fifteen to eighteen commits first degree murder, that child is a serious youthful offender and not a youthful offender. Section 32A–2–3(H). Thus, the Legislature would not have included first degree murder in the list of offenses enumerated in Section 32A–2–3(I)(1) because to do so would have put the statute in conflict with the serious youthful offender statute. In order to avoid that result, the Legislature enacted a separate subsection of the statute defining a youthful offender, Section 32A–2–3(I)(3), that refers to first degree murder, but only when committed by a fourteen year old. Thus, we reject Child's argument.

{16} Next, Child argues that even if she can be committed until she reaches the age of twenty-one, such commitment can only be accomplished using the procedures set forth in Section 32A–2–23(E). That section provides in pertinent part as follows:

> Prior to the expiration of a *long-term commitment*, as provided for in Section 32A–2–19 . . ., the court may extend the judgment for additional periods of one year until the child reaches the age of twenty-one if the court finds that the extension is necessary to safeguard the welfare of the child or the public safety.

Section 32A–2–23(E) (emphasis added). Section 32A–2–19(B)(1)(b) defines a long-term commitment as a "commitment for no more than two years." Child argues that Section 32A–2–23(E) mandates that she only receive an initial commitment of two years, which would then be subject to one-year extensions until she reaches the age of twenty-one.

{17} Child's argument fails. By its plain language, Section 32A–2–23(E) only applies to "long-term commitments" of two years. Child was not given a "long-term commitment." Rather, the trial court ordered that she be committed until she reaches the age of twenty-one, as the Act authorizes under the circumstances of this case. Thus, Section 32A–2–23(E) is inapplicable.

{18} Finally, Child argues that we should adopt her reading of the Act because it is more consistent with one of the primary goals of the Act—rehabilitation. Child as-

serts that a long commitment, like the seven-year one imposed here, would constitute punishment rather than rehabilitation. Child also urges us to apply the rule of lenity and construe the statutes, which she characterizes as ambiguous, in her favor.

{19} We agree with Child that rehabilitation is one of the primary goals of the Act. *See* § 32A-2-2. We also agree that statutes should be interpreted so as to further legislative goals. *See State v. Adam M.*, 1998-NMCA-014, ¶ 15, 124 N.M. 505, 953 P.2d 40. Moreover, we acknowledge that when a criminal statute is ambiguous, the rule of lenity counsels that such ambiguities should be resolved in the defendant's favor. *See State v. Ogden*, 118 N.M. 234, 242, 880 P.2d 845, 853 (1994). However, we would only need to interpret the Act so as to further legislative intent or apply the rule of lenity if the Act was ambiguous. *See id.* (noting that the rule of lenity applies where "insurmountable ambiguity persists regarding the intended scope of a criminal statute"). As explained above, the Act is not ambiguous on this point. Where a statute is "clear and unambiguous, we give the statute its plain and ordinary meaning and refrain from further interpretation." *State v. Vaughn*, 2005-NMCA-076, ¶ 33, 137 N.M. 674, 114 P.3d 354. Because the Act clearly and unambiguously authorizes the commitment imposed in this case, we affirm the trial court.

CONCLUSION

{20} Child's commitment to the age of twenty-one is affirmed.

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

BUSTAMANTE, C.J. and ROBINSON, J., concur.

APPENDIX

Section 32A-2-3:

C. "delinquent offender" means a delinquent child who is subject to juvenile sanctions only and who is not a youthful offender or a serious youthful offender;

. . .

H. "serious youthful offender" means an individual fifteen to eighteen years of age who is charged with and indicted or bound over for trial for first degree murder. A "serious youthful offender" is not a delinquent child as defined pursuant to the provisions of this section; and

I. "youthful offender" means a delinquent child subject to adult or juvenile sanctions who is:

(1) fourteen to eighteen years of age at the time of the offense and who is adjudicated for at least one of the following offenses:

(a) second degree murder, as provided in Section 30-2-1 NMSA 1978;

(b) assault with intent to commit a violent felony, as provided in Section 30-3-3 NMSA 1978;

(c) kidnapping, as provided in Section 30-4-1 NMSA 1978;

(d) aggravated battery, as provided in Subsection C of Section 30-3-5 NMSA 1978;

(e) aggravated battery against a household member, as provided in Subsection C of Section 30-3-16 NMSA 1978;

(f) aggravated battery upon a peace officer, as provided in Subsection C of Section 30-22-25 NMSA 1978;

(g) shooting at a dwelling or occupied building or shooting at or from a motor vehicle, as provided in Section 30-3-8 NMSA 1978;

(h) dangerous use of explosives, as provided in Section 30-7-5 NMSA 1978;

(i) criminal sexual penetration, as provided in Section 30-9-11 NMSA 1978;

(j) robbery, as provided in Section 30-16-2 NMSA 1978;

(k) aggravated burglary, as provided in Section 30-16-4 NMSA 1978;

(*l*) aggravated arson, as provided in Section 30-17-6 NMSA 1978; or

(m) abuse of a child that results in great bodily harm or death to the child, as provided in Section 30-6-1 NMSA 1978;

(2) fourteen to eighteen years of age at the time of the offense and adjudicated for any felony offense and who has

had three prior, separate felony adjudications within a three-year time period immediately preceding the instant offense. The felony adjudications relied upon as prior adjudications shall not have arisen out of the same transaction or occurrence or series of events related in time and location. Successful completion of consent decrees are not considered a prior adjudication for purposes of this paragraph; or

(3) fourteen years of age and adjudicated for first degree murder, as provided in Section 30–2–1 NMSA 1978.

Section 32A–2–19:

B. If a child is found to be delinquent, the court may impose a fine not to exceed the fine that could be imposed if the child were an adult and may enter its judgment making any of the following dispositions for the supervision, care and rehabilitation of the child:

(1) transfer legal custody to the department, an agency responsible for the care and rehabilitation of delinquent children, which shall receive the child at a facility designated by the secretary of the department as a juvenile reception facility. The department shall thereafter determine the appropriate placement, supervision and rehabilitation program for the child. The judge may include recommendations for placement of the child. Commitments are subject to limitations and modifications set forth in Section 32A–2–23 NMSA 1978. The types of commitments include:

(a) a short-term commitment of one year in a facility for the care and rehabilitation of adjudicated delinquent children. No more than nine months shall be served at the facility and no less than ninety days shall be served on parole, unless: 1) a petition to extend the commitment has been filed prior to the commencement of parole; 2) the commitment has been extended pursuant to Section 32A–2–23 NMSA 1978; or 3) parole is revoked pursuant to Section 32A–2–25 NMSA 1978;

(b) a long-term commitment for no more than two years in a facility for the care and rehabilitation of adjudicated delinquent children. No more than twenty-one months shall be served at the facility and no less than ninety days shall be served on parole, unless: 1) parole is revoked pursuant to Section 32A–2–25 NMSA 1978; or 2) the commitment is extended pursuant to Section 32A–2–23 NMSA 1978;

(c) if the child is a delinquent offender who committed one of the criminal offenses set forth in Subsection I of Section 32A–2–3 NMSA 1978, a commitment to age twenty-one, unless sooner discharged; or

(d) if the child is a youthful offender, a commitment to age twenty-one, unless sooner discharged[.]

Section 32A–2–20:

A. The court has the discretion to invoke either an adult sentence or juvenile sanctions on a youthful offender.

2006-NMCA-020

128 P.3d 513

R & R DELI, INC., Plaintiff–Appellant,

v.

SANTA ANA STAR CASINO; Tamaya Enterprises, Inc.; the Pueblo of Santa Ana; Conrad Granito, General Manager of Santa Ana Star Casino; Aaron Armijo, Chairman of Tamaya Enterprises, Inc., and Leonard Armijo, Governor of Pueblo of Santa Ana, Defendants–Appellees.

No. 25,582.

Court of Appeals of New Mexico.

Dec. 21, 2005.

Certiorari Denied, No. 29,625, Feb. 1, 2006.

Chris Lucero, Jr., Albuquerque, for Appellant.

Rothstein, Donatelli, Hughes, Dahlstrom, Schoenburg & Bienvenu, LLP, Richard W. Hughes, Santa Fe, for Appellees.

OPINION

PICKARD, J.

{1} In this case, we determine whether limited waivers of tribal sovereign immunity in a commercial lease and in a pueblo's gaming compact with the State are applicable to a suit based in contract and tort brought by a lessee of property located on tribal lands. Holding the waivers inapplicable, we affirm the trial court's grant of Defendants' motion to dismiss.

STANDARD OF REVIEW AND FACTS

{2} When reviewing a trial court's grant of a motion to dismiss, we accept as true the facts pleaded in the complaint, and we review de novo the trial court's application of the law to those facts. *Envtl. Control, Inc. v. City of Santa Fe,* 2002–NMCA–003, ¶ 6, 131 N.M. 450, 38 P.3d 891. In its complaint, Plaintiff alleged the following facts. Plaintiff entered into a lease with Tamaya Enterprises, Inc. (TEI), a federally chartered corporation wholly owned by the Pueblo of Santa Ana. The lease contemplated that Plaintiff would operate a restaurant located in the Santa Ana Star Casino. When the lease was entered into, the Pueblo also issued Plaintiff a liquor license.

{3} The lease stated that nothing contained in it would be deemed a waiver of TEI's sovereign immunity from suit, but that the TEI Board of Directors would adopt a resolution providing "a limited waiver of sovereign immunity and consent to be sued in the Pueblo of Santa Ana Tribal Court for the limited purpose of determining and enforcing the obligations of the parties under this Lease." The lease also stated that there would be no waiver of sovereign immunity with regard to the Pueblo itself.

{4} The TEI Board of Directors subsequently adopted a resolution pursuant to the lease, which states that "the Board of Directors hereby approves a limited waiver of sovereign immunity and consents to be sued in the Pueblo of Santa Ana Tribal Court." The resolution also states that the waiver is applicable only to "actions seeking one [or] more of the following remedies: injunctive relief, declaratory judgment, or specific performance."

{5} After Plaintiff had been operating the restaurant for approximately one year, the Pueblo declined to renew Plaintiff's liquor license, stating that Plaintiff was in violation of the Santa Ana Liquor Code. Plaintiff had received no prior notice of any violations and was unaware of any investigations into the matter. Because the lease required Plaintiff to maintain a liquor license, Plaintiff believed that the Pueblo had purposefully prevented the renewal of the license so that it could take over the restaurant, which had been very successful. Pueblo officials also told Plaintiff that the decision was made for "political reasons."

{6} Plaintiff brought suit against the Pueblo, TEI, the casino, and several Pueblo officials. Plaintiff alleged breach of lease, intentional interference with contract, discrimination and violation of state constitutional rights, constructive fraud, negligent misrepresentation, prima facie tort, breach of the covenant of good faith, conspiracy, and fraud. Defendants filed a joint motion to dismiss, arguing that nothing in the lease agreement, resolution, or the Pueblo's gaming compact with the State waived tribal sovereign immunity for purposes of the suit. The trial court dismissed the complaint, finding that Plaintiff's claims were barred by sovereign immunity and were within the exclusive jurisdiction of the Santa Ana Tribal Court.

DISCUSSION

{7} On appeal, Plaintiff argues that Defendants waived sovereign immunity from suit in the lease agreement and in the gaming compact with the State. Plaintiff also appears to argue a separate waiver regarding alleged violations of constitutional rights.

Because Plaintiff does not make different arguments with regard to the various Defendants, we do not distinguish between them, and we refer to them collectively as "the Pueblo."

{8} The Pueblo argues that the suit is barred because there is no waiver of immunity in either the lease or the gaming compact and because Plaintiff's claims fall within the exclusive jurisdiction of the Santa Ana Tribal Court. We hold that the trial court lacked jurisdiction under either of the alternative theories argued by Plaintiff because the Pueblo did not waive its sovereign immunity in either the lease or the gaming compact. Thus, we need not address whether tribal court jurisdiction is exclusive.

A. THE LEASE AGREEMENT AND RESOLUTION WAIVER

{9} Plaintiff argues on appeal that "Defendants specifically waived sovereign immunity as reflected in [the lease agreement and resolution] for any claims concerning the lease." We disagree.

{10} It has long been recognized that Indian tribes have the same common-law immunity from suit as other sovereigns. *Sanchez v. Santa Ana Golf Club, Inc.*, 2005-NMCA-003, ¶ 5, 136 N.M. 682, 104 P.3d 548. A tribe is free to waive its sovereign immunity, but such waivers must be express and unequivocal. *See id.* Because a tribe need not waive immunity at all, it is free to "prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted." *Mo. River Servs., Inc. v. Omaha Tribe*, 267 F.3d 848, 852 (8th Cir.2001) (internal quotation marks and citations omitted). Any such conditions or limitations "must be strictly construed and applied." *Id.* (internal quotation marks and citation omitted).

{11} When a tribe is protected by sovereign immunity, a state court lacks jurisdiction to hear a suit. *See Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 7, 132 N.M. 207, 46 P.3d 668 ("Without an unequivocal and express waiver of sovereign immunity or congressional authorization, state courts lack the power to entertain lawsuits against tribal entities."); *see also Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 172, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977) ("Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe.").

{12} As explained above, the Pueblo in this case did decide to waive its sovereign immunity under limited circumstances. The resolution issued pursuant to the lease agreement states as follows:

> [T]he Board of Directors hereby approves a limited waiver of sovereign immunity and consents to be sued in the Pueblo of Santa Ana Tribal Court, should an action be commenced to determine and enforce the obligations of the parties under this Lease, provided that the foregoing waiver of sovereign immunity with respect to TEI's obligations under the Lease is limited to actions seeking one [or] more of the following remedies: injunctive relief, declaratory judgment, or specific performance.

{13} In examining this waiver, we are guided by the above principles of sovereign immunity, as well as by ordinary principles of contract interpretation. When a contractual provision is unambiguous, we only apply it and do not interpret it. *Richardson v. Farmers Ins. Co.*, 112 N.M. 73, 74, 811 P.2d 571, 572 (1991). Here, we need not interpret or construe the waiver of immunity in the resolution because we find it to be unambiguous. By its clear terms, the waiver provides a consent to suit only if the suit (1) is brought in tribal court and (2) seeks "injunctive relief, [a] declaratory judgment, or specific performance."

{14} Moreover, even if we were to interpret or construe the provision, we do not see how it could plausibly be read to encompass, as Plaintiff argues, "any claims concerning the lease." Plaintiff offers no support for its position that we should construe the waiver to encompass a suit for damages (rather than injunctive or declaratory relief) in state (rather than tribal) court. The Pueblo clearly limited the waiver to claims brought in tribal court for injunctive and declaratory relief, and those limitations must be strictly construed. *See Mo. River Servs., Inc.*, 267

F.3d at 852. Thus, we hold that the lease agreement and resolution do not waive the Pueblo's sovereign immunity with regard to this suit.

B. THE GAMING COMPACT WAIVER

{15} Plaintiff next argues that its suit is permissible because the Pueblo waived its sovereign immunity in the gaming compact it entered into with the State of New Mexico. As an initial matter, the parties dispute which version of the gaming compact is applicable. Plaintiff contends that the 1997 version of the gaming compact is applicable because it is a "current statute." Plaintiff notes that the 2001 gaming compact, relied on by the Pueblo, is "*not a part of the state statutes.*" Plaintiff further argues that the 1997 gaming compact is still valid "based on its history of use by the Pueblo of Santa Ana and the State of New Mexico," and that the waivers of sovereign immunity in the 1997 gaming compact "cannot be deluded [sic], since those waivers were the consideration which the gaming tribes gave for the contractual relationship with the state as contained in the compacts."

{16} The Pueblo asserts that the 2001 version of the gaming compact is currently in effect because it superceded the 1997 version. The 2001 gaming compact was signed by Governor Johnson on October 2, 2001, signed by the Governor of the Pueblo of Santa Ana on October 1, 2001, and approved by the New Mexico Legislature. *See* NMSA 1978, § 11–13–1, compiler's note (2004). Section 9(D) of the 2001 gaming compact states:

> Upon the publication of notice of the Secretary [of the Interior's] affirmative approval of this Compact in the Federal Register, the Predecessor Agreements shall be and become null and void, and of no further effect, . . . and the terms and provisions of this Compact shall go into full force and effect, fully supplanting and replacing the Predecessor Agreements.

Section 2(L) defines the term "Predecessor Agreements" to include the 1997 gaming compact. The Secretary of the Interior published an official notice of approval of the 2001 gaming compact in the Federal Register on December 14, 2001. Notice of approved Tribal–State Compacts, 66 Fed.Reg. 64,856 (Dec. 14, 2001).

{17} Under these circumstances, we agree with the Pueblo that the 2001 gaming compact is applicable in this case because it superceded the 1997 gaming compact. We reject Plaintiff's argument that the 1997 gaming compact is still valid just because it is still in the New Mexico Statutes Annotated.

{18} Plaintiff argues that even if the 2001 gaming compact is in effect, it also contains a waiver of the Pueblo's sovereign immunity that is applicable to this case. Section 8(A) of the 2001 gaming compact, entitled "Policy Concerning Protection of Visitors," states as follows:

> The safety and protection of visitors to a Gaming Facility is a priority of the Tribe, and it is the purpose of this Section to assure that any such persons who suffer bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise have an effective remedy for obtaining fair and just compensation. To that end, in this Section, and subject to its terms, the Tribe agrees to carry insurance that covers such injury or loss, agrees to a limited waiver of its immunity from suit, and agrees to proceed either in binding arbitration proceedings or in a court of competent jurisdiction, at the visitor's election, with respect to claims for bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise. For purposes of this Section, any such claim may be brought in state district court, including claims arising on tribal land, unless it is finally determined by a state or federal court that IGRA [the Indian Gaming Regulatory Act] does not permit the shifting of jurisdiction over visitors' personal injury suits to state court.

Section 8(D) states that the Pueblo "waives its defense of sovereign immunity in connection with any claims for compensatory damages for bodily injury or property damage up to the amount of fifty million dollars ($50,000,000) per occurrence asserted as provided in this section."

{19} Under these provisions, the Pueblo's sovereign immunity from suit will be waived in this case only if (1) Plaintiff is a "visitor" as that term is used in the gaming compact and (2) the gaming compact's use of the phrase "bodily injury and property damage" contemplates suits like the present one alleging breach of contract and tortious business activity. We hold that Plaintiff is not a "visitor" under the gaming compact and that the waiver of sovereign immunity in the gaming compact was not intended to encompass claims like those pleaded in this case.

{20} Gaming compacts are contracts between two parties, and we treat them as such. *Gallegos,* 2002–NMSC–012, ¶ 30, 132 N.M. 207, 46 P.3d 668. When interpreting a contract, our primary goal is to "ascertain the intentions of the contracting parties." *Id.* (internal quotation marks and citations omitted). When a contractual provision is unambiguous, we need not engage in construction or interpretation of the provision's language. *Richardson,* 112 N.M. at 74, 811 P.2d at 572 ("Absent ambiguity, provisions of a contract need only be applied, rather than construed or interpreted.").

{21} We find the waiver provision in the gaming compact to be unambiguous. By its plain language, the waiver is geared toward personal injury claims brought by casino patrons. We also note four statements in Section 8 that support this conclusion. First, Section 8 consistently uses the phrase "bodily injury" in conjunction with the phrase "property damage." The juxtaposition of these terms indicates that the drafters of the gaming compact were referring to physical harms to persons or property. (We note the possibility that the drafters also intended the waiver to refer to related claims, such as emotional distress and loss of consortium. Because that possibility is not raised by this case, we expressly decline to address it.) Second, Section 8(A) begins by referencing the importance of "the safety and protection" of visitors. The use of the word "safety" again indicates that the drafters were referring to physical damage to persons or property when they worded the waiver. Third, the final sentence of Section 8(A) states that the claims referenced in that section may be brought in state court "unless it is finally determined . . . that IGRA does not permit the shifting of jurisdiction over *visitors' personal injury suits* to state court." *Id.* (emphasis added). Section 8's reference to the type of claims it encompasses as "personal injury" claims further supports our interpretation of the waiver.

{22} Finally, Section 8(A) refers to "visitors to a Gaming Facility" and then states that the purpose of the section is "to assure that any such persons who suffer bodily injury or property damage" have a remedy. The term "persons" is sometimes used to refer to corporations as well as natural persons. *See, e.g., Metro. Life Ins. Co. v. Ward,* 470 U.S. 869, 881 n. 9, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985) ("It is well established that a corporation is a 'person' within the meaning of the Fourteenth Amendment."). However, corporations clearly do not suffer "bodily injury." Thus, the gaming compact's reference to "persons who suffer bodily injury" further supports our conclusion that the waiver of sovereign immunity was intended to cover only claims for physical injuries to persons and property and not claims like the present ones, which involve contract law and business torts.

{23} With regard to the proper definition of the word "visitor" as used in the gaming compact, Plaintiff argues that "[t]here is no language in [the gaming compact] . . . which limits the definition of 'visitors' to exclude commercial persons or corporations which do business with the casinos." Plaintiff also relies on a New Mexico Uniform Jury Instruction, which defines a visitor as "a person who enters or remains upon the premises with the [express] [or] [implied] permission of the [owner] [occupant] of the premises." UJI 13–1302 NMRA. Plaintiff notes that, in the context of negligence actions, our Supreme Court has eliminated the distinction between licensees and business visitors. *See Ford v. Bd. of County Comm'rs,* 118 N.M. 134, 139, 879 P.2d 766, 771 (1994).

{24} We agree that there is no specific language in the gaming compact explicitly limiting the waiver to personal injury-type claims. We also agree with Plaintiff that it falls within the definition of a "visitor" under

the cited UJI, and we believe that Plaintiff correctly reads the *Ford* case. However, in determining the meaning of contractual provisions, our primary duty is to ascertain the intent of the drafters. *Gallegos,* 2002-NMSC-012, ¶ 30, 132 N.M. 207, 46 P.3d 668. As we have shown in our analysis above, the drafters of the gaming compact intended to provide a limited waiver of sovereign immunity for purposes of providing a remedy to casino patrons who suffer physical injury to their persons or property. Plaintiff has not shown how the definition used in the UJI or the distinction between licensees and business visitors eliminated in *Ford* would inform our inquiry into the intent of the drafters of the gaming compact.

{25} Moreover, we agree with the policy rationale asserted by the Pueblo for limiting the term "visitor" to casino patrons and guests. The Pueblo notes that "while an ordinary customer has no opportunity to negotiate the terms upon which he or she comes onto the gaming facility premises, a contractor or vendor has every such opportunity[.]" In view of this observation, it makes sense that the State and the Pueblo would have been concerned with the safety of ordinary customers, rather than the financial well-being of entities who enter into business transactions with the Pueblo and can be assumed to be capable of protecting their own interests. For the above reasons, we reject Plaintiff's contention that it should be considered a "visitor" to whom the waiver applies.

{26} In support of its argument that the phrase "bodily injury and property damage" encompasses the type of claims brought in this case, Plaintiff argues that its contract with the Pueblo created a "property right" that was "damage[d]" by the Pueblo's actions. Plaintiff cites numerous cases holding that intangibles such as rights under a contract can be "property rights." *See, e.g., Mills v. N.M. Bd. of Psych. Examiners,* 1997-NMSC-028, ¶¶ 13-15, 123 N.M. 421, 941 P.2d 502 (holding that professional license constitutes a "constitutionally protected property interest" for purposes of both procedural and substantive due process analysis); *Bd. of Educ. v. Harrell,* 118 N.M. 470, 477, 882 P.2d 511, 518 (1994) ("[I]nterests in government benefits will be recognized as constitutional 'property' if the person can be deemed 'entitled' to them." (citation omitted)); *Scott v. Bd. of Comm'rs,* 109 N.M. 310, 312, 785 P.2d 221, 223 (1989) (noting that written contract with political subdivision creates a "cognizable property interest" but does not necessarily form the basis for a claim under 42 U.S.C. § 1983); *Moongate Water Co., Inc. v. State,* 120 N.M. 399, 404, 902 P.2d 554, 559 (Ct.App.1995) (noting that for purposes of Fourteenth Amendment, property interests are generally created by state law).

{27} All of the cases cited by Plaintiff involve due process claims asserted against state actors. The Pueblo is not a state actor that is bound by the federal constitution or the New Mexico Constitution to afford due process to those with whom it conducts business. *See Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (noting that tribes are generally not bound by any constitutional provisions that are "limitations on federal or state authority"); *Twin Cities Chippewa Tribal Council v. Minn. Chippewa Tribe,* 370 F.2d 529, 533 (8th Cir.1967) (holding that the Due Process Clause has "no application to actions of Indian tribes, acting as such" (cited with approval in *Santa Clara Pueblo,* 436 U.S. at 56 n. 7, 98 S.Ct. 1670)).

{28} However, in citing the above-mentioned due process cases, Plaintiff does not appear to argue that the Pueblo is a state actor who has violated its due process rights. Rather, Plaintiff seems to analogize the concept of a "property right" for purposes of due process analysis to the contractual rights at stake in this case. We are not persuaded by this analogy. As explained above, our duty is to ascertain the intent of the gaming compact drafters, and we are confident that their intent was to provide a remedy for casino patrons who suffer physical damage to their persons or property. Plaintiff has not shown how the definition of "property" in the due process context is relevant to our inquiry regarding the intent of the gaming compact drafters. Thus, we reiterate our holding that Plaintiff's claims do not fall under the waiver

contained in Section 8 of the gaming compact.

C. LACK OF ANY WAIVER FOR CLAIMS ALLEGING VIOLATIONS OF CONSTITUTIONAL RIGHTS

{29} Finally, Plaintiff argues that in forcing it out of its business, the Pueblo has committed illegal discrimination on the basis of race and national origin. Plaintiff appears to claim that because "the Compact specifically requires the Defendants to not discriminate based on race and national origin," the Pueblo has waived its sovereign immunity with regard to discrimination claims. Plaintiff is correct that the gaming compact requires the Pueblo to adopt laws "prohibiting the Tribe, the Gaming Enterprise and a Management Contractor from discriminating in the employment of persons to work for the gaming Enterprise or in the Gaming Facility on the grounds of race, color, national origin, gender, sexual orientation, age or handicap[.]"

{30} As the Pueblo points out, however, Plaintiff has not demonstrated how it is a "person" who "work[s] for" the Gaming Enterprise. According to Plaintiff's allegations, Plaintiff is a corporation that entered into a lease and contractual agreement with the Pueblo. However, even if the quoted provision were applicable to an entity in Plaintiff's position. Plaintiff has not indicated the basis on which it believes the provision waives the Pueblo's sovereign immunity with respect to claims for discrimination. Because waivers of sovereign immunity must be express and unequivocal, *see Sanchez*, 2005–NMCA–003, ¶ 5, 136 N.M. 682, 104 P.3d 548, and because the above-quoted provision makes no mention whatsoever of a waiver, we decline to hold that the provision constitutes a valid waiver of the Pueblo's sovereign immunity from suit.

CONCLUSION

{31} Because neither the lease agreement nor the gaming compact waived the Pueblo's sovereign immunity with regard to this suit, we hold that the trial court lacked jurisdiction, and we affirm the grant of the motion to dismiss.

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

BUSTAMANTE, C.J. and ALARID, J., concur.

2006-NMCA-019

128 P.3d 1070

STATE of New Mexico, Plaintiff–Appellee,

v.

Elisa BRAVO, Defendant–Appellant.

No. 23992.

Court of Appeals of New Mexico.

Dec. 8, 2005.

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

John Bigelow, Chief Public Defender, Nancy M. Hewitt, Assistant Appellate Defender, Santa Fe, for Appellant.

OPINION

WECHSLER, J.

{1} Defendant Elisa Bravo appeals her conviction for child abuse resulting in the death of her four-year-old son, Rodrigo, in violation of NMSA 1978, § 30–6–1 (1997) (amended 2005). On appeal, Defendant argues that, because she was in custody but had not been given *Miranda* warnings, the district court erred in admitting into evidence two incriminating statements she made to police. She argues that a third statement she made to police was also admitted in error because she had invoked her right to an attorney but had not been provided one. Finally, Defendant appeals the district court's classification of her crime as a "serious violent offense" under the Earned Meritorious Deduction Act (EMDA), NMSA 1978, § 33–2–34(L)(4)(n) (1999) (amended 2004), arguing that the classification violated *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Because Defendant was not in custody during the first two interviews and did not clearly invoke her right to counsel at the time of the third interview, and because the district court's classification did not violate *Blakely* or *Apprendi,* we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

{2} On July 12, 2001, police and emergency medical personnel responded to Defendant's home because Defendant called 911 to report that her four-year-old son, Rodrigo, had been injured and was unconscious. Officer Steven Barnett of the Las Cruces Police Department was the first to arrive at Defendant's home. Upon his arrival, Defendant allowed Officer Barnett into her residence and into one of the back bedrooms of her home. Officer Barnett saw a small boy on the bed. The boy, Defendant's son, Rodrigo, was dressed only in his underwear and socks and seemed to be having trouble breathing. His eyes were partially open and "starting to roll up into the top of his [head]." Officer Barnett also noticed that Rodrigo had a bruise on his chin. Shortly thereafter, emergency personnel arrived, followed by Defendant's husband, Vidal Bravo. Officer Barnett asked Defendant, who was in the bedroom along with her three young daughters, to vacate the bedroom so that the emergency personnel could work on Rodrigo. Officer Barnett was assisted by one of the fire department personnel in communicating

with Defendant because Defendant spoke primarily Spanish.

{3} Officer Barnett requested that the Dona Ana Sheriff's Department respond to the scene when he realized that Defendant's home was outside Las Cruces Police Department jurisdiction. Deputy Allen Franzoy and Investigator Craig Buckingham, along with at least one other Dona Ana sheriff, arrived soon after. Officer Trivizo of the Las Cruces Police Department also arrived to assist in Spanish/English translation. Mr. Bravo left with the emergency personnel and accompanied Rodrigo to the hospital.

{4} Defendant, accompanied by her three daughters and other family members who had arrived at the house, remained at her home at the request of police. Defendant was then interviewed by Investigator Buckingham with Officer Trivizo serving as an interpreter. Investigator Buckingham questioned Defendant in the dining room of her home regarding the cause of Rodrigo's injuries. He and the remaining officers left after the interview without arresting Defendant. Police officers interviewed Defendant on July 16 and again on July 17, 2001, after her arrest. She was charged with intentional child abuse resulting in death and tampering with evidence. Defendant filed three motions to suppress incriminating statements she made on July 12, 16, and 17. The district court denied her motions. We discuss the remaining facts as they pertain to the particular issues on appeal.

STANDARD OF REVIEW

{5} In reviewing a district court's ruling on a motion to suppress, "we observe the distinction between factual determinations which are subject to a substantial evidence standard of review and application of law to the facts[,] which is subject to de novo review." *State v. Nieto,* 2000–NMSC–031, ¶ 19, 129 N.M. 688, 12 P.3d 442 (alteration in original) (internal quotation marks and citation omitted); *see State v. Munoz,* 1998–NMSC–048, ¶ 39, 126 N.M. 535, 972 P.2d 847. "[W]e determine whether the law was correctly applied to the facts, viewing the facts in the light most favorable to the prevailing party." *State v. Joe,* 2003–NMCA–071, ¶ 6, 133 N.M. 741, 69 P.3d 251. We "defer to the district court with respect to findings of historical fact so long as they are supported by substantial evidence." *State v. Jason L.,* 2000–NMSC–018, ¶ 10, 129 N.M. 119, 2 P.3d 856. We will indulge in all reasonable inferences in support of the district court's ruling and disregard all evidence and inferences to the contrary. *Id.* In addition, we review de novo the issue of whether the district court correctly applied the EMDA during sentencing. *State v. Young,* 2004–NMSC–015, ¶ 11, 135 N.M. 458, 90 P.3d 477 (stating that the interpretation of a statute is an issue of law subject to de novo review).

JULY 12 AND JULY 16 STATEMENTS

{6} Defendant argues that the district court erred in denying her motions to suppress evidence obtained during police questioning on July 12 and July 16, 2001. Defendant argues that she was "in custody" on both occasions, which required the questioning officers to advise Defendant of her rights pursuant to *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), prior to questioning her. We find our Supreme Court's opinion in *Munoz* instructive in deciding these issues.

{7} In *Munoz,* two FBI agents went to the defendant's home in order to question him regarding his involvement in the stabbing death of the victim. *Munoz,* 1998–NMSC–048, ¶¶ 2–3. The defendant's grandfather answered the door and retrieved the defendant, who appeared to have recently been sleeping. *Id.* ¶ 3. The FBI agents introduced themselves and informed the defendant that they wanted to talk to him about the victim's death, but not at the defendant's home. *Id.* The defendant stated that he was afraid of the agents, yet accompanied them because his grandfather told him to do so. *Id.* ¶ 4. Once outside the defendant's home, the agents informed the defendant that he was not obligated to speak with them, that he was not under arrest, and that he could leave at any time. *Id.* ¶ 5. The agents did not inform the defendant that he could, or should, have an attorney present. *Id.* The defendant told the agents that he did not mind speaking with them and consented to being interviewed. *Id.* One of the agents

reiterated that the defendant was not obligated to accompany them and that he was not in custody. *Id.*

{8} The agents drove the defendant to a parking lot near the defendant's home. *Id.* ¶ 6. One agent drove the vehicle, while the other was seated in the back seat with the defendant. *Id.* ¶ 7. For a third time, prior to interviewing the defendant, one of the agents informed him that the interview would only be conducted "on a voluntary basis." *Id.* ¶ 6. During the course of the interview, the defendant ultimately confessed to stabbing and killing the victim, and then concealing the body. *Id.* ¶ 11. The defendant signed a handwritten confession, after making corrections, and initialed each page. *Id.* ¶ 13. After obtaining the confession, the agents allowed the defendant to return to his home. *Id.* ¶ 15.

{9} Our Supreme Court held that even though the defendant was interrogated by the FBI agents, the defendant's *Miranda* rights were not violated because the interrogation was not custodial. *Id.* ¶¶ 40, 44. In making this determination, the Court made it clear that one's subjective belief is irrelevant. *Id.* ¶ 40. It stated that "[a] suspect is . . . considered in custody if a reasonable person would believe that he or she were not free to leave the scene." *Id.* It stated that factors in determining whether a reasonable person would believe he or she is free to leave include "the purpose, place, and length of interrogation" in addition to "the extent to which the defendant is confronted with evidence of guilt, the physical surroundings of the interrogation, the duration of the detention, and the degree of pressure applied to the defendant." *Id.*

{10} Applying these factors, the Court in *Munoz* stated that the record did not support a finding that a reasonable person in the defendant's position would have felt that his or her freedom was restrained in a way that could be associated with a formal arrest. *Id.* ¶ 43. Some of the facts relied upon by the Court were that the defendant was informed that he was not under arrest and that he could leave at any time, that he was never handcuffed or searched, that there was no evidence that the car doors were locked, and that he was free to go home at the conclusion of the interview. *Id.*

{11} With regard to the interview conducted by police of Defendant on July 12, 2001, the State's position that Defendant was not in custody, and therefore not entitled to *Miranda* warnings, is even stronger than in *Munoz.* As we have already stated, we must view the facts in the light most favorable to the prevailing party, in this case, the State. *Joe,* 2003–NMCA–071, ¶ 6. The district court found that Defendant was questioned in the familiar surroundings of the dining room of her own home, by police officers who responded to her 911 call. The questioning took place with Defendant's children and family members still in the home. Defendant expressed a willingness to speak with Investigator Buckingham. Defendant mentioned a desire to go see her son, who had just been taken in an ambulance to the hospital, but agreed to remain for a short time to speak with Investigator Buckingham. Her movements were not restricted in any way by the officers. On the contrary, after the interview, Defendant accompanied the officers throughout the house while explaining her side of the events surrounding Rodrigo's injuries. After interviewing Defendant, the officers left her residence. As in *Munoz,* the fact that Investigator Buckingham and Officer Trivizo questioned Defendant in the dining room while sitting between her and the doorway is not, by itself, enough to make Defendant's interview custodial. *See Munoz,* 1998–NMSC–048, ¶¶ 42–43 (stating that the fact that the defendant was questioned while he was sitting in the back seat of an FBI vehicle was insufficient in itself to lead to a conclusion that the defendant was in custody). Substantial evidence supports the district court's finding that Defendant was not in custody when she was interviewed on July 12, 2001.

{12} For similar reasons, Defendant also was not in custody when she was interviewed a second time by police, at the Dona Ana police station on July 16, 2001. On July 16, Sergeant Ed Miranda and Investigator John Ordunez, along with three other officers, went to Defendant's home and asked whether Defendant and her husband would

be willing to give another statement. The police officers wanted to speak with Defendant and her husband because they had received information from medical personnel that was inconsistent with the statements Defendant made on July 12. Defendant and her husband agreed to be interviewed and followed the officers to the police station in their own personal vehicle. They stated that they did so because they did not know where the police station was located.

{13} The interview lasted approximately two hours. The district court found that Defendant never told the officers she was tired. She was never placed in handcuffs or told she was under arrest. During the course of the interview, Defendant essentially confessed to the crime charged. Like the defendant in *Munoz,* despite her confession, Defendant was allowed to go home with her husband at the conclusion of the interview. *See id.* ¶ 43; *see also Nieto,* 2000–NMSC–031, ¶ 21 (holding that the fact that the defendant's interrogation took place in a police station, without more, is insufficient for a finding that the defendant was in custody). Given this record, substantial evidence supports the district court's finding that Defendant was not in custody, and therefore was not entitled to *Miranda* warnings, on July 16, 2001.

JULY 17 CONFESSION

{14} Defendant argues that she did not waive her right to counsel prior to giving a confession on July 17. She contends that she invoked her right to counsel and that Investigator John Ordunez did not afford her her right.

{15} Defendant had been formally arrested and taken to the police station. The district court found that Investigator Ordunez "carefully read the *Miranda* warnings to Defendant in Spanish." After reciting the warning, he asked Defendant if she still wanted to talk to him and she replied "Yes." As a further precaution, Investigator Ordunez asked Defendant to read the advice of rights card to him in Spanish. When Defendant reached the sentence that indicated that she did not want a lawyer, Defendant stated, "I can ask for an attorney here?" Investigator Ordunez explained that she could have a lawyer if she wanted one. But because she had just waived her right to a lawyer, he explained that she did not need one to talk with him at that time and that a lawyer could be appointed later. Defendant responded "Okay" and continued reading in Spanish from the card: "I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me, and no pressure of any kind had been used against me." Investigator Ordunez then asked Defendant if what she had just read was "true and correct" to which she responded in the affirmative. Defendant then signed and dated the waiver.

{16} The invocation of the right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *Davis v. United States,* 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994) (internal quotation marks and citation omitted). An ambiguous statement is insufficient. *Id.; see State v. Castillo–Sanchez,* 1999–NMCA–085, ¶¶ 15–17, 127 N.M. 540, 984 P.2d 787. In *State v. Barrera,* 2001–NMSC–014, 130 N.M. 227, 22 P.3d 1177, our Supreme Court stated:

> Resolution of whether a valid waiver of counsel has occurred depends upon the totality of the circumstances and the particular facts surrounding each case, including consideration of the mental and physical condition, background, experience and conduct of the accused.

Id. ¶ 28 (internal quotation marks and citation omitted). In that case, based on the totality of the circumstances, the Court reasoned that the defendant knowingly and validly waived his right to counsel despite asking the police "[d]o I need an attorney?" *Id.* ¶ 31. The Court reached its decision by relying in part on *Davis,* 512 U.S. at 462, 114 S.Ct. 2350, in which the United States Supreme Court held that a defendant who had stated "[m]aybe I should talk to a lawyer" had not made a clear, unequivocal request for an attorney requiring officers to cease questioning him. The United States Supreme Court stated in *Davis* that although the fact that the defendant only spoke Spanish could increase the potential for ambiguity, "the

primary protection . . . is the *Miranda* warnings themselves." *Davis,* 512 U.S. at 460, 114 S.Ct. 2350.

{17} The same is true in this case. The waiver was provided to Defendant in her primary language, Spanish. Defendant read the *Miranda* waiver out loud and stated that she understood it. Under the totality of the circumstances, Defendant's query: "I can ask for an attorney here?" is at best ambiguous. She did not ask for a lawyer, and her question appears to inquire whether she could ask for a lawyer if she wanted one. With this ambiguity, Investigator Ordunez could not reasonably understand that Defendant was invoking her right to counsel. *See Davis,* 512 U.S. at 459–60, 114 S.Ct. 2350. He was not required to either clarify Defendant's request or cease questioning until counsel was provided. *See Barrera,* 2001–NMSC–014, ¶ 31.

{18} Defendant also argues, relying primarily on the recent United States Supreme Court's decision in *Missouri v. Seibert,* 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004), that the district court erred in not suppressing the confession she gave police on July 17, 2001. But this case is not like *Seibert.* In *Seibert,* the Court dealt with the police tactic of "question first, then give the warnings, and then repeat the question 'until I get the answer that she's already provided once.'" *Id.* at 606, 124 S.Ct. 2601. The Court stated that confessions obtained by use of this "question-first" technique violated the defendant's constitutional rights because the technique rendered *Miranda* warnings "ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." *Id.* at 611, 124 S.Ct. 2601.

{19} In this case, viewing the facts in the light most favorable to the State, the record does not indicate that police employed the tactic proscribed by the Supreme Court in *Seibert.* Defendant gave a tape-recorded statement on July 17. Defendant testified that she was questioned by police prior to the activation of the tape recorder for approximately ten minutes. However, Investigator Buckingham stated that there was no portion of Defendant's July 17 interrogation that went unrecorded. In addition, with regard to Defendant's statements concerning the events of July 16, the district court indicated that "her testimony . . . [was] not credible." Viewing the facts in the light most favorable to the State, we must infer that the district court found Defendant's assertion that the police interrogated prior to turning on the recorder not credible. *See State v. Urioste,* 2002–NMSC–023, ¶ 6, 132 N.M. 592, 52 P.3d 964 (stating that an appellate court should "not sit as a trier of fact; the district court is in the best position to resolve questions of fact and to evaluate the credibility of witnesses"). Moreover, there was no need for the police to resort to the tactics described in *Seibert* because, as previously stated, Defendant had already confessed to the crime on July 16. With this foundation in the record, we have no basis to conclude that Defendant's July 17 confession was improper under *Seibert.*

EMDA CLASSIFICATION

{20} Finally, Defendant argues, relying on *Blakely* and *Apprendi,* that the district court erred in classifying Defendant's crime as a "serious violent offense" under the EMDA. *See* § 33–2–34(A)(1) (stating that the maximum meritorious deduction for a prisoner confined for having committed a "serious violent offense" is four days per month); § 33–2–34(L)(4)(n) (allowing the sentencing judge the discretion to classify first degree child abuse as a "serious violent offense"). Defendant argues that the issue of whether her crime was a "serious violent offense" should have been submitted to a jury and proven beyond a reasonable doubt. Defendant acknowledges that we have already addressed this precise issue in *State v. Montoya,* 2005–NMCA–078, 137 N.M. 713, 114 P.3d 393. However, Defendant argues, relying on *State v. Franklin,* 78 N.M. 127, 428 P.2d 982 (1967), and *State v. Boyer,* 103 N.M. 655, 712 P.2d 1 (Ct.App.1985), that *Montoya* was wrongly decided. We decline Defendant's invitation to reconsider our holding in *Montoya* and we apply our rationale in *Montoya* to this case.

{21} In *Montoya,* we stated that the United States Supreme Court in *Apprendi* was primarily concerned with "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," not minimum sentences. *Montoya*, 2005–NMCA–078, ¶ 13 (alteration in original) (citation omitted). Therefore, we held 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" because the EMDA does not increase the maximum sentence allowed by statute. *Montoya*, 2005–NMCA–078, ¶ 15.

{22} In this case, Defendant pleaded no contest to the offense of intentional child abuse resulting in death, as charged in the jury indictment. She was sentenced to serve a period of incarceration not to exceed sixteen years. The maximum sentence allowed by statute is eighteen years. *See* § 30–6–1(F) (classifying intentional child abuse which results in the death of the child as a first degree felony); NMSA 1978, § 31–18–15(A)(1) (1999) (amended 2005) (stating that the maximum sentence for a first degree felony is eighteen years). Defendant's sentence was within the statutory maximum. In addition, the grand jury indictment, to which Defendant pleaded no contest, charged Defendant with causing Rodrigo's death by throwing or slamming Rodrigo's head into a wall, in addition to shaking, torturing, cruelly confining, or cruelly punishing him. Based on this record, we cannot conclude that the district court erred in classifying Defendant's acts as a "serious violent offense" under the EMDA.

CONCLUSION

{23} The district court did not err in denying Defendant's motions to suppress evidence. In addition, the district court did not err in classifying Defendant's crime as a "serious violent offense" under the EMDA. Therefore, we affirm Defendant's conviction.

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

BUSTAMANTE, C.J. and PICKARD, J., concur.

2006-NMCA-025

128 P.3d 1076

BROOKS TRUCKING CO., INC., Plaintiff–Appellant,

v.

BULL ROGERS, INC., Defendant–Appellee.

No. 24,684.

Court of Appeals of New Mexico.

Jan. 13, 2006.

Martin Law Firm, W.T. Martin, Jr., Carlsbad, NM, for Appellant.

Maddox & Holloman, PC, Lee A. Kirksey, Hobbs, NM, for Appellee.

OPINION

SUTIN, Judge.

{1} This appeal centers on whether this lawsuit by Brooks Trucking Co., Inc. against Bull Rogers, Inc. is barred by the doctrine of res judicata. We conclude that it is not. This lawsuit involves claims and transactions distinct and separate from the prior lawsuits in question. Important to our analysis of transactions is an issue of first impression in New Mexico. That issue involves the extent, if any, res judicata should apply where the claims asserted in the later lawsuit are based on operative facts that were not in existence at the time the earlier lawsuit was filed. We hold that res judicata does not apply to such claims.

BACKGROUND

BEN BROOKS' LAWSUIT

{2} In 1994, Bull Rogers, an oilfield service company, used Brooks Trucking to remove old fuel tanks in an environmental cleanup project. Bull Rogers' clean-up cost was to be reimbursed by the New Mexico Environment Department. In December 1997, the President of Brooks Trucking, Ben Brooks, in his own behalf, filed an action in breach of contract against Bull Rogers, alleging that he was an employee of Bull Rogers and was entitled to unpaid wages from 1994. At trial in November 1998, Mr. Brooks offered an assignment, created at the time of trial, by which Brooks Trucking attempted to assign all of its claims against Bull Rogers to Mr. Brooks personally. The district court did not allow the assignment and ruled in favor of Bull Rogers. The court held that Bull Rogers did not enter into any contract, either written or oral, to employ Mr. Brooks individually, and that Mr. Brooks had never been on Bull Rogers' payroll. The court further held that Mr. Brooks could not assert claims on behalf of Brooks Trucking. The court dismissed Mr. Brooks' lawsuit with prejudice in February 1999. Mr. Brooks did not appeal. We refer to this lawsuit as Mr. Brooks' lawsuit to distinguish it from the following two lawsuits filed by Brooks Trucking.

BROOKS TRUCKING'S TWO LAWSUITS

{3} In November 1998, after knowing Mr. Brooks' lawsuit would be dismissed, and be-

fore entry of the order of dismissal of Mr. Brooks' lawsuit, Brooks Trucking filed a complaint against Bull Rogers for debt on a contract pursuant to which Brooks Trucking leased equipment and performed labor during 1993 and 1994. We refer to this lawsuit as Brooks Trucking's "first lawsuit." In its complaint, Brooks Trucking contended that Bull Rogers owed money to Brooks Trucking and sought judgment in the amount owed. Brooks Trucking failed to serve the complaint on Bull Rogers for some sixteen months, during which period of time the statute of limitations on Brooks Trucking's claim expired, and in May 2002 the district court granted Bull Rogers' motion to dismiss the action. In its dismissal order, the court characterized the action as one on open account, and the dismissal was based on the running of the applicable four-year statute of limitations and was also based on Brooks Trucking's failure to diligently serve the complaint. Brooks Trucking did not appeal the dismissal of its first lawsuit.

{4} In December 2002, Brooks Trucking filed another lawsuit against Bull Rogers, asserting claims of fraud, conversion, and damages. Bull Rogers filed a motion to dismiss in February 2003, on res judicata grounds, to which Brooks Trucking filed a response and amended complaint in April 2003. Brooks Trucking's amended complaint added claims for unjust enrichment and breach of contract. The thrust of Brooks Trucking's response to the motion to dismiss and the thrust of its amended complaint was that in 1999 or 2000 Bull Rogers received and wrongfully retained money paid to it by the State of New Mexico which it should have paid to Brooks Trucking. Brooks Trucking claimed that it was contractually entitled to payment directly from the State of funds that Bull Rogers retained and did not transfer to Brooks Trucking as assignee. The contractual documents on which Brooks Trucking relied for its claims were (1) an assignment by Bull Rogers to Brooks Trucking, as payee, in May 1994 of payments to be made by the State covering Brooks Trucking's leasing and work and (2) a settlement agreement between the State and Bull Rogers in February 1996 relating to the payment of funds and also relating to Bull Rogers' assigns. After a hearing on Bull Rogers' motion to dismiss, the district court dismissed this lawsuit with prejudice. The dismissal of this second lawsuit is currently before us on appeal. We refer to this current lawsuit as Brooks Trucking's "second lawsuit."

{5} More particularly, Brooks Trucking's amended complaint in its second lawsuit alleged what is set out in the remainder of this paragraph. In 1993 and 1994 Bull Rogers contracted with and incurred an obligation to the State of New Mexico for environmental cleanup. Bull Rogers also contracted with Brooks Trucking to provide services for the cleanup. In May 1994, together with a request for reimbursement from the State for work done by Brooks Trucking, Bull Rogers submitted a printed claim form seeking reimbursement from the New Mexico Corrective Action Fund. On this form, Bull Rogers assigned to Brooks Trucking the reimbursement rights held by Bull Rogers. Bull Rogers and the State were in dispute as to the amount of reimbursement to which Bull Rogers was entitled, and the New Mexico Environment Department sued Bull Rogers for fraud, unfair trade practice, and debt and money due, following which Bull Rogers counterclaimed. In February 1996, those parties settled their dispute by entering into a written settlement agreement. This settlement agreement dealt with the method and terms of reimbursement to Bull Rogers, and did not revoke Bull Rogers' prior assignment to Brooks Trucking. The agreement expressly stated that it was binding upon Bull Rogers and its assigns. In 1999, in conformity with the settlement agreement, Bull Rogers received reimbursement for work done by Brooks Trucking. At the hearing on the motion to dismiss, Brooks Trucking clarified that the payment from the State to Bull Rogers was in "late 1999, or 2000." The settlement agreement was a new contract and constituted a novation or an entirely new agreement as to which Brooks Trucking was a beneficiary in the form of an assignee. Bull Rogers retained the funds it received from the State and did not pay any funds to Brooks Trucking.

{6} In granting Bull Rogers' motion to dismiss Brooks Trucking's second lawsuit, the district court stated that it had reviewed and considered the pleadings filed in Mr. Brooks' lawsuit and in Brooks Trucking's first lawsuit. Stating only that Bull Rogers' motion to dismiss was "well taken," the court dismissed Brooks Trucking's original and amended complaints in its second lawsuit with prejudice. In light of its ruling that the suit was barred, the district court also denied a motion Brooks Trucking had filed to amend the complaint to add a party. Brooks Trucking appealed. On appeal, Brooks Trucking asserts that the district court erred in granting Bull Rogers' motion to dismiss because res judicata was not applicable to its second lawsuit. Brooks Trucking also asserts that it should be given the opportunity to amend the complaint.

{7} We first discuss the doctrine of res judicata and then provide our analysis of why the current lawsuit, Brooks Trucking's second lawsuit, is not barred under res judicata. While this over-ten-year saga sorely needs to end, we do not see res judicata as the stopping point. Brooks Trucking's second lawsuit claims are different than its prior claim on open account and the claims are based on facts distinct enough from those underlying the open account claim in the first lawsuit to conclude that the transactions underlying the two lawsuits are different.

STANDARD OF REVIEW

{8} Because the parties and the district court relied on pleadings and documents filed in Mr. Brooks' action and in Brooks Trucking's first lawsuit in granting Bull Rogers' motion to dismiss in Brooks Trucking's second lawsuit, we will view the court's dismissal as a summary judgment in Bull Rogers' favor. Rules 1-012(B), 1-056 NMRA. The facts upon which the court entered summary judgment are undisputed. Our review is de novo because the issues are issues of law. *Moffat v. Branch*, 2005-NMCA-103, ¶ 10, 138 N.M. 224, 118 P.3d 732, *cert. granted*, 2005-NMCERT-008, 138 N.M. 329, 119 P.3d 1266.

RES JUDICATA

{9} We agree with the parties that the governing law is the doctrine of res judicata. We look to the elements constituting the doctrine and the policy underlying it.

{10} The elements of res judicata or claim preclusion required as to the two actions at issue are (1) the same parties or parties in privity, (2) the identity of capacity or character of persons for or against whom the claim is made, (3) the same subject matter, and (4) the same cause of action. *Moffat*, 2005-NMCA-103, ¶ 11, 138 N.M. 224, 118 P.3d 732; *Anaya v. City of Albuquerque*, 1996-NMCA-092, ¶ 6, 122 N.M. 326, 924 P.2d 735. In regard to the subject matter and cause of action, res judicata "does not depend upon whether the claims arising out of the same transaction were actually asserted in the original action, as long as they could have been asserted." *Id.* ¶ 18 (internal quotation marks and citation omitted). However, that a claim could have been asserted in the first lawsuit does not require invocation of res judicata where the two lawsuits do not arise out of the same transaction. *Id.* We are guided by *Restatement (Second) of Judgments* § 24(2) (1982), in res judicata transaction analysis. *Anaya*, 1996-NMCA-092, ¶¶ 7, 12, 122 N.M. 326, 924 P.2d 735. Under Section 24(2), we consider "(1) the relatedness of the facts in time, space, origin, or motivation; (2) whether, taken together, the facts form a convenient unit for trial purposes; and (3) whether the treatment of the facts as a single unit conforms to the parties' expectations or business understanding or usage." *Id.* ¶ 12.

{11} As for policy, a party's full and fair opportunity to litigate is the essence of res judicata. *Moffat v. Branch*, 2002-NMCA-067, ¶ 26, 132 N.M. 412, 49 P.3d 673; *Bank of Santa Fe v. Marcy Plaza Assocs.*, 2002-NMCA-014, ¶ 14, 131 N.M. 537, 40 P.3d 442 (stating that claim preclusion applies only when plaintiff has had a "full and fair" opportunity to litigate issues in a prior action and that limitations on subject matter jurisdiction in the first action may prevent such an opportunity). Res judicata "reflects the expectation that parties who are given the capacity to present their entire controversies shall in fact do so." *Apodaca v. AAA Gas*

Co., 2003–NMCA–085, ¶ 81, 134 N.M. 77, 73 P.3d 215 (internal quotation marks and citation omitted). In considering the application of res judicata, we weigh whether "the courts' and Defendants' interests in bringing litigation to a close outweigh Plaintiff's interest in the vindication of his claims." *Anaya*, 1996–NMCA–092, ¶ 17, 122 N.M. 326, 924 P.2d 735. The party seeking to bar claims has the burden of establishing res judicata. *Bank of Santa Fe*, 2002–NMCA–014, ¶ 14, 131 N.M. 537, 40 P.3d 442; *cf. Padilla v. Intel Corp.*, 1998–NMCA–125, ¶ 9, 125 N.M. 698, 964 P.2d 862 (discussing burden of party asserting collateral estoppel to establish it).

ANALYSIS OF THE LAWSUITS

{12} Bull Rogers argues that Mr. Brooks' lawsuit and Brooks Trucking's two lawsuits all arose out of the same set of facts and circumstances, seeking the same amounts of money for the same work. Bull Rogers therefore contends that Mr. Brooks' lawsuit and Brooks Trucking's first lawsuit provide a basis to apply res judicata to bar Brooks Trucking's second lawsuit. With respect to the applicability of Mr. Brooks' lawsuit, Bull Rogers states in its answer brief that Brooks Trucking conceded identity of capacity or character in regard to Mr. Brooks and Brooks Trucking. Although in its reply brief Brooks Trucking did not respond to this bare assertion, in its brief in chief Brooks Trucking footnoted a statement, carrying with it no argument or authority, that "there is no identity of parties between the first suit and the present suit." Neither party develops this identity issue with any facts or authority. We therefore see no need to include Mr. Brooks' lawsuit in our analysis and determinations. In addition, even were we to consider Mr. Brooks' lawsuit, our holding in this case would apply to that lawsuit for the same reason it applies to Brooks Trucking's first lawsuit.

{13} Turning to Brooks Trucking's two lawsuits, Brooks Trucking asserts that its claims in its second lawsuit are based on (1) a right assigned by Bull Rogers to funds to be paid at some future date by the State, (2) an agreement between Bull Rogers and the State constituting a novation and binding on Bull Rogers' assigns in regard to reimbursement sums to be paid at some future date by the State, and (3) Bull Rogers' intentional and tortious refusal to pay funds to Brooks Trucking that were assigned to Brooks Trucking when Bull Rogers received the reimbursement sums from the State. Brooks Trucking argues that the facts giving rise to the claims in its second lawsuit did not arise until late 1999 or early 2000, when the State paid Bull Rogers and Bull Rogers wrongfully retained the funds. Brooks Trucking further argues that these claims could not have been asserted in its first lawsuit given that the district court had ruled that the statute of limitations on the open account claim asserted in that action had expired as of January 5, 1999, during the pendency of the action, service of process had not been completed by January 5, 1999, and the court ultimately dismissed the first lawsuit for failure to serve process within a reasonable time after filing the action.

{14} In Bull Rogers' view, because the assignment and the settlement agreement were known to Brooks Trucking as early as Mr. Brooks' lawsuit, having been exhibits or otherwise the subject of testimony in the trial in that action, and because no new investigation or discovery was done by Brooks Trucking after dismissal of its first lawsuit, the claims raised by Brooks Trucking in its second lawsuit could have been raised in the first one. Thus, Bull Rogers argues, when Brooks Trucking learned in late 1999 or early 2000 of the reimbursement payment from the State to Bull Rogers, there was sufficient time for Brooks Trucking to assert its claim in its first lawsuit which was pending at the time and not dismissed until May 2002.

{15} We are unpersuaded by Bull Rogers' arguments. First, the claims Brooks Trucking stated in its second lawsuit were not the same as the claim of open account in its first lawsuit. Second, underlying Brooks Trucking's different claims were different transactional relationships.

{16} With respect to the claims, Brooks Trucking's first lawsuit's open account claim was based on the underlying agreement to lease equipment and perform labor, and the actual leasing, labor, and incurrence of open

account liability. That underlying agreement, and the leasing, labor, and debt owed for it resulted in the documents later executed that created Brooks Trucking's right to receive payment from the State. Brooks Trucking's second lawsuit claims of fraud, conversion, unjust enrichment, and breach of contract encompass a right Brooks Trucking alleges as having been created by the later-executed documents, a separate contractual right independent of the right to be paid on open account. *See St. Joseph Healthcare Sys. v. Travelers Cos.*, 119 N.M. 603, 606, 893 P.2d 1007, 1010 (Ct.App.1995) ("[W]hen a plaintiff has made written assignment of particular funds from a third party to a creditor, the creditor has an enforceable legal right to the funds.").

{17} With respect to the transactional relationships, facts necessary for the resolution of the two lawsuits differ, and the factual and legal issues dispositive in the first lawsuit are different in significant degree from those in the second lawsuit. The proof in the first lawsuit required evidence of equipment leasing, labor performed, and the charges for those activities; the proof in the second lawsuit required evidence of the assignment and settlement agreement and the ultimate payment and retention of funds covered by those documents. Applied to the circumstances here, the guidelines in Section 24(2) of the *Restatement* do not support a single-transaction determination. The underlying debt for leasing and labor is substantially unrelated in time, origin, and motivation to the assignment and settlement agreement. Further, while the different claims in Brooks Trucking's first and second lawsuits could be tried in one lawsuit with all of the facts underlying those claims, the different facts are not so intertwined as to cause us to conclude that they would best be adjudicated in one lawsuit. Nor do we see that the treatment of the different facts as a single unit conforms to any expectation of the parties or business understanding or usage. *See Anaya*, 1996-NMCA-092, ¶ 18, 122 N.M. 326, 924 P.2d 735 (rejecting an argument that res judicata applied because the second action could have been brought in the first, where the two lawsuits did not arise out of the same transaction).

{18} In addition, although the documentary bases for Brooks Trucking's claims in the second lawsuit are grounded in the early known assignment and settlement agreement, Brooks Trucking did not assert a claim and, indeed, may not have successfully asserted or recovered on a claim based on those documents until the reimbursement payments were ultimately made to and wrongfully retained by Bull Rogers. Thus, the transactions become even more distinct because critical operative facts underlying the claims in Brooks Trucking's second lawsuit did not come into existence until after the first lawsuit was filed. For res judicata purposes, claims that arise from circumstances that come into existence after the first lawsuit is filed *may* be asserted by a supplemental pleading, but they are not required to be asserted in the first lawsuit. *See* Rule 1-015(D) NMRA; *Baker Group, L.C. v. Burlington N. & Santa Fe Ry.*, 228 F.3d 883, 886 (8th Cir.2000) (holding (1) claim preclusion does not apply to claims that did not arise until *after* the first suit was filed; and (2) because Fed.R.Civ.P. 15(d) is permissive for parties and discretionary with the court, the failure to supplement an already-commenced lawsuit did not raise a res judicata bar that precludes a second suit based upon a party's later conduct); *Fla. Power & Light Co. v. United States*, 198 F.3d 1358, 1360-61 (Fed.Cir.1999) (holding that under Fed.R.Civ.P. 15(d) as well as the different claims and underlying facts, the plaintiff's later asserted claims were "not barred by res judicata on the ground that the plaintiffs should have arranged to have them joined in the same action with their [earlier action]" (emphasis omitted)); *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 914-15 (7th Cir.1993) (holding if the plaintiff could not have learned of fraud and breach of contract before filing the first lawsuit, res judicata will not bar subsequent litigation, and that the plaintiff is not required to amend the complaint in the first lawsuit to include the issues that arose later).

{19} Even were the distinctions between the transactions somewhat less clear, we would not under the facts and claims in this case conclude that res judicata should bar

the second lawsuit. Wright and Miller's on-topic discussion indicates that the distinctions between transactions are often difficult to make, and that the better rule to follow is that the cause of action in the earlier proceeding "need include only the portions of the claim due at the time of commencing that action," and a supplemental or amended complaint as to claims that later ripen is not required to escape res judicata even if evidence of the underlying activity is used to prove the new claim. 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4409, at 210–52, esp. 213–20, 239–46 (2d ed.2002).

{20} Nothing in New Mexico law requires a different result. No New Mexico case holds that later-raised claims must be asserted in an earlier lawsuit where the operative facts underlying the newly asserted claims arose after the claims in the first action were brought. In our cases that apply res judicata, when later-raised claims could have been asserted in an earlier lawsuit, the operative facts underlying the newly asserted claims existed at the time the claims in the first action were brought. *See Moffat,* 2005–NMCA–103, ¶¶ 12–13, 138 N.M. 224, 118 P.3d 732 (concluding that the second action could have been brought in the first action where all facts necessary had occurred before the first suit was brought); *Apodaca,* 2003–NMCA–085, ¶¶ 76–85, 134 N.M. 77, 73 P.3d 215 (holding that res judicata barred a second claim where it could have been brought in the first case where both claims were brought based on the same transaction and all of the events underlying both suits happened before either suit was filed); *see also Bank of Santa Fe,* 2002–NMCA–014, ¶¶ 22, 24, 131 N.M. 537, 40 P.3d 442 (holding that claim for overpayment of rent was not the same claim as claim about refinancing cost as a part of rent and deciding that because it was unclear whether overpayment was known at the time of earlier arbitration that it could not have been brought at that time); *First State Bank v. Muzio,* 100 N.M. 98, 99, 101–02, 666 P.2d 777, 778, 780–81 (1983) (adopting and applying the rule that res judicata bars a subsequent action on issues that could have been brought in an earlier action); *overruled on other grounds by Huntington Nat'l Bank v. Sproul,* 116 N.M. 254, 861 P.2d 935 (1993).

CONCLUSION

{21} We reverse the district court's dismissal with prejudice and remand for further proceedings consistent with this opinion. In light of our reversal reinstating the lawsuit, the district court should revisit its ruling on Brooks Trucking's motion to amend.

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

WE CONCUR: LYNN PICKARD and IRA ROBINSON, Judges.

2006-NMSC-005

129 P.3d 142

STATE of New Mexico, Plaintiff-Respondent,

v.

Israel Delgado MUNOZ, Defendant-Petitioner.

No. 27,945.

Supreme Court of New Mexico.

Jan. 31, 2006.

OPINION

MAES, Justice.

{1} Defendant Israel Delgado Munoz ("Defendant") was convicted of custodial interference, contrary to NMSA 1978, § 30–4–4(B) (1989), and injuring or tampering with a vehicle, contrary to NMSA 1978, § 66–3–506 (1978). The Court of Appeals affirmed Defendant's convictions in an unpublished memorandum opinion. *State v. Munoz,* No. 23,-094 (Ct.App. Feb. 7, 2003). This Court granted Defendant's petition for a writ of certiorari pursuant to Rule 12–502 NMRA 2006. On certiorari review, we consider two issues related to Defendant's conviction for custodial interference: (1) whether the instruction given to the jury defining *good cause* constituted error because it failed to include the concept of *good faith;* and (2) whether the trial court erred in refusing to give the jury Defendant's tendered instruction defining *protracted period of time.* We hold that the trial court's *good cause* instruction did not adequately reflect New Mexico's custodial interference law; however, we find the erroneous definitional instruction did not amount to reversible error. We also hold that the trial court's refusal to give Defendant's requested instruction defining *protracted period of time* was not erroneous because the meaning of the phrase is readily understandable. Accordingly, we affirm Defendant's conviction for custodial interference.

FACTS AND PROCEEDINGS BELOW

{2} The following facts were adduced at Defendant's criminal trial. In 1996, Defendant and his wife, Yolanda Munoz ("Yolanda"), divorced in order to protect several of their business enterprises, which were jeopardized by Defendant's prior felony conviction. Yolanda testified further that she also went along with the divorce because she was unhappy with the marriage. In the divorce decree, Defendant and Yolanda were given joint legal custody of their four children, with Yolanda receiving physical custody of the children and Defendant receiving liberal visitation rights. However, the two continued to live together until 1999, when Yolanda and the children moved to Carlsbad, New Mexico.

John A. McCall, Albuquerque, NM, for Petitioner.

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

After Yolanda moved to Carlsbad, Defendant and Yolanda no longer acted as a married couple. Defendant lived in another city and would occasionally visit the children. Sometimes Defendant would ask Yolanda if they could get back together. Defendant wanted the family to move to Arizona. Yolanda, however, did not want to reunite with Defendant.

{3} In July 2000, Defendant went to Yolanda's house to visit. At that time, Defendant was living with his brother in Safford, Arizona. Defendant stayed at the house, ignoring Yolanda's repeated requests to leave. On July 3, Yolanda called Defendant from work and told him to leave her home. Despite this request, Defendant was there when Yolanda came home from work. In order to avoid arguing with Defendant, Yolanda left the house for the evening, leaving the children in Defendant's care.

{4} In the early morning hours of July 4, 2000, Yolanda had not returned home and Defendant left the house to look for her. Defendant observed Yolanda with a male acquaintance. Upon seeing Yolanda with another man, Defendant returned home, woke up his three youngest children and took them to see what their mother was doing. Around dawn, Yolanda attempted to approach her car, however, as she approached she saw Defendant waiting for her in the car. Defendant ran out of the car and chased Yolanda, who fled with her male acquaintance. Defendant and the three children then drove Yolanda's vehicle back to her home.

{5} When Defendant and the three youngest children returned from observing Yolanda, Defendant proceeded to pack up his things. He also packed clothing and toys belonging to the three youngest children. Defendant removed the distributor wire from Yolanda's vehicle, disabling it so that she could not follow him. He then took the three youngest children to Arizona.

{6} When Yolanda finally returned to her home, she saw her oldest child standing outside on the road. Upon hearing that Defendant had left with the three other children, Yolanda went to the police station to report the incident. Yolanda returned home to find the contents of her purse strewn about the grass and her car parked in an unusual place behind the home. She could not start her car because of the missing distributor wire. When Defendant took the three youngest children, he also took some of Yolanda's personal items, including her money.

{7} Defendant and the children called Yolanda after arriving in Arizona and stayed in almost daily contact while they were away. Each time Yolanda spoke to Defendant, she demanded that he return the children, but Defendant said he would not return the children until she moved to Arizona. At one point Defendant offered to meet Yolanda in El Paso, Texas with the children, on the condition that she go alone. Yolanda declined Defendant's offer because she was unwilling to go by herself. The children were eventually returned to Yolanda sixteen days after they were taken, following Defendant's arrest at a social services agency in Arizona on July 19, 2000.

{8} As a result of these events, Defendant was charged with custodial interference, contrary to Section 30–4–4(B), injuring or tampering with a vehicle, contrary to Section 66–3–506, unlawful taking of a motor vehicle, contrary to NMSA 1978, § 66–3–504 (1998), and larceny, contrary to NMSA 1978, § 30–16–1 (1987). During Defendant's trial, two definitional jury instructions related to custodial interference became an issue. The jury was given the following instruction outlining the elements of custodial interference:

> For you to find the defendant guilty of Custodial Interference . . . the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. The defendant had a right to custody of [the children];
>
> 2. The defendant maliciously took [the children], *and* failed to return them without *good cause;*
>
> 3. At the time defendant took [the children], each of them was under the age of eighteen (18);
>
> 4. The defendant intended to deprive permanently or for a *protracted period of time* another person also having a right to custody of these children. . . .

(Emphasis added.) Neither party objected to this instruction outlining the elements of custodial interference. However, Defendant and the State disagreed about related instructions defining the terms *good cause* and *protracted period of time.*

{9} Both Defendant and the State tendered definitional jury instructions for the term *good cause.* Defendant's proposed definition for *good cause* was taken from *State v. Luckie,* which defined *good cause* as " 'a good faith and reasonable belief that the taking, detaining, concealing, or enticing away of the child is necessary to protect the child from immediate bodily injury or emotional harm.' " 120 N.M. 274, 278, 901 P.2d 205, 209 (Ct.App.1995) (*quoting* CAL.PENAL CODE § 277 (Cum.Supp.1995)). The State's submitted definition was also taken from *Luckie,* but based on employment law, and stated that " '[g]ood cause is established when an individual faces compelling and necessitous circumstances of such magnitude that there is no [other] alternative.' " *Id.* at 277–78, 901 P.2d at 208–09 (*quoting Molenda v. Thomsen,* 108 N.M. 380, 381, 772 P.2d 1303, 1304 (1989)). After argument by counsel, the trial court chose the State's instruction based on the Court of Appeal's statement in *Luckie* that the employment law definition "can readily be applied to varying fact patterns in the context of our custodial interference statute." *Id.* at 278, 901 P.2d at 209. The trial court interpreted the appellate court's comment as instructing lower courts to use the employment law definition in custodial interference cases. Consequently, the jury was given the employment context instruction over Defendant's alternative request that no instruction be given.

{10} The trial court declined Defendant's request to provide the jury with a definitional instruction for the phrase *protracted period of time.* The court determined that the phrase was readily understandable and an instruction would not aid the jury.

{11} The jury convicted Defendant of custodial interference and injuring or tampering with a motor vehicle and acquitted him of unlawful taking of a motor vehicle and larceny. The Court of Appeals held that the jury instruction given adequately defined *good cause* and that it was not necessary to define *protracted period of time* for the jury. We granted certiorari to review the *good cause* definitional instruction and the trial court's decision not to instruct the jury on the definition of *protracted period of time.*

DISCUSSION

Good Cause Instruction

{12} "The standard of review we apply to [the *good cause* instruction] depends on whether the issue has been preserved." *State v. Benally,* 2001–NMSC–033, ¶ 12, 131 N.M. 258, 34 P.3d 1134. If Defendant preserved the error, we review the given instructions under a reversible error standard. *Id.* If Defendant failed to preserve the issue for review, we review for fundamental error. *Id.* Thus, we must first address the State's claim that the *good cause* instruction should be reviewed only for fundamental error.

{13} The State maintains that the jury instruction error now identified by Defendant was not preserved because after the State submitted the instruction drawn from *Molenda,* the defense maintained a general objection to the instruction but did not point to any fault in the instruction's failure to expressly address *good faith.* Defendant, however, took two significant steps which constituted adequate preservation. First, Defendant submitted the *good cause* definition found in the California custodial interference statute cited in *Luckie* that specifically states *good faith* is an element of *good cause.* Second, when Defendant's tendered instruction was refused, Defendant objected and argued alternatively that no instruction defining *good cause* should be given. By taking these two steps, Defendant fairly invoked a ruling by the trial court. *Benally,* 2001–NMSC–033, ¶ 26, 131 N.M. 258, 34 P.3d 1134 (Baca J., dissenting) ("With respect to jury instructions, a ruling or decision by the district court may be fairly invoked by either a formal objection to the instruction that is to be given to the jury by the court, or by tendering a correct instruction."). Therefore, we review the given instruction for reversible error.

{14} In order to determine whether the *good cause* instruction given to the jury con-

stitutes reversible error, it is first necessary to clarify both types of action prohibited by the custodial interference statute and the mental state a defendant must have to be subject to conviction for custodial interference. The custodial interference statute states:

> Custodial interference consists of any person, having a right to custody of a child, maliciously taking, detaining, concealing or enticing away *or* failing to return that child without good cause and with the intent to deprive permanently or for a protracted time another person also having a right to custody of that child of his right to custody. Whoever commits custodial interference is guilty of a fourth degree felony.

Section 30–4–4(B) (emphasis added). The statute clearly sets forth two distinct ways that a person, having a right to custody of a child, can commit custodial interference: (1) maliciously taking, detaining, concealing or enticing away a child with the intent to deprive permanently or for a protracted period of time another person also having a right to custody; or (2) failing to return that child without good cause and with the intent to deprive permanently or for a protracted time another person also having a right to custody of that child of his right to custody. The first act constitutes "taking" interference, and the second, "failing to return" interference. To be guilty of custodial interference, a defendant need only engage in one of the acts prohibited by the statute, either "taking" interference or "failing to return" interference.

{15} Both types of custodial interference require malice and the intent to deprive permanently or for a protracted time another person of his or her custodial rights. *Luckie,* 120 N.M. at 278, 901 P.2d at 209 ("[W]e think it is clear that the term '*maliciously*' modifies all of the proscribed conduct in Section 30–4–4(B), and is an essential element of the alleged offense."). Only the second type, "failing to return" interference, requires a showing that a defendant acted without *good cause.* Thus, the *good cause* instruction in this case only pertains to the jury's finding with regard to "failing to return" interference. Having clarified the type of harm that is prohibited by the custodial interference statute and a defendant's requisite mental state, we now turn to the meaning of *good cause* in custodial interference cases in New Mexico. Defendant argues that a *good cause* instruction in custodial interference cases should include the concept of *good faith.* We agree.

{16} Currently there is no uniform jury instruction defining *good cause* and no New Mexico case has defined *good cause* within the context of custodial interference. *Cf. Luckie,* 120 N.M. 274, 901 P.2d 205 (discussion of *good cause* limited to determining whether the term rendered our custodial interference statute unconstitutionally vague). Therefore, to determine what constitutes *good cause* in custodial interference cases, we must consider the objective of the custodial interference statute. The custodial interference statute is intended to prevent persons with custodial rights from disrupting another person's right to custody. Section 30–4–4(B). However, recognizing that there may be situations in which custodial interference is warranted, the legislature modified the custodial interference statute to include the requirement that the custodial interference must be perpetrated "without good cause." *Compare* NMSA 1978, § 30–4–4 (prior to 1989 amendments), *with* NMSA 1978, § 30–4–4(B) (1989). Thus the statute punishes conduct effected without *good cause* and excuses conduct justified by *good cause.*

{17} The Model Penal Code offers guidance as to what constitutes *good cause* in custodial interference cases. In the section on interference with custody, the Model Penal Code provides an affirmative defense when "the actor believed that his action was necessary to preserve the child from danger to its welfare." MODEL PENAL CODE § 212.4(1)(a) (Official Draft and Revised Comments 1962). To prevent the willful defiance of a custody order, however, the Model Penal Code requires a defendant's belief to be a *good faith* belief. *Id.* at § 212.4 cmt. 3 (the Model Penal Code requires "an honest belief that the actor's conduct was 'necessary to preserve the child from danger to its welfare.' "). Several other jurisdictions also excuse a defendant's conduct when his or her

action is taken to protect a child from harm, so long as the action is based on a *good faith* belief, a reasonable belief, or both.[1]

{18} We believe that the term *good cause* in our custodial interference statute similarly encompasses the concepts of subjective *good faith* and objective reasonableness. To avoid criminal sanctions for custodial interference, a defendant must have an honest belief that his actions are necessary to protect a child from harm and that honest belief must be reasonable. A defendant's unreasonable belief that custodial interference is necessary to protect children from harm will not satisfy the *good cause* requirement.

{19} In custodial interference cases, an instruction defining *good cause* should communicate that a defendant's belief must be both reasonable and in *good faith.* Therefore, when a defendant requests an instruction defining *good cause, good cause* should be defined. A suggested definition is as follows: "a good faith and reasonable belief that the defendant's actions were necessary to protect a child from physical or significant emotional harm."[2] We believe this suggested definition adequately describes our state's custodial interference law which excuses a defendant's actions when they are motivated by an honest and reasonable belief that custodial interference is necessary to prevent physical harm or significant emotional harm. Our uniform jury instructions committee should review this instruction and make a further recommendation.

{20} We acknowledge that the *good cause* instruction given to the jury in this case did not accurately reflect New Mexico's custodial interference law because it failed to address the concept of *good faith.* When reviewing an erroneous jury instruction for reversible error, "[w]e consider jury instructions as a whole, not singly," *State v. Montoya,* 2003–NMSC–004, ¶ 23, 133 N.M. 84, 61 P.3d 793, and we look to see "whether a reasonable juror would have been confused or misdirected by the jury instructions." *Id.*

{21} When the given jury instructions are examined as a whole, it becomes clear that the jury in this case could not have been confused or misdirected by the erroneous *good cause* instruction. The jury was instructed that to find the defendant guilty of custodial interference, "[t]he State must prove to your satisfaction beyond a reasonable doubt that . . . the defendant maliciously took [the children], *and* failed to return them without good cause." (Emphasis added.) As previously discussed, either "taking" interference or "failing to return" interference alone constitutes illegal custodial interference, however, the instruction in this case required the jury to find beyond a reasonable doubt that Defendant both maliciously took the children *and* failed to return them without *good cause.* In light of this instruction, Defendant's conviction for custodial interference meant that the jury found Defendant guilty

1. The Model Penal Code and most of the jurisdictions that provide a defense for actions taken to protect a child from harm limit the defense to actions based on a good faith belief, a reasonable belief, or both. *See, e.g.,* ARIZ.REV.STAT. § 13–1302(C)(2)(a) (2001) (requiring a good faith and reasonable belief); CAL.PENAL CODE § 278.7(a) (1999) (requiring a good faith and reasonable belief); COLO.REV.STAT. § 18–3–304(3) (2005) (requiring a reasonable belief); FLA. STAT. § 787.03(4) (2005) (requiring a reasonable belief); HAW.REV.STAT. § 707–726(2) (1993) (requiring a good faith and reasonable belief); LA.REV. STAT. ANN. § 14:45.1(A) (1997) (requiring a reasonable belief); MINN.STAT. § 609.26(2)(1) (2004) (requiring a reasonable belief); N.J. STAT ANN. § 2C:13–4(c)(1) (2005) (requiring a reasonable belief); OHIO REV.CODE ANN. § 2919.23(c) (1997) (requiring a good faith and reasonable belief); VT. STAT. ANN tit. 13, § 2451 (1998) (requiring a good faith belief); WASH REV.CODE § 9A.40.080(2)(a) (2004) (requiring a reasonable belief); W. VA.CODE § 61–2–14(d)(c) (2005) (requiring a reasonable belief); WIS. STAT. § 948.31(4)(a)(1) (2005) (requiring a reasonable belief); *see also* N.H. REV. STAT. ANN. § 633:4(III) (1996) (requiring a good faith act).

2. This suggested definition takes into account California's custodial interference statute, CAL.PENAL CODE § 277 (Cum.Supp.1995), on which the Court of Appeals apparently relied in *State v. Luckie,* 120 N.M. 274, 901 P.2d 205 (Ct.App. 1995), and the version of the California statute in effect at the time of Defendant's conduct, CAL.PENAL CODE § 278.7(a) (1999). Our suggested instruction identifies the types of harm that are relevant in New Mexico. We believe that a defendant should be permitted to protect a child from both physical harm and significant emotional harm without being subjected to criminal penalty.

of both "taking" interference and "failure to return" interference.

{22} The erroneous *good cause* instruction only affected "failure to return" interference because *good cause* only modifies "failure to return" interference. Section 30-4-4(B) ("failing to return that child without good cause"). Thus, the incorrect definitional instruction had no bearing on the jury's finding that Defendant engaged in "taking" interference. Because the jury found Defendant guilty of "taking" interference, an error with regard to "failure to return" interference should not invalidate the jury's verdict that Defendant was guilty of custodial interference based on "taking" interference. Therefore, when the jury instructions are considered as a whole, the jury was not confused or misled as to "taking" interference and the *good cause* instruction error did not amount to reversible error.

***Protracted Period of Time* Instruction**

{23} Defendant contends that the trial court erred when it refused to give the jury his tendered instruction defining the phrase *protracted period of time.* Defendant's proposed instruction read: "protracted period of time means a lengthy or unusually long time under the circumstances." Relying on *State v. Mascareñas,* 2000-NMSC-017, 129 N.M. 230, 4 P.3d 1221, Defendant asserts that the trial court was required to give his tendered instruction. Defendant appears to argue that once a court has determined the meaning of a term, the jury should be instructed on that meaning. However, Defendant told the trial court when he submitted his definitional instruction that the definition might be helpful to the jury but that it was not required. Defendant asserts that because it is uncertain whether the jury considered the circumstances in determining whether he had kept the children for a *protracted period of time,* this error rose to the level of fundamental error.

{24} We conclude that the trial court did not err in refusing to give Defendant's requested instruction. "Where the issue is the failure to instruct on a term or word having a common meaning, there is no error in refusing an instruction defining the word or term." *State v. Carnes,* 97 N.M. 76, 79, 636 P.2d 895, 898 (Ct.App.1981). Since the phrase *protracted period of time* is self-explanatory and has an understandable and common meaning, there was no need for further definition. *See Trujeque v. Serv. Merch. Co.,* 117 N.M. 388, 390, 872 P.2d 361, 363 (1994) (concluding that the phrase "exclusive control and management" was self-explanatory and thus required no further definition for the jury); *Luckie,* 120 N.M. at 279, 901 P.2d at 210 (concluding that the phrase *protracted time* does not require "enactment of a further statutory definition" because "any reasonable person would interpret the meaning of the phrase 'protracted period' to mean a 'lengthy or unusually long time under the circumstances' " (*quoting People v. Obertance,* 105 Misc.2d 558, 432 N.Y.S.2d 475, 476 (1980))). Indeed, Defendant admits that this phrase has a common meaning.

{25} Additionally, Defendant's reliance on *Mascareñas* is misplaced. In *Mascareñas,* 2000-NMSC-017, ¶ 21, 129 N.M. 230, 4 P.3d 1221, we held that the trial court committed fundamental error when it failed to properly instruct the jury on the *mens rea* element of the crime at issue. We determined that "the trial court's failure to provide the instruction was a critical determination akin to a missing elements instruction." *Id.* ¶ 20. That is not the situation here because the jury was properly instructed on all the elements of the crime. Thus, *Mascareñas* is not applicable to the facts of this case.

{26} Further, Defendant was able to argue his interpretation of the meaning of *protracted period of time* to the jury. Defendant argued that he did not intend to keep the children for a *protracted period of time,* unlike situations where a child is taken and never heard from again until several years later when the child is found. Defendant said that he never intended to deprive Yolanda of the children; she knew where they were and he told her that she could come and get them. He argued that the two-week time period in this case did not qualify as a *protracted period of time.* We believe that a reasonable juror could glean from Defendant's closing argument that a *protracted*

period of time meant an unusually lengthy amount of time and that, according to Defendant, the two-week period was not unusually long under the circumstances of this case. Thus, we conclude that no error resulted from the trial court's refusal to give the jury Defendant's tendered definitional instruction on the phrase *protracted period of time. Cf. Benally,* 2001–NMSC–033, ¶ 21, 131 N.M. 258, 34 P.3d 1134 (holding that closing argument was not sufficient to correct fundamental error arising from an erroneous jury instruction).

CONCLUSION

{27} For the reasons stated, we affirm Defendant's conviction for custodial interference.

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

WE CONCUR: RICHARD C. BOSSON, Chief Justice, PAMELA B. MINZNER, PATRICIO M. SERNA, and EDWARD L. CHÁVEZ, Justices.

2006-NMCA-022

129 P.3d 149

STATE of New Mexico, Plaintiff–Appellee,

v.

GERALD B., Child–Appellant.

No. 24,538.

Court of Appeals of New Mexico.

Jan. 5, 2006.

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

Sheri A. Raphaelson, Espanola, NM, for Appellant.

OPINION

ROBINSON, Judge.

{1} Child appeals his adjudication as a delinquent for possession of one ounce or less of marijuana contrary to NMSA 1978, § 30–31–23(B)(1) (2005). On appeal, Child makes three arguments: (1) the trial court erred in refusing to suppress statements and evidence because he was not advised of his rights, pursuant to NMSA 1978, § 32A–2–14 (2005), prior to questioning before a pat-down search; (2) insufficient evidence exists to convict him of possession of marijuana; and (3) the prosecutor exercised a peremptory challenge during jury selection in a racially discriminatory manner.

{2} We hold that (1) Section 32A–2–14 does not require police officers to issue warnings to juveniles, pursuant to *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), before asking about needles or weapons prior to conducting a valid pat-down search; (2) sufficient evidence exists to support the conviction for possession of marijuana; and (3) the claim of racial discrimination fails under the analysis in *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). We, therefore, affirm Child's adjudication of delinquency.

I. BACKGROUND AND FACTS

{3} At approximately 11:00 a.m., on December 1, 2002, police officers arrived at the Santa Fe Plaza to investigate a citizen's complaint about individuals selling drugs in the area. According to his testimony, Officer Worth approached seventeen-year-old Child and nineteen-year-old Adam Stewart because they matched the descriptions in the complaint. Child and Stewart appeared very nervous and were wearing heavy clothing that could have concealed weapons. The officer told Stewart that he was going to conduct a pat-down search for weapons, but first asked if Stewart had any syringes with needles. Officer Worth testified that he always asked about needles to avoid getting pricked. Stewart produced a syringe, which he admitted he had used to inject cocaine. Officer Worth patted down Stewart, then arrested him for possession of drug paraphernalia.

{4} Officer Worth testified that, during the search of Stewart, Child kept turning his body sideways as if preparing to attack. Concerned for his safety, the officer decided to perform a pat-down search of Child. He first asked if Child had any syringes with needles. Child said he did not have any needles, but that he did have some marijuana, and handed the officer a small plastic sandwich bag from his pocket. Another officer performed the pat-down search, but did not find any additional contraband. Officer Worth then asked if Child had any more marijuana. Child reached into his jacket and produced eight more sandwich bags. Child was arrested, handcuffed, and placed in the police car. Only then was Child advised of his *Miranda* rights.

A. Motion to Suppress Statements and Marijuana

{5} The State filed an amended petition in district court, charging Child with possession of one ounce or more of marijuana, contrary to NMSA 1978, § 30–31–23(B)(2) (2005); distribution of marijuana, contrary to NMSA 1978, § 30–31–22 (2005); and conspiracy to distribute marijuana, contrary to Section 30–31–22 and NMSA 1978, § 30–28–2 (1979). Child filed a motion to suppress all evidence of marijuana and accompanying statements. Child argued that he should have been given *Miranda* warnings, as required by Section 32A–2–14 and *State v. Javier M.,* 2001–NMSC–030, 131 N.M. 1, 33 P.3d 1, before the officer asked about needles because Child was being held in an investigatory detention. Child also filed a motion to suppress all statements made to the arresting officer following his arrest. After a hearing, the district court denied both motions to suppress. The court concluded that the officer initially had reasonable suspicion to approach Child and Stewart and that it was proper for the officer to conduct a pat-down search for offi-

cer safety, pursuant to *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The court concluded that the question regarding syringes prior to the pat-down search was an administrative question, which does not require a previous advisement of rights under *Javier M.*

B. Sufficiency of the Evidence

{6} The nine plastic bags police took from Child were introduced into evidence and viewed by the jury. Lab tests on the marijuana were excluded because the State disclosed the results on the morning of the trial. Officer Worth, who had worked as a narcotics agent and had handled marijuana numerous times in his eighteen years in law enforcement, testified that, in his opinion, the bags contained marijuana. No expert witnesses testified.

{7} At the close of the State's case, Child moved for a directed verdict on all counts, which the court granted on the conspiracy charge, but denied on the marijuana charges.

C. Jury Selection

{8} Following voir dire, the State exercised its first of two peremptory challenges to remove a prospective juror named David Grayson. Previously, the State had requested Grayson's removal for cause because he was an attorney, which the court ruled was not a sufficient reason. Defense counsel did not object to the first peremptory strike. The State used its second peremptory challenge to remove a prospective juror named Michael Begay. Defense counsel objected, alleging racial bias, because Begay was the only Native American on the panel, and requested a non-racial reason for the peremptory strike.

{9} Although the district court did not rule that defense counsel had made a prima facie showing of discriminatory intent, the prosecutor denied that the peremptory strike was racially motivated. The prosecutor said she wanted Begay excused because he did not appear to be listening. The court allowed the peremptory challenge. Defense counsel subsequently stated that she thought the prospective juror was paying attention. The prosecutor responded that there was no showing that Begay was the only Native American on the panel and again denied that she wanted to strike Begay due to racial reasons. She added that Begay appeared to be closing his eyes and falling asleep. Defense counsel suggested that the prosecutor point out anyone else she thought was Native American. The State objected to defense counsel basing its claim on Begay's appearance and also argued that a person's name does not necessarily indicate his ethnicity.

{10} The district court allowed the peremptory challenge for the reasons given by the prosecutor stating that "[Child] to my knowledge is not Native American and I do not believe that that's the reason that the State is exercising its peremptory . . . excusal for . . . this particular juror." Defense counsel stated that Child was Hispanic. The final panel apparently included three jurors with Hispanic surnames and three jurors with Anglo surnames. There is nothing in the record regarding the ethnicity of the potential jury members other than surnames. However, from the record, it appears defense counsel based her *Batson* claim, not on surnames, but on the appearance of the prospective jurors.

{11} The jury returned a verdict, finding that Child committed the lesser-included offense of possession of one ounce or less of marijuana. The jury was unable to reach a verdict on the distribution charge.

II. DISCUSSION

A. Motion to Suppress Statements and Marijuana

{12} On appeal, Child contends that, under *Javier M.,* he was statutorily entitled to be warned of his right to remain silent and that anything he said could be used against him in a delinquency hearing. 2001–NMSC–030, ¶ 41, 131 N.M. 1, 33 P.3d 1. We disagree.

{13} An appeal of a suppression motion involves 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.

{14} In *Javier M.,* our Supreme Court held that Section 32A–2–14 provides children with broader rights in the area of police questioning than those guaranteed by *Miranda* jurisprudence. 2001–NMSC–030, ¶ 1, 131 N.M. 1, 33 P.3d 1. Our Supreme Court concluded that "a child need not be under custodial interrogation in order to trigger the protections of the statute." *Id.* Rather, these protections are triggered when a child is subject to an investigatory detention. *Id.* Therefore, "prior to questioning, a child who is detained or seized and suspected of wrongdoing must be advised that he or she has the right to remain silent and that anything said can be used in court." *Id.*

{15} However, in our case, Child's initial incriminating statements and evidence was not intended to confirm or dispel the officer's suspicions of whether Child committed a delinquent act. "[W]hen an officer *reasonably* believes the individual may be armed and dangerous [during an investigatory stop, he] may check for weapons to ensure personal safety." *State v. Chapman,* 1999–NMCA–106, ¶ 15, 127 N.M. 721, 986 P.2d 1122 (internal quotation marks and citation omitted). Furthermore, police officers about to conduct a lawful frisk or search of a suspect need not give *Miranda* warnings before asking the suspect about the presence of dangerous objects on his person. *See United States v. Lackey,* 334 F.3d 1224, 1225 (10th Cir.2003). In *Lackey,* the Tenth Circuit explains that "[t]he purpose of the question 'Do you have any guns or sharp objects on you?' is not to acquire incriminating evidence; it is solely to protect the officers, as well as the arrestee, from physical injury." *Id.* at 1228.

{16} To justify a frisk for weapons, an officer must have a sufficient degree of articulable suspicion that the person being frisked is both armed and presently dangerous. *Terry v. Ohio,* 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Moreover, in *Chapman,* our Court emphasized that the officer "provided more than [just] conclusive characterizations of [the defendant]. Instead of just describing [the d]efendant as nervous, the deputy identified specific behaviors and changes in [the d]efendant's demeanor and attitude that explain[ed] why he believed that [the d]efendant might be armed and dangerous." 1999–NMCA–106, ¶ 16, 127 N.M. 721, 986 P.2d 1122 (internal citation omitted).

{17} Here, Officer Worth approached Child and Stewart because they matched the descriptions in the complaint. Child and Stewart appeared very nervous and were wearing heavy clothing that could have concealed weapons. The officer told Stewart that he was going to conduct a pat-down search for weapons, but first asked if he had any syringes with needles. After Stewart produced a syringe, Officer Worth patted him down and then arrested him for possession of drug paraphernalia. During the search of Stewart, Officer Worth testified that he noticed that Child kept turning his body sideways as if he was preparing to attack. Concerned for his safety, he decided to conduct a pat-down search of Child. Like Stewart, he asked Child as well if he had any syringes with needles. At that time, Child said he did not have any needles, but that he had some marijuana and handed it to the officer. Officer Worth then asked if Child had any more marijuana, then Child admitted that he had eight additional bags.

{18} During his testimony, Officer Worth explained his reason for asking Stewart if he had any needles was "so I don't get punctured while I'm searching." He went on to explain that dirty needles, shared by intravenous drug users, can transmit AIDS and other infectious diseases, and that he was trained to ask the question. He added, "I don't know a policeman who doesn't ask that question."

{19} Here, Child does not dispute that Officer Worth had a right to conduct a pat-down search for the officer's personal safety under *Chapman.* We conclude that asking Child whether he had any needles, within the context of a pat-down search, was proper for the purpose of ensuring the officer's personal safety. *Cf. Chapman,* 1999–NMCA–106, ¶ 15, 127 N.M. 721, 986 P.2d 1122 ("[T]he officer may check for weapons

to ensure personal safety."). Questions intended to ensure the officer's personal safety during a pat-down search are an integral part of the search itself. Moreover, we note that Officer Worth's question is not prohibited by *Javier M.* and Section 32A–2–14 because (1) it was not "intended to confirm or dispel the officer's suspicions that [Child was committing] a delinquent act," and (2) Child's response was a voluntary statement. *See Javier M.*, 2001–NMSC–030, ¶ 40, 131 N.M. 1, 33 P.3d 1 ("The statute's protections also do not apply ... when the child makes a voluntary statement."). Therefore, when Child volunteered that he possessed marijuana, in response to Officer Worth's inquiry about needles during a pat-down search, Child was not entitled under Section 32A–2–14 to suppression of the statements or marijuana.

{20} We do find it necessary to address Officer Worth's second question regarding whether Child had any more marijuana. In light of our discussion above, we conclude that Officer Worth did not ask the second question because of concerns for officer safety. The question about additional marijuana clearly was intended to confirm, or dispel, the officer's suspicions that Child committed a delinquent act. *See Javier M.*, 2001–NMSC–030, ¶ 40, 131 N.M. 1, 33 P.3d 1. As a result, Officer Worth was required to advise Child of his "constitutional rights" prior to that questioning. Because Officer Worth failed to do so, Child's admission that he had eight additional bags of marijuana should have been suppressed. Given the jury's verdict, however, we conclude that the trial court's error in failing to suppress any statements, regarding the additional marijuana, was harmless. The jury only found that Child committed the act of possession of one ounce or less of marijuana. As we next discuss, even if we were to conclude that the physical evidence accompanying Child's improperly admitted statement should have been excluded, the evidence viewed in the light most favorable to the State would support the jury's verdict concerning the first small bag of marijuana, which Child voluntarily admitted having and produced in response to the question about needles.

B. Sufficiency of the Evidence

{21} Child argues that the evidence was insufficient to prove, beyond a reasonable doubt, that he had marijuana in his possession. *See* UJI 14–3101 NMRA. In evaluating a sufficiency of the evidence challenge, we determine "whether there is substantial evidence of either a direct or a circumstantial nature to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to conviction." *State v. Sanchez*, 2001–NMCA–109, ¶ 14, 131 N.M. 355, 36 P.3d 446. We view the evidence in the light most favorable to the State, resolving all conflicts and indulging all reasonable inferences to uphold the verdict. *State v. Sanders*, 117 N.M. 452, 456, 872 P.2d 870, 874 (1994).

{22} Child argues that the evidence was insufficient to support his conviction because Officer Worth's lay testimony was the only evidence presented at trial to prove that the substance in the bags was marijuana. We reject this argument.

{23} First, as Child concedes, expert testimony is not required to identify illegal drugs. "Lay opinion concerning the identification of marijuana is admissible, and the qualifications of the witness go to weight and not admissibility." *State v. Rubio*, 110 N.M. 605, 607, 798 P.2d 206, 208 (Ct.App. 1990). Officer Worth's many years of experience in narcotics and drug investigations qualified him to give his opinion that the substance was marijuana. The jury was entitled to consider the officer's testimony and give it whatever weight the jury deemed appropriate. *See id.*

{24} Next, the record indicates that Officer Worth's identification was not the only evidence admitted at trial. According to Officer Worth's testimony, Child referred to the substance in both the first bag and the eight other bags as marijuana. We are mindful that an extra-judicial admission is "not sufficient as evidence that a child committed delinquent acts absent other corroborating evidence." *In re Bruno R.*, 2003–NMCA–057, ¶ 17, 133 N.M. 566, 66 P.3d 339. However, Child also testified that the first

bag was his own marijuana. In addition, the jury could infer, from Child's admissions and the physical evidence, that the substance in Child's possession was marijuana.

{25} We find substantial evidence exists to support Child's conviction. Viewed in the light most favorable to the State, and resolving all inferences to uphold the verdict, we conclude the jury could reasonably infer, from Child's admissions and the physical evidence of the first bag, that the substance in Child's possession was marijuana. Thus, even if the additional eight bags were excluded because Child was not given *Miranda* warnings as required by the statute and *Javier M.*, sufficient evidence exists to support the verdict that Child possessed an ounce or less of marijuana.

C. The State's Use of Peremptory Challenges

{26} Child argues that the State's peremptory challenge against a Native American prospective juror was racially motivated and violated Child's constitutional rights. It is well settled that the State may not exercise its peremptory challenges to exclude potential jurors solely on account of their race without violating the equal protection rights of both the defendant and the prospective jurors. *Batson,* 476 U.S. at 85–89, 106 S.Ct. 1712; *State v. Martinez,* 2002–NMCA–036, ¶ 9, 131 N.M. 746, 42 P.3d 851.

{27} A determination of whether a prosecutor discriminated in exercising peremptory challenges involves a three-step analysis from *Batson. Martinez,* 2002–NMCA–036, ¶ 10, 131 N.M. 746, 42 P.3d 851. First, a defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. *Id.* If the defendant makes the requisite showing, then the burden shifts to the prosecutor to provide a racially neutral reason for the challenges. *Id.* If the trial court finds that the State's explanation is racially neutral, then the burden shifts back to the defendant "to show that the reason given is in fact pretext for a racially discriminatory motive." *Id.*

{28} In reviewing a claim of racial discrimination in the use of peremptory challenges, we give deference to the trial court's factual findings, but review its legal conclusions de novo. *See id.* ¶ 21. "Deference to the trial court is especially important in evaluating the reasons a prosecutor gives for making a challenge, as well as the reasons a defendant puts forth for claiming those reasons are pretextual." *Id.* ¶ 20.

1. Prima Facie Showing

{29} Ordinarily, a party desiring to raise a *Batson* claim of discrimination must first make a prima facie showing that (1) the State exercised its peremptory challenges to remove members of a racial group from the jury panel and (2) these facts and any other relevant circumstances raise an inference that the State used its challenges to exclude members based solely on race. *Martinez,* 2002–NMCA–036, ¶ 11, 131 N.M. 746, 42 P.3d 851. Child argues that the prosecution's removal of the only Native American from the jury panel raises an inference of discrimination. The State contends that even if Begay was the only Native American member of the venire, which defense counsel did not establish below, Child failed to meet his burden of proving discriminatory intent.

{30} Child is correct that our cases have indicated that a prima facie case can be made when "the prosecution uses a peremptory challenge to remove the sole member of a particular racial group from the jury." *Id.* ¶ 29. A defendant need not share the same race as the prospective juror to object to peremptory challenges that exclude jurors based on race. *Powers v. Ohio,* 499 U.S. 400, 402, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (recognizing that one purpose of *Batson* is to address the right of a juror not to be excluded from serving on a jury for racial reasons). "A single prospective juror may be stricken for a racially motivated reason and the jury still retain its 'representative' character. This, nevertheless, offends equal protection." *State v. Gonzales,* 111 N.M. 590, 595, 808 P.2d 40, 45 (Ct.App.1991), *modified on other grounds by State v. Dominguez,* 115 N.M. 445, 452, 853 P.2d 147, 154 (Ct.App.1993).

{31} In this case, however, we leave aside the issue of whether Child made the necessary showing to establish a prima facie case. As the record indicates, the trial court made no findings on whether Child established the first step of the *Batson* inquiry. As soon as defense counsel requested a reason for the peremptory strike against Begay, the prosecutor offered a racially neutral explanation. Thus, the trial court had no opportunity to determine whether Child had made a prima facie showing of intentional discrimination.

{32} "[W]here the record shows that the trial court did not clearly indicate whether or not defendant made a prima facie case, ... remand is the appropriate remedy." *Gonzales,* 111 N.M. at 596, 808 P.2d at 46. In *Hernandez v. New York,* the United States Supreme Court held that "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." 500 U.S. 352, 359, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion). Because the State proceeded past the first step of the *Batson* analysis without questioning Child's prima facie showing, and the trial court made findings on intentional discrimination, we proceed with the next step of the analysis.

2. Racially Neutral Explanation

{33} In *Batson's* second step, the burden shifts to the State to articulate a racially neutral explanation for the peremptory challenge. *See Gonzales,* 111 N.M. at 597, 808 P.2d at 47. At this point, the focus of the inquiry "is the facial validity of the prosecutor's explanation." *State v. Jones,* 1997–NMSC–016, ¶ 3, 123 N.M. 73, 934 P.2d 267 (quoting *Hernandez,* 500 U.S. at 360, 111 S.Ct. 1859) (internal quotation marks and citation omitted). The prosecutor explained that she challenged Begay because she did not think he was listening. By explaining that the prospective juror appeared to be closing his eyes and falling asleep, the State provided a racially neutral explanation for its challenge. *Cf. id.* ¶ 5 (concluding that failure to make eye contact and lack of assertiveness is a racially neutral reason). Thus, the prosecutor met the legal threshold by offering a reason to exclude the juror based not on race, but on the juror's ability to fairly and impartially hear the case. *See Gonzales,* 111 N.M. at 596, 808 P.2d at 46 (relating racially neutral reasons "to the juror's ability to fairly and impartially hear the case").

3. Determination of Intentional Discrimination

{34} In the final step of the *Batson* analysis, after the prosecutor produces an explanation for exercising peremptory challenges that the trial court finds facially valid, the defendant may "refute the stated reason or otherwise prove purposeful discrimination." *Jones,* 1997–NMSC–016, ¶ 3, 123 N.M. 73, 934 P.2d 267. The trial court's duty is "to consider the reason advanced and to determine whether, considering all the facts and circumstances, defendant has carried his burden of persuading the trial court that the state used one or more of its peremptory challenges to eliminate jurors on the basis of race." *Gonzales,* 111 N.M. at 597, 808 P.2d at 47. "The trial court's determination that the prosecution has or has not intentionally discriminated on the basis of race is a finding of fact and will not be disturbed on appeal if it is supported by substantial evidence." *Id.*

{35} The trial court found that the State met its burden of coming forward and establishing a racially neutral explanation for its use of the peremptory challenge against Begay. Child argues that the racially neutral reason given by the prosecutor must be true and Child successfully disputed it by arguing that the prospective juror appeared to be paying attention. In Child's view, the court erred because it never made any factual finding regarding the disputed accounts of Begay's behavior during voir dire. Child also argues that the trial court erred in applying the wrong standard—whether Child is of the same race as the excluded juror.

{36} We agree with Child that the trial court would err, as a matter of law, if it based its ruling that the State did not exercise its peremptory challenges in a racially discriminatory manner on the finding

that the prospective juror was a different race than Child. However, the court explicitly stated that it did not believe the state exercised its peremptory challenge for racially discriminatory reasons. The court accepted the reasons provided by the State. A prosecutor's subjective belief might not be susceptible to verification or objective rebuttal, but that does not mean a reason for a peremptory strike is inherently discriminatory. *See Jones,* 1997–NMSC–016, ¶¶ 4–5, 123 N.M. 73, 934 P.2d 267. As courts have recognized, the ultimate *Batson* findings "largely will turn on evaluation of credibility" of counsel. *Jones,* 1997–NMSC–016, ¶ 4, 123 N.M. 73, 934 P.2d 267 (internal quotation marks and citation omitted). Because we review the action of the trial court under a deferential standard, we conclude that the trial court was in the best position to evaluate the prosecutor's sincerity and to determine she did not purposefully discriminate in striking jurors.

{37} In sum, the burden was on Child not only to make an adequate record to establish his contention that the prosecutor struck the only Native American member of the venire, but that she did so for discriminatory reasons. In response to Child's claim that the prosecutor improperly exercised a peremptory challenge to remove a prospective juror from the jury panel, the prosecutor gave a race-neutral explanation. The trial court explicitly found the prosecutor's explanation credible. We, therefore, conclude that Child failed to carry his burden of showing sufficient evidence to support a finding of discriminatory intent. As a result, Child's claim, that the State exercised a peremptory challenge during jury selection in a racially discriminatory manner, fails.

III. CONCLUSION

{38} We therefore hold that the trial court committed only harmless error in admitting evidence of eight bags of marijuana on Defendant's person, and did not otherwise err in (1) admitting evidence of the results of a pat-down search without *Miranda* warnings, and (2) in allowing the State's peremptory challenge of a Native American juror. Finding sufficient evidence to support Defendant's conviction for possession of marijuana, we affirm Child's adjudication of delinquency.

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

WE CONCUR: CELIA FOY CASTILLO and MICHAEL E. VIGIL, Judges.

2006-NMCA-024

129 P.3d 158

Stephen SELMECZKI, Petitioner–Appellant,

v.

NEW MEXICO DEPARTMENT OF CORRECTIONS, Respondent–Appellee.

No. 24,646.

Court of Appeals of New Mexico.

Jan. 12, 2006.

L. Helen Bennett, P.C., L. Helen Bennett, Albuquerque, NM, for Appellant.

New Mexico Department of Corrections, James R. Brewster, Deputy General Counsel, Santa Fe, NM, for Appellee.

OPINION

FRY, Judge.

{1} Stephen M. Selmeczki (Worker) appeals the termination of his employment with the Department of Corrections (the Department), which both the Personnel Board and the district court affirmed. The termination resulted from accusations that Worker slapped coins at the Secretary and Deputy Secretary of Corrections and cursed at them in relation to a lack of pay raises for correctional officers. We conclude that the record in this case is sufficient to support the termination of Worker for intentional misconduct and such termination is consistent with New Mexico case law. Therefore, we reject Worker's contention that progressive discipline was required prior to termination of his employment where he engaged in intentional, hostile, and unprovoked conduct approaching a physical fight. We also conclude that Worker's argument that he had no notice of what behavior could result in termination was neither preserved for our review nor supported by authority.

I. FACTUAL BACKGROUND

{2} We begin with uncontested background facts and then present the conflicting testimony given before the Personnel Board Administrative Law Judge (ALJ) regarding the confrontation itself. Our review of an administrative agency's findings of fact involves whole record review, *Regents of University of New Mexico v. New Mexico Federation of Teachers*, 1998–NMSC–020, ¶ 17, 125 N.M. 401, 962 P.2d 1236, so we recount testimony that is both favorable and unfavorable to Worker.

{3} At the time of his termination, Worker, who held the rank of sergeant, had been employed by the Department for approximately thirteen years and had received favorable job reviews and commendations. Worker had not been disciplined previously, except for one incident in relation to overtime, and that discipline had been rescinded by the Department. Worker presented evidence that he had previously been a labor activist or advocate for better pay and conditions for correctional officers.

{4} On May 9, 2000, Secretary of Corrections Robert J. Perry and Deputy Secretary John Shanks were at the Central New Mexico Correctional Facility (Central) for meetings and conducted an inspection tour of the facility. An associate warden at Central, Warden Langston, testified he personally notified Worker in advance about the tour by Perry and Shanks and told Worker to ensure that things were running smoothly. Langston testified that Worker said something

like, "I will tell him exactly how I feel," or "[w]hat I'm thinking."

{5} Toward the end of the tour, Perry and Shanks entered a security office where Worker and correctional officer Howard Houston were located. Shanks testified that it was his intention, in keeping with his practice, to greet the two officers. From this point forward, testimony describing the interaction between Worker, Perry, and Shanks is conflicting.

{6} We begin with the viewpoint of Perry and Shanks as the version least favorable to Worker. Perry recounted that he greeted Houston, who was polite but seemed nervous, while Shanks approached Worker. Worker refused Shanks's offered handshake. When Perry moved to greet Worker, Worker rose up part way from a seated position behind a desk and forcefully slapped a stack of five to ten coins toward both visitors, which resulted in the coins striking them both on the legs. Perry testified that after the coins struck him, he asked Worker, "What's that all about?" and that Worker replied, "That's for our fucking raises." Shanks also testified that Worker said, "That's for our fucking raises." Perry then asked the others to leave the room so that only he, Shanks, and Worker remained. Again, Perry asked what this was all about and Worker replied, "That's how much you're fucking worth to us." Perry testified that he was defensive and concerned that a physical fight would take place and described Worker as angry. Shanks testified that, but for his position and self control, he could have responded physically to this provocation. Perry told Worker that he should consider looking for another job if he behaved so unprofessionally, to which Worker replied with something similar to, "I like my job," and "I don't care who you are." At this point, Perry attempted to describe his efforts to obtain pay raises for officers, to which Worker replied, "I don't believe you." Shanks told Worker that his behavior was a disgrace to the Department, to which Worker replied, "You're a disgrace, too." At this point, the interaction ended when either Shanks or Perry opened the office door, allowing re-entry of those waiting just outside. Perry told Langston to place Worker on administrative leave. Perry testified that inmates were nearby during the confrontation.

{7} Worker's version of these events is strikingly different. Worker denied slapping or striking the coins at Perry and Shanks but claimed that he only "nudged or dropped" them off the desk, a gesture he admitted was probably "not prudent." He denied any advance planning, claiming it was a "spur of the moment" act. He said he had only been planning to ask Perry about officers being allowed to observe National Correctional Officers Day. He also denied cursing at Perry, saying that he had said, "thanks for our pay raise," in a normal, conversational tone, remaining calm and using no profanity. Worker testified that it was only Perry and Shanks who were angry and hostile, that Perry raised his voice and Shanks was "trying to crowd me." He could not understand why they were so upset. Worker had previously claimed in a statement provided to a department investigator that he had dropped the coins for "some reason, still unknown to me," but on cross examination he stated that, upon reflection, "it became clear" to him that he was "indignant" at the time over the lack of a pay raise. Worker testified that at the time of the incident, he was a supervisor in the minimum restrict unit portion of Central.

{8} Others who were in the security office at the time also testified. Houston, who had been seated nearby, testified that Worker had dropped the coins, not slapped them, and had not cursed, but only sarcastically said, "Thanks for my raise." Houston said that Perry and Shanks went "into an uproar about the whole deal" and that it was Perry who raised his voice and was angry. On cross examination, Houston admitted that Worker was a "good guy," a work friend, and his supervisor, and that Houston admired what Worker had done. Houston also admitted to being unhappy working at the Department and was contemplating resigning. Captain Bill Marez testified that he was standing behind Perry and Shanks when he heard the coins strike the floor. He heard Perry say something like, "What was that for?" and heard Worker, who he described as angry with a red face, say in a raised voice,

"That's what I think of your raise," but did not recall any profanity. Finally, Langston testified that he saw Worker swipe the coins at Perry and Shanks and saw the coins strike them in the legs. Langston thought that he heard Worker say, "That's what I think of your fucking raise," although he had excluded the profanity from his prior descriptions and was "not one hundred percent" sure that Worker had used profanity.

{9} The warden at Central, Ron Lytle, testified that he asked Worker what had happened immediately after the incident. Both Lytle and Langston testified that Worker replied, "I did what I had to do and now you have to do what you have to do." Worker denied saying this, but claimed instead that he "didn't understand why they were so upset" and "didn't know what was going on" so he "had nothing to say." After the incident, Langston took Worker's official identification, and senior staff, including Perry and Shanks, escorted Worker from the facility. Lytle placed Worker on administrative leave. After receiving statements from witnesses and providing Worker with an oral response hearing, Lytle issued a notice of final action dismissing Worker from the Department.

II. PROCEDURAL POSTURE

{10} Worker appealed his termination to the Personnel Board. The Personnel Board's ALJ conducted a two-day hearing, at which Worker testified and was represented by counsel. The parties stipulated that the Personnel Board had jurisdiction over Worker's appeal and thus agree that Worker was a classified state employee subject to the Personnel Act. *See* NMSA 1978, §§ 10–9–1 to –25 (1961, as amended through 1999). The ALJ made findings of fact that Worker had forcefully struck the coins at Perry and Shanks and had cursed at them. The ALJ also made conclusions of law that Worker's actions violated the Department's code of ethics, that dismissal of Worker was justified without the need for progressive discipline, and that Worker's speech was not protected by the First Amendment. Worker filed exceptions to the ALJ's recommended decision with the Personnel Board. The Personnel Board, however, adopted the ALJ's findings and conclusions and affirmed Worker's dismissal. Worker appealed to the district court under Section 10–9–18(G) (allowing appeals of Board decisions), NMSA 1978, 39–3–1.1(C) (1999) (permitting judicial review of final administrative agency decisions), and Rule 1–074 NMRA (governing administrative appeals to the district court). The district court affirmed Worker's termination.

{11} Worker timely sought a writ of certiorari from this Court, which we granted. *See* § 39–3–1.1(E) (permitting a party to petition the Court of Appeals for a writ of certiorari to review the district court's decision in an administrative appeal); Rule 12–505(B) NMRA (same).

III. DISCUSSION

{12} We first set out the standard of review applicable to appeals of administrative decisions. We then address Worker's contention that progressive discipline was mandatory in this case as a matter of law. Finally, we address Worker's claim as to lack of notice, and his connected arguments on disparate discipline, the paramilitary structure of the Department, and civil battery.

A. Standard of Review

{13} In reviewing a decision of the Personnel Board, we apply a whole-record standard of review. *Martinez v. N.M. State Eng'r Office*, 2000–NMCA–074, ¶ 31, 129 N.M. 413, 9 P.3d 657. "Like the district court, we independently review the entire record of the administrative hearing to determine whether the Board's decision was arbitrary and capricious, not supported by substantial evidence, or otherwise not in accordance with law." *Id.* An administrative ruling is arbitrary and capricious if it is "unreasonable or without a rational basis, when viewed in light of the whole record," and we must avoid substituting our own judgment for that of the agency. *Archuleta v. Santa Fe Police Dep't, ex rel., City of Santa Fe*, 2005–NMSC–006, ¶ 17, 137 N.M. 161, 108 P.3d 1019. Whether the Board's actions were contrary to law is a question that we review de novo. *Id.* ¶ 18. The burden is on the party challenging the agency decision to

demonstrate grounds for reversal. *Regents of Univ. of N.M.*, 1998–NMSC–020, ¶ 17, 125 N.M. 401, 962 P.2d 1236.

B. Just Cause And Progressive Discipline

{14} Worker contends that progressive discipline was required in his case. We begin by reviewing the concept of just cause for discipline and then discuss progressive discipline.

{15} Employees subject to the Personnel Act who have completed a probationary period may only be disciplined for just cause. 1 NMAC 7.11.10(A) (2002). Our review necessarily includes an evaluation of whether just cause existed for discipline, including termination, because the Board "must decide whether agency action was based on just cause" and we are reviewing the Board's action. *Gallegos v. N.M. State Corrs. Dep't*, 115 N.M. 797, 802, 858 P.2d 1276, 1281 (Ct.App.1992) (internal quotation marks and citation omitted). Just cause to terminate an employee covered by the Personnel Act requires that the Board determine both that the employee engaged in misconduct and that the discipline was appropriate and reasonable in light of the misconduct. *Martinez*, 2000–NMCA–074, ¶ 30, 129 N.M. 413, 9 P.3d 657. Just cause to terminate exists "when an employee engages in behavior inconsistent with the employee's position and can include, among other things, incompetency, misconduct, negligence, insubordination, or continuous unsatisfactory performance." *Id.* ¶ 32; *see also* 1 NMAC 7.11.10(B) (defining just cause similarly). The question of whether behavior "constituted misconduct so as to provide 'just cause' for the discipline of a state employee is a question of fact to be determined from all the attendant circumstances in each case." *Romero v. Employment Sec. Dep't*, 102 N.M. 71, 74, 691 P.2d 72, 75 (Ct.App.1984). We review an agency's findings by examining the entire record, but we must affirm a decision if it is supported by substantial evidence. *Regents of Univ. of N.M.*, 1998–NMSC–020, ¶ 17, 125 N.M. 401, 962 P.2d 1236.

{16} The ALJ found that progressive discipline was not required for Worker's "egregious action" that provided just cause for termination. We agree. The findings were supported by substantial evidence, and they support the determination that just cause existed to terminate Worker without first employing lesser forms of discipline.

{17} The evidence as to Worker's behavior in the security office was conflicting. Worker's testimony was self-serving overall, and the record fairly supports an inference that Worker was untruthful. *See Gallegos*, 115 N.M. at 801, 858 P.2d at 1280 (concluding that no substantial evidence supported a finding of misconduct where no evidence existed to support an inference that the employee was untruthful). Houston's testimony supporting Worker was effectively impeached. Perry and Shanks both told identical stories and were in the best position to see and hear Worker. Langston and Marez, who were nearby, generally supported the version recounted by Perry and Shanks, but were either unsure of or could not recall the use of profanity. Langston's testimony supported the notion that Worker was aware of the tour and was planning some type of confrontation. On the other hand, Worker contended that he had been a labor activist and advocate for better pay and hours for correctional officers, contending that this could motivate retaliation by the Department against him. In this case, however, such evidence cuts both ways—not only is it a potential motivation for the Department to fire him, but his pro-labor activities also provide a plausible motive for the very misconduct of which Worker was accused. Based upon the entire record, there was substantial evidence for the fact finder in this case to have found that Worker cursed at Perry and Shanks and deliberately slapped or struck the coins, causing them to strike Perry and Shanks.

{18} Having determined that the findings are properly supported, we further conclude that the ALJ correctly applied the law to the facts in deciding that just cause existed for termination without the need for progressive discipline. Both the Personnel Board Rules and the Department's own rules promote the concept of progressive discipline, which means that increasing levels of discipline should be used in an effort to retain the

employee and to correct deficient performance or behavior. *See* 1 NMAC 7.11.8(B) (2001) (stating that progressive discipline "shall be used whenever appropriate"). Progressive discipline, however, need not be used in all cases. *Id.* (stating that "[t]here are instances when a disciplinary action, including dismissal, is appropriate without having imposed a less severe form of discipline"). The Department's own rules state that "some misconduct is so severe as to not warrant progressive discipline and immediate dismissal is the only appropriate action."

{19} Several New Mexico cases have evaluated progressive discipline and its relation to the concept of just cause for discipline. In accord with the Board rules, our cases have "recognized that progressive discipline is not required before termination when the conduct for which an employee is terminated constitutes just cause to terminate." *Martinez,* 2000–NMCA–074, ¶ 42, 129 N.M. 413, 9 P.3d 657. The question then becomes precisely what conduct provides just cause to terminate, which again requires a case-by-case evaluation. *Romero,* 102 N.M. at 74, 691 P.2d at 75.

{20} Other cases provide guidance in this evaluation. In the context of a denial of unemployment insurance benefits, our Supreme Court has focused on the importance of willful misconduct contrasted with simply poor performance, concluding that an employer had to show compliance with progressive discipline policies where only unsatisfactory job performance was at issue and there was no substantial evidence to support a finding of willful misconduct. *Chicharello v. Employment Sec. Div.,* 1996–NMSC–077, ¶ 4, 122 N.M. 635, 930 P.2d 170. The case of *New Mexico Regulation & Licensing Department v. Lujan,* 1999–NMCA–059, 127 N.M. 233, 979 P.2d 744, teaches that socially inappropriate conduct may not rise to the level of just cause for termination, particularly where there is a culture of misbehavior. There, a worker had engaged in a pattern of "foul language, sexually charged misconduct, and outbursts of anger." *Id.* ¶ 2. The hearing officer in that case found the conduct was demeaning and disrespectful, but found no just cause for dismissal in light of "other conduct occurring at the office, all of it attributable to lack of effective management." *Id.* ¶¶ 4, 18, 19 (internal quotation marks omitted). We agreed, based upon the whole record, that there was no just cause for dismissal and that progressive discipline was required. *Id.* ¶ 21. *Martinez,* on the other hand, instructs that hostile or threatening behavior clearly provides just cause for termination. In *Martinez,* a worker failed to control his mental illness and became erratic and threatening at work, including threatening the life of a supervisor over the telephone. 2000–NMCA–074, ¶¶ 9–15, 129 N.M. 413, 9 P.3d 657. There, we noted that the employee was dismissed for "insubordination, misconduct, and threats of physical violence against his supervisor, all of which clearly fall within the category of conduct constituting just cause for dismissal." *Id.* ¶ 42. We found there that the conduct in question was "the type of serious 'misconduct' which does not have to be tolerated by an employer and which justifies immediate dismissal." *Id.* We have held that "the term 'misconduct' as contemplated by the rule is not limited to circumstances of intentional wrongdoing, but also embraces an employee's disregard of proper behavior which an employer has a right to expect of an employee." *Romero,* 102 N.M. at 74, 691 P.2d at 75. Our cases have also expressly noted that supervisory staff clearly affect the efficiency of the agency and serve as examples for subordinates. *Id.* Finally, our Supreme Court has recently stated that we must be properly deferential to the internal disciplinary practices of an agency. *Archuleta,* 2005–NMSC–006, ¶ 28, 137 N.M. 161, 108 P.3d 1019 (stating that "[t]he 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" (internal quotation marks and citation omitted)).

{21} Based upon the foregoing, it is clear that whether progressive discipline was required turns on whether there was just cause for termination. We think just cause for termination was properly found for three reasons. First, unlike the circumstances in *Lujan,* here the hearing officer found just cause for dismissal and also did not find any

culture of misbehavior or mismanagement mitigating Worker's actions. 1999–NMCA–059, ¶ 18, 127 N.M. 233, 979 P.2d 744. The Personnel Board and the district court each affirmed this conclusion; while we independently determine whether just cause existed, we find it noteworthy that the ALJ, the Personnel Board, and district court all concluded that just cause for termination existed. We agree and, based upon the standard articulated in *Archuleta*, see no clear abuse of authority. Second, we see this case as more akin to *Martinez*, in which aggressive, threatening, and hostile behavior "clearly fall[s] within the category of conduct constituting just cause for dismissal." 2000–NMCA–074, ¶ 42, 129 N.M. 413, 9 P.3d 657. Several factors inform this conclusion: (1) the confrontation was planned and intentional, (2) while Worker was on duty, (3) as a supervisor, (4) committing a civil battery on his superiors, (5) using hostile and foul language, and (6) all of which come close to causing a physical fight. We think these combine to overcome Worker's long positive record with the Department. Third, unlike *Chicharello*, here there is substantial evidence to support a finding of misconduct, and the Department was not attempting to correct merely unsatisfactory job performance. 1996–NMSC–077, ¶ 4, 122 N.M. 635, 930 P.2d 170. Worker engaged in misconduct, and the Department's response to that conduct was neither unreasonable, *Martinez*, 2000–NMCA–074, ¶ 30, 129 N.M. 413, 9 P.3d 657, nor a clear abuse of authority, *Archuleta*, 2005–NMSC–006, ¶ 28, 137 N.M. 161, 108 P.3d 1019. Because just cause existed to terminate Worker, progressive discipline was not necessary. *Martinez*, 2000–NMCA–074, ¶ 36, 129 N.M. 413, 9 P.3d 657 (stating that "[o]nce it is determined that just cause exists to terminate, termination is appropriate under the Board Rules"). In sum, we find no clear abuse of authority, no contravention of our law, and no capriciousness in the Personnel Board's determination that just cause existed to discipline Worker and to terminate him without imposing progressive discipline.

C. Lack of Notice and Associated Arguments

{22} Initially in his appeal to the Personnel Board, Worker claimed he was not on notice that his actions could result in termination. This reference to notice was also contained in the list of Worker's contested issues in the joint stipulated pre-hearing order. The Department contends that such an argument was not preserved for our review and also lacks merit. After thoroughly reviewing the record, we agree with the Department on these points. Worker recites lack of notice in the heading of his first issue on appeal to this Court, but cites no authority in reference to any notice requirement. Worker is not claiming a procedural right to notice, such as notice of the hearing or the allegations against him. Instead, we discern that the substance of his argument is aimed at making the following points: (1) that he was subjected to disparate discipline, (2) that the ALJ improperly relied on the purportedly paramilitary nature of the Department to find just cause for termination, and (3) that striking Perry and Shanks with the coins was not "meaningfully" a civil battery. We reject each contention in turn after discussing Worker's attempt to argue lack of notice.

{23} We generally will not review a matter not passed upon by the trial court, which in this case was either the ALJ sitting as the trier of fact, or the Personnel Board as the ultimate decision maker. Rule 12–216(A) NMRA. While the formal rules of procedure need not all be followed in administrative proceedings, we do require preservation of issues raised on appeal from an administrative decision. *Garza v. State Taxation & Revenue Dep't*, 2004–NMCA–061, ¶¶ 7, 8, 135 N.M. 673, 92 P.3d 685 (evaluating whether an issue had been preserved in an administrative hearing). Worker made no notice argument before the ALJ or in his statement of exceptions to the Personnel Board. Indeed, in his opening statement, Worker stated that the case involved only "three of the seven" issues raised in the joint stipulated pre-hearing order. Notice was not one of the three arguments. The only argument in the hearing regarding notice was from the Department, not Worker. Worker may not preserve an argument raised by his opponent. *Woolwine v. Furr's, Inc.*, 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct.App.

1987) (stating that "[t]o preserve an issue for review on appeal, it must appear *that appellant* fairly invoked a ruling of the trial court on the same grounds argued in the appellate court" (emphasis added)). In fact, Worker expressly conceded that if the allegations were true, perhaps even severe discipline would be justified and at the hearing stated that notice, at least of the contents of the code of ethics, was "not an issue."

{24} We decline to review an issue when Worker did not invoke a ruling of the ALJ thereon. Moreover, even if this argument were preserved for our review, Worker provides no authority for his argument that he lacked notice of the border between acceptable and unacceptable behavior. 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).

{25} Unlike his notice argument, however, Worker did seek to show that he was subjected to disparate discipline. In attempting to demonstrate this, he elicited the following testimony. First, Worker offered evidence that a correctional officer at Central had been coached (but not disciplined) for refusing to shake Perry's hand. Second, he obtained testimony that another officer had asked Perry, off-duty and in a noisy bar, an arguably provocative question and had inadvertently dropped a pitcher of beer near Perry. This did not result in any discipline and Perry denied that any beer was thrown on him. Finally, in response to testimony alluding to a purportedly similar incident, the Department introduced a letter showing that a correctional officer had been reprimanded for calling a higher ranking officer an "idiot" in the presence of others and leaving his post before the end of the shift. The ALJ found no disparate discipline, and there is substantial evidence supporting this finding.

{26} We see none of these actions as substantially similar to Worker's because none involved the combination of hostile words and acts tending to provoke a physical altercation by an on-duty supervisor. As we have discussed, the findings provided just cause to dismiss Worker. Thus, Worker's reliance on disparate discipline cases is misplaced. *See In re Termination of Kibbe,* 2000-NMSC-006, ¶ 19, 128 N.M. 629, 996 P.2d 419 (holding that termination of a worker was arbitrary where there was a "drastic difference" in treatment of a worker compared to another for "substantially similar" conduct in the context of public school employees). And even where other officers are similarly situated, they may be disciplined differently based upon the severity of the conduct, the circumstances, and the consequences of the conduct. *Archuleta,* 2005-NMSC-006, ¶¶ 24, 32, 137 N.M. 161, 108 P.3d 1019 (explaining that "[e]ven similarly situated employees may be disciplined differently depending on the severity of the conduct" and summarizing New Mexico disparate discipline cases).

{27} Next, we consider Worker's concern about the ALJ's reliance on the paramilitary nature of the Department. Warden Lytle, who had served in the Navy, described the paramilitary nature of the Department, including its adherence to a chain of command structure. He spoke at length about the need for obedience and respect in a prison's inherently dangerous environment and described the Department as "very similar" to the military. Lytle testified that it was his decision to dismiss Worker and his decision was based upon his fear that if he did not use the highest discipline then more similar incidents would occur, leading to a breakdown in staff cohesion, respect by inmates, and the ultimate safety and order within the facility. The ALJ found that the Department is a paramilitary organization and relied on this finding in its conclusion that just cause existed to terminate Worker. This finding was adopted by the Personnel Board.

{28} We consider this finding superfluous and affirm without passing on this paramilitary argument for two reasons. First, we may affirm the ruling from below on a different ground, as long as doing so is not unfair to the appellant and there is substantial evidence supporting the ground we rely on. *Meiboom v. Watson,* 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154. We

have already concluded that substantial evidence supports a finding that just cause for termination existed. We think the finding that the Department is paramilitary in style is of no consequence to an ultimate determination of just cause for discipline. Worker's arguments at the hearing disputed both the factual basis for discipline and the existence of just cause, so we see no unfairness to Worker in holding that just cause existed in a more generalized sense. Second, a finding that is irrelevant or not necessary to support the judgment may be disregarded. *Martinez,* 2000–NMCA–074, ¶ 43, 129 N.M. 413, 9 P.3d 657. Again, we conclude that the paramilitary basis was not essential to the conclusion that just cause existed. We recognize that the ALJ may have concluded that the prison environment demanded a higher degree of courtesy, respect, and obedience from Worker than would more traditional types of state work. However, we need not pass upon this question of paramilitary structure because we conclude that Worker's behavior would meet the standard of just cause for termination in any state organization. We express no opinion about whether the Department is or is not paramilitary in nature and the impact this may have on its disciplinary practice.

{29} Finally, we are not persuaded by Worker's argument that he did not commit battery. Worker elicited testimony that no injury or harm was likely from the coins being launched at Perry and Shanks. Worker now argues that he did not "meaningfully" commit a civil battery. He is mistaken. It is black-letter law that causing an offensive touching, even indirectly to another's clothing and not resulting in injury, is the tort of battery. *State v. Ortega,* 113 N.M. 437, 440–41, 827 P.2d 152, 155–56 (Ct. App.1992) (describing tortious battery as including causing indirect contact with a person's clothing and applying these concepts to criminal battery). Worker's citation to criminal battery cases notwithstanding, his actions constituted a tort, and it was proper for the ALJ to have so found and used in its consideration of Worker's conduct.

IV. CONCLUSION

{30} The district court's decision affirming Worker's termination from the Department is affirmed.

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

WE CONCUR: A. JOSEPH ALARID and IRA ROBINSON, Judges.

2006-NMCA-023

129 P.3d 167

STATE of NEW MEXICO, ex rel. CHILDREN, YOUTH AND FAMILIES DEPARTMENT, Plaintiff–Appellant,

v.

DONNA J., Michael H., and Tommy J. II, Respondents,

Martha K. and Anthony K., Intervenors,

Elsie N., Intervenor/Appellee.

In the Matter of Jessica H. and Elizabeth N., Children

No. 25,872.

Court of Appeals of New Mexico.

Jan. 12, 2006.

Children, Youth & Families Department, Rebecca J. Liggett, Santa Fe, NM, for Appellant.

Atkinson & Kelsey, P.A., Patrick L. McDaniel, Albuquerque, NM, for Appellee.

Karen L. Townsend, Aztec, NM, Guardian Ad Litem.

F. Chester Miller III, PC, F. Chester Miller III, Farmington, NM, for Respondent Donna J.

OPINION

WECHSLER, Judge.

{1} In this abuse and neglect case, with child custody proceedings in both Texas and New Mexico, we address whether exclusive, continuing jurisdiction remains in the Texas court after the father dies and the mother moves to New Mexico with the child, but is later incarcerated in Texas at the time the child's grandmother files a petition to modify the Texas court's custody order. We hold that the mother resided in Texas under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA), NMSA 1978, §§ 40–10A–101 to –403 (2001), and affirm the ruling of the district court granting full faith and credit to the orders of the Texas court.

FACTUAL AND PROCEDURAL BACKGROUND

{2} The jurisdictional background of this case is not disputed. Respondent Donna J. is the mother of Elizabeth N. Raymond N., deceased, is the father. In a consolidated proceeding, initiated by Father's paternity and Mother's divorce petitions, a Texas district court declared Father's paternity and ruled that Mother and Father were never married. In a final order signed on July 19,

2001, it appointed both parents as joint managing conservators of Elizabeth and ordered that Mother had the right to establish Elizabeth's primary residence in one of two Texas counties.

{3} Thereafter, Mother moved between Texas and New Mexico several times. On April 30, 2002, Father filed a motion for the Texas court to enforce its final order because of Mother's violations. In May 2002, Mother, Elizabeth, and Mother's other child, Jessica H., established permanent residence with Mother's father in New Mexico.

{4} Father was murdered on September 2, 2002. Mother was arrested on November 19 and returned to Texas on November 20, 2002. Mother entered a plea to first degree murder and received a sentence of fifteen years confinement by the Texas Institutional Division, less 486 days credit for time spent in the county jail.

{5} During the time that Mother was incarcerated in Texas, legal custody proceedings ensued in both Texas and New Mexico. The existing Texas proceeding, which had been initiated by Father's paternity petition and Mother's divorce petition, was dismissed for lack of prosecution on January 21, 2003. Then, on March 17, 2003, in the same proceeding, Elsie N., Elizabeth's paternal grandmother (Grandmother), filed a petition to modify the parent-child relationship with the Texas court, asking for modification of the final order and asserting that her appointment as sole managing conservator would serve Elizabeth's best interest. After Grandmother amended her petition and after notice to Mother and Elizabeth's maternal grandmother, the Texas court held a hearing and issued temporary orders on August 6, 2003, appointing Grandmother temporary sole managing conservator and appointing Mother temporary possessory conservator of Elizabeth. The orders were to "continue in force until the signing of the final order or until further order of [the][c]ourt."

{6} During the same general time period in New Mexico, the Children, Youth and Families Department (CYFD) took protective custody of Elizabeth and Jessica and, on June 25, 2003, filed an abuse and neglect petition in the district court. Grandmother and her niece and niece's husband, Martha K. and Anthony K., intervened so that they could be considered for placement or custody of Elizabeth. As Mother requested, CYFD placed Elizabeth and Jessica with other, unrelated foster parents. The case proceeded with judicial reviews and permanency hearings. Grandmother participated in the proceedings by telephone and was represented by counsel.

{7} At the end of 2004 and in early 2005, the separate proceedings came to a head and merged. The Texas case was set for final trial on February 4, 2005. After notice of this setting had been received by CYFD, on December 7, 2004, the district court denied CYFD's motion to terminate parental rights because of the unresolved placement issues and ordered the parties to mediate to attempt to agree on the terms of an open adoption. The Texas court held its hearing. Despite notice, Mother did not appear. The Texas court granted Grandmother's request to modify its original custody order as in the best interest of Elizabeth and appointed Grandmother as Elizabeth's sole managing conservator with no possessory conservator. It stated that it retained exclusive jurisdiction over the case because Mother unlawfully removed Elizabeth from the jurisdiction of the court in violation of the court's valid order.

{8} Elizabeth's foster parents intervened in the Texas case and requested a new trial. The Texas court dismissed their petition, stating that although the New Mexico court had temporary jurisdiction to make orders for Elizabeth's immediate protection, at the time the New Mexico court placed Elizabeth with CYFD, Grandmother's petition was pending in the Texas court, and the Texas court "had continuing, exclusive jurisdiction over the child as a result of prior proceedings" under the UCCJEA, Tex. Family Code Ann. § 152.202 (Vernon 2002); *see* NMSA 1978, §§ 40–10A–101 to –403. The Texas court concluded that the New Mexico orders entered after the New Mexico court had actual notice of the Texas proceedings on August 13, 2003, were void for lack of jurisdiction. The Texas court determined that it was not necessary for it to communicate with

the New Mexico court based on its determination that it had continuing, exclusive jurisdiction.

{9} The next actions in the New Mexico court led to this appeal. Grandmother, Martha K., and Anthony K. filed a motion to dismiss as to Elizabeth for lack of jurisdiction under the UCCJEA. Grandmother filed a notice of registration of the Texas custody order and a verified motion to enforce the Texas custody order and for immediate transfer of physical custody. After conducting a hearing, the district court granted Grandmother's motion to dismiss. It concluded that the Texas court had continuing, exclusive jurisdiction, had not relinquished jurisdiction, and did not lose jurisdiction because Mother resided in Texas due to her incarceration in a Texas correctional facility. It afforded full faith and credit to the orders of the Texas court and, based on its jurisdictional conclusion and the prohibition against simultaneous child custody proceedings, set aside its orders except as to those issued under its emergency jurisdiction. It ordered the transfer of the physical custody of Elizabeth "no sooner than three and no later than five days after the child's school year ends." CYFD appealed. This Court has held CYFD's application for a stay of the district court's judgment under advisement pending further order.

PKPA AND UCCJEA

{10} Article IV, Section 1 of the United States Constitution requires that each state give full faith and credit to the judicial proceedings of other states. In furtherance of this constitutional provision, Congress enacted the Parental Kidnaping Prevention Act (PKPA), 28 U.S.C. § 1738A (2000), to ensure state compliance with the child custody orders of other states. *See State ex rel. Valles v. Brown,* 97 N.M. 327, 330, 639 P.2d 1181, 1184 (1981) ("The PKPA is intended to eliminate [parental kidnaping] by requiring states to give full faith and credit to custody decrees."). The UCCJEA was designed as a uniform state law to complement the PKPA and to allow states to fulfill their full faith and credit requirements. *See* UCCJEA prefatory note, 9 U.L.A. 650 (1999). Its purposes follow that of the Uniform Child Custody Jurisdiction Act (UCCJA), 9 U.L.A. 261 (1999), to provide jurisdictional clarity and to promote interstate cooperation. UCCJA prefatory note, 9 U.L.A. at 264. Both New Mexico and Texas have adopted the UCCJEA and have largely identical provisions. *Compare* NMSA 1978, §§ 40–10A–101 to –403, *with* Tex. Family Code Ann. §§ 152.001–152.317 (Vernon 2002 & Supp.2005).

{11} Section 40–10A–206(a) of the New Mexico UCCJEA structures our analysis. It prohibits a New Mexico court from exercising jurisdiction under the UCCJEA, except in emergency circumstances, if an action has been commenced in another state "having jurisdiction substantially in conformity with" the UCCJEA unless the other state's proceeding is terminated or stayed. *Id.* The New Mexico district court determined that Section 40–10A–206(a) precluded its jurisdiction. If the Texas court had exclusive, continuing jurisdiction as contemplated by Section 202 of the UCCJEA, it was acting "in conformity with" the UCCJEA. We review the district court's determination by interpreting the UCCJEA, a task we perform de novo. *State v. Rivera,* 2004–NMSC–001, ¶ 9, 134 N.M. 768, 82 P.3d 939.

{12} Section 202 of the UCCJEA addresses the exclusive, continuing jurisdiction of the courts of the state entering a child custody order. Under Section 202(a), a court that enters a child custody order has "exclusive, continuing jurisdiction" over its order until (1) a court of the same state "determines that neither the child, the child's parents, and any person acting as a parent do not have a significant connection with [the][s]tate and that substantial evidence is no longer available in [the][s]tate concerning the child's care, protection, training, and personal relationships;" or (2) a court of the same or another state "determines that the child, the child's parents, and any person acting as a parent do not presently reside in [the][s]tate."

{13} Under Section 202, the Texas court had exclusive, continuing jurisdiction as of March 17, 2003, when Grandmother filed her petition to modify the court's original custody order. The Texas court had entered

the initial custody order concerning Elizabeth in July 2001 and had the jurisdiction to do so under Section 201 of the UCCJEA. This order, the subject of Grandmother's petition, triggered the Texas court's exclusive, continuing jurisdiction under Section 202. After September 2, 2002, even though Father had died and Mother and Elizabeth had left Texas, the Texas court did not make any determination, as part of its exclusive ability under Section 202(a)(1), that there was a lack of significant connection for Texas to continue its jurisdiction. Under Section 40–10A–202(a)(2) and the Texas equivalent, Section 155.202(a)(2), after Father died and Mother and Elizabeth moved to New Mexico, either the Texas or the New Mexico court had the authority to make a determination that Elizabeth and Mother no longer resided in Texas. Neither court made such a determination.

{14} We do not agree with CYFD that the Texas court lost its exclusive, continuous jurisdiction when Father died because Mother and Elizabeth had already moved from Texas. CYFD relies on the Comment to Section 202 by the National Conference of Commissioners on Uniform State Laws, which states the intention that "unless a modification proceeding has been commenced, when the child, the parents, and all persons acting as parents physically leave the State to live elsewhere, the exclusive, continuing jurisdiction ceases." UCCJEA § 202 cmt., 9 U.L.A. at 674. Although the Comment stresses the importance of physical presence to exclusive, continuing jurisdiction, the UCCJEA language specifically requires action by either the home or another state before exclusive, continuing jurisdiction in the home state ceases. Section 40–10A–202(a); *see In re Lewin,* 149 S.W.3d 727, 736 (Tex.App.2004) (stating that "[a] court's exclusive continuing jurisdiction does not vanish immediately once all the parties leave the state," but that jurisdiction remains with the initial court until a judicial determination is made under UCCJEA § 202); *C.M. v. B.A.* (*In re Parenting of A.B.A.M.*), 2004 MT 222, ¶¶ 4, 8–11, 26, 322 Mont. 406, 96 P.3d 1139, ¶¶ 4, 8–11, 26 (holding that Pennsylvania court had jurisdiction after the father moved to Washington, the mother and the child moved to Pennsylvania, and the Pennsylvania court, after a hearing, determined that the parties no longer resided in Montana). We understand the basis for this requirement. Parents can easily move back and forth between states as Mother did after the Texas court's July 2001 order. An automatic loss of jurisdiction, without any factual determination, would add uncertainty, diminish the oversight ability of the courts, and increase conflicts between states. These results are contrary to the purposes of the UCCJEA. *See generally* UCCJEA prefatory note, 9 U.L.A. at 651–53. Because no determination under Section 202 was made in this case, the Texas court did not automatically lose its exclusive, continuing jurisdiction when Father died.

{15} Nor does the Texas court's dismissal in January 2003 have bearing on our analysis. The Texas court obtained exclusive, continuing jurisdiction with its July 2001 custody order. The UCCJEA does not require that the case in which the initial custody order is entered be ongoing when a later petition is filed. *See* Section 40–10A–202. The district court properly looked to the Texas court's jurisdiction at the time Grandmother filed her petition to ascertain the nature of the Texas court's jurisdiction.

{16} The Texas court had exclusive, continuing jurisdiction under Section 40–10A–202 when Grandmother filed her petition to modify because, by that time, Mother resided in Texas as a result of her incarceration. CYFD contends that Mother's incarceration does not meet the UCCJEA requirement of residence to justify exclusive, continuing jurisdiction. She argues that although the Comment indicates that "reside" for the purposes of Section 202 does not mean "technical domicile," it nevertheless requires a volitional act. UCCJEA § 202 cmt., 9 U.L.A. at 674. She maintains that involuntary relocation, such as incarceration and service in the armed forces, does not meet the Section 202 definition. We do not agree under these circumstances.

{17} The purposes of the UCCJEA do not require domicile or volition, although evidence consistent with intent to reside is relevant to the analysis. As CYFD points out, the Comment states that "[t]he phrase 'do

not presently reside' is not used in the sense of a technical domicile." UCCJEA § 202 cmt., 9 U.L.A. at 674. It states that intent of Section 202(a)(2) is to address whether the persons named "continue to actually live within the [s]tate." *Id.* Actually living in the state does not import the volition or intent argued by CYFD and does not exclude living in a prison. A requirement of volition or intent to reside would be contrary to the purpose of the UCCJEA to discourage continuing child custody controversies because it would invite litigation of the issue. *See In re McCoy,* 52 S.W.3d 297, 302 (Tex.App.2001) (stating that the UCCJEA has the same objectives as the UCCJA including discouraging continued controversies over child custody).

{18} The cases relied on by CYFD that were decided under the UCCJEA do not require a different result. CYFD quotes *In re Brilliant,* 86 S.W.3d 680, 688 (Tex.App. 2002), to analogize incarceration to service in the armed forces, stating that "[i]n other contexts, the Family Code contemplates that time spent by a Texas domiciliary outside Texas while in the service of the armed forces is considered residence in Texas." The same provision of the Texas Family Code has no application to this case. Moreover, the *Brilliant* case concerned the initial jurisdiction of the court under Section 201 of the UCCJEA and the issue of whether the child was temporarily absent from Texas for reasons other than military service. *In re Brilliant,* 86 S.W.3d at 682, 686–90. In this case, we are concerned with the exclusive, continuing jurisdiction of the Texas court; the Texas court's initial jurisdiction was established when Father and Mother respectively filed their petitions for paternity and divorce. CYFD also cites *In re Brilliant* and *Vannatta v. Boulds,* 2003 MT 343, 318 Mont. 472, 81 P.3d 480, to indicate that courts consider factors in addition to physical presence in interpreting the UCCJEA. But, as we have mentioned, *In re Brilliant* does not involve Section 202. In *Vannatta,* the court used evidence of the child's activities to reflect her residence. 2003 MT 343, ¶¶ 4, 16, 318 Mont. 472, 81 P.3d 480. The case demonstrates that evidence of volitional acts can indicate residence, not that the absence of such acts indicates lack of residence.

{19} We lastly address CYFD's contention that the Texas court's jurisdiction results in a custody determination contrary to the purpose of the UCCJEA of promoting cooperation between states "to ensure that a custody decision is rendered in the state that can better determine the best interest of the child." The UCCJEA pursues that purpose by encouraging communication between courts of different states concerning proceedings and enabling courts to allow testimony to be taken, hearings held, and information exchanged between states. Sections 40–10A–110 to –112. However, as the UCCJEA Prefatory Note states, "[t]he UCCJEA eliminates the term 'best interests' in order to clearly distinguish between the jurisdictional standards and the substantive standards relating to custody and visitation of children." UCCJEA prefatory note, 9 U.L.A. at 652. At this stage of this case, the jurisdictional standards are at issue, and we apply the UCCJEA jurisdictional provisions to reach a decision.

CONCLUSION

{20} Because we determine that the Texas court retained exclusive, continuing jurisdiction and the New Mexico court therefore did not have subject matter jurisdiction, we affirm. We deny CYFD's application for a stay.

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

WE CONCUR: CYNTHIA A. FRY and IRA ROBINSON, Judges.

2006-NMCA-029

130 P.3d 198

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

v.

JOSEPH M., Respondent–Appellant.

In the Matter of Victor M. and Dominic M., Children.

No. 25,471.

Court of Appeals of New Mexico.

Jan. 18, 2006.

Rebecca J. Liggett, Children's Court Attorney, Children, Youth & Families Department, Santa Fe, NM, for Appellee.

Mary Jo Snyder, Santa Fe, NM, for Appellant.

OPINION

VIGIL, Judge.

{1} The opinion filed on December 12, 2005, is hereby withdrawn, and the following opinion is substituted therefor. In other respects, the motion for rehearing is denied.

{2} Joseph M. (Father) appeals the termination of his parental rights. He argues that the district court's decision is not supported by evidence that the court could have properly found to be clear and convincing. We agree and reverse.

BACKGROUND

1. NEGLECT/ABUSE PROCEEDINGS

{3} On April 25, 2003, the Children, Youth & Families Department (Department) filed a "Neglect/Abuse Petition" alleging that Father and Mother were abusing and/or neglecting their two children, Dominic M. and Victor M. Father and Mother were never married, but lived as a family unit with the children. Father is the natural father of Dominic M., and the legal father of Victor M. He agreed to have his name appear on Victor M.'s birth certificate as the father, and he is the only father Victor M. has ever known, although he is neither the biological nor adoptive father of Victor M. The Department based its allegations on numerous referrals suggesting that Father and Mother had substance abuse problems and that their children had witnessed domestic violence in the home, as well as allegations of a cigarette burn, Father's threat to beat a child, and Mother's endangering a child by holding onto him during an episode of domestic violence. Based on these allegations, the Department took the children into custody.

{4} On July 25, 2003, Father and Mother pled no contest to the allegation that their children had been neglected and/or abused, and the district court adopted the Department's findings, including a finding that the children's "[p]arents [were] not able to care for [them] in a safe and stable home due to substance use, violence, unsanitary/unsafe environment, and untreated mental health issues." As a result, the district court gave the Department temporary legal custody of the children and ordered the Department to implement its proposed treatment plans.

{5} Father's treatment plan required him to (1) "participate in an alcohol/drug assessment and follow recommendations"; (2) "participate in a domestic violence program for offenders"; (3) "participate in weekly, supervised counseling at the Department's discretion"; (4) "complete a psychological-social assessment and follow recommendations"; (5) "participate [in] and successfully complete parenting classes"; (6) "participate in family counseling when appropriate at the Department's discretion"; and (7) "furnish [the] Department with relative names and addresses

for possible placement for children and sign necessary releases."

2. FATHER'S INCARCERATION

{6} The "Neglect/Abuse Petition" filed by the Department did not reference any specific physical harm to the children, although the Department had also received information that the children had ingested cocaine and there were allegations of some specific harm or threats of harm contained in the application for temporary custody order. A test of the children's hair subsequently confirmed the cocaine allegation. As a result, Father was arrested on June 3, 2003, and charged with two counts of child abuse and one count of possession of drug paraphernalia. On May 4, 2004, Father pled no contest to two counts of negligently caused child abuse, and on July 13, 2004, he was sentenced to a six-year prison term with three years suspended.

{7} Father was therefore in jail for somewhat less than half of the time from the time the Department took custody of the children until the hearing on the petition to terminate parental rights. Specifically, he was in the Bernalillo County Detention Center from June 3, 2003, until September 27, 2003, and again for about a month in May 2004. Then, from the time he was sentenced on July 13, 2004, through the date of the trial on the petition to terminate parental rights, which commenced on October 26, 2004, he was in the Roswell Correctional Center. No services were made available to Father under any treatment plan during the time that Father was incarcerated. One of the State's witnesses, Jude DeMoss, testified she did not know how to go about getting services for him during that time.

3. EVIDENCE ON TERMINATION OF PARENTAL RIGHTS

{8} Reunification of the children with both parents was always the goal of the Department. The Department subsequently determined that reunification of the children with the parents was no longer an appropriate goal, and three days after Father was sentenced on the negligent child abuse charges, the Department moved to terminate the couple's parental rights. The decision to terminate parental rights was made in compliance with the Department's policy, described to us as follows at oral argument:

> The Department does have a policy of not terminating parental rights unless it's to both parents or all people who have a legal relationship to the child in order to free the child for adoption because that's the purpose of terminating parental rights. So when the Department states and under its policy that it's not going to terminate the parental rights of mother then it's not going to go ahead and terminate the parental rights of father. That's assuming that mother is an appropriate parent for the child or the child could be returned to mother. So we're not creating a legal relationship with just the one parent and taking away the responsibilities of the other parent. And that's unless the—there's some clinical indication on the part—as far as the child is concerned that indicate that terminating the parental rights would be in their best interest without terminating all the parental rights.

{9} The State presented evidence chronicling the Department's involvement with Mother and Father at the termination hearing. Between May 2003, and the parents' termination hearing, Father received services from at least twelve individuals employed by at least five different agencies, including the Department, All Faiths Receiving Home (All Faiths), Dragonfly Services (Dragonfly), High Desert Family Services (High Desert) and the Criminal Custody Program (CCP). These individuals and entities provided a somewhat disjointed program of individual, coupled, and family services including therapy, counseling, supervised visitation, and observation. These services were frequently interrupted, transferred, or inconsistently administered due to a variety of issues including staff turnover, lack of communication by the Department with the providers about the nature of service they were to provide, incarceration of Father, refusal by providers to treat Mother due to her uncontrolled behavior, skipped visits, and a falling out between Mother and one provider.

{10} Two salient points emerged during the hearing: Mother failed to make progress

towards becoming an adequate parent while Father did make some progress. The testimony of the State's witnesses clearly established that Mother had numerous issues that interfered with her ability to properly parent her children. Jennifer Perea, a therapist employed by High Desert, testified that during her observation of the family Mother had several inappropriate and violent outbursts and that she engaged in violent play with her youngest son. At one point, Mother and her son were wielding toy guns and pretending to shoot Ms. Perea. Ron Keltner, a treatment social worker employed by the Department, testified that Mother consistently engaged in inappropriate and problematic behaviors with her children. Further, many of the witnesses who worked with Mother also noted that she made little progress toward becoming an adequate parent. In particular, Nancy Johnson, a licensed professional clinical counselor who worked with Mother and Father on parenting issues, testified that it was difficult to keep Mother on track and that she tended to become absorbed in her own issues. As a result, Mother made no progress toward becoming an adequate parent during her sessions with Ms. Johnson. In light of all the evidence concerning Mother, we affirmed the termination of her parental rights in a separately filed memorandum opinion, concluding that clear and convincing evidence supported that decision.

{11} On the other hand, nearly all of the State's witnesses acknowledged the positive progress that Father made toward becoming an adequate parent. Sheila Genoni, a parent educator and family advocate employed by All Faiths, noted that Father was very attentive and that he made good progress during his work with her. Ms. Johnson observed positive changes in Father and noted that he listened, learned, and asked some good questions. She thought that Father could learn to be an adequate parent. Jennifer Oesterling, a therapist employed by Dragonfly, agreed that, over the course of her work with the family, she saw some personal growth in Father. Jeremy Brazfield, a social worker employed by the Department, observed that Father demonstrated an interest in learning how to become a better parent and showed some progress toward that goal. Mr. Brazfield also noted that he did not see any obvious barriers to Father learning to be an adequate parent. Netti Clegg, a licensed independent social worker employed by Dragonfly, noted that unlike the vast majority of her counseling clients, Father accepted her suggestions. Finally, Mr. Keltner testified that Father was compliant and stable during the time that Mr. Keltner had the case and that Father worked toward completing his treatment plan. He took classes on anger management, substance abuse, and parenting while he was incarcerated.

{12} The record also reveals that Father had successfully dealt with his substance abuse problems. With the exception of a disputed test in the Spring of 2004, that was never proved, all of Father's urinalysis results were negative. At the termination hearing, Father testified that he had not used drugs or alcohol since June 3, 2003. He had also been involved in Alcoholics Anonymous and Narcotics Anonymous. Ms. Oesterling testified that she found Father's claims that he had overcome his cravings for alcohol to be credible. Mr. Keltner testified that he saw no evidence that Father was drinking.

{13} To be sure, some problems were noted along with these positive observations. The State's witnesses observed that Father had several issues to resolve regarding his interaction with his children. Mr. Brazfield observed that Father had difficulty picking up on the children's verbal and non-verbal cues. Ms. DeMoss also observed that Father had difficulty relating to the children. Mr. Brazfield's opinion was that Father made "rote" progress, but not significant enough progress for Brazfield to say that there was real behavioral change. Additionally, Father acknowledged that his children had witnessed domestic violence in his home, and Father did not seem to appreciate the seriousness of the children's witnessing the domestic violence.

{14} Following the termination hearing, the district court entered an order terminating Mother and Father's parental rights. Father appeals.

STANDARD OF REVIEW

{15} "The grounds for any attempted termination [of parental rights] shall be proved by clear and convincing evidence." NMSA 1978, § 32A–4–29(I) (2003); *In re Doe,* 98 N.M. 198, 200, 647 P.2d 400, 402 (1982). "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 Adoption of Doe,* 98 N.M. 340, 345, 648 P.2d 798, 803 (Ct.App. 1982) (internal quotation marks and citation omitted). However, we will not reweigh the evidence and "we must view it in a light most favorable to affirmance." *State ex rel. Children, Youth & Families Dep't v. Vanessa C.,* 2000–NMCA–025, ¶ 24, 128 N.M. 701, 997 P.2d 833. Therefore, we must determine "whether, viewing the evidence in a light most favorable to affirming the termination of [Father's] parental rights, the [district] court could properly determine that the clear and convincing standard was met." *Id.*

DISCUSSION

{16} In a proceeding to terminate parental rights, we "give primary consideration to the physical, mental and emotional welfare and needs of the child, including the likelihood of the child being adopted if parental rights are terminated." NMSA 1978, § 32A–4–28(A) (2005). However, a child is not "entitled to a 'better' environment than that provided by the [parent], if the one provided by the [parent] is acceptable to society." *State ex rel. Dep't of Human Servs. v. Natural Mother,* 96 N.M. 677, 681, 634 P.2d 699, 703 (Ct.App.1981). Further, "parental rights are among the most basic rights of our society and go to the very heart of our social structure." *In re Doe,* 98 N.M. at 200, 647 P.2d at 402 (internal quotation marks and citation omitted). Therefore, a parent's rights may not be terminated simply because "a child might be better off in a different environment." *State ex rel. Children, Youth & Families Dep't v. Patricia H.,* 2002–NMCA–061, ¶ 21, 132 N.M. 299, 47 P.3d 859 (internal quotation marks and citation omitted).

{17} Father's parental rights were terminated on grounds that he abused or neglected his children as provided in the Abuse and Neglect Act, NMSA 1978, §§ 32A–4–1 to –33 (1993, as amended through 2005). Before the court may terminate parental rights based on abuse or neglect, it must find

> (1) that the children were abused or neglected, (2) that the conditions and causes of the abuse and neglect were unlikely to change in the foreseeable future, and (3) that the [Department] made reasonable efforts to assist [Father] in adjusting the conditions which rendered [him] unable to properly care for the children.

In re Termination of Parental Rights of Eventyr J., 120 N.M. 463, 467, 902 P.2d 1066, 1070 (Ct.App.1995).

{18} Father concedes that the district court properly concluded that his children had been neglected and/or abused, but contends that termination of his parental rights was not supported by sufficient evidence because the latter two requirements were not met. We agree.

{19} From the inception, the treatment goal of the Department was reunification of the children with both parents. As such, Mother and Father were treated as a unit, and consistent with the treatment plans, Father was "committed" to Mother "and to the reunification of their family." In fact, treatment providers noted that Father was determined to make things work with Mother because she needed help and he did not want to abandon her, "abandonment" being a huge issue and problem for her. As we have already noted, Mother failed to become an adequate parent despite the substantial efforts of the Department to help her for over a year. When the Department decided to change the permanency plan of the children from reunification to termination of parental rights and adoption, it described Father's "lack of progress" as centering on his "primary motivations" being his desire to help Mother have a family rather than be a good parent or attend to the safety needs of the children. On appeal, the Department continues to argue that "Mother's presence in the

home is a threat to the well-being of Children," and that "it is clear that Father had no intention of raising Children without Mother." The Department asserts, "[p]erhaps the most dangerous condition that Father was unable or unwilling to remedy is the presence of Mother in the home." However, the option of raising the children without Mother was never included as a goal in any of the treatment plans adopted by the Department or ordered by the court for Father.

{20} The Department has a statutory duty it must perform before parental rights may be terminated because of abuse and neglect. That duty is to engage in "reasonable efforts" to "assist the parent in adjusting the conditions that render the parent unable to properly care for the child" unless certain exceptions, not applicable here, are present. Section 32A–4–28(B)(2). Whether the Department has made reasonable efforts "var[ies] with a number of factors, such as the level of cooperation demonstrated by the parent and the recalcitrance of the problems that render the parent unable to provide adequate parenting." *Patricia H.*, 2002–NMCA–061, ¶ 23, 132 N.M. 299, 47 P.3d 859. When a parent is in an abusive relationship and the abuser is obviously and physically harming the children, parental rights can be terminated of the parent who is doing nothing to prevent the abuse. *See In re I.N.M.*, 105 N.M. 664, 668–69, 735 P.2d 1170, 1174–75 (Ct.App.1987) (involving a partner who beat the child). However, when the behavior of the parent's partner is more subtle, such that it is difficult for a person of ordinary intelligence and sensibilities to realize that the partner's self-centeredness or other characteristic is harming the children, we believe that more is required of CYFD than simply expecting the parent to know and appreciate the harm being caused. We deem it noteworthy that no treatment plans were ever formulated or implemented in this case for Father to separate from Mother and raise the children without Mother. *Compare In re D.L.S.*, 230 Neb. 435, 432 N.W.2d 31, 37 (1988) (pointing out that the plan required the mother to decide what to do about her relationship with her husband who was abusive toward her and the child, and she divorced him). In fact, Father was never specifically and pointedly told that a failure to separate from Mother could constitute a basis for terminating his rights as a parent because that relationship rendered him unable to properly care for his children.

{21} The only evidence that was introduced on this question was the following. Mr. Keltner, a treatment social worker with the Department, was asked whether the issue ever came up that Father would be able to function as a parent on his own. His response was that Mother and Father held themselves out as a couple and it was never mentioned to him that Mother and Father were planning on separating, and one or the other taking primary parental responsibility. Mr. Brazfield, a social worker with the Department, was asked whether there was ever an attempt on the part of the Department to assist Father to live independently of Mother. His negative answer was that the reference was made for both parents, and that both parents were dealt with as a unit instead of separately except when Father was incarcerated and Mother was treated alone. When he was asked whether he had any discussion with Father about his choice to remain with Mother, he only answered, without elaboration, "We talked about it, yes." Mr. Brazfield later testified that it was suggested to Father that he might have a better chance of regaining custody if he were not with Mother. Ms. Johnson, the licensed parental counselor assigned to provide treatment, testified that the "gate was not open" for Father to have adequate parenting skills if he was not willing to raise the children without Mother, but she never told him she needed to see him separately. Further, she was "not sure" whether it would have "left the gate open" if she had worked with Father individually, although "it was certainly possible" for Father to have developed "adequate parenting skills."

{22} We are not persuaded that the foregoing evidence was sufficient to put Father on notice that his relationship with Mother was a condition and cause of the abuse and neglect of his children which had to end for him to be able to parent his children. *See In re Mainor T.*, 267 Neb. 232, 674 N.W.2d 442, 461 (2004) (stating that a plan must "correct,

eliminate, or ameliorate" the condition on which the adjudication is based) (internal quotation marks and citation omitted). Nor are we persuaded that the Department's actions can be construed as a reasonable effort to assist Father. Instead, the record reveals that the Department treated Mother and Father as a unit. Importantly, there was no evidence of any specific discussion with Father indicating that he would have to leave Mother to become a successful parent and no part of the treatment plan listed this factor as an element. We conclude that the record does not contain evidence that the district court could have properly found to be clear and convincing that the Department made reasonable efforts to help Father terminate his relationship with Mother so he could become an adequate parent.

{23} We therefore hold that the district court could not have found that the clear and convincing standard was met when it ultimately found that "it is unlikely that [Father] will be able to properly parent the children in the foreseeable future." Under the circumstances of this case, where the social workers agreed that Father was motivated to comply with the Department and made some steps to improve his parenting skills, and where the problem was mainly with Mother, although it was understandable that a person in Father's position might not appreciate this, it was incumbent on the Department to have a specific treatment plan or specifically alert Father to the consequences of his staying with Mother. Absent that happening, the district court could not have properly found that the clear and convincing standard was met under the facts of this case. Therefore, we reverse.

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

WE CONCUR: LYNN PICKARD and IRA ROBINSON, Judges.

2006-NMCA-030

130 P.3d 204

Allen SPARKS, Dennis Cleaver, Ellis Jones, Jay Paul, Rex Pope, and Tim Archuleta, Plaintiffs–Appellees,

v.

Gary GRAVES, Defendant–Appellant,

and

In the Matter of De Baca County Sheriff Gary Graves.

No. 26,181.

Court of Appeals of New Mexico.

Jan. 25, 2006.

Doerr & Knudson, P.A., Stephen Doerr, Portales, NM, for Appellees.

Heard, Robins, Cloud & Lubel, L.L.P., Bill Robins III, Amy Propps, Santa Fe, NM, for Appellant.

OPINION

SUTIN, Judge.

{1} De Baca County Sheriff Gary Graves appealed to this Court from an adverse probable cause determination made by the district court under Article X, Section 9 of the New Mexico Constitution governing elections to recall elected county officials. *See* N.M. Const. art. X, § 9(B) (providing for district court adjudication to establish probable cause that grounds exist for a recall election). Under Article X, Section 9(B), a probable cause determination was required upon presentation to the district court of a petition of De Baca County voters containing "factual allegations supporting the grounds of malfeasance or misfeasance in office." *Id.*

BACKGROUND

{2} Petitioners filed a petition pursuant to N.M. Const. art. X, § 9, to recall Sheriff Graves. The petition listed several grounds on which Petitioners alleged that Sheriff Graves had committed malfeasance or misfeasance in office. After a two-day hearing, the district court announced from the bench that it found probable cause to believe Sheriff Graves had committed acts of malfeasance or misfeasance while in office. The district court entered an order on September 6, 2005, memorializing its oral ruling.

{3} The next day, Sheriff Graves filed a motion to alter the court's order or, alternatively, to grant a new trial. The court denied the motion by letter decision filed on September 30, 2005. In the meantime, on about September 14, 2005, the De Baca County Clerk scheduled a recall election to take place on November 9, 2005. *See* N.M. Const. art. X, § 9(C) (requiring the county clerk to place the recall question on the ballot for a special election once signatures on the circulated petition are verified).

{4} On October 6, 2005, Sheriff Graves filed a notice of appeal to this Court from the district court's probable cause order. He simultaneously filed in the district court an application for a stay pending appeal, pursuant to Rule 1–062(D) NMRA. The district court heard argument on the stay application on October 26, 2005, and denied the application from the bench. An order denying the stay application was entered November 15, 2005.

{5} On November 3, 2005, Sheriff Graves filed an emergency motion in this Court for a stay of the district court's September 6, 2005, order in order to forestall the special election pending the appeal. He asserted that the district court's failure, to that date, to enter an order denying the stay application was an attempt on the part of the court to allow the recall election to go forward on November 9, before any appellate review of the probable cause order could take place—thus violating Sheriff Graves' absolute right to an appeal. Following Petitioners' response to Sheriff Graves' emergency motion, this Court entered a stay order on November 7, 2005.

{6} De Baca County nevertheless held the recall election on November 9, 2005. On the same day, Sheriff Graves filed a motion for a temporary restraining order and preliminary injunction in this Court to stop the election or, alternatively, to enforce this Court's stay order. Sheriff Graves also filed in this Court a motion for a contempt order against the County Clerk. Neither the County nor the County Clerk was a party to the proceeding

in the district court. Likewise, neither the County nor the County Clerk was, or is, a party to this appeal. We denied relief and entered an amended stay order, nunc pro tunc to clarify our previous order. We also held a telephone hearing with legal counsel for Sheriff Graves, legal counsel for Petitioners, and legal counsel for the County in order to discuss expediting oral argument on appeal. We set an expedited oral argument in this appeal for November 22, 2005. In the telephone hearing, the County, though not a party, was invited to attend oral argument. Further, we confirmed with Petitioners' counsel that Petitioners had not waived their position that this Court lacked jurisdiction to entertain the appeal and that they could argue lack of jurisdiction at the oral argument. The recall election was completed on November 9, 2005, resulting in a vote to recall Sheriff Graves.

{7} On November 10, 2005, Petitioners filed a motion in this Court to dismiss this appeal sua sponte and to cancel the oral argument scheduled for November 22, 2005. Petitioners essentially asserted that no constitutional, statutory, or Supreme Court rule grants jurisdiction in this Court to address the district court's probable cause determination. Petitioners also asserted that the issues Sheriff Graves raised on appeal were moot as a result of the recall election result. On November 18, 2005, Petitioners filed an alternative motion to dismiss, contending that the appeal should be dismissed based on Sheriff Graves' failure to post the supersedeas bond, as required by our stay order filed November 7, 2005, and by our amended stay order filed November 9, 2005.

{8} After our review of the jurisdiction and other issues presented in the appeal, we certified this appeal to the Supreme Court pursuant to NMSA 1978, § 34-5-14(C) (1972). The Supreme Court declined certification. For the reasons that follow, we exercise jurisdiction and dismiss the appeal.

JURISDICTION

{9} The recall provisions for elected county officials set out in Article X, Section 9 of the New Mexico Constitution provide no guidance with regard to the appeal process. Article VI, Section 2 of the New Mexico Constitution, however, specifically provides that an aggrieved party shall have an absolute right to one appeal.

{10} Article VI, Section 29 of the New Mexico Constitution relates to the jurisdiction of the Court of Appeals and provides that this Court shall exercise jurisdiction as provided by law. This is a civil action, and by statute, the Court of Appeals has jurisdiction in any civil action not specifically reserved to the jurisdiction of the Supreme Court by constitution or law. NMSA 1978, § 34-5-8(A) (1983). There is some circular analysis, in that Section 34-5-14(A) grants jurisdiction in the Supreme Court when it "is not specifically vested by law" in the Court of Appeals.

{11} Supreme Court Rule 12-102(A) NMRA lists the categories of appeals that "shall be taken to the Supreme Court." None of the appeals listed specifically covers a recall election or a probable cause determination of the district court in a recall election. Consistent with Section 34-5-8(A), Rule 12-102(A)(4) requires appeals to be taken to the Supreme Court when jurisdiction has been specifically reserved to the Supreme Court by the New Mexico Constitution or by Supreme Court order or rule. As to the Court of Appeals, Rule 12-102(B) states that all other appeals shall be taken to the Court of Appeals.

{12} We recognize that the recall provisions for elected officials set out in Article X, Section 9 do not furnish guidance with regard to the appeal process. However, no constitutional or statutory provisions require that issues relating to Article X, Section 9 recall elections be appealed to the Supreme Court. In regard to the recall of local school board members, Article XII, Section 14 of the New Mexico Constitution states that "[p]rocedures for filing petitions and for determining validity of signatures shall be as provided by law." Legislative instruction is found in the Local School Board Member Recall Act (the Recall Act), NMSA 1978, §§ 22-7-1 to -16 (1977, as amended through 1993). Section 22-7-12(A) of the Recall Act governs a board member's right to appeal the determination of a district court and limits the appeal to only the Supreme Court.

But nothing in N.M. Const. art. XII, § 14 or the Recall Act applies to recall elections under Article X, Section 9.

{13} Chapter 1 of the New Mexico Statutes is the New Mexico Election Code. NMSA 1978, §§ 1–1–1 to –24–4 (1969, as amended through 2005). Section 1–1–19 sets out the types of elections covered by the Code. County official recall elections are not listed. However, Sections 1–24–1 to –4, governing special elections, might arguably be construed to apply to county official recall elections. If these special election provisions were construed to apply to county official recall elections, then perhaps the appeal provision relating to contested elections in Section 1–14–5, which vests appellate jurisdiction in the Supreme Court, might apply to the contest of a county official recall election. In the present case, Sheriff Graves' appeal was filed before the election occurred and was not, when filed, a contest of an election. It does not appear that the Election Code expressly covers the appeal in this case.

{14} Based on the foregoing discussion of jurisdiction, we conclude that this Court has jurisdiction to entertain this appeal. We view the Supreme Court's declination of our certification of this case to constitute an affirmation of our jurisdiction of this appeal.

WE DISMISS THE APPEAL

{15} Avenues were open, beginning in early September 2005 following the district court's probable cause determination and certainly by September 14, 2005 following the setting by the County of the recall election for November 9, 2005, for Sheriff Graves to join the County and/or the County Clerk (together, the County) as a party in the pending or a separate action and to pursue effective relief seeking to enjoin the election pending review of the district court's probable cause decision. *See* N.M. Const. art. VI, § 3 (providing that the Supreme Court has power to issue writs of injunction necessary for the exercise of its jurisdiction); Rule 12–504 NMRA (governing procedure for issuance of writs in the exercise of the Supreme Court's original jurisdiction, including stays); *see also* N.M. Const. art. VI, § 13 (providing that district courts have power to issue writs of injunction); Rule 1–066 NMRA (governing procedure for issuance by district courts of temporary restraining orders and preliminary injunctions). Instead, valuable time lapsed while Sheriff Graves failed to timely and effectively pursue relief to enjoin the election. As a consequence, the election was held, with a completed electoral result.

{16} A constitutionally prescribed political election process was set in progress, with mandatory action required on the part of the County officials to hold an election following a threshold court determination of probable cause and a properly circulated recall petition triggering the mandated election. Article X, Section 9 involves the judiciary in the political election process. Although nothing in the Constitution or laws suggests that a probable cause determination of the district court under Article X, Section 9 is completely off limits in regard to appellate review from a jurisdiction standpoint, we nevertheless view the district court's probable cause determination as part and parcel of the political election process and appellate courts must be cautious about interfering with that process. In some instances, it might be appropriate to postpone or enjoin an election pending review of an Article X, Section 9 probable cause determination. However, the target of the recall must act effectively and expeditiously to seek relief before the special election is held. In order to seek to vindicate his political rights before the election took place, Sheriff Graves, the target of the recall, should have taken whatever steps were available to join or otherwise sue the County and to attempt to obtain injunctive relief to enjoin the election pending review of whether the election could lawfully be held. He failed to take those steps. Under these circumstances, we will not enter the political fray. Absent effective and expeditious action, it is not the duty of this Court to protect the target's political rights by addressing the district court's probable cause determination on appeal after the election has occurred.

{17} Under the circumstances, we do not feel compelled to address issues raised by Sheriff Graves for the ultimate purpose of overturning a mandated and completed recall election. We therefore decline to address the issue Sheriff Graves raised in this appeal,

namely, whether the district court erred in its probable cause determination. The election having been held, we consider the issues moot.

CONCLUSION

{18} We dismiss Sheriff Graves' appeal.

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

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

2006-NMCA-031

130 P.3d 208

STATE of New Mexico, Plaintiff–Appellee,

v.

Alonzo CLEMONTS, Defendant–Appellant.

No. 23,549.

Court of Appeals of New Mexico.

Feb. 7, 2006.

Certiorari Denied, No. 29,675, March 9, 2006.

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

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

OPINION

ROBINSON, Judge.

{1} Alonzo Clemonts (Defendant) appeals his conviction of felony child abuse. His

conviction stems from a low-speed police chase. We sua sponte reviewed whether there was sufficient evidence to convict Defendant, and we hold that the evidence was insufficient to convict him of felony child abuse. Therefore, we do not address the issues on which Defendant seeks reversal, namely, application of the general/specific rule, denial of due process, and improper enhancement of his sentence.

I. BACKGROUND

{2} On January 27, 2002, at approximately 10:23 p.m., Defendant was driving down Main Street in Farmington with three children in his car. Officer Glenn Mearls, relying on his radar, determined that Defendant was speeding by driving between sixty-eight and seventy-two miles per hour in a thirty-five mile-per-hour zone. Officer Mearls turned around to pursue Defendant. After following Defendant for about an eighth of a mile, Officer Mearls activated his emergency lights and siren. Defendant continued driving and entered a residential neighborhood. During his pursuit, Officer Mearls noticed that Defendant maintained a speed of thirty to thirty-five miles per hour. Officer Mearls also noticed that Defendant stopped at one red traffic signal and one stop sign, but failed to use his turn signal at one of those intersections and rolled through one stop sign without coming to a complete stop. Officer Mearls testified that Defendant maintained his car in his lane, but moved from side-to-side within that lane.

{3} Officer Dwayne Faverino was in the neighborhood, listening to his police radio, and heard Officer Mearls updating his efforts to get Defendant to stop for the speeding violation. Officer Faverino responded and attempted to block Defendant by placing his car perpendicular across the road in the intersection Defendant was approaching. When Defendant slowed down as he approached Officer Faverino's car, Officer Mearls approached Defendant's car from behind and placed his push bumper against Defendant's car, pushing it into Officer Faverino's car. Defendant stopped his car, placed it in park, got out of his car, and ran away, leaving the three children in the car. Officers Mearls, Faverino, and Norwood pursued Defendant and Officer Mearls subdued him by striking him in the back of the head with the butt of his gun. After handcuffing Defendant, the officers took Defendant to the emergency room to be treated for the injury he suffered when Officer Mearls struck him.

{4} Officer Mearls thought that he smelled alcohol on Defendant's breath and tried to administer a breath alcohol test at the hospital, but Defendant refused the test and was charged with aggravated DWI. At all times, Defendant denied being under the influence of alcohol and was later acquitted of that charge.

{5} On July 12, 2002, the trial court filed a Notice of Trial for August 13, 2002. On August 5, 2002, the State filed a Supplemental State's Witness List, which listed six additional witnesses. On August 8, 2002, Defendant filed an objection to the late disclosure of the State's witnesses, claiming that the disclosure came less than a week before trial in violation of Rule–501(A)(5) and asked the trial court to bar the testimony of these witnesses, but the trial court declined to exclude the witnesses.

{6} At trial, Defendant tendered a jury instruction on child abandonment, which the trial court refused, but instead gave an instruction for felony abuse of a child to the jury. Defendant was convicted of four misdemeanor violations: (1) speeding; (2) resisting, evading, or obstructing an officer; (3) failure to use turn signals; and (4) failure to obey traffic control devices. Defendant was also convicted of felony abuse of a child, which did not result in death or great bodily injury.

{7} Following Defendant's convictions, the State pursued a habitual offender enhancement at a hearing where the evidence of Defendant's prior convictions were certified copies of judgments and sentences from other jurisdictions. These records were admitted under seal and no witnesses with first-hand knowledge identified Defendant as the prior offender on the out-of-state judgments and sentences. Defendant identified himself as Alonzo Fleming when he was taken into custody, and he did not have any identification on his person at that time. During his

booking, Defendant refused to identify himself. Consequently, Officer Mearls contacted the mother of one of the children that was left in Defendant's car and she identified Defendant as Alonzo Williamson. She explained that she had a child with him and that he was not from the area. She further explained that she had received letters from him while he was incarcerated in the Monroe County Jail in New York. Sergeant Anderson, a booking officer, contacted the Monroe County Jail, which revealed that Defendant's name was Alonzo Clemonts and that he had numerous felony convictions.

{8} The State connected the out-of-state records with Defendant using a fingerprint expert, who examined the prints associated with out-of-state records and the fingerprints taken from Defendant at the time of his booking in New Mexico. The expert declared that all of the prints were identical. Defendant was sentenced to three years, enhanced by four, totaling seven years.

II. DISCUSSION

A. STANDARD OF REVIEW

{9} Defendant's contention, that the underlying misdemeanors do not support a finding of felony child abuse, goes to the sufficiency of evidence. On a sufficiency of the evidence challenge, the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, a rational trier-of-fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Perea,* 2001–NMSC–026, ¶ 5, 130 N.M. 732, 31 P.3d 1006. 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.

B. SUFFICIENT EVIDENCE OF FELONY ABUSE OF A CHILD

{10} We *sua sponte* raised the question whether there was sufficient evidence presented by the State to satisfy each element set forth in Jury Instruction No. 7 (felony child abuse) because the State's failure to come forward with substantial evidence of the crime charged implicates fundamental error and the fundamental rights of Defendant. *State v. Vallejos,* 2000–NMCA–075, ¶ 29, 129 N.M. 424, 9 P.3d 668. "[W]e have held that the question of sufficiency of the evidence to support a conviction may be raised for the first time on appeal." *State v. Stein,* 1999–NMCA–065, ¶ 9, 127 N.M. 362, 981 P.2d 295; *accord In re Gabriel M.,* 2002–NMCA–047, ¶¶ 9, 27, 132 N.M. 124, 45 P.3d 64. To insure a fully informed decision, we requested supplemental briefing by the parties.

{11} Defendant argues that none of the misdemeanor charges in this case can possibly support the jury verdict of felony child abuse. *See* § 30–6–1 (defining felony abuse of a child). We begin our review of the sufficiency of evidence to support Defendant's conviction with the elements of child abuse. The State had the burden of proving, beyond a reasonable doubt, that Defendant caused children under the age of eighteen, to be placed in a situation that may have endangered their life or health and did so with reckless disregard for the safety of the children. § 30–6–1(A)(3), (D)(1). Reckless disregard requires that Defendant "knew or should have known [his] conduct created a substantial and foreseeable risk, [he] disregarded that risk and [he] was wholly indifferent to the consequences of the conduct and to the welfare and safety" of the children. UJI 14–604 NMRA.

{12} The State, relying on *State v. Santillanes,* 2001–NMSC–018, 130 N.M. 464, 27 P.3d 456 (2001), *State v. Castañeda,* 2001–NMCA–052, 130 N.M. 679, 30 P.3d 368 (2001), and *State v. Guilez,* 2000–NMSC–020, 129 N.M. 240, 4 P.3d 1231 (2000), contends that "Defendant's cumulative acts of speeding and abruptly swerving such that he almost lost control of his vehicle, driving while intoxicated, and leading police on a low-speed vehicle chase through city streets while ignoring traffic laws, all acted to endanger the three children riding as passengers inside the vehicle." We are unpersuaded.

{13} The State correctly points out that our appellate courts have sustained convictions for felony child abuse where the underlying conduct was a misdemeanor. In *Gui-*

lez, 2000–NMSC–020, ¶ 25, our Supreme Court upheld the defendant's convictions for DWI, reckless driving, and child abuse, when his underlying conduct was that he drove at a speed of sixty-five to seventy-five miles per hour after dark without headlights or taillights and collided with a fence. He admitted to drinking beer. He smelled of alcohol, had bloodshot eyes, and failed the sobriety test. The child in the truck was unrestrained. Furthermore, in *Santillanes,* 2001–NMSC–018, ¶ 38, our Supreme Court upheld a conviction for criminally negligent child abuse when the defendant drove while intoxicated with her children in the car. Lastly, in *Castañeda,* 2001–NMCA–052, ¶ 22, this Court upheld a conviction for criminally negligent child abuse when the defendant drove while intoxicated on the wrong side of a divided highway with her unrestrained children in the car.

{14} This case is distinguishable from the above cases. Most notably, Defendant was acquitted of DWI. Evidence was presented that Defendant was speeding, but then slowed to thirty-five miles per hour and lawfully went through six intersections when he failed to stop for the police. During this time, the police observed that Defendant failed to use a turn signal on one turn and slowed, but did not come to a complete stop at a single stop sign, and that his car was drifting back and forth within its lane of travel. We note first that there is nothing unlawful in swaying within one's own lane. There was no evidence presented that the children were unrestrained. There was no evidence presented of the surrounding circumstances, i.e., the extent of Defendant's abrupt swerve, traffic congestion, or volume, that indicated that Defendant was wholly indifferent, or acted with a reckless disregard. When Officer Mearls ran after Defendant, he had his service revolver drawn, with his finger away from the trigger, and subdued Defendant by striking him on the back of his head with the butt of the drawn gun.

{15} However, this Court has explained that mere proximity to a dangerous situation is insufficient to support a conviction for child abuse. *See State v. Trujillo,* 2002–NMCA–100, ¶¶ 19–20, 132 N.M. 649, 53 P.3d 909 (holding that no "reasonable probability or possibility" of endangerment existed when a daughter, not in "direct line of danger," witnessed her father abusing her mother (internal quotation marks and citation omitted)). The Legislature did not intend to criminalize conduct creating "a mere possibility, however remote, that harm may result" to a child. *State v. Ungarten,* 115 N.M. 607, 609, 856 P.2d 569, 571 (Ct.App.1993). Rather, "[t]here 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 (internal quotation marks and citation omitted). Lastly, in *State v. Roybal,* 115 N.M. 27, 34, 846 P.2d 333, 340 (Ct.App.1992), during a drug transaction, police officers, who apprehended the defendant and his co-defendants, were armed and one of the co-defendants resisted arrest. This Court held that there was insufficient evidence that the defendant's daughter was actually placed in danger when the child watched her parent conduct a drug transaction, while she sat in the defendant's car ten to fifteen feet away, even though drug transactions might be attended by violence. *Id.*

{16} Here, Defendant was acquitted of DWI and the misdemeanor traffic offenses he committed, either exclusively or in the aggregate, did not expose a substantial risk to the children's lives or health as passengers in Defendant's car. Furthermore, the possibility that the children could have been placed in the line of danger is lacking because, as in *Ungarten,* the mere possibility of harm is not enough to sustain a conviction of felony child abuse. Furthermore, in contrasting *Roybal,* the child in that case was more likely in the path of danger than the circumstances presented here because when Officer Mearls used his weapon to strike Defendant on the back of the head, he was in a foot pursuit, running away from the location of the children. Thus, as in *Roybal* and *Trujillo,* there was insufficient evidence to support a child abuse conviction because the children were not in the direct line of any danger. In *Santillanes, Castañeda,* and *Guilez,* the underlying offenses which supported the felony child abuse convictions

were DWI in all three cases and reckless driving, or unrestrained child, or vehicular homicide, none of which were present. There was evidence presented that Defendant never saw or acknowledged that he was being pursued. Lastly, though it was undisputed that Defendant was speeding, speed alone is insufficient to show reckless or wanton operation of a motor vehicle. *See State v. Hayes,* 77 N.M. 225, 421 P.2d 439 (1966); *see also Alford v. Drum,* 68 N.M. 298, 301, 361 P.2d 451, 452 (1961) (stating that "it is well established in this jurisdiction that speed alone, or speed accompanied by inadvertence, or speed accompanied by acts of mere negligence, as the term is ordinarily understood, does not meet the test of [a reckless disregard of the rights of others])."

{17} Accordingly, we find that, in light of Defendant's acquittal on the DWI charge and that there was no evidence presented that the children were endangered, the evidence in this case could not justify a finding by a rational trier-of-fact that Defendant showed a reckless disregard for the children in his car, or exposed them to a substantial risk to their safety, to sustain a conviction of felony child abuse. Since we find that there was insufficient evidence to find Defendant guilty of felony child abuse, we need not address the remaining issues raised by Defendant.

III. CONCLUSION

{18} We hold that the evidence here was insufficient for a conviction of felony child abuse. We, therefore, reverse and remand with instructions to vacate Defendant's conviction for felony child abuse and enter an amended judgment and sentence.

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

WE CONCUR: JONATHAN B. SUTIN and MICHAEL E. VIGIL, Judges.

2006-NMSC-007

130 P.3d 731

STATE of New Mexico, Plaintiff–Appellee,

v.

Manuel MARTINEZ, Defendant–Appellant.

No. 28,623.

Supreme Court of New Mexico.

Feb. 16, 2006.

John Bigelow, Chief Public Defender, Nancy M. Hewitt, Assistant Appellate Defender, Santa Fe, New Mexico, for Appellant.

Patricia A. Madrid, Attorney General, Victoria M. Wilson, Assistant Attorney General, Santa Fe, New Mexico, for Appellee.

OPINION

BOSSON, Chief Justice.

{1} Defendant Manuel Martinez is charged with two counts of first degree murder and one count of kidnapping, robbery and aggravated burglary. The charges arise from the killings of Ervin and Julia Tafoya in their home. The State seeks the death penalty for both killings based on the aggravating circumstance that the victims were killed to prevent them from reporting crimes they had witnessed. *See* NMSA 1978, § 31–20A–5(G) (1981). The State also seeks the death penalty for the killing of Mrs. Tafoya for the aggravating circumstance that she was intentionally killed in the commission of a kidnapping. *See* § 31–20A–5(B).

{2} Defendant moved to dismiss all of the aggravating circumstances thereby making him ineligible for the death penalty. *See State v. Ogden,* 118 N.M. 234, 239, 880 P.2d 845, 850 (1994) The district court conducted

an evidentiary hearing and determined there was sufficient evidence to establish probable cause that all the alleged aggravating circumstances were present. On interlocutory appeal, pursuant to *Ogden*, we find no probable cause to support the murder-of-a-witness aggravating factor for either killing. However, we affirm the district court's decision finding probable cause existed that Mrs. Tafoya was intentionally killed in the commission of a kidnapping.

BACKGROUND

{3} Ervin and Julia Tafoya operated a rock and gem store attached to their residence in Hobbs, New Mexico. The couple was elderly and in poor health. Mr. Tafoya used a cane to walk, and Mrs. Tafoya was on oxygen because of health problems. Mrs. Tafoya's mobility was extremely limited and she usually stayed in her bedroom, sitting in a chair.

{4} On July 24, 2003, Mr. and Mrs. Tafoya were robbed and attacked in their home. The Tafoyas' daughter, Rosetta Bland, discovered the couple when she came to check on them that evening. When she entered their home, Ms. Bland noticed certain things out of place. The back door was closed and one of her father's shirts was covering the window of the door. Usually, this window was never covered. Once inside, Ms. Bland noticed there were items from a chest of drawers scattered all over the floor. Mrs. Tafoya, who was still conscious, said they were robbed and instructed her daughter to check on her father in the other room because she had heard him fall. Ms. Bland went into the kitchen and found her father dead on the kitchen floor near the entrance way to the gem store. Ms. Bland returned to her mother and turned on the lights to find her covered in blood and bound to her chair by her husband's suspenders with her hands tied behind her back.

{5} Mrs. Tafoya had stab wounds to her neck and chest as well as defensive wounds to her arms and hands. She died two days later of her injuries. Mr. Tafoya had multiple stab wounds throughout his body.

{6} Subsequently, the police conducted several interviews with Defendant. Defendant changed his story many times, first denying involvement, then claiming he was only the lookout. He finally admitted to being present in the house when the murders occurred and to stealing a gun and some jewelry, but he maintained that another man actually did the killings. Defendant stated he went to the Tafoya home with the intention of stealing rocks and gems to buy drugs, but, in his words, the robbery had "gone bad."

{7} Defendant moved to dismiss all the aggravating circumstances, but after an evidentiary hearing the district court ruled there was probable cause to proceed with the death penalty. On interlocutory appeal, the State argues the district court correctly found probable cause to go forward on the murder-of-a-witness aggravating factor with respect to both killings. The State's overarching theory is that both victims were killed to prevent them from reporting the burglary and robbery of their home and gem store. The State points to the Tafoyas' elderly age and disabilities, reasoning that Defendant did not need to kill them to succeed in the robbery, and therefore, the motive must have been to silence them as witnesses. The State also relies on evidence that Defendant attempted to conceal his involvement in both crimes, thereby giving rise to an inference that Defendant's motive for murder was to conceal his identity.

{8} The State further argues for a second aggravating factor with respect to the murder of Mrs. Tafoya; that Defendant had the intent to kill her during the commission of a kidnapping. Defendant challenges the trial court's finding of probable cause regarding both the aggravating factors. We now review both determinations.

DISCUSSION

Standard of Review

{9} In *Ogden*, we held that a pretrial ruling is appropriate to assess aggravating death penalty factors, and thereby prevent unwarranted death penalty prosecutions and needless waste of time, expense and judicial resources. 118 N.M. at 238–39, 880 P.2d at 849–50. "Pretrial review of aggravating circumstances is intended to screen out only those cases in which the State does not have

any significant factual or legal basis for pursuing the death penalty. . . ." *Id.* at 240, 880 P.2d at 851. Accordingly, we apply a probable cause standard of review. *Id.*

{10} The standard of review for rulings on probable cause will be affected depending on whether the question is one of fact, law or mixed fact and law. *Id.* at 239, 880 P.2d at 850. When the district court is presented with a question of fact or a mixed question of fact and law, as in this case, it should dismiss when there is no probable cause to believe the aggravating circumstance is present. *Id.* The State bears the burden of persuasion to establish probable cause. *Id.* at 240, 880 P.2d at 851. The district court does not weigh the evidence and, on appeal, we review questions of fact to "see whether the district court correctly evaluated probable cause to support the aggravating circumstance." *Id.; accord State v. Coffin,* 1999–NMSC–038, ¶ 48, 128 N.M. 192, 991 P.2d 477. Probable cause exists when there is " 'that degree of evidence to bring within reasonable probabilities the fact that [an aggravating circumstance] was committed by the accused.' " *State v. Young,* 2004–NMSC–015, ¶ 2, 135 N.M. 458, 90 P.3d 477 (quoting *State v. Garcia,* 79 N.M. 367, 368–69, 443 P.2d 860, 861–62 (1968)).

Aggravating Circumstances

{11} To avoid the arbitrary imposition of capital punishment, the State must insure that aggravating factors "justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens,* 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); *see also McCleskey v. Kemp,* 481 U.S. 279, 305, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Gregg v. Georgia,* 428 U.S. 153, 197, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). To justify the death penalty, the United States Supreme Court has mandated that states create a sentencing scheme that insures the punishment of death is only applied to "materially more 'depraved' " murderers, a narrowly tailored class of the worst offenders. *Godfrey v. Georgia,* 446 U.S. 420, 433, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); *see also State v. Clark,* 108 N.M. 288, 304, 772 P.2d 322, 338 (1989), *overruled on other grounds by State v. Henderson,* 109 N.M. 655, 789 P.2d 603 (1990) (citing *Godfrey*). To this end, the Capital Felony Sentencing Act enumerates seven aggravating circumstances that make a first degree murder eligible for the death penalty. The two at issue here are murder of a witness, and murder, with intent to kill, during the commission of a kidnapping. *See* § 31–20A–5(B), (G).

Murder of a Witness

{12} A first degree murder becomes death eligible if the murder is of a "witness to a crime or any person likely to become a witness to a crime, for the purpose of preventing report of the crime or testimony in any criminal proceeding." Section 31–20A–5(G); *see also* UJI 14–7023. To establish this aggravating factor at trial, the State must prove beyond a reasonable doubt that (1) the victim was a witness to a crime or was likely to become a witness to a crime, and (2) the defendant murdered the victim with the motive to prevent the victim from reporting the crime or testifying in a criminal proceeding. UJI 14–7023. The crime witnessed must be separate from the murder. *Id.* The key is the defendant's motive or reason for killing the victim. *Clark,* 108 N.M. at 304, 772 P.2d at 338. At the pretrial *Ogden* stage, the issue is whether the State can show "*probable cause* to believe a jury could reasonably find that [the defendant] killed the victim as a witness." *State v. Willis,* 1997–NMSC–014, ¶ 18, 123 N.M. 55, 933 P.2d 854.

{13} When ruling on the existence of probable cause that murder was committed for the purpose of silencing a witness, we bear in mind the legislative policy in enumerating a limited number of narrowly tailored aggravating circumstances. In creating these limited circumstances in Section 31–20A–5(B), our Legislature determined that murderers who kill witnesses to prevent them from testifying or reporting a separate crime, represent a narrowly tailored class. Narrowing the class of murders to which the death penalty applies, in part to those murders committed to avoid detection and arrest, withstands Eighth Amendment scrutiny and

is therefore a constitutional application of the death penalty. *Clark,* 108 N.M. at 304, 772 P.2d at 338.

{14} In so narrowing this class of murderers, the Legislature, lest it run afoul of the Eighth Amendment, did not intend to cast a net wide enough to include every murder, or even every murder in which another crime occurs and the defendant later attempts to conceal involvement or avoid apprehension. *See State v. Cleve,* 1999–NMSC–017, ¶ 14, 127 N.M. 240, 980 P.2d 23 (stating that when enacting a statute, the Legislature is presumed to know the law). By definition, every murder involves a victim who is a potential witness. *People v. Davis,* 794 P.2d 159, 187 (Col.1990). Moreover, in almost every murder, the killer makes some attempt to tamper with evidence and conceal his guilt. Constitutional narrowing requires more.

{15} In this context, what distinguishes murders deserving of the death penalty is concrete evidence indicative of the murderer's intent at the time of the killing, something more than mere incidental efforts to avoid detection after the killing has already taken place. To satisfy Eighth Amendment scrutiny, our statute narrows the class of offenders to those whose specific intent or motivation for the killing is to silence a potential witness and prevent report of a crime. *Id.* (noting that focus on the purpose of the murder narrows the class of murders for which the aggravating circumstance applies); *Clark,* 108 N.M. at 304, 772 P.2d at 338; *see also State v. Flores,* 2004–NMSC–021, ¶ 16, 135 N.M. 759, 93 P.3d 1264 (stating the court construes a statute, if possible, so that it will be constitutional). Because the specific intent requirement is directed toward attendant circumstances of the crime, a defendant acts "purposely" when "he is aware of the existence of such circumstances or he believes or hopes that they exist." 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.2 (2d ed.2003).

{16} To support the aggravating factor of silencing a witness to prevent the report of another crime, we have previously relied on such evidence as the defendant's own incriminating statements about killing to prevent testimony, prior crimes that are probative of the defendant's motive, and the lack of other plausible motives for the killing. *State v. Allen,* 2000–NMSC–002, ¶ 79, 128 N.M. 482, 994 P.2d 728 (citing cases). Circumstantial evidence of intent surrounding the crimes may also be considered. *See State v. Frank,* 92 N.M. 456, 458, 589 P.2d 1047, 1049 (1979) ("Intent is subjective and is almost always inferred from other facts in the case."); UJI 14–141, –201 (intent may be inferred from surrounding circumstances). The crime the victim witnessed must be separate from the murder; it must be a second, underlying crime serious enough that the defendant kills specifically to silence the victim and prevent the victim's report or testimony against him. *Cf.* UJI 14–7023 (requiring the crime the victim witnessed be a separate crime from the murder); *State v. Treadway,* ——–NMSC–——, No. 26,218, slip op. at 5 (May 6, 2002);[1] *State v. Smith,* 1997–NMSC–017, ¶ 10, 123 N.M. 52, 933 P.2d 851.

{17} Our cases concerning the evidence necessary to support the murder-of-a-witness aggravator represent a broad spectrum.[2] We analyze those cases as a guide to help determine where on this spectrum the two Tafoya murders fit.

{18} On one end are those cases involving direct evidence of a killer's motive. Evidence of this type commonly involves incriminating statements by the killer that the victim was silenced to prevent report of an underlying crime. *See Allen,* 2000–NMSC–002, ¶ 80, 128 N.M. 482, 994 P.2d 728 (stating defendant told wife he killed his rape victim

1. The unpublished Decision in *Treadway,* attached as an appendix to this opinion, will be reported and may be cited in the future as any other published opinion. We do so because it adds significant value to our case law on the issues raised in this case.

2. Our precedent has not yet included the classic case where a trial is pending and a witness is killed prior to giving all of the witness's testimony or a witness is killed in retaliation for testifying. *See* § 31–20A–5(G). Our cases are limited to the more frequent circumstance in which the victim is a potential witness to a crime preceding or coinciding with the murder. *Id.*

to prevent her from reporting the rape); *Coffin*, 1999-NMSC-038, ¶ 49, 128 N.M. 192, 991 P.2d 477 (stating defendant told witness he killed the victim because the victim witnessed him killing another man); *Clark*, 108 N.M. at 304, 772 P.2d at 338 (stating defendant believed he could not let his rape victim go "because that would be the end for him"); *cf. Smith*, 1997-NMSC-017, ¶ 11, 123 N.M. 52, 933 P.2d 851 (indicating the defendant's motive to kill was the belief the victim was possessed by the devil and none of his statements indicated an intent to kill victim as a potential witness).

{19} Although not as compelling as incriminating statements, a defendant's prior crimes may be strong circumstantial evidence of a motive to silence. *See Allen*, 2000-NMSC-002, ¶ 80, 128 N.M. 482, 994 P.2d 728; *Clark*, 108 N.M. at 304, 772 P.2d at 338. In *Allen*, the defendant had a prior conviction in which he threatened to kill one of the witnesses if she testified. 2000-NMSC-002, ¶ 80, 128 N.M. 482, 994 P.2d 728. In *Clark*, the defendant had a prior conviction for kidnapping and rape in which the victim had supplied critical evidence against him. 108 N.M. at 304, 772 P.2d at 338. Notably, these strong indicators of a witness-oriented motive, incriminating statements and prior convictions, are absent from this case.

{20} At the other end of the spectrum are those cases in which the evidence is insufficient to satisfy the specific intent requirement of the statute. For example, in *Treadway*,[3] we held the evidence was insufficient to support the specific purpose of killing to prevent report of a crime. No. 26,218, slip op. at 6. The defendant in that case shot a store clerk during a robbery as the clerk picked up a cue stick and the telephone. *Id.* This Court acknowledged the clerk's act of picking up the telephone supported an inference that the clerk may have intended to call the police. *Id.* at 5. Nonetheless, we noted the short period of time, only a few seconds, between when the clerk grabbed the phone and the defendant shot him, and the "paucity of additional evidence" of defendant's motive for the killing. *Id.* at 6. Despite evidence that the defendant subsequently took steps to conceal his identity and cover up his crimes, we concluded in *Treadway* that the evidence was insufficient to determine whether the clerk was killed to silence him. *Id.*

{21} Somewhere in between these two polar opposites, *Allen* and *Clark* at one end and *Treadway* at the other, are those cases in which there is no direct evidence of the defendant's motive, but there is enough circumstantial evidence to allow the jury to decide if the aggravating factor is present. A prime example comes from the *Willis* case. In *Willis*, 1997-NMSC-014, ¶ 3, 123 N.M. 55, 933 P.2d 854, neighbors called police reporting yelling, scuffling, and a female crying from inside the victim's apartment. The police arrived two minutes later, but by then the house was quiet. *Id.* The victim was found dead in her apartment. *Id.* A neighbor told police he saw a man matching Willis's physical characteristics running from the alley behind the house. *Id.* The evidence indicated that Willis had gone to the victim's house to steal her supply of drugs and money, but not to kill her. *Id.* ¶ 7. There was also evidence that Willis was attempting to rob the victim, that she struggled with him and screamed loud enough to alert the neighbors, thereby leaving Willis only a short time in which to commit the murder before the police arrived. *Id.* The evidence suggested that Willis killed the victim to silence her as she attempted to report the crime by screaming. We found probable cause to proceed on the murder-of-a-witness aggravator. *Id.* ¶ 16.

{22} While *Willis* was a close case, the circumstantial evidence that the victim was killed to silence her—she was a robbery victim, she screamed loud enough to alert the neighbors, and she was silent upon the quick arrival of the police—had a direct link to the requisite motive. Such a link was enough to establish probable cause that the case fit within the narrow circumstance in which our legislature has found the death penalty permissible.[4]

3. *See supra* note 1.

4. In *Willis*, we observed with some hesitation that whether the motive could be proven to a

{23} Another example of a case without direct evidence is our opinion in *Henderson*, 109 N.M. 655, 789 P.2d 603, *overruled on other grounds by Clark v. Tansy*, 118 N.M. 486, 882 P.2d 527 (1994), which represents the closest case to date. In that case, the defendant went to the victim's house apparently to engage in sexual intercourse. *Id.* at 657, 789 P.2d at 605. Although he first denied it, Henderson ultimately admitted he raped the victim. *Id.* There was evidence of a struggle with the victim while Henderson severely beat and strangled her. *Id.* He attempted to wipe his fingerprints from the scene following the killing. *Id.* The next day, he went back to the victim's house, broke in, again tried to wipe fingerprints from the scene, and then turned on gas jets in an attempt to destroy the entire crime scene. *Id.*

{24} On appeal, this Court unanimously concluded there was sufficient evidence of another aggravator, that the victim was intentionally killed in the commission of criminal sexual penetration.[5] However, in a sharply divided opinion, in which the majority changed from its original decision upon rehearing,[6] three justices held there was sufficient evidence that the victim was killed to silence her as a witness. *Id.* at 660, 789 P.2d at 608. The majority concluded there were only two plausible motives for the killing, to silence a witness or to overcome the resistance of the rape victim. *Id.* A combination of the lack of any other plausible motive, the defendant's extreme and repeated attempts to destroy evidence, and some, undefined "other evidence in the record" led the majority to conclude the evidence was sufficient. *Id.*

{25} The State relies heavily upon *Henderson* in applying the murder-of-a-witness aggravating factor to both killings. It argues that probable cause is met because there are no other plausible motives for the killings, and Defendant attempted to destroy evidence and conceal his involvement in the crimes. We agree that *Henderson* is the closest case favoring affirmance on this issue. Although a second plausible motive existed for that killing—to overcome resistance to rape—the *Henderson* Court seemed to conclude that it was sufficient to prove: (a) the murder-of-a-witness motive was equally plausible, (b) other than those two, there were no other plausible motives, and (c) there were attempts to destroy evidence. The State asks us to construe *Henderson* to hold that this evidence would permit a jury to conclude the Tafoyas were murdered to prevent them from being witnesses. As noted above, however, in *Henderson*, this Court referred to "other evidence in the record" in concluding there was sufficient evidence to support the aggravating circumstance. *See Henderson*, 109 N.M. at 660, 789 P.2d at 608.

{26} The State appears to cite to *Henderson* for a universal proposition that the murder-of-a-witness aggravator fits whenever there is no other plausible motive for the killing and there is evidence of concealment after the crime. This interpretation of *Henderson* arguably finds some support in our own precedent. *See Allen*, 2000-NMSC-002, ¶ 79, 128 N.M. 482, 994 P.2d 728 (quoting *Henderson* as holding the aggravator was supported by "the lack of any other plausible motive, together with the acts of the defendant in attempting to avoid detection by destroying evidence at the scene that would tie him [or her] to the crime"); *Smith*,

jury beyond a reasonable doubt "is another question entirely." 1997-NMSC-014, ¶ 16, 123 N.M. 55, 933 P.2d 854. The difference between the evidence necessary to satisfy probable cause and that needed to meet proof beyond a reasonable doubt in this type of case is perhaps best illustrated by comparing *Willis* to *Treadway*. The same type of "direct link" circumstantial evidence was present in *Treadway*, in that of the clerk picking up the phone. Nevertheless, due to the lack of other evidence of the requisite motive we held the evidence was insufficient. *Treadway*, No. 26,218, slip op. at 6.

5. *See* § 31-20A-5(B) (making death eligible a murder "committed with intent to kill in the commission of or attempt to commit . . . criminal sexual penetration").

6. Initially, a majority of Chief Justice Sosa and Justices Ransom and Montgomery ruled there was insufficient evidence that the victim was killed to silence her as a witness. *See Henderson*, 109 N.M. at 666-67, 789 P.2d at 614-15 (Montgomery, J., concurring in part and dissenting in part).

1997–NMSC–017, ¶ 11, 123 N.M. 52, 933 P.2d 851 ("In *Henderson,* the lack of any other plausible motive supported the State's theory that the defendant had murdered the victim to avoid detection of his rape of her."). In *Allen,* there was evidence the defendant attempted to avoid detection by disposing of the body in a remote location and cleaning the pick-up he used to abduct her. 2000–NMSC–002, ¶ 80, 128 N.M. 482, 994 P.2d 728. Further, the State argued that because the defendant did not know the victim, the jury should infer that "there was no other plausible motive for the killing." [7] *Id.* More accurately, it seems that these cases stand for the proposition that the evidence in *Henderson* only *supported* the murder-of-a-witness aggravator. Nonetheless, because it is unclear what evidence the *Henderson* majority was referring to when it said "other evidence in the record," we believe *Henderson* can be understood, at least arguably so, to mean that lack of other plausible motives and post-crime destruction of evidence is *sufficient* to satisfy the aggravator.

{27} We find this construction of *Henderson* deeply disturbing. As we have previously discussed, proof of the aggravator requires evidence that the murder of a witness is specifically "for the purpose of preventing report of the crime." Section 31–20A–5(G). When this evidence is purely circumstantial, it must have a direct link to the motive, such as in *Willis.* By contrast, proof of a negative—the lack of any other plausible motive—is not the equivalent of affirmative proof of a specific motive. The State does not meet its burden of proving an essential element of death eligibility merely by showing the lack of alternatives. The language and intent of the statute, and the constitutional requirement of narrowing require more. Moreover, the commonplace event that a murderer tries to destroy incriminating evidence does not elevate the lack of other plausible motives to proof of a specific motive to silence a witness.

7. We note, however, that there was substantial other, direct evidence of motive in *Allen,* including the defendant's statement that he killed the victim so she would not report the rape. 2000–NMSC–002, ¶ 80, 128 N.M. 482, 994 P.2d 728. There was also the defendant's prior conviction resulting from a witness reporting the crime, even though the defendant threatened to kill her if she did. *Id.*

{28} We are always reluctant to overturn precedent. *See Herrera v. Quality Pontiac,* 2003–NMSC–018, ¶ 15, 134 N.M. 43, 73 P.3d 181 (noting that *stare decisis* promotes: "1) stability of the law; 2) fairness in assuring that like cases are treated similarly; and 3) judicial economy"). Before doing so, we will look to a number of factors:

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

Trujillo v. City of Albuquerque, 1998–NMSC–031, ¶ 34, 125 N.M. 721, 965 P.2d 305 (quoting *Planned Parenthood v. Casey,* 505 U.S. 833, 855, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)); *accord Herrera,* 2003–NMSC–018, ¶ 15, 134 N.M. 43, 73 P.3d 181.

{29} In this case, only the first factor comes into play. We find the potential interpretation of *Henderson*—that the murder-of-a-witness motive is established when there is no other plausible motive and the defendant takes steps to destroy evidence or conceal involvement in the crime—to be unworkable. Read this way, it would open up a majority of murder cases to death eligibility. Many murders involve at least one other crime, and many murderers take some post-crime action to avoid detection. Yet, many murders will not involve a clear-cut motive, and in such cases should not become death eligible, essentially by default, simply because no other plausible motive appears more likely. Consistent with the Constitution and our legislative mandate, death penalty eligibility requires more in the way of compelling evidence that, as a matter of probabilities, the killing was specifically for the purpose of silencing a witness.

{30} Because *Henderson* is subject to an interpretation that appears to relax the constitutional and statutory standard in an impermissible manner, we find it "so unworkable as to be intolerable." *Trujillo,* 1998–NMSC–031, ¶ 34, 125 N.M. 721, 965 P.2d 305. To the extent *Henderson,* 109 N.M. at 659–60, 789 P.2d at 607–08, can be read as upholding the murder-of-a-witness motive, when the only evidence of motive is the lack of other plausible motives and attempts to destroy evidence or conceal involvement in the crimes, then to that extent, *Henderson* must be overturned, and we do so in this opinion.

{31} Having excised the foregoing proposition from *Henderson* from our murder-of-a-witness jurisprudence, we return to our spectrum of cases to determine the outcome of the present case. Within this spectrum, the cases are distinguished by the quantum and quality of evidence presented by the State that is relevant to the aggravating factor. In all the above cases, there is a murder, a separate crime that precedes or coincides with the murder, and attempts to cover-up the crimes by tampering with evidence or lying to police. But that alone is not enough. What makes the evidence enough for probable cause is something more; there must be some additional evidence of motive to bring within "*reasonable probabilities*" that the killing was "for the purpose of preventing report of the crime" by a witness, and not for some other motive, immaterial to death penalty considerations. *Young,* 2004–NMSC–015, ¶ 2, 135 N.M. 458, 90 P.3d 477 (emphasis added); *see* § 31–20A–5(G).

{32} At the easier end of the analysis is the *Clark/Allen* line of cases in which the additional evidence of motive comes directly from the defendant's own statements or there is other direct evidence such as a prior crime. At the more difficult end is a case like *Willis* where we are left to infer the defendant's motive from minimal circumstantial evidence. The key is to determine from the record whether there is a direct link from the circumstantial evidence that makes it reasonably probable, not just possible, that the defendant's motive was to silence a witness. With these considerations in mind, we turn to the two victims in this case to determine if probable cause exists that either was murdered to prevent the report of another crime.

{33} The State presented sufficient evidence of a robbery or burglary taking place at the Tafoya residence. From this, there is probable cause to believe that Mr. and Mrs. Tafoya were witnesses or likely to become witnesses to the robbery and burglary. Thus, the first element was satisfied. It is the second element, evidence of Defendant's specific intent to silence a witness, that is more problematic.

{34} For this element, we look to the record for evidence that Defendant's intent or motivation behind the killings was to silence the victims. *See* UJI 14–7023; *Willis,* 1997–NMSC–014, ¶ 18, 123 N.M. 55, 933 P.2d 854; *Clark,* 108 N.M. at 304, 772 P.2d at 338. The evidence suggests the house and store were robbed. Gems and a gun missing from the house were later connected to Defendant, the house was in disarray, and Defendant admitted he went to the house to steal and called it a robbery "gone bad." There was evidence Defendant may have attempted to conceal his involvement in the robbery by placing a shirt in the back door of the house so that no one could look in, by hiding the gems and gun, and by misleading police about his involvement in the crimes.

{35} The record is devoid of circumstantial evidence with a direct link to the requisite motive. We are left with nothing but speculation as to Defendant's motive. *Cf. State v. Flores,* 1996–NMCA–059, ¶ 15, 122 N.M. 84, 920 P.2d 1038 (probable cause cannot be based on speculation). It is not unusual for a criminal to take steps to avoid detection while committing a crime, like posting a lookout during a drug deal or wearing a ski mask during a bank robbery. Defendant's placement of a shirt over the window in the door here is no different than this common behavior. Similarly, Defendant's later efforts to hide the gems and the gun he took from the shop, and then lie to police about his role in the killings are symptomatic of nearly every crime. If this were enough to satisfy probable cause, the murder-of-a-witness aggrava-

ting factor would be broadened far beyond the narrow class of offenders the Legislature intended for the ultimate sanction.

{36} Defendant did tell police he went to the Tafoya house to steal gems so he could use them to buy drugs, and he characterized his crime as a robbery gone bad. This is not a statement that indicates an intent to silence a witness. *Cf. Smith,* 1997–NMSC–017, ¶ 11, 123 N.M. 52, 933 P.2d 851 (holding murder-of-a-witness aggravator not established when the defendant indicated a different motive). Notably, it is also not the kind of statement this Court has found persuasive in the past with regard to the killing-of-a-witness aggravator. *Cf. Allen,* 2000–NMSC–002, ¶ 80, 128 N.M. 482, 994 P.2d 728; *Coffin,* 1999–NMSC–038, ¶ 49, 128 N.M. 192, 991 P.2d 477; *Clark,* 108 N.M. at 304, 772 P.2d at 338.

{37} The circumstantial evidence surrounding each individual killing does not shed any more light on Defendant's motive. Beginning with Mr. Tafoya, the record indicates he was found face down in the kitchen near the entry way to the store with multiple stab wounds. There is no other evidence concerning the circumstances of his death. This makes Defendant's motive even less clear.

{38} Mr. Tafoya's murder best resembles the killing in *Treadway.* It appears Mr. Tafoya was killed very quickly after confronting Defendant, leaving Defendant little time to form the specific intent to kill for the purpose of silencing a witness. *See Treadway,* No. 26,218, slip op. at 6. We note the same "paucity of additional evidence" that made the evidence of motive insufficient in *Treadway,* where at least there was some circumstantial evidence (reaching for the phone) with a direct link to the requisite motive. *Id.; see supra* note 4. And unlike *Willis,* there is no evidence the victim screamed and alerted the neighbors, causing the robber to kill the potential witness and then flee for fear of imminent capture. In short, we are struck by the absence of circumstantial evidence that might enlighten us, or a jury, as to why Mr. Tafoya was killed.

{39} Similarly, the circumstances of Mrs. Tafoya's killing have no direct link to the murder-of-a-witness motive. We note there are differences between the two killings. Most notably, Mrs. Tafoya not only witnessed the robbery, but may have also witnessed her husband's murder, when she heard him fall. Thus, it is reasonable to infer that Mr. Tafoya was killed first, before Defendant discovered Mrs. Tafoya in the home. It is possible, therefore, that Defendant felt compelled to kill Mrs. Tafoya because she was a potential witness to her husband's murder in addition to the robbery/burglary. *Cf. Henderson,* 109 N.M. at 660, 789 P.2d at 608 (noting in *State v. Guzman,* 100 N.M. 756, 676 P.2d 1321 (1984), that having two potential witnesses increases the chance someone would report the accused and make the motive more likely to silence a witness). There is, however, no concrete evidence that Defendant actually considered this reason for the killings. Without other evidence, we are left with nothing more than a guess.

{40} Additionally, Mrs. Tafoya was elderly and disabled, and her hands were bound behind her back, which makes it possible that the only reason she was tied down was to prevent her from reporting the crime and ultimately to silence her as a witness. But, none of this evidence establishes anything more than a possibility that Mrs. Tafoya may, or may not, have been killed because she was a potential witness against Defendant. Contrary to the State's assertions, the evidence she was elderly and incapacitated, does not add to the probable cause calculation. Essentially, the probative nature of this evidence derives from the question it begs, "What other reason could Defendant have had to kill her?" Although it is true that her disabled state may eliminate the possibility she was killed for trying to resist, or for other motives, this only proves a negative. The lack of other plausible motives, as we have said earlier in the opinion with regard to *Henderson,* does not prove the opposite, the motive for the killing. The murder-of-a-witness aggravator cannot be established by default.

{41} Due to the lack of evidence on motive, we cannot leave the jury to speculate about a fundamental element of death eligibility. The State has not produced a record that

narrows the motive as a matter of "reasonable probabilities" to this aggravating factor. Accordingly, we hold that the murder-of-a-witness aggravating circumstance for the killings of both Mr. and Mrs. Tafoya should have been dismissed by the court at the conclusion of the *Ogden* hearing.

Murder in the Commission of Kidnapping

{42} A first degree murder becomes death eligible if it "was committed with intent to kill in the commission of or attempt to commit kidnaping."[sic] Section 31–20A–5(B). The elements of murder in the commission of a kidnapping are: (1) the crime of kidnapping or attempted kidnapping was committed; (2) the victim was murdered in the commission of the kidnapping; and (3) the defendant had the intent to kill. UJI 14–7015; *Allen,* 2000–NMSC–002, ¶ 72, 128 N.M. 482, 994 P.2d 728. This does not require the defendant to have the specific intent to kidnap and then murder the victim, but rather only the intent to kill during a kidnapping. *See* § 31–20A–5(B); *Allen,* 2000–NMSC–002, ¶ 74, 128 N.M. 482, 994 P.2d 728. As with the murder-of-a-witness aggravating factor, we review the evidence of murder in the commission of a kidnapping under the probable cause standard. We find there is probable cause to believe all three elements are present.[8]

{43} The first element satisfies probable cause because Mrs. Tafoya was found with her hands bound behind her back and she had severe injuries from which she ultimately died. *See* NMSA 1978, § 30–4–1(A)(4) (1995) ("Kidnapping is the unlawful . . . restraining . . . or confining of a person, by force . . . with intent . . . to inflict death [or] physical injury. . . .").

{44} In regard to the second element, Defendant argues probable cause cannot be met because the State cannot show the killing was committed in the commission of the kidnapping. He argues the defensive wounds on Mrs. Tafoya's hands indicate she sustained all her injuries prior to being restrained. Since there was no evidence of the timing of her other wounds, Defendant concludes, she may have received the mortal blows before the kidnapping and not in the commission of the kidnapping. We are not persuaded.

{45} Mrs. Tafoya was alive when she was found, leaving open the possibility she suffered some of her more serious wounds after being restrained. Even Defendant admits it is a "reasonable interpretation" to conclude some of Mrs. Tafoya's injuries were inflicted after she was kidnapped. Furthermore, it seems improbable that Defendant would administer all of the mortal blows to Mrs. Tafoya and only tie her up afterwards.

{46} The third element is also satisfied as there is probable cause that Defendant had the intent to kill when he murdered Mrs. Tafoya. Defendant's motive and the manner in which Mrs. Tafoya was killed suggests an intentional killing. *See State v. Rojo,* 1999–NMSC–001, ¶ 34, 126 N.M. 438, 971 P.2d 829 (stating motive and manner of killing supports deliberate intention to take life); *State v. Griffin,* 116 N.M. 689, 695, 866 P.2d 1156, 1162 (1993) (holding close range shooting involving multiple gun shots supports intent to kill). Mrs. Tafoya was stabbed multiple times to the neck and chest. She was beaten so severely her eye came out of place. She had defensive wounds on her hands. When found, she told her daughter that the perpetrator beat her, she begged him to stop, but he just laughed at her. There is probable cause to believe Defendant had the intent to kill.

{47} We acknowledge Defendant's argument that the force used to commit the murder must be "separate and distinct" from the force used to commit the kidnapping; it cannot be one unitary act. *See Henderson,* 109 N.M. at 661, 789 P.2d at 609. In the case at hand, there is ample evidence of a separate and distinct kidnapping occurring prior to the murder. *See Allen,* 2000–NMSC–002, ¶¶ 67–69, 128 N.M. 482, 994 P.2d 728 (finding murder and kidnapping were distinct where all of the elements of kidnapping were met prior to strangulation); *State v. Jacobs,* 2000–NMSC–026, ¶ 57, 129 N.M. 448, 10 P.3d 127; *cf. State v. Foster,* 1999–NMSC–007, ¶ 30, 126 N.M. 646, 974 P.2d 140 (kidnapping

8. The State did not allege murder in the commission of a kidnapping for the killing of Mr. Tafoya.

and murder are not unitary conduct when the force used to complete kidnapping is different from the force used to kill the victim). Here, the force used to commit the kidnapping was tying up the victim. The force used to kill her was stabbing her in the chest. Accordingly, this conduct is not unitary and *Henderson* is inapposite.

CONCLUSION

{48} For the killings of both Mr. and Mrs. Tafoya, we reverse the finding of probable cause with respect to the murder-of-a-witness aggravating circumstance. With respect to the murder of Mrs. Tafoya, we affirm the finding of probable cause that she was killed in the commission of a kidnapping, making that crime death eligible. We remand for further proceedings in both prosecutions not inconsistent with this opinion.

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

WE CONCUR: PAMELA B. MINZNER, PATRICIO M. SERNA, PETRA JIMENEZ MAES, and EDWARD L. CHÁVEZ, Justices.

APPENDIX

STATE of New Mexico, Plaintiff–Appellee,

v.

Michael TREADWAY, Defendant–Appellant.

No. 26,218.

May 6, 2002.

Appeal from the District Court of Curry County, David W. Bonem, District Judge.

Phyllis H. Subin, Chief Public Defender, Jeffrey J. Buckels, Assistant Public Defender, Albuquerque, NM, for Appellant.

Patricia A. Madrid, Attorney General, M. Victoria Wilson, Assistant Attorney General, Santa Fe, NM, for Appellee.

DECISION

MAES, Justice.

{1} Defendant, Michael Treadway, was convicted of felony murder after shooting and killing Red Prather, a store owner in Texico, during a robbery. Because Defendant was sentenced to death, we have jurisdiction over his appeal pursuant to Article VI, Section 2 of the New Mexico Constitution. Defendant presents numerous arguments to this Court as to why his death sentence should be vacated. These include: that there was insufficient evidence to prove the murder of a witness aggravating circumstance according to which he was sentenced; that this case is indistinguishable from any killing in the course of an armed robbery and therefore that to permit the death penalty to stand would constitute judicial creation of an "armed robbery aggravator" and would violate separation of powers; that premeditation generally was eliminated from the case when the charge of premeditated murder was dismissed and so there can be no sufficient intent to support the murder of a witness aggravator; that the death penalty is applied to Defendant disproportionately; that the prosecutor engaged in prejudicial misconduct; that evidentiary rulings during the penalty phase of the case limited the defense case and resulted in jury passion and prejudice; that the trial court improperly permitted the prosecution to rebut its own evidentiary presentation; that there was instructional error; that the Capital Felony Sentencing Act, NMSA 1978, §§ 31–20A–1 to 6 (1979, as amended through 1991), is unconstitutional in six separate respects; and that there was cumulative error.

{2} Defendant's principal argument is that there was insufficient evidence to prove the aggravating circumstance of murder of a witness beyond a reasonable doubt. We agree. We begin our analysis by noting that the murder of a witness aggravator requires the killing of a witness to a crime with specific intent, that is "for the purpose of preventing report of the crime or testimony in any criminal proceeding." *See* NMSA 1978, § 31–20A–5(G) (1981); *see also State v. Henderson,* 109 N.M. 655, 665, 789 P.2d 603, 613 (1990) (Ransom, J., concurring in part and dissenting in part) (finding, under statute, that a specific criminal intent is required), *overruled on other grounds by Clark v. Tansy,* 118 N.M. 486, 493, 882 P.2d 527, 534 (1994). Therefore, the issue is whether there was sufficient evidence that Defendant

killed Red Prather to prevent him from reporting the robbery then in progress or to prevent him from testifying to the facts thereof. We hold that as a matter of law, there was insufficient evidence to prove the murder of a witness aggravating circumstance.

FACTS

{3} On December 11, 1997, Defendant and two others decided to rob a store called the Play–A–Rama. They had been using cocaine, marijuana, and alcohol. The three of them first drove around the area to plan their crime and discuss the robbery. They returned to the store a short time later. Defendant, who had made himself a mask and armed himself with a loaded revolver, told the others to drop him off, drive around for a few minutes, and come back and pick him up. There was no discussion among the three of actually carrying out a shooting.

{4} Defendant was dropped off and walked into the store wearing the mask so as not to be recognized. The store was empty. Prather was in the back. He came into the store area and found Defendant near the counter. Defendant pointed the gun in the direction of Prather and demanded his wallet. Prather said he did not have any money. In his confession, Defendant stated that Prather came toward Defendant as if he were going to "get" him. Prather grabbed hold of a sawed-off pool cue with a nail in the end as well as the telephone.

{5} The prosecution argued from circumstantial evidence that Prather did not come toward Defendant in a threatening manner; rather Defendant shot Prather because he had grabbed the phone. The prosecution argued alternatively, however, that Defendant may have shot because Prather refused to hand over his wallet. Police found the pool cue on the counter and the telephone on the floor around Prather's feet. Defendant shot Prather three times, took the wallet, and fled.

{6} His accomplices picked up Defendant after he left the Play–A–Rama. They went to Defendant's girlfriend's house. Defendant told the others to go back to the store, remove Defendant's fingerprints from the door area and, as if to buy cigarettes, pretend to discover the body, and report that Prather had been shot. They tried to carry this out, but in the course of police questioning, they confessed to their roles in the crime and stated that Defendant told them he had shot Prather. Meanwhile, Defendant tried to cover up the crime by treating his hands with wax to remove gunpowder residue, setting fire to the clothes he was wearing and other evidence, and hiding the gun. Defendant told his girlfriend to say he was with her at the relevant time. Defendant later confessed to the killing.

STANDARD OF REVIEW

{7} The sufficiency of the evidence is reviewed pursuant to a substantial evidence standard. *State v. Sutphin,* 107 N.M. 126, 131 753 P.2d 1314, 1319 (1988). "[T]he relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Garcia,* 114 N.M. 269, 274, 837 P.2d 862, 867 (1992) (*quoting Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). This Court evaluates the sufficiency of the evidence in a criminal case by viewing 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. *State v. Rojo,* 1999–NMSC–001, ¶ 19, 126 N.M. 438, 971 P.2d 829. We will not substitute our judgment for that of the fact finder, nor will we re-weigh the evidence. *State v. Hernandez,* 115 N.M. 6, 26, 846 P.2d 312, 332 (1993).

DISCUSSION

{8} The basis for concluding that there was insufficient evidence to support a conviction, under the aggravating circumstance of the murder of a witness, is that the facts are insufficient to support the conclusion that Defendant shot Prather because Prather could be shown to have had the intent to report the crime of the ongoing robbery. We take as our analytical starting point *Garcia,* 114 N.M. 269, 837 P.2d 862. In that case, the evidence was that the defendant

and the ultimate victim, Gutierrez, had a history of animosity. *Id.* at 270, 837 P.2d at 863. On the day of the killing, these two and some others bought some liquor and went to a house where a party was going on. *Id.* Garcia and Gutierrez began arguing. *Id.* They appeared to reconcile but then resumed arguing. *Id.* They were told to "take it [their argument] to the street." Garcia remarked, "Remove [him] away from me or you're not going to be seeing him for the rest of the day." *Id.*

{9} The trial court in *Garcia* denied a defense motion for directed verdict on the charge of first-degree premeditated murder, and the defendant was convicted by the jury. *Id.* at 271, 837 P.2d at 864. Considering the difference between first- and second-degree murder, we reversed, holding that the evidence was insufficient to support a first-degree murder conviction because no rational jury could have found premeditation and deliberation beyond a reasonable doubt. *Id.* at 274, 837 P.2d at 867. We said the appellate court's role in such a situation is to determine whether *any* rational jury could have found each element of the crime beyond a reasonable doubt:

> This does not involve substituting the appellate court's judgment for that of the jury in deciding the reasonable-doubt question, but it does require appellate court scrutiny of the evidence and supervision of the jury's fact-finding function to ensure that, indeed, a rational jury could have found beyond a reasonable doubt the essential facts required for a conviction.

Id.

{10} "The legislature has given us the responsibility to review death sentences on appeal and determine whether the evidence supports the jury's finding of a statutory aggravating circumstance. In assessing the death penalty we must apply that 'greater degree of scrutiny' called for by the Constitution." *Henderson,* 109 N.M. at 660–61, 789 P.2d at 608–09 (citation omitted). The manner of killing in this case, three gunshots at close range, including one in the eye, supports an intent to kill. *See Jackson,* 443 U.S. at 325, 99 S.Ct. 2781. However, we do not believe that this evidence supports the further intent to kill Prather for the purpose of preventing the report of a crime. Additionally, although Defendant sought to conceal his identity and attempted to cover up the crime, this evidence alone is inadequate to support the specific intent required by Section 31–20A–5(G) because there existed other plausible motives for the killing. *See Henderson,* 109 N.M. at 660, 789 P.2d at 608 (stating that such evidence can be sufficient to support this aggravating circumstance when there is a "lack of other plausible motive").

{11} Finally, we acknowledge that the evidence, including Defendant's statement, indicates that Prather grabbed the telephone immediately before being shot, supporting an inference that Prather intended to call the police. Nevertheless, we do not believe that this evidence, even when viewed in conjunction with the other evidence, supports a reasonable inference that Defendant formed a specific intent to kill for the purpose of preventing the report or a crime. According to the record, only a few seconds elapsed between Prather's reaching for the telephone and the shooting. While it is true that "[a] calculated judgment and decision may be arrived at in a short period of time," UJI 14–201 NMRA 2002, we believe that the paucity of additional evidence supporting an inference of a specific purpose to prevent the report of a crime, coupled with the heightened scrutiny that we are bound to apply in cases involving the extraordinary penalty of death, counsels against reliance on this rule in the present case.

{12} Our conclusion that there is insufficient evidence to support the aggravating circumstance in this case is reinforced by the actions of the prosecutor and the trial judge. At the close of the State's case in chief, Defendant moved for a directed verdict on the charge of deliberate intent first degree murder. Following a discussion among the trial judge, the prosecutor, and defense counsel, the prosecutor agreed to dismiss the charge, and the trial judge accepted the dismissal. The State argues before this Court that the dismissal of the charge did not require the trial judge to rule on the issue of

deliberation. We disagree. Defendant's motion for directed verdict sought a ruling that there was insufficient evidence of a deliberate intent to kill. The prosecutor, by agreeing to dismiss the charge, conceded this claim. The trial judge's decision to accept the prosecutor's acquiescence in the dismissal of the charge is a ruling that as a matter of law the State presented insufficient evidence to establish a deliberate intent to kill, and this ruling operated as a acquittal on the charge of deliberate intent first degree murder. *See County of Los Alamos v. Tapia,* 109 N.M. 736, 739, 790 P.2d 1017, 1021 (1990).("[A] defendant who demurs to the evidence as 'insufficient to establish his factual guilt' has been acquitted ....") (*quoting Smalis v. Pennsylvania,* 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986)). It would be anomalous for this Court to conclude that there was sufficient evidence of a specific intent to kill for the purpose of preventing the report of a crime when the prosecutor and the trial judge determined that there was not an adequate opportunity for "careful thought" or a "calculated judgment," especially considering the gravity of the penalty at issue.

{13} For these reasons, we conclude that the State failed to present sufficient evidence to support a finding beyond a reasonable doubt of the essential elements of the aggravating circumstance of murder of a witness for the purpose of preventing the report of a crime. Accordingly, the judgment of the trial court is reversed and the case remanded for imposition of life sentence. In light of this reversal, we need not review the remainder of the issues raised by Defendant on appeal.

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

WE CONCUR: PATRICIO M. SERNA, Chief Justice, JOSEPH F. BACA, GENE E. FRANCHINI, and PAMELA B. MINZNER, Justices.

2006-NMSC-008

130 P.3d 746

STATE of New Mexico, Plaintiff–Appellee,

v.

Michael TREADWAY, Defendant–Appellant.

No. 26,218.

Supreme Court of New Mexico.

Feb. 16, 2006.

Phyllis H. Subin, Chief Public Defender, Jeffrey J. Buckels, Assistant Public Defender, Albuquerque, NM, for Appellant.

Patricia A. Madrid, Attorney General, M. Victoria Wilson, Assistant Attorney General, Santa Fe, NM, for Appellee.

OPINION

MAES, Justice.

{1} Defendant, Michael Treadway, was convicted of felony murder after shooting and killing Red Prather, a store owner in Texico, during a robbery. Because Defendant was sentenced to death, we have jurisdiction over his appeal pursuant to Article VI, Section 2 of the New Mexico Constitution. Defendant presents numerous arguments to this Court as to why his death sentence should be vacated. These include: that there was insufficient evidence to prove the murder of a witness aggravating circumstance according to which he was sentenced; that this case is indistinguishable from any killing in the course of an armed robbery and therefore that to permit the death penalty to stand would constitute judicial creation of an "armed robbery aggravator" and would violate separation of powers; that premeditation generally was eliminated from the case when the charge of premeditated murder was dismissed and so there can be no sufficient intent to support the murder of a witness aggravator; that the death penalty is applied to Defendant disproportionately; that the prosecutor engaged in prejudicial misconduct; that evidentiary rulings during the penalty phase of the case limited the defense case and resulted in jury passion and prejudice; that the trial court improperly permitted the prosecution to rebut its own evidentiary presentation; that there was instructional error; that the Capital Felony Sentencing Act, NMSA 1978, §§ 31–20A–1 to 6 (1979, as amended through 1991), is unconstitutional in six separate respects; and that there was cumulative error.

{2} Defendant's principal argument is that there was insufficient evidence to prove the aggravating circumstance of murder of a witness beyond a reasonable doubt. We agree. We begin our analysis by noting that the murder of a witness aggravator requires the killing of a witness to a crime with specific intent, that is "for the purpose of preventing report of the crime or testimony in any criminal proceeding." *See* NMSA 1978, § 31–20A–5(G) (1981); *see also State v. Henderson*, 109 N.M. 655, 665, 789 P.2d 603, 613 (1990) (Ransom, J., concurring in part and dissenting in part) (finding, under statute, that a specific criminal intent is required), *overruled on other grounds by Clark v. Tansy*, 118 N.M. 486, 493, 882 P.2d 527, 534 (1994). Therefore, the issue is whether there was sufficient evidence that Defendant

killed Red Prather to prevent him from reporting the robbery then in progress or to prevent him from testifying to the facts thereof. We hold that as a matter of law, there was insufficient evidence to prove the murder of a witness aggravating circumstance.

FACTS

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{5} The prosecution argued from circumstantial evidence that Prather did not come toward Defendant in a threatening manner; rather Defendant shot Prather because he had grabbed the phone. The prosecution argued alternatively, however, that Defendant may have shot because Prather refused to hand over his wallet. Police found the pool cue on the counter and the telephone on the floor around Prather's feet. Defendant shot Prather three times, took the wallet, and fled.

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STANDARD OF REVIEW

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DISCUSSION

{8} The basis for concluding that there was insufficient evidence to support a conviction, under the aggravating circumstance of the murder of a witness, is that the facts are insufficient to support the conclusion that Defendant shot Prather because Prather could be shown to have had the intent to report the crime of the ongoing robbery. We take as our analytical starting point *Garcia,* 114 N.M. 269, 837 P.2d 862. In that case, the evidence was that the defendant

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Id.

{10} "The legislature has given us the responsibility to review death sentences on appeal and determine whether the evidence supports the jury's finding of a statutory aggravating circumstance. In assessing the death penalty we must apply that 'greater degree of scrutiny' called for by the Constitution." *Henderson,* 109 N.M. at 660–61, 789 P.2d at 608–09 (citation omitted). The manner of killing in this case, three gunshots at close range, including one in the eye, supports an intent to kill. *See Jackson,* 443 U.S. at 325, 99 S.Ct. 2781. However, we do not believe that this evidence supports the further intent to kill Prather for the purpose of preventing the report of a crime. Additionally, although Defendant sought to conceal his identity and attempted to cover up the crime, this evidence alone is inadequate to support the specific intent required by Section 31–20A–5(G) because there existed other plausible motives for the killing. *See Henderson,* 109 N.M. at 660, 789 P.2d at 608 (stating that such evidence can be sufficient to support this aggravating circumstance when there is a "lack of other plausible motive").

{11} Finally, we acknowledge that the evidence, including Defendant's statement, indicates that Prather grabbed the telephone immediately before being shot, supporting an inference that Prather intended to call the police. Nevertheless, we do not believe that this evidence, even when viewed in conjunction with the other evidence, supports a reasonable inference that Defendant formed a specific intent to kill for the purpose of preventing the report or a crime. According to the record, only a few seconds elapsed between Prather's reaching for the telephone and the shooting. While it is true that "[a] calculated judgment and decision may be arrived at in a short period of time," UJI 14–201 NMRA 2002, we believe that the paucity of additional evidence supporting an inference of a specific purpose to prevent the report of a crime, coupled with the heightened scrutiny that we are bound to apply in cases involving the extraordinary penalty of death, counsels against reliance on this rule in the present case.

{12} Our conclusion that there is insufficient evidence to support the aggravating circumstance in this case is reinforced by the actions of the prosecutor and the trial judge. At the close of the State's case in chief, Defendant moved for a directed verdict on the charge of deliberate intent first degree murder. Following a discussion among the trial judge, the prosecutor, and defense counsel, the prosecutor agreed to dismiss the charge, and the trial judge accepted the dismissal. The State argues before this Court that the dismissal of the charge did not require the trial judge to rule on the issue of deliberation. We disagree. Defendant's mo-

tion for directed verdict sought a ruling that there was insufficient evidence of a deliberate intent to kill. The prosecutor, by agreeing to dismiss the charge, conceded this claim. The trial judge's decision to accept the prosecutor's acquiescence in the dismissal of the charge is a ruling that as a matter of law the State presented insufficient evidence to establish a deliberate intent to kill, and this ruling operated as an acquittal on the charge of deliberate intent first degree murder. *See County of Los Alamos v. Tapia,* 109 N.M. 736, 739, 790 P.2d 1017, 1021 (1990).("[A] defendant who demurs to the evidence as 'insufficient to establish his factual guilt' has been acquitted . . . .") (*quoting Smalis v. Pennsylvania,* 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986)). It would be anomalous for this Court to conclude that there was sufficient evidence of a specific intent to kill for the purpose of preventing the report of a crime when the prosecutor and the trial judge determined that there was not an adequate opportunity for "careful thought" or a "calculated judgment," especially considering the gravity of the penalty at issue.

CONCLUSION

{13} For these reasons, we conclude that the State failed to present sufficient evidence to support a finding beyond a reasonable doubt of the essential elements of the aggravating circumstance of murder of a witness for the purpose of preventing the report of a crime. Accordingly, the judgment of the trial court is reversed and the case remanded for imposition of life sentence. In light of this reversal, we need not review the remainder of the issues raised by Defendant on appeal.

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

WE CONCUR:

/s/ signed 5-6-02
PATRICIO M. SERNA, Chief Justice

/s/ signed 5-6-02
JOSEPH F. BACA, Justice

/s/ signed 5-6-02
GENE E. FRANCHINI, Justice

/s/ signed 5-6-02
PAMELA B. MINZNER, Justice

2006-NMSC-006

131 P.3d 22

KMART CORPORATION, a Michigan corporation, Petitioner,

v.

TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO, Respondent.

No. 27,269.

Supreme Court of New Mexico.

Dec. 29, 2005.

Modrall, Sperling, Roehl, Harris & Sisk, P.A., Curtis W. Schwartz, Timothy R. Van Valen, Santa Fe, McDermott, Will & Emery, L.L.P, Donald M. Griswold, Melise R. Blakeslee, William L. Goldman, Joshua D. Odintz, Washington, DC, for Petitioner.

Jeffrey W. Loubet, Bruce J. Fort, Santa Fe, for Respondent.

Rubin, Katz, Salazar, Alley, Rouse & Herdman, James S. Rubin, Santa Fe, Morrison and Foerster, L.L.P., Paul H. Frankel, Hollis L. Hyans, Amy F. Nogid, New York, NY, for Amicus Curiae Lanco Inc.

OPINION

MAES, Justice.

{1} We granted a Petition for Certiorari filed by Kmart Properties, Incorporated ("KPI"). On appeal, Kmart Corporation ("Kmart") was substituted as a party for KPI because KPI subsequently merged with Kmart, who assumed KPI's state and local taxation rights and obligations. Kmart asks this Court to reverse the opinion by our Court of Appeals, which upheld the imposition of the Gross Receipts Tax ("GRT") and

the Corporate Income Tax on KPI by the New Mexico Taxation and Revenue Department ("the Department"). Kmart presented six questions for our review: (1) Whether New Mexico has jurisdiction to tax KPI under the Commerce Clause of the United States Constitution; (2) Whether New Mexico has jurisdiction to tax KPI under the Due Process Clause of the United States Constitution; (3) If New Mexico has taxing jurisdiction, whether New Mexico's Corporate Income and Franchise Tax Act, NMSA 1978, §§ 7-2A-1 to -17 (variously amended through 2003), and Uniform Division of Income for Tax Purposes Act, NMSA 1978, §§ 7-4-1 to -21 (variously amended through 2002), subject KPI income to state taxation; (4) If New Mexico has taxing jurisdiction, whether the GRT applies to receipts from the granting (a "sale") of a license to use property when the granting occurs outside of New Mexico; (5) If New Mexico has taxing jurisdiction, whether the administrative hearing process, as implemented by the Department, violates KPI's due process rights; and (6) If New Mexico has taxing jurisdiction, whether the Hearing Officer, by failing to render his Decision and Order within thirty days of the completion of briefing during the administrative protest renders the Decision and Order void, and requires a holding that KPI was entitled to a grant of its protest?

{2} We find that the New Mexico GRT does not apply to the transaction at issue because it involved the sale of property and the GRT does not impose a tax on sales that take place entirely out of the state. Because analysis of New Mexico state statutes wholly resolves this issue, we do not need to address Kmart's constitutional challenges to the imposition of the GRT as raised in questions one and two above. With respect to questions five and six, this case is resolved completely without examining the Department's administrative hearing process. Additionally, we now quash certiorari on the Corporate Income Tax issues identified in question number three and order that the Court of Appeals opinion, *Kmart Properties, Inc. v. New Mexico Taxation & Revenue Dep't*, 2006-NMCA-026, 139 N.M. 177, 131 P.3d 17, shall be filed concurrent with the filing of this opinion.

FACTS AND PROCEDURE BELOW

{3} The facts of this case are not disputed. Kmart is a well-known retailer of consumer goods throughout the United States. During the tax years at issue, 1991 through 1996, Kmart owned and operated twenty-two stores in New Mexico. Kmart is both registered as a corporation and has its principal place of business in Michigan. In 1991, Kmart formed KPI as a wholly owned subsidiary. KPI is also a Michigan corporation with its principal place of business there. KPI was housed in rented office space near Kmart's corporate headquarters. Its employees consisted of two intellectual property attorneys and support staff transferred from Kmart.

{4} In 1991, Kmart assigned to KPI certain trademarks, trade names and domestic services marks (collectively, "Marks"), along with their associated goodwill. The Marks included the name "Kmart" and many of its well-known brand names. The Marks were valued at between $2,734,100,000 and $4,101,200,000 by an independent appraiser. KPI's primary business purpose was the licensing of the Marks. Pursuant to a plan created by Price-Waterhouse, Kmart and KPI entered into a License Agreement concerning the Marks. The License Agreement granted Kmart the exclusive right to use the Marks, subject to quality control restrictions, and in exchange, Kmart paid KPI a license fee of 1.1% of Kmart's national net sales. All activity related to the License Agreement took place in Michigan. Michigan law governs the Agreement and the parties are required to bring any legal actions related to it in Michigan courts. KPI managed Kmart's trademark portfolio, monitored its compliance with the License Agreement, and provided trademark-related services to Kmart and its subsidiaries. KPI's operations were contained within Michigan, and the record contains no indication that any of its employees or agents ever had the pleasure of visiting New Mexico. KPI did not file tax returns in New Mexico for the years at issue here, 1991 through 1996.

{5} It seems apparent that KPI was created to reduce Kmart's state tax liability.

KPI's formation and the plan for reducing Kmart's state tax liability are spelled out in a Price–Waterhouse document prepared for Kmart entitled *Utilization of an Investment Holding Company to Minimize State and Local Income Taxes.* KPI was formed as an "investment holding company," also known as an "intangible holding company," in Michigan, which does not tax royalty or interest income. Its direct activities were restricted to Michigan so that it would not be taxed by another state. As a result of the formation of KPI, Kmart was able to deduct two different "losses" from its income tax liability in other states. First, Kmart could deduct the royalty payments it made to KPI, as a business expense. Second, because KPI loaned back to Kmart the money it received from the royalty payments at market interest rates, Kmart could claim a deduction for interest expenses. As a result of these deductions and expenses, Kmart's stated profits declined and its state income tax liability was consequently reduced. In one year, Kmart was able to completely eliminate its corporate income tax liability in New Mexico.

{6} Kmart's royalty deductions caught the eye of an auditor for the New Mexico Taxation and Revenue Department in 1997. The Department requested a copy of the License Agreement. It applied the 1.1% royalty rate to the relevant New Mexico sales revenue from Kmart stores to determine KPI's income attributable to New Mexico under the License Agreement. This resulted in a determination that KPI earned in excess of two million dollars per year from business in New Mexico Kmart stores. The Department then performed an audit on KPI, which calculated corporate income tax and gross receipts tax on KPI. The Department assessed $758,142 corporate income tax due from 1991 through 1996 and $478,099.55 in gross receipts tax due from the same period. The Department also assessed penalties and interest on KPI for failing to pay the taxes on time. The Department did not challenge the validity of the transactions creating KPI, but attempted to assert taxes on KPI income generated from Kmart's stores in New Mexico.

{7} KPI filed a timely protest of all assessments in accordance with NMSA 1978, Section 7–1–24(B) (2000). A Department officer heard the protest and affirmed the assessment of corporate income tax and gross receipts tax plus interest, but reversed the assessment of penalties. KPI appealed this ruling to the Court of Appeals. In that appeal, the Department did not appeal the hearing officer's determination to eliminate the penalties.

{8} The Court of Appeals upheld the Department's imposition of both taxes. In its discussion, the Court of Appeals focused on the constitutionality of imposing corporate income tax and gross receipts tax on KPI. It held that neither the Commerce Clause nor the Due Process Clause of the United States Constitution prohibit New Mexico from imposing the corporate income tax or gross receipts tax on KPI. Further, the court held that the taxes as written applied to KPI, specifically that the GRT applied to the License Agreement. We granted Kmart's Petition for Certiorari concerning both taxes pursuant to Rule 12–502 NMRA 2005. Subsequently, the case was stayed when Kmart filed for bankruptcy on July 30, 2002. *In Re: Kmart Corp.,* Cause No. 02–B0247 (Bankr. N.D.Ill.). We entered an Order lifting the stay on June 13, 2003. In doing so, we lifted the stay as to all issues on certiorari, but limited briefing and oral argument to whether the GRT applies to receipts from the granting of a license to use property when the granting occurs outside of New Mexico, including how the constitutional issues in the first and second questions in the petition for certiorari relate to the gross receipts issue. The Department filed a motion to quash certiorari on the Corporate Income Tax issue contained in issue three. After considering the response of Kmart, we now quash certiorari on the issue of Corporate Income Tax.

STANDARD OF REVIEW

{9} Because the facts in this case are undisputed, we review de novo the court's or administrative agency's application of the law to the facts. *TPL, Inc. v. N.M. Taxation & Revenue Dep't,* 2003–NMSC–007, ¶ 10, 133 N.M. 447, 64 P.3d 474. The

interpretation of phrases within a statute is a question of law that is reviewed de novo. *Id.*

DISCUSSION

{10} This case requires us to decide if the Legislature intended to apply the GRT to the receipts generated from the License Agreement between KPI and Kmart. The Court of Appeals opinion in *Kmart* did not undertake a separate analysis of the GRT on the licensing transaction between KPI and Kmart. It relied instead on the analysis in an earlier opinion—*Sonic Industries, Inc. v. State,* 2000-NMCA-087, ¶¶ 14-15, 129 N.M. 657, 11 P.3d 1219, *cert. granted,* 129 N.M. 519, 10 P.3d 843 (2000)—because Kmart conceded that *Sonic* was determinative of the state law issue. Our analysis here of the GRT is thus necessarily in response to the Court of Appeals in *Sonic. Sonic* involved the taxability of franchise fees rather than trademark licensing royalties and it is thus not precisely on point. However, we do not perceive any legally significant distinction between franchise fees and trademark licensing royalties in this context.

{11} To determine whether the 1.1% royalty should be taxed as gross receipts, a two-step analysis is necessary. First, we must engage in statutory interpretation to determine if the Legislature intended to tax those receipts under the GRT. Second, if we conclude that the Legislature intended to tax the receipts under the GRT, we must determine whether the tax violates the Commerce Clause, commonly referred to as the Dormant Commerce Clause, of the United States Constitution. U.S. Const., art. I, § 8. However, if we determine that the Legislature did not intend to tax the receipts under the GRT, then we need not perform a constitutional analysis. *Prop. Tax Dep't v. Molycorp, Inc.,* 89 N.M. 603, 605, 555 P.2d 903, 905 (1976) ("This Court will not pass upon constitutional questions if the merits of the case may be otherwise fairly decided.").

{12} In our attempt to determine whether the Legislature intended to tax the receipts generated from the licensing agreement between Kmart and KPI, we examine both the purpose behind the GRT and the statute's recent history. The purpose of the GRT is to "provide revenue for public purposes by levying a tax on the privilege of engaging in certain activities within New Mexico and to protect New Mexico businessmen from the unfair competition that would otherwise result from the importation into the state of property without payment of a similar tax." NMSA 1978, § 7-9-2 (1966). The GRT defines gross receipts as "the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing property employed in New Mexico, from selling services performed outside New Mexico, the product of which is initially used in New Mexico, or from performing services in New Mexico." NMSA 1978, § 7-9-3.5(A)(1) (2003). The GRT defines property as "real property, tangible personal property, licenses, franchises, patents, trademarks and copyrights." NMSA 1978, § 7-9-3(J) (2003). Thus, the Marks are property as defined by the GRT.

{13} Historically, property like the Marks was taxed under the GRT if the property was used or employed in New Mexico because the granting of a license to use intangible property was considered a lease under the GRT. § 7-9-3.5(A)(1) (stating that the GRT applied to "leasing property employed in New Mexico"). In 1979, our Court of Appeals decided a trio of cases that upheld the imposition of the GRT on the granting of a license in franchise agreements, when the intangible property was owned by an out-of-state corporation but was used or employed in New Mexico. *See Am. Dairy Queen Corp. v. Taxation and Revenue Dep't,* 93 N.M. 743, 747, 605 P.2d 251, 255 (N.M.Ct.App.1979) ("[T]he legislature created a system of taxation under which a tax can be imposed upon and paid by a licensor who 'leases' a trademark to a licensee."); *Baskin-Robbins Ice Cream Co. v. Revenue Div., Dep't of Taxation & Revenue,* 93 N.M. 301, 304, 599 P.2d 1098, 1101 (N.M.Ct.App.1979) (same); *AAMCO Transmissions, Inc. v. Taxation & Revenue Dep't,* 93 N.M. 389, 391, 600 P.2d 841, 843 (N.M.Ct.App.1979) (same).

{14} In 1991, the Legislature amended the definition of leasing within the GRT. *See* 1991 N.M. Laws, ch. 203, § 1. It is this amended version of the statute that we must

examine to determine if the GRT applies to the License Agreement in this case. In the amended statute, leasing was defined as "an arrangement whereby, for a consideration, property is employed for or by any person other than the owner of the property, *except that the granting of a license to use property is the sale of a license and not a lease.*" NMSA 1978, § 7–9–3(E) (1991) (emphasis added). This 1991 amendment marked a significant change in the treatment of the granting of a license. As discussed above, prior to the 1991 amendments, the GRT was imposed on the receipts generated from treating the granting of a license, occurring outside New Mexico by an out-of-state corporation, as a lease. Therefore, the receipts generated from the License Agreement in this case would have been taxable as leased property in New Mexico. *See Am. Dairy Queen Corp.,* 93 N.M. at 747, 605 P.2d at 255; *Baskin–Robbins Ice Cream Co.,* 93 N.M. at 304, 599 P.2d at 1101; *AAMCO Transmissions, Inc.,* 93 N.M. at 391, 600 P.2d at 843.

{15} The 1991 amendments clearly mandate a departure from treating the granting of a license as a lease, to treating the granting of a license as a sale of a license. § 7–9–3(E). By treating the granting of a license as the sale of a license, we believe that the Legislature intended this transaction be analyzed as a sale. We presume that the Legislature knows the state of the law when it enacts legislation, *Bybee v. City of Albuquerque,* 120 N.M. 17, 20, 896 P.2d 1164, 1167 (1995), and when enacting a statute, we conclude that the Legislature intended to change the law as it previously existed. *Bettini v. City of Las Cruces,* 82 N.M. 633, 635, 485 P.2d 967, 969 (1971).

{16} The Department argues that Kmart owes gross receipts tax on the licensing agreement because it sold intangible property located in New Mexico, and thus the GRT applies. In other words, the Department wants us to focus on the location of the property when analyzing whether the receipts generated from the License Agreement were from "selling property in New Mexico" under the GRT. The Department argues that if we find that the intangible property attained a business situs in New Mexico, then the GRT would apply because there would be property sold in New Mexico.

{17} In contrast, Kmart argues that since the License Agreement was completed out-of-state, there was "no sales activity" in New Mexico that would be subject to the GRT. In other words, Kmart argues that the act of selling, rather than the location of the property, determines whether "selling property in New Mexico" occurred under Section 7–9–3.5(A)(1).

{18} We believe that the issue in this case may be resolved completely by examining the language of the Gross Receipts and Compensating Tax Act. Under the Act, the GRT only applies when the selling of property takes place within the borders of New Mexico. § 7–9–3.5(A)(1) ("'gross receipts' means the total amount of money or the value of other consideration received from selling property in New Mexico"). Thus, licensed property can only be subject to the GRT in New Mexico if the license was in essence *sold in New Mexico. Id.* As previously discussed, the parties agree that all activity related to the License Agreement took place in Michigan. KPI, located in Michigan, licensed the Marks in Michigan, to Kmart, a Michigan corporation. With all critical elements and parties being in Michigan, it cannot be said that this transaction involved the sale of property within the borders of New Mexico. While we recognize that the subject matter property of the License Agreement was used in New Mexico, this use does not subject the Agreement to the GRT. The language "selling property in New Mexico" means that the property as defined in the tax code must be sold in New Mexico for it to be taxed, otherwise the statute would read "selling property used in New Mexico" is taxable.

{19} Additionally, we are persuaded by Kmart's argument that the Legislature intended to exempt out-of-state grants of licenses to use intangibles in New Mexico. Kmart asserts that after the 1991 amendments the license in this case would have been subject to another tax, the Compensating Tax. NMSA 1978, § 7–9–7(A) (1995). This Tax is designed to subject out-of-state sellers of goods that are used in New Mexico

to a tax similar to the GRT. *Id.* Our Court of Appeals explained the distinction between the Compensation Tax and the GRT.

> Compensating tax is paid by a New Mexico purchaser only if the sales occurred outside of New Mexico. Gross receipts tax is due from the seller on its receipts from the sales only if the sales occurred inside New Mexico. Therefore, the determination as to which tax applies turns on the point of sale.

Siemens Energy & Automation, Inc. v. Taxation & Revenue Dep't, 119 N.M. 316, 322, 889 P.2d 1238, 1244 (N.M.Ct.App.1994) (internal citations omitted). Kmart contends that *Siemens* holds that the determination of where a sale takes place for purposes of the GRT depends on the point of sale rather than simply the location of the property. In this case, Kmart argues that all of the relevant sales activity took place in Michigan and therefore the Compensating Tax was the appropriate tax rather than the GRT.

{20} In 1993, the Legislature amended the definition of property in Compensating Tax so that it does not include intangible property. 1993 N.M. Laws, ch. 31, § 2. Thus, the Compensating Tax would no longer apply to the receipts generated by the License Agreement. This, Kmart claims, shows a legislative intent to lessen the tax burden on out-of-state sales transactions of intangible property. We agree. With this statutory change, the Legislature altered the taxation of an out-of-state grant of a license, resolving the issue in favor of tax exemption.

CONCLUSION

{21} We find that the GRT does not apply to the receipts generated from the Licensing Agreement. Because we find that the GRT does not apply, we do not need to analyze whether or not the Commerce Clause or the Due Process Clause forbid the GRT to apply to the License Agreement. Additionally we quash certiorari on the issue of Corporate Income Tax.

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

MINZNER, SERNA and CHÁVEZ, Justices, concur.

BUSTAMANTE, Chief Judge, New Mexico Court of Appeals (sitting by designation).

2006-NMCA-026

131 P.3d 27

KMART PROPERTIES, INC., a Michigan Corporation, Protestant–Appellant,

v.

TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO, Respondent–Appellee.

No. 21140.

Court of Appeals of New Mexico.

Nov. 27, 2001.

Certiorari Granted, No. 27,269, Jan. 9, 2002.

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OPINION

BOSSON, Chief Judge.

{1} Kmart Properties, Incorporated (KPI), a wholly owned Michigan subsidiary of Kmart Corporation, owns and manages trademarks previously developed by Kmart Corporation. KPI challenges New Mexico's assessment of state income taxes and gross receipts taxes upon royalties paid by Kmart Corporation to KPI. KPI bases its challenge upon the following grounds: (1) New Mexico's assertion of jurisdiction to tax KPI violates the Due Process Clause of the United States Constitution; (2) New Mexico's assessment of each tax against KPI is prohibited by the Commerce Clause of the United States Constitution; (3) New Mexico's tax on KPI's gross receipts is not authorized by state law; (4) the method for apportioning KPI's income for income tax purposes violates state law; and (5) the hearing officer was not independent and impartial, and his decision was not timely as required by state law. In affirming both taxes, we address matters of first impression regarding the constitutional limits imposed on New Mexico in its efforts to tax income and gross receipts in light of the physical-presence standard of *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992) (Quill).

BACKGROUND

{2} In the fall of 1991 Kmart Corporation created KPI for the purpose of holding title to and managing the trademarks, trade names, and service marks (collectively referred to as the "marks") that Kmart Corporation had developed and used in the United States over the years. Those marks include such well known trade names as "Blue Light Special," and "At Home with Martha Stewart," among many others, as well as the trade name "Kmart" that appears on Kmart stores, signs, products, and employee apparel throughout the United States. When creating KPI, Kmart Corporation followed a plan, developed by Price Waterhouse, entitled "Utilization of an Investment Holding Company to Minimize State and Local Income Taxes." Under this plan, Kmart Corporation infused KPI with assets by transferring ownership of all its domestic marks and their associated goodwill to KPI, in exchange for all of KPI's stock. An independent appraiser estimated that the marks were worth between $2,734,100,000 and $4,101,200,000. Both companies were incorporated in Michigan, as were their headquarters and principal places of business. KPI rented an office suite located one block from Kmart Corporation's corporate headquarters, where KPI housed a total of five employees who were transferred from Kmart Corporation, including two intellectual property lawyers and support staff.

{3} On October 30, 1991, Kmart Corporation transferred ownership of the marks to KPI, and the two corporations entered into a licensing agreement whereby KPI granted Kmart Corporation the exclusive right to use the marks in the United States and its territories, thereby allowing Kmart Corporation the continued use of the "Kmart" name. In exchange for Kmart Corporation's exclusive right to use the marks, the licensing agreement required Kmart Corporation to make royalty payments to KPI, based on 1.1 per-

cent of Kmart Corporation's gross sales throughout the United States. The licensing agreement was negotiated, drafted, and signed by the parties in Michigan.

{4} The creation of KPI dramatically affected Kmart Corporations's tax liability within New Mexico. New Mexico income tax laws allow Kmart Corporation to take a business deduction for royalty payments made to KPI. With this deduction, Kmart Corporation was able to reduce significantly and, in some years, eliminate altogether its New Mexico income tax liability. Meanwhile, KPI paid state taxes only in Michigan, which does not tax income from royalty payments. Thus, income formerly attributed to Kmart Corporation's operations in New Mexico and taxed in New Mexico was shifted to KPI, a corporation with no formal operations in the state, which paid no state income taxes on that income.

{5} In 1997 an auditor for the New Mexico Taxation and Revenue Department (the Department) inquired about Kmart Corporation's royalty deduction, and requested from Kmart a copy of the licensing agreement. By applying the 1.1 percent royalty rate to the relevant New Mexico sales revenues, the Department determined that, during the tax assessment period, KPI earned royalty income in excess of $2,000,000 per year from conducting business within New Mexico. Using that information, the Department then audited KPI, which resulted in the assessment of income taxes and gross receipts taxes upon KPI. Assessment No. 2134646 assessed corporate income tax in the amount of $758,392, apportioned to reflect the royalty income from February 1991 through January 1996 that KPI derived from Kmart Corporation's operations in New Mexico. Assessment No. 2134647 assessed gross receipts taxes in the amount of $478,099.55 for royalty payments during this same period. Additionally, each assessment included penalties and interest for the failure to pay these taxes in a timely manner. KPI timely filed a written protest of all assessments. *See* NMSA 1978, § 7–1–24(B) (2000).

{6} KPI's protest was heard by a Department hearing officer who affirmed the assessment of income and gross receipts taxes plus interest, but reversed the assessment of a penalty. KPI appealed the hearing officer's decision to this Court. *See* NMSA 1978, § 7–1–25(A) (1989); Rule 12–601 NMRA 2001. The Department did not appeal the hearing officer's decision to eliminate the penalty.

DISCUSSION

{7} This appeal requires us to examine whether the federal constitution prohibits New Mexico taxation of a non-domiciliary company under these circumstances.[1] A state's ability to tax a non-domiciliary company may be limited by the Due Process Clause or the Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3 & amend. XIV, § 1. In the past, courts analyzed these clauses with little differentiation between the two, in part because they both address a non-domiciliary company's nexus with the taxing state. *See Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) ("Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State."); *cf. Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977) (Complete Auto Transit) (holding that a state must demonstrate that the "tax is applied to an activity with a substantial nexus with the taxing State"); *Nat'l Geographic Soc'y v. Cal. Bd. of Equalization,* 430 U.S. 551, 558, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1977) (same). Historically, courts treated the nexus requirement of Commerce Clause jurisprudence as though it were similar, if not identical, to that found in the Due Process Clause. *See Quill,* 504 U.S. at 325–27, 112 S.Ct. 1904 (White, J., concurring in part and dissenting in part); *Nat'l Bellas Hess, Inc. v. Dep't of Revenue,* 386 U.S. 753, 756, 87 S.Ct. 1389, 18 L.Ed.2d 505

1. Although KPI contends that the taxes violate the New Mexico Constitution, it failed to explain why or how the Due Process Clause of the state constitution would offer more protection from state taxation than its federal counterpart. *See* N.M. Const. art. II, § 18. By not making an appropriate record, KPI waived the state constitutional issue. *See State v. Gomez,* 1997–NMSC–006, ¶¶ 21–23, 122 N.M. 777, 932 P.2d 1.

(1967) (Bellas Hess) (stating that the "same principles" of minimum contacts guide the state's power to tax under each, after observing that the two clauses share a "similar" test), *overruled on other grounds by Quill,* 504 U.S. at 301–02, 112 S.Ct. 1904; *Trinova Corp. v. Mich. Dep't of Treasury,* 498 U.S. 358, 373, 111 S.Ct. 818, 112 L.Ed.2d 884 (1991); *Memphis Natural Gas Co. v. Stone,* 335 U.S. 80, 96–97, 68 S.Ct. 1475, 92 L.Ed. 1832 (1948) (Rutledge, J., concurring).

{8} However, in 1992 while reviewing a state's ability to impose a use tax on an out-of-state mail order company, which had no stores or sales staff in the taxing state, the United States Supreme Court held that the nexus requirements of the two constitutional clauses were distinct. *Quill,* 504 U.S. at 313–14, 112 S.Ct. 1904. After stating that "a corporation may have the 'minimum contacts' with a taxing State as required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause," *id.* at 313, 112 S.Ct. 1904 the Court fashioned a bright-line test to determine the constitutional validity of sales and use taxes under the Commerce Clause, *id.* at 314, 112 S.Ct. 1904. To justify a sales and use tax, this bright-line test required a taxpayer's physical presence in the taxing state. *Id.* at 315–17, 112 S.Ct. 1904.

{9} There has been a split among state courts regarding whether *Quill*'s presence requirement was intended as a broad, Commerce Clause principle, applicable to all state taxes, or whether physical presence was limited to sales and use taxes. *See J.C. Penney Nat'l Bank v. Johnson,* 19 S.W.3d 831, 839 (Tenn.Ct.App.1999) (requiring physical presence beyond sales and use taxes to satisfy Commerce Clause); *cf. Geoffrey, Inc. v. S.C. Tax Comm'n,* 313 S.C. 15, 437 S.E.2d 13, 18 n. 4 (1993) (articulating the court's understanding that the physical-presence requirement is limited to sales and use taxes under the Commerce Clause). Additionally, states have grappled with determining what satisfies *Quill*'s physical-presence test for the Commerce Clause, beyond the minimum contacts of due process that are shown when a taxpayer purposefully conducts economic activity within a state. *See, e.g., J.C. Penney Nat'l Bank,* 19 S.W.3d at 840 (holding that the physical presence of 11,000 to 17,000 accounts of the bank's credit cards failed to satisfy the physical-presence requirement of the Commerce Clause under *Quill*).

{10} In this appeal, KPI contends that neither the minimum-contacts requirement of due process nor the substantial nexus and physical-presence requirements of the Commerce Clause are satisfied with respect to either the state's income tax or its gross receipts tax. We discuss, in turn, each constitutional argument as it is applied to each tax assessed against KPI.

Due Process Minimum Contacts Nexus

{11} When a state asserts its jurisdiction to tax, the Due Process Clause " 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' " *Quill,* 504 U.S. at 306, 112 S.Ct. 1904 (quoting *Miller Bros. Co. v. Maryland,* 347 U.S. 340, 344–45, 74 S.Ct. 535, 98 L.Ed. 744 (1954)).[2] The fundamental concern of due process is fairness: whether a foreign corporation's contacts with the taxing state are sufficient to put the foreign corporation on notice that the taxing state will exercise power over it. *Quill,* 504 U.S. at 312, 112 S.Ct. 1904. Due process does not require that the taxpayer be physically present within the taxing state. *Id.* at 308, 112 S.Ct. 1904

{12} KPI contends that it lacked any connection to New Mexico, and argues that its corporate business was conducted solely within the territorial boundaries of Michigan. KPI emphasizes that the licens-

2. Although Due Process also requires "that the 'income attributed to the State for tax purposes must be rationally related to values connected with the taxing State,' " *Quill,* 504 U.S. at 306 (internal quotation marks and citation omitted), KPI only briefly argues the point in its reply brief, and without citation to authority. Under our briefing requirements, the issue is waived. *See Hale v. Basin Motor Co.,* 110 N.M. 314, 321, 795 P.2d 1006, 1013 (1990) (declining to address issues raised for the first time in a reply brief); *DeMatteo v. Simon,* 112 N.M. 112, 116, 812 P.2d 361, 365 (Ct.App.1991) (holding that "arguments unsupported by authority will not be considered on appeal").

ing agreement was executed in Michigan, between two Michigan corporations, and was to be performed within Michigan. KPI arranged its corporate structure so that its employees did not leave Michigan. KPI has no tangible property or formal KPI representatives located in New Mexico, or apparently in any state other than Michigan. Accordingly, KPI argues that it does not have the minimum contacts with New Mexico that would justify the imposition of any state tax consistent with the Due Process Clause.

{13} We disagree. KPI takes a narrow view of its licensing agreement with Kmart Corporation that ignores its substance. The licensing agreement ties KPI to New Mexico, and to other states outside of Michigan where Kmart has its stores. The agreement grants to Kmart the "exclusive right, license and privilege to use the Marks *in the United States.*" (Emphasis added.) As consideration for that right, Kmart made quarterly royalty payments to KPI, calculated at 1.1 percent of the gross sales generated by the "Hardlines, Fashions and Reader's Market Divisions" from all "Kmart stores in the United States." The parties have stipulated that, at the time KPI signed the licensing agreement, Kmart owned and operated approximately twenty-two stores in New Mexico. On October 30, 1991, when Kmart transferred ownership of its marks to KPI and KPI licensed its use back to Kmart, those marks continued to be used, much as before, at the same Kmart stores in New Mexico. Certainly KPI, as owner of the marks, took no action to prevent its licensee from using the marks in New Mexico. *See Geoffrey,* 437 S.E.2d at 16 (noting that trademark licensing company had the ability to control its contact with the state by prohibiting the use of its intangible).

{14} KPI allowed Kmart Corporation to use its marks in New Mexico, in exchange for 1.1 percent of a specific revenue stream generated in New Mexico. That-revenue gave KPI, as the recipient of a direct pecuniary benefit, a clear stake in New Mexico's consumer market. By allowing its marks to be used in New Mexico to generate income, KPI "purposefully avail[ed] itself of the benefits of an economic market in the forum State." *Quill,* 504 U.S. at 307, 112 S.Ct. 1904; *see also Burger King Corp.,* 471 U.S. at 476, 105 S.Ct. 2174 (due process is satisfied "[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of another State"). Thus, New Mexico satisfies the traditional due process standard, which is universally used to evaluate whether an out-of-state business has established and maintained minimum contacts within a taxing state.

{15} This holding should come as no surprise to KPI. New Mexico courts have long held that the Due Process Clause permits the state to tax a foreign corporation that allows its intangible trademarks to be used in New Mexico. *See, e.g., Aamco Transmissions, Inc. v. Taxation & Revenue Dep't,* 93 N.M. 389, 392, 600 P.2d 841, 844 (Ct.App.1979) (holding that gross receipts tax on a franchise fee paid to out-of-state franchiser did not violate due process when trademarks were used in New Mexico); *Am. Dairy Oueen Corp. v. Taxation & Revenue Dep't,* 93 N.M. 743, 746, 605 P.2d 251, 254 (Ct.App. 1979) (same). In a case almost identical to this one, the Supreme Court of South Carolina held that an out-of-state trademark holding company, similar to KPI, was subject to the state's taxing jurisdiction because its parent company, Toys–R–Us, used those trademarks under license in the course of its retail sales business in South Carolina. *See Geoffrey,* 437 S.E.2d at 18. The court specifically held that the tax was consistent with due process because the trademark holding company "purposefully directed its activities toward South Carolina," and because of the "presence of Geoffrey's intangible property in [the] State." *Id.* at 16, 437 S.E.2d 13. Likewise, United States Supreme Court precedent has consistently upheld the taxation of intangibles employed within the taxing state despite due process concerns. *See Int'l Harvester Co. v. Wis. Dep't of Taxation,* 322 U.S. 435, 441, 64 S.Ct. 1060, 88 L.Ed. 1373 (1944); *Wis. v. J.C. Penney Co.,* 311 U.S. 435, 450–52, 61 S.Ct. 246, 85 L.Ed. 267 (1940) (Roberts, J., dissenting); *Curry v. McCanless,* 307 U.S. 357, 365–66, 59 S.Ct. 900, 83 L.Ed. 1339 (1939); *Wheeling Steel Corp. v. Fox,* 298 U.S. 193, 209–11, 56 S.Ct. 773, 80 L.Ed. 1143 (1936).

{16} Accordingly, we hold that KPI has established and maintained sufficient minimum contacts with New Mexico to satisfy all due process concerns. This holding applies equally to New Mexico income tax and its gross receipts tax.

Commerce Clause Substantial Nexus

{17} As we have seen, the Commerce Clause imposes a more demanding standard than that required by due process. In the words of the United States Supreme Court, "Although [we] might suggest that every tax that passes contemporary Commerce Clause analysis is also valid under the Due Process Clause, it does not follow that the converse is as well true: A tax may be consistent with due process and yet unduly burden interstate commerce." *Quill,* 504 U.S. at 313–14 n. 7, 112 S.Ct. 1904. We turn now to that more exacting standard to determine if either the state income tax or the gross receipts tax unduly burdens interstate commerce.

{18} The framers of the federal constitution expressly reserved to Congress the authority to "regulate Commerce with foreign Nations, and among the several states." U.S. Const. art. I, § 8, cl. 3. In what has become known as the "negative" or "dormant" Commerce Clause jurisprudence, the Commerce Clause has been interpreted as implicitly "prohibit[ing] certain state actions that interfere with interstate commerce." *Quill,* 504 U.S. at 309, 112 S.Ct. 1904. Under the dormant Commerce Clause, state taxes that fail to meet the four-part test of *Complete Auto Transit,* 430 U.S. at 279, 97 S.Ct. 1076 interfere unconstitutionally with interstate commerce. That *Complete Auto Transit* test upholds a state tax as long as it " '[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.' " *Quill,* 504 U.S. at 311, 112 S.Ct. 1904 (quoting *Complete Auto Transit,* 430 U.S. at 279, 97 S.Ct. 1076). The *Complete Auto Transit* analysis does not require physical presence in the taxing state. *Quill,* with its physical-presence standard for sales and use taxes, was decided after the Court adopted the four-part Commerce Clause test outlined in *Complete Auto Transit.* As an initial matter, we must determine whether *Quill*'s physical-presence component of the Commerce Clause analysis is limited to the sales and use taxes that were at issue in *Quill,* or whether it applies to income taxes as well.

Quill's Physical–Presence Requirement Does Not Apply to the State Income Tax

{19} In *Quill,* 504 U.S. at 311, 112 S.Ct. 1904 the Supreme Court affirmed the Commerce Clause holding of *Bellas Hess,* 386 U.S. at 753–60, 87 S.Ct. 1389 a twenty-five-year-old opinion at the time, which held that an Illinois sales and use tax imposed upon an out-of-state mail-order company that lacked physical presence in the taxing state violated both the Due Process Clause and the Commerce Clause. *Quill* involved an interstate mail-order business similar to *Bellas Hess* whose only nexus to the taxing state was by way of interstate mails or common carrier. *Quill,* 504 U.S. at 302, 112 S.Ct. 1904. Whereas both *Quill* and *Bellas Hess* involved sales and use taxes, neither case involved a state income tax.

{20} In considering the scope of *Quill,* we turn first to the text of the opinion. The Supreme Court repeatedly emphasized a narrow focus upon sales and use taxes and the need to retain a bright-line test of physical presence for the benefit of an interstate mail-order industry that had relied upon such a test for sales and use taxes. *Quill,* 504 U.S. at 315–17, 112 S.Ct. 1904. The Court stated,

> *Bellas Hess* . . . created a safe harbor for vendors "whose only connection with customers in the [taxing] State is by common carrier or the United States mail." Under *Bellas Hess,* such vendors are free from state-imposed duties to collect sales and use taxes.
>
> . . . Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes. . . . .
>
> Moreover, a bright-line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fos-

ters investment by businesses and individuals.....

... [W]e have never intimated in our review of sales or use taxes that *Bellas Hess* was unsound.

Id. (footnotes omitted).

{21} In that same text, the Court leaves the clear impression that it was not applying the *Bellas Hess* physical-presence requirement to any other taxes. The Court acknowledged that it had "not, in our review of other types of taxes, articulated the same physical-presence requirement that *Bellas Hess* established for sales and use taxes." *Quill,* 504 U.S. at 314, 112 S.Ct. 1904. The Court also stated,

[A]lthough in our cases subsequent to *Bellas Hess* and concerning other types of taxes[,] we have not adopted a similar bright-line, physical-presence requirement, our reasoning in those cases does not compel that we now reject the rule that *Bellas Hess* established in the area of sales and use taxes. To the contrary, the continuing value of a bright-line rule in this area [of sales and use taxes] and the doctrine and principles of *stare decisis* indicate that the *Bellas Hess* rule remains good law.

Quill, 504 U.S. at 317, 112 S.Ct. 1904. While acknowledging that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today," *Quill,* 504 U.S. at 311, 112 S.Ct. 1904 the Court, nonetheless, retained the physical-presence test for sales and use taxes to establish stability for a particular industry faced with the burdens of a particular kind of tax. *See id.* at 317, 112 S.Ct. 1904 ("[T]he *Bellas Hess* rule has engendered substantial reliance and ... therefore counsels adherence to settled precedent.").

{22} It is also evident from *Quill* that a sales and use tax can impose a special burden on interstate commerce beyond just the payment of money. Unlike an income tax, a sales and use tax can make the taxpayer an agent of the state, obligated to collect the tax from the consumer at the point of sale and then pay it over to the taxing entity. Whereas, a state income tax is usually paid only once a year, to one taxing jurisdiction and at one rate, a sales and use tax can be due periodically to more than one taxing jurisdiction within a state and at varying rates. *See id.* at 313 n. 6, 112 S.Ct. 1904. Thus, collecting and paying a sales and use tax can impose additional burdens on commerce that the Supreme Court has repeatedly identified in prior opinions. *See, e.g., Nat'l Geographic Soc'y,* 430 U.S. at 558, 97 S.Ct. 1386; *Bellas Hess,* 386 U.S. at 759–60, 87 S.Ct. 1389; *Scripto, Inc. v. Carson,* 362 U.S. 207, 211, 80 S.Ct. 619, 4 L.Ed.2d 660 (1960).

{23} New Mexico gross receipts tax is similar in structure to the sales and use tax at issue in *Quill.* New Mexico income tax is not. Considering this difference and the Supreme Court's narrow focus on the sales and use tax in *Quill,* we believe that *Quill*'s physical-presence requirement was intended to apply to sales and use taxes only; it was not intended to apply to other taxes such as a state income tax. In coming to this conclusion, we join other state courts that have applied an identical rationale to uphold the constitutionality of other state taxes in a similar context. *See Geoffrey,* 437 S.E.2d at 18 (upholding the constitutionality of an income tax on royalty payments to a wholly-owned, out-of-state trademark holding company on the basis that, even after *Quill,* "the taxpayer need not have a tangible, physical presence in a state for income to be taxable there"); *Gen. Motors Corp. v. City of Seattle,* 107 Wash.App. 42, 25 P.3d 1022, 1028 (2001) (declining "to extend [*Quill*'s] physical presence requirement in the context of [Seattle's business and occupation tax]"); *see also Borden Chems. & Plastics. L.P. v. Zehnder,* 312 Ill.App.3d 35, 244 Ill.Dec. 477, 726 N.E.2d 73, 80 (2000) ("The *Quill* court merely carved out a narrow exception in the area of use tax collection duties. Moreover, the court's decision was based upon considerations that have no bearing upon the facts of this case."); *cf. J.C. Penney Nat'l Bank,* 19 S.W.3d at 839 ("Both *Bellas Hess* and *Quill* are clear in their holding that in the context of a use tax, physical presence is required in order to satisfy the substantial nexus requirement of *Complete Auto.*"). We also observe that applying a physical-presence requirement to state income taxes would be a marked depar-

ture from established precedent. *See, e.g., New York ex rel. Whitney v. Graves,* 299 U.S. 366, 372, 57 S.Ct. 237, 81 L.Ed. 285 (1937); *Int'l Harvester Co.,* 322 U.S. at 441–42, 64 S.Ct. 1060. *See generally* Jerome R. Hellerstein & Walter Hellerstein, *State Taxation: Constitutional Limitations and Corporate Income and Franchise Taxes* ¶ 6.08 (3d ed.1907–2000) (stating a corporation that regularly exploits state markets should be subject to its state income tax whether or not it is physically present); Michael T. Fatale, *State Tax Jurisdiction and the Mythical "Physical Presence" Constitutional Standard,* 54 Tax Law. 105, 131 ("In general, the state court cases determine that, when a taxpayer has income derived from a state's economic market, the taxpayer is subject to that state's income tax.").

{24} Accordingly, we conclude that the Commerce Clause analysis of New Mexico income tax is controlled, not by *Quill*'s physical presence, but by the overarching substantial nexus test announced in *Complete Auto Transit.* Although *Quill* did establish that "substantial nexus" under *Complete Auto Transit* has more than the minimum contacts required of due process, *Quill,* 504 U.S. at 313, 112 S.Ct. 1904 we need not quantify that difference here. In whatever manner that difference may be measured, the use of KPI's marks within New Mexico's economic market, for the purpose of generating substantial income for KPI, establishes a sufficient nexus between that income and the legitimate interests of the state and justifies the imposition of a state income tax. *See Complete Auto Transit,* 430 U.S. at 279, 97 S.Ct. 1076; *Geoffrey,* 437 S.E.2d at 18. Accordingly, we hold that the Department's assessment of state income tax on KPI's royalty revenues is not an undue burden on interstate commerce within the meaning of the United States Constitution.

The Gross Receipts Tax Does Not Unduly Burden Interstate Commerce Where There Is Physical Presence or Its Functional Equivalent

{25} The Department acknowledges that KPI does not have any of its own employees, operations, offices, or facilities physically located within New Mexico. Thus, this case lacks the usual indicia of physical presence described in *Quill.* If the Department is to satisfy the *Quill* standard, it must demonstrate something special about the nature of trademarks and KPI's relationship with Kmart Corporation within New Mexico that constitutes physical presence or its functional equivalent. Any such showing must also satisfy *Quill*'s fundamental concern of avoiding an undue burden on interstate commerce. We also keep in mind the statutory presumption that the New Mexico Legislature intends "to extend the reach of the [Gross Receipts and Compensating Tax] Act to its constitutional limits." *Sonic Indus., Inc. v. State,* 2000–NMCA–087, ¶ 14, 129 N.M. 657, 11 P.3d 1219, *cert. granted,* 129 N.M. 519, 10 P.3d 843 (2000) (Sonic).

{26} We begin by recognizing that KPI, not Kmart Corporation, is the true owner of all of KPI's domestic marks and the goodwill represented by them, which includes the trademark name "Kmart." Ownership of those marks brings with it the complexities of trademark law and one of its abiding principles: that a trademark, and its goodwill, are inseparable property rights that, as a practical matter, are bound to the business that generates the goodwill. "Unlike patents or copyrights, trademarks are not separate property rights. They are integral and inseparable elements of the goodwill of the business or services to which they pertain." *Visa, U.S.A., Inc. v. Birmingham Trust Nat'l Bank,* 696 F.2d 1371, 1375 (Fed.Cir. 1982). A trade name or mark "is merely a symbol of goodwill; it has no independent significance apart from the goodwill it symbolizes." *Marshak v. Green,* 746 F.2d 927, 929 (2d Cir.1984). "Good will and its trademark symbol are as inseparable as Siamese Twins who cannot be separated without death to both." 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 18:2, at 18–5 (4th ed.2001).

{27} When a company acquires trademarks and goodwill, the essence of what it obtains "is the right to inform the public that it is in possession of the special experience and skill symbolized by the name of the original concern, and of the sole authority to

market its products." *Levitt Corp. v. Levitt*, 593 F.2d 463, 468 (2d Cir.1979). The value of what it obtains is tied to the underlying business that generates the goodwill associated with the trademarks. "If there is no business and no good will, a trademark symbolizes nothing." McCarthy, *supra*, § 18:2, at 18–5 to 18–6. Goodwill is bound to the business with which it is associated, and "can no more be separated from a business than reputation from a person." *Id.* at 18–7 (citing *Webster Investors, Inc. v. Comm'r*, 291 F.2d 192 (2d Cir.1961)). *See generally* 1 Jerome Gilson, *Trademark Protection and Practice* § 1.03[7][b] (2001) ("Since there can be no goodwill for the trademark to symbolize without such a going business and corresponding use of the trademark, trademark rights in the United States, at least, are wholly dependent upon actual use.").

{28} When Kmart Corporation created KPI and transferred ownership of the "Kmart" name, it legally separated the trademark and its goodwill from the actual business upon which that goodwill depends. As a practical matter, KPI and Kmart Corporation then became, to paraphrase McCarthy, corporate "Siamese Twins," inextricably bound to each other. McCarthy, *supra*, § 18:2, at 18–5. For KPI, the trademark right to inform the public that they would have a "Kmart shopping experience" would be meaningless without access to Kmart retail outlets that actually provide that experience. Kmart Corporation, in turn, needed continued access to the trademark "Kmart" name so that it could differentiate its retail outlets from other general merchandising stores.

{29} Thus, for the mutual benefit of both companies, Kmart Corporation's retail outlets in New Mexico continued to use the KPI-owned, trademark name, "Kmart," on the storefront. According to the record below, KPI's trademark on the storefront told New Mexico citizens that they would have a "Kmart shopping experience" at that store. Upon entering a Kmart store, a New Mexico consumer will find Kmart Corporation employees bearing the trademark "Kmart" name on their store uniforms. The use of the "Kmart" name has informed customers that they will find products and services associated only with the Kmart name, such as the "Blue Light Special" and "At Home with Martha Stewart," a shopping experience that, because of KPI's marks, could only happen within the confines of a "Kmart" store.

{30} The use of KPI's marks in this fashion has allowed Kmart Corporation to personify the goodwill owned by KPI to facilitate merchandise sales in New Mexico. In this manner, Kmart employees, wearing KPI's trademarks and working at stores with KPI's trademark on the marquee, have acted to represent and promote the goodwill of KPI's marks to the New Mexico consuming public. The value of that goodwill in New Mexico depended, at least to some extent, on how well or how poorly those employees and products performed in New Mexico. Kmart customers, of course, have had no way of knowing that they were dealing with representatives of KPI's goodwill; apparently few people were actually aware that KPI, and not Kmart Corporation, owned the marks and associated goodwill. But, nonetheless, the use of those marks in New Mexico by Kmart Corporation employees promoted the good business reputation associated with KPI's property.

{31} The licensing agreement further demonstrates that Kmart Corporation represented KPI's goodwill in New Mexico by requiring Kmart employees, at least in some form, to act on behalf of KPI's interests. Under the licensing agreement, Kmart Corporation's use of the "Kmart" name was to be "consistent with the high standards of quality and excellence established over the years." The licensing agreement obligated Kmart Corporation to refrain from activities that would "injure or diminish the image or reputation" of KPI's goodwill. More to the point, to ensure that Kmart Corporation would "maintain and enhance the goodwill and image of quality associated by the public with the Marks," Kmart Corporation could only use the "Kmart" name on "establishments maintaining a good business reputation." Kmart Corporation could not use the trademark name in association with "any illegal, vulgar, obscene, immoral, unsavory or

offensive activities." Thus, this licensing agreement empowered KPI to dictate a standard of conduct that governed Kmart's employees in New Mexico, so that Kmart stores could maintain a good business reputation in the local community.

{32} The Department argues that the use of Kmart Corporation stores and employees in New Mexico, to represent KPI's goodwill, gives KPI a "physical presence" in New Mexico under the analysis of *Tyler Pipe Industries, Inc. v. Washington Department of Revenue,* 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987) (Tyler Pipe) and *Scripto,* 362 U.S. at 211, 80 S.Ct. 619. In each of these cases, the United States Supreme Court upheld the constitutionality, under the Commerce Clause, of state sales or use taxes imposed on out-of-state companies that did business in the taxing state *solely* through independent representatives. These representatives were local people who were *not* employees or agents of the taxpayer. In each case, the out-of-state taxpayers had *none* of their own employees or facilities in the taxing state. The Supreme Court considered sufficient, for Commerce Clause purposes, the physical presence of local jobbers, wholesalers, and independent contractors who assumed the job of promoting or aiding the taxpayers' interests within the taxing state. *See Tyler Pipe,* 483 U.S. at 251, 107 S.Ct. 2810 (holding that "the activities of Tyler's sales representatives adequately support the State's jurisdiction to impose its wholesale tax"); *Scripto,* 362 U.S. at 209, 80 S.Ct. 619 (finding that each independent sales representative was engaged as "a representative of 'Scripto' ").

{33} Importantly, the Supreme Court regarded the label or technical legal status of the representative within the taxing state as "without constitutional significance." *Scripto,* 362 U.S. at 211, 80 S.Ct. 619. What mattered was a physical presence, within the taxing state, of someone acting on the company's behalf. Even though *Scripto* and *Tyler Pipe* preceded *Quill,* the Supreme Court in *Quill* reconfirmed that the presence of independent representatives within the taxing state satisfies the physical-presence test. *Quill,* 504 U.S. at 314 (observing that cases such as *Tyler Pipe* "involved taxpayers who had a physical presence in the taxing State" through local independent representatives).

{34} *Tyler Pipe* and *Scripto* provide a close analogy for purposes of analyzing Commerce Clause concerns and physical presence. As the Department argues, the record below supports a conclusion that Kmart Corporation used its stores and employees in New Mexico as local representatives of KPI's goodwill, under a licensing agreement with KPI, to promote both its own sales and the goodwill of KPI's marks. However, there is a difference. Unlike *Tyler Pipe* and *Scripto,* KPI is not engaged in the retail sales of a product. Its sole function is to hold title to marks and associated goodwill that are under license to Kmart Corporation. The question is whether this distinction, with respect to the kind of business and the nature of the intangible property interests being promoted, requires any different result. We think not.

{35} Being intangible property, a trademark can only have "physical presence," beyond the state of its creation, in those locales where it is put to tangible use. *See Geoffrey,* 437 S.E.2d at 17–18. When Kmart Corporation uses KPI's marks in a highly visible and commercially purposeful fashion in New Mexico, it logically follows that those marks are physically present during their period of use. Otherwise, trademarks could never be physically present anywhere other than where the taxpayer designates for its own tax purposes. *See id.* (rejecting similarly restrictive argument regarding use of intangible trademarks in taxing state). The Constitution does not impose such a taxpayer-driven restriction on New Mexico's taxing policy. *See Sonic,* 2000–NMCA–087, ¶ 13, 129 N.M. 657, 11 P.3d 1219; *Am. Dairy Queen Corp.,* 93 N.M. at 746, 605 P.2d at 254.

{36} KPI counters that, if we attribute physical presence for Commerce Clause purposes, based *solely* on the tangible manifestation of KPI's marks in New Mexico, then the State's taxing jurisdiction would become boundless. KPI poses a hypothetical dilemma that any out-of-state third-party, such as a national book author or a holding company for the trademarks of an international sports

or entertainment personality, would have to pay gross receipts tax to New Mexico simply for allowing its trademark to appear on products held for sale on Kmart's shelves. Under that hypothetical, New Mexico would be allowed to extend its reach to tax the out-of-state author for each book sold and the international sports star for each pair of sports paraphernalia sold in a Kmart store without any other connection to this state. KPI contends that this would be gross overreaching on the state's part without precedent anywhere in the country.

{37} We agree that such a result would be unprecedented. However, we disagree that our opinion opens the door to any such hypothetical tax. We have no indication on this record that New Mexico intends to impose its gross receipts tax upon national book authors or sports celebrities merely because merchandise bearing their trademark names is sold in New Mexico stores. We emphasize that we do not decide such a question in the abstract.

{38} The case before us presents far more than just merchandise bearing out-of-state trademarks for sale in New Mexico stores. An extensive apparatus of Kmart stores, signs, and employees are also physically present in New Mexico to work on behalf of KPI's goodwill and associated interests. That apparatus represents KPI's property interests in New Mexico, pursuant to a licensing agreement that requires Kmart Corporation to act on KPI's behalf.

{39} Considering the *Quill* standard in the context of this case, we conclude that the combination of Kmart Corporation's activities in New Mexico, together with the tangible presence of KPI's marks, constitutes the functional equivalent of physical presence as afforded by the independent representatives in *Scripto* and *Tyler Pipe.* As the Supreme Court implicitly acknowledges in the *Quill* opinion, by citing *Scripto* in the context of its physical presence discussion, an independent representative present in the taxing state satisfies the physical presence test and Commerce Clause concerns. *Quill,* 504 U.S. at 314. Here, as in *Tyler Pipe,* Kmart employees were instrumental in " 'maintain[ing] and improv[ing] the name recognition, market share, goodwill, and individual customer relations' " associated with valuable property owned by KPI. *Tyler Pipe,* 483 U.S. at 249, 107 S.Ct. 2810.

{40} We also note that the gross receipts tax in this instance appears to be less of a burden on interstate commerce than the use tax in *Quill.* Because KPI is not engaged in retail sales, it does not have to collect a separate tax from each consumer and then pay it at varying rates according to each local governmental entity in which it is present. As we have previously noted, KPI pays one tax, at a uniform rate, to a single entity based solely on the royalty payment from Kmart Corporation to KPI. This is significantly different from the burden threatened in *Quill* upon the interstate mail-order industry.

{41} KPI also contends that Kmart Corporation cannot be a representative of KPI because Kmart Corporation sells general merchandise, whereas KPI sells only trademarks. Yet, the licensing agreement undercuts this claim. Having granted Kmart Corporation "the exclusive right, license and privilege to use the Marks in the United States," KPI no longer has the capacity to sell its trademarks in the United States. KPI's business purpose, under the terms of the licensing agreement, is to pursue the "further protection and enhancement of its uniquely valuable trademarks and service marks." In other words, KPI is in the business of protecting the goodwill and reputation of the "Kmart" name. This includes ensuring that New Mexico's consumers can continue to rely on the quality that the "Kmart" name has come to represent. *See Dawn Donut Co. v. Hart's Food Stores, Inc.,* 267 F.2d 358, 367 (2d Cir.1959).

{42} For purposes of clarity, we wish to emphasize that our holding today does *not* make Kmart Corporation or any of its employees the agents of KPI, and it does *not* purport to establish a legal relationship of agency, respondeat superior, or premises liability. *See Oberlin v. Marlin Am. Corp.,* 596 F.2d 1322, 1327 (7th Cir.1979). Nothing in this opinion should imply vicarious liability in KPI for the tortious acts of Kmart Corporation and its personnel. *See Ciup v. Chevron*

U.S.A., Inc., 1996–NMSC–062, ¶ 8, 122 N.M. 537, 928 P.2d 263. As the Supreme Court emphasized in *Scripto,* representatives for purposes of establishing Commerce Clause physical presence do not need legal authority to bind the out-of-state taxpayer, contractually or otherwise. *Scripto,* 362 U.S. at 209, 80 S.Ct. 619 (noting that orders collected by the sales representatives were sent "directly to the Atlanta office for acceptance or refusal").

Imposition of the Gross Receipts Tax Upon KPI Is Authorized By Statute

{43} KPI challenges the statutory foundation for the state to tax its royalties received from Kmart Corporation as gross receipts under New Mexico law. NMSA 1978, Section 7–9–3(F) (2001) of the Gross Receipts and Compensating Tax Act authorizes the State to impose gross receipts tax on "the total amount of money or the value of other considerations received from selling property in New Mexico." Section 7–9–3(J) of the same Act provides that "the granting of a license to use property is the sale of a license." *Accord Sonic,* 2000–NMCA–087, ¶ 7, 129 N.M. 657, 11 P.3d 1219. Based on these statutes, the State imposes its tax upon the royalties KPI received from KPI's grant of a license to Kmart Corporation to use KPI's marks and associated goodwill within New Mexico.

{44} KPI argues that New Mexico is without jurisdiction to impose this tax, and the statute could not have intended such a result because the grant of license occurred in Michigan, not in New Mexico. However, in *Sonic* we rejected a similarly formalistic, place-of-contracting argument. *Id.* ¶ 14. In that opinion, we interpreted the same tax statute "to reinforce the requirement that the activities generating receipts subject to taxation under the Act must have a sufficient nexus with New Mexico to support taxation by New Mexico." *Id.* We held that the act of licensing intangible trademarks from an out-of-state franchiser to a New Mexico franchisee to be used in this state constituted "selling property *in* New Mexico" with sufficient nexus to be subject to New Mexico gross receipts tax. *Id.* ¶ 15.

{45} KPI concedes that *Sonic* is determinative of this argument as a matter of state law, and urges us to reconsider that decision. We decline to do so. To the contrary, we follow the rationale of *Sonic* and hold that the gross receipts statute authorizes the State to tax KPI's royalties generated in New Mexico as consideration for the grant (sale) of a license to Kmart Corporation to use those marks in New Mexico.

Apportionment of KPI's Income for Income Tax Purposes Based on Income Generated From Use of the Marks in New Mexico Complies With State Law

{46} KPI files an additional protest against the state income tax on the ground that the tax is not properly apportioned between this state and Michigan as provided by New Mexico law. KPI relies on the Uniform Division of Income for Tax Purposes Act (UDITPA), NMSA 1978, §§ 7–4–1 to –21 (1965, as amended through 2001), a widely-used, uniform system of apportioning and allocating the income of taxpayers who operate in multiple states. In an effort at fair and uniform allocation of taxable income among the states, UDITPA apportions business income among the states based upon the amount and location of three factors regarding the taxpayer's business: real and tangible personal property, employee payroll, and sales. *See* §§ 7–4–10, –11, –14, –16.

{47} It is undisputed that KPI has no real or tangible personal property in New Mexico nor any employees, and it is also settled that KPI never consummated any of its own sales in New Mexico. Therefore, KPI argues that application of the UDITPA formula should result in none of its income being subject to tax in New Mexico and all of its income subject to tax in Michigan. In short, KPI charges that the State of New Mexico is breaking faith with a kind of national compact by imposing its income tax on revenues that should rightly be taxed elsewhere.

{48} The Department responds by citing to Section 7–4–19, a section of UDITPA that allows New Mexico, as with other states, to modify an apportionment formula that "do[es] not fairly represent the extent of the

taxpayer's business activity in this state." That section reads,

> 7–4–19 **Equitable adjustment of standard allocation or apportionment.**
>
> If the allocation and apportionment provisions of [UDITPA] do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for, or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable:
>
> A. separate accounting;
>
> B. the exclusion of any one or more of the factors;
>
> C. the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
>
> D. the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

{49} The Department specifically relied upon Section 7–4–19 to fashion a modified formula that would fairly represent the extent of KPI's "business activity" in New Mexico. The Department applied the sales factor, finding that KPI had a business presence in New Mexico directly related to Kmart's use of KPI's marks and goodwill to produce a revenue stream of sales from New Mexico's markets that translated into royalties paid to KPI. However, the Department excluded the property and payroll factors from the formula pursuant to Section 7–4–19(B), because those factors were de minimis compared to the sales factor in both amount and significance in terms of KPI's business activity. The Department concluded that property and payroll played little or no role in how KPI generated its income, and that inclusion of those factors would distort the economic reality of KPI's business presence.

{50} KPI objects that Section 7–4–19 should be used only under unusual circumstances, and that the Department is simply changing the rules to unfairly increase its revenues. KPI also cites out-of-state case law for the universally accepted propositions that UDITPA, Section 7–4–19, should be used sparingly and that the Department has a heavy burden of persuasion to justify any modification of the UDITPA formula. *See Roger Dean Enters., Inc. v. Dep't of Revenue,* 387 So.2d 358, 363 (Fla.1980); *Donald M. Drake Co. v. Dep't of Revenue,* 263 Or. 26, 500 P.2d 1041, 1044 (1972) (in banc).

{51} We agree that, by definition, modification of the standard formula should be the exception, not the rule. However, we are also aware that the Department did establish a case below to carry its burden in support of exceptional circumstances. The Department presented evidence sufficient to persuade the hearing officer that use of the standard formula in this instance "distorts" the economic reality of KPI's income. The hearing officer concluded that, "[i]n this case, the Department has met its burden of proving that the three-factor formula does not fairly represent KPI's business activity in the state." Although there was evidence on both sides of the proposition, the hearing officer's conclusion finds support in the evidentiary record. It also has support in case law and treatise materials. *See, e.g., Twentieth Century–Fox Film Corp. v. Dep't of Revenue,* 299 Or. 220, 700 P.2d 1035, 1043 (1985) (in banc) (describing criteria for adjustment of UDITPA formula); Hellerstein, *supra,* ¶ 9.09[4], at 9–44 (suggesting that attribution of income to the place where the intangible asset is being exploited would be "likely to reflect, realistically and equitably, the legitimate competing claims of the states involved in the taxation of income").

{52} The hearing officer's determination is also supported by a Department regulation, adopted in 1974 pursuant to Section 7–4–19, providing that where the income producing activity producing business income from intangibles can be readily identified, that income should be sourced to that state and not the state with the greatest cost of production. *See* 3 NMAC 5.19.11(A)(3). Application of that regulation and Section 7–4–19 to the specific circumstance of taxing KPI's royalties generated in New Mexico is supported, in this case, by an amicus curiae brief from the Multistate Tax Commission, "the organization primarily responsible for promoting uniformity of taxation in member states." *Twentieth Century–Fox Film*

Corp., 700 P.2d at 1041. Finally, even with the adjusted formula, it bears repetition that New Mexico is only taxing revenues (royalties) from sales attributable to New Mexico; the Department is not trying to tax income generated beyond its borders. We conclude that the Department sustained its burden to justify a modified formula under Section 7–4–19.

Additional Procedural Issues

{53} KPI raises two procedural issues with which we deal summarily. First, KPI points out that the Department hearing officer took almost a year to decide its administrative protest of these tax assessments. KPI cites to language in the Tax Administration Act providing that "[i]n the case of the hearing of any protest . . . [t]he hearing officer, within thirty days of the hearing, shall inform the protestant in writing of the decision." *See* § 7–1–24(H). Both parties agree that the decision was rendered far longer than thirty days from the hearing. KPI now claims on appeal that the thirty-day requirement is jurisdictional, such that the hearing officer lost power to render his decision and the resulting decision is void. KPI cites two jurisdictional New Mexico opinions interpreting a provision in the Uniform Licensing Act, NMSA 1978, § 61–1–13(B) (1993), that a licensing revocation "decision must be rendered and signed within ninety days after the hearing." *See Lopez v. N.M. Bd. of Med. Exam'rs,* 107 N.M. 145, 145–47, 754 P.2d 522, 522–24 (1988); *Foster v. Bd. of Dentistry,* 103 N.M. 776, 776–78, 714 P.2d 580, 580–82 (1986).

{54} The Uniform Licensing Act is not a tax statute, and does not carry with it the presumption of correctness and burden of persuasion that favors the state in tax matters. *See* NMSA 1978, § 7–1–17 (1992). We have previously construed a similar portion of the Tax Administration Act requiring that a hearing officer "shall promptly set a date for hearing." Section 7–1–24(D). In *In re Ranchers–Tufco Limestone Project Joint Venture,* 100 N.M. 632, 635, 674 P.2d 522, 525 (Ct.App.1983), we declined the kind of relief KPI requests here and held that "[t]he general rule is that tardiness of public officers in the performance of statutory duties is not a defense to an action by the state to enforce a public right or to protect public interests."

{55} We think the same is true of the Tax Administration Act. We hold that the thirty-day requirement for a hearing officer decision does not affect "the essential power" of the hearing officer to decide complex and time-consuming tax protests of this magnitude. In addition, KPI has shown no prejudice from the delay that would affect the merits of the issues it raises in its protest and on this appeal.

{56} KPI's second procedural issue is an attack on the Department hearing officer and the administrative hearing process. KPI alleges that the hearing process did not afford it an objectively fair and impartial forum, and that there was an objective indication of bias or prejudice in the process. *See Reid v. N.M. Bd. of Exam'rs,* 92 N.M. 414, 416, 589 P.2d 198, 200 (1979). KPI makes several factual allegations, including allegations that hearing officers are "captives" of the Department. KPI alleges that the officers are employees of the Department and answer to Department supervisors, that the hearing officer used arguments and took positions outside the parameters of the hearing without affording the parties fair notice, and that the hearing officer cooperated with and assisted the Department attorneys outside the record and in a manner unknown to KPI. KPI also relies upon the alleged fact that tax protesters always lose before the Department hearing officer.

{57} We have dealt with some of these arguments in prior opinions, and we need not re-plow old ground here. *See TPL. Inc. v. N.M. Taxation & Revenue Dep't,* 2000–NMCA–083, ¶ 19, 129 N.M. 539, 10 P.3d 863 (rejecting argument that hearing officer did not provide a fair hearing and that she demonstrated bias by, among other things, searching through the record to come to her own conclusions outside of the arguments of the parties), *cert. granted,* 129 N.M. 519, 10 P.3d 843 (2000). Other arguments are simply too fact-based for this Court, or any appellate court, to adjudicate without a developed record below. Most of KPI's positions on this subject were not sufficiently devel-

oped before the hearing officer. It is well-established that due process is not violated by having hearing officers who are employed by an agency adjudicating cases in which that agency is a party. *C & D Trailer Sales v. Taxation & Revenue Dep't*, 93 N.M. 697, 700, 604 P.2d 835, 838 (Ct.App.1979). We note that any tax protestor can avoid the hearing process altogether by electing to pay the tax assessed and filing a refund claim with the district court. *See* NMSA 1978, § 7-1-26(C)(2) (2001).

{58} We acknowledge that some of KPI's allegations, such as that of ex parte relations between department hearing officers and other department employees, do raise issues of particular note with at least the potential for conflict. Notwithstanding the absence of an adequate record that precludes us from deciding these factual issues on appeal, the Department might be well-advised, if only out of an abundance of caution, to pay more heed to appearances created when department hearing officers and department attorneys and employees are all housed, figuratively and literally, under one roof. With that observation, we reject KPI's arguments on this point as well.

CONCLUSION

{59} We affirm the decision and order of the hearing officer upholding the taxes imposed.

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

WECHSLER and CASTILLO, JJ., concur.

2006-NMSC-009

131 P.3d 43

Leslie ULIBARRI, M.A., Plaintiff–Appellant,

v.

STATE of New Mexico Corrections Academy, Defendant–Appellee.

No. 29,045.

Supreme Court of New Mexico.

Feb. 10, 2006.

Daniel M. Faber, Albuquerque, NM, for Appellant.

Gilkey & Stephenson, P.A., George Christian Kraehe, Barbara Stephenson, Albuquerque, NM, for Appellee.

OPINION

MINZNER, Justice.

{1} This is an appeal of the district court's grant of summary judgment and dismissal of Plaintiff Leslie Ulibarri's complaint alleging violations of the New Mexico Human Rights Act, NMSA 1978, § 28-1-1 (1969) ("NMHRA"), by Defendant, the State of New Mexico Corrections Academy. We conclude that Defendant was entitled to judgment as a matter of law, that the procedural arguments raised by Plaintiff are without merit, and we affirm.

FACTS

{2} Because Plaintiff challenges the district court's grant of summary judgment in favor of Defendant, we recite the facts in the light most favorable to Plaintiff "and draw all reasonable inferences in support of a trial on the merits." *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, ¶ 12, 135 N.M. 539, 91 P.3d 58 (*quoting Rummel v. Lexington Ins. Co.*, 1997-NMSC-041, ¶ 18, 123 N.M. 752, 945 P.2d 970). Plaintiff worked for Defendant as a psychologist from October 1, 2001 to June 7, 2002. Shortly after she was hired, the Academy Director, Alan Shuman, promised her a raise. Plaintiff believed that Shuman had the power or authority to give her this raise. Through November and December of 2001, Shuman made it increasingly clear that he was sexually attracted to Plaintiff. While dining with Plaintiff, following a work related trip to Los Lunas, Shuman giggled and smiled oddly. He later told her that he was thinking about them "being together." On another occasion, he told Plaintiff "[y]our eyes are really beautiful." At the office, Shuman told Plaintiff that he was sexually attracted to Hispanic women, and on another occasion told Plaintiff "[y]ou smell delicious." Shuman also sent Plaintiff emails of virtual flowers and chocolates with personal messages attached.

{3} Finally, on December 10, 2001, Plaintiff and Shuman drove to Hobbs for a work related audit. Shuman asked Plaintiff if she wanted to stop at a "romantic" bed and breakfast. He also asked Plaintiff "[d]o you want to mess around?" and "[d]o you want to have a relationship?" Plaintiff declined. The next day, when returning to Albuquerque, Shuman was concerned that his car was having trouble but hesitated to call for assistance, explaining "[m]y wife doesn't know you are with me."

{4} As a result of these comments, Plaintiff felt increasingly uncomfortable at work. Plaintiff reported to her supervisor, Stan Wilson, that Shuman had propositioned her, but requested that he not tell anyone else, or take any further action. She started wearing scarves, and she told Wilson that she was afraid Shuman would retaliate against her. Although Shuman did not engage in any other behavior that Plaintiff considered sexually harassing or offensive after December 10, 2001, he did increase his criticism of Plaintiff, asking that she keep her in/out marker properly placed, and instructing her that she needed to try to be at work by eight in the morning. Shuman had not previously expressed any concern about the in/out board or Plaintiff's timeliness. Shuman also asked Wilson "What does [Plaintiff] actually do here?" All of these comments were made prior to January 25, 2002. On June 7, 2002, after finding another position, Plaintiff resigned. On learning the news, Shuman commented, "I'm glad I didn't give her that raise that she wanted."

{5} While Plaintiff worked for the Defendant, Shuman and the then-Deputy Secretary of Corrections, had an agreement to "watch each other's back," which Plaintiff contends helped to create a permissive atmosphere and encouraged inappropriate behavior. Shuman was known to have "had improper working relationships with some of the people he supervised." Plaintiff contends that Defendant took no steps to correct Shuman's behavior.

{6} On November 21, 2002, Plaintiff filed a complaint with the New Mexico Human Rights Division and the Equal Employment Opportunity Commission, alleging quid pro quo sexual harassment, hostile work environment sexual harassment, constructive discharge, and retaliation. The district court

granted Defendant's motion for summary judgment with respect to the quid pro quo sexual harassment and constructive discharge claims, and following Defendant's motion for reconsideration, the court granted the motion for summary judgment in its entirety. On appeal, Plaintiff argues that she presented genuine issues of material fact regarding her quid pro quo sexual harassment, hostile work environment sexual harassment, constructive discharge, and retaliation claims. Plaintiff also raises two procedural claims, arguing that the trial court erred in granting Defendant's motion for reconsideration and in denying Plaintiff's reply and motion for reconsideration without a hearing.

DISCUSSION

{7} We review the district court's grant of summary judgment de novo. *Ocana*, 2004–NMSC–018, ¶ 12, 135 N.M. 539, 91 P.3d 58. Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Rule 1–056(C) NMRA 2006. When reviewing a motion for summary judgment, we view the facts in the light most favorable to the non-moving party. *Ocana*, 2004–NMSC–018, ¶ 12, 135 N.M. 539, 91 P.3d 58.

{8} The parties agree that the relevant statute of limitations is set out in Title VII of the Civil Rights Act of 1964 and states that a charge of discrimination must be filed within 300 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e–5(e)(1) (2000); *see also* NMSA 1978, § 28–1–10(A) (2005) (requiring filing of a complaint within 300 days of the alleged act) and NMSA 1978, § 28–1–10(A) (1995) (requiring filing within 180 days).[1] Plaintiff filed her complaint on November 21, 2002, so events prior to January 25, 2002 fall outside the 300 day limitation period.

{9} While Plaintiff concedes that her sexual harassment and retaliation claims are based on events prior to January 25, 2002, she argues that these events should nonetheless be considered under the continuing violation doctrine, an equitable doctrine permitting a plaintiff to bring an otherwise untimely claim. Plaintiff contends that the harassing acts continued until her resignation. In 2002, the United States Supreme Court noted the various approaches taken by the Circuit Courts regarding whether acts falling outside the statutory time period for filing charges are actionable under Title VII. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 107–08, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). The Court observed that many unlawful employment practices are defined by statute and take place at an identifiable time. "Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify." *Id.* at 114, 122 S.Ct. 2061. These defined acts each constitute separate, actionable unlawful employment practices and a charge covering these discrete acts must be filed within the appropriate time period. *Id.* Therefore, the Court concluded that the clear language of Title VII requires that charges related to discrete acts be filed within the statutory time period and rejected the use of equitable doctrines to extend the statutory time period. *Id.* at 115, 122 S.Ct. 2061.

{10} Unlike discrete acts, hostile environment cases involve repeated conduct over days or years and individual acts of harassment may not be separately actionable. Hostile environment claims are based on the cumulative effects of these acts, and these separate acts constitute a single unlawful employment practice: the practice of requiring an employee to work in a discriminatory, hostile or abusive environment. *Id.* The Court concluded that the practice of permitting a hostile work environment can be said to have "occurred" at the time of any act contributing to the hostile environment. Therefore, if one act contributing to a hostile environment claim occurred within the filing period, all acts creating the hostile environment may be considered. *Id.* at 117, 122 S.Ct. 2061.

1. Because the parties have not raised the issue, we do not consider whether the shorter New Mexico limitation period applies to this case.

{11} Although we recognize that we are not bound by the Court's decision in *Morgan* when interpreting the New Mexico Human Rights Act, we find the opinion persuasive and adopt a similar approach to time limitations under the NMHRA.[2] We therefore consider whether Plaintiff's claims can be construed as discrete unlawful employment practices, which must fall entirely within the statutory period, or as a cumulative series of acts constituting a single unlawful employment practice, which may all be considered if any one act contributing to Plaintiff's claim falls within the statutory period. Plaintiff argues that Shuman's comment, "I'm glad I didn't give her that raise that she wanted," was the last in a series of acts contributing to a hostile environment. This comment, made after Plaintiff's resignation, to a third party, could not in itself contribute to the hostile environment. It may, however, support an inference that Shuman created a hostile environment by withholding Plaintiff's raise. Even if we infer from this comment that Shuman's harassment in the form of withholding a promised raise continued as long as she was employed by the Academy, it is not clear that this should be considered an act contributing to a hostile environment, rather than a discrete discriminatory act. In addition, summary judgment was proper as to each of Plaintiff's claims, which are discussed below, even if the time barred events are considered.

{12} First, Plaintiff has not shown that she was subject to a hostile work environment. A hostile environment is created "when the offensive conduct 'has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.' " *Ocana*, 2004–NMSC–018, ¶ 23, 135 N.M. 539, 91 P.3d 58 (*quoting Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)). When determining whether a work environment was hostile or abusive, we look at "the totality of the circumstances, including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " *Ocana*, 2004–NMSC–018, ¶ 24, 135 N.M. 539, 91 P.3d 58 (*quoting Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)). A plaintiff must show that the work environment was both objectively and subjectively hostile: "one that a reasonable person would find hostile or abusive and one that the employee did perceive as being hostile or abusive." *Id.* "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Nava v. City of Santa Fe*, 2004–NMSC–039, ¶ 13, 136 N.M. 647, 103 P.3d 571 (*quoting Faragher v. Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998)). The United States Supreme Court, interpreting Title VII, has clarified that the statute is not "a general civility code" and "requires neither asexuality nor androgyny in the workplace," therefore, "ordinary socializing in the workplace[ ]such as male-on-male horseplay or intersexual flirtation" should not be mistaken for discriminatory conditions of employment. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998); *see also Slay v. Glickman*, 137 F.Supp.2d 743, 751–52 (S.D.Miss.2001) (holding that occasional suggestive comments, some criticism, and single proposition by supervisor did not amount to discriminatory changes in terms and conditions of employment or create a hostile or abusive working environment).

{13} The alleged harassment in this case was not sufficiently severe and pervasive to support Plaintiff's claim. Over a period of two months, Plaintiff was told several times by a superior that he found her attractive and was asked on one occasion if she was interested in a relationship. He did not pursue the matter after she rebuffed him, and he reduced his contact with her. Plaintiff offered no evidence that her work performance was affected. While we acknowledge

2. Because it is not presented in this case, we do not address whether equitable doctrines are available to permit claims that could not reasonably have been discovered within the statutory time period.

that a reasonable person may have felt uncomfortable in the face of Shuman's comments, simple discomfort over a short period of time is not sufficient to alter the terms and conditions of employment. *Cf. Ocana*, 2004–NMSC–018, ¶¶ 25, 27, 135 N.M. 539, 91 P.3d 58 (holding summary judgment inappropriate where plaintiff claimed that her manager engaged in a pattern of intimidating behavior that made her uncomfortable and affected her work performance). In the absence of additional facts, this relatively isolated incident is not sufficiently severe or serious to support a hostile environment claim. Shuman's "parting shot" does not establish that the environment was hostile. Viewed from the Plaintiff's perspective, she was made to wait five months for a promised raise. Shuman never made any comment connecting this raise to anything other than Plaintiff's job performance, and we do not believe the experience of waiting for a raise, in the absence of evidence of discriminatory withholding of that raise, interferes with working conditions.

{14} Second, Plaintiff has not shown that she was constructively discharged. In order to establish that she was constructively discharged, Plaintiff must meet an even higher standard than that required for sexual harassment. She must show "that the employer made working conditions so intolerable, when viewed objectively, that a reasonable person would be compelled to resign." *Gormley v. Coca–Cola Enters.*, 2005–NMSC–003, ¶ 10, 137 N.M. 192, 109 P.3d 280 ("Essentially, a plaintiff must show that she [or he] had no other choice but to quit." (*quoting Yearous v. Niobrara County Mem'l Hosp.*, 128 F.3d 1351, 1356 (10th Cir.1997))). As discussed above, Plaintiff's working conditions were not so intolerable that a reasonable person would feel compelled to resign, and the record reflects that Plaintiff herself did not feel any need to resign for five months after the incident. The district court properly granted summary judgment on both the hostile environment and constructive discharge claims.

{15} Third, the district court properly granted Defendant's summary judgment on Plaintiff's quid pro quo sexual harassment claim. "When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753–54, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). Federal courts have rejected quid pro quo claims when plaintiffs failed to show an explicit or implicit promise of a benefit or threat of harm in exchange for sexual conduct. *See, e.g., Carter v. New York*, 310 F.Supp.2d 468, 477–78 (N.D.N.Y.2004) (rejecting quid pro quo claim where plaintiff failed to show any nexus between supervisor's attempts to kiss her and denied travel and overtime, when supervisor's superiors had implemented a nondiscriminatory policy against overtime); *Wang v. Metro. Life Ins. Co.*, 334 F.Supp.2d 853, 866 (D.Md.2004) (rejecting quid pro quo claim because plaintiff did not contend that supervisor ever actually threatened to take "tangible employment actions" against her for rebuffing his sexual overtures and no such action was taken). The record does not reflect the " 'conditioning of tangible employment benefits upon the submission to sexual conduct.' " *Ocana*, 2004–NMSC–018, ¶ 23, 135 N.M. 539, 91 P.3d 58 (*quoting Hirschfeld v. New Mexico Corr. Dep't*, 916 F.2d 572, 575 (10th Cir. 1990)). Plaintiff has not alleged that Shuman made any suggestion that her response to his advances would have an impact on her compensation or any other aspect of her employment. Shuman's comment following Plaintiff's resignation cannot establish such a connection because it was not directed at Plaintiff and was offered after her resignation, when he no longer had any influence over the conditions of Plaintiff's employment. Further, Plaintiff has not shown that Shuman took any action to deprive her of a tangible employment benefit after he was rebuffed. In fact, Defendant has shown that Shuman sought a raise on Plaintiff's behalf. Because Plaintiff has not demonstrated that any employment benefit was "conditioned on" her engaging in sexual conduct with Shuman, the district court did not err in

granting summary judgment as to the quid pro quo sexual harassment claim.

{16} Fourth, Plaintiff has not established that she suffered retaliation. To prove a prima facie case of retaliation, Plaintiff must show that: "(1) she engaged in protected activity; (2) she suffered an adverse employment action; and (3) there is a causal connection between these two events." *Ocana*, 2004–NMSC–018, ¶ 33, 135 N.M. 539, 91 P.3d 58. While Plaintiff engaged in a protected activity by reporting what she believed to be harassment to her supervisor, she has not made any showing that she suffered any adverse employment action. An adverse employment action occurs when an employer imposes a tangible, significant, harmful change in the conditions of employment. *See Ellerth*, 524 U.S. at 761, 118 S.Ct. 2257 ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."). Plaintiff identifies three comments by Shuman as evidence of retaliation. Shuman asked that Plaintiff keep her in/out marker properly placed, he instructed her that she needed to try to be at work by eight in the morning, and he also asked her supervisor: "What does [Plaintiff] actually do here?" These criticisms are both exceedingly mild and isolated. Plaintiff has not alleged that they were repeated or part of a broader pattern of increased supervision. *Cf. Nava*, 2004–NMSC–039, ¶¶ 14–15, 136 N.M. 647, 103 P.3d 571 (describing a daily pattern of discriminatory behavior by a supervisor taking place over a period of more than a year and holding such behavior harassing). Even if these comments were made with a retaliatory motive, they do not constitute a significant, harmful change in the conditions of employment. Without any showing that these comments were coupled with any more concrete action, they do not rise to the level of an adverse employment action. Having concluded that the district court did not err in granting summary judgment on Plaintiff's substantive claims, we now address Plaintiff's procedural claims.

{17} Plaintiff argues that the trial court did not have the power to grant Defendant's motion for reconsideration. Plaintiff characterizes the motion to reconsider the trial court's partial grant of summary judgment as a motion for new trial under Rule 1–059 NMRA (2006) and argues that the motion was denied because it was not timely granted. We believe this characterization is improper, because the partial grant of summary judgment was not a final judgment. *See Aetna Life Ins. Co. v. Nix*, 85 N.M. 415, 416, 512 P.2d 1251, 1252 (1973); *see also B.L. Goldberg & Assocs., Inc. v. Uptown, Inc.*, 103 N.M. 277, 278, 705 P.2d 683, 684 (1985) (recognizing that "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"). Because the partial grant of summary judgment is interlocutory, it is subject to reconsideration by the trial court prior to the entry of a final judgment. Rule 1–054(B)(1) NMRA (2006); *see also Barnett v. Cal M, Inc.*, 79 N.M. 553, 556, 445 P.2d 974, 977 (1968) (observing that "because of the multiple claims in this case and of the failure to obtain a determination by the court making this judgment final, the court retained jurisdiction and had the authority to revise it at any time before the entry of the judgment"). The trial court therefore retained the power to act on Defendant's motion for reconsideration and did not err in granting the motion.

{18} Plaintiff also contends that the trial court erred in denying her motion for reconsideration of summary judgment in favor of Defendant because no hearing on the motion was held. Unlike Defendant's earlier motion, Plaintiff's motion requested reconsideration of a final judgment, summary judgment having been granted as to all claims. Plaintiff's motion is therefore properly characterized as a motion for a new trial under Rule 1–059. A hearing is not required unless the trial court is granting the motion for a new trial for a reason not stated in the motion. Rule 1–059(D); *see New Mexico Feeding Co., Inc. v. Keck*, 95 N.M. 615, 618–19, 624 P.2d 1012, 1015–16 (1981). That situation is not presented here, and the court

was not required to hold a hearing prior to denying Plaintiff's motion.

CONCLUSION

{19} For the foregoing reasons, we conclude the district court did not err in granting summary judgment. Therefore, we affirm.

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

WE CONCUR: RICHARD C. BOSSON, Chief Justice, PATRICIO M. SERNA, PETRA JIMENEZ MAES, and EDWARD L. CHÁVEZ, Justices.

2006-NMSC-010

131 P.3d 51

Connie CALLAHAN, Sally Fish, and Anne Waters, Plaintiffs–Respondents,

v.

NEW MEXICO FEDERATION OF TEACHERS–TVI, Albuquerque TVI Faculty Federation Local No. 4974 AFT, NMFT, and American Federation of Teachers, Defendants–Petitioners.

No. 28,983.

Supreme Court of New Mexico.

Feb. 22, 2006.

Corrected March 27, 2006.

Law Offices of Justin Lesky, Justin Lesky, Albuquerque, NM, for Petitioners.

Steven K. Sanders & Associates, L.L.C., Steven K. Sanders, Albuquerque, NM, for Respondents.

OPINION

CHÁVEZ, Justice.

{1} This case examines the scope of a public employee union's liability to its members for alleged inadequate representation during a grievance proceeding. Plaintiffs, who were members of the New Mexico Federation of Teachers–TVI, Albuquerque TVI Faculty Federation Local No. 4974 AFT, NMFT, and the American Federation of Teachers ("Union Defendants"), were fired from their jobs as full-time teachers at Albuquerque Technical Vocational Institute ("TVI"). Plaintiffs requested Union Defendants to represent them in a grievance against TVI seeking reinstatement and back pay through the procedures established in the Collective Bargaining Agreement between Union Defendants and TVI. However, after obtaining a favorable arbitration decision concluding that Plaintiffs could file a grievance challenging their terminations, Union Defendants allegedly negotiated a settlement with TVI without consulting Plaintiffs, effectively waiving Plaintiffs' grievance. Plaintiffs then filed a lawsuit in the district court against Union Defendants, asserting: 1) breach of the duty of fair representation, based on a negligence standard; 2) breach of the collective bargaining agreement of which Plaintiffs were third-party beneficiaries; 3) breach of the covenant of good faith and fair dealing implied in the collective bargaining agreement; and 4) breach of a fiduciary duty. The district court dismissed Plaintiffs' complaint under Rule 1–012(B)(6) NMRA 2006, concluding that Plaintiffs did not state a cause of action against Union Defendants.

{2} On appeal the Court of Appeals reversed the district court, reinstating Plaintiffs' complaint in its entirety. *Callahan v. Albuquerque TVI Faculty Fed'n Local No. 4974*, 2005–NMCA–011, 136 N.M. 731, 104 P.3d 1122. The Court of Appeals held that Plaintiffs could sue Union Defendants for breach of the duty of fair representation, breach of the collective bargaining agreement because Plaintiffs were third-party beneficiaries, breach of the covenant of good faith, and breach of a fiduciary duty. *Id.* ¶ 30. The Court of Appeals opinion also suggests that mere negligence would suffice to prove a breach of the duty of fair representation. *Id.* ¶ 28. In addition, the Court of Appeals decided two issues not specifically addressed by the district court. The Court of Appeals held that Plaintiffs were not required to file their complaint against Union Defendants with the TVI Labor Relations Board as a means of exhausting administrative remedies under the Public Employees Bargaining Act, *see* NMSA 1978, §§ 10–7D–1 to 10–7D–26 (1992, amended 1997 and 1998, repealed 1999) ("PEBA I")[1], and that the international union, American Federation of Teachers ("AFT"), was a proper party defendant under the facts as pled. *Id.* ¶ 30.

{3} We granted certiorari to consider three issues. One, what is the scope of a public employee union's liability to a member for alleged failure or refusal to adequately represent the employee in a grievance proceeding? Two, whether public employees who seek compensatory damages from their

1. Plaintiffs based their lawsuit largely on the provisions for public employee bargaining in PEBA I. The current provisions for public employee bargaining are found in a new Public Employee Bargaining Act. *See* NMSA 1978, § 10–7E–1 (2005). Although the two acts appear to be identical in relevant part, *see* §§ 10–7E–2 to 10–7E–26 (2003, amended 2005), we rely on the provisions of PEBA I because the relevant events occurred prior to the repeal of PEBA I.

union for inadequate representation during a grievance proceeding must file their complaint against the union with a Labor Relations Board as a prohibited practice in order to exhaust administrative remedies. Three, whether under the facts as pled the international union may be joined as a party defendant. We hold that under the facts pled by Plaintiffs, the only cause of action that may survive a 12(B)(6) motion is the cause of action for breach of the duty of fair representation based only on a showing that the union acted arbitrarily, fraudulently or in bad faith. Plaintiffs were not required to file their complaint with the TVI Labor Relations Board in order to exhaust administrative remedies since their cause of action against Union Defendants is not a prohibited practice under PEBA I. Finally, because Plaintiffs pled that AFT does business in New Mexico as an exclusive bargaining agent for Plaintiffs under the Collective Bargaining Agreement, Plaintiffs' complaint survives a 12(B)(6) motion. Accordingly, the Court of Appeals is reversed in part, affirmed in part, and this matter is remanded to the district court for proceedings consistent with this opinion.

BACKGROUND

{4} In its order dismissing Plaintiffs' complaint, the district court was clear that it was deciding this case under Rule 12(B)(6) and was not considering matters outside the pleadings. Dismissal on 12(B)(6) grounds is appropriate only if Plaintiffs are not entitled to recover under any theory of the facts alleged in their complaint. *Kirkpatrick v. Introspect Healthcare Corp.*, 114 N.M. 706, 709, 845 P.2d 800, 803 (1992). Therefore, we assume the veracity of all of the well-pled facts in Plaintiffs' complaint to determine whether Plaintiffs may prevail under any state of the facts alleged. *Swinney v. Deming Bd. of Educ.*, 117 N.M. 492, 493, 873 P.2d 238, 239 (1994). The material facts pled by Plaintiffs, which we accept as true, are provided as background for our analysis.

{5} Plaintiffs were fired from their jobs as full-time teachers at TVI without notice or explanation. As employees of a public institution, Plaintiffs were covered by PEBA I. PEBA I gives public employees the right to join a labor organization for the purpose of collective bargaining. Union Defendants are the exclusive representatives of TVI employees under a Collective Bargaining Agreement between Union Defendants and TVI. Part of the responsibilities of Union Defendants under the Collective Bargaining Agreement are to represent public employees during a grievance proceeding.

{6} Plaintiffs sought representation from Union Defendants to challenge their terminations and obtain reinstatement and back pay. Union Defendants undertook representation of Plaintiffs and filed grievances on Plaintiffs' behalf. As a preliminary matter, Union Defendants represented Plaintiffs in an arbitration to determine whether Plaintiffs had a right to challenge their terminations. On this issue, Union Defendants prevailed—it was determined that Plaintiffs were entitled to challenge their terminations under the Collective Bargaining Agreement. Although Union Defendants continued to represent Plaintiffs, rather than seek reinstatement and back pay for them, Union Defendants settled the matter without notifying or consulting with Plaintiffs. The settlement required Plaintiffs to dismiss a pending federal lawsuit against TVI and to waive any right to future employment with TVI.[2] In the event Plaintiffs refused to abide by the settlement, Union Defendants had an agreement with TVI to testify against Plaintiffs in an attempt to have Plaintiffs' federal lawsuit against TVI dismissed.

{7} Dissatisfied with the settlement, Plaintiffs sued Union Defendants in the district court. In their complaint, Plaintiffs allege that Union Defendants ignored Plaintiffs' legitimate defense to their terminations, failed to investigate Plaintiffs' claims, processed

2. Plaintiffs' federal lawsuit against TVI was dismissed with prejudice on April 2, 2002, pursuant to a settlement between the parties. We note that in the federal scheme, suits involving wrongful termination and inadequate union representation are normally brought as hybrid actions, where the aggrieved employee sues the employer for breach of the collective bargaining agreement under Labor Management Relations Act § 301, 29 U.S.C. § 185 (2000), and sues the union for breach of the duty of fair representation implied from the National Labor Relations Act. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983).

their grievances in a perfunctory manner, and settled Plaintiffs' claims with TVI without notifying or consulting Plaintiffs. The first issue we decide is what cause or causes of action these facts will support against Union Defendants.

I. CAUSES OF ACTION SUPPORTED BY THE FACTS STATED IN PLAINTIFFS' COMPLAINT AGAINST UNION DEFENDANTS

A. LABOR ORGANIZATIONS OWE PUBLIC EMPLOYEES A DUTY OF FAIR REPRESENTATION BUT CANNOT BE SUED FOR NEGLIGENT REPRESENTATION

{8} Plaintiffs argue that the above facts state a cause of action against Union Defendants for breach of the duty of fair representation and urge us to adopt a negligence standard to support such a cause of action. Union Defendants concede that they have a duty to fairly represent their union members. Union Defendants also concede in their reply brief that Plaintiffs have alleged sufficient facts in their complaint to support a cause of action for breach of the duty of fair representation. However, relying on *Jones v. Int'l Union of Operating Engineers,* 72 N.M. 322, 383 P.2d 571 (1963), Union Defendants contend that the duty of fair representation may only be breached if a union acts arbitrarily, fraudulently, or in bad faith.

{9} In *Jones,* the employer, Continental Oil Company, fired Jones for refusing to sign a statement acknowledging he had a preexisting eye injury that limited his ability to work. *Id.* at 324, 383 P.2d at 572. Jones sued Continental for wrongful termination. He also sued his union for arbitrarily, fraudulently, and in bad faith breaching its trust obligations as his exclusive bargaining agent by refusing to demand that his termination be submitted to arbitration. *Id.* The district court dismissed his lawsuit under Rule 12(B)(6) for failure to state a cause of action. *Id.* On appeal, we reversed the district court and held that Jones stated a cause of action against his union because labor organizations owe their members a duty of fair representation. *Id.* at 330, 332, 383 P.2d at 576, 578. We explained that the duty of fair representation extends beyond the bargaining table to the "day-to-day adjustment of working rules and the protection of employee's rights secured by the contract." *Id.* at 330, 383 P.2d at 576. Despite explaining that a union's responsibilities extend to the protection of employees' rights, we cautioned against unrestrained interference with a union's decision whether to pursue the arbitration of an employee's grievance:

> The union has great discretion in handling the claims of its members, and in determining whether there is merit to such claim which warrants the union's pressing the claim through all of the grievance procedures, including arbitration, and the courts will interfere with the union's decision not to present an employee's grievance only in extreme cases.

Id. at 331, 383 P.2d at 577.

{10} In *Jones,* we also cited cases and legal scholars for the legal premise that a union is liable to a member for its arbitrary or bad faith action in representing or failing to represent a member against his or her employer. *Id.* Persuaded by the authority we cited, we held Jones had stated a cause of action when he pled that the union had arbitrarily, in bad faith, and in violation of its trust refused to press Jones's grievance to arbitration. *Id.* at 331–32, 383 P.2d at 577. In this case, Plaintiffs suggest that our holding in *Jones* was limited to the pleadings in that case and invite us to recognize that a cause of action for breach of the duty of fair representation may be sustained on facts which demonstrate negligent representation. We decline Plaintiffs' invitation.

{11} We continue to believe that a court should only interfere with a union's decision not to present an employee's grievance in extreme cases. Expanding a cause of action for breach of fair representation to include negligent representation would exceed the bounds of caution we expressed in *Jones.* Moreover, requiring arbitrary, fraudulent or bad faith conduct to prove a breach of the duty of fair representation is consistent with United States Supreme Court precedent. *See Vaca v. Sipes,* 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

{12} In *Vaca,* the employee was terminated from his employment because of high blood pressure and poor health. *Id.* at 174–75, 87 S.Ct. 903. He sued his employer for wrongful termination and the union for refusing to submit his grievance to arbitration. *Id.* at 173, 87 S.Ct. 903. In examining whether the employee had a viable cause of action against the union, the United States Supreme Court recognized that a union's duty of fair representation was a well established duty stemming from federal laws like the Railway Labor Act and the National Labor Relations Act. *Id.* at 177, 87 S.Ct. 903. The Supreme Court went on to define the duty as "a statutory obligation to serve the interests of all members [of a union] without hostility or discrimination toward any, to exercise . . . discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* The duty of fair representation was considered by the Supreme Court to be "a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Id.* at 182, 87 S.Ct. 903.

{13} Nevertheless, the Supreme Court recognized that the federal collective bargaining system "of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Id.* Therefore, "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190, 87 S.Ct. 903. With respect to the employee's specific claims that the union was obligated to take his grievance to arbitration, the Supreme Court held that a union member does not have "an absolute right to have his [or her] grievance taken to arbitration." *Id.* at 191, 87 S.Ct. 903. Rather, a union does not breach its duty of fair representation merely by settling an employee's grievance short of arbitration; the union's refusal or failure to take the grievance to arbitration has to be arbitrary, discriminatory or in bad faith. *Id.* at 190, 192, 87 S.Ct. 903.

{14} Since *Vaca,* the United States Supreme Court has reiterated its holding that a union breaches its duty of fair representation only when its conduct is arbitrary, discriminatory, or in bad faith. *United Steelworkers of Am.,* 495 U.S. 362, 372, 110 S.Ct. 1904, 109 L.Ed.2d 362 (1990); *see also Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554, 571, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976) (indicating that it would be injustice of the grossest sort to let erroneous arbitration decisions stand even though the union's representation had been dishonest, in bad faith, or discriminatory).

{15} Because we hold that the breach of duty of fair representation requires a showing of arbitrary, fraudulent, or bad faith conduct, Plaintiffs' cause of action based on simple negligence is dismissed. The factual allegations in the complaint are sufficient to state a cause of action for arbitrary, fraudulent, or bad faith breach of the duty of fair representation.

B. PLAINTIFFS DO NOT STATE A CLAIM FOR BREACH OF FIDUCIARY DUTY

{16} The Court of Appeals held that "unions such as Defendants owe a fiduciary duty to their union members such as Plaintiffs to represent those members fairly. Plaintiffs have adequately stated a cause of action and should be able to proceed with it." *Callahan,* 2005–NMCA–011, ¶ 23. The Court of Appeals also wrote in its conclusion that "Plaintiffs adequately stated a cause of action in that unions owe a fiduciary duty to their members to represent them fairly." *Id.* ¶ 30. Plaintiffs have interpreted this language as permitting a cause of action for breach of fiduciary duty. Union Defendants argue that the factual allegations in the complaint cannot support a cause of action for breach of fiduciary duty since Plaintiffs do not allege a breach of fiduciary duty as defined in 29 U.S.C. § 501 (2000).

{17} We do not interpret the Court of Appeals opinion to create a cause of action for breach of fiduciary duty. Rather, we interpret the opinion as relying on our language in *Jones* to explain why Plaintiffs state a cause of action for breach of the duty of fair representation. In *Jones,* we stated that collective bargaining agreements "generally provide that grievance procedures are union

controlled and that the individual employee is to be represented by the union under its *fiduciary* capacity as the bargaining agent." *Jones,* 72 N.M. at 329, 383 P.2d at 576 (emphasis added). We also quoted the following passage from a law review article:

> Unless a contrary intention is manifest, the employer's obligations under a collective bargaining agreement which contains a grievance procedure controlled by the union shall be deemed to run solely to the union as the bargaining representative, to be administered by the union in accordance with its *fiduciary duties* to employees in the bargaining unit. The representative can enforce the claim. It can make reasonable, binding compromises. It is liable for breaches of trust in a suit by the employee beneficiaries.

Id. at 329, 383 P.2d at 576 (emphasis added) (*quoting* Archibald Cox, *Rights Under a Labor Agreement,* 69 Harv. L.Rev. 601, 619 (1956)). Although we employed the phrases "fiduciary capacity" and "fiduciary duties" in the above quotations, we were referring to a union's duty to represent union members under a collective bargaining agreement. The intent in using such language was and remains an explanation as to why we recognize a cause of action by a union member against the union for breach of the duty of fair representation. We have explained the proof necessary to establish a breach of the duty but do not label the cause of action as one for breach of fiduciary duty. When the complaint arises from the union's representation of the employee in a grievance proceeding, the cause of action is for breach of the duty of fair representation.[3]

{18} Plaintiffs rely on an American Law Reports annotation and two Pennsylvania cases in support of their argument that Union Defendants owed them a fiduciary duty relating to their employment grievance. However, our review of these authorities reveals that the authorities deal only with a union's duty of fair representation. *See* Jerald J. Director, Annotation, *Union's Liability in Damages for Refusal or Failure to Process Employee Grievance,* 34 A.L.R.3d 884, 896 (1970) (stating that a number of "courts have recognized or applied a duty often arising out of the fact that the union is the employee's statutory agent, or out of a general fiduciary obligation, *to fairly represent* its members and other employees in the bargaining unit" (Emphasis added and footnotes omitted)); *Falsetti v. Local Union No.2026,* 400 Pa. 145, 161 A.2d 882, 895 (1960) ("In entering into this [collective bargaining] Agreement, the Union has assumed the role of trustee for the rights of its members and other employees in the bargaining unit. The employees, on the other hand, have become beneficiaries of fiduciary obligations owed by the Union. As a result, the Union bears a heavy *duty of fair representation* to all those within the shelter of its protection." (Emphasis added.)); *Rutledge v. Se. Pa. Transp. Auth.,* 52 Pa.Cmwlth. 308, 415 A.2d 982, 984 (1980) (describing a union's failure to pursue the final stages of grievance procedures under a collective bargaining agreement as a breach of the "fiduciary duty of fair representation"), *overruled on other grounds by Fouts v. Allegheny County,* 64 Pa.Cmwlth. 441, 440 A.2d 698 (1982). Since Plaintiffs do not allege any financial impropriety on the part of Union Defendants, and since Plaintiffs' claims are encompassed by their claim for breach of the duty of fair representation, we hold that Plaintiffs did not state a claim for breach of a fiduciary duty in this case.

C. PLAINTIFFS DID NOT STATE A CLAIM FOR BREACH OF COLLECTIVE BARGAINING AGREEMENT AS THIRD-PARTY BENEFICIARIES

{19} The Court of Appeals held that Plaintiffs stated a claim for breach of a collective bargaining agreement as third-party beneficiaries. *Callahan,* 2005-NMCA-011, ¶ 25. As the Court of Appeals stated, "[a] collective bargaining agreement is a contract between a labor organization and the employ-

3. We agree the complaint does not state a cause of action for breach of fiduciary duty as fiduciary duty is defined in 29 U.S.C. § 501. However, a review of 29 U.S.C. § 501 is not necessary since this section is not applicable to government, or public, employee unions. *Local 1498 v. Am. Fed'n of Gov't Employees,* 522 F.2d 486, 490 (3rd Cir.1975).

er." *Id.* In this case, TVI and Union Defendants entered into a collective bargaining agreement. Plaintiffs were not signatories to that contract. However, Plaintiffs allege that they may state a cause of action against Union Defendants for breach of the collective bargaining agreement as third-party beneficiaries.

{20} A third-party may have an enforceable right against an actual party to a contract if the third-party is a beneficiary of the contract. *Fleet Mortgage Corp. v. Schuster,* 112 N.M. 48, 49, 811 P.2d 81, 82 (1991). A third-party is a beneficiary if the actual parties to the contract intended to benefit the third-party. *Id.* at 49–50, 811 P.2d at 82–83; *Leyba v. Whitley,* 120 N.M. 768, 773, 907 P.2d 172, 177 (1995). The intent to benefit the third-party " 'must appear either from the contract itself or from some evidence that the person claiming to be a third party beneficiary is an intended beneficiary.' " *Fleet Mortgage,* 112 N.M. at 50, 811 P.2d at 83 (*quoting Valdez v. Cillessen & Son, Inc.,* 105 N.M. 575, 581, 734 P.2d 1258, 1264 (1987)). As TVI and Union Defendants entered into a collective bargaining agreement in accordance with PEBA I, TVI and Union Defendants clearly intended to benefit Plaintiffs, as public employees.

{21} However, for Plaintiffs "to have an enforceable right as third-party beneficiaries against the Union, at the very least the employer must have an enforceable right as promisee." *Rawson,* 495 U.S. at 375, 110 S.Ct. 1904. Plaintiffs argue that they should be allowed to seek damages for breach of the collective bargaining agreement because "TVI promised that it would not terminate their employment unfairly or unjustly and Unions indirectly through the CBA ... promised that they would safeguard Members' rights by challenging their unfair or unjust terminations through arbitration." In order to state a claim, instead of relying on the general notion that TVI and Union Defendants entered into a collective bargaining agreement that pertains to Plaintiffs' employment, Plaintiffs would need to assert a promise that Union Defendants made to TVI and subsequently broke. Plaintiffs have not directed this Court to any such promise or to duties that Union Defendants owed to TVI, and thus also owed to Plaintiffs as third-party beneficiaries of the Collective Bargaining Agreement. Therefore, we find that Plaintiffs did not state a claim for breach of the Collective Bargaining Agreement as third-party beneficiaries.

D. PLAINTIFFS DID NOT STATE A CLAIM FOR BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING AS THIRD-PARTY BENEFICIARIES

{22} While we do not recognize breach of an implied covenant of good faith and fair dealing as a cause of action in New Mexico in at-will employment relationships, *Melnick v. State Farm Mut. Auto. Ins. Co.,* 106 N.M. 726, 730, 749 P.2d 1105, 1109 (1988), we have recognized breach of an implied covenant of good faith and fair dealing in employment arrangements that are not at-will. *Bourgeous v. Horizon Healthcare Corp.,* 117 N.M. 434, 439, 872 P.2d 852, 857 (1994). *Bourgeous* dealt with a lawsuit brought by the *non-union* director of nursing at a nursing home against her *employer* for breach of contract and breach of implied covenant of good faith and fair dealing stemming from wrongful termination. *Id.* at 435, 872 P.2d at 853. In this case, we are faced with a situation where Plaintiffs are attempting to sue Union Defendants for breach of the implied covenant of good faith and fair dealing as third-party beneficiaries to a collective bargaining agreement. We conclude Plaintiffs' claims for breach of implied covenant are subsumed within their claims for breach of the duty of fair representation.

II. PLAINTIFFS WERE NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES IN THIS CASE BECAUSE BREACH OF THE DUTY OF FAIR REPRESENTATION IS NOT A "PROHIBITED PRACTICE" UNDER PEBA

{23} Union Defendants argue that Plaintiffs' claims are barred because Plaintiffs did not file a prohibited practices complaint with either the Public Employee Labor Relations Board ("PELRB") or the TVI Labor Rela-

tions Board ("TVI–LRB") alleging a breach of the duty of fair representation. According to Union Defendants, PEBA I "required Plaintiffs to file a 'prohibited practices complaint' if they believed the Union failed or refused to comply with the collective bargaining agreement or otherwise violated or interfered with their rights." Plaintiffs counter that requiring exhaustion in the present case would be inappropriate or futile because the duty of fair representation is not a clearly defined "prohibited practice" under New Mexico law and because neither PEBA I nor TVI's Collective Bargaining Agreement "provide any direct rights for union Members against their union."

{24} The general rule is that a party must exhaust administrative remedies unless those administrative remedies are inadequate. *McDowell v. Napolitano,* 119 N.M. 696, 700, 895 P.2d 218, 222 (1995). Of course, where there is no applicable statutory remedy, there is no need to exhaust administrative procedures. *Id.* Although the PELRB and the TVI–LRB schemes for filing a prohibited practice complaint are comprehensive and subject to judicial review, a claim against a union for breach of the duty of fair representation does not fall within the "prohibited practices" of PEBA I. Section 10–7D–20.

{25} Even if we were to interpret PEBA I broadly enough to define a prohibited practice to include a claim for breach of the duty of fair representation, the PELRB and the TVI–LRB cannot provide Plaintiffs with an appropriate remedy. Neither the PELRB nor the TVI–LRB are authorized to award monetary damages to an aggrieved union member for a union's breach of its duty of fair representation. PEBA I endows the PELRB with "the power to enforce provisions of the Public Employee Bargaining Act through the imposition of appropriate administrative remedies." Section 10–7D–9(F); *see also* Section 10–7D–11(E) (endowing local boards like TVI–LRB with "the power to enforce provisions of the Public Employee Bargaining Act or a local collective bargaining ordinance, resolution or charter amendment through the imposition of appropriate administrative remedies"). However, PEBA I does not define the scope of PELRB's power to impose appropriate administrative remedies to include the award of compensatory damages. TVI's Governing Board Resolution 1994–57 (August 29, 1994), which was adopted pursuant to PEBA I, Section 10–7D–26(C), states the collective bargaining policy and creates the TVI–LRB. While Section 6(F) of Resolution 1994–57 attempts to define the scope of the administrative remedies, the resolution does not state that the TVI–LRB is authorized to award Plaintiffs' monetary damages against Union Defendants. Section 6(F) of Resolution 1994–57 states:

> If upon the preponderance of the evidence introduced at a hearing the board shall be of the opinion that it has been established that a person or organization has engaged in or has committed a prohibited practice under Section 14 or 15 of this policy, it shall issue and cause to be served on such person an order requiring such person to cease and desist from such prohibited practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate this policy. . . .

It is clear that those who wrote Resolution 1994–57 envisioned suits against an employer, who would be in a position to reinstate an employee and provide that employee with back pay. However, the TVI–LRB, armed with the Legislature's grant of power to impose "appropriate administrative remedies," could not order Union Defendants to reinstate Plaintiffs. It is also doubtful that the Legislature's grant empowers the TVI–LRB to award monetary damages other than back pay, such as the actual and exemplary damages sought by Plaintiffs here against Union Defendants. Therefore Plaintiffs were not required to exhaust administrative remedies by first bringing their claim against Union Defendants before the PELRB or the TVI–LRB.

III. PLAINTIFFS HAVE PLED FACTS SUFFICIENT TO DEFEAT A MOTION TO DISMISS AFT AS A DEFENDANT UNDER RULE 12(B)(6)

{26} Plaintiffs' lawsuit included AFT as a named defendant along with the New Mexico

Federation of Teachers–TVI, Albuquerque TVI Faculty Federation Local No. 4974 AFT, NMFT. AFT contends that it should be dismissed from the lawsuit because it is neither a party to the Collective Bargaining Agreement nor a bargaining agent for the public employees. Although this issue was not specifically decided by the district court, the Court of Appeals addressed the issue and concluded that because AFT was included in the definition of "Federation" under the Collective Bargaining Agreement, it could not conclude that AFT was not a party to the agreement or that AFT was not the bargaining agent for Plaintiffs. *Callahan,* 2005–NMCA–011, ¶ 29. Accordingly, the Court of Appeals held that the AFT was a proper party to the litigation. *Id.* ¶ 29, 30.

{27} A general rule is that an international union cannot be sued for breach of the duty of fair representation where the international union is not designated as an exclusive representative in a collective bargaining agreement. *Kuhn v. Nat'l Ass'n of Letter Carriers, Branch 5,* 528 F.2d 767, 770 (8th Cir.1976) (stating that "exclusive representation is a necessary prerequisite to a statutory duty to represent fairly"); *Teamsters Local Union No. 30 v. Helms Exp. Inc.,* 591 F.2d 211, 217 (3rd Cir.1979) (indicating that only an "exclusive collective bargaining representative of the individual plaintiffs" owes a duty of fair representation). In addition, an international union cannot be sued for breach of the duty of fair representation if the international union has not played a role in consulting with or advising either the employee or the local union. *See Kuhn,* 528 F.2d at 770 (finding as support for dismissing suit against an international union the fact that the international union has "played no part whatsoever in advising or consulting with [the discharged employee] with respect to the grievance and was in no way responsible for the failure, if any, of [the local union] to properly present [the discharged employee's] case at the informal appearance before the postal authorities or in failing to file a notice of appeal within the appropriate time limits").

{28} Although these authorities are persuasive, because the district court decided the issues under Rule 12(B)(6), we must determine whether Plaintiffs pled sufficient facts in their Complaint which, if true, would make AFT a party to the Collective Bargaining Agreement or an exclusive bargaining agent for Plaintiffs. In paragraph 2 of their Complaint, Plaintiffs alleged that AFT does business in New Mexico and by contract is an exclusive representative for Plaintiffs. In paragraph 4, Plaintiffs alleged that AFT is a party to the Collective Bargaining Agreement. We conclude that Plaintiffs have pled facts sufficient to defeat a 12(B)(6) motion seeking to dismiss AFT as a party defendant.

CONCLUSION

{29} We hold that public employee unions in New Mexico owe union members a duty of fair representation and that Plaintiffs stated a cause of action against Union Defendants for breach of the duty of fair representation since the complaint can be interpreted to include a breach based on arbitrary, fraudulent, or bad faith conduct. Plaintiffs did not state a claim for breach of a fiduciary duty, breach of a collective bargaining agreement as third-party beneficiaries, or breach of the implied covenant of good faith and fair dealing as third-party beneficiaries. Because breach of the duty of fair representation is not listed as a prohibited practice under PEBA I, Plaintiffs were not required to bring their claim before the PELRB or the TVI–LRB to exhaust their administrative remedies. Finally, Plaintiffs have pled sufficient facts against AFT, which if true, make AFT a proper party defendant. We remand to the district court for proceedings consistent with this opinion.

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

WE CONCUR: RICHARD C. BOSSON, Chief Justice, PAMELA B. MINZNER, PATRICIO M. SERNA, and PETRA JIMENEZ MAES, Justices.

2006-NMSC-011
131 P.3d 61

**STATE of New Mexico,
Plaintiff–Appellee,**

v.

Steven DeGRAFF, Defendant–Appellant.

No. 28,306.

Supreme Court of New Mexico.

Feb. 28, 2006.

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

Patricia A. Madrid, Attorney General, Anita Carlson, Assistant Attorney General, Santa Fe, NM, for Appellee.

OPINION

MINZNER, Justice.

{1} Following a jury trial, Defendant Steven DeGraff was convicted of: felony murder, contrary to NMSA 1978, § 30–2–1(A)(2) (1994); armed robbery, contrary to NMSA 1978, § 30–16–2 (1973); aggravated burglary, contrary to NMSA 1978, § 30–16–4 (1963); and five counts of tampering with evidence, contrary to NMSA 1978, § 30–22–5 (1963, prior to 2003 amendment). The district court dismissed the armed robbery conviction as the predicate felony underlying Defendant's felony murder conviction. On appeal, Defendant argues that because the prosecutor asked the jury to draw an inference of guilt from his failure to tell the police he acted in self-defense, he was denied due process contrary to the Fifth Amendment, and he is entitled to a new trial. He also argues that he has been subject to multiple punishments, contrary to the Double Jeopardy Clause of the Fifth Amendment, and he is entitled to an amended judgment and sentence, because (1) his convictions for both aggravated burglary and felony murder are based on the same conduct, and (2) his convictions for tampering with evidence are based on a continuous course of conduct.

{2} Because the prosecutor's comments did not amount to fundamental error, we affirm the felony murder conviction. Nevertheless, we take this opportunity to clarify our approach to unpreserved claims that a prosecutor has commented on a defendant's silence. We conclude that the felony murder and aggravated burglary convictions are not based on the same conduct and affirm both convictions. Because we conclude that three convictions for tampering with evidence are based on a single course of conduct and the Legislature did not intend to impose multiple punishments for this conduct, we remand

with instructions to dismiss two of the tampering convictions.

I. BACKGROUND

{3} Sometime in the evening of December 7, 2001, Father Michael Mack was killed in his home. Investigators found that he had been hit on the head numerous times with a hammer and a glass or crystal object. He had also been stabbed in the neck at least eight times with a knife. Defendant was arrested for unrelated auto theft charges by the Pojoaque Tribal Police on December 16, 2001, and remained in custody from December 16 to December 28.[1] On December 28, 2001, Defendant gave a voluntary statement to the investigating officers. Defendant admitted that he was at the victim's home and was responsible for the victim's death, but Defendant explained that he was defending himself from sexual advances. After the attack, Defendant picked up the knife, glass, and hammer he had used as weapons, and he fled in the victim's car. Defendant threw the knife, glass, and hammer out of the car on the highway. On the next day he abandoned the car and returned to his house. While he was at his home, he changed out of the clothes he had worn during the attack, leaving the clothes in a pillowcase in a grey van outside the house.

{4} During the State's closing argument, the prosecutor explained that the case "is not so much what [Defendant] did on December 7th but what he did afterward." The prosecutor commented in closing arguments:

> So I'm saying wouldn't a person have called Deputy Baker or Deputy Toya and said "Deputy, something terrible has happened, I'm sorry, I was defending myself from a vicious attack. I'm a victim and I'm calling you now because I want you to know the truth." But that didn't happen in this case, did it? And there's a reason why it didn't happen that way. Because the story that [Defendant] gave is a complete fabrication.

{5} The prosecutor made repeated references in his closing argument to the three weeks between the murder and Defendant's statement to officers. He argued that Defendant had time in those three weeks to fabricate a self-defense story, and that his story was not credible because he did not volunteer it sooner. The defense did not object to these comments at trial.

II. DISCUSSION

{6} Defendant now argues that these statements were fundamental error and necessitate a new trial. Alternatively, he suggests he is entitled to a remand for entry of an amended judgment and sentence. His arguments primarily raise questions of constitutional law, which we review de novo. *State v. Javier M.*, 2001-NMSC-030, ¶ 17, 131 N.M. 1, 33 P.3d 1. This general rule is particularly relevant when constitutional rights are at issue.

A. Comment on Silence Claims

{7} We first consider whether the prosecutor commented on Defendant's silence, contrary to his constitutional rights. We then address whether and how Defendant's silence was protected. Finally, we determine whether the comment should be characterized as fundamental error.

1. Comment

{8} In *Griffin v. California*, 380 U.S. 609, 614, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the United States Supreme Court held that a defendant's Fifth Amendment privilege is violated in a state court trial when the prosecution asks the jury to draw an adverse conclusion from the defendant's failure to testify. New Mexico courts, following *Griffin*, consider "whether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment" on the accused's exercise of his or her right to remain silent. *State v. Clark*, 108 N.M. 288, 302, 772 P.2d 322, 336 (1989), *overruled on other grounds by State v. Henderson*, 109 N.M. 655, 789 P.2d 603 (1990). We evaluate the statement in context "to determine the manifest intention that prompted the re-

1. The record does not indicate when he was transferred from the custody of the Pojoaque Tribal Police to the Sandoval County Sheriff's Department.

marks, as well as the natural and necessary impact upon the jury." *State v. Isiah,* 109 N.M. 21, 24–25, 781 P.2d 293, 296 (1989), *overruled on other grounds by State v. Lucero,* 116 N.M. 450, 863 P.2d 1071 (1993). We have recognized that indirect comments, both those that are ambiguous, and those inadvertently elicited by the prosecutor from a witness, *see State v. Baca,* 89 N.M. 204, 549 P.2d 282 (1976), are less likely to call a jury's attention to the defendant's exercise of his rights. We have considered direct or indirect comments, *Clark,* 108 N.M. at 302, 772 P.2d at 336, and comments addressed both to a defendant's failure to testify and his or her "right to remain silent when taken into custody," *Isiah,* 109 N.M. at 24, 781 P.2d at 296, in each case focusing on the likely impact of the comment on the jury.

{9} Where comments by the prosecutor are ambiguous, we consider what inference the jury was asked to draw from the defendant's silence and the propriety of that inference. For example, in *State v. Garcia,* 118 N.M. 773, 777–78, 887 P.2d 767, 771–72 (Ct.App.1994), a series of questions regarding how suspects normally act when they have an alibi was improper as a matter of due process; the jury was implicitly asked to conclude that the defendant's alibi was fabricated because it was not immediately revealed to the police on arrest. Similarly, a prosecutor's questions regarding a defendant's failure to correct or amend his initial statement to the police were improper because they invited the jury to draw a negative inference from the defendant's failure to make an additional statement after his arrest. *State v. Hennessy,* 114 N.M. 283, 288–89, 837 P.2d 1366, 1371–72 (Ct.App.1992), *overruled on other grounds by State v. Lucero,* 116 N.M. 450, 863 P.2d 1071 (1993). *But cf. State v. Foster,* 1998–NMCA–163, ¶¶ 14–15, 126 N.M. 177, 967 P.2d 852 (holding that evidence of a defendant's failure to mention in initial interviews threats made on the day of shooting had significant probative value as impeachment, was admissible as a matter of New Mexico evidentiary law, and did not deny the defendant due process). Although *Foster* and *Hennessy* initially appear contradictory, they illuminate the difference between a permissible comment on a defendant's incomplete statement, as in *Foster,* and commenting on a defendant's silence, as in *Hennessy.* On the facts of this case, we conclude the prosecutor invited the jury to infer guilt from silence.

{10} The prosecutor used Defendant's silence immediately after the attack, and in the following weeks, to suggest that Defendant's explanation was fabricated. In closing argument, the prosecutor repeatedly stated that Defendant had three weeks to fabricate a story and suggested that most people would come forward immediately if they had killed another in self-defense. The prosecution's comments regarding the three weeks between the attack and Defendant's statement were indirect, but the jury was implicitly asked to reject Defendant's self-defense explanation because Defendant did not offer it immediately. We conclude that the prosecutor's statement regarding Defendant's failure to come forward immediately was a comment on Defendant's pre-arrest silence, and the references to the three weeks between the attack and Defendant's statement to police was a comment on both pre-arrest silence and post-arrest silence while he was in the custody of the Pojoaque Tribal Police. We next consider whether and how that silence was protected.

2. Protection

{11} There are four relevant time periods at which a defendant may either volunteer a statement or remain silent: before arrest; after arrest, but before the warnings required by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), have been given; after *Miranda* warnings have been given; and at trial. The general rule limiting prosecution comment on a defendant's silence is drawn from multiple sources, which are variously applied to each of these time periods. We have recognized that the Fifth Amendment right against self-incrimination, the Due Process Clause, and New Mexico evidentiary rules all limit prosecutorial comment on a defendant's silence. *See Foster,* 1998–NMCA–163, ¶ 9, 126 N.M. 177, 967 P.2d 852. Although we ultimately conclude that this case involves only pre-

arrest and post-*Miranda* periods, we touch on all four briefly because the rules on preservation and the standard of review change with the source of the protection. *See generally Garcia,* 118 N.M. at 776–77, 887 P.2d at 770–71 (distinguishing post-arrest, pre-*Miranda* silence from post-arrest, post-*Miranda* silence).

{12} The Fifth Amendment protects a defendant's decision not to testify at trial from prosecutorial comment. *See Griffin,* 380 U.S. at 613–14, 85 S.Ct. 1229 (describing a state constitutional provision permitting comment on a defendant's silence at trial as a violation of the Fifth Amendment protection against self-incrimination). Similarly, due process guaranteed by the Fifth Amendment protects post-*Miranda* silence. *Doyle v. Ohio,* 426 U.S. 610, 618–19, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) (holding that, in light of the assurance implicit in the *Miranda* warning that silence will carry no penalty, "it would be fundamentally unfair" and a denial of due process protected by the Fourteenth Amendment to allow post-*Miranda* silence to be used in a state criminal trial "to impeach an explanation subsequently offered at trial"). Where a timely objection is made, a mistrial may be required. *See State v. Lopez,* 105 N.M. 538, 544–45, 734 P.2d 778, 784–85 (Ct.App.1986). If a mistrial is denied, a new trial may be ordered on appeal unless the State can show the error is harmless. *Id.* In the absence of a timely objection from a defendant, comments on a defendant's exercise of his or her right not to testify, or right to remain silent, are reviewed for fundamental error. *State v. Allen,* 2000–NMSC–002, ¶ 27, 128 N.M. 482, 994 P.2d 728.

{13} The law regarding post-arrest, pre-*Miranda* silence is less clear. The United States Constitution does not limit the use of post-arrest, pre-*Miranda* silence to impeach a defendant at trial. *Fletcher v. Weir,* 455 U.S. 603, 607, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982). The federal circuits, however, are divided on the question of whether the Fifth Amendment bars the use of a defendant's post-arrest, pre-*Miranda* silence as proof of guilt.[2] The standard of review applicable to post-arrest, pre-*Miranda* situations has not been determined in New Mexico. *See generally State v. Gutierrez,* 2003–NMCA–077, ¶ 10, 133 N.M. 797, 70 P.3d 787 (noting the absence of New Mexico law on this point, and assuming for the appeal that a *Miranda* warning had been given); *Garcia,* 118 N.M. at 777, 887 P.2d at 771 (assuming that the same standard is applied before and after *Miranda* warnings). Rather, we have assumed warnings were given when the record did not permit us to determine whether or not they were given. *Gutierrez,* 2003–NMCA–077, ¶ 10, 133 N.M. 797, 70 P.3d 787. Because we also assume in this case that *Miranda* warnings were given when Defendant was arrested by the Pojoaque Tribal Police, we do not determine the appropriate review of a comment on post-arrest, pre-*Miranda* silence at this time.

{14} We have recognized the general absence of a constitutional limitation on using pre-arrest silence to impeach, *see State v. Gonzales,* 113 N.M. 221, 229, 824 P.2d 1023, 1031 (1992), although a suspect's silence is protected if the suspect invokes the right to remain silent in response to non-custodial interrogation. In *Gonzales,* we observed that, based on *Jenkins v. Anderson,* 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), "the use of a defendant's pre[-]arrest silence to impeach is constitutional." *Gonzales,* 113 N.M. at 229, 824 P.2d at 1031. Nevertheless, any evidence remains subject to normal evidentiary rules and should be excluded where its prejudicial effect substantially outweighs its probative value. *See* Rule 11–403 NMRA 2006.

{15} New Mexico evidentiary rules limited comment on a defendant's si-

2. *Compare United States v. Velarde–Gomez,* 269 F.3d 1023, 1029 & n. 1, 1033 (9th Cir.2001) (en banc) (reasoning that an "individual has a right to remain silent in the face of government questioning, regardless of whether the *Miranda* warnings are given" and concluding that the trial court erred in permitting comment on a defendant's post-arrest, pre-*Miranda* silence), *with United States v. Frazier,* 408 F.3d 1102, 1111 (8th Cir.2005) (summarizing the holdings of the circuits and holding that use of pre-*Miranda* silence as evidence of guilt does not violate the Fifth Amendment).

lence prior to the Supreme Court's decision in *Doyle*. *See Baca*, 89 N.M. at 205, 549 P.2d at 283 (reviewing reference by a witness to post-arrest, post-*Miranda* silence as an evidentiary matter); *State v. Lara*, 88 N.M. 233, 539 P.2d 623 (Ct.App.1975) (holding that comments on a defendant's silence were prejudicial, of minimal probative value, and would require reversal). In the absence of controlling federal law, we return to these principles. Because silence is often too ambiguous to have great probative force and may be given improper weight by a jury, evidence of a defendant's silence generally is not admissible as proof of guilt. *See also Garcia v. State*, 103 N.M. 713, 714, 712 P.2d 1375, 1376 (1986) (distinguishing *Jenkins* and holding that pre-arrest refusal to permit a search could not be used as proof of guilt when the defendant did not testify at trial); *Lara*, 88 N.M. at 234–35, 539 P.2d at 624–25 (describing prosecutor's inquiry about a defendant's silence as reversible error if the fact of post-arrest, post-*Miranda* silence lacked "significant probative value"). We have recognized exceptions to this rule when the State can make some additional showing of relevance. *See, e.g., Foster*, 1998–NMCA–163, ¶¶ 12, 15, 126 N.M. 177, 967 P.2d 852 (holding that evidence of omission of exculpatory details in an ostensibly complete statement to police was relevant and admissible for impeachment purposes). We review these evidentiary decisions for abuse of discretion, *Allen*, 2000–NMSC–002, ¶ 17, 128 N.M. 482, 994 P.2d 728, and where no objection is made at trial, limit our review to plain error. *Id.* ¶ 27.

{16} We also have reviewed comments on a defendant's silence as prosecutorial misconduct, *see, e.g., Hennessy*, 114 N.M. at 286, 837 P.2d at 1369, but applied essentially the same fundamental error analysis used in post-arrest comment on silence cases. *Compare Allen*, 2000–NMSC–002, ¶ 95, 128 N.M. 482, 994 P.2d 728 (reviewing a claim of prosecutorial misconduct), *with id.* ¶ 27 (reviewing the effect of a comment on silence). Where comments by a prosecutor encourage a jury to base its decision on improper grounds, we consider whether this misconduct denied the defendant a fair trial. *Id.* ¶ 27. Where no objection was made at trial, we review the claim on appeal for fundamental error. *Id.*

{17} The comments made by the prosecutor refer to Defendant's silence in the immediate aftermath of the attack and also in the three-week interval between the attack and Defendant's statement to police. Defendant was not immediately apprehended by police. The prosecutor's comment that Defendant could have, but chose not to, contact the police was a reference to pre-arrest silence, but it should not be reviewed as an evidentiary matter. These comments may, however, have constituted prosecutorial misconduct by encouraging the jury to convict Defendant on improper grounds, and we consider below whether this comment constituted fundamental error. *Id.*

{18} The prosecutor also commented on Defendant's silence after his arrest. The three-week interval on which the prosecutor commented includes time when Defendant was in the custody of the Pojoaque Tribal Police between December 16 and December 28. The record does not indicate whether Defendant was given the *Miranda* warnings on December16, and the State argues that we should assume that no warning was given. We decline, however, to place on Defendant the burden of showing that law enforcement complied with the well-known requirements of *Miranda*. Rather, where such an inference will benefit a defendant, we presume that the warning was given. *See Gutierrez*, 2003–NMCA–077, ¶ 10, 133 N.M. 797, 70 P.3d 787.

{19} We conclude that Defendant's silence while in the custody of the Pojoaque Tribal Police is protected even though he was held on unrelated charges. *Doyle*, 426 U.S. at 617–18, 96 S.Ct. 2240. The Fifth Amendment protections stated in the *Miranda* warnings are a general right against self-incrimination. *Cf. Arizona v. Roberson*, 486 U.S. 675, 683–84, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988) (holding that a suspect who has invoked his Fifth Amendment right to counsel may not be questioned regarding a separate investigation); *State v. Juarez*, 120 N.M. 499, 502–03, 903 P.2d 241, 244–45 (Ct.App. 1995) (holding that a defendant arrested on one charge was entitled to *Miranda* warn-

ings prior to police questioning regarding another more serious charge). It would be inconsistent with *Doyle* to offer a defendant the implicit assurance that his or her decision to remain silent will not be used against him or her, and then add that it may be used in another trial on a different charge. 426 U.S. at 618, 96 S.Ct. 2240. Therefore, we consider Defendant's silence protected under *Doyle* from the moment he was arrested by the Pojoaque Tribal Police.

{20} The State has also suggested that Defendant did not invoke his right to remain silent, and the prosecutor could not have commented on the exercise of a right that was not invoked. *Compare State v. Garvin,* 2005–NMCA–107, ¶ 24, 138 N.M. 164, 117 P.3d 970 (distinguishing a defendant's failure to provide "the whole story" when questioned by the police from his failure to testify at trial), *and Foster,* 1998–NMCA–163, ¶ 14, 126 N.M. 177, 967 P.2d 852 ("The *Miranda* warnings do not imply that the arrestee's half-truths will carry no penalty."), *with Hennessy,* 114 N.M. at 288, 837 P.2d at 1371 (rejecting the argument that a defendant who gives a statement to the police waives the right to be free from comment on silence). While we agree that silence is protected only if a right to remain silent is invoked, the record contains no evidence that Defendant did not invoke this right while in the custody of the Pojoaque Tribal Police. Defendant's later statement does not have the effect of waiving any objection to comment on his silence prior to that statement. Because Defendant was in custody for a portion of the three weeks referred to by the prosecutor, and because we assume that he invoked his rights while in custody, Defendant's silence was protected as in *Doyle* from prosecutorial comment. He is not entitled to a new trial, however, unless he can show that the prosecutor's comments resulted in fundamental error. *See Hennessy,* 114 N.M. at 289, 837 P.2d at 1372.

3. Fundamental Error

{21} When a defendant fails to object at trial to comments made by the prosecution about his or her silence, we review only for fundamental error, recognizing that it is "fundamentally unfair and a violation of due process" to allow an individual's invocation of the right to remain silent to be used against him or her at trial. *Allen,* 2000–NMSC–002, ¶ 27, 128 N.M. 482, 994 P.2d 728; *see also Isiah,* 109 N.M. at 25, 781 P.2d at 297; *Clark,* 108 N.M. at 303, 772 P.2d at 337. This review consists of two parts. We first determine whether any error occurred, i.e., whether the prosecutor commented on the defendant's protected silence. If such an error occurred, we then determine whether the error was fundamental. An error is fundamental if there is a "reasonable probability that the error was a significant factor in the jury's deliberations in relation to the rest of the evidence before them." *Clark,* 108 N.M. at 303, 772 P.2d at 337; *cf. United States v. Olano,* 507 U.S. 725, 731–37, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (discussing federal review under the plain error standard). We have recognized that more direct prosecutorial comments on a defendant's invocation of the right to remain silent are more likely to be fundamental error. Applying this analysis, we have held no fundamental error occurred where the prejudicial effect of the prosecutor's comments was minimal and the evidence presented by the prosecution was overwhelming. *Isiah,* 109 N.M. at 25, 781 P.2d at 297.

{22} Our cases may have created some confusion about the proper analysis of a claim that a prosecutor has commented on a defendant's silence when no objection was made at trial. *See, e.g., Gutierrez,* 2003–NMCA–077, ¶¶ 17–18, 133 N.M. 797, 70 P.3d 787 (characterizing this as harmless error review and separately considering whether the error was fundamental). This confusion may stem from *Hennessy's* reference to "the remedy of automatic reversal regardless of objection . . . as a prophylactic measure to deter prosecutors from obtaining convictions by unfair tactics." 114 N.M. at 286, 837 P.2d at 1369. *Hennessy* recognizes that appellate courts will reverse on the basis of an unpreserved error only where the error is fundamental. *Hennessy* does not stand for the proposition that any prosecutorial comment on silence will require reversal because the court in fact considered whether the defendant was prejudiced after concluding that the prosecutor's comments violated the defen-

dant's privilege. *Id.* at 289, 837 P.2d at 1372 (reversing where the evidence presented was not overwhelming and the court could not "say there is no reasonable probability that the prosecutor's numerous comments on silence were not a significant factor in the jury's deliberations in relation to the rest of the evidence before them"). Where a defendant has made a proper objection at trial, the appellate court determines whether the prosecution commented on the defendant's protected silence, and if so, reverses the conviction unless the State can demonstrate that "the error was harmless beyond a reasonable doubt." *Garcia,* 118 N.M. at 779, 887 P.2d at 773. Where no timely objection is made, the court considers only whether the defendant has shown that there is a reasonable probability that the error was a significant factor in the jury's deliberations relative to the other evidence before them. *Isiah,* 109 N.M. at 25, 781 P.2d at 297; *Clark,* 108 N.M. at 303, 772 P.2d at 337. While similar considerations influence both harmless and fundamental error analyses, they are not interchangeable, and both need not be applied on appellate review.

{23} Although we conclude that the prosecution's comments regarding Defendant's silence were error, they were not fundamental error. There is a reasonable argument that the comments did not directly call on the jury to infer guilt from Defendant's silence. The comments on the three-week interval suggest that the Defendant had an opportunity to think up an explanation in that time, not that the failure to give a statement was in itself proof of guilt. The prosecution offered evidence at trial that was inconsistent with self-defense. Investigators testified that a screen at the back of the house had been cut. The victim had been stabbed eight times and hit repeatedly with a hammer and another object, and blood spatter low to the ground suggests that a portion of the attack occurred while he was on the ground. After the attack, Defendant gathered up key pieces of evidence, took the victim's keys and wallet, and fled the scene, later disposing of the incriminating weapons. In light of the evidence of forcible entry into the victim's house, an extended struggle within the house, Defendant's flight, and attempt to hide evidence of the attack, we conclude that the prosecutor's comments were not a significant factor in deliberations and do not rise to the level of fundamental error.[3] In light of the minimal prejudicial effect of the prosecutor's comments, and the "overwhelming evidence" presented by the prosecution, Defendant has not shown fundamental error. *See Isiah,* 109 N.M. at 25, 781 P.2d at 297.

B. Double Jeopardy

{24} Defendant next argues he was denied constitutional protection against multiple punishments for the same offense because the same conduct forms the basis of both his felony murder and aggravated burglary convictions, and his five tampering with evidence convictions were based on a continuous course of conduct with a single *mens rea* which the Legislature intended to constitute a single crime. With respect to the felony murder and aggravated burglary claims, we conclude that the underlying conduct is not unitary and that the convictions do not violate the protection provided against multiple punishments. We conclude that the Legislature did not intend the tampering statute to punish unitary conduct, but that some of Defendant's actions are distinct enough to support multiple tampering convictions. Accordingly, we dismiss two of Defendant's five tampering convictions.

3. Defendant argues that two other comments by the prosecutor in closing were also prejudicial and that he is entitled to a new trial on the basis of cumulative error. First, the prosecutor made reference to the possibility that the claw of a hammer was used in Defendant's attack. The trial court sustained defense counsel's objection to this comment and no curative instruction was requested. Second, at the end of his closing the prosecutor asked the jury to "send a signal that this could never be tolerated in New Mexico." Counsel again objected; however, the trial court did not rule on the objection, and defense counsel began his closing rather than requesting a ruling or curative instruction. These issues were not preserved for appeal and are not fundamental error. *Allen,* 2000-NMSC-002, ¶ 95, 128 N.M. 482, 994 P.2d 728 (holding that isolated and minor improprieties are not normally sufficient to require a new trial).

{25} The Double Jeopardy Clause of the Fifth Amendment, enforced against the states by the Fourteenth Amendment, protects defendants from receiving "multiple punishments for the same offense." *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds by Alabama v. Smith,* 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). This prohibition relates to two general categories of cases: cases in which a defendant has been charged with multiple violations of a single statute based on a single course of conduct, known as "unit of prosecution" cases; and cases in which a defendant is charged with violations of multiple statutes for the same conduct, known as "double-description" cases. *Swafford v. State,* 112 N.M. 3, 8, 810 P.2d 1223, 1228 (1991). Defendant raises a double-description issue, arguing that the felony murder and aggravated burglary convictions are based on the same conduct. Defendant also raises a unit of prosecution issue that we address in the next subsection of this opinion.

1. Double-Description Claim

{26} We first address Defendant's double-description claim. In double-description cases, we consider first whether the conduct underlying the offenses is unitary and then consider whether the Legislature intended multiple punishments for this conduct. *See Swafford,* 112 N.M. at 13, 810 P.2d at 1233. If the conduct is unitary, a defendant cannot be convicted of both felony murder and the predicate felony. *State v. Contreras,* 120 N.M. 486, 491, 903 P.2d 228, 233 (1995). There can be no conviction for killing in the course of a felony without proof of all of the elements of the felony. *Id.* Therefore, the predicate felony is subsumed within the offense of felony murder, and cannot support a separate conviction. *Id.* In this case, the jury returned convictions for felony murder, armed robbery, and aggravated burglary. The district court dismissed the armed robbery conviction.

{27} When determining whether Defendant's conduct was unitary, we consider whether Defendant's acts are separated by sufficient "indicia of distinctness." *Swafford,* 112 N.M. at 13, 810 P.2d at 1233. On several occasions, this Court has previously considered whether the force used to commit a murder merged with the force constituting an element of another crime and therefore was unitary conduct requiring further analysis of legislative intent. *Foster,* 1999-NMSC-007, ¶¶ 34, 40, 126 N.M. 646, 974 P.2d 140 (concluding that convictions for kidnapping and felony murder did not involve unitary conduct although convictions for armed robbery and felony murder did); *State v. Cooper,* 1997-NMSC-058, ¶¶ 61-62, 124 N.M. 277, 949 P.2d 660 (holding that the force used to commit felony murder did not merge with the force underlying an aggravated battery conviction); *State v. Livernois,* 1997-NMSC-019, ¶¶ 21-22, 123 N.M. 128, 934 P.2d 1057 (upholding convictions for first-degree murder and aggravated burglary); *Contreras,* 120 N.M. at 490, 903 P.2d at 232 (holding that murder and theft were unitary conduct when the victim had been stabbed once and the defendant immediately took the victim's cab and its contents). In our consideration of whether conduct is unitary, we have looked for an identifiable point at which one of the charged crimes had been completed and the other not yet committed. *See, e.g., Foster,* 1999-NMSC-007, ¶ 34, 126 N.M. 646, 974 P.2d 140; *Cooper,* 1997-NMSC-058, ¶ 59, 124 N.M. 277, 949 P.2d 660. We have also looked for an event that intervened between the initial use of force and the acts that caused death. *See, e.g., Cooper,* 1997-NMSC-058, ¶ 61, 124 N.M. 277, 949 P.2d 660. In *Cooper,* we concluded that death was not the consequence of a defendant's initial act of battery because there was a struggle between victim and defendant in which several different weapons were used. *Id.* We held that this struggle was an intervening event between an aggravated battery and later murder, and therefore the underlying conduct was not unitary. In these situations, which are not intended to be exclusive of other possibilities, we have characterized the conduct as not unitary and have held multiple punishments were authorized.

{28} The statutory definition of the relevant crimes controls the conduct we consider. Aggravated burglary is the unauthorized entry of a dwelling with the intent to commit a

felony therein, when the entrant either "is armed with a deadly weapon; after entering, arms himself with a deadly weapon; [or] commits a battery upon any person while in such place, or in entering or leaving such place." Section 30–16–4. The jury was instructed to return a guilty verdict with respect to the aggravated burglary claim if it found that Defendant "entered a dwelling without authorization ... with the intent to commit any felony or theft once inside ... [and that] defendant touched or applied force to [the victim] in a rude or angry manner while entering or leaving, or while inside."

{29} The State theorized that Defendant broke into the victim's home intending to steal. Defendant was surprised by the victim's return to the house, attacked him, and in the course of an extended struggle, killed him. The State argues on appeal that the underlying conduct was not unitary because the aggravated burglary took place when Defendant first used a weapon against the victim, while the murder took place at a later point in time. Defendant argues that the force used in the aggravated burglary was the same force used to commit the felony murder, and that all of the events took place in the same location as part of a single struggle. *See Contreras,* 120 N.M. at 490, 903 P.2d at 232.

{30} The jury was not instructed to determine when the aggravated burglary was completed. Nevertheless, the evidence offered at trial supports a conclusion that Defendant's conduct was not unitary. *Cf. Foster,* 1999–NMSC–007, ¶ 31, 126 N.M. 646, 974 P.2d 140 (reviewing evidence presented at trial for sufficient "indicia of distinctness"). The record shows that Defendant used several weapons during the attack. While the initial use of force completed the crime of aggravated burglary, the evidence shows that the death was not caused by this initial attack alone. The facts that several weapons were used and that strands of Defendant's hair were found in the victim's hands indicate an intervening struggle during which the victim defended himself. We conclude that the conduct in this case is not unitary, but consists of at least two distinct acts: the initial attack, completing the crime of aggravated burglary, and the later murder.[4] *Cooper,* 1997–NMSC–058, ¶¶ 60–62, 124 N.M. 277, 949 P.2d 660 (affirming convictions for felony murder and aggravated battery where the evidence showed that "death was not the consequence of the initial act of battery" but followed a struggle).

{31} Because the conduct underlying the convictions for aggravated burglary and felony murder was not unitary, we do not consider "whether the [L]egislature intended to create separately punishable offenses" for the unitary conduct. *Swafford,* 112 N.M. at 13, 810 P.2d at 1233. We therefore affirm the aggravated burglary conviction.

2. Unit of Prosecution Claim

{32} Defendant was convicted of five counts of tampering with evidence, one each for hiding the knife, glass, hammer, car, and clothing. He argues that his disposal of these items consisted of a continuous course of conduct with a single *mens rea* and constitute a single crime. In "unit of prosecution" cases, where a defendant is charged with multiple violations of a single statute, we inquire "whether the [L]egislature intended punishment for the entire course of conduct or for each discrete act." *Id.* at 8, 810 P.2d at 1228. If a statute clearly creates separate offenses, we follow the statute. *State v. Alvarez–Lopez,* 2004–NMSC–030, ¶ 40, 136 N.M. 309, 98 P.3d 699. In construing the statute we consider the text and its apparent purpose. *Id.* ¶¶ 40–42. We also consider whether the offenses are separated by sufficient "indicia of distinctness" as an indication of legislative intent. *Swafford,* 112 N.M. at 13, 810 P.2d at 1233. Finally, if we have not found a clear indication of legislative intent, we apply the "rule of lenity," a presumption against imposing multiple punishments for acts that are not sufficiently distinct. *Alvarez–Lopez,* 2004–NMSC–030, ¶ 40, 136 N.M. 309, 98 P.3d 699.

4. We recognize our inquiry is highly fact specific, but note that the essential facts were not contested at trial. In cases where the facts relevant to a determination that conduct was unitary are contested at trial, courts should carefully consider whether the instructions given will allow the jury to adequately resolve the factual issues presented.

{33} Defendant argues that the statute forbids tampering with "any" physical evidence, rather than each piece of evidence and reasons that the use of the word "any" suggests punishment for the entire course of conduct rather than each act of tampering. The State suggests first that this analysis is inconsistent with *State v. Morro*, 1999-NMCA-118, ¶ 1, 127 N.M. 763, 987 P.2d 420 (upholding multiple convictions for damaging gravestones even though all damage occurred in a single incident). The relevant statute in that case also prohibited defacing of any gravestone, *id.* ¶ 13, but the court did not find that this established the Legislature's intent to punish defacing multiple gravestones as a single crime. We believe *Morro* is distinguishable in at least two respects. There were different victims for each act of vandalism to a different gravestone, *id.* ¶ 19, and the court in *Morro* concluded that each act of vandalism took place at a distinct time and place, each time the defendant smashed or defaced a particular gravestone. *Id.* ¶ 20. Nonetheless, we are not persuaded that the statute's use of the word "any" shows the Legislature's intent to permit only a single conviction for all tampering with a single crime scene.

{34} The State argues that the underlying purpose of the tampering statute is to punish those who deprive the State of evidence needed in investigating possible crimes. Because the harm associated with tampering increases with each piece of evidence removed, we are asked to conclude the Legislature intended to punish each act of tampering, rather than the course of conduct. This argument proves too much. First, the statute, prior to the 2003 amendment, made no distinction based on the severity of the underlying crime, suggesting that the Legislature was not focused on the severity of the harm caused by tampering. *Compare* § 30-22-5 (1963, prior to 2003 amendment) (providing that "[w]hoever commits tampering with evidence is guilty of a fourth degree felony"), *with* NMSA 1978, § 30-22-5 (2003) (providing for different degrees of the offense of tampering). Second, given the ambiguity in the term "evidence," the State's interpretation could open the door to a virtually unlimited number of tampering prosecutions in any given case. Defendant in this case, for example, could have been charged with separate tampering counts for each article of clothing he concealed: shoes, shirt and pants. We believe the Legislature intended a more moderate result, consistent with our unitary conduct analysis. We consider whether a defendant's actions can be divided into discrete acts, and permit only a single conviction where they cannot. In the absence of clear evidence that the Legislature intended to punish a defendant for every individual piece of evidence hidden, we apply the rule of lenity and presume that the Legislature did not intend to impose multiple punishments on a single action.

{35} Because we conclude that the statute does not clearly define the unit of prosecution, we consider whether Defendant's acts are separated by sufficient "indicia of distinctness." *Swafford*, 112 N.M. at 13, 810 P.2d at 1233. Such indicia include the timing, location, and sequencing of the acts, the existence of an intervening event, the defendant's intent as evidenced by his conduct and utterances, and the number of victims. *Herron v. State*, 111 N.M. 357, 361, 805 P.2d 624, 628 (1991).

{36} Defendant's conduct appears to be three distinct acts rather than a single continuous action. All of the evidence was gathered from the crime scene in a relatively short span of time, but was disposed of at three distinct times in different locations. The State argues that each act of removing material from the crime scene should be viewed as a separate act of tampering. At the time of the alleged tampering, the tampering statute prohibited "destroying, changing, hiding, placing or fabricating any physical evidence" and did not differentiate among the degrees of offenses with which the tampering had occurred. Section 30-22-5. The jury was instructed to return guilty verdicts if it found that Defendant hid evidence. They were not instructed to consider specifically whether Defendant changed or removed evidence. The relevant actions are, therefore, throwing the knife, hammer, and crystal or glass from the car, abandoning the car, and placing the clothing in the van.

{37} Defendant hid evidence at three different times: throwing the box containing the knife, glass, and hammer from the car; leaving the car on the side of the road on his return trip; and hiding his clothing in his van the next morning after he returned to his house. These actions each took place in a different location. These were three distinct acts, supporting three convictions for tampering with evidence.

{38} Defendant has made a strong argument that the disposal of the knife, glass, and hammer was a single action. Not only were the three items gathered in a short period of time, but they were also thrown together, in a single box, on the side of the road. No events intervened as he hid each weapon. There is no indication that Defendant's intentions were different with respect to each weapon. To the extent that the crime had identifiable victims, they were the same with respect to each weapon. In the present case, the same interest was harmed when the knife, glass, and hammer were hidden, and we have already found that these items were hidden at the same time and in the same location.

{39} We therefore dismiss two of the tampering counts because Defendant's disposal of the weapons constituted a single act and can support only a single tampering conviction.

III. CONCLUSION

{40} We hold that the prosecutor's comments on Defendant's pre-arrest and post-*Miranda* silence do not rise to the level of fundamental error. We affirm Defendant's convictions for felony murder and aggravated burglary and remand to the district court with directions to dismiss two of the five tampering convictions.

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

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

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

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

{42} I concur with the discussion in Section II(A) in its entirety and Section II(B)(2) of the majority opinion. However, because the conduct which supports the aggravated burglary is indistinguishable from the conduct that caused the victim's death, I would vacate the aggravated burglary conviction as a violation of double jeopardy. *See State v. Contreras,* 120 N.M. 486, 491, 903 P.2d 228, 233 (1995) (It would be a violation of the Double Jeopardy Clause to convict and sentence a defendant for both felony murder and the predicate felony when the conduct is unitary.). Therefore, I respectfully dissent from the discussion in Section II(B)(1).

{43} Conduct is not unitary if the defendant commits acts which are separated by sufficient indicia of distinctness. *State v. Mora,* 1997–NMSC–060, ¶ 68, 124 N.M. 346, 950 P.2d 789. "The court may consider as 'indicia of distinctness' the separation of time or physical distance between the illegal acts, 'the quality and nature' of the individual acts, and the objectives and results of each act." *Id.* In this case, the theory advanced by the State was that Defendant broke into the victim's home intending to steal. While Defendant was inside the home, the victim returned, surprising Defendant. A struggle ensued and the victim was killed during the struggle.

{44} The forensic pathologist who testified at trial opined that the cause of death was due to "injuries to the head and stab wounds of the neck." After describing the wounds to the head and neck the pathologist was asked whether it was possible "to determine the order in which these wounds were sustained." The response was "Actually no. All these wounds looked to be made in what we call the perimortem interval that means right before death, during death or right after death, the wounds are going to look similar irregardless of when they occurred in relationship to each other." I find it difficult to find a separation of time or physical distance between the illegal act giving rise to aggravated burglary and the act giving rise to murder.

{45} The distinction is difficult because in this case the jury was instructed that for it to find Defendant guilty of Felony Murder, the State was required to prove beyond a reasonable doubt that Defendant caused the death of the victim *during* the commission of or the attempt to commit aggravated burglary.[1] To find aggravated burglary the jury was instructed in relevant part:

> The State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. The defendant entered a dwelling without authorization;
>
> 2. The defendant entered the dwelling with the intent to commit any felony or theft once inside;
>
> 3. The defendant touched or applied force to Fr. Michael Mack in a rude or angry manner while entering or leaving, or while inside.

{46} The key element is the application of force. In the past, we have upheld a felony murder conviction and aggravated burglary conviction as against a double jeopardy challenge because the defendant entered a structure, while armed, with the intent to commit a felony in the structure. *State v. Livernois,* 1997–NMSC–019, ¶ 20, 123 N.M. 128, 934 P.2d 1057. In *Livernois,* we concluded that the crime of aggravated burglary was complete once the defendant entered the structure because he was already armed and had the intent to commit a felony in the structure. As such, the subsequent shooting of the victim by the defendant was not unitary conduct. One could find a separation of time and physical distance between the time the defendant in *Livernois* entered the dwelling while armed and his subsequent shooting of the victim.

{47} Defendant in this case was not charged with aggravated burglary based on his entry into the victim's home while armed or even that he armed himself with a deadly weapon once inside. Instead, the State charged Defendant with aggravated burglary based on his entry into the structure and application of force to Fr. Mack. It was Defendant's touching or application of force to Fr. Mack in a rude or angry manner while entering, leaving or inside Fr. Mack's house that resulted in the aggravated burglary conviction. It was also the force used during the commission of the aggravated burglary that resulted in the victim's death.

{48} The majority relies on *State v. Cooper,* 1997–NMSC–058, 124 N.M. 277, 949 P.2d 660, to support its analysis that Defendant's conduct was not unitary. In *Cooper,* the court did not find unitary conduct involving conduct giving rise to a conviction for aggravated battery and felony murder. As such we upheld defendant's convictions for felony murder and aggravated battery. The rationale seemed to be a finding of multiple attacks on the victim by the defendant, each time using different weapons. *Cooper,* 1997–NMSC–058, ¶ 61, 124 N.M. 277, 949 P.2d 660. Indeed, we stated that the first attack with one of the weapons was followed by a struggle and then more acts which caused the death of the victim. Thus, we concluded that the struggle was an intervening event between the initial battery and the acts which caused the death of the victim. *Id.* In this case, the testimony of the pathologist supports only a finding of a single attack which resulted in the death of Fr. Mack.

{49} When the force used during the commission of an aggravated burglary results in death, the Legislature has elevated the crime from a second degree felony to a capital felony. The punishment is therefore increased from nine years for aggravated burglary to life imprisonment for felony murder with the predicate felony being aggravated burglary. Therefore, in my opinion the Legislature did not intend punishment for both aggravated burglary and felony murder. *See Swafford v. State,* 112 N.M. 3, 15, 810 P.2d 1223, 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 ele-

1. Armed robbery was also a predicate felony for felony murder. As noted in the majority opinion, the district court dismissed the conviction for armed robbery.

ments of a base statute, and extracts a greater penalty than the base statute").

{50} For the foregoing reasons, I would vacate Defendant's aggravated burglary conviction. The majority disagreeing, I respectfully dissent.

I CONCUR: RICHARD C. BOSSON, Chief Justice.

2006-NMCA-032

131 P.3d 76

Frank TALAMANTE, Petitioner–Appellant,

v.

PUBLIC EMPLOYEES RETIREMENT BOARD, Respondent–Appellee.

No. 24,024.

Court of Appeals of New Mexico.

Jan. 31, 2005.

Certiorari Denied May 19, 2005.

Sarah M. Singleton, Andrew S. Montgomery, Montgomery & Andrews, P.A., James George Chakeres, Santa Fe, NM, for Appellant.

G.T.S. Khalsa, Santa Fe, NM, for Appellee.

OPINION

BUSTAMANTE, Chief Judge.

{1} Frank Talamante (Employee) appeals an order from the district court affirming the Public Employees Retirement Board's (the PERA Board) decision to deny his claim for disability retirement benefits. At issue is the proper interpretation of NMSA 1978, § 10–11–10.1(C)(2)(a) (1993), and what is required to prove that an employee is "mentally or physically totally incapacitated for any gainful employment." In particular, this case poses the question of whether the legislature intended a specific geographic area to be considered when deciding whether an employee is incapacitated for gainful employ-

ment. We hold that in order to be entitled to disability retirement benefits an employee must establish that no "gainful employment" is attainable within the State of New Mexico, unless the employee presents substantial evidence that application of this statewide standard to the employee is unreasonable. We remand.

FACTUAL AND PROCEDURAL BACKGROUND

{2} Employee is a Public Employment Retirement Association (PERA) member with 11.8 years of service credits. Employee began working for the Village of Chama in 1983. Employee had previously worked in Chama, as well as in Colorado, Farmington, and Santa Fe. Employee made these job moves because he was offered more money. Employee eventually settled in Chama to raise his children where he and his wife preferred the Chama school system. Employee's children are now over 18 years of age. While working for the Village of Chama, Employee was a heavy equipment operator. In June 1996, at the age of 42, Employee suffered a back injury. Employee had suffered a previous back injury in 1974 from which he returned to full duty operating and maintaining heavy equipment, although he continued to have some back problems as a result of that prior injury.

{3} After the 1996 injury, Employee saw Dr. Akes who referred him to Dr. Feldman. In 1998, consulting Dr. Feldman's reports, Dr. Delahoussaye performed an independent medical evaluation of Employee. Employee conceded that Dr. Feldman told him that there was a very small problem with his disc, that it was not affecting any nerves, and that he should get on with his life and go back to work. Dr. Delahoussaye found Employee to be capable of full-time employment at a medium duty status. On March 9, 2001, the Functional Capacity Assessment reported to the PERA that Employee "could work and work safely within the [l]ight-[m]edium physical demand level." This report was consistent with the findings of Drs. Delahoussaye and Feldman. The hearing officer concluded that Dr. Akes' opinion that Employee was unable to work and had restrictions of "no lifting, no work" was unreliable. Employee is currently released to return to work with the restriction that he is not to lift more than fifty pounds.

{4} Employee did not look for employment after the 1996 injury until his workers' compensation and administrative leave were exhausted in February 1999. Employee has not looked for work outside a fifty-mile radius of Chama, although as discussed above, Employee's work history reflected several occasions prior to 1983 when he had taken employment beyond this geographical boundary. Employee testified that the general manager at the Chama railroad turned Employee down for employment because of his physical restrictions. Employee was told by the Village of Chama, the grocery store, the gas station owners in Chama, and the Espanola Department of Labor that there were no openings.

{5} Employee's application for disability retirement benefits was denied by the PERA Disability Review Committee. On appeal to the PERA Board, the hearing officer recommended denial of benefits. Based on the hearing officer's recommendation, the PERA Board also denied Employee's application. Employee filed an administrative appeal to the district court. The district court affirmed the PERA Board decision. Employee filed a motion for reconsideration in the district court, which was also denied. Employee then filed a petition for writ of certiorari, which was granted by this Court.

STANDARD OF REVIEW

{6} In exercising our certiorari jurisdiction, 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." *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. We review the Board's decision to determine whether "(1) [it] acted fraudulently, arbitrarily or capriciously; (2) the final decision was not supported by substantial evidence; or (3) [the Board] did not act in accordance with [the] law." NMSA 1978, § 39–3–1.1(D) (1999); *see* NMSA 1978, § 10–11–120(B) (1999). We review questions of statutory interpretation de novo. *Rio*

Grande Chapter of the Sierra Club, 2003–NMSC–005, ¶ 17; *Johnson v. Pub. Employees Ret. Bd.*, 1998–NMCA–174, ¶ 18, 126 N.M. 282, 968 P.2d 793.

INTERPRETATION OF GAINFUL EMPLOYMENT

{7} At the time Employee applied for disability retirement benefits, he had worked for an affiliated public employer for 11.8 service credit years, although he was not a currently employed member of an affiliated public employer. The applicable inquiry, therefore, is whether Employee has met his burden of establishing that he is entitled to disability retirement benefits under Section 10–11–10.1(C)(2), which provides:

> C. The disability review committee shall review applications for disability retirement to determine whether:
>
> . . . .
>
> (2) if the member is not a currently employed, contributing employee of an affiliated public employer:
>
> (a) the member is mentally or physically totally incapacitated for any *gainful employment;* and
>
> (b) the incapacity is likely to be permanent.

(Emphasis added.)

Section 10–11–10.1(*O*)(2) defines "gainful employment" as "remunerative employment or self-employment that is commensurate with the applicant's background, age, education, experience and any new skills or training the applicant may have acquired after terminating public employment or incurring the disability[.]" While the federal statute requires consideration of the national economy in determining whether an employee is disabled, *see* 42 U.S.C. § 423(d)(2)(A) (2004), our New Mexico statute makes no mention of any geographic area to be considered. In the context of this case, we consider that the legislature has delegated to the PERA Board the authority to administer the Public Employees Retirement Act, NMSA 1978, § 10–11–1 (1987) (the Act), in "a reasonable manner consistent with legislative intent, in order to develop the necessary policy to respond to unaddressed or unforeseen issues." *City of Albuquerque v. N.M. Pub. Regulation Comm'n*, 2003–NMSC–028, ¶ 16, 134 N.M. 472, 79 P.3d 297; *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995) ("When an agency that is governed by a particular statute construes or applies that statute, the court will begin by according some deference to the agency's interpretation."); *see also Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."). As our Supreme Court noted, "[t]he judicial deference to be accorded a legislative rule is a strong form of deference attributable to the fact that the agency is exercising legislative power." *City of Albuquerque*, 2003–NMSC–028, ¶ 16, (quoting 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.4, at 334 (4th ed. 2002) (internal quotation marks omitted)); *see also Regents of Univ. of N.M. v. Hughes*, 114 N.M. 304, 312, 838 P.2d 458, 466 (1992) (stating that "it is hornbook law that an interpretation of a statute by the agency charged with its administration is to be given substantial weight, and is entitled to judicial deference" (citations omitted)).

[3] {8} Therefore, we begin our interpretation of the meaning of "gainful employment" by considering the PERA Board's interpretation of that term as reflected in the applicable regulations promulgated under the Act in effect at the time Employee applied for disability retirement. *See Duke City Lumber Co. v. N.M. Envtl. Improvement Bd.*, 101 N.M. 291, 292, 681 P.2d 717, 718 (1984) (stating that "[t]he separation of powers doctrine directs administrative agencies to their duty of implementing legislation. The Legislature grants agencies the discretion of promulgating rules and regulations which have the force of law."); *see also Costain v. State Regulation & Licensing Dep't*, 1999–NMCA–119, ¶ 7, 128 N.M. 68, 989 P.2d 443 (stating that "[a]n act of an administrative agency which is authorized by the legislature has the force and effect of law"). We are mindful, however, that as the reviewing Court, we will reverse an agency's interpre-

tation of a statute if it is unreasonable or unlawful. *City of Albuquerque,* 2003–NMSC–028, ¶ 16, (citing *Morningstar,* 120 N.M. at 583, 904 P.2d at 32); *see also Torres v. State,* 119 N.M. 609, 612, 894 P.2d 386, 389 (1995) ("With deference always to constitutional principles, it is the particular domain of the legislature, as the voice of the people, to make public policy.").

{9} This Court has previously construed the meaning of the term "commensurate employment" with regard to compensation in *Johnson,* 1998–NMCA–174, ¶ 20. In *Johnson,* this Court agreed with the PERA Board that a claimant may be capable of obtaining "gainful employment" even though "the work the claimant is able to perform does not have the same duties or level of responsibility as his or her former job." *Id.* We also agreed with the PERA Board that "commensurate does not mean 'equal to.' " *Id.* We concluded, however, that gainful employment that is "commensurate," does not include "any employment, no matter how nominal or temporary, or employment which results in payment of a nominal sum or mere pittance." *Id.* Otherwise, "[s]uch interpretation [would] effectively eliminate[ ] the term 'commensurate' from the statute." *Id.* ¶ 23. Thus, we stated that gainful employment which is commensurate means "employment whose compensation approximates to a substantial degree what the claimant was able to earn when he or she was disabled." *Id.* ¶ 20. Regulation 2.80.1000.7(A) NMAC (2004) currently reads: " 'Commensurate' employment means that the applicant is able to engage in some profitable employment or enterprise in the state of New Mexico, which approximates to a substantial degree the applicant's pre-injury compensation but is not necessarily equal to the applicant's pre-injury employment."

{10} In this case, however, we are considering what commensurate employment means with regard to geographic area. Although raised by the parties at the hearings, what commensurate employment means with regard to geographic area was not determined by the PERA Disability Review Commission, the hearing officer, the PERA Board, or the district court. The hearing officer rejected Employee's legal arguments in favor of a fifty-mile radius standard. In addition, the hearing officer found as a matter of fact that "the factual record does not support [Employee's] contention that gainful employment is confined to the specified geographical area." However, the hearing officer did not decide what geographic area would be acceptable to sustain Employee's burden to show that he was not able to obtain commensurate employment. The hearing officer's recommended decision simply concluded that Employee was capable of commensurate employment and had failed to prove by a preponderance of the evidence that he could not find it. The PERA Board's order simply states that the PERA Board accepted and incorporated the hearing officer's recommendation "in the entirety."

{11} The district court stated that it was more inclined to favor Employee's proposal that the applicable geographic area would be northern New Mexico, including Espanola and Chama, rather than the statewide area the PERA Board advocated:

> Actually I don't have any problem with the argument here by [Employee] that a reasonable area from within which for him to look for employment is the area of northern New Mexico, Espanola, Chama, that area. I think that's more consistent with what the Legislature had in mind, so I would reject [the PERA Board's lawyer]'s argument that it is required, that an employee establish that no commensurate employment exists in the entire state. That seems inconsistent with what I see as the Legislative intent in finding commensurate employment.

The district court affirmed the PERA Board's order, however, on the basis that the hearing officer could reasonably conclude that Employee's own testimony about his search for a job did not sustain Employee's burden of showing that Employee was not able to find commensurate employment even within the geographic area Employee proposed. Thus, the decisions below agreed that Employee did not sustain his burden of proving that he was not able to find commensurate employment but did not specifically

decide what that burden entails with regard to geographic area.

{12} The *Johnson* opinion also discusses what the legislature intended when it used the word "commensurate" in general: commensurate employment means employment that is "reasonably attainable." 1998–NMCA–174, ¶ 20. Thus, in *Johnson,* this Court held that, whether the work an employee is able to perform is " 'commensurate' is a factual question, taking into consideration the claimant's background, age, education, experience, and skills." *Id.; see also Torix v. Ball Corp.,* 862 F.2d 1428, 1430 (10th Cir.1988) (" 'Permanent disability is a question of fact that depends upon all the circumstances of a particular case.' " (quoting *Helms v. Monsanto Co.,* 728 F.2d 1416, 1420 (11th Cir.1984))).

{13} At the time Employee applied for disability retirement and currently the PERA Board's regulation provides, with regard to geographic area, that an employee must show that he is unable to engage in some profitable employment or enterprise in the State of New Mexico. We agree with the PERA Board that a community based geographic standard would be problematic and may give rise to equal protection problems. For example, an applicant having Employee's current physical restrictions and remaining capabilities in this case would be entitled to disability retirement because he lives in a relatively small community, Chama, surrounded by a relatively rural area, whereas another applicant with the same physical restrictions and remaining capabilities, who happens to live in a larger, more commercially developed area, like Santa Fe, Albuquerque, or Las Cruces, would be denied disability retirement because there are more employment options. The statewide standard, moreover, seems to comport with the legislative intent given the statutory language allowing disability retirement to be awarded only to those applicants who are permanently mentally or physically "totally incapacitated for any gainful employment." Section 10–11–10.1(C)(2)(a). This statutory language does not bear Employee's interpretation that disability retirement benefits are payable to a person who remains capable of some gainful employment within certain restrictions, but who simply testifies, as Employee did in this case, that they cannot find a job within some variable or arbitrarily chosen radius of their current community.

{14} As such, we defer to the PERA Board's statewide standard. However, in accordance with the rationale from *Johnson,* 1998–NMCA–174, ¶ 20, and with the requirement that the PERA Board's interpretation must be reasonably consistent with legislative intent, *City of Albuquerque,* 2003–NMSC–028, ¶ 16, we read the term "commensurate" in the definition of gainful employment as necessarily tempering the geographical requirement to mean that an employee could make a factual showing that the statewide standard is unreasonable with regard to that particular employee. *See Johnson,* 1998–NMCA–174, ¶ 20. Thus, we hold that in order to be entitled to retirement disability benefits, a PERA member employee has the burden of showing by a preponderance of the evidence that commensurate employment is not attainable within the State of New Mexico, unless the employee can present substantial evidence that under the circumstances of his case it is unreasonable for him to have to satisfy the statewide standard.

CONCLUSION

{15} We remand to the district court for subsequent remand to the hearing officer for application of this standard to this Employee. Employee should be allowed the opportunity to show why the statewide standard would be unreasonable as applied to his situation.

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

WE CONCUR: JONATHAN B. SUTIN and CYNTHIA A. FRY, Judges.

2006-NMCA-033

131 P.3d 81

Nora PERALTA, Plaintiff–Appellant,

v.

Manford R. and Lucy A. PERALTA, husband and wife, and Alex and Ruby V. Archuleta, husband and wife, Defendants–Appellees.

No. 24,970.

Court of Appeals of New Mexico.

Oct. 3, 2005.

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

Robert B. Martinez, Robert B. Martinez, P.A., Albuquerque, NM, for Appellees.

OPINION

FRY, Judge.

{1} Nora Peralta filed suit against her brother Manford Peralta and her sister Ruby Archuleta seeking to recover assets of their mother, Helen Peralta, that had been diverted prior to Helen's death by Manford and Ruby (Defendants). The district court granted summary judgment to Manford and Ruby on the basis that Nora's action should have been brought in a probate proceeding on behalf of the estate. Nora appeals the order granting summary judgment. We re-

verse, concluding that Nora could file her suit as a civil action, and remand for trial.

BACKGROUND

{2} After the death of her husband in 1979, Helen executed a will leaving her estate to her three children or their survivors equally. At that same time, Nora was living with Helen and, together with Delores Valdez, providing care for Helen when it was needed. In December 1994, Manford removed Helen from her residence and moved her to live with him and/or Ruby. Shortly thereafter, in March 1995, Helen's bank accounts were changed to payable-on-death accounts for the benefit of Manford and Ruby. At the same time, Helen executed a codicil to her 1979 will that excluded Nora and divided her estate between Manford and Ruby. In January 1996, Helen transferred by quitclaim deed the sole remaining asset in her estate, a piece of property with a house and apartments, to Manford and Ruby and their respective spouses.

{3} During this time, Manford and Ruby maligned Nora to Helen, telling her that Nora had no use for her and would not take care of her. The transfer of the assets of the estate were concealed from Nora for several years. Helen died on August 2, 1999, at the age of 94. There was no probate of her estate.

{4} Five months after Helen died, Nora filed her complaint for rescission, restitution and recovery, and for imposition of a trust with regard to Helen's estate. Nora claimed that Manford and Ruby had used their control and influence to convince Helen to transfer her bank accounts and real property to them and to have Nora removed from Helen's will. She sought to have a trust imposed on the assets that Manford and Ruby had received from Helen. Nora amended her complaint more than two years later to include, as a basis for her claims, that her father and mother had made a contract to make a will disposing of their property equally among their three children. Nora has abandoned this contract claim on appeal.

{5} Manford and Ruby moved for summary judgment arguing that there were no issues of material fact relating to Nora's claims of undue influence and abuse of confidential or familial relationship. They argued that Nora was unable to prove that they had exerted any influence over Helen. Nora responded, arguing that there was a presumption of undue influence under the evidence presented.

{6} The district court conducted a hearing on the motion and expressed concern that the estate had not been included in Nora's suit and that her claim had not been made in connection with probate. The district court granted the motion for summary judgment on grounds different from those argued by Defendants, ruling:

> There is no case. There is absolutely no case because if there was any undue influence, it was exerted on the senior Mrs. Peralta, who is dead; and the damage, if any, was done to her or her estate.... Without an estate, you don't have a case. It wasn't brought in the name of the estate or against it but, more importantly, in the name of the estate, which is something your client could have undertaken to do, is open up an estate and say, I'm suing on behalf of my mother; it has been dissipated by the following misconduct on the part of these putative heirs. Maybe you have a case there, but you don't now.

DISCUSSION

{7} We review the grant of summary judgment de novo because it presents a question of law. *Wilson v. Fritschy,* 2002-NMCA-105, ¶ 10, 132 N.M. 785, 55 P.3d 997. We must decide whether Nora was required to proceed on her claim in probate.

{8} In 1994, we recognized a cause of action against those who intentionally interfere with an expected inheritance. *Doughty v. Morris,* 117 N.M. 284, 287, 871 P.2d 380, 383 (Ct.App.1994). In that case, a will beneficiary alleged that her brother had tortiously interfered with her inheritance by coercing their ailing mother into making certain inter vivos transfers of property, which resulted in no property remaining in the estate to divide as the will specified. Relying on the Restatement (Second) of Torts, § 774B (1979), we recognized the tort of interference with a prospective inheritance. *Doughty,* 117 N.M.

at 287–88, 871 P.2d at 383–84. Thus, we allowed the cause of action where an inter vivos transfer of property depleted the estate and left nothing to be transferred in probate. The elements of the cause of action are: "(1) the existence of an expectancy; (2) a reasonable certainty that the expectancy would have been realized, but for the interference; (3) intentional interference with that expectancy; (4) tortious conduct involved with interference, such as fraud, duress, or undue influence; and (5) damages." *Id.* at 288, 871 P.2d at 384.

{9} In 2002, we were asked to decide whether the tort of intentional interference with expected inheritance would lie where probate proceedings were available to address the distribution of disputed assets and would otherwise provide an adequate remedy. *Wilson,* 2002–NMCA–105, ¶ 1. In *Wilson,* the plaintiffs were beneficiaries of a trust that would have allowed each of them to receive one-third of their uncle's estate. *Id.* ¶ 3. About five years later, the uncle drastically changed the testamentary plan on the urging of a third party so that the plaintiffs' share of the estate was distributed to a nursing home. *Id.* ¶¶ 3–4. When their uncle died, the plaintiffs indicated that they were challenging the revised testamentary plan. *Id.* ¶ 5. No formal probate proceeding was instituted. *Id.* However, the trustee filed an interpleader and informal probate proceeding, which eventually resulted in a settlement where plaintiffs each received 18.7875 percent of the estate. *Id.* ¶¶ 3–6. Sometime thereafter, the plaintiffs filed a lawsuit alleging that the defendants had tortiously interfered with their inheritance.

{10} We decided, following the majority of our sister states, "that a cause of action for tortious interference with an expected inheritance will not lie when probate proceedings are available to address the disposition of disputed assets and can otherwise provide adequate relief." *Id.* ¶ 35. We determined that "when property passes subject to a testamentary instrument, it is preferable to conclude the dispute at one setting, which ordinarily will afford injured parties an opportunity for substantial relief." *Id.* We stated that the preferred proceeding was in probate because the legislature had enacted the Probate Code to deal with such matters and we did not want to undermine the legislative intent in enacting the Probate Code. *Id.* ¶¶ 19, 21.

{11} We are now faced with a case falling between *Doughty* and *Wilson.* Defendants argue that the proper forum for resolution of the issues raised by Nora is pursuant to the Probate Code. It is true that any action attacking the testamentary capacity of the decedent should be brought pursuant to the Probate Code. *See Wilson,* 2002–NMCA–105, ¶ 18 (explaining that the right to contest a will "exists solely by virtue of the New Mexico Probate Code"). Defendants argue that Nora placed the validity of her parents' will and Helen's codicil into issue, thus putting this case squarely within the holding of *Wilson.* Nora counters that her case falls within the holding of *Doughty* because she is attacking the inter vivos transfers of all the property in Helen's estate before she died. Contrary to the arguments of the parties, we believe this case does not fall precisely within the holding of either *Doughty* or *Wilson* because there was both an inter vivos transfer of all the property in Helen's estate as well as a claim of improper influence in the revision of Helen's will to exclude Nora.

{12} Although a probate proceeding would be the proper place to attack the codicil, such an attack does not provide an adequate remedy here. If Nora were to prevail and have the codicil set aside, she is placed in the same situation as the *Doughty* plaintiff. There is no estate left to distribute under the will. It is this injustice that the tort of intentional interference with inheritance was meant to remedy. We conclude that in a situation where the estate has been depleted so that there could be no remedy in probate, proceeding in a civil action is appropriate.

{13} We believe that the district court erred in determining that this matter could only have been brought in the context of a probate proceeding. In *Wilson* and the cases it relied on, probate proceedings had been brought and matters relating to the validity of the testamentary plan were before the probate court. Thus, where matters re-

lating to the validity of the testamentary instrument are present, the courts have determined that the probate proceeding is the proper place to pursue such issues. *Id.* ¶ 19. As we noted in *Wilson,* "[t]he proper focus of the tort is on the just distribution of estate assets; when that can be achieved in probate, the need for the tort disappears." *Id.* ¶ 31. However, it is clear that where probate does not provide an adequate remedy, the tort action will be available. *Id.*

{14} This problem was recognized by the Illinois appellate court in *In re Estate of Jeziorski,* 162 Ill.App.3d 1057, 114 Ill.Dec. 267, 516 N.E.2d 422, 425 (1987), where there had been fraudulent inter vivos transfers and all of the assets were outside the estate. In that case, the court stated that even if the plaintiffs should prevail in a will contest proceeding, that would not provide them with the relief they were seeking. *Id.* at 426. The court allowed the tort action to proceed. Similarly, in *Martin v. Martin,* 687 So.2d 903, 907 (Fla.Dist.Ct.App.1997), where most of the assets were placed in a inter vivos trust prior to death, the remedy in probate was deemed inadequate because the trust assets were not part of the probate. The court permitted the tort action to proceed.

{15} Consistent with these authorities, we hold that the situation here is an exception to the requirement that a probate proceeding is the only forum for attacking the validity of a testamentary instrument, because we conclude that it will not provide adequate relief. Had Nora filed a probate proceeding as a means to attack the codicil, she would have achieved nothing because there was nothing in the estate for her to recover. Thus, she was placed in the situation of the *Doughty* plaintiff, where there was nothing to challenge in probate because there was no property left in the estate.

{16} While a probate proceeding would have been futile for Nora to pursue, in order to establish her claim for tortious interference with expected inheritance, she would nonetheless have to challenge the validity of Helen's codicil in order to establish the existence of an expectancy that she would inherit from Helen if Manford and Ruby had not interfered with that expectancy, which is an element of her tort cause of action. *Doughty,* 117 N.M. at 288, 871 P.2d at 384. Under our holding, on remand Nora may attack the codicil in an attempt to prove her tort claim.

{17} We recognize that there may be problems with the different burdens of proof required to contest a will and to establish tortious interference with inheritance when both are allowed to proceed in a single action before the district court. A claim that a will was procured through undue influence must be shown by clear and convincing evidence, *In re Will of Ferrill,* 97 N.M. 383, 392, 640 P.2d 489, 498 (Ct.App.1981), while a claim of tortious interference with inheritance need only be established by a preponderance of the evidence. *See United Nuclear Corp. v. Allendale Mut. Ins.,* 103 N.M. 480, 485, 709 P.2d 649, 654 (1985) (stating that "[i]t is the general rule . . . that issues of fact in civil cases are to be determined according to the preponderance of the evidence"). We do not believe that the different burdens of proof necessitate different proceedings. Plaintiff will simply be required to meet the different burdens applicable to each aspect of her claim at trial.

{18} We see no reason not to allow the matter to proceed in the district court, particularly because the district court is a court of general jurisdiction and can determine probate matters brought before it. NMSA 1978, § 45–1–302.1 (1977). Thus, the district court can hear matters relating to the testamentary document and require Nora to prove undue influence by clear and convincing evidence. Then, if Nora succeeds in attacking the document and thereby proves the existence of an expectancy, the court can hear the remaining aspects of the claim of tortious interference with inheritance and determine the facts by a preponderance of the evidence.

{19} To the extent Defendants argue that the statute of limitations is implicated here, we disagree. Nora's complaint was filed within six months after Helen's death. Because the case was properly filed as a civil action, it was filed well within the statute of limitations. NMSA 1978, § 37–1–8 (1976) (setting a three year statute of limitations for personal injury).

{20} Citing to NMSA 1978, § 45-3-203 (1975), Defendants argue that Nora could only proceed in a probate proceeding because the Probate Code grants Nora standing to bring an action concerning the estate of her mother, Helen. That section simply sets forth the priority among persons seeking appointment as personal representatives. We agree that Nora could have moved to have herself appointed as the personal representative of Helen's estate and presented the 1979 will for probate. Again, however, this would have availed her nothing because there was no estate to probate. If the Probate Code does not provide an adequate remedy, then the suit in tort is the proper proceeding to pursue.

{21} To the extent Defendants argue that the district court properly granted summary judgment because there were no issues of material fact going to Nora's claim of undue influence, we do not agree. Nora presented evidence sufficient to warrant trial on the merits.

{22} "A presumption of undue influence arises when a confidential or fiduciary relationship exists and other suspicious circumstances are shown." *Doughty,* 117 N.M. at 288, 871 P.2d at 384. Nora pointed to suspicious circumstances, including old age and weakened condition, lack of consideration, unjust disposition of the property, participation of Manford and Ruby in procuring the inter vivos gifts, and secrecy, concealment, or failure to disclose the gifts. *See Gersbach v. Warren,* 1998-NMSC-013, ¶ 8, 125 N.M. 269, 960 P.2d 811 (setting out factors to be considered in determining undue influence). Defendants argue that Nora has not proved the confidential relationship or that Helen was susceptible to undue influence. However, Nora produced evidence suggesting that Helen was susceptible to undue influence, including evidence of Helen's advanced age and physical frailty as well as proof that Manford and Ruby were maligning Nora to Helen in an apparent effort to isolate Helen. Nora also produced evidence that Helen was living with Manford or Ruby and that they participated in the procurement of the inter vivos gifts shortly after Helen moved in with them. This evidence is comparable to the evidence upon which we held that the trial court could determine that a confidential relationship existed between a parent and her child in *Doughty,* 117 N.M. at 289, 871 P.2d at 385. Once the confidential relationship can be found, the presence of suspicious circumstances permits the presumption of undue influence, which Defendants may then attempt to rebut. But the fact remains that the foregoing evidence creates issues of fact that cannot be resolved on summary judgment.

CONCLUSION

{23} For the foregoing reasons, we reverse and remand for a trial on the merits of Nora's complaint.

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

WE CONCUR: A. JOSEPH ALARID and LYNN PICKARD, Judges.

2006-NMCA-028

131 P.3d 85

Jerry V. MAYEUX and Sally Brown Mayeux, Plaintiffs-Appellants,

v.

James R. WINDER and Katrina Erica Winder, Defendants-Appellees.

No. 25,355.

Court of Appeals of New Mexico.

Dec. 21, 2005.

Hubert & Hernandez, P.A., Beverly J. Singleman, Las Cruces, NM, for Appellants.

Cervantes Moberly, P.C., Joseph Cervantes, Las Cruces, NM, for Appellees.

OPINION

PICKARD, Judge.

{1} In this case, we decide whether the trial court abused its discretion in finding that the managing member of a limited liability land development company (the LLC) did not breach his fiduciary duty to the other

members of the LLC. In doing so, we must decide which party should bear the burden of proof in such a case and whether the burden of proof issue was adequately raised below. We also address whether the trial court abused its discretion in (1) allowing the testimony of a witness who was not on Defendant's pretrial witness list and (2) determining that Defendant was the prevailing party for purposes of assessing costs. Finding no abuse of discretion with regard to any of these issues, we affirm.

BACKGROUND

{2} In 1997, Plaintiffs Jerry and Sally Mayeux purchased a lot from Defendant Jim Winder located in one of Defendant's subdivisions. (While Winder and his wife were both named defendants, we refer to them as "Defendant," since all the relevant actions in the case were taken by Mr. Winder.) Because Plaintiffs liked Defendant's style of subdividing, they told him that they would be interested in investing in similar projects. In 1998, the parties purchased some land located in Lincoln and Torrance counties and created a limited liability company, which they called Corona Ranch LLC. Plaintiffs and Defendant and his wife were the only members of the LLC. Under the parties' operating agreement, Defendant was to be the sole managing member of the LLC, and he was authorized to exercise "general supervision, direction and control" over the LLC. The operating agreement also contained a mandatory buyout provision, in which the parties agreed that if Plaintiffs wanted to withdraw from the LLC, Defendant would be required to buy them out. The agreement contained a formula for calculating the purchase price under the mandatory buyout provision.

{3} In addition to Corona Ranch, Defendant was involved in several other land development LLCs. He marketed all of his properties, including the Corona Ranch properties, under one trade name, "Heritage Ranch." Although the parties dispute the level of involvement, Plaintiff Sally Mayeux was involved in bookkeeping for the Corona Ranch LLC. Facts surrounding Sally Mayeux's involvement in the LLC's financial affairs, and the trial court's eventual findings regarding this issue, will be discussed more fully below.

{4} Plaintiffs claim that sometime in 2002, they began to suspect that Defendant was using funds from the Corona Ranch LLC to pay for expenses generated by his other land development projects. At this time, they informed Defendant that they wanted to exercise their rights under the buyout provision. Plaintiffs claimed that their interest in the LLC was worth $1,500,792. Defendant replied that he would buy them out at a price of $205,000. Plaintiffs rejected Defendant's offer and filed suit.

{5} Plaintiffs' original complaint claimed breach of contract based on Defendant's failure to comply with the terms of the buyout provision and fraud based on a breach of fiduciary duty in connection with misappropriation of funds. The complaint also requested an accounting and damages for breach of the covenant of good faith and fair dealing. Plaintiffs later amended their complaint to add a claim for conversion. At trial, Plaintiffs' primary contention seems to have been that Defendant's improper usage of funds had devalued the worth of the company. Plaintiffs specifically allege that Defendant (1) paid his life insurance premiums with LLC funds when there was no benefit to the LLC; (2) paid for advertising for his other Heritage Ranch properties with LLC funds; (3) watered his cattle improperly, causing the nearby village of Corona to refuse to renew an agreement under which water was provided to the Corona Ranch subdivision; (4) paid the water bill for the subdivision with LLC funds, charged the residents fees for water, and then did not reimburse the LLC; (5) hired other people to manage the LLC and paid them with LLC funds, even though the parties had agreed that he would perform all the management duties himself with no extra compensation; (6) claimed that a zoning restriction precluded him from subdividing as planned when in fact there was no such zoning restriction; and (7) failed to keep proper records of expenditures.

{6} After approximately a year and a half of litigation, Defendant moved to amend his answer to include counterclaims seeking re-

covery based on Plaintiffs' management of the LLC's capital accounts. It appears that the trial court never formally ruled on the motion to amend, but the court's findings and conclusions show that the counterclaims were litigated and that Plaintiffs prevailed on them.

{7} In July 2004, the trial court conducted a three-day bench trial, hearing extensive testimony and admitting numerous exhibits. Plaintiffs testified on their own behalf and put on testimony from numerous fact witnesses. Defendant testified and put on testimony from his accountant and an expert accountant. Defendant testified that based on advice from his accountant, he now valued Plaintiffs' interest in the LLC at $306,666, rather than the approximately $200,000 that he had initially offered. The trial court also allowed Defendant to call Ken Binkley, a partner in the advertising agency employed by Defendant. Plaintiffs objected to Binkley's testimony on the ground that he was not on Defendant's pretrial witness list. Finding no prejudice to Plaintiffs, the trial court allowed the testimony.

{8} After trial, the court issued a memorandum decision. It noted that "[t]he gravamen of the suit is that [Defendant] breached his fiduciary responsibility as Manager of Corona Ranch LLC by self[-]dealing." The court stated:

> Having heard the testimony of the parties and their witnesses I am satisfied that [Defendant] did not breach his fiduciary duty to the [Plaintiffs] nor did he breach his contract with them. I am satisfied that there has been no fraud. I am satisfied that the various expenses were reasonably allocated between the various entities and under consistently applied methods.... I find that [Defendant] performed his job as Manager of Corona Ranch LLC in good faith and in the best interest of the Company.

The court denied Defendant's counterclaims, stating, "I do not make a credit for a negative capital account as I was not satisfied with the proof of that amount."

{9} The court awarded Plaintiffs $306,666 for their interest in the LLC, the amount Defendant acknowledged at trial to be owing. The court clarified its decision by adopting many of Defendant's proposed findings of fact and conclusions of law. We address the substance of some of the court's findings and conclusions in our discussion below. Subsequently, the court entered a Judgment and Final Decree, which adopted the memorandum decision and awarded Defendant costs as the prevailing party.

DISCUSSION

1. BREACH OF FIDUCIARY DUTY CLAIM

{10} On appeal, Plaintiffs have abandoned their other claims and argue only that they are entitled to damages based on Defendant's breach of fiduciary duty. Their primary contention seems to be that the trial court applied the wrong standard to their breach of fiduciary duty claim by (1) putting the burden on Plaintiff to show a breach of fiduciary duty rather than requiring Defendant to demonstrate the propriety of his conduct, (2) requiring proof by a preponderance of the evidence rather than by clear and convincing evidence, and (3) failing to apply the high standard appropriate to fiduciary duty claims and instead applying the lower standard appropriate to breach of contract claims. Plaintiffs also argue that the trial court generally abused its discretion in finding, on the evidence presented, that Defendant did not breach his fiduciary duty. Plaintiffs' theory for this argument seems to be that Defendant's failure to keep detailed, written records was enough by itself to constitute a breach of fiduciary duty.

{11} Plaintiffs' appellate briefing sets forth the facts in a light favorable to Plaintiffs. For example, Plaintiffs contend that they "proved" several different instances of self-dealing at trial. They also argue that "[t]here was substantial evidence in the case at bar that [Defendant] placed his own interests above those of Corona Ranch LLC and the [Plaintiffs] as minority, non-managing members in using Corona Ranch LLC assets and monies to benefit his private ranching operation and other land development LLCs in which [Plaintiffs] had no interest." We note that when we review a trial court's factual findings, the presence of evidence supporting

the result opposite from that reached by the trial court is not relevant. *See Hernandez v. Mead Foods, Inc.,* 104 N.M. 67, 71, 716 P.2d 645, 649 (Ct.App.1986) (holding that the plaintiff's statement that substantial evidence supported his claims represented "a basic misunderstanding of the function of appellate review," and noting that "[t]he question is not whether substantial evidence would have supported an opposite result; it is whether such evidence supports the result reached"), *limited on other grounds by Graham v. Presbyterian Hosp. Ctr.,* 104 N.M. 490, 723 P.2d 259 (Ct.App.1986).

{12} Despite these statements regarding the strength of their own evidence, Plaintiffs do not appear to actually argue that the trial court's findings were not supported by substantial evidence. Nor do Plaintiffs identify any of the trial court's findings to which they take exception. *See* Rule 12–213(A)(4) NMRA ("A contention that a verdict, judgment or finding of fact is not supported by substantial evidence shall be deemed waived unless the argument has identified with particularity the fact or facts which are not supported by substantial evidence.").

{13} Under these circumstances, we need not conduct a thorough review for substantial evidence. However, we note that Defendant testified at trial as to the propriety of the expenditures and other actions challenged by Plaintiffs. It was up to the trial court to determine whether Defendant was a credible witness and we will not second-guess the trial court's judgment in that regard. Nor are Plaintiffs aided by their citation to *Lawson v. Rogers,* 312 S.C. 492, 435 S.E.2d 853, 857 (1993), for the proposition that every presumption should be made against a fiduciary who is unable to account for challenged expenses with written receipts, invoices, or time cards. In that case, the trial court ruled against the fiduciary on the facts; here, even if a presumption applied, the trial court apparently found it was overcome by the credibility of Defendant's and his witnesses' testimony. We hold that, to the extent Plaintiffs make a substantial evidence claim, Defendant's testimony alone would have been a sufficient basis for the trial court to rule as it did. *See State ex rel. Martinez v. Lewis,* 116 N.M. 194, 207, 861 P.2d 235, 248 (Ct.App.1993) ("[W]hen there is testimony going both ways, an appellate court will not say that the trial court erred in finding on one side of the issue.").

{14} We now turn to Plaintiffs' argument that the trial court erred in applying the wrong legal standards to their breach of fiduciary duty claim. We review this question de novo. *See State v. Torres,* 1999–NMSC–010, ¶ 28, 127 N.M. 20, 976 P.2d 20 ("[T]he threshold question of whether the trial court applied the correct evidentiary rule or standard is subject to de novo review on appeal.").

{15} Plaintiffs first argue that the trial court erred when it put the burden on them to prove that Defendant breached his fiduciary duty. Plaintiffs argue that "[t]he burden of proving fair dealing should have been shifted to [Defendant] to prove fair dealing by clear and convincing evidence, which he failed to prove." We answer this contention both procedurally and on the merits.

{16} First, as a matter of procedure, we question whether Plaintiffs fairly invoked a ruling on the question of burden of proof. *See Woolwine v. Furr's, Inc.,* 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct.App.1987). To be sure, the trial court was aware that Plaintiffs wanted Defendant to explain various expenses, and Plaintiffs did request a conclusion that Defendant bore the burden of accounting for expenditures by clear and convincing evidence. However, immediately thereafter, Plaintiffs requested a conclusion that the burden was a preponderance of the evidence, and as noted above, Plaintiffs' complaint contained no independent count for breach of fiduciary duty and instead mentioned breach of fiduciary duty only in their count for fraud, a count on which they would ordinarily bear the burden of proof by clear and convincing evidence. *See* UJI 13–304 NMRA.

{17} Thus, if the trial court did not fully appreciate Plaintiffs' burden of proof argument, it may be fairly said that Plaintiffs had no one to blame but themselves. Nevertheless, because we are to exercise our discretion to entertain issues on their merits, we

will proceed to consider the merits of Plaintiffs' stated breach of fiduciary duty issues. *See Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 2002–NMSC–021, ¶ 21, 132 N.M. 401, 49 P.3d 662.

{18} In support of their argument that a defendant in a breach of fiduciary duty case should bear the burden of showing fair dealing, Plaintiffs cite to two out-of-jurisdiction cases. *See Oakhill Assocs. v. D'Amato*, 228 Conn. 723, 638 A.2d 31 (1994); *Cronin v. McCarthy*, 264 Ill.App.3d 514, 202 Ill.Dec. 129, 637 N.E.2d 668 (1994). Plaintiffs have not cited, nor have we located, any authority stating that this is the rule in New Mexico. *Cf. Sanchez v. Saylor*, 2000–NMCA–099, ¶¶ 51–52, 129 N.M. 742, 13 P.3d 960 (citing *Oakhill* and *Cronin* and holding that this Court need not decide whether to adopt the rule from those cases as an "affirmative defense" to a claim against a fellow partner for reimbursement of expenses). Thus, we address as a novel issue the appropriate party on which to place the burden of proof in a breach of fiduciary duty case. We hold that under the facts of this case, the burden was mostly on Plaintiffs to show that Defendant breached his fiduciary duty, and that where the burden may have been on Defendant, there is no indication from the record that the trial court erroneously placed the burden on Plaintiffs.

{19} We tend to agree with Plaintiffs, that in some instances, the burden should be on the fiduciary to show proper dealings. For example, in a case involving a transaction that creates a facial presumption of self-dealing, such burden shifting might be appropriate. Many of the cases stating Plaintiffs' preferred rule involve such transactions. *Oakhill Associates*, 638 A.2d at 32, for example, involved a dispute over a nearly $300,000 construction project where the owner of the defendant construction company performing the services was also a partner in the plaintiff partnership.

{20} *Hum v. Ulrich*, 458 N.W.2d 615 (Iowa Ct.App.1990), similarly involved a facially suspect transaction. In *Hum*, one partner sold assets of a partnership as well as some of his personal assets to one buyer for a lump sum. *Id.* at 616. He then labeled a small portion of the sale price as compensation for the partnership assets and claimed the rest as compensation for his personal assets. *Id.* at 617. The court noted that if the fiduciary allocated a larger amount of the sale price to his personal assets, he would have "more money in his own pocket because he would not have to split [that part of the sale price] with [his partner]." *Id.* Because of that "clear conflict of interest," the court held that the burden of proof should lie with the fiduciary. *Id.; see also Cleary v. Cleary*, 427 Mass. 286, 692 N.E.2d 955, 958 (1998) ("[t]he general rule is that one acting in a fiduciary capacity for another has the burden of proving that a *transaction with himself* was advantageous for the person for whom he was acting" (internal quotation marks and citation omitted) (emphasis added)); *Walsh v. Walker*, No. B159560, 2004 WL 1759250, at * 7 (Cal.Ct.App. Aug.6, 2004) (unpublished) (" '[D]uring the existence of the fiduciary relationship any *transaction* by which one of the co-adventurers secures an advantage over the other is presumptively fraudulent and casts a burden on such party gaining the advantage to show fairness and good faith in all respects.' ") (quoting *Davis v. Kahn*, 7 Cal.App.3d 868, 86 Cal.Rptr. 872, 878 (Ct. App.1970) (emphasis added)). *But see Silverberg v. Colantuno*, 991 P.2d 280, 286 (Colo.Ct.App.1998) ("Defendants cite several Illinois cases for the proposition that, when there is a question concerning breach of fiduciary duty by a managing partner, that partner carries the burden of proving his or her innocence. However, such is not the rule in Colorado." (citing *Cronin*, 264 Ill.App.3d 514, 202 Ill.Dec. 129, 637 N.E.2d 668, other internal citations omitted, and relying on an ordinary contract case)).

{21} Here, most of the expenditures challenged by Plaintiffs were not presumptively suspect as were the transactions in *Oakhill Associates* and *Hum*. Plaintiffs' argument was essentially that Defendant made a series of relatively small expenditures from Corona Ranch LLC funds that benefitted his other companies. For example, some of Plaintiffs' proposed findings of fact, all of which the trial court rejected, included the following:

38. Corona Ranch LLC purchased a Ford Explorer with Corona Ranch money and titled the vehicle in the Defendant's name and paid $500 to Defendant Katrina Winder's sister.

. . . .

46. From 1999 to December 2002 [Defendant] paid from Corona Ranch LLC funds the sum of $300 to Hatch Mercantile. . . .

. . . .

50. From 1999 to December 2002 [Defendant] paid from the Company funds the sum of $4,161.00 to Cheryl Vana as labor. . . .

. . . .

52. From 1999 to December 2002 [Defendant] paid from Corona Ranch LLC funds the sum of $1,179.35 in office supplies and $4,415.13 in postage. . . .

Many of Plaintiffs' other proposed findings involved transfers of funds from Corona Ranch LLC to other companies owned in whole or part by Defendant.

{22} Unlike the transactions in *Oakhill Associates* and *Hum*, we cannot say that most of these expenditures are presumptively unfair or even suspect. Many of them, such as the expenditures for postage, office supplies, labor, and the vehicle, are presumptively legitimate. As for the amounts paid to Defendant's other businesses, they come closer to creating a presumption of impropriety, but there are also legitimate explanations for those expenditures. At trial, Defendant testified at length regarding his financial management of the various companies. Defendant explained that he would often make an expenditure that benefitted several of his companies, drawing the necessary funding from one of the companies, and then writing reimbursement checks to that company from the other companies. The trial court must have believed this testimony because it specifically held that "I am satisfied that the various expenses were reasonably allocated between the various entities and under consistently applied methods."

{23} Thus, to the extent that most of Plaintiffs' complaints concern matters on which they retained the burden of proof, we hold that no error occurred. *See Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co.*, 150 S.W.3d 718, 733 (Tex.Ct.App.2004) (holding that the burden remains on the plaintiff to show a breach of fiduciary duty where a transaction is not presumptively unfair); *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wash.App. 502, 728 P.2d 597, 604–05 (1986) (holding that "mere allegations" of self-dealing do not shift the burden to the fiduciary and even once a plaintiff has shown self-dealing with regard to one transaction, "the burden does not shift to the fiduciary to prove the fairness of all transactions complained of"). It may be that, with regard to some of the expenses, the burden should have been shifted to Defendant, but as to these, as will be seen below, we cannot say that the trial court did not find in favor of Defendant pursuant to the proper burden and standard of proof.

{24} We also deem it noteworthy that Plaintiff Sally Mayeux was involved in the record keeping for the LLC. The parties heavily dispute the degree of her involvement and the duties she performed. For example, Defendant asserts that she "assumed and was assigned all bookkeeping [and accounting] responsibilities" for the company, that she "received all bank statements and cancelled checks . . . directly from the company bank," and that she "prepared and delivered financial statements and reports" to an accountant. Plaintiffs minimize Ms. Mayeux's role, stating that she merely "enter[ed] numbers from check registers kept by [Defendant] into a computer bookkeeping program."

{25} The trial court found the following facts:

63. Sally Mayeux generated, kept and maintained the financial books and records of Corona Ranch, LLC, and performed the responsibilities of bookkeeper for Corona Ranch, LLC between 1999 and mid–2002.

64. Sally Mayeux is formerly a licensed certified public accountant with education and experience to qualify her as the bookkeeper and accountant for Corona Ranch, LLC.

. . . .

72. Between 1999 and mid–2002, Sally Mayeux received all cancelled checks and bank statements from the Corona Ranch, LLC operating account....

....

74. Between 1999 and mid–2002, Sally Mayeux prepared monthly financial reports for Corona Ranch, LLC including a general ledger, income statement, balance sheet, bank reconciliation, and other financial reports.

The trial court also entered the following conclusion of law:

101. By receiving monthly checks and bank statements, and preparing the financial statements, [Plaintiffs] waived, and are now estopped, from asserting any challenge to the expenses incurred, paid and allocated by [Defendant] as Manager of Corona Ranch, LLC.

{26} Plaintiffs' awareness of and involvement in the financial affairs of the company further support our conclusion that it was fair for Plaintiffs to bear the burden of showing that Defendant's facially legitimate expenditures were improper. In *Dufoe v. Dufoe*, No. 99–0463, 2000 WL 702303, at **2–3 (Iowa Ct.App. May 31, 2000) (unpublished), the Iowa Court of Appeals held that the burden of proving a breach of fiduciary duty remained on the plaintiff where he had prepared tax returns for the partnership. The court held that while the defendant partner had commingled personal and partnership funds, the burden of proving a breach of fiduciary duty remained on the plaintiff because he was "fully aware" of the commingling due to his involvement in the record keeping and tax preparation. *Id.* at *3, 2000 WL 702303. Like the plaintiff in *Dufoe*, Plaintiffs were involved in the record keeping for the LLC, and we find such involvement to weigh in favor of requiring them to prove a breach of fiduciary duty.

{27} In sum, we hold that in a case such as the present one where (1) a plaintiff challenges expenditures that do not themselves create a presumption of self-dealing and (2) the plaintiff is involved in the financial affairs of the partnership or LLC such that he or she has access to the entity's records, the burden of proving a breach of fiduciary duty remains on the plaintiff. To the extent that one or two categories of expenses do raise a possible inference of self-dealing, there is nothing in the record clearly showing that the trial court did not properly apply the burden and standard of proof. Specifically, the trial court's findings with regard to the presumptively legitimate expenses placed the burden of proof on Plaintiffs and explicitly ruled that Defendant's evidence preponderated. With regard to other expenses, the trial court did not place the burden of proof on Plaintiffs, did not use the preponderance of the evidence standard, and instead affirmatively found that Defendant's expenditures were properly accounted for. Under these circumstances, and in view of our concerns expressed above that Plaintiffs may not have presented their case in such a way that the trial court would have clearly understood what they were arguing, Plaintiffs have not convinced us that the record in this case shows such clear error as to call for a reversal. *See Gonzales v. Lopez*, 2002–NMCA–086, ¶ 27, 132 N.M. 558, 52 P.3d 418 (noting that appellant bears the burden of clearly demonstrating how the trial court erred); *see also 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 by the reviewing court in favor of the correctness and regularity of the [trial] court's judgment." (internal quotation marks and citation omitted)).

{28} Next, Plaintiffs argue that the trial court applied the wrong substantive standard to their breach of fiduciary duty claim. Plaintiffs claim that rather than applying the high standard applicable to fiduciary duty claims, the court relied either on the lower standard applicable to contract claims or on the standard articulated in the parties' operating agreement, which is in good faith in the best interests of Corona Ranch LLC, and with such care including reasonable inquiry, using ordinary prudence, as a person in a like position would use under similar circumstances.

{29} As a general matter, we agree with Plaintiffs that a fiduciary relationship

imposes a duty on the fiduciary that is greater than the duty of good faith and fair dealing implied in all contractual relationships. *See Walta v. Gallegos Law Firm, P.C.,* 2002–NMCA–015, ¶ 40, 131 N.M. 544, 40 P.3d 449. However, Plaintiffs have not pointed us to anything in the record indicating that the trial court actually applied an incorrect standard. In support of their argument, Plaintiffs rely on the following statement in the trial court's memorandum decision: "I find that [Defendant] performed his job as manager of Corona Ranch LLC in good faith and in the best interest of the company." Plaintiffs also rely on several findings by the trial court, all of which contain variations on the statement that Defendant's actions were taken "in good faith and in the best interests of Corona Ranch, LLC using reasonable inquiry and ordinary prudence of a person in a like position under similar circumstances."

{30} We do not agree that these statements indicate that the trial court was unaware of the higher standard applicable to fiduciary relationships. Because the parties' agreement required Defendant to act "in good faith and in the best interests of the company," and because Plaintiffs' complaint alleged a breach of the duty of good faith and fair dealing, it is not surprising that the trial court would enter findings of fact using the language appropriate to those claims. Because none of the findings of which Plaintiffs complain actually mention fiduciary duty, we assume that those findings relate to Plaintiffs' contract claims, rather than their breach of fiduciary duty claim. *See 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 by the reviewing court in favor of the correctness and regularity of the [trial] court's judgment." (internal quotation marks and citation omitted)).

{31} We also note that in its memorandum decision, the trial court specifically stated, "I am satisfied that [Defendant] did not breach his fiduciary duty to [Plaintiffs] nor did he breach his contract with them." This mention of both theories of recovery further indicates that the court was aware of the difference between the two theories and did not improperly conflate them. For these reasons, we hold that the trial court did not apply the wrong legal standard to Plaintiffs' breach of fiduciary duty claim.

{32} Finally, in a variation of what appears to be their substantial evidence argument, Plaintiffs argue that the trial court abused its discretion in finding no breach of fiduciary duty on the facts of this case and Plaintiffs ask us to award damages. We will only overturn a decision under the abuse of discretion standard where "the court's ruling exceeds the bounds of all reason" or is "arbitrary, fanciful, or unreasonable." *Edens v. Edens,* 2005–NMCA–033, ¶ 13, 137 N.M. 207, 109 P.3d 295 (internal quotation marks and citation omitted). Unless this standard is met, we will not substitute our judgment for that of the trial court. *Meiboom v. Watson,* 2000–NMSC–004, ¶ 29, 128 N.M. 536, 994 P.2d 1154.

{33} In this case, the trial court heard three days of testimony. Defendant testified for several hours, and a brief overview of his testimony indicates that he explained to the court the contested expenditures. The trial court specifically found that "the various expenses were reasonably allocated between the various entities and under consistently applied methods." Plaintiffs disagree with this finding, but they do not explicitly challenge the sufficiency of the evidence supporting it. Thus, as stated above, we need not review the evidence that was before the trial court to see whether the findings are supported by substantial evidence. However, we are certain that Defendant's testimony alone would have been a sufficient basis on which the trial court could have decided that there was no breach of fiduciary duty. *See Sanchez,* 2000–NMCA–099, ¶ 12, 129 N.M. 742, 13 P.3d 960 (noting that we are entitled to disregard any evidence contrary to the trial court's findings). Since the trial court explicitly found that the contested expenditures were proper, we hold that the court did not abuse its discretion in ruling on the basis of that factual finding that Defendant had not breached his fiduciary duty.

2. TESTIMONY OF AN UNDISCLOSED WITNESS

{34} Plaintiffs next argue that the trial court abused its discretion in allowing Ken Binkley, a partner in the advertising firm used by Defendant, to testify even though he was not on Defendant's pretrial witness list. We do not find an abuse of discretion unless "the court's ruling exceeds the bounds of all reason" or is "arbitrary, fanciful or unreasonable." *Edens,* 2005-NMCA-033, ¶ 13, 137 N.M. 207, 109 P.3d 295.

{35} Defendant argues that Plaintiffs did not properly preserve their objection on this point. In order to preserve an issue for appeal, it must "appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court." *Woolwine,* 106 N.M. at 496, 745 P.2d at 721. When Defendant expressed a desire to call Binkley, the trial court asked Plaintiff for a response. The following colloquy took place between the court and Plaintiffs' attorney:

> [ATTORNEY]: Your honor, he wasn't identified—advertising has been an issue from day one. It's not something that he has just recently found out. I just grabbed my deposition of Mr. Binkley and it was just nothing more than trying to get copies of the invoices is what it was.
>
> [THE COURT]: Well, there has been some fairly extensive testimony concerning the allocations.
>
> [ATTORNEY]: Twelve pages is the extent of my deposition, your honor.
>
> [THE COURT]: I can't see the prejudice to plaintiffs by allowing this witness to come up, so your permission is granted.

Based on the attorney's statement, the trial court would have understood that Plaintiffs objected to Binkley's testimony on the grounds that (1) they would be prejudiced because they were unprepared to question him and (2) there was no legitimate reason for Defendant to have failed to disclose before trial the intention to call him. Under these circumstances, we hold that the objection was properly preserved because Plaintiffs "fairly invoked a ruling of the trial court on the same grounds argued in the appellate court." *See Woolwine,* 106 N.M. at 496, 745 P.2d at 721.

{36} The trial court has "broad discretion to admit or refuse testimony of witnesses whose identity was not revealed" before trial. *Montoya v. Super Save Warehouse Foods,* 111 N.M. 212, 215, 804 P.2d 403, 406 (1991). Our Supreme Court has held that "[o]nly rarely could a court commit reversible error in the exercise of discretion in allowing a witness to testify, notwithstanding the failure to give timely notice of the witness[.]" *Id.* Our cases have generally held that undisclosed witness testimony should be excluded under two circumstances: (1) where prejudice to the appellant is severe because the testimony of the witness is crucial to the appellee's case and (2) where the appellee has gained a tactical advantage by willfully failing to disclose the intention to call a witness.

{37} In *Khalsa v. Khalsa,* 107 N.M. 31, 751 P.2d 715 (Ct.App.1988), we explained the type of prejudice warranting reversal on the basis of undisclosed witness testimony. We held that the trial court had abused its discretion in allowing the "surprise testimony" of a doctor, which was "the only evidence supporting the trial court's denial of joint custody." *Id.* at 35, 751 P.2d at 719. We noted that if we considered the doctor's testimony, we would have no choice but to find that the trial court's ruling was supported by substantial evidence, but that in the absence of the testimony, there was no evidence whatsoever supporting the ruling. *Id.* at 33, 751 P.2d at 717. In *State v. Griffin,* 108 N.M. 55, 58, 766 P.2d 315, 318 (Ct.App.1988), we relied on *Khalsa* to support our holding that the trial court had not abused its discretion in allowing the testimony of two undisclosed witnesses. The prosecutor in *Griffin* had not submitted a witness list, and the trial court continued the proceeding for an afternoon so that the defendant could interview two witnesses. *Id.* The defendant did not thereafter ask for more time. *Id.* We held that reversal was not required because the defendant had not shown prejudice. *Id.* We noted that the witnesses' testimony was ascertainable because the State's exhibits should have clued the defendant in to the

likely substance of the witnesses' testimony, and that the defendant had not shown how his cross-examination of the witnesses could have been improved by an additional opportunity to interview them. *Id.*

{38} In *Lewis ex rel. Lewis v. Samson,* 2001–NMSC–035, ¶¶ 6–17, 131 N.M. 317, 35 P.3d 972, our Supreme Court indicated the type of willful behavior that warrants disallowing the testimony of an undisclosed witness. The trial court in *Lewis* refused, as a discovery sanction, to allow the testimony of a witness disclosed on the eve of trial. *Id.* ¶¶ 11–13, 861 P.2d 235. Our Supreme Court upheld that decision, noting that the Plaintiff had failed on many occasions to disclose her intention to add witnesses. *Id.* ¶ 14, 861 P.2d 235. The Court stated: "This type of conduct, if tolerated, would frustrate the general purposes of discovery and the specific purpose of witness disclosure." *Id.* ¶ 15, 861 P.2d 235. *Cf. McCarty v. State,* 107 N.M. 651, 653, 763 P.2d 360, 362 (1988) (holding that, in the criminal context, it would be "consistent with the purposes of the Confrontation Clause" to exclude witness testimony where it appeared that the failure to identify witnesses before trial was "willful and motivated by a desire to obtain a tactical advantage" (internal quotation marks and citation omitted)).

{39} Here, Plaintiffs have alleged no prejudice besides their "lack of preparation and ability to counter . . . Binkley's testimony with that of another witness so late in the trial." However, Plaintiffs have not indicated that they requested the opportunity to put on a rebuttal witness. Nor have Plaintiffs shown us that they asked for more time to conduct another deposition or interview of Binkley. *See In re Estate of Heeter,* 113 N.M. 691, 694, 831 P.2d 990, 993 (Ct.App. 1992) ("This [C]ourt will not search the record to find evidence to support an appellant's claims."). As in *Griffin,* Plaintiffs have not demonstrated how their cross-examination of Binkley would have been materially improved had they had the opportunity to further interview him. Thus, Plaintiffs' allegations of prejudice do not rise to the level where we can say the trial court abused its discretion in allowing the testimony. Moreover, there is no showing that Defendant willfully failed to disclose his intention to call Binkley in order to gain a tactical advantage. Under these circumstances, we hold that the trial court did not abuse its discretion in allowing Binkley to testify.

3. AWARD OF COSTS

{40} Finally, Plaintiffs argue that the trial court abused its discretion in awarding costs to Defendant as the prevailing party. Our Rules of Civil Procedure state that the prevailing party shall recover its costs "unless the court otherwise directs." Rule 1–054(D)(1) NMRA. We have held that the trial court has broad discretion to award costs or to refuse to award them. *See In re Adoption of Stailey,* 117 N.M. 199, 203, 870 P.2d 161, 165 (Ct.App.1994). In exercising this discretion, the court should "approach the issue of awarding costs on a case-by-case basis, based on the equities of the situation." *Marchman v. NCNB Tex. Nat'l Bank,* 120 N.M. 74, 94, 898 P.2d 709, 729 (1995) (internal quotation marks and citation omitted). However, a court does not have discretion to require the prevailing party to pay a losing party's costs unless "the costs are intended to serve as a sanction and the court clearly expresses its reasons for imposing such sanction." *Stailey,* 117 N.M. at 204, 870 P.2d at 166.

{41} The issue we must determine is whether the trial court abused its discretion in concluding that Defendant was the prevailing party. A prevailing party is defined as "the party who wins the lawsuit—that is, a plaintiff who recovers a judgment or a defendant who avoids an adverse judgment." *Dunleavy v. Miller,* 116 N.M. 353, 360, 862 P.2d 1212, 1219 (1993). We have also defined the prevailing party as "[t]he party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention." *Hedicke v. Gunville,* 2003–NMCA–032, ¶ 26, 133 N.M. 335, 62 P.3d 1217 (internal quotation marks and citation omitted). Finally, we have reiterated that the prevailing party is the party that wins on the "main issue of the case." *Id.*

{42} Plaintiffs argue that they are the prevailing party because (1) they recovered a money judgment, (2) Defendant lost on his counterclaims, and (3) the judgment was 50% higher than Defendant's pretrial offer of settlement. Defendant essentially argues that he is the prevailing party because Plaintiffs lost on the claims for breach of contract, fraud, breach of the covenant of good faith and fair dealing, and conversion and because the trial court's accounting awarded Plaintiffs exactly the amount Defendant said their interest was worth at trial, an amount that was nearly $900,000 less than Plaintiffs requested.

{43} Under these facts, we hold that the trial court did not abuse its discretion in finding Defendant to be the prevailing party and awarding him costs. We do agree with Plaintiffs that this is a close case because Defendant lost on his counterclaims and had to pay Plaintiffs more than he offered pretrial. For these reasons, it would not be unreasonable to conclude that Plaintiffs were the prevailing party. However, where a trial court must exercise discretion in deciding between two possible rulings, either of which would be reasonable, we will not reverse the court's decision. *See 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.").

{44} Moreover, we agree that Defendant's arguments are stronger than Plaintiffs' on the prevailing party issue. The valuation of Plaintiffs' interest in the LLC was clearly the heart of the case. As Plaintiffs acknowledge, all the counts in their complaint asserted "alternative legal remedies that [Plaintiffs] claimed entitled them to a higher amount owed for their partnership interest," although some of their other counts would also have supported their claims for punitive damages. With regard to that partnership interest, the trial court entered judgment for Plaintiffs in the amount of $306,666, the exact amount Defendant agreed was owing at trial, instead of the nearly $1.2 million Plaintiffs claimed. Thus, in light of the above and in light of the fact that it is Plaintiffs who are appealing, it seems fair to say that Defendant won on the "main issue of the case." *See Hedicke,* 2003-NMCA-032, ¶ 26, 133 N.M. 335, 62 P.3d 1217. For this reason, we hold that the trial court did not abuse its discretion in determining that Defendant was the prevailing party and, as such, was entitled to costs.

CONCLUSION

{45} We affirm the decision of the trial court.

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

WE CONCUR: A. JOSEPH ALARID and IRA ROBINSON, Judges.

2006-NMCA-035

131 P.3d 97

STATE of New Mexico, Plaintiff-Appellee,

v.

Herbert WORRICK, Defendant-Appellant.

No. 24,557.

Court of Appeals of New Mexico.

Jan. 12, 2006.

Certiorari Granted, No. 29,687, March 20, 2006.

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

John Bigelow, Chief Public Defender, Cynthia S. Sully, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

ROBINSON, Judge.

{1} Defendant appeals his sentence following his guilty plea to homicide by vehicle

while under the influence, NMSA 1978, § 66–8–101 (1978), a third-degree felony, and aggravated driving under the influence of alcohol, NMSA 1978, § 66–8–102 (2003), a misdemeanor. His conviction stems from a car accident that resulted in the death of a sixteen-year-old boy. The district court sentenced Defendant to six years in prison on the homicide count and dismissed the DWI count on Defendant's motion. The district court found that the offense qualified as a serious violent offense under NMSA 1978, § 33–2–34 (1999), New Mexico's Earned Meritorious Deductions Act (EMDA).

{2} The EMDA provides that a prisoner, who is confined for committing a serious violent offense, is limited to earning four days per month of meritorious deductions on his sentence, often referred to as "good time." § 33–2–34(A)(1). Defendant successfully appealed from that sentence on the grounds that the district court failed to support the serious violent offender designation. This Court stated that while it appeared there was a factual basis for the finding of a serious violent offense, the district court had not made findings to support its determination. *State v. Worrick*, No. 23,748 (N.M.Ct. App. May 9, 2003) (unpublished). On remand, the district court made its findings and entered a second amended judgment and sentence, which reinstated the serious violent offense designation. Defendant appeals, once again challenging only the portion of his sentence that designates this vehicular homicide as a serious violent offense. Defendant contends that the district court's findings do not demonstrate that the offense was committed with an intent to do serious bodily harm, or with recklessness in the face of knowledge that one's acts are reasonably likely to result in serious harm. Defendant argues that again the district court's findings are insufficient as a matter of law to support the serious violent offense designation. As a new issue, Defendant asserts that the district court's determination, that this vehicular homicide was a serious violent offense, infringes upon his right to a jury trial under *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

{3} We affirm the district court's designation of Defendant's vehicular homicide as a serious violent offense and find that Defendant is not entitled to a jury trial to determine if his offense was a serious violent offense.

I. BACKGROUND

{4} On March 2, 2002, Defendant was driving northbound on Valley Drive in Las Cruces. Victim was driving southbound on Valley Drive. Defendant was attempting to make a left-hand turn onto Isaacks Lane, when he collided virtually head on with Victim. The point of impact was well into oncoming traffic. Defendant had never been arrested for driving under the influence before the present incident and had a very minimal record of driving infractions. However, when asked to take a field sobriety test at the scene, Defendant told the police to go ahead and arrest him because he was drunk. Defendant's breath test registered .25/.24. Defendant stated that he had not seen Victim's vehicle approaching and that Victim was driving without his lights on. An expert for the State and for the defense both determined that Victim's lights were on when the crash occurred. When Defendant learned at the scene that Victim was still alive, Defendant said he was going to go home, and someone had to snatch his keys from the ignition to prevent him from continuing to drive.

II. DISCUSSION

A. Serious Violent Offense Designation Analysis

{5} We review the district court's actions on an abuse of discretion standard. *See State v. Montoya*, 2005–NMCA–078, ¶ 8, 137 N.M. 713, 114 P.3d 393 (2005) (indicating that the standard of review for actions in designating an offense as a serious violent one is abuse of discretion). Defendant contends that his vehicular homicide conviction should not be designated a serious violent offense. He contends that the district court's findings do not demonstrate that the offense was committed 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. In *State v. Morales,* 2002–NMCA–016, 131 N.M. 530, 39 P.3d 747, we articulated the types of judgments that a district court must make to designate the crimes listed in Section 33–2–34(L)(4)(n) as serious violent offenses. *Id.* ¶¶ 12–16. This Court concluded that, under Section 33–2–34(L)(4)(n), serious violent offenses include only those offenses which are "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. 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.

> [H]omicide 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.

{6} In this case, at resentencing, the district court again found that the vehicular homicide was a serious violent offense. In the amended judgment and sentence and commitment to the Corrections Department, the district court stated that "[t]he [c]ourt finds that due to the nature of this offense and the resulting harm this crime is a serious violent offense pursuant to [Section] 33–2–34, NMSA 1978." The district court made three further findings that supported its determination:

1. [V]ictim was a teenager, active in the community and his death has severely impacted his family, friends and school mates.
2. Defendant's breath alcohol level was .25/.24—three times the presumptive level of intoxication (.08).
3. Defendant repeatedly insisted that . . . [V]ictim's vehicle did not have its headlights on which caused . . . Defendant not to see . . . [V]ictim's vehicle. Tests by both the State's expert and an expert hired by the defense proved that the headlights were in fact on at the time of the collision. [D]efendant was either too intoxicated to notice the headlights before turning in front of . . . [V]ictim's vehicle or he is being deliberately untruthful about the headlights.

{7} Our case is one of first impression because, like the offense described in *Montoya,* 2005–NMCA–078, ¶ 7, this case "falls somewhere between the two extremes described in *Morales,*" although the facts of this case fall even farther toward non-serious-violent-offense extreme than did the facts of *Montoya.* Thus, the question we must answer is whether the facts were egregious enough and the findings specific enough so that the district court could have properly found Defendant's crime of vehicular homicide to be a serious violent offense.

{8} *Morales* does not require the district court to enter findings containing specific terminology. *See State v. Cooley,* 2003–NMCA–149, ¶¶ 18–19, 134 N.M. 717, 82 P.3d 84. Here, the district court did not specifically state that Defendant acted with recklessness in the face of knowledge that his acts were reasonably likely to result in serious harm. *See Morales,* 2002–NMCA–016, ¶ 16. However, the record supports this finding, and it is clear from the second and third numbered factors that the district court believed that Defendant's actions were reckless in the face of knowledge that his acts were reasonably likely to result in serious harm.

{9} We, therefore, review the facts and circumstances before the district court. The district court stated that it considered the factual basis for the plea, the presentence report, the statement of the family and friends of Victim, and the statements of Defendant in making its determination. In this case, the prosecutor noted in the presentence report that there was information that Defendant habitually drank to the point of intoxication two times a week, but denied the need for alcohol abuse counseling. The showing at sentencing was that Defendant was driving with a blood alcohol level of .25/.24, three times the level that is presumed

to show intoxication in New Mexico. The district court also noted that Defendant claimed that Victim had been driving with his lights off, which was why he could not see Victim, when indeed Victim did have his headlights on. This seems to indicate that either Defendant was so intoxicated that he could not see the oncoming car with its headlights on, or he was dishonest about not seeing Victim's headlights on in order to downplay his culpability for the collision and death. The fact that Defendant would lie at the scene about how the accident happened shows a consciousness of guilt that would allow the district court to find a level of awareness on Defendant's part that his actions were likely to cause harm.

{10} The district court relied on the finding that Defendant was driving while extremely intoxicated, with a breath alcohol level of .25/.24, three times the minimum per se limit. When taken together with Defendant's admission that the police should arrest him because he was drunk, these facts show that Defendant knew he was too drunk to be on the road and demonstrate his obvious understanding of his inability to drive a vehicle safely at that period of time. Under these circumstances, especially when taken together with Defendant's announced intent to drive away, the district court could find that Defendant was a person with knowledge that his acts were reasonably likely to result in serious harm.

{11} Next, the district court relied on the finding that either Defendant was so drunk he could not see that Victim's headlights were on before turning in front of him, or that he was being dishonest about the circumstances to mitigate his own actions. Either conclusion leads to an inference that Defendant had knowledge that his acts were reasonably likely to result in serious harm because, either way, he was too drunk to appreciate his actions.

{12} Defendant claims that the district court erred when it determined that the offense of vehicular homicide was a serious violent offense under Section 33–2–34 of the EMDA. At the sentencing hearing, the district court heard testimony from friends and relatives of Victim. The district court imposed a six-year sentence for the vehicular homicide, as a third-degree felony, resulting in the death of a human being under NMSA 1978, § 31–18–15(A)(4) (1999). *See State v. Guerro,* 1999–NMCA–026, ¶ 11, 126 N.M. 699, 974 P.2d 669 (holding that Section 31–18–15(A)(4) encompasses vehicular homicide). The district court then determined that the crime was a serious violent offense under the EMDA.

{13} In *State v. Wildgrube,* 2003–NMCA–108, 134 N.M. 262, 75 P.3d 862, this Court held that evidence of the defendant's drinking prior to the incident, and the manner of his driving under the circumstances, was sufficient to support the findings that the defendant drove under the influence and recklessly. *Id.* ¶ 37. On the night in question, the defendant had consumed a significant amount of alcohol in a short period of time and compounded that problem by driving in a reckless manner such that, while looking away from the road, he drove into and killed a person walking on the shoulder of the roadway. *See id.* ¶ 38. Our Court held that the findings were sufficient to support the determination that the vehicular homicide was a serious violent offense, and the district court did not abuse its discretion. *Id.* We held to a like effect on less egregious facts in *Montoya,* 2005–NMCA–078, ¶¶ 7–10.

{14} In our case, although there was no history of DWI offenses, there was evidence of considerable drunkenness as well as sufficient evidence of Defendant's knowledge of his drunkenness. There were also findings tied to these facts. Through criminal sentencing, New Mexico courts must decisively express society's disapproval of the needless killing of innocent victims by the reckless acts of drunk drivers. But at the same time, New Mexico courts must also honor the legislative intent, which was not to make vehicular homicide a listed serious violent offense, such as those found in Section 33–2–34(L)(4)(a) through (m), thereby demonstrating that some vehicular homicides are not serious violent offenses. To the extent that the district court in this case believes that all vehicular homicides committed while DWI are deserving of serious violent offense designation, such views must be subordinated

to the law, which is otherwise. However, because the district court expressly recognized that it is a legislative function to designate the offense as a serious violent one as a matter of law, because there was sufficient evidence to support the serious violent offense designation, and because the import of the district court's findings was that the offense caused serious harm and was committed with recklessness in the face of knowledge that Defendant's acts were reasonably likely to result in serious harm, we affirm the district court's designation of Defendant's crime as a serious violent offense.

B. Impact of *Blakely* on a Judicial Finding That a Felony is a Serious Violent Offense

{15} Defendant argues that the district court's determination of his crime as a serious violent offense increased his penalty and, thereby, violated Defendant's right to a jury trial under *Blakely*. We disagree.

{16} In *Montoya*, 2005–NMCA–078, this Court held that the defendant was not entitled to a jury trial in determining whether the offense of vehicular homicide committed while driving intoxicated (DWI) was a serious violent offense. *Id.* ¶ 10. This Court's designation of the defendant's crime as a serious violent offense simply narrowed the availability of good time credit against the defendant's sentence and did not increase sentencing exposure above the statutory maximum. *Id.* ¶ 15. The defendant's imposed sentence was the basic sentence without any aggravating factors. *Id.* ¶ 14. At most, the serious violent offense sentencing statute merely imposed mandatory increased minimum sentence. § 31–18–15(A)(4); § 66–8–101(C)–(D).

{17} Consequently, in our case, Defendant's sentence was not aggravated by being labeled a serious violent crime, and the effect of the EMDA did not change anything with regard to the maximum sentence. Defendant's sentence for vehicular homicide was six years. This was the basic sentence without any aggravating factors. *See Montoya*, 2005–NMCA–078, ¶ 14.

{18} Increasingly, we see Defendant's claims on appeal concerning the EMDA, its application, and whether a defendant is fully informed of his or her liabilities under the Act prior to entering a plea. We believe that full disclosure of potential application of the EMDA and the likely effect on a particular sentence prior to a plea should be a "best practice" in New Mexico's courts.

III. CONCLUSION

{19} We hold that Defendant is not entitled to a jury trial to determine if the crime he committed was a serious violent offense, and we affirm the district court's designation of Defendant's vehicular homicide as a serious violent offense.

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

WE CONCUR: LYNN PICKARD and RODERICK T. KENNEDY, Judges.

2006-NMCA-039

131 P.3d 102

Rabbi Isaac CELNIK and Peggy Celnik, Plaintiffs–Appellants,

v.

CONGREGATION B'NAI ISRAEL, a New Mexico, non-profit corporation, Defendant–Appellee.

No. 24,833.

Court of Appeals of New Mexico.

Feb. 6, 2006.

Corrected April 4, 2006.

Law Offices of Daymon B. Ely, Daymon B. Ely, Albuquerque, NM, for Appellants.

Beall & Biehler, An Association, Marcia E. Lubar, Diane P. Donaghy, Albuquerque, NM, for Appellee.

OPINION

BUSTAMANTE, Chief Judge.

{1} This case raises an issue of first impression in New Mexico concerning the constitutional prohibition against secular adjudication of certain claims brought against religious organizations by their employees. Known as the "church autonomy doctrine,"

this prohibition arises out of the First Amendment and has been applied in a variety of contexts by other courts, most notably the United States Supreme Court and the federal circuit courts. The question in the present appeal is whether the district court properly applied this doctrine to dismiss a lawsuit brought by a long-tenured rabbi against his congregation after his employment was terminated. We conclude that the facts of this case fall firmly within the prohibition as defined by the federal courts. Accordingly, we affirm.

BACKGROUND

{2} Plaintiff Rabbi Isaac Celnik (Rabbi Celnik) was originally hired in 1971 by Congregation B'Nai Israel (CBI) of Albuquerque to serve as its rabbi. CBI is the corporate body of Defendant religious congregation. In 1979 Rabbi Celnik entered into an employment contract with CBI for a term of thirty years. According to Plaintiffs' first amended complaint, Rabbi Celnik developed Parkinson's disease in 1996, and his symptoms became more "visually apparent" by the year 2000. In April of 2000, Plaintiff's wife was diagnosed with breast cancer, and some board members of CBI allegedly came to believe that her condition distracted Plaintiff from his rabbinical duties. Plaintiffs' first amended complaint alleged that CBI commenced an "ouster campaign" in late 2000. Plaintiff characterized this campaign as follows:

> 13. Despite his service at CBI, late in 2000, CBI began a two-pronged effort to oust Rabbi Celnik from CBI by: 1) withholding or failing to pay Plaintiff as required under the terms of his contract; and 2) attempting to compel Rabbi Celnik to release CBI from [Rabbi Celnik's] thirty (30)-year contract ostensibly to become rabbi emeritus through campaign of false promises, harassment, ridicule, and intimidation, including publishing one-sided and negative information about . . . Rabbi [Celnik] to Congregation members and other members of the public in an effort to ensure that in the event Plaintiff did not resign, CBI would have the Congregation members' votes to terminate Plaintiff's employment.
>
> 14. CBI's motivation for conducting this campaign was in whole or, at least in part, Rabbi Celnik's Parkinson's disease, his age, his wife's medical condition and his complaints about CBI's failure to compensate him in accordance with his contract.
>
> 15. This CBI-led movement to oust Rabbi Celnik was carried out from approximately late 2000 through Plaintiff's termination in January of 2002.
>
> 16. This negative information included CBI Board members and officers falsely and publicly accusing . . . Rabbi Celnik of having a poor work ethic, having no concern for congregation members, and performing poorly as a rabbi by failing to return telephone calls, failing to work adequate hours, failing to make hospital visits, and the like.

{3} Plaintiffs' amended complaint went on to allege that individually named board members organized the ouster campaign, which ended with an ultimatum that Rabbi Celnik either sign an "Agreement and Release of Claims," or be terminated without any health and disability benefits. The agreement stated that Rabbi Celnik was resigning from active service because of a medical condition and would receive unspecified, uncollected monetary pledges. Rabbi Celnik was also required to release CBI from all legal claims. Rabbi Celnik refused to sign the agreement and was terminated, effective January 4, 2002.

{4} Pursuant to the parties' contract, the dispute was submitted to arbitration by the Committee on Congregational Standards under the auspices of the United Synagogue of Conservative Judaism. Rabbi Celnik lost the arbitration, which he claims was limited to the issue of whether the vote to terminate him was properly held. Rabbi Celnik also filed a complaint with the New Mexico Human Rights Commission, which issued an order of non-determination prior to the commencement of the district court action. *See* NMSA 1978, § 28–1–10(D) (2005). Plaintiffs' amended complaint listed Defendants as CBI, one named board member, one named officer, and ten unnamed board members. Plaintiffs included seven counts: (1) violation of the New Mexico Human Rights Act, (2)

breach of the covenant of good faith and fair dealing, (3) prima facie tort, (4) tortious interference with contractual relations against the named board members, (5) interference with prospective business advantage against the named defendants, (6) civil conspiracy against the named board members, and (7) breach of fiduciary duty against the named board members.

{5} CBI filed a motion to dismiss, primarily arguing that the district court lacked subject matter jurisdiction under the First Amendment from adjudicating the claims. CBI also claimed that Plaintiff was collaterally estopped or barred by res judicata from raising the contract issue in Count II because the claim was resolved in arbitration. Plaintiff filed a limited response, reiterating his claims that CBI "presented [to the board] a one-sided view of ... Rabbi [Celnik] as incompetent and uncaring." Pursuant to Rule 1–056(F) NMRA, Plaintiff requested that any hearing on the matter be continued until he could take various depositions. Plaintiffs subsequently filed a response that substantively challenged the First Amendment arguments for dismissal.

{6} The district court denied Plaintiffs' Rule 1–056(F) motion and granted the motion to dismiss. All counts except Count II, relating to contract, were dismissed based on the first amendment. Count II was dismissed based on collateral estoppel. Subsequent to the filing of the briefs on appeal, the parties filed a stipulation that all of the individual defendants would be dismissed, as well as all counts except Count III, relating to prima facie tort. Plaintiffs also are continuing to challenge the denial of their Rule 1–056(F) motion.

STANDARD OF REVIEW

{7} The parties dispute the procedural posture of this case and, hence, the standard of review. Plaintiffs contend that the district court considered matters outside of the pleading, thereby converting the motion to dismiss to summary judgment. *See Knippel v. N. Commc'ns, Inc.*, 97 N.M. 401, 402, 640 P.2d 507, 508 (Ct.App.1982) ("Where matters outside the pleadings are considered on a motion to dismiss for failure to state a claim, the motion becomes one for summary judgment."). A summary judgment order is reviewed to see if there are material fact disputes and whether the movant is entitled to judgment as a matter of law. *See Self v. United Parcel Serv., Inc.*, 1998–NMSC–046, ¶ 6, 126 N.M. 396, 970 P.2d 582. CBI contends that the district court did not actually consider matters outside of the pleadings, and therefore its motion was not converted to a motion for summary judgment. *See Clark v. Lovelace Health Sys., Inc.*, 2004–NMCA–119, ¶ 6, 136 N.M. 411, 99 P.3d 232. An order of dismissal based on Rule 1–012(B)(6) for failure to state a claim is reviewed differently than an order granting summary judgment. *See Cypress Gardens, Ltd. v. Platt*, 1998–NMCA–007, ¶ 6, 124 N.M. 472, 952 P.2d 467 ("A motion to dismiss ... is properly granted only when it appears that the plaintiff cannot recover or be entitled to relief under any state of facts provable under the claim.").

{8} A review of the motion hearing transcript indicates that the district court made several references to the fact that the court was considering all of the materials that had been filed. However, there does not seem to be any specific filing that was of particular relevance to the constitutional issue that served as the basis for the dismissal of the complaint. Nevertheless, as discussed below, we believe that dismissal was appropriate regardless of whether we treat the order as one under Rule 1–012(B) or Rule 1–056 (summary judgment).

{9} We note that the district court referenced both Rule 1–012(B)(1) (lack of subject matter jurisdiction) and Rule 1–012(B)(6) (failure to state a claim). We believe that a claim of constitutional immunity based on the church autonomy doctrine should be treated in the first instance as a motion under Rule 1–012(B)(6), because the court does in fact have jurisdiction to consider the constitutional claim. *See Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 654 (10th Cir.2002) (holding that this claim is similar to qualified immunity and should be treated as a motion under Rule 1–012(B)(6) instead of Rule 1–012(B)(1)).

DISCUSSION

{10} The church autonomy doctrine is based on the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Although the First Amendment expressly refers to Congress, its prohibitions apply equally to the judicial branch. *See Kreshik v. Saint Nicholas Cathedral,* 363 U.S. 190, 191, 80 S.Ct. 1037, 4 L.Ed.2d 1140 (1960). The First Amendment is made applicable to the states by incorporation through the Fourteenth Amendment Due Process Clause. *See Health Servs. Div. v. Temple Baptist Church,* 112 N.M. 262, 263, 814 P.2d 130, 131 (Ct.App.1991).

{11} The doctrine protects both interests: First, it prevents civil legal entanglement between government and religious establishments by prohibiting courts from trying to resolve disputes related to ecclesiastical operations. Second, by limiting the possibility of civil interference in the workings of religious institutions, the free exercise of religion is also protected. *See generally* Marjorie A. Shields, J.D., Annotation, *Construction and Application of Church Autonomy Doctrine,* 123 A.L.R. 5th 385 (2004); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy,* 81 Colum. L.Rev. 1373 (1981).

{12} The United States Supreme Court first announced this rule in *Watson v. Jones,* 80 U.S.(13 Wall.) 679, 20 L.Ed. 666 (1871), a case that involved a property dispute between pro-slavery and anti-slavery church members after the civil war. The Court reversed the state court intervention in the dispute, stating the following:

> [T]he rule of action which should govern the civil courts . . . is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

Id. at 727.

{13} Three subsequent Supreme Court cases are of particular relevance here. In *Gonzalez v. Roman Catholic Archbishop,* 280 U.S. 1, 50 S.Ct. 5, 74 L.Ed. 131 (1929), the Supreme Court first applied the doctrine to a dispute involving the right of an ecclesiastical organization to freely choose its leaders. In rejecting a layman's claim that a trust entitled him to appointment to a chaplaincy, the Court reasoned as follows:

> Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. In the absence of *fraud, collusion, or arbitrariness,* the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.

Id. at 16, 50 S.Ct. 5 (emphasis added).

{14} In *Kedroff v. Saint Nicholas Cathedral,* 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 (1952), the Court considered a New York statute that gave control of New York property of the Russian Orthodox Church to an American group that was attempting to break off from its leadership in Russia. The Court struck down the statute after concluding that it "intrudes for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment." *Id.* at 119, 73 S.Ct. 143.

{15} A third case dealing with the right of an ecclesiastical organization to freely choose its leaders and structure is *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976), where the Supreme Court rejected the *Gonzalez* "arbitrariness" reference in a passage that directly addresses the question posed by Plaintiffs' appeal:

> [N]o "arbitrariness" exception—in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a

> hierarchical church complied with church laws and regulations—is consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.

Milivojevich, 426 U.S. at 713, 96 S.Ct. 2372.

{16} *Gonzalez, Kedroff,* and *Milivojevich,* therefore indicate that the dispute in the present case is precisely the type of religious debate that the church autonomy doctrine is intended to protect from judicial review. An examination of the elements and allegations of Plaintiffs' sole pending claim for prima facie tort proves the point. Prima facie tort requires the following: "1. An intentional, lawful act by defendant; 2. An intent to injure the plaintiff; 3. Injury to plaintiff, and 4. [A lack] of justification or insufficient justification for the defendant's acts." *Schmitz v. Smentowski,* 109 N.M. 386, 394, 785 P.2d 726, 734 (1990). Prima facie tort demands a high degree of judicial inquiry because the trial court must engage in a balancing test that weighs "(1) the injury; (2) the culpable character of the conduct; and (3) whether the conduct is unjustifiable under the circumstances." *Beavers v. Johnson Controls World Servs., Inc.,* 120 N.M. 343, 348–49, 901 P.2d 761, 766–67 (Ct.App. 1995) (internal quotation marks and citation omitted).

{17} Here, Plaintiffs' prima facie tort claim alleged that "[d]efendants intentionally disseminated one-sided and negative information about Rabbi Celnik with the intent to sway congregation members against Rabbi Celnik and to compel Rabbi Celnik to lose his employment with CBI." To act as a judicial referee to this particular dispute, applying the intrusive balancing test called for under prima facie tort analysis would require us to ignore the core principles of the church autonomy doctrine.

{18} As indicated by the allegations of Plaintiffs' first amended complaint, set forth above, Rabbi Celnik is claiming that his struggles with Parkinson's disease played a role in his termination. Rabbi Celnik believes that CBI was worried about their liability for his disability. At the motion's hearing, Plaintiff's counsel argued that "[t]his wasn't about religion . . . this was about money." We are sympathetic to Rabbi Celnik's struggles with Parkinson's and the manifestation of the disease after so many years of service with CBI. We are not persuaded that this circumstance justifies judicial intervention into how CBI treats and selects its ecclesiastical leaders.

{19} We find support in the federal circuit courts, which have addressed the analogous issue of whether the church autonomy doctrine should bend to social policies underlying Title VII civil rights claims. The leading case is from the Fifth Circuit, which first adopted the so-called "ministerial exception" to Title VII claims based on the following first amendment concerns:

> [T]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection.

McClure v. Salvation Army, 460 F.2d 553, 558–59 (5th Cir.1972). Other federal circuit courts subsequently followed suit in barring various claims of discrimination and wrongful termination. *See Werft v. Desert S.W. Annual Conference of United Methodist Church,* 377 F.3d 1099 (9th Cir.2004) (another case involving the dismissal of a claim that the defendant failed to accommodate a disability); *Bryce,* 289 F.3d 648; *Gellington v. Christian Methodist Episcopal Church, Inc.,* 203 F.3d 1299 (11th Cir.2000); *Starkman v. Evans,* 198 F.3d 173 (5th Cir.1999) (another fifth circuit case notable because it affirmed summary judgment for the defendant on failure to accommodate disability claim); *EEOC v. Catholic Univ. of Am.,* 83 F.3d 455 (D.C.Cir.1996); *Young v. N. Ill. Conference of United Methodist Church,* 21 F.3d 184 (7th Cir.1994); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.,* 929 F.2d 360 (8th Cir.1991); *Natal v. Christian & Missionary*

Alliance, 878 F.2d 1575 (1st Cir.1989); and *Rayburn v. Gen. Conference of Seventh–Day Adventists,* 772 F.2d 1164 (4th Cir.1985).

{20} Although the immunity from suit by a religious leader is not absolute, *cf. Elvig v. Calvin Presbyterian Church,* 375 F.3d 951 (9th Cir.2004) (permitting a limited Title VII sexual harassment and retaliation claim to survive motion to dismiss), we believe that the federal authorities discussed above overwhelmingly support dismissal under the facts of the present case.

{21} Finally, to the extent that Plaintiffs believed that additional discovery was necessary, they have not indicated that they would have obtained any specific information that would have changed or explained the basic nature of his claims so as to overcome an overwhelming weight of authority against judicial intervention. *See* Rule 1–056(F) (additional time may be permitted where deemed necessary).

CONCLUSION

{22} For the reasons discussed above, we affirm the district court.

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

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

2006-NMCA-038

131 P.3d 108

STATE of NEW MEXICO, CHILDREN, YOUTH & FAMILIES DEPARTMENT, Plaintiff–Appellant,

v.

PAUL G., Child–Appellee.

Nos. 25,090, 25,321.

Court of Appeals of New Mexico.

Feb. 6, 2006.

Corrected April 4, 2006.

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

John Bigelow, Chief Public Defender, Santa Fe, NM, Meg Bailey, Assistant Appellate Defender, Albuquerque, NM, for Appellee.

OPINION

BUSTAMANTE, Chief Judge.

{1} This case requires us to decide whether the Delinquency Act, NMSA 1978, §§ 32A–2–1 to –33 (1993, as amended through 2005) (the Act) authorizes the children's court, pursuant to a plea agreement, to commit a child who has been adjudicated delinquent to the legal custody of the Children Youth & Families Department (CYFD) for an indeterminate period up to the age of eighteen. Because we find no statutory authority for this disposition, we reverse and remand.

BACKGROUND

{2} A petition alleging that Paul G. (Child) committed a delinquent act and was in need of care or rehabilitation was filed in children's court on April 21, 2003. Child was charged with willful and deliberate murder and conspiracy to commit murder. At the time of his arraignment, Child was twelve years old. On November 13, 2003, Child entered into a plea agreement in which he pled no contest to aggravated battery and conspiracy to commit second-degree murder. There was no agreement as to disposition "except that sentence shall not run past Child's 18th birthday." After a hearing, the children's court accepted the plea and ordered a pre-disposition report to be prepared.

{3} At the dispositional hearing on December 16, 2003, the juvenile probation officer (JPO) recommended on behalf of CYFD that the children's court commit Child to CYFD until the age of eighteen. The JPO noted that Child lacked interest in treatment, had

refused to apologize to the victim's family, demonstrated suicidal and homicidal tendencies, and had dropped out of school after a series of behavioral problems. After stating that Child posed a risk to the community and himself, the JPO presented commitment to CYFD as a way for Child to receive 24-hour supervision and access to mental health and educational services. Also concerned about Child's lack of remorse, the children's court attorney recommended that Child be committed to the age of eighteen in order to protect the community. Child's attorney argued that Child should receive probation so that Child could continue treatment he had started a week earlier at an adolescent treatment facility or in the alternative the dispositional hearing should be continued. Based on Child's poor upbringing and lack of stability and supervision at home, the children's court found Child a significant danger to himself and to others. The children's court stated that it believed in treatment, but that it did not feel comfortable putting Child on probation. The children's court entered a disposition committing Child to the custody of CYFD until the age of eighteen, with a recommendation that CYFD seek treatment for Child at a secure juvenile treatment facility.

{4} After CYFD was unable to place Child at the recommended treatment facility, Child filed a motion seeking reconsideration of the disposition. At the hearing on Child's motion to reconsider, the JPO requested a hearing on behalf of CYFD regarding Child's commitment to the age of eighteen, noting for the first time that the disposition was not specified in the Children's Code, NMSA 1978, §§ 32A-1-1 to -23-8 (1993, as amended through 2005) (Code). After denying Child's motion, the children's court entered an amended judgment and disposition. In the amended judgment and disposition, the children's court declared Child a delinquent child instead of a youthful offender, excluded the recommendation that Child be placed at the treatment facility, and modified the language of the commitment from "an indeterminate period not exceeding 18 years of age" to read "an indeterminate period not exceeding up to the age of 18."

{5} On April 13, 2004, the children's court heard CYFD's motion to clarify the judgment and disposition. CYFD argued that the children's court only had statutory authority to enter a disposition committing Child to CYFD for one year, two years, or until the age of twenty-one because Child in this case had committed a youthful offender offense, and that it had no authority to commit Child to CYFD until age eighteen. In response, the children's court explained that the judgment and disposition was consistent with the plea agreement, and that under the Code the children's court only had jurisdiction until age eighteen because Child was not a youthful offender. After commenting that CYFD's motion was inappropriate, the children's court denied it. CYFD timely appealed.

DISCUSSION

{6} On appeal, CYFD argues that Child's commitment to the age of eighteen is unlawful and that the Delinquency Act only authorizes a commitment to age twenty-one in these circumstances. After first challenging CYFD's standing to appeal the judgment and disposition of the children's court, Child responds that the disposition is authorized by the Code. Thus, we address two issues: (1) CYFD's right to appeal a delinquency disposition, and (2) the dispositional authority of the children's court to commit a delinquent child to the custody of CYFD pursuant to a plea agreement.

STANDARD OF REVIEW

{7} The question whether the Delinquency Act authorizes Child's commitment to age eighteen is one of statutory construction which this Court reviews de novo. *See State v. Jose S.*, 2005-NMCA-094, ¶ 6, 138 N.M. 44, 116 P.3d 115, *cert. denied*, 2005-NMCERT-007, 138 N.M. 145, 117 P.3d 951. "The language of unambiguous provisions must be given effect without further interpretation. Only ambiguous provisions require us to delve into the legislative purpose behind the statute." *Id.* (citation omitted). "Although portions of the [Act] at issue in [this appeal] were subsequently amended, we review the version of the [statute] in effect during the course of [Child's] proceedings." *State v. Steven B.*, 2004-NMCA-086, ¶ 11,

136 N.M. 111, 94 P.3d 854 (citations omitted) (*cert. denied,* 2004–NMCERT–007, 136 N.M. 452, 99 P.3d 1164).

STANDING

{8} As a preliminary matter, we address Child's claim that CYFD does not have standing to bring this appeal. Child asserts, based on Rule 10–108(A) NMRA, that the parties in a delinquency proceeding are the child and the State. Because CYFD, and not the children's court attorney who prosecuted the case below, appealed to this Court, Child argues that CYFD is not a party to the delinquency proceedings and otherwise lacks standing to appeal. We disagree.

{9} The Code provides that "[a]ny party may appeal from a judgment of the court to the court of appeals in the manner provided by law." Section 32A–1–17(A). Rule 10–108(A) provides that the parties in proceedings on petitions alleging delinquency "are the child alleged to be delinquent and the state." In Child's view, the entity referred to in the children's court rule as "the state" refers to the state as the prosecutor during the delinquency proceeding. Because CYFD did not file a motion to clarify the disposition until after the judgment was entered, Child assumes that CYFD was not a party and cannot appeal. Child further argues that CYFD has not otherwise demonstrated that it was aggrieved or prejudiced by the children's court decision.

{10} This case does not require us to determine whether the State, which was a party at the time judgment was entered, is a party different from CYFD. *See State v. Doe,* 90 N.M. 572, 574, 566 P.2d 121, 123 (Ct.App. 1977) (noting in a slightly different context that there was no need to determine whether the State was a party different from the Department of Corrections). Even if we assume that the State and CYFD are separate parties, the children's court rules permit intervention, with leave of the court, by the custodian of the child. *See* Rule 10–108(E)(2)(a). CYFD became the custodian of Child after the initial judgment was entered. As custodian, CYFD filed a motion to clarify the amended disposition it was responsible for implementing. The children's court agreed to hear the motion. Even though Child argues that CYFD did not make a formal application to intervene as custodian, in *Doe* we recognized that an agency acting as custodian became an intervening party by virtue of the district court's grant of its motion after the entry of judgment. 90 N.M. at 574, 566 P.2d at 123. Here intervention implicitly occurred when the children's court heard CYFD's motion to clarify the disposition without challenging CYFD's right to come before the court. *Cf. id.* (holding that, after judgments placed delinquent children in the custody of the department of corrections, intervention occurred when the children's court granted the department's motion for an extension of time for filing notices of appeal).

{11} Child points out that after the hearing on CYFD's motion to clarify the judgment, the children's court stated that CYFD's motion was inappropriate. This comment, Child argues, suggests that the children's court did not allow intervention by virtue of either the motion or the hearing. Child further argues that when the children's court denied the motion, it could have determined that CYFD lacked standing. We are not persuaded.

{12} Nothing in the record indicates that the children's court thought CYFD's motion to clarify the judgment was inappropriate because CYFD was not a proper party. Rather, at the hearing the children's court dismissed the motion as inappropriate after emphasizing that the disposition was consistent with the plea agreement and that it was the understanding of the parties that a commitment to age twenty-one would serve no purpose. Even though the children's court denied CYFD's motion, at no time did the children's court challenge CYFD's authority as a party to raise the issue. Nor did Child object to CYFD's motion on the basis that CYFD was not a party. Absent any indication from the hearing or in the children's court order to the contrary, the court implicitly allowed CYFD to intervene by filing the motion and hearing the matter. Because CYFD is not required to formally intervene if it wants to contest the disposition of a child committed to its custody, we hold that CYFD's motion to clarify the judgment and

disposition should be construed as an implicit motion to intervene.

{13} Moreover, it would have been inappropriate for the children's court to deny CYFD's motion on the basis that CYFD lacked standing. Appeals from judgments and dispositions on petitions alleging delinquency are governed by the rules of appellate procedure. Rule 10-230(C) NMRA. Generally, a party may appeal if it is an "aggrieved party," which "means a party whose interests are adversely affected." *In re Christobal V.*, 2002-NMCA-077, ¶ 8, 132 N.M. 474, 50 P.3d 569. In *State v. Doe*, this Court recognized that both "the State" and the agency to which an adjudicated delinquent is committed are aggrieved by a disposition contrary to law. 95 N.M. 90, 92, 619 P.2d 194, 196 (Ct.App.1980) (stating that the department of corrections, having been permitted to intervene, is aggrieved by a disposition contrary to law), *superseded on other grounds by statute*, NMSA 1978, § 32-1-3(P) (1992) (current version at § 32A-2-3(B)), *as recognized in State v. Michael R.*, 107 N.M. 794, 795, 765 P.2d 767, 768 (Ct.App.1988). Because we can see no reason why CYFD should be precluded from raising concerns about a disposition it is responsible for carrying out, we hold that CYFD is a proper party to this appeal.

DISPOSITIONAL AUTHORITY

PRESERVATION

{14} CYFD first challenged the authority of the children's court to commit Child to the legal custody of CYFD for an indeterminate period up to age eighteen in its motion to clarify the initial judgment and amended disposition. Thus, CYFD's appeal from the order affirming the disposition appears to be properly before this Court. *See* Rule 10-230.1(A) NMRA (providing that the children's court "may correct an unlawful disposition in a delinquency proceeding at any time").

DELINQUENCY ACT

{15} The authority of the children's court to impose a commitment is statutory. *State v. Adam M.*, 2000-NMCA-049, ¶ 5, 129 N.M. 146, 2 P.3d 883. As a court of limited jurisdiction, the children's court "is only permitted to do what is specifically authorized" by the Code. *In re Angela R.*, 105 N.M. 133, 137, 729 P.2d 1387, 1391 (Ct.App.1986). In construing the Code, we examine it in its entirety, reading "each part to achieve a harmonious result." *Adam M.*, 2000-NMCA-049, ¶ 5, 129 N.M. 146, 2 P.3d 883 (internal quotation marks and citation omitted). "When possible, we give effect to the clear and unambiguous language of the Code." *Id.*

{16} According to Section 32A-2-19(B)(2) of the Act, the children's court has statutory authority to commit a child found to be delinquent to the custody of CYFD for:

(a) a short-term commitment of one year;

(b) a long-term commitment for no more than two years in a long-term facility for the care and rehabilitation of adjudicated delinquent children;

(c) if the child is a delinquent offender who committed one of the criminal offenses set forth in Subsection I of Section 32A-2-3 NMSA 1978, a commitment to age twenty-one, unless sooner discharged; or

(d) if the child is a youthful offender, a commitment to age twenty-one, unless sooner discharged.

See Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); A "delinquent act" is an act by a child that would be a crime if committed by an adult. Section 32A-2-3(A). A "delinquent offender" is a "delinquent child" ("a child who has committed a delinquent act") who "is subject to juvenile sanctions only and who is not a youthful offender or a serious youthful offender." Section 32A-2-3(B), (C).

{17} Here, Child pled no contest to aggravated battery and conspiracy to commit second-degree murder. Aggravated battery is an act listed under Section 32A-2-3(I). *See* § 32A-2-19(B)(2)(c) (providing that if child is a delinquent offender who has committed one of the offenses enumerated in Section 32A-2-3(I), commitment to the age of twenty-one is authorized). Although Child was originally found to be a youthful offender, the judgment and disposition was later amended to

find that Child was a delinquent child. Because Child was twelve years old when he committed his acts, he does not qualify as a youthful offender or as a serious youthful offender and thus is subject only to juvenile sanctions as a delinquent offender. *See* § 32A–2–3(H), (I). However, contrary to the children's court's statement about its jurisdiction extending only until Child reaches the age of eighteen, the Code allows jurisdiction to extend until age twenty-one. *See State v. Adam M.*, 1998–NMCA–014, ¶ 4, 124 N.M. 505, 953 P.2d 40.

{18} On appeal, CYFD argues that Section 32A–2–19(B)(2) controls this disposition. Accordingly, CYFD contends that the only types of commitments available for Child include: "(a) a short-term commitment of one year; (b) a long-term commitment for no more than two years;" or (c) "a commitment to age twenty-one, unless sooner discharged." § 32A–2–19(B)(2)(a)–(c). Thus, the State maintains that commitment to the age of eighteen is not one of the commitment options statutorily authorized for an adjudicated delinquent offender such as Child.

{19} Child objects to the State's argument, arguing that the disposition was authorized by the Act. According to the plea agreement, the parties agreed that Child's sentence would not extend past his eighteenth birthday. Child argues that the disposition, which was consistent with the plea agreement, was not illegal. The plea agreement merely limited the court's ability to impose a disposition under Section 32A–2–19(B)(2)(c), which would otherwise subject Child to CYFD's custody to age twenty-one. Thus, in Child's view, the agreement was essentially a sentencing cap.

{20} We reject this argument. The language in Section 32A–2–19(B)(2) is not ambiguous. The statute specifies three possible dispositions: a short-term commitment of one year, a long-term commitment of no more than two years, or a commitment until age twenty-one, unless sooner discharged. *See* § 32A–2–19(B)(2)(a)–(c). Giving effect to the clear language of the Act, we conclude that the statute does not authorize the children's court to impose a disposition allowing a commitment less than to age twenty-one, unless it is a short-term commitment of one year or a long-term commitment of no more than two years. *See Adam M.*, 2000–NMCA–049, ¶ 6, 129 N.M. 146, 2 P.3d 883 (interpreting the statute as requiring commitment for an adjudicated delinquent offender to be either one year, two years, or until age twenty-one); *see also State v. Dennis F.*, 104 N.M. 619, 621, 725 P.2d 595, 597 (Ct.App.1986) (interpreting an earlier version of the Children's Code, which also provides for indeterminate commitment, and stating that a court may neither exceed the time authorized by the statute, nor commit a child "for a specified period less than the time authorized by statute"); *Doe*, 95 N.M. at 92–93, 619 P.2d at 196–97 (stating that "not more than one year" language in the previous version of the Code does not authorize the children's court to transfer custody to an agency for specified terms of less than one year because the sentencing is indeterminate and the parole board, not the court, determines the time of release).

{21} Moreover, far from allowing judicial discretion to fashion commitments of various lengths, the legislature provided specified mechanisms to allow flexibility in order "to accomplish the rehabilitative purposes of the Code." *See Adam M.*, 2000–NMCA–049, ¶ 9, 129 N.M. 146, 2 P.3d 883. Those mechanisms provide that a child must be released before the commitment expires if the purposes of commitment are met. *See* § 32A–2–23(F) (providing that "[t]he court may terminate a judgment if [a] child is no longer in need of care, supervision or rehabilitation or [the court] may [extend or modify] a judgment if . . . necessary to safeguard the child or the public interest"). In addition, the children's court may extend a long-term commitment "for additional periods of one year until the child reaches the age of twenty-one" upon a finding that it "is necessary to safeguard the welfare of the child or the public interest." Section 32A–2–23(D). As we concluded in *Adam M.*, "the children's court must exercise its discretion over a long-term commitment at the end of the commitment, after review-

ing a record of the child's performance while committed, instead of at the beginning when the court has less information before it." 2000–NMCA–049, ¶ 10, 129 N.M. 146, 2 P.3d 883. Because the Act expressly provides procedures for addressing delinquent children who are not rehabilitated during a long-term commitment of two years, the children's court was required to use those procedures. Under the statute, the children's court had no authority to impose an indeterminate initial commitment greater than two years and less than to age twenty-one.

ABUSE AND NEGLECT ACT

{22} Child next argues that a commitment up to age eighteen is authorized by Section 32A–2–19(B)(1). At the time of the hearing, Section 32A–2–19(B)(1) provided that the court may enter a judgment making "any disposition that is authorized for the disposition of a neglected or abused child, in accordance with the Abuse and Neglect Act." *See* § 32A–2–19(B)(1) (2003) (prior to 2005 amendment).[1] Under the Abuse and Neglect Act, Sections 32A–4–1 to –33 "[i]f a child is found to be neglected or abused," the children's court may "place the child under protective supervision of [CYFD]." Section 32A–4–22(B)(2). Reading this subsection in conjunction with Section 32A–4–24(F), which provides that all neglect and abuse orders terminate when a child reaches eighteen years of age, Child urges us to conclude that the children's court has the authority to place Child under CYFD's protective supervision until the age of eighteen. Child also relies on Section 32A–4–22(F) to support his interpretation of the disposition options under the Abuse and Neglect Act. *See* § 32A–4–22(F) (providing that "[u]nless a child found to be neglected or abused is also found to be delinquent, the child shall not be confined in an institution established for the long-term care and rehabilitation of delinquent children"). Thus, Child argues that the Abuse and Neglect Act explicitly authorizes a disposition transferring custody of a delinquent child to CYFD until the age of eighteen for commitment to an institution for long-term care and rehabilitation.

{23} While we note that the children's court did not expressly find Child to be neglected or abused, we reject Child's argument that the disposition of the children's court is consistent with putting child under protective supervision until the age of eighteen. A possible disposition under the Abuse and Neglect Act allows transferring legal custody of a child found to be delinquent and abused or neglected to an agency such as CYFD. *See* § 32A–4–22(B)(3)(b). While this disposition appears most relevant to Child's circumstances, it does not help Child. The Abuse and Neglect Act limits dispositional judgments "vesting legal custody of a child in an agency" to "an indeterminate period not exceeding two years from the date entered." Section 32A–4–24(A). Thus, even if we construe the proceedings as consistent with finding Child abused or neglected, the Abuse and Neglect Act provides no authority for committing Child for an indeterminate period beyond two years.

{24} Because we conclude the children's court was not authorized to commit Child for an indeterminate period of time up to the age of eighteen, we reverse the disposition of the children's court and remand for proceedings consistent with this opinion. *See Dennis F.*, 104 N.M. at 621–22, 725 P.2d at 597–98 (stating that "an invalid sentence may be corrected by the imposition of a proper sentence" without violating the guarantee against double jeopardy). While we recognize that the parties agreed that Child's sentence would not extend beyond his eighteenth birthday, the children's court has no authority to enter a disposition not authorized by statute. *See id.* at 621, 725 P.2d at 597. Accordingly, Child may withdraw his plea and is entitled to a full adjudication on the merits. *See Adam M.*, 1998–NMCA–014, ¶ 9, 124 N.M. 505, 953 P.2d 40 (noting that the right to adjudication cannot be given up without knowledge of the potential penalties). Alternatively, the district court may hold a hearing to determine whether the plea agreement

1. The 2005 amendment deleted this portion and added subsection G, which allows the court to make an abuse or neglect report. *See* § 32A–2–19(B) (2005).

can be reasonably interpreted to support a legal commitment under Section 32A-2-19(B)(2)(a) or (b), and whether the parties should be bound by such an interpretation.

CONCLUSION

{25} For the reasons stated above, the judgment and disposition of the children's court is reversed. We remand to the children's court for further proceedings consistent with this opinion.

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

WE CONCUR: JAMES J. WECHSLER and RODERICK T. KENNEDY, Judges.

2006-NMSC-012

131 P.3d 653

In the MATTER OF RONALD D. MIKUS,

An Attorney Licensed to Practice Before the Courts of the State of New Mexico.

No. 29,313.

Supreme Court of New Mexico.

March 28, 2006.

Virginia L. Ferrara, Chief Disciplinary Counsel, Albuquerque, NM, for Petitioner.

Briggs F. Cheney, Esq., Albuquerque, NM, for Respondent.

OPINION

PER CURIAM.

{1} This attorney disciplinary proceeding comes before the Court pursuant to the Rules Governing Discipline. We are called upon to decide whether attorney Ronald D. Mikus (Respondent) engaged in conduct prior to his admission to the bar that warrants disciplinary sanctions. For the reasons that follow, we adopt the recommendation of the Disciplinary Board to suspend Respondent from the practice of law pursuant to Rule 17–206(A)(2) NMRA 2006.

BACKGROUND

{2} Prior to submitting his application for admission to the New Mexico Bar, Respondent and a former girlfriend traveled to Mexico and, on the return trip, became involved in an altercation near the border patrol checkpoint on I–25 north of Las Cruces, New Mexico. Apparently, the dispute arose because Respondent and his former girlfriend had purchased drugs in Mexico, including steroids, and Respondent was concerned that his former girlfriend would alert border patrol agents to the presence of the steroids in the car. The confrontation at the side of the road resulted in the girlfriend tumbling down an embankment, causing serious injury. Subsequently, a New Mexico state police officer contacted Respondent to schedule an appointment to discuss the incident. Although Respondent initially agreed to meet with the officer, Respondent cancelled the meeting after discussing the matter with an attorney. Shortly thereafter, Respondent submitted his application to take the New Mexico bar exam.

{3} A few days after taking the New Mexico bar exam, Respondent received a target letter notifying him of a grand jury investigation into a criminal complaint filed against him. Respondent subsequently appeared before the grand jury and was ultimately in-

dicted on charges of aggravated battery against a household member and false imprisonment, both felony offenses. Less than two months after his indictment, Respondent was sworn-in to the New Mexico bar. Shortly thereafter, Respondent was convicted by a jury on both charges in the indictment, and the trial court imposed a deferred sentence of three years and placed Respondent on supervised probation.

{4} In Respondent's application for admission to the State Bar of New Mexico, the application asks, "Have you ever been charged with, arrested, or questioned regarding the violation of any law, including juvenile offenses?" If the answer is positive, the application asks for full details,

> including dates, exact name and location of court, if any, case [number], references to court records, if any, the facts, the disposition of the matter; if no court records are available, give to the best of your ability the names and addresses of all persons involved, including counsel. (Include all such incidents no matter how minor the infraction or whether guilty or not except for minor violations which did not involve a court appearance.)

Respondent answered "no" to this question. The application also provided that "[i]f information becomes available subsequent to the date of this application you must supplement the application prior to your admission." In this regard, Respondent signed an oath providing, in part, that,

> I fully understand that I have a continuing obligation to keep the Board of Bar Examiners advised of any additional information that would be pertinent to this application or my qualifications, prior to my admission. I also understand that I will not be admitted to the New Mexico Bar until any character and fitness issues arising from the application process have been resolved in my favor.

Respondent concedes that he never supplemented his application with information about his criminal indictment.

{5} The amended specification of charges against Respondent alleged several violations of the Rules of Professional Conduct. With regard to Respondent's failure to supplement his bar application, Respondent was charged with violating Rule 16–801(B) NMRA 2006 for failing to disclose a fact necessary to correct a misapprehension known by Respondent to have arisen in connection with a bar admission application, Rule 16–804(C) NMRA 2006 for engaging in conduct involving dishonesty, deceit, or misrepresentation, and Rule 16–804(H) for engaging in conduct reflecting adversely upon fitness to practice law. With regard to Respondent's criminal conviction, he was charged with violating Rule 16–804(B), for committing a criminal act reflecting adversely upon honesty, trustworthiness, or fitness, and Rule 16–804(H) for again engaging in conduct reflecting adversely upon fitness to practice law.

DISCUSSION

{6} Respondent admits that he was under an obligation to supplement his bar application with information about his criminal conduct, and Respondent concedes that he failed to do so. Respondent also acknowledges this Court's general policy of prohibiting an attorney who has been convicted of a crime from practicing law while serving a sentence of probation. *See, e.g., In re Lopez,* 116 N.M. 699, 866 P.2d 1166 (1994); *In re Bryan,* 116 N.M. 745, 867 P.2d 415 (1993); *In re Griffin,* 101 N.M. 1, 677 P.2d 614 (1983); *In re Norrid,* 100 N.M. 326, 670 P.2d 580 (1983). However, Respondent maintains that suspension is too severe a sanction in his case because the timing of his criminal conduct and bar application demonstrates that he did not intentionally fail to supplement his bar application and because his continued practice of law will not pose a danger to the public. For the reasons that follow, we conclude that suspension is the appropriate sanction in this case.

FAILURE TO SUPPLEMENT BAR APPLICATION

{7} As noted above, applicants to the State Bar of New Mexico are under an affirmative duty to update their bar applications to inform the Board of Bar Examiners of any occurrence or new information that might bear upon their qualifications or fitness to practice law. To underscore the importance of this obligation, a member of the Board of

Bar Examiners testified before the hearing committee that had the Board known of Respondent's indictment, the Board would have not recommended admitting Respondent to the bar even though Respondent passed the bar examination. Consequently, had Respondent been forthright with the Board of Bar Examiners, as he should have been, in all likelihood he would not currently be a member of this bar.

{8} Even though Respondent's failure to supplement his bar application was not discovered in time to affect the decision to admit him to the bar, our own case law recognizes that misrepresentations on a bar application can be grounds for discipline. *See In re Cherryhomes,* 115 N.M. 734, 736, 858 P.2d 401, 403 (1993) (concluding that discipline was appropriate because the attorney forged a physician's signature on the certificate of fitness required by the Arizona bar application in another state, which raised serious concerns about the attorney's honesty). We recognize that Respondent did not include an affirmative misrepresentation in his application as was the case in *In re Cherryhomes.*

{9} Nevertheless, whether the misrepresentation was by commission or omission, Respondent's failure to supplement his bar application calls into question his fitness to practice law. As one court has observed,

> [c]andor and honesty are a lawyer's stock and trade. Truth is not a matter of convenience. Sometimes lawyers may find it inconvenient, embarrassing, or even painful to tell the truth. Nowhere is this more important than when an applicant applies for admission to the bar. In all instances, the applicant must display complete candor in all filings and proceedings required by the [bar]. Anyone who does not grasp that fundamental proposition should not be a lawyer.

In re Scavone, 106 N.J. 542, 524 A.2d 813, 820 (1987) (citations and internal quotation marks omitted); *see also In re Press,* 627 A.2d 842 (R.I.1993) (stating that "even though the truth may hurt at times, honesty is to be demanded and expected of all those who seek to practice law"). We are not alone in requiring prospective members of the bar to supplement their bar applications with relevant information as it becomes available. *See In re Chandler,* 161 Ill.2d 459, 204 Ill. Dec. 249, 641 N.E.2d 473, 478 (1994) (recognizing a continuing duty on every bar applicant to immediately disclose information relevant to the applicant's character and fitness as it becomes available). Without a doubt, Respondent's criminal indictment was a matter directly relevant to his character and fitness to practice law. By failing to supplement his bar application with that information, Respondent only made a bad situation worse.

{10} Respondent nevertheless attempts to minimize the seriousness of his actions by suggesting they were unintentional. However, the hearing committee who had the opportunity to take Respondent's testimony and observe him first-hand concluded that "Respondent failed to disclose a fact necessary to correct a misrepresentation known by him to have arisen in the matter," and "engaged in conduct involving dishonesty, deceit, or misrepresentation." We recognize that we are not bound by the findings and conclusions of the Disciplinary Board's hearing committee, and are free to accept them in whole, in part, or not at all. *See* Rule 17–316(D) NMRA 2006. But, to the extent that Respondent is arguing that the conclusions of the hearing committee are not supported by substantial evidence, we disagree. *See* Rule 17–316(A) (allowing for challenges to findings relied on by the Disciplinary Board for lack of substantial evidence).

{11} As disciplinary counsel has pointed out, there is good reason to doubt Respondent's claim that he did not think about the importance of supplementing his bar application when he was under investigation and indicted by the grand jury. In particular, we note that Respondent acknowledged that he was concerned that his admission to the bar, and his legal career, could be jeopardized if the border patrol discovered the drugs in the car or if he was ultimately convicted on the grand jury indictment. That realization demonstrates an awareness by Respondent that criminal conduct could be an impediment to admission to the bar. And, given that the bar application asked questions about crimi-

nal conduct and advised Respondent of his duty to supplement his application with pertinent information as it became available, we have no basis for rejecting the findings and conclusions to the effect that, by intentionally failing to supplement his bar application, Respondent violated the Rules of Professional Conduct. *See In re Patton,* 86 N.M. 52, 54, 519 P.2d 288, 290 (1974) (recognizing that "the findings and recommendation of a Hearing Committee are entitled to great weight"). We now examine whether Respondent's criminal conviction was properly considered by the Disciplinary Board in reaching its recommendation to suspend Respondent from the practice of law for the duration of his term of probation when the conduct that led to the conviction occurred before his admission to the bar.

CRIMINAL PROBATION PRECLUDES PRACTICING LAW

{12} From the beginning of these proceedings, Respondent has pointed out that his criminal conduct occurred before he was admitted to the bar. Although this Court has not had occasion to address the issue, several other states have considered misconduct prior to admission as a basis for subsequent discipline. *See, e.g., Stratmore v. State Bar of Cal.,* 14 Cal.3d 887, 123 Cal.Rptr. 101, 538 P.2d 229 (1975) (recognizing that an attorney could be disciplined even though the misconduct may have preceded admission to practice); *State ex rel. Neb. State Bar Ass'n v. Blackstone,* 246 Neb. 220, 517 N.W.2d 400 (1994) (indicating that an attorney who passed forged checks between taking the bar examination and being admitted to the bar received disbarment); *In re Wong,* 275 A.D.2d 1, 710 N.Y.S.2d 57 (2000) (stating that an attorney's actions involving sexual misconduct with a minor prior to admission, but not discovered until after admission, constitutes "misconduct"); *Office of Disciplinary Counsel v. Clark,* 40 Ohio St.3d 81, 531 N.E.2d 671 (1988) (indicating that an attorney was indefinitely suspended for participation in a drug smuggling operation while in law school and prior to admission, although not convicted until after admission); *State ex rel. Oklahoma State. Bar Ass'n v. Flanery,* 863 P.2d 1146, 1150 (Okla.1993) (holding that an attorney's pre-admission conduct of embezzling $71,000 from family members warranted disbarment because it went "to the heart of respondent's fitness to practice law"); *Office of Disciplinary Counsel v. Zdrok,* 538 Pa. 41, 645 A.2d 830 (1994) (suspending an attorney based, in part, on his pre-admission conduct of nighttime loitering and prowling in violation of a Pennsylvania criminal statute).

{13} In considering whether pre-admission conduct should be the basis for attorney discipline, the Pennsylvania Supreme Court found

> no unfairness in disciplining [the respondent] for conduct committed prior to his admission to the bar. Disciplinary proceedings are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministration of persons unfit to practice.

Zdrok, 645 A.2d. at 834. We agree with that assessment. Accordingly, to the extent that Respondent may suggest that suspension is not warranted simply because his conduct occurred prior to his admission to the bar, we hold that an attorney may be disciplined for acts committed prior to admission but not discovered until after admission.

{14} Aside from suggesting that suspension should not be based on pre-admission conduct, Respondent also suggests that suspension is too severe a sanction in his case because his continued practice of law does not pose a danger to the public. In this regard, Respondent attempts to distinguish his case from *In re Key,* 2005–NMSC–014, 137 N.M. 517, 113 P.3d 340, a case in which we recently reiterated our well-established position that, absent exceptional and very limited circumstances, attorneys on probation for serious crimes will not be permitted to practice law while on probation. Respondent tries to distance himself from *Key* by maintaining that the criminal conviction at issue in *Key* involved crimes of dishonesty while Respondent's crimes do not. However, Respondent's attempts to distinguish his situation from *Key* are misguided because Respondent is not being disciplined simply because he was convicted of a crime and sen-

tenced to a term of probation. Rather, as discussed above, Respondent also is being disciplined for the dishonest act of failing to supplement his bar application with the fact of his criminal indictment. As such, even though Respondent argues that his crimes were not ones of dishonesty, his attempt to hide those crimes from the Board of Bar Examiners calls into question his character for honesty and his fitness to practice law. For this reason, we will not depart from our general policy of requiring suspension or disbarment while an attorney serves a criminal sentence of probation.

{15} Relying on this Court's often-stated principle that disciplinary sanctions are not to punish the lawyer, but rather to protect the public, *see Key*, 2005–NMSC–014, ¶ 8, 137 N.M. 517, 113 P.3d 340, Respondent points to his conduct since being admitted to the bar as evidence that his continued practice of law will not endanger the public. While Respondent may have performed satisfactorily on probation for his crimes so far, and while Respondent may have successfully practiced as an attorney for almost three years under the supervision of his current law firm while this case progressed through the disciplinary process, we see no reason to reward Respondent for his failure to be candid with the Board of Bar Examiners and, by extension, with this Court.

{16} Even had he been acquitted of all charges, Respondent still would have been subject to discipline for his failure to be candid with the Board of Bar Examiners in the first instance as we discussed above. Moreover, when an attorney is sentenced to a term of probation in a criminal proceeding, we often impose discipline not just to protect the public, but also the profession and the administration of justice. *Key*, 2005–NMSC–014, ¶ 8, 137 N.M. 517, 113 P.3d 340; NMRA, Discipline Rules, Preface ("[T]he purpose of discipline of lawyers is the protection of the public, the profession and the administration of justice."). Given this important purpose, and given that Respondent did engage in dishonest conduct, we find no basis for carving out the type of exception alluded to in *Key*.

{17} In light of Respondent's conduct before his admission to the bar, and in light of his criminal conviction shortly after his admission to the bar, we agree with the Disciplinary Board's assessment that the disciplinary sanction of suspension is warranted in this case.

{18} **NOW, THEREFORE, IT IS ORDERED** that Respondent Ronald D. Mikus is hereby suspended from the practice of law pursuant to Rule 17–206(A)(2) for a time certain until January 23, 2007, which date coincides with the deferred sentence effective September 7, 2005, imposed by the district court;

{19} **IT IS FURTHER ORDERED** that during the period of suspension Respondent shall comply with all terms and conditions of the probation as set forth in the district court order;

{20} **IT IS FURTHER ORDERED** that for a two-year period following the completion of his probation under the district court order, *i.e.*, from January 23, 2007, until January 23, 2009, Respondent shall enter into a monitoring agreement to be approved by disciplinary counsel which requires him to continue participation in twelve-step meetings on a three-day-a-week regime or an equivalent program;

{21} **IT IS FURTHER ORDERED** that Respondent shall be subject to random alcohol screening during the two-year probationary period following the completion of his probation under the district court order;

{22} **IT IS FURTHER ORDERED** that Respondent shall take and pass the ethics portion of the multi-state bar examination prior to reinstatement to the probationary practice of law;

{23} **IT IS FURTHER ORDERED** that Respondent shall comply with the requirements of Rule 17–212 NMRA 2006 and file his affidavit of compliance on or before November 16, 2005; and

{24} **IT IS FURTHER ORDERED** that costs in the amount of $764.59 hereby are assessed against Respondent and shall be paid to the Disciplinary Board on or before

November 15, 2005, or thereafter bear interest at the rate of 15 percent per annum.

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

[redacted]

2006-NMCA-034

131 P.3d 661

Jessie KRIEGER, Plaintiff,

v.

The WILSON CORPORATION, Defendant and Third-Party Plaintiff-Appellant,

v.

Allstate Insurance Company, and Barbara Stevens, d/b/a Hooter Browns, Third-Party Defendants-Appellees.

Nos. 24,421, 24,497.

Court of Appeals of New Mexico.

Nov. 30, 2005.

Certiorari Granted, No. 29,598, March 23, 2006.

[redacted]

Stephen E. McIlwain, Albuquerque, NM, for Plaintiff.

Comeau, Maldegen, Templeman & Indall, LLP, Stephen J. Lauer, Grey W. Handy, Sharon W. Horndeski, Santa Fe, NM, for Defendant and Third–Party Plaintiff–Appellant.

Modrall, Sperling, Roehl, Harris & Sisk, P.A., Lisa Mann, Jennifer A. Noya, Albuquerque, NM, for Third–Party Defendant–Appellee Allstate Insurance Company.

The Hone Law Firm, P.C., Jay R. Hone, Albuquerque, NM, for Third–Party Defendant–Appellee Barbara Stevens.

OPINION

BUSTAMANTE, Chief Judge.

{1} This case involves two consolidated appeals by The Wilson Corporation (Wilson) against Barbara Stevens, d/b/a Hooter Browns Restaurant (Lessee), the owner of a restaurant located in Wilson's building, and Lessee's insurance company, Allstate Insurance Company (Allstate). The basic issue is whether an indemnification provision in the restaurant lease creates or-under the circumstances present here-may create actionable obligations in the Lessee and Allstate to defend Wilson from a tort action brought by a restaurant patron. Complicating the analysis somewhat is that it is unclear from the record exactly where on Wilson's premises the injury occurred. Applying settled principles of contract interpretation and civil procedure, we decide that the district court prematurely dismissed some of Wilson's claims. We affirm in part and reverse in part.

I. BACKGROUND

{2} Jessie Krieger visited Hooter Browns Restaurant (restaurant) in May 2000. Krieger filed a complaint for personal injuries against Wilson, the owner of the building and adjacent parking area, for damages suffered in a fall. Krieger's complaint alleged she stepped into a "hole or other defect in the paving located within or near the parking lot" of the restaurant. Wilson requested a defense and indemnification from Lessee and Allstate. Both denied the request. Wilson eventually settled the claim with Krieger. In the meantime, Wilson filed a third-party complaint for contractual indemnification, breach of contract, negligence, and a declaratory judgment against the Lessee and Allstate.

{3} Allstate moved for summary judgment pursuant to Rule 1-056(A) NMRA on the grounds that Wilson was not an Allstate insured at the time Krieger's accident occurred, and that the Lease did not otherwise create insurance coverage for Wilson. Allstate alleged that Lessee did not add Wilson as an additional named insured under the policy until 2002, two years after Krieger's accident. Wilson asserted it was unaware that it was not named as an additional insured at the time the original third-party complaint was filed. At the hearing on Allstate's motion for summary judgment, Allstate emphasized a new argument: that the injury occurred outside the physical area covered by the Lease and that therefore there was and could be no coverage under Lessee's policy. The district court granted Allstate's motion for summary judgment.

{4} Lessee moved for dismissal pursuant to Rule 1-012(B)(6) NMRA. The district court granted Lessee's motion to dismiss, and at the same time denied Wilson's motion for leave to amend its complaint to allege that Lessee failed to list Wilson as an additional insured on the insurance policy. At the hearing on the motion, the district court reasoned "[t]here's nothing in this lease that places the liability for any accidents which occur in the parking lot with the third party defendant, [Lessee]."

{5} These two appeals followed. We discuss each of Wilson's appeals in turn, beginning with its case against Lessee. We provide details on the Lease and insurance provisions in our discussion below.

II. *WILSON V. LESSEE*

{6} Wilson's claims against Lessee include contractual indemnification, breach of contract, violation of the Unfair Practices Act (UPA), and negligence. The UPA claims have been abandoned on appeal. Wilson argues that the district court erred in granting the motion to dismiss for several reasons, including: the Lease required Lessee to indemnify Wilson for claims based on injuries such as those sustained by Krieger; there are facts provable which would entitle Wilson to relief under the indemnification provision; Wilson has a viable claim against Lessee for breach of contract for failure to procure insurance; and the claim of negligence was adequately plead. We begin with the negligence claim, then discuss the claim for contractual indemnification and the breach of contract claims.

{7} We review a dismissal pursuant to Rule 1-012(B)(6) de novo. *Young v. Van Duyne*, 2004-NMCA-074, ¶ 13, 135 N.M. 695, 92 P.3d 1269. "A motion to dismiss pursuant to [Rule] 1-012(B)(6) tests the legal sufficiency of the complaint. In reviewing an order granting a motion to dismiss, we accept as true all facts properly pleaded." *Rummel v. Edgemont Realty Partners, Ltd.*, 116 N.M. 23, 25, 859 P.2d 491, 493 (Ct.App.1993) (citation omitted). "A complaint should not be dismissed unless there is a total failure to allege some matter essential to the relief sought." *Healthsource, Inc. v. X-Ray Assocs. of N.M.*, 2005-NMCA-097, ¶ 16, 138 N.M. 70, 116 P.3d 861.

A. NEGLIGENCE

{8} To determine whether Wilson's allegations state a claim for negligence against Lessee, we accept all well-pleaded facts as true and consider whether Wilson might prevail under any state of facts provable under the claim. *See id.* Wilson alleges that Lessee, as the occupant and operator of the restaurant, owed a duty to business visitors to use ordinary care to keep the premis-

es safe for use by such visitors. Wilson argues that if it is found negligent with respect to Krieger in the underlying personal injury claim, it should be determined that Lessee, as the occupant and operator of the restaurant, should also be found negligent.

{9} The claim of negligence fails for several reasons, but we need not get beyond the first element, duty. The complaint is void of any allegations of a duty of care owed by Lessee to Wilson. *See Bober v. N.M. State Fair*, 111 N.M. 644, 653, 808 P.2d 614, 623 (1991) (stating that the "injured [party's] complaint must allege at least *some* facts . . . giving rise to invocation of [a] duty in [the] particular case"); *Blake v. Pub. Serv. Co. of N.M.*, 2004–NMCA–002, ¶ 6, 134 N.M. 789, 82 P.3d 960 (stating that the question of whether a duty exists turns on whether a relationship existed by which defendant was legally obliged to protect the interest of plaintiff). The complaint alleges that Lessee "owed a duty to *business visitors* to use ordinary care to keep the premises safe." (Emphasis added.) There is no factual allegation that Lessee owed a duty to Wilson, that Lessee breached the duty, or that damages flowed from such a breach. Wilson is saying that if Lessee's negligence injures a third party, and Wilson suffers damages as a result of the third party's injuries, then Lessee is negligent as to Wilson. What Wilson alleges in the claim for negligence is no more than another indemnification claim. Such allegations fail to state a claim for negligence. We affirm the dismissal of Wilson's claim of negligence against Lessee.

B. CONTRACTUAL INDEMNIFICATION

{10} Wilson argues that as a condition of leasing the premises, Lessee undertook to indemnify it for any bodily injuries to its patrons arising out of the operation of the restaurant, no matter where or how those injuries occurred. Wilson entered into a Lease with Carla Grim which was subsequently assigned to Barbara Stevens, d/b/a Hooter Browns. Wilson argues that the following provisions of the Lease establish the obligation to indemnify it:

> 3. . . . Lessee agrees to keep and maintain the premises in a clean and safe condition. . . .
>
> . . . .
>
> 10. Lessee further agrees to indemnify and hold Lessor and its officers, directors, employees and agents harmless from any and all claims, liens, suits, causes of action, damages, costs, taxes, and expenses, including, but not by way of limitation, expenses of litigation, court costs and attorney fees, incurred, arising, or in any way resulting from Lessee's activities, actions, or omissions or the actions of any of her agents, employees, guests, invitees, or licensees. This indemnity shall survive the termination of this agreement for any reason, and neither final payment of all rentals nor acceptance of such payments by Lessor shall constitute a waiver of the foregoing indemnity provision.

The Lease also provides that "[t]he Lessor does hereby . . . lease unto the Lessee the restaurant portion only of the Lessor's building at the B & W Truck Stop."

{11} The district court granted Lessee's motion to dismiss reasoning that "[t]here's nothing in this lease that places the liability for any accidents which occur in the parking lot with the third party defendant, [Lessee]." With regard to the issue of breach of contract, the district court stated:

> Now, the Wilson Corporation may have a cause of action against her enforcing her to obtain an insurance policy naming the Wilson Corporation. But as I see the lease agreement, it would mean that they would be liable as it says, in Paragraph 10, *for anything or any activities, actions or* omissions by lessee or any of its employees or agents. But it does not extend, as far as I can see, to the parking lot. Because it limits it to the actions—to the activities and to the omissions.

The district court apparently concluded that Lessee had no obligation under the indemnity clause for anything occurring outside the restaurant.

{12} To rule as a matter of law that the motion to dismiss should be granted be-

cause Lessee had no responsibility under the Lease for areas outside the restaurant, the district court had to find that the language of the indemnity provision together with other provisions of the Lease was so clear that no reasonable person could interpret it in any other way. *See C.R. Anthony Co. v. Loretto Mall Partners,* 112 N.M. 504, 510, 817 P.2d 238, 244 (1991). Whether a contractual provision is susceptible to reasonable but conflicting meanings, that is, whether there is a lack of clarity or ambiguity, is a question of law. *Id.* at 509, 817 P.2d at 243. In the absence of ambiguity, the interpretation of language in a contract is an issue of law which we review de novo. *Id.* at 510, 817 P.2d at 244. Where contractual language is "susceptible of conflicting inferences, the ultimate factual issues must be resolved by the appropriate fact finder with the benefit of a full evidentiary hearing." *Id.* at 510, 817 P.2d at 244.

{13} We apply the general rules of contract construction in determining the meaning of the language used in indemnity contracts and clauses. *Arkansas Kraft Corp. v. Boyed Sanders Constr. Co.,* 298 Ark. 36, 764 S.W.2d 452, 453 (1989); *Oddo v. Speedway Scaffold Co.,* 233 Neb. 1, 443 N.W.2d 596, 602 (1989). "A contract must be construed as a harmonious whole, and every word or phrase must be given meaning and significance according to its importance in the context of the whole contract." *Aspen Landscaping, Inc. v. Longford Homes of N.M., Inc.,* 2004–NMCA–063, ¶ 14, 135 N.M. 607, 92 P.3d 53 (internal quotation marks and citation omitted). We balance these principles of general contract construction with the rules of construction for commercial leases that call for the court to construe ambiguity, if any exists, against the landlord and drafter. *L.R. Prop. Mgmt., Inc. v. Grebe,* 96 N.M. 22, 24, 627 P.2d 864, 866 (1981).

{14} Lessee accurately notes that whether the language in the Lease is broad enough to encompass Krieger's accident as a customer of the restaurant is a question of first impression in New Mexico. Our courts have interpreted the phrase "arising or in any way resulting from" broadly in the insurance context. In *Baca v. New Mexico State Highway Department,* 82 N.M. 689, 692, 486 P.2d 625, 628 (Ct.App.1971), we stated, "[t]he words 'arising out of' are very broad, general and comprehensive terms, ordinarily understood to mean 'originating from,' 'having its origin in,' 'growing out of' or 'flowing from.' " *See also Servants of the Paraclete, Inc. v. Great Am. Ins. Co.,* 857 F.Supp. 822, 836–37 (D.N.M.1994) (holding that the injury " 'arose' out of the use of the premises" if there was some causal connection or a sufficient nexus between the ownership, maintenance, or use of the premises and the injuries sustained). But our courts have not interpreted this language in the context of a lease.

{15} Other jurisdictions have given a broad interpretation to similar language in indemnity provisions. *See N.P.P. Contractors, Inc. v. John Canning & Co.,* 715 A.2d 139, 140–42 (D.C.1998) (holding that an indemnity clause applicable to "any and all claims and liabilities . . . arising out of or resulting from or in connection with the execution of the work" was "so broad and sweeping" as to cover damages incurred, and was unambiguous and enforceable (internal quotation marks and citation omitted)); *Rios v. Field,* 132 Ill.App.2d 519, 270 N.E.2d 98, 101 (1971) (holding that the phrase "resulting from" in a lease merely requires that the lessee's use of the premises be "the occasion for, as opposed to the cause of, the injury"); *see also Myers v. ANR Pipeline Co.,* 959 F.2d 1443, 1446–47 (8th Cir.1992) (indicating that the "any and all claims" language may justify the conclusion that "absolute indemnification was intended").

{16} Lessee urges us to adopt a more strict approach, asserting that indemnity clauses generally should be construed against the indemnitee. *Vitty v. D.C.P. Corp.,* 268 N.J.Super. 447, 633 A.2d 1040, 1042 (1993); *Lynch v. Santa Fe Nat'l Bank,* 97 N.M. 554, 556, 627 P.2d 1247, 1249 (Ct.App.1981) (holding exculpatory clauses should be strictly construed against the promisee). We decline to decide the issue in this case, because even under a strict approach, we conclude that the language in the Lease is broad enough for Wilson to state a claim. The record involving the injury to Krieger is limited to the information in Krieger's complaint. The only facts relating to the injury are that Krieger

was a visitor to the restaurant, a dangerous condition existed on the premises consisting of a hole or other defect in the paving located within or near the parking lot, and Krieger was injured by stepping into the hole or defect. On the limited information before us, it is not possible to rule as a matter of law that the language in the indemnity provision was so clear that no reasonable person would determine the issue in any way other than limiting coverage to injuries occurring in the restaurant portion only. *See C.R. Anthony Co.*, 112 N.M. at 510, 817 P.2d at 244.

{17} The intentions of the parties as to the meaning of the indemnification provision is subject to further factual development. The first relevant inquiry is the intention of Wilson and Grim, who was the original lessee. *See id.* at 508–09, 817 P.2d at 242–43 (stating that what is relevant in determining whether any term or provision of the lease is unclear is evidence of the circumstances surrounding the making of the lease). On remand, the district court is not limited to the four corners of the contract in deciding the meaning of the language in the Lease, and "extrinsic evidence may be offered to aid the court in the threshold determination involving the interpretation of contract terms." *Id.* at 510, 817 P.2d at 244. The parties have not addressed whether any factual background is available or appropriate.

{18} We now address Lessee's argument that even if the indemnity provision is broad enough to cover claims arising from the parking lot area, it does not serve to indemnify Wilson for its own negligence. New Mexico has adopted the rule that there must be a clear and unequivocal intent by the parties for an indemnitee to be held harmless for his own negligence. *Metro. Paving Co. v. Gordon Herkenhoff & Assocs.*, 66 N.M. 41, 43, 341 P.2d 460, 461 (1959). Other jurisdictions that have addressed the issue have held that where the indemnity clause in an agreement contains a hold harmless provision, and there is a requirement for the indemnitor to obtain insurance and name the other party as an additional insured, it is clear the parties intended that the indemnitee will be indemnified against his own negligence. *See Myers*, 959 F.2d at 1448 (stating that absolute indemnity is the intention when an agreement contains both hold harmless and insurance provisions). The court in *Bridston v. Dover Corp.*, 352 N.W.2d 194 (N.D.1984) held that where the agreement had "save harmless" language, and the indemnitee was to be held harmless for "*any and all claims for loss*" without limitation, together with a requirement that the indemnitor obtain liability insurance naming the indemnitee as an additional insured, the parties intended indemnification for indemnitee's own negligence. *Id.* at 197 (internal quotation marks omitted).

{19} Although not identical to the Lease here, the provisions dealt with in these other cases are sufficiently similar to provide guidance. The Lease includes "hold harmless" language and also requires Lessee to procure liability insurance naming Wilson as an additional insured. There are no limitations in the indemnity provision excluding coverage for Wilson's negligence. Given the broad language of the indemnity provision, we cannot say that as a matter of law the provision excludes coverage for Wilson's own negligence. However, neither can we say that the provision provides coverage for Wilson based on the limited facts before us in the record. Resolution of this issue awaits further litigation on remand. Of course, we do not address whether Wilson was in fact negligent because that issue is not before us.

{20} We conclude, after reviewing the Lease and the third-party complaint, that the district court erred in dismissing the claim for contractual indemnification. We cannot say as a matter of law that the Lease is susceptible to only one reasonable interpretation. The Lease requires Lessee to hold Wilson harmless "from *any and all claims* ... including ... expenses of litigation ... *arising, or in any way resulting from* Lessee's activities." (Emphasis added.) Although the Lease is for the restaurant portion only of the truck stop, there is no language limiting the agreement to hold harmless and indemnify to claims physically occurring within the leased premises only. Neither is the duty to indemnify limited to claims caused by the negligence of Lessee.

The language requires that Wilson be held harmless from any and all claims, with no geographical or party-defendant limitation. We conclude that Wilson's complaint states a claim for contractual indemnification upon which relief can be granted, therefore we reverse and remand.

C. BREACH OF CONTRACT

{21} Again we look to the allegations in the amended third-party complaint against Lessee to determine whether Wilson has stated a claim upon which relief can be granted, testing only the legal sufficiency of the complaint. *Healthsource, Inc.*, 2005-NMCA-097, ¶ 16, 138 N.M. 70, 116 P.3d 861.

1. SUBSTITUTE PERFORMANCE

{22} The Lease required Lessee to procure general commercial liability insurance, and to list Wilson as a named additional insured on the policy. We recite the exact language of the complaint here because it becomes relevant to arguments made by the parties. Wilson alleges that Lessee "procured commercial liability insurance coverage from Third-Party Defendant Allstate, but Allstate has failed to honor its insuring obligations to Wilson . . . in this regard." Wilson then alleges that "[Lessee's] attendant failure to provide substitute performance or to otherwise defend and indemnify Wilson . . . in connection with the underlying action, constitutes a breach of the Lease Agreement's provisions." In fact, Lessee procured liability insurance, but failed to name Wilson as an additional named insured until two years after Krieger's accident. Wilson moved to amend the complaint for breach of contract to specify more precisely how Lessee allegedly breached the Lease by failing to procure insurance. The district court denied the motion for leave to amend, apparently deciding an amendment would be futile. The district court found that even if Wilson had been named as an additional insured, no coverage was available.

{23} The district court properly dismissed Wilson's breach of contract for failure to provide a substitute performance claim as plead. Wilson essentially alleges that Lessee breached the contract by failing to provide substitute performance when Allstate denied its request to defend and indemnify on Krieger's claims. This claim fails because there is no language in the Lease that requires Lessee to provide substitute performance. *See id.* ¶¶ 18–19 (dismissal affirmed where record revealed there was no agreement, therefore there could be no breach). The language of the complaint indicates that the claim for substitute performance is based on Allstate's denial of coverage for Wilson, allegedly a named insured under the policy. The problem is that Wilson, in fact, was not a named insured under the policy at the time Krieger was injured. Lessee cannot be held liable for substitute performance as plead, based on Allstate's failure to indemnify and defend Wilson as a named insured when Wilson was not named on the policy. However, the problem with the complaint can be cured through leave to amend, which we discuss below. We now must consider whether the district court erred in denying Wilson's request for leave to amend, and if so, whether a breach for failure to procure insurance is itself actionable.

2. LEAVE TO AMEND

{24} Rule 1-015(A) NMRA provides that leave to amend pleadings shall be "freely given when justice so requires," and the district court is required to allow it if the objecting party fails to show they will be prejudiced. *Schmitz v. Smentowski*, 109 N.M. 386, 390, 785 P.2d 726, 730 (1990). A party ought to be afforded an opportunity to test its claim on the merits, and amendment should be allowed in the absence of a showing of dilatory faith, undue delay, bad motive on the part of the movant, repeated failure to cure deficiencies by previous amendments, undue prejudice to opposing party, or futility of the amendment. *Crumpacker v. DeNaples*, 1998-NMCA-169, ¶ 18, 126 N.M. 288, 968 P.2d 799 (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). This Court reviews the denial of a motion for leave to amend for an abuse of discretion. *Id.* ¶ 16. An abuse of discretion occurs "when the court exceeds the bounds of reason, all the circumstances before it being considered." *Matrix Prod. Co. v.*

Ricks Exploration, Inc., 2004–NMCA–135, ¶ 21, 136 N.M. 593, 102 P.3d 1285 (internal quotation marks and citation omitted).

{25} The district court did not indicate a reason for denying leave to amend in its order. However, in reviewing the transcript of the proceedings below, it appears the district court's decision was based on futility. The district court reasoned:

> Now, the way I read the claim for breach of contract, ... [i]f there's a breach of contract by the Wilson Corporation against [Lessee], it would be for the failure of providing an insurance policy for her portion of the liabilities.
>
> If she's not liable for any of the injuries incurred because of the lease itself, then regardless of the fact that she has named the Wilson Corporation ... in any insurance contract that she purchases, the way I see it means nothing if she's not liable for that accident and that injury.

The district court went on to state that Wilson may have a cause of action against Lessee to force her to obtain the required insurance policy, but denied Wilson's motion to amend. The district court appears to have decided that even if Wilson was a named insured, Wilson would not be covered for an injury that occurred in the parking lot. In other words the district court apparently decided Lessee could not be liable to Wilson for an injury to a restaurant patron occurring in the parking lot, either with or without insurance coverage.

{26} We note that Lessee did not argue that she would be prejudiced by the amendment, and the record does not reveal any other basis for denying the motion to amend. We reverse the denial of Wilson's request for leave to amend.

3. FAILURE TO PROCURE INSURANCE

{27} Wilson argues that a claim for Lessee's failure to obtain insurance covering Wilson is actionable. Such a claim is generally actionable under New Mexico law. *See Lommori v. Milner Hotels, Inc.*, 63 N.M. 342, 351, 319 P.2d 949, 955–56 (1957) (stating that where a clause requires lessee to carry liability insurance for the benefit of both the lessor and lessee, so that both should be protected under the requirements of the covenant and any policy provided by the lessee, lessee is liable to lessor for failure to meet the requirements to obtain insurance). Again, the issue is whether the language in the complaint adequately pleaded this cause of action; and, if not whether amendment was improperly denied. We need not decide the issue as such because, as previously discussed, Wilson should be permitted to amend its complaint on remand to adequately reflect the claim for breach of contract for failure to procure insurance.

{28} Lessee argues that leave to amend was properly denied because Wilson was not damaged by the alleged breach in that Allstate would be under no obligation to defend or indemnify Wilson from Krieger's complaint-whether or not Lessee had added Wilson to the policy-since Krieger's injury did not occur on the leased premises. Contrary to Lessee's position, we have decided that the scope of the indemnity provision has yet to be determined. If it is determined that the indemnity provision covers Krieger's accident, Wilson will have been damaged by Lessee's failure to indemnify, and Allstate's failure to defend and indemnify. This must be decided on remand.

III. *WILSON V. ALLSTATE*

{29} Wilson's amended third-party complaint sought a declaratory judgment that Allstate was required to provide a defense and pay all damages paid to Krieger by Wilson. The complaint also alleged breach of the implied covenant of good faith and fair dealing. The district court granted summary judgment in favor of Allstate. Wilson moved for reconsideration, arguing that Allstate made an entirely different argument at the hearing than it set forth in its motion and memorandum in support of summary judgment. The district court denied the motion for reconsideration. On appeal, Wilson argues that the district court erred in granting summary judgment because: (1) Wilson is an additional insured under the Allstate policy; (2) if the policy is ambiguous, Wilson is entitled to coverage under the reasonable expec-

tations doctrine; (3) the policy covers off-premises accidents; and (4) it was improper to grant summary judgment based on an argument raised for the first time at the motion hearing. Because we reverse and remand on the coverage issue, we do not address Wilson's last argument.

{30} We review the grant of a motion for summary judgment to determine "whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law." *Williams v. Cent. Consol. Sch. Dist.*, 1998-NMCA-006, ¶ 7, 124 N.M. 488, 952 P.2d 978. "[W]e examine the whole record for any evidence that places a genuine issue of material fact in dispute." *Rummel v. Lexington Ins. Co.*, 1997-NMSC-041, ¶ 15, 123 N.M. 752, 945 P.2d 970. The issue on appeal is whether the defendant was entitled to judgment as a matter of law, and we review this legal question de novo. *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. Furthermore, the interpretation of an insurance contract is a matter of law, which we review de novo. *Rummel*, 1997-NMSC-041, ¶ 60, 123 N.M. 752, 945 P.2d 970.

{31} Wilson argues that the Allstate policy, standing alone, is sufficient to trigger coverage for Wilson as an "additional insured," even if it was not a "named additional insured" under the policy. In the complaint, Wilson sought coverage from Allstate because Wilson believed Lessee had procured commercial general liability insurance and named Wilson as an additional insured. Discovering later that Lessee had not obtained the required insurance at the time of Krieger's accident, Wilson contends that it is still entitled to coverage, though under a different provision of the policy. We begin by looking at the language of the policy in effect at the time of Krieger's accident.

{32} "[I]nsurance contracts are construed by the same principles which govern the interpretation of all contracts." *Id.* ¶ 18 (internal quotation marks and citation omitted). The insurance contract is reviewed as a whole, starting with the language of the agreement itself. *Id.* ¶ 20. The question of whether a contractual term is susceptible to reasonable but conflicting meaning is one of law. *C.R. Anthony Co.*, 112 N.M. at 509, 817 P.2d at 243. Where the language is "so plain that no reasonable person could hold any way but one, then the court may interpret the meaning as a matter of law." *Mark V, Inc. v. Mellekas*, 114 N.M. 778, 781, 845 P.2d 1232, 1235 (1993). However, if the court determines that the contract is reasonably and fairly susceptible to different interpretations, and the proffered evidence of surrounding facts and circumstances is in dispute, turns on witness credibility, or is susceptible to conflicting inferences, the meaning must be resolved by the appropriate fact finder. *Id.* In such a case, the grant of summary judgment would be improper. An ambiguity is not established simply because the parties disagree on the proper interpretation. *Trujillo v. CS Cattle Co.*, 109 N.M. 705, 709, 790 P.2d 502, 506 (1990).

{33} When evaluating competing interpretations of a policy, the appellate court views the language of the policy from the standpoint of "a hypothetical reasonable insured." *Computer Corner, Inc. v. Fireman's Fund Ins. Co.*, 2002-NMCA-054, ¶¶ 7, 13, 132 N.M. 264, 46 P.3d 1264. The question a court should ask itself initially is what understanding a reasonably intelligent lay person might glean from the policy, in light of the usual meaning of the words and the circumstances contemporaneous with the making of the policy. *Id.* ¶ 7. Confronted with assertions of conflicting interpretations, courts should look first to the language itself. If the parties do not offer extrinsic evidence probative of the issue, the appellate court may proceed to resolve the conflict as a matter of law. *Mark V, Inc.*, 114 N.M. at 782, 845 P.2d at 1236.

{34} The Allstate policy issued to Lessee provides, in relevant part:

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to

pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. . . .

. . . .

2. Exclusions

This insurance does not apply to:

. . . .

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

. . . .

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense had also been assumed in the same "insured contract"; and

(b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

. . . .

SECTION V – DEFINITIONS

. . . .

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting form [sic] any of these at any time. . . . .

8. **"Inusred [sic] contract" means:**

a. A contract for a lease of premises . . . ;

. . . .

f. That part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

{35} Wilson was not a named insured under the Allstate policy at the time of Krieger's injury. In addition to the Lease and the Allstate policies, the record reflects an affidavit from an insurance agent. The insurance agent stated in the affidavit that Allstate did not intend to provide insurance coverage for Wilson prior to September 2002 when it was added as a named insured.

{36} We must determine if a genuine issue of material fact exists based on the record before us as to whether Wilson could claim the status and benefit of an insured under the policy at the time of Krieger's accident, and if Krieger's accident is one to which the insurance applies. If it is determined that Wilson was covered under the insured contract provisions, then Allstate was obligated to provide a defense for Wilson. If the injury to Krieger is one to which the insurance applies, Allstate is obligated to provide indemnification for Wilson.

{37} Wilson argues that it is entitled to coverage based on the language in the "Exclusions" clause of the policy. The policy specifically excludes coverage for contractual obligations assumed by Lessee, with some important exceptions. The policy provides that "insured contracts" are excepted from the exclusions of coverage. An insured contract, as defined by the Allstate policy, "is [a] contract for a lease of premises." In other words, a contract for a lease of premises is

excepted from the exclusions to coverage; that is, it is covered by the policy.

{38} Allstate concedes that the policy does provide coverage for liabilities Lessee assumes in an "insured contract," and that the policy defines an "insured contract" to include the Lease. Allstate argues-and we agree-that the terms of the Lease are critical in determining whether it is required to provide coverage for Krieger's claim against Wilson. Allstate contends that since the Lease specifies that Lessee leased the "restaurant portion only" of the building, the Allstate policy applies only to Lessee's obligations pertaining to the restaurant, and not injuries occurring outside the restaurant. Allstate reasons that since Lessee was only covered for the restaurant portion of the building, Wilson cannot be afforded greater coverage under the insured contract provision to areas outside the restaurant. In other words, Allstate asserts it is not obligated to provide a defense or indemnity for any injury that occurred off-premises. This brings us back to where we began in this opinion, to the language of the Lease.

{39} Wilson argues that the off-premises liability theory raised by Allstate raises a host of other fact specific issues relating to the law of premises liability, and is not appropriately decided on summary judgment. Wilson argues that under the law of premises liability in New Mexico, Lessee owes a duty of care to invitees such as Krieger beyond the leased premises, and could be liable for injuries such as those sustained by Krieger. Tenants of leased premises such as Lessee owe a duty of care to invitees for off-premises injuries under certain circumstances. *See Mitchell v. C & H Transp. Co.*, 90 N.M. 471, 475, 565 P.2d 342, 346 (1977) (stating that an occupant or owner of a premises owes a duty of ordinary care to have the premises "in a reasonably safe condition[, including] the duty to provide an invitee with reasonably safe means of ingress and egress, both within the confines of the premises . . . controlled by the inviter, and, within limitations dictated by the facts of the case, beyond the precise boundaries of such premises" (internal quotation marks and citation omitted)); *Bober*, 111 N.M. at 650, 808 P.2d at 620 (stating that "consistent with *Mitchell*, . . . an occupier of land has the duty to avoid creating an unreasonable risk of harm to persons outside the land"). However, "where the landlord reserved the right to enter the leased premises to make repairs, and the landlord remains responsible to make inspections and any necessary repairs to guard against any unsafe condition." *Id.* at 652, 808 P.2d at 622; *see also Monett v. Dona Ana County Sheriff's Posse*, 114 N.M. 452, 458, 840 P.2d 599, 605 (Ct.App.1992) (stating that "an occupier of premises owes a duty to safeguard each business visitor whom the occupier reasonably may foresee could be injured by a danger avoidable through reasonable precautions available to the occupier of the premises" (internal quotation marks and citation omitted)); *Klopp v. Wackenhut Corp.*, 113 N.M. 153, 157, 824 P.2d 293, 297 (1992) (same).

{40} However, a tenant's liability for injuries caused by defects on the premises may be limited by the degree of control exercised over that area. *See Stetz v. Skaggs Drug Ctrs., Inc.*, 114 N.M. 465, 468, 840 P.2d 612, 615 (Ct.App.1992) (noting that "[t]he foundation of premises liability is that owners, occupiers, or possessors of premises have responsibility only for hazards arising on or from their premises"); *Torres v. Piggly Wiggly Shop Rite Foods, Inc.*, 93 N.M. 408, 410, 600 P.2d 1198, 1200 (Ct.App.1979) (stating "a tenant in complete and sole control of leased premises is liable for any defects in those premises or for the failure to make repairs in them, absent a reservation by the landlord for common use of several tenants or a reservation by the landlord of the right to enter and make repairs"); *see also Acosta v. City of Santa Fe*, 2000-NMCA-092, ¶ 25, 129 N.M. 632, 11 P.3d 596 (stating that "a property owner may incur off-premises tort liability if the owner exercised control of the area upon which a tort took place or was committed").

{41} We agree with Wilson that it is not sufficient to simply say the leased premises was the restaurant only, therefore Lessee had no control over the parking lot, and therefore Lessee has no liability for Krieger's injury. Control is a factual issue, and there is little or no evidence in the record relating to control of the area where Krieg-

er's injury occurred-or even where it occurred. Significant to the inquiry of control would be to know how long the defect had been there, whether there was any agreement between Wilson and Grim or Lessee regarding the parking lot, or the actions of the parties in relation to care and use of the parking area. There are no such facts in the record, except an allegation in Krieger's original complaint that "defendant (Wilson) had prior knowledge of this dangerous condition but had done nothing to remedy the same." That allegation alone is not sufficient to establish sole control in Wilson.

{42} Wilson also relies on the indemnification provision of the Lease contending that it constitutes an insured contract which requires Allstate to provide coverage under definitional Section 8(f) of the policy. In response, Allstate argues that the indemnification provision of the Lease cannot be expanded to encompass more than the Lease itself covers, namely the "restaurant portion only" of the truck stop. We disagree. Wilson relies on *Harrah's Atlantic City, Inc. v. Harleysville Ins. Co.*, 288 N.J.Super. 152, 671 A.2d 1122 (1996) for the proposition that Allstate is obligated to provide a defense and indemnification to it for injuries arising out of Lessee's activities in running the restaurant. In *Harrah's Atlantic City, Inc.*, the issue was whether the insurer was required to defend and indemnify the landlord/owner in a personal injury suit brought against it by a patron and an employee of a tenant in the building. *Id. at 1123.* The injured parties were struck by an automobile driven by one of the landlord/owner's parking valets as they crossed the street in front of the building. *Id.* The lease in *Harrah's Atlantic City, Inc.* required the tenant to purchase liability insurance "in the name of and for the benefit of" the landlord/owner and the tenant. *Id.* (internal quotation marks omitted). The lease also included an indemnification provision. *Id.* When the tenant did not respond to the landlord/owner's request for indemnification and a defense, it filed a third-party complaint seeking indemnification under the lease. The endorsement at issue provided coverage for the landlord/tenant as an additional insured "only with respect to liability arising out of the ... use of that part of the premises leased to [tenant] and shown in the Schedule." *Id.* at 1124 (internal quotation marks omitted). The lease in *Harrah's Atlantic City, Inc.* was thus similar to the Lease in this case.

{43} The court held that the insurer owed the landlord/owner both a defense and indemnification. *Id.* The court reasoned that the language "arising out of" the leased premises has been interpreted broadly to mean "originating from the use of or growing out of the use of the leased premises," and by using such language an "insurer ... necessarily [understands] that it [is] providing coverage to the landlord against accidents occurring outside of the leased premises." *Id.* (internal quotation marks and citation omitted). The court further reasoned that "an insurer would expect to provide coverage to a landlord under such an endorsement where there is a substantial nexus between the occurrence and the use of the leased premises." *Id.* at 1125 (internal quotation marks and citation omitted). In such cases, the landlord, like Wilson, is attempting to insure against the risk of liability generated by the business conducted by the tenant (Lessee), and place the cost of insuring that risk on the tenant (Lessee). The court went on to say that "where the landlord can trace the risk creating its liability directly to the tenant's business presence, it is not unreasonable for the landlord to expect coverage, inasmuch as it can be truly said that the accident originated from or grew out of the use of the leased premises." *Id.* Finally, the court noted that the "insurer cannot reasonably contend that it did not anticipate having to insure against an accident occurring in the course of such conduct by an invitee" of the tenant. *Id.*

{44} *Harrah's Atlantic City, Inc.* is similar to our case. There are some factual differences, but the reasoning is sound and applicable here. A plausible interpretation of the Lease is that Wilson, like *Harrah's Atlantic City, Inc.*, attempted to place the risk of liability for accidents arising out of the tenant's use of the premises on the tenant. This intent can be gleaned in the indemnification provision, and the requirement that Lessee procure liability insurance naming Wilson as an additional insured. As in *Harrah's Atlantic City, Inc.*, there is a substantial nexus between Lessee's business activities and Krieger's accident; that is, Krieger was at

the truck stop because of the restaurant. *See id.* (concluding that the requisite nexus existed between the accident and leased premises when store patron was hit by car while crossing street after leaving the store). Allstate cannot easily contend that it could not anticipate having to defend or provide coverage for Wilson given the Lease provisions and its policy's language covering insured contracts. Allstate issued the policy to Lessee to operate a restaurant. The Allstate policy specifically provides coverage for insured contracts, which are defined to include a lease. Given its coverage for insured contracts with third parties, Allstate necessarily had some knowledge of the Lease provisions and the potential for some obligations to Wilson. Allstate cannot claim it was unaware of the provisions of the Lease.

{45} Finally, Allstate contends it provides coverage to Lessee, not Wilson, and Wilson does not become an insured simply because there was an insured contract. And, Allstate argues, since Wilson is not an insured under the policy, Wilson cannot go directly against Allstate for indemnification. We hold that Wilson can bring this direct action against Allstate because, as a potential indemnitee under an insured contract, Wilson can reasonably claim to stand in the shoes of Allstate's insured. *See Marlin v. Wetzel County Bd. of Educ.*, 212 W.Va. 215, 569 S.E.2d 462, 468–69 (2002) ("In a policy for commercial general liability insurance ... when a party has an insured contract, that party stands in the same shoes as the insured for coverage purposes." (internal quotation marks and citation omitted)); *Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, 203 W.Va. 385, 508 S.E.2d 102, 109 (1998) (same). The court in *Marlin* held that "the phrase 'liability assumed by the insured under any contract' in an insurance policy, or words to that effect, refers to liability incurred when an insured promises to indemnify or hold harmless another party, and thereby agrees to assume that other party's tort liability." *Id.* at 464. The court went on to hold that when there is such an insured contract, the party to the insured contract may directly seek coverage from the insurance company. *Id.* at 469.

{46} Allstate argues that the West Virginia cases are directly opposed to New Mexico law. Allstate relies on *City of Farmington v. L.R. Foy Constr. Co.*, 112 N.M. 404, 816 P.2d 473 (1991) for the proposition that under New Mexico law, notwithstanding a written agreement to provide insurance, the intended beneficiary does not thereby become an additional insured under the insurance policy, and therefore may not proceed directly against the insurance company. The Court in *City of Farmington* specifically stated that it expressed no opinion regarding whether a direct action may be brought by a third party against an insurer because that issue was not before it. *Id.* at 409 n. 9, 816 P.2d at 478 n. 9. The West Virginia cases thus are not opposed to New Mexico law, and provide guidance in this case.

{47} We conclude that there are issues of material fact that preclude summary judgment in favor of Allstate. The insurance policy on its face arguably provides coverage for Wilson under the insured contract provision. Allstate therefore has a duty at the least to provide a defense for Wilson. *See Bernalillo County Deputy Sheriffs Ass'n v. County of Bernalillo*, 114 N.M. 695, 697, 845 P.2d 789, 791 (1992) (stating that an insurer is obligated to defend when the injured party's complaint contains allegations or states facts that bring the case within the coverage of the policy); *Found. Reserve Ins. Co. v. Mullenix*, 97 N.M. 618, 620, 642 P.2d 604, 606 (1982) (stating that when a complaint states facts within a policy's coverage, an insurer has a duty to defend). However, the extent of the coverage is yet to be determined on remand. The scope of the indemnity provision will determine the extent of coverage. We reverse the district court's grant of summary judgment in favor of Allstate.

CONCLUSION

{48} The district court is affirmed in part and reversed in part.

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

WE CONCUR: A. JOSEPH ALARID and JONATHAN B. SUTIN, Judges.

2006-NMCA-027

131 P.3d 675

MAGNOLIA MOUNTAIN LIMITED PARTNERSHIP, a Texas limited partnership, Plaintiff–Appellee,

v.

SKI RIO PARTNERS, LTD., a Texas limited partnership, Defendant–Appellant.

No. 24,740.

Court of Appeals of New Mexico.

Dec. 12, 2005.

Scheuer, Yost & Patterson, Donald A. Walcott, Charles V. Henry, IV, Santa Fe, NM, for Appellee.

Holland & Hart, L.L.P., Bradford C. Berge, Robert J. Sutphin, Jr., Santa Fe, NM, for Appellant.

OPINION

PICKARD, Judge.

{1} In this case, we decide whether the trial court abused its discretion in refusing to set aside a default judgment of foreclosure on a finding that the defendant had not presented a meritorious defense. Holding that

the trial court acted within its discretion, we affirm.

BACKGROUND

{2} This case arises out of a default judgment of foreclosure entered in favor of Plaintiff–Appellee, Magnolia Mountain Limited Partnership. Defendant–Appellant, Ski Rio Partners, does not dispute that the note was in default, but many of the other pertinent facts are disputed. Defendant's basic argument is that although it was properly served with a complaint for foreclosure, it did not answer the complaint because it relied to its detriment on Plaintiff's assertion that if Defendant cooperated, Plaintiff would not actually pursue foreclosure. Under established New Mexico law, a defendant seeking to set aside a default judgment must show grounds for relief under Rule 1–060(B) NMRA, which the foregoing facts tend to establish, and one or more meritorious defenses. *Sunwest Bank v. Roderiguez,* 108 N.M. 211, 213, 770 P.2d 533, 535 (1989). As discussed fully below, New Mexico case law generally requires us to accept all facts pleaded by the defendant in a motion to set aside a default judgment as true. *See id.* at 214–15, 770 P.2d at 536–37. Over the course of this litigation, however, Defendant has put forth at least four different versions of the disputed facts. Thus, we begin by setting forth the procedural history of the case and briefly explaining Defendant's factual allegations at each stage of the proceedings below.

FACTS AND PROCEDURAL HISTORY

{3} In 1998, Plaintiff sold Defendant some property in Northern New Mexico known as the Ski Rio Resort. The property was the subject of a mortgage and promissory note for $400,000 executed by Plaintiff and Defendant. Defendant asserts that it was "arguably in default" and admits that "it had not made all payments timely." After sending several demand letters threatening immediate foreclosure, Plaintiff filed its foreclosure complaint on February 28, 2003. Defendant was properly served with the complaint on March 10, 2003. Defendant did not answer the complaint. Plaintiff moved for an entry of default judgment on April 24, 2003, and on May 6, 2003, Judge Sam Sanchez entered the default judgment. A sale was conducted by a special master on June 4, 2003, at which Plaintiff bought the property.

{4} On August 8, 2003, Defendant moved to set aside the default judgment. In its motion, Defendant argued that Plaintiff's actions constituted fraud, misrepresentation, and misconduct, and that such a showing was all that was required to set aside the judgment under Rule 1–060(B)(3). Defendant argued that it was not required to show "that there would have been a different result had the fraud not occurred."

{5} In support of its arguments, Defendant attached an affidavit from its Project Manager, George Wollmann, which alleged the following facts. Upon receiving the foreclosure complaint, Defendant immediately contacted David Hendricks, the owner of the Plaintiff partnership. Mr. Hendricks stated that "if [Defendant] did not disagree with the dollar amount sought in the summons that [it] did not need to file an answer." Mr. Wollmann had suggested getting a New Mexico attorney, but one of Defendant's partners "did not want to waste the money if it was not necessary." Mr. Wollmann voiced this concern to Mr. Hendricks, who responded that "if [Defendant] did not disagree with the amount there was no reason to get an attorney to file an answer." Mr. Hendricks also said that there would be "plenty of opportunities to cure the defaults and that a lot of things had to happen and that the foreclosure process was very slow in New Mexico." Finally, there was a possibility that Defendant would sell the resort, and Mr. Hendricks told Defendant that if the planned sale went through, the sale would "occur before foreclosure and eliminate the controversy." In its motion, Defendant alleged that, because it trusted Mr. Hendricks, it chose not to answer the complaint.

{6} Defendant's motion also asserted that before and after the complaint was filed, it was trying to sell the resort and had found a potential buyer who was in the process of obtaining financing. Mr. Hendricks had "suggested" that Defendant "could sell the Resort before Mr. Hendricks took further action." Mr. Hendricks was an active participant in the negotiations with the potential buyer, cooperating in ironing out the details

relating to water rights. Even after he had "secretly" obtained the default judgment and had bought the property at the foreclosure sale, Mr. Hendricks continued to pretend to cooperate with Defendant in its efforts to sell the resort. Because Mr. Hendricks had "led [Defendant] to believe that ... he was content waiting for the sale ... or making other arrangements," Defendant took no actions regarding the foreclosure complaint.

{7} After argument, Judge Sanchez granted Defendant's motion and set aside the judgment, allowing Defendant to answer the complaint. Defendant answered the complaint and also for the first time deposited $528,854.05, which it characterized as the sum demanded by Plaintiff plus interest, into the court registry. Defendant included in its answer a third-party complaint against Mountain Highlands L.L.C., the current owner of the property, which was later dismissed from the case. Then, Plaintiff filed a motion asking Judge Sanchez to reconsider his decision setting aside the judgment. Before Judge Sanchez ruled on the motion to reconsider, Mountain Highlands removed him from the case by exercising a peremptory excusal. The case was reassigned to Judge Peggy Nelson.

{8} In both the response to Defendant's initial motion to set aside and the motion for reconsideration, Plaintiff argued that allegations of fraud were not alone sufficient to set aside a default judgment. Instead, Plaintiff asserted that a default judgment should be set aside only if a defendant can also show one or more meritorious defenses to the underlying action. Thus, Defendant filed an answer to the original foreclosure complaint alleging five defenses on the merits: unclean hands, waiver, laches, estoppel, and a separately numbered defense that "Plaintiff's claims are barred in whole or part by Plaintiff's own fraudulent conduct." Defendant also included a counterclaim, which sought damages and other relief.

{9} In support of its claims, Defendant modified its factual allegations as follows, but no new affidavits were ever filed. Defendant now claimed that it had been "negotiating" with Mr. Hendricks since December 2002, and that throughout the negotiations, Mr. Hendricks was "well aware of [Defendant's] intentions to either pay the amount owing ... or sell the property to a third party." Mr. Hendricks "knew or should have known that Ski Rio had the ability to pay the amount owing ... on short notice." Further, Mr. Hendricks "assured" Defendant that there was no reason to get an attorney or file a response to the foreclosure complaint. Mr. Hendricks made these "assurances" knowing they were false and with the intent to deceive Defendant so that it would not respond to the complaint.

{10} After hearing argument, Judge Nelson found that Defendant's response to the complaint did not assert any meritorious defenses. She then reinstated the default judgment. Judge Nelson allowed Defendant to file supplemental briefing on the issue of meritorious defenses. In the supplemental briefing, Defendant asserted several new defenses and made the following modifications to its factual allegations. Plaintiff, through Mr. Hendricks, "introduced" Defendant to the potential buyer of the property. Plaintiff told Defendant that "Plaintiff understood that it would get paid from the proceeds of the sale prior to any foreclosure taking place." As a result, Plaintiff indicated that the foreclosure was "no longer an issue." Finally, Mr. Hendricks "promised that he would not have to foreclose the property" so long as Defendant sold it to a particular buyer.

{11} After supplemental briefing and another hearing, Judge Nelson again denied the motion to set aside the default judgment. This appeal followed. In its appellate briefs, Defendant has yet again revised its facts. Now it alleges as follows. Defendant had told Plaintiff that it "stood ready and able to pay the mortgage, should [Plaintiff] deem payment necessary. Instead of paying the amount alleged to be owing, as [it] would have done," Defendant "accepted [Plaintiff's] promise that [Plaintiff] would not foreclose." The result was that Plaintiff "secretly foreclosed on the mortgage and promissory note, robbed [Defendant] of its redemption rights, purchased the property for itself, and thereafter sold it for a handsome profit."

STANDARD OF REVIEW

{12} We generally review a trial court's denial of a motion to set aside a default judgment for abuse of discretion. *Sunwest Bank,* 108 N.M. at 213, 770 P.2d at 535. Our Supreme Court has specifically held that the meritorious defense component of the analysis is also reviewed for abuse of discretion. *Id.* at 214, 770 P.2d at 536 ("The finding of a meritorious defense is addressed to the sound discretion of the trial court[.]").

DISCUSSION

Changing Factual Bases

{13} We first address the standard for conducting the meritorious defense analysis, as set forth in *Sunwest Bank,* 108 N.M. 211, 770 P.2d 533. In *Sunwest Bank,* our Supreme Court began by explaining that the reason for requiring a showing of a meritorious defense is "to ascertain whether there is some possibility that the outcome of the suit after trial will be different from the result achieved by the default." *Id.* at 214, 770 P.2d at 536. In order to allow for this determination, the Court held that the defendants must do more than assert "bare legal conclusions that lack factual support." *Id.* Rather, they must "'set[ ] forth relevant legal grounds substantiated by a credible factual basis.'" *Id.* (quoting *Kirtland v. Fort Morgan Auth. Sewer Serv., Inc.,* 524 So.2d 600, 606 (Ala.1988)). Although this showing requires more than "the mere notice requirements that would suffice if plead[ed] before default," *Sunwest Bank,* 108 N.M. at 214, 770 P.2d at 536, "facts stated in the . . . motion should be accepted as true." *Id.* at 215, 770 P.2d at 537.

{14} The standard set forth in *Sunwest Bank* is not completely clear. Specifically, it is unclear how the trial court is to determine whether the claims are supported by a "credible" factual basis when there has been no evidentiary hearing. *Id.* at 214, 770 P.2d at 536. "Credibility" is defined as "[t]he quality that makes something . . . worthy of belief." *Black's Law Dictionary* 396 (8th ed.2004). Thus, because *Sunwest Bank* also says that factual allegations should be "accepted as true" (i.e., believed), we do not think that the Court intended the word "credible" to be given its ordinary meaning. 108 N.M. at 215, 770 P.2d at 537.

{15} We take guidance in resolving this difficulty from *Kirtland,* 524 So.2d 600, which is the case our Court quoted for the proposition that a "credible factual basis" is required for a showing of a meritorious defense. *Sunwest Bank,* 108 N.M. at 214, 770 P.2d at 536. *Kirtland* also states that the movant must set forth "a clear and specific statement showing, not by conclusion, but by definite recitation of facts, that an injustice has been probably done by the judgment," 524 So.2d at 606 (internal quotation marks and citations omitted), and that the movant must "counter the cause of action averred in the complaint with specificity." *Id.* There is nothing in any of these statements, or in *Sunwest Bank,* indicating that a court conducting a meritorious defense analysis should weigh evidence to determine "credibility" in the normal sense of the word. Thus, the most logical reading of *Sunwest Bank* is that a litigant attempting to show a meritorious defense is subject to a heightened pleading requirement, similar to the pleading requirement under Rule 1–009 NMRA. *See, e.g.,* Rule 1–009(B) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").

{16} We also note that *Kirtland,* 524 So.2d at 606, relied on the Restatement (Second) of Judgments § 67 (1982), which states that the test employed in assessing whether a meritorious defense has been asserted is "essentially the same as used in considering summary judgment." *Id.* cmt. e. In New Mexico, summary judgment is proper where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Ocana v. Am. Furniture Co.,* 2004–NMSC–018, ¶ 12, 135 N.M. 539, 91 P.3d 58. In other words, the goal at the summary judgment stage is to determine whether there is a viable legal theory and whether there are genuine disputes with regard to the facts that must be proven in order to prevail on that legal theory.

{17} We agree with the Restatement that the meritorious defense analysis is analogous to the summary judgment analysis. As with summary judgment, the point of

requiring a showing of meritorious defense is to ensure that there is a reason to conduct a trial, i.e., to ensure that the movant has a viable legal theory and that there are genuine issues of fact that require submission to a factfinder. *See Sunwest Bank*, 108 N.M. at 214, 770 P.2d at 536 ("The object is to ascertain whether there is some possibility that the outcome of the suit after trial will be different from the result achieved by the default."). Thus, we determine that the *Sunwest Bank* standard is best summarized as follows: parties seeking to set aside a default judgment must assert a valid legal theory and allege with some particularity facts that would support that legal theory; such facts are to be taken as true, but in order to reopen the judgment and proceed to trial, the factual issues presented must be genuine.

{18} In the present case, Defendant argues that the trial court must have ignored the relevant standard from *Sunwest Bank*. It argues that in "light of the overwhelming evidence demonstrating [Defendant's] meritorious defenses, the only reasonable means by which the court below could have denied [Defendant's] motion is by weighing the facts asserted against those asserted by [Plaintiff]." Aside from this conclusory statement, Defendant fails to point to anything indicating that the trial court misapplied the relevant standard. Moreover, Defendant failed to designate any of the transcripts as part of the record on appeal. Plaintiff asserts that the trial court "expressly refrained from weighing facts, and held that there was no meritorious defense shown based on [Defendant's] stated allegations." Under these circumstances, we assume that the trial court followed the controlling law from *Sunwest Bank* and made its ruling based on Defendant's stated allegations. *See State v. Garcia*, 83 N.M. 794, 795, 498 P.2d 681, 682 (Ct.App.1972) ("[U]pon a doubtful or deficient record, every presumption must be indulged by this [C]ourt in favor of the correctness and regularity of the trial court's judgment.").

{19} However, for the reasons that follow, we also hold that the trial court would not have abused its discretion had it refused to rely on some of Defendant's later-pleaded allegations. Defendant's factual allegations have changed significantly over the course of these proceedings. Thus, we take guidance from a recent New Mexico case dealing with changing facts in the summary judgment context. In *Rivera v. Trujillo*, this Court upheld a district court's grant of summary judgment in a case involving an automobile accident. 1999–NMCA–129, ¶¶ 1–2, 12, 128 N.M. 106, 990 P.2d 219. In deposition testimony, one of the plaintiffs had admitted that he "blacked out" prior to the accident. *Id.* ¶ 10. When his attorney asked him what he understood the term "black out" to mean, the plaintiff replied, "More or less passing out, losing consciousness." *Id.* He also agreed that one who blacked out while driving would lose control of the vehicle. *Id.* Then, after the defendant had moved for summary judgment, the plaintiff submitted an affidavit in opposition to the motion. *Id.* ¶ 3. The affidavit stated that at his deposition, the plaintiff had not understood the meaning of the term "black out." *Id.* ¶ 11. The affidavit also asserted that he had only meant to say that he suffered memory loss following the accident, and that he had never intended to say that he lost consciousness prior to the accident. *Id.*

{20} This Court held that the plaintiff's affidavit did not create a genuine issue of material fact. *Id.* ¶ 12. The Court stated that "while it is not the judge's role to weigh the evidence at summary judgment," factual disputes must nonetheless be "*genuine*." *Id.* ¶ 8. The Court noted that most of the federal circuit courts have held that a plaintiff may not defeat summary judgment by raising a "sham issue of fact." *Id.* ¶ 9. The Court then adopted that doctrine as "consistent with New Mexico law." *Id.* The Court concluded that the allegations in the plaintiff's affidavit were an attempt to create a sham issue of fact: "Such post-hoc efforts to nullify unambiguous admissions under oath will not create a factual dispute sufficient to evade summary judgment." *Id.* ¶ 12.

{21} While we understand that it is not our place to weigh the facts, we hold that, in accordance with *Rivera*, factual disputes in the context of the meritorious defense analysis must be genuine and attempts to create

sham issues of fact will not be sufficient to support reopening the judgment. In this case, as in *Rivera*, we find that the inconsistencies in Defendant's allegations could have led the trial court to believe that Defendant was attempting to create a sham issue of fact. As detailed above, Defendant based its arguments in the initial motion to set aside on Plaintiff's alleged statement that "there was no reason for [Defendant] to get an attorney and file a response to the complaint, and that [Defendant] would have plenty of time to cure the alleged late payments on the promissory note." This alleged statement, however, was nothing more than Defendant's argument, which was in turn based on Mr. Wollmann's affidavit. The affidavit's statements concerning getting an attorney were focused on whether an answer to the complaint needed to be filed, and Mr. Hendricks indicated that if there was no contention that the dollar amount of money owed was incorrect, an answer did not need to be filed. The affidavit continued with Mr. Wollmann affirming that Mr. Hendricks told him that foreclosures "typically" took up to a year or more in New Mexico and for that reason there would be time to cure. An available inference from this affidavit was that Plaintiff was going to continue the suit to foreclosure. There was no promissory language in this affidavit. In Defendant's motion to set aside reinstated default judgment, however, Defendant alleges that Plaintiff "promised," both before and after filing the complaint, not to foreclose.

{22} Defendant's assertions regarding the alleged "promise" not to foreclose are belied by not only its own affidavit but also by the record in this case. As to the allegation that Plaintiff made a promise not to foreclose before filing the complaint, we note the existence in the record of the two demand letters sent from Defendant to Plaintiff. Both letters were sent before the complaint was filed, and Defendant does not deny having received them. The first letter, sent approximately two and one-half months before the complaint was filed, states that the note is in "serious default," and ends by remarking that, "you need to pay off this debt or if not, [Plaintiff] must proceed toward foreclosure." The second letter, sent by Plaintiff's attorney nearly two months prior to the filing of the complaint, states that "[w]e are instructed to inform you that if all amounts due are not paid by ten days from the date of this notice ... we will commence a suit for foreclosure[.]" Thus, Defendant's assertion that Plaintiff had "promised" not to foreclose in the period leading up to the filing of the complaint is simply not plausible. As to Defendant's assertion that Plaintiff filed the complaint and yet simultaneously and subsequently "promised" not to foreclose, we note that Defendant did not make any such allegation in its initial motion to set aside the default judgment. Thus, in accordance with *Rivera*, the trial court would not have abused its discretion had it chosen to disregard that allegation.

{23} In sum, we reiterate our assumption that the trial court accepted all of Defendant's initial factual allegations as true, but we hold that due to the inconsistencies in Defendant's own allegations, the trial court would not have abused its discretion if it had refused to rely on some of Defendant's later-pleaded factual assertions. *Cf. Freeman v. San Diego Ass'n of Realtors*, 77 Cal.App.4th 171, 91 Cal.Rptr.2d 534, 540 n. 3 (Ct.App. 1999) ("[Plaintiff] may not avoid defects of her earlier pleadings by omitting facts that made the earlier pleadings defective or alleging new facts inconsistent with the allegations of the earlier pleadings.").

{24} We now turn to the specific defenses raised by Defendant. Addressing each in turn, we hold that the trial court did not abuse its discretion in finding these defenses to be non-meritorious.

Promissory Estoppel

{25} Defendant first asserts that Plaintiff should not have been allowed to foreclose on the property based on the doctrine of promissory estoppel. The elements of promissory estoppel are:

> (1) An actual promise must have been made which in fact induced the promisee's action or forbearance; (2) The promisee's reliance on the promise must have been reasonable; (3) The promisee's action or forbearance must have amounted to a sub-

stantial change in position; (4) The promisee's action or forbearance must have been actually foreseen or reasonably foreseeable to the promisor when making the promise; and (5) enforcement of the promise is required to prevent injustice.

Strata Prod. Co. v. Mercury Exploration Co., 121 N.M. 622, 628, 916 P.2d 822, 828 (1996). According to Defendant, these elements are satisfied because (1) Plaintiff promised not to foreclose and in reliance on that promise, Defendant did not pay the amount owing, even though it otherwise could and would have; (2) this reliance was reasonable by virtue of the parties' long business history; (3) Plaintiff should have foreseen that Defendant would rely on the promise; and (4) "manifest injustice" will result if the promise is not enforced.

{26} We reject Defendant's argument because neither the initial motion to set aside the default judgment nor any of the documents filed in support of it (affidavit or memorandum of argument) contended that Plaintiff in fact "promised" not to foreclose on the note. Moreover, we are not convinced by Defendant's assertion that it reasonably relied on any promise. As Defendant itself states, its principal owner is "an experienced and prominent Dallas real estate investor" who has "transacted more than $600 million in land development projects." Thus, this is not a case in which one party is susceptible to being easily misled or taken advantage of due to unequal experience or bargaining power. *Cf. Fleet Mortgage Corp. v. Lacy*, No. 87 C 03804, 1990 WL 70852, at * 3 (N.D.Ill. May 10, 1990) (vacating a default judgment of foreclosure and stating that "[t]he Lacys claim they have put their life savings into the building. We believe equity would be served by allowing the Lacys the opportunity to defend on the merits against the loss of their investment"). In view of the circumstances of this case, we hold that it would have been well within the trial court's discretion to find that no promise was made and even if one were made, Defendant's reliance on it was unreasonable as a matter of law.

{27} We also agree with Plaintiff that any reliance by Defendant on the alleged promise would likely have been unreasonable due to the equivocal and ambiguous nature of most of the statements on which Defendant relies. At the beginning of this litigation, for example, Defendant only asserted (in the affidavit of its Project Manager) that Plaintiff told Defendant that "if [Defendant] did not disagree with the dollar amount sought in the summons, [it] did not need to file an answer." Defendant at this early stage also asserted reliance on Plaintiff's statement that "[Defendant] would have plenty of time to cure the alleged late payments on the promissory note." The implication from this statement was that Plaintiff was proceeding toward foreclosure, and therefore Plaintiff's statement to Defendant was mere opinion as to how long foreclosure would take. Defendant does not allege any specific promissory language on which it relied.

{28} Finally, with regard to the last element of promissory estoppel, we do not believe that "manifest injustice" will result from our refusal to enforce the "promise." As a general matter, we find no injustice in requiring defendants to respond to complaints for foreclosure. We acknowledge that promissory estoppel might be a valid theory in a case where a default judgment defendant alleged from the outset that the plaintiff had made assurances that the foreclosure proceeding was just a formality and should be ignored. This, however, is not such a case.

Waiver

{29} Defendant next asserts that Plaintiff's foreclosure claim is barred on a theory of "[w]aiver by acquiescence." Waiver by acquiescence "arises when a person knows he is entitled to enforce a right and neglects to do so for such a length of time that under the facts of the case the other party may fairly infer that he has waived or abandoned such right." *Sisneroz v. Polanco*, 1999–NMCA–039, ¶ 16, 126 N.M. 779, 975 P.2d 392 (internal quotation marks and citation omitted). However, "a trial court should not infer acquiescence from doubtful or ambiguous acts." *Id.*

{30} Defendant argues that Plaintiff waived its right to foreclose by waiting "almost two and one-half years" to file the

complaint. This period of time, Defendant argues, is "a reasonable period of time, under the circumstances, for [Defendant] to fairly infer that [Plaintiff] waived its right to foreclose." Plaintiff points out that the terms of the note and mortgage specifically preclude waiver of rights under those instruments, unless such waivers are in writing and signed by the mortgagee. We do not disagree with Defendant that "[a] written contract may be modified by a subsequent oral agreement, even though the written contract requires that modifications be in writing." *Powers v. Miller*, 1999–NMCA–080, ¶ 8, 127 N.M. 496, 984 P.2d 177. However, in view of the clear provisions in the note and mortgage, we hold that the trial court would not have abused its discretion in finding that, as a matter of law, Defendant could not have "fairly inferred" a waiver based on Plaintiff's statements and actions. We also note that Plaintiff's actions in waiting two and one-half years to foreclose are at best "doubtful and ambiguous" as indicators that it was intending to permanently waive its right to foreclose.

{31} We also agree with Plaintiff that a finding of waiver under these circumstances would have negative policy consequences. As Plaintiff argues,

> if a lender's willingness to negotiate with a debtor regarding a default resulted in . . . waiver of its right to pursue its contractual remedies, lenders would refuse to communicate with defaulting borrowers, would refuse to negotiate terms of payment, and would refuse to cooperate with reasonable attempts to sell property securing debts.

Laches

{32} Next, Defendant argues that Plaintiff was barred from foreclosing based on the doctrine of laches. Laches is an equitable defense under which an action is barred if four elements are present: (1) conduct by the defendant for which the plaintiff seeks a remedy; (2) avoidable delay by the plaintiff in bringing suit; (3) lack of knowledge on the defendant's part that the plaintiff would eventually seek to enforce the right; and (4) "prejudice to the defendant in the event relief is accorded to the complainant or the suit is not held to be barred." *Martinez v. Martinez*, 2004–NMCA–007, ¶ 21, 135 N.M. 11, 83 P.3d 298. We agree with Defendant that the first two elements are met. However, as explained above in our analysis of the waiver defense, we do not see how Plaintiff's actions in waiting some length of time before filing suit for foreclosure could have given Defendant any reasonable expectation that Plaintiff had decided to permanently forego the remedy of foreclosure.

{33} As to the fourth element of laches, Defendant argues that it has been prejudiced because Plaintiff foreclosed on its property and it thereby lost a significant amount of money. We do not agree that this is the type of prejudice contemplated by the doctrine of laches. A defendant who loses a lawsuit is always "prejudiced" in the sense that he or she suffers harm. However, to support a defense of laches, the prejudice alleged must be a result of the delay itself, not merely a result of the suit being brought or the defendant losing the suit. *Brown v. Taylor*, 120 N.M. 302, 306, 901 P.2d 720, 724 (1995) (citing *Garcia v. Garcia*, 111 N.M. 581, 589, 808 P.2d 31, 39 (1991) for the proposition that the "party asserting a laches defense must show injury or prejudice resulting from the delay"). Defendant has offered no reason why it was prejudiced by Plaintiff's delay in filing the action. We thus hold that the trial court did not abuse its discretion in finding that Defendant had not presented a meritorious defense of laches.

Novation

{34} In the statement of issues in its brief in chief, Defendant lists novation as one of its defenses. Nowhere else does the brief in chief mention novation. *See Stewart v. Lucero*, 1996–NMSC–027, ¶ 8 n. 1, 121 N.M. 722, 918 P.2d 1 ("[P]oints of error identified in the statement of proceedings but neither briefed nor supported by authority [are] considered abandoned."). However, Plaintiff does address novation in its answer brief, and Defendant addresses Plaintiff's arguments in its reply brief. Ordinarily, an issue is abandoned on appeal if it is not raised in the brief in chief. *Barreras v. N.M. Motor Vehicle Div.*, 2005–NMCA–055, ¶ 1, 137 N.M. 435, 112 P.3d 296. However, in the

interest of completeness, we exercise our discretion to briefly address the novation defense.

{35} Novation occurs where the following four elements are present: "1) an existing and valid contract; 2) an agreement to the new contract by all the parties; 3) a new valid contract; and 4) an extinguishment of the old contract by the new one." *Maulsby v. Magnuson,* 107 N.M. 223, 226, 755 P.2d 67, 70 (1988) (internal quotation marks and citation omitted). Defendant appears to argue that (1) it agreed, at Plaintiff's request, to sell the property to a specific buyer; (2) this agreement constituted new consideration, which formed a new contract; and (3) this new contract replaced the old contract that was memorialized in the note and mortgage. In the affidavit accompanying its original motion to set aside the default judgment, however, Defendant's Project Manager made the following statement: "Throughout all these conversations, [Mr. Hendricks] led me to believe that he was content with waiting for the sale of the property to Mr. Sunday or making other arrangements for payment of the outstanding balance in the event that the sale was not completed." To the extent that Defendant now alleges that it promised to sell the property to a specific buyer at Plaintiff's request, we disregard this allegation because it directly contradicts the facts asserted in the Project Manager's affidavit. *Cf. Healthsource, Inc. v. X-Ray Assocs.,* 2005-NMCA-097, ¶ 19, 138 N.M. 70, 116 P.3d 861 (following the Texas rule that "where an obligation in the pleading does not conform to the writing exhibited as a basis thereof, the document rather than the pleading controls."); *see also Freeman,* 91 Cal.Rptr.2d at 540 n. 3 ("[W]e disregard allegations ... contradicted by the express terms of an exhibit incorporated into the complaint. [Plaintiff] may not avoid defects of her earlier pleadings by omitting facts that made the earlier pleadings defective or alleging new facts inconsistent with the allegations of the earlier pleadings." (citation omitted)). Moreover, there was no new consideration for the new contract. Thus, we hold that the trial court did not abuse its discretion in deciding that the defense of novation was non-meritorious as a matter of law.

Unclean Hands

{36} Defendant next asserts that because foreclosure is an equitable remedy, Plaintiff should be barred from seeking foreclosure on a theory of unclean hands. The doctrine of unclean hands generally prevents a complainant from recovering where he or she "has been guilty of fraudulent, illegal or inequitable conduct in the matter with relation to which he [or she] seeks relief." *Home Savs. & Loan Ass'n v. Bates,* 76 N.M. 660, 662, 417 P.2d 798, 799 (1966).

{37} First, although the parties have not specifically argued this point, it seems unlikely that the defense of unclean hands is applicable under these circumstances. Generally, the doctrine is appropriately invoked only where the complainant "dirtied [his or her hands] in acquiring the right he [or she] now asserts." *Romero v. Bank of the Southwest,* 2003-NMCA-124, ¶ 38, 135 N.M. 1, 83 P.3d 288 (internal quotation marks and citation omitted). Here, there has been no allegation of impropriety in the execution of the note and mortgage. Thus, Plaintiff apparently has done nothing inequitable in "acquiring the right" to foreclose. Second, we note that particular deference is given to trial court rulings involving unclean hands. *See Wolf & Klar Cos. v. Garner,* 101 N.M. 116, 118, 679 P.2d 258, 260 (1984) ("The application of doctrines of 'clean hands' or other such equitable defenses rests in the sound discretion of the trial court. Absent a clear abuse of discretion, the trial court's exercise thereof will not be disturbed on appeal." (citation omitted)). Finally, we note that "equity aids the vigilant, not those who slumber on their rights." *Thompson v. Montgomery & Andrews, P.A.,* 112 N.M. 463, 467, 816 P.2d 532, 536 (Ct.App.1991) (internal quotation marks and citation omitted). Despite Defendant's protestations that Plaintiff led it astray, we do not find it "vigilant" to purposefully ignore a complaint for foreclosure. For all of these reasons, we hold that the trial court did not abuse its discretion in finding that unclean hands was not a meritorious defense to the foreclosure action.

Cure

{38} Finally, Defendant asserts that "cure," which it defines as "ability to pay," is a meritorious defense in a foreclosure action. Defendant further argues that when Judge Sanchez initially set aside the default judgment, it deposited the total amount alleged to be owing into the court registry. This action, Defendant argues, cured the alleged default "as a matter of law."

{39} Plaintiff first argues that Defendant's cure argument was not properly preserved for appeal because it was not raised in the Motion to Set Aside Reinstated Default Judgment. In order to preserve an issue for appeal, the issue must have been raised before the trial court such that it "appear[s] that [the] appellant fairly invoked a ruling of the trial 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 Judge Nelson's "Order Denying Ski Rio's Motion to Set Aside Reinstated Default Judgment" is the final order that we are reviewing in this appeal, we would tend to agree with Plaintiff that Defendant did not "fairly invoke[ ] a ruling of the trial court" with regard to its cure defense. However, because Defendant did raise the cure defense in its original motion to set aside the default judgment, we will briefly address it.

{40} Plaintiff argues that even if the cure defense was preserved, it fails as a matter of law because default is cured by tender, and not by the mere ability to pay or even an offer to pay. We agree. In *Miller v. Johnson*, 1998-NMCA-059, 125 N.M. 175, 958 P.2d 745, we held that buyers under a real estate contract had failed to cure a default. *See id.* ¶ 2. The real estate contract at issue in *Miller* provided that all defaults had to be cured within thirty days. *Id.* ¶ 7. On the last day on which the default could be cured, the buyers' attorney was informed by the escrow agent that payment would not be accepted without a written statement from the sellers indicating that repairs to the property had been performed. *Id.* ¶ 11. The buyers' attorney called the sellers' attorney and said that funds were available to pay the total amount due, but that the escrow agent would not accept the money. *Id.* ¶ 12. However, the buyer did not actually deliver any funds within the time for curing default. *Id.* We held that these actions did not constitute a tender sufficient to cure the default. *Id.* ¶ 22.

{41} We defined tender as follows: "Tender is an offer to perform coupled with the present ability of immediate performance, so that the obligation could be satisfied but for the other party's refusal to cooperate." *Id.* ¶ 21. We then held that tender had not occurred:

> It is undisputed that Buyers did not deliver a check to pay the default in the monthly installments prior to the expiration of the cure period. The offer to deliver a check merely evidences an intention and does not constitute a tender, since the offer to deliver a check, as opposed to the presence of a check in the default amount, does not satisfy Buyers' obligation to cure the payment defaults.

Id. ¶ 22. In view of our holding in *Miller*, we agree with Plaintiff that having the ability to pay and depositing money in the court registry only after a judgment of foreclosure has been set aside are not actions sufficient to constitute cure.

{42} In support of its cure argument, Defendant cites two cases from other jurisdictions that do not support its position. *See Sanders v. Kerwin*, 413 N.E.2d 668, 671 (Ind. Ct.App.1980) (holding that the allegation that only $275 dollars was owed is a meritorious defense to a claim for $475); *James V. Zelch, M.D., Inc. v. Reg'l MRI of Orlando, Inc.*, No. 81826, 2003 WL 1393743, ¶ 17 (Ohio Ct.App. March 20, 2003) (vacating default judgment when the defendant had shown a meritorious defense by attaching to the motion a settlement agreement that purported to release the defendant from all liability).

{43} Defendant does point to one unpublished federal district court decision that appears to support the argument that "ability to pay" is a defense to an action for foreclosure. *Fleet Mortgage Corp.*, 1990 WL 70852, at *3. In *Fleet Mortgage Corp.*, the defendants defaulted on payments due on their home mortgage. *Id.* at *1. The mortgage

company filed a foreclosure complaint, and at least one of the defendants admitted that she had been personally served with a summons and complaint, but asserted that she "did not know what to do" and did not understand that a default judgment would be entered if she did nothing. *Id.* at *1. When the defendants failed to respond to the complaint, a default judgment of foreclosure was entered and the mortgage company purchased the property at the foreclosure sale. *Id.* In support of their motion to vacate the default judgment, the defendants submitted affidavits stating that they were "ready, willing and able to pay" the money owed because they now had "access to the necessary funds." *Id.* at *3. The court vacated the default judgment, holding that ability to pay was a viable defense and that the affidavits "provide[d] a sufficient factual basis for the [Lacy's] defense." *Id.* We note that there is no indication in the *Fleet Mortgage Corp.* case that the defendants at any point actually tendered the money owing to the mortgage company. Rather, they relied solely on their ability to pay.

{44} We decline to follow *Fleet Mortgage Corp.* While the result in that case may have been justified by the particular circumstances present, we believe that adoption of "ability to pay" as a generally available defense to foreclosure would have negative policy consequences. If that were the rule, a foreclosure defendant could simply ignore the complaint, allow a default judgment to be entered, spend time gathering funds, and then move to have the default judgment set aside on the basis that the default could now be "cured." Of course, such a defendant would still be required to show grounds to set aside the judgment under Rule 1–060(B). *See Sunwest Bank*, 108 N.M. at 213, 770 P.2d at 535 ("A party seeking relief from a default judgment must show the existence of grounds for relief under Rule 1–060(B), and a meritorious defense."). But the practical effect of adopting the "ability to pay" defense would be to eliminate the meritorious defense requirement as to default judgments of foreclosure. Thus, we hold that the trial court did not abuse its discretion in finding that cure under the factual circumstances of this case is not a meritorious defense to a foreclosure action.

CONCLUSION

{45} We hold that the trial court did not abuse its discretion in finding that none of Defendant's proffered defenses were meritorious. Thus, we affirm the trial court's order refusing to set aside the default judgment.

{46} Plaintiff's request for attorney fees, as provided in the note and mortgage, is granted. Plaintiff may either ask this Court to set an amount by motion providing this Court with sufficient information to make an award, *see* Rule 12–403(B)(3) NMRA for time limits, or Plaintiff may have the district court set an amount in its judgment or the mandate.

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

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

2006-NMCA-036

131 P.3d 687

Socorro Sandra CADENA, Shannon Horst, Orlando Olivas, the South Valley Coalition of Neighborhood Associations, and the Southwest Organizing Project, Appellants–Respondents,

v.

The BERNALILLO COUNTY BOARD OF COUNTY COMMISSIONERS, Alan B. Armijo, Michael Brasher, Tim Cummins, Steve Gallegos, and Tom Rutherford, Bernalillo County Commissioners, and Southwest Landfill, Llc., Appellees–Petitioners.

No. 25,381.

Court of Appeals of New Mexico.

Feb. 2, 2006.

New Mexico Environmental Law Center, Douglas Meiklejohn, Eric Jantz, Roderick Ventura, Santa Fe, NM, for Respondents.

Modrall, Sperling, Roehl, Harris & Sisk, P.A., Zachary L. McCormick, Arthur D. Melendres, Sutin, Thayer and Browne, PC, Kerry Kiernan, Albuquerque, NM, for Petitioners.

OPINION

VIGIL, Judge.

{1} The Bernalillo County Board of County Commissioners (the Board) and the Albuquerque City Council jointly adopted the Bernalillo County Groundwater Protection Policy and Action Plan (GPPAP) (pronounced gee-pap). The GPPAP prohibits the expansion of a landfill in a "crucial area" to protect underlying groundwater and thereby assure its quality for human consumption and economic uses. The GPPAP also states, "Crucial areas are *defined* in Attachment E and *mapped* in Attachment F." (Emphasis added.) This case requires us to determine the relationship of "crucial areas" as they are "mapped" and "crucial areas" as they are "defined." Specifically, we are asked to make the legal determination of whether a landfill that is located in a "crucial area" on the map attached to the GPPAP prohibits any further inquiry into whether the location of the landfill actually satisfies the "crucial area" definition that is separately set forth in the GPPAP.

{2} On appeal from a decision of the Board, which had concluded that the landfill at issue was not in a crucial area, the district court concluded that the map alone controls the crucial area determination. Alternatively, the district court ruled that the administrative record supports a conclusion that the landfill at issue is in a crucial area as defined in the GPPAP. We granted Southwest's petition for a writ of certiorari to review the district court decision pursuant to Rule 12–505 NMRA.

{3} We conclude that while the map creates a generalized presumption that a landfill is located in a crucial area, it is not conclusive. If the specific landfill location does not meet the criteria set forth in the definitional section, it is exempt from the generalized presumption established by the map. We also conclude that the district court acted outside its capacity as an appellate court by engaging in fact-finding when it determined

that the administrative record supports a conclusion that the landfill is in a crucial area as defined in the GPPAP. Finally, because the issue of whether the landfill fits within the GPPAP's definition of "crucial area" is a mixed legal and factual inquiry, and the Board failed to make adequate findings, any meaningful appellate review is not possible. We remand to the district court with instructions to remand to the Board to make findings.

BACKGROUND

{4} Southwest Landfill, L.L.C., (Southwest) filed an application with Bernalillo County to amend its special use zoning permit to allow an expansion of a construction debris landfill that it operates southwest of Albuquerque. The matter was initially considered by the Bernalillo County Extraterritorial Land Use Commission (ELUC), which denied the application based on a number of grounds, including a determination that the application was inconsistent with the GPPAP's prohibition against landfill expansion in crucial areas. The ELUC relied on the fact that the site is "clearly" within a crucial area zone as depicted by the GPPAP map entitled "Generalized Crucial Areas in Bernalillo County."

{5} Southwest appealed to the Board, which overruled the ELUC and granted the amendment to the special use permit subject to a number of conditions. With respect to the dispute over the site's designated status, the Board simply entered a finding stating that "[t]he landfill is not located in a crucial area as defined by the [GPPAP.]"

{6} Respondents, a coalition of neighboring citizens and community interest groups, appealed the Board's decision to the district court. Acting in its appellate capacity pursuant to Rule 1–074 NMRA, the district court reversed the Board on two alternative grounds. First, the district court ruled as a matter of law that inclusion of the landfill in a crucial area zone as depicted by the Generalized Crucial Area Map conclusively resolves the issue of whether the landfill is in a crucial area. In coming to this conclusion, the district court rejected the view that the GPPAP permits determining whether land is in a crucial area on a parcel-by-parcel basis. Alternatively, if a parcel-by-parcel determination was permissible, the district court concluded that the Southwest landfill location satisfies a crucial area definition, citing certain portions of the administrative record in support of its decision.

STANDARD OF REVIEW

{7} We employ an administrative standard of review when determining whether a district court, sitting as an appellate court, erred in its review of an administrative decision. *See Gallup Westside Dev., LLC v. City of Gallup,* 2004–NMCA–010, ¶ 10, 135 N.M. 30, 84 P.3d 78. That is to say, we review the Board's decision the same way the district court does when sitting in its appellate capacity to determine if the administrative decision is arbitrary, capricious, or an abuse of discretion; not supported by substantial evidence in the record; or otherwise is not in accordance with the law. *Id.; see* NMSA 1978, § 39–3–1.1(D) (2005); Rule 1–074(Q). At the same time, we review the GPPAP and the related ordinances de novo, using the same rules of construction that apply to statutes. *See Smith v. Bernalillo County,* 2005–NMSC–012, ¶ 18, 137 N.M. 280, 110 P.3d 496. We look to the plain language as the primary indicator of legislative intent, giving words their ordinary meaning. *High Ridge Hinkle Joint Venture v. City of Albuquerque,* 1998–NMSC–050, ¶ 5, 126 N.M. 413, 970 P.2d 599. We do not read language into the ordinances unless they do not make sense. *Id.* As discussed below, we are interpreting the GPPAP together with a related ordinance. We therefore attempt to harmonize the language of each ordinance and facilitate their respective underlying purposes. *See Pub. Serv. Co. v. N.M. Pub. Util. Comm'n,* 1999–NMSC–040, ¶ 23, 128 N.M. 309, 992 P.2d 860.

DISCUSSION

{8} We initially consider the legal definition of "crucial area," and then we review the Board's decision in light of our discussion.

I. Crucial Area Definition

{9} The starting point for our analysis is a review of this Court's decision in an earlier appeal involving this same landfill. In *Atlixco Coalition v. County of Bernalillo,*

1999–NMCA–088, 127 N.M. 549, 984 P.2d 796, Southwest was granted a permit to include municipal waste in addition to the construction debris accepted at the landfill. The permit was challenged on the ground that the Board failed to consider compliance with the GPPAP and the County's Resolution No. 116–86 (Oct. 21, 1986). The Resolution sets forth criteria to consider when reviewing a request for zone map changes and special use applications. *Atlixco Coal.*, 1999–NMCA–088, ¶ 12, 127 N.M. 549, 984 P.2d 796. We concluded that the GPPAP and Resolution No. 116–86 had the force of the law because it had been incorporated into a subsequent ordinance dealing with the disposal of solid waste in the county. *Atlixco Coal.*, 1999–NMCA–088, ¶ 16, 127 N.M. 549, 984 P.2d 796. Referring to Resolution No. 116–86, we noted that "[w]hen invoked, this provision thus imposes substantive and procedural guidelines for any zone map changes and applications for special-use permits." *Atlixco Coal.*, 1999–NMCA–088, ¶ 14, 127 N.M. 549, 984 P.2d 796.

{10} Resolution No. 116–86, provides in pertinent part that, "A proposed land use change shall not be in significant conflict with adopted elements of the Comprehensive Plan or other County Master Plans and amendments thereto including privately developed area plans which have been adopted by the County." *Id.* Ordinance 96–22 explicitly requires compliance with the GPPAP before disposal of solid waste may occur. *Atlixco Coal.*, 1999–NMCA–088, ¶ 16, 127 N.M. 549, 984 P.2d 796. Therefore, we consider whether Southwest's application is "in significant conflict with" the GPPAP. The district court concluded that it is, because the site of the landfill is indisputably within a crucial area as depicted by the map labeled "Generalized Crucial Areas in Bernalillo County." The district court agreed with Respondents' argument that "a parcel-by-parcel determination would negate the protection provided by GPPAP because it would allow removal of properties with the potential to generate contamination." This reasoning, however, reads into the GPPAP language that is not there. If the County wanted the Generalized Map to prohibit a parcel-by-parcel consideration based on the policies of the GPPAP and the procedure set forth in Resolution No. 116–86 and Ordinance 96–22, it could have explicitly so stated. *See Smith*, 2005–NMSC–012, ¶ 23, 137 N.M. 280, 110 P.3d 496 (noting that, if the county intended to place height restriction within a particular zone, it could have expressly so stated).

{11} As indicated, the GPPAP expressly prohibits new landfills or expansion of existing landfills in a crucial area. This achieves one of its stated policies, which is to "prohibit or control releases of substances having the potential to degrade the ground-water quality." The GPPAP then lists nine "Protection Measures" in Section 3, with a stated rationale. The "Protection Measure" that is pertinent to this case and its stated rationale is described as follows:

PROHIBIT OR RESTRICT ACTIVITY IN CRUCIAL AREAS	RATIONALE: Ground water underlying crucial areas must be protected to assure its quality for human consumption and economic uses. Crucial areas are defined in Attachment E and mapped in Attachment F. Potential short-term economic gains associated with hazardous materials, septic tanks, and other pollution threats cannot begin to offset the long-term environmental and economic costs to clean up polluted ground water.

The definition contained in Attachment E is the following:

> Crucial areas. An area having one or more of the following characteristics: (1) a modified DRASTIC Index equal to or greater than 100; (2) areas used or likely to be used for public and private water supply; (3) a hydrogeologic setting, such as fractured bedrock, where conditions may allow the rapid movement of contaminants; or (4) within the 30–year capture zone of a public water-supply well.

{12} The map referred to as Attachment F is entitled, "Generalized Crucial Areas in Bernalillo County," and it is, as suggested by its title, a very generalized map, depicting three large crucial areas that make up well over half of the surface area of Bernalillo

County. No specific parcels of property are identified. The generalized crucial areas are identified as (1) a "Crucial area where groundwater occurs in the Albuquerque ground-water basin"; (2) a "Crucial area where ground water occurs in the Madera Limestone"; and (3) a "Crucial area where ground water occurs in low-flow fractured rocks." The small scale of the map, the failure to identify specific parcels of property, and the broad designation of these categories indicates that they were not intended to conclusively determine whether any specific parcel of property is, in fact, crucial. Furthermore, the definition of "crucial area" in Attachment E is included on the generalized map itself. We therefore agree with Southwest that the definition would be surplusage if the map alone controls what constitutes a crucial area. *See In re Rehabilitation of W. Investors Life Ins. Co.*, 100 N.M. 370, 373, 671 P.2d 31, 34 (1983) ("Statutes must be construed so that no part of the statute is rendered surplusage or superfluous.").

{13} Respondents attempt to counter this result by referring us to the following language found elsewhere in the GPPAP:

> Within crucial areas and wellhead protection areas, certain activities will be prohibited or restricted as detailed in Section 3 of this policy. The regulations will define these areas, identify the restrictions and prohibitions, and appropriately amend the existing ordinances. *Crucial areas in Bernalillo County have been defined (Attachment F [the Crucial Area map]), but this small-scale map and maps of wellhead protection areas need to be refined to parcel specificity and updated as new wells are added.*

(Emphasis added.)

{14} Respondents contend that there are three keys to interpreting this provision. First, they argue that the reference to the small-scale map and the need for refinement contemplates a parcel-by-parcel review only to determine if a specific parcel is in fact in a crucial area and depicted on the generalized map when those properties are located near the edge of the boundaries. Again, we believe that Respondents are reading in language that is not there. The GPPAP could have simply stated that a parcel-by-parcel review may be necessary where the map is unclear. Second, Respondents argue that only the map can be changed to reflect "parcel specific" changes because the provision only refers to the map and not the definitions in Attachment E when referring to refining its provision to "parcel specificity." We disagree. The definitions themselves are contained on the map of the crucial areas and thus it is inaccurate to refer to the map in isolation without consideration of the definitions that are repeated on the map. Finally, Respondents argue that when the provision states that crucial areas "have been defined" by referring only to the generalized map, this means that the inquiry has been completed, the crucial areas have been defined, and they are on the map. This, however, begs the question before us. In addition, it ignores the fact that the words "have been defined" were written in a document adopted in 1993–94, which contains a time line, indicating that wellhead protection areas and crucial areas would be "designate[d]" in 1997. It also ignores other indications that the special use permit process can be used to remove a specific property from being designated a crucial area. The fact that crucial areas have been broadly designated does not unalterably prevent further review for a specific parcel of property. To the contrary, the language quoted above supports the view that the GPPAP is an evolving document, with the development of wells being of particular concern.

{15} It would not serve the purpose of the GPPAP for an area to be designated as "crucial" when, by the GPPAP's own definition, it is not. When words are defined in the statute, we must interpret the statute according to those definitions, because those definitions reflect what the legislative intent is. *Sw. Land Inv., Inc. v. Hubbart*, 116 N.M. 742, 743, 867 P.2d 412, 413 (1993); *see* 2A Norman J. Singer, *Statutes and Statutory Construction* § 47:07, at 227–28 (6th ed. 2000) ("As a rule a [statutory] definition which declares what a term means is binding on the court."). We therefore agree with Southwest that a two-step inquiry is contemplated. First, a determination is made

whether the subject parcel is located within the boundary of one of the three crucial areas on the generalized map. Second, reading the GPPAP together with Resolution No. 116–86 and Ordinance 96–22, if the property is located within a crucial area, as depicted on the generalized map, the applicant has the burden to show that the site is not a "crucial area" as defined by the detailed definitions set forth in Attachment E, and that the application is otherwise "consistent with the community's general welfare." *Atlixco Coal.*, 1999–NMCA–088, ¶ 14, 127 N.M. 549, 984 P.2d 796. Contrary to Respondent's argument that a parcel-by-parcel determination renders the map "meaningless," this two-step approach harmonizes these otherwise conflicting portions of the GPPAP and provides a more reasoned implementation of its underlying policies. *See High Ridge Hinkle Joint Venture,* 1998–NMSC–050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (stating that portions of statutes "must be read together so that all parts are given effect"); *Romero v. Valencia County,* 2003–NMCA–019, ¶ 8, 133 N.M. 214, 62 P.3d 305 ("[A] statute is read in its entirety and each part is construed with every other part to achieve a harmonious whole[.]").

II. The Board's Decision

{16} The GPPAP defines four types of crucial areas in Attachment E. The only dispute in this case is whether the Southwest landfill falls into the second category: "areas used or likely to be used for public and private water supply." The administrative record in this case contains conflicting evidence on the issue, and it is unclear what "area" needs to be considered for making a determination of whether a property fits within this definition of a crucial area. The Board simply made a finding that "[t]he landfill is not located in a crucial area as defined by the [GPPAP]." The district court, after initially ruling that the map controlled, alternatively determined that the administrative record supports a finding that the landfill is in an area that is likely to be used for public and private wells. The district court referenced portions of the administrative record that it believed to support this determination.

{17} In particular, the district court relied on the predictions of city and county staff that they anticipated increased residential development on the southwest mesa and a consequent need for water for which the residents would rely on private wells. In addition, there was testimony by Respondents about a few existing wells in varying numbers of feet from the landfill and predictions about the likelihood of future wells. However, Southwest presented evidence to the Board of an expert hydrologist, whose opinion was that the water quality and depth in the area of the landfill would make the drilling of wells there expensive, underproductive, and uneconomic, and therefore unlikely.

{18} We agree with Southwest that the district court improperly engaged in fact finding, in effect substituting its judgment for that of the Board on the issue of whether the landfill is within a crucial area as defined by the GPPAP. *See Paule v. Santa Fe Bd. of County Comm'rs,* 2005–NMSC–021, ¶ 32, 138 N.M. 82, 117 P.3d 240 (observing rule that reviewing courts "may not substitute their decision for that of the zoning authority and conclude that there is evidence supporting a different conclusion"). In this case, however, we do not believe that a meaningful appellate review can be made absent additional findings from the Board. *See Apodaca v. Payroll Express, Inc.,* 116 N.M. 816, 822, 867 P.2d 1198, 1204 (Ct.App.1993) (noting that appellate court will remand for additional findings when necessary). The definitional section contained in the GPPAP, particularly the determination of what "area" is to be considered, presents a mixed issue of law and fact. The GPPAP's stated rationale for the designation of crucial areas, set forth earlier in this opinion, provides a legal framework for deciding any site-specific "area" definition, but this involves a fact-intensive inquiry that must be set forth in the record. In the absence of such findings on the issue, we find it necessary to remand, after which, if the result is the same, the district court may revisit the "crucial area" issue and the other grounds Respondents raised in their appeal to that court.

CONCLUSION

{19} For the reasons discussed above, we reverse the district court with instructions to remand to the Board for proceedings consistent with this opinion.

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

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

2006-NMCA-041

131 P.3d 693

Kennith and Edna HURLEY, husband and wife, Plaintiffs–Appellants,

v.

VILLAGE OF RUIDOSO, a New Mexico Municipality, Defendant–Appellee.

No. 25,572.

Court of Appeals of New Mexico.

Feb. 27, 2006.

Richard A. Hawthorne, P.A., Richard A. Hawthorne, Ruidoso, NM, for Appellants.

H. John Underwood, Ltd., Zach Cook, Ruidoso, NM, for Appellees.

OPINION

FRY, Judge.

{1} This case presents us with the opportunity to clarify whether municipalities are subject to statutes of limitations. In this declaratory judgment action, Plaintiffs Kennith and Edna Hurley appeal from an order granting summary judgment in favor of the Village of Ruidoso, determining that the Village's claim of lien was not time barred. The district court reasoned that the statutes of limitations could not be pleaded as a defense against the Village's claim because the Village was a subdivision of the State of New Mexico, against which statutes of limitations do not run. We hold that the Village is subject to statutes of limitations, and we therefore reverse the district court's order granting summary judgment in favor of the Village.

BACKGROUND

{2} The material facts are undisputed. Plaintiffs alleged in their complaint that they owned two residential lots in the Village, which they sold to third parties. The third parties defaulted, and Plaintiffs foreclosed the mortgage and bought the property at the foreclosure sale. Plaintiffs alleged that the third parties had failed to pay water and sewer fees, and the Village recorded a claim of lien against the property on March 20, 2000. In the process of selling the property,

Plaintiffs discovered the lien and on March 23, 2004, demanded that the Village release the lien because the statutes of limitations had expired. The Village refused, and Plaintiffs paid the debt to release the lien. Plaintiffs subsequently filed a complaint for declaratory relief on the statutes of limitations issue and for the return of their payment. The Village responded that the statutes of limitations could not be pleaded against it. Both parties moved for summary judgment, and the district court entered summary judgment in favor of the Village. This appeal followed.

DISCUSSION

{3} We review the district court's grant of summary judgment de novo. *Self v. United Parcel Serv., Inc.,* 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. We address only one legal issue in this appeal: whether or not the four-year statutes of limitations set forth in NMSA 1978, § 37-1-4 (1880), can be pleaded as a defense to a claim for a municipal water lien.

{4} The Village argued successfully to the district court that Plaintiffs could not raise the statutes of limitations as a defense because the Village is an auxiliary of the State, and, therefore, that this case is governed by the general common law rule that statutes of limitation do not run against the State. *See Bd. of Educ. v. Standhardt,* 80 N.M. 543, 549, 458 P.2d 795, 801 (1969); *see also Valdez v. Valdez (In re Valdez),* 136 B.R. 874, 876 (Bankr.D.N.M. 1992). The general common law rule, as expressed in *Standhardt,* is

> that statutes of limitations do not run against the state unless the statute expressly includes the state or does so by clear implications, but will run against county and other political subdivisions, including school districts, unless such may be deemed to be an arm of the state because of the particular governmental functions or purposes involved.

80 N.M. at 549, 458 P.2d at 801; *see also In re Valdez,* 136 B.R. at 876.

{5} In *Standhardt,* our Supreme Court addressed the question of whether a school board could bring an action against a company after the statutes of limitations had run on the school board's claim. 80 N.M. at 548, 458 P.2d at 800. In analyzing this issue, the Court construed and applied the statute now compiled as NMSA 1978, § 37-1-19 (1880), which provides that statutes of limitations apply to "actions brought by or against all bodies corporate or politic, except when otherwise expressly declared." The Court reasoned that while the common law rule protects the State from statutes of limitations, the statute, Section 37-1-19, makes statutes of limitations applicable in actions involving other political subdivisions. *Standhardt,* 80 N.M. at 550, 458 P.2d at 802. In construing the equivalent statute to Section 37-1-19, the Court determined that a political subdivision would only be immune from the statutes of limitations when the State was the real party in interest in the claim brought by or against that subdivision. *Standhardt,* 80 N.M. at 550, 458 P.2d at 802. That reasoning was subsequently applied by the Court in *State ex rel. Stratton v. Alto Land & Cattle Co.,* 113 N.M. 276, 824 P.2d 1078 (Ct.App.1991), *superseded by statute on other grounds,* NMSA 1978, § 47-6-2 (2005), *as recognized in State ex rel. Udall v. Cresswell,* 1998-NMCA-072, ¶ 3, 125 N.M. 276, 960 P.2d 818. In *Alto Land & Cattle Co.,* the Court determined that the state was a real party in interest in an action brought by Lincoln County because under the relevant statute, the Attorney General was authorized to bring the action. Accordingly, the action was not time-barred. 113 N.M. at 285-86, 824 P.2d at 1087-88.

{6} Relying on *Standhardt,* Plaintiffs point out that the Village is a "body corporate or politic" under NMSA 1978, § 3-18-1 (1972), which defines municipalities. Because Section 37-1-19 expressly states that statutes of limitations apply to bodies corporate or politic, Plaintiffs argue, the Village is not immune from Plaintiffs' statute-of-limitations defense. In addition, Plaintiffs maintain that the Village has not demonstrated that the State was the real party in interest in a municipal water lien.

{7} The Village makes two arguments in response, neither of which suggests that the State is the real party in interest in this

action. The Village contends that more recent case law has held that municipalities are auxiliaries of the State and that, consequently, it should be immune from statutes of limitations. Specifically, the Village draws our attention to our Supreme Court's opinion in *Morningstar Water Users Ass'n, Inc. v. Farmington Municipal School,* 120 N.M. 307, 316–20, 901 P.2d 725, 734–38 (1995). In that case, the Court addressed whether the City of Farmington was a government entity for the purposes of the Procurement Code. *See* NMSA 1978, § 13–1–98(A), (D) (2005). *Morningstar Water Users Ass'n, Inc.* determined that the City of Farmington was an "auxiliary of the state government." 120 N.M. at 316, 901 P.2d at 734. We are not persuaded by the Village's argument that the rationale of *Morningstar Water Users Ass'n, Inc.* affects our analysis of when municipalities are subject to or immune from statutes of limitations. That case focused only on whether the parties could be considered as governmental entities for the purposes of the Procurement Code, NMSA 1978, §§ 13–1–28 to –199 (1984, as amended through 2005). It did not address the question of how far common law governmental immunity can be extended.

{8} The Village also argues that in determining that bodies corporate or politic—such as school districts, counties, and other political subdivisions—are not immune from statutes of limitations, the *Standhardt* court relied on the governmental-proprietary doctrine, which was rejected in *Morningstar Water Users Ass'n, Inc.,* 120 N.M. at 320, 901 P.2d at 738. "[T]he governmental-proprietary distinction was a judicial attempt to diminish the unfair consequences of sovereign immunity." *Id.* at 312, 901 P.2d at 730. In making this distinction, courts attempted to discern whether a municipality was acting as a governmental or a business-like entity to determine whether it was immune. *Id.* at 311–12, 901 P.2d at 729–30. This was not the analysis employed in *Standhardt.* The *Standhardt* court did not rely on the subsequently rejected governmental-proprietary doctrine to determine whether the school board was immune from the statutes of limitations, but on a statute, Section 37–1–19, that "expressly provides that the limitations will run against all bodies corporate or politic." *Standhardt,* 80 N.M. at 550, 458 P.2d at 802. Then, in construing Section 37–1–19, the *Standhardt* court clarified that bodies corporate and politic are immune from statutes of limitations only when the state is the real party in interest in the litigation. 80 N.M. at 549–50, 458 P.2d at 801–02. Indeed, the Court expressly stated that it was not applying the subsequently-rejected governmental-proprietary doctrine:

> Since our statute ... expressly provides that the limitations will run against all bodies corporate or politic we need not determine whether such bodies were exercising governmental functions or concerned with public rights in bringing the action; our only concern is whether the plaintiff is the real party in interest....

Id. at 550, 458 P.2d at 802.

{9} We are not persuaded by the Village's arguments that it is immune from the statutes of limitations, and we agree with Plaintiffs that Section 37–1–19 expressly states that statutes of limitations apply to all bodies corporate or politic, such as the Village.

CONCLUSION

{10} Because the Village, a municipality, is a body corporate or politic and because it has not demonstrated that the State was a real party in interest in this case, the Village was subject to the four-year statutes of limitations set forth in Section 37–1–4. Accordingly, Plaintiffs were entitled to (1) a declaratory judgment that the statutes of limitations had run on the Village's lien and, (2) a return of their payment.

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Chief Judge, and JAMES J. WECHSLER, Judge.

2006-NMCA-042

131 P.3d 696

Jose S. MEDINA, Petitioner–Appellee,

v.

Rachael R. MEDINA, Respondent–Appellant.

No. 25,584.

Court of Appeals of New Mexico.

Feb. 28, 2006.

Cusack, Jaramillo & Associates, P.C., Timothy J. Cusack, Roswell, NM, for Appellee.

Ramon I. Garcia, Roswell, NM, for Appellant.

OPINION

PICKARD, Judge.

{1} This divorce case requires us to decide whether the trial court erred in refusing to award Wife any portion of Husband's retirement benefits for the period following her bigamous marriage to another man. We hold that the mere fact of bigamy is insufficient to deprive Wife of her share of community property. We determine that a bigamous spouse should be deprived of his or her community property rights only when the circumstances of the case shock the conscience of the court, and we remand for the trial court to make additional factual findings and reconsider the issue.

FACTS

{2} Jose Medina (Husband) and Rachael Medina (Wife) were married on May 14, 1993. They lived together for some period of time, although the parties dispute their date of separation. Husband alleges that they separated in 1997, while Wife alleges that they separated in 2003. The trial court specifically declined to make a factual finding regarding the date of the parties' separation. In 2003, Husband filed for divorce.

{3} At trial, Wife testified that she married a man named Paul Orozco at a ceremony in Colorado on September 22, 1999, while she was still legally married to Husband. Before marrying Orozco, Wife applied for a marriage license. On the application, she used a fictitious name, birth date, and social security number. Wife also checked the box on the application marked "widowed" and indicated that her previous husband had died in New Mexico in 1992. Orozco was ill at the time of the marriage, and he died on October 21, 2002.

{4} The trial court did not enter findings regarding whether Wife ever lived with Or-

ozco. The trial court's findings also do not indicate when Husband and Wife lived together between Wife's marriage to Orozco in 1999 and Husband's filing for divorce in 2003. However, it appears that the parties may have lived together at least sporadically during this time. There is also an ongoing factual dispute regarding when Husband became aware of Wife's marriage to Orozco. Wife argues that Husband found out about the marriage two weeks after it occurred, and she states that at the very least, he was aware of it by 2000. Husband alleges that he had some suspicions regarding the marriage in 2000, but that he "was not able to absolutely confirm the fact of a bigamous marriage" until Orozco's sister testified regarding the marriage at trial. The trial court did not make any findings with respect to Husband's knowledge of the marriage to Orozco.

{5} At trial, Husband argued that Wife should not receive a share of his retirement benefits for the period during which she was married to Orozco. The trial court ruled that Wife's entitlement to the benefits would be terminated as of the date of her marriage to Orozco, and Wife appeals only that ruling.

STANDARD OF REVIEW

{6} We review de novo whether there should be any circumstances, beside the fact of bigamy, relevant to the determination of whether a bigamous spouse should lose his or her share of community property. *See State ex rel. Children, Youth & Families Dep't v. Maria C.*, 2004-NMCA-083, ¶ 17, 136 N.M. 53, 94 P.3d 796 ("We review issues of law de novo.").

DISCUSSION

1. General Rules Concerning Bigamy

{7} Many states have statutes characterizing bigamous marriages as void ab initio. *See, e.g.*, Cal. Fam.Code § 2201 (1992); Ind. Code § 31-11-8-2 (1997); R.I. Gen. Laws § 15-1-5 (1999); S.C.Code Ann. § 20-1-80 (1990); S.D. Codified Laws § 25-1-8 (1939); Va.Code Ann. § 20-43. New Mexico does not appear to have such a statute, although our state does make bigamy a criminal offense. *See* NMSA 1978, § 30-10-1 (1963). Colorado, however, has a statute mandating that a court shall declare a bigamous marriage invalid from its inception. Colo.Rev. Stat. Ann. § 14-10-111(1)(g)(I), (5) (1998). In New Mexico, the validity of a marriage is governed by the law of the jurisdiction in which the marriage was celebrated. *In re Estate of Bivians*, 98 N.M. 722, 726, 652 P.2d 744, 748 (Ct.App.1982). Thus, because Wife's marriage to Orozco is invalid under Colorado law, it is also invalid in New Mexico and does not operate to nullify her marriage to Husband.

{8} However, the fact that a bigamous marriage does not technically nullify a prior marriage does not necessarily mean that the second marriage has no legal effect on the first marriage and its incidents. Many courts, under circumstances which we will discuss below, have applied a theory of estoppel or unclean hands to similar cases involving bigamy. We agree that under some circumstances, a bigamous spouse should be precluded from reaping the benefits of his or her first marriage. Before examining this issue, we address the proposition that a second, bigamous marriage should automatically deprive a spouse of his or her share of the community's assets.

2. The Mere Fact of Bigamy Does Not Deprive a Spouse of Community Property Rights

{9} In support of her argument that bigamy alone is not sufficient to deprive a spouse of community property rights, Wife relies on *Beals v. Ares*, 25 N.M. 459, 185 P. 780 (1919), which we find helpful. In *Beals*, our Supreme Court considered whether a wife "forfeit[ed] her interest in the community property by the commission of adultery." *Id.* at 494, 185 P. at 791. The Court first stated that under the civil laws of Spain and Mexico, a wife did forfeit her "matrimonial gains" when she committed adultery. *Id.* at 478, 185 P. at 785. The Court then noted that when New Mexico passed a statute adopting the common law, the civil law was completely supplanted and the common law became "the rule of decision." *Id.* at 460, 185 P. at 781 (Syllabus by the Court). After examining the common law involving a wife's property rights, the Court stated as follows:

> There being no applicable provisions of the common law, or any statute of this state barring the wife of her interest in the community property by reason of the commission of adultery, we conclude that her rights and interests in the community property are not affected by any wrongs which she may have committed, however grievous they may have been. As the legislature has not seen fit to deprive her of the interest which it conferred upon her, in the property earned by the parties to the union, because she may have violated her marital vows, the courts can not legislate upon the subject and by judicial fiat correct that which many think is a serious defect in our laws. The remedy is with the legislature and not the courts.

Id. at 494, 185 P. at 791.

{10} The most logical rationale for a holding that bigamy automatically deprives a spouse of community property rights would be that the spouse forfeits those rights as a result of his or her misconduct. We note that some jurisdictions appear to have distinguished cases like *Beals* from cases involving bigamy. *See In re Estate of Anderson,* 60 Cal.App.4th 436, 70 Cal.Rptr.2d 266, 271 (1997) (distinguishing case that held adultery insufficient to forfeit marital inheritance rights from case involving bigamy as well as other circumstances calling for an equitable resolution). However, we agree with Wife that *Beals* stands for the proposition that a spouse does not forfeit community property rights merely by engaging in misconduct relative to the marriage.

{11} Marriage is a civil contract that confers a certain status upon the parties. New Mexico does not recognize common law marriage. *Lozoya v. Sanchez,* 2003–NMSC–009, ¶ 24, 133 N.M. 579, 66 P.3d 948. Thus, a marriage is valid only if it is "formally entered into by contract and solemnized before an appropriate official." *Id.* (internal quotation marks and citation omitted). Similarly, if parties want to alter their marital status, they must initiate and complete legal proceedings. We note that even in jurisdictions that do recognize or have recognized common law marriage, the concept of "common law divorce" has been consistently rejected, and courts have required legal proceedings to alter the marital status. *See, e.g., Wilkins v. Wilkins,* 137 Idaho 315, 48 P.3d 644, 649 (2002) ("Once parties agree or consent to marry and consummate the marriage by mutual assumption of marital rights, duties and obligations, their subsequent actions cannot defeat the marriage, because there is no common law divorce."); *In re Estate of Newton,* 65 Ohio App.3d 286, 583 N.E.2d 1026, 1027 (1989) ("While Ohio law accepts the concept of a common-law marriage, it has no counterpart in a common-law divorce."); *Villegas v. Griffin Indus.,* 975 S.W.2d 745, 750 (Tex.App.1998) ("Informal marriages, like ceremonial marriages, can only be dissolved by legal proceedings decreeing annulment or divorce, or by the death of one spouse."); *see also In re Estate of Weems,* 258 Iowa 711, 139 N.W.2d 922, 924 (1966) ("[W]e know of no such thing as a common law divorce, or divorce resting on nothing more secure than bigamy."). Thus, the general rule is that until spouses obtain a final, judicial order dissolving their marriage or ordering a legal separation, *see* NMSA 1978, § 40–3–8(A)(2) (1990) (defining separate property to include property acquired after a legal separation), they retain all the legal benefits and obligations of the marital status, including the presumption that all property acquired during the marriage is community property. *See* NMSA 1978, § 40–3–12(A) (1973) (stating that property acquired by either spouse during marriage is presumed to be community property). For these reasons, we cannot agree with Husband that the mere fact of bigamy causes a de facto divorce, thereby depriving the parties of the benefits of their marriage.

{12} At oral argument, Husband argued that *Beals* is inapplicable because bigamy, unlike adultery, is a criminal offense. *See* § 30–10–1. We do not find this argument persuasive. Other criminal acts that adversely affect the marital relationship, such as domestic violence, do not result in a forfeiture of community property rights. Rather, the general rule is that such property rights are affected only when one spouse has taken some unilateral action to improperly dissipate or otherwise damage the commu-

nity's property. In such cases, that spouse can be required to compensate the other spouse for the improperly used resources. *See, e.g., Roselli v. Rio Cmtys. Serv. Station, Inc.,* 109 N.M. 509, 514, 787 P.2d 428, 433 (1990) (noting that "absent intervening equities, a gift of substantial community property to a third person without the other spouse's consent may be revoked and set aside for the benefit of the aggrieved spouse"); *Fernandez v. Fernandez,* 111 N.M. 442, 446, 806 P.2d 582, 586 (Ct.App.1991) (citing *Roselli* and noting that under such circumstances, it would also be reasonable to "allow the spouse the option of recouping his or her community share of the gift from the spouse who made the gift"); *see also Irwin v. Irwin,* 121 N.M. 266, 269–70, 910 P.2d 342, 345–46 (Ct.App. 1995) (noting that no duty to reimburse arises where one spouse makes expenditures from community funds during marriage, as long as there has been no breach of the fiduciary duty owed to the other spouse).

{13} We also agree with Wife that to inject an element of moral fault into the rules governing the distribution of community property on divorce might be inconsistent with New Mexico's system of no-fault divorce. *See* NMSA 1978, § 40–4–1(A) (1973) (stating incompatibility as a ground for divorce); *State ex rel. DuBois v. Ryan,* 85 N.M. 575, 577, 514 P.2d 851, 853 (1973) (noting that where incompatibility is the ground on which divorce is sought, "[m]isconduct, fault or blame is of no significance"). *Cf. Foutz v. Foutz,* 110 N.M. 642, 644, 798 P.2d 592, 594 (Ct.App. 1990) (noting that alimony is not a punishment and whether a spouse has taken a paramour is irrelevant to alimony determination).

{14} Finally, we recognize that when our Legislature has wanted to make fault relevant to the disposition of community property, it has done so. For example, NMSA 1978, § 45–2–102(B) (1975) provides that the surviving spouse of an intestate decedent ordinarily receives the portion of the community property over which the decedent could have exercised testamentary power. But NMSA 1978, § 45–2–803(B) (1995) mandates that anyone who feloniously and intentionally kills a decedent forfeits any benefit the person would have received under the intestate succession statute. Thus, if bigamy is to automatically deprive a spouse of community property rights, that is a decision best made by the Legislature.

{15} In accordance with *Beals* and New Mexico's preference for removing the element of moral fault from issues involving marital property division, we hold that a spouse does not automatically forfeit his or her community property rights upon the commission of bigamy. Thus, we remand this case for further consideration because the trial court's written ruling and oral comments indicate that the court did make its ruling based on the mere fact of bigamy. We now turn to our examination of when a spouse's bigamy might preclude him or her from claiming the benefits of a prior marriage.

3. Estoppel and Unclean Hands as Applied in Cases Involving Bigamy

{16} As a preliminary matter, we address Wife's assertion that Husband has failed to preserve his arguments regarding estoppel because he did not argue on that theory in the trial court. We reject Wife's assertion for three reasons. First, an appellee is generally not required to preserve arguments that support the trial court's decision because we will affirm if the trial court was right for any reason. *Piano v. Premier Distrib. Co.,* 2005–NMCA–018, ¶ 17, 137 N.M. 57, 107 P.3d 11. Second, although Husband may not have used the word "estoppel" in arguing that Wife's bigamy precluded her receiving property acquired after her bigamous marriage, he was invoking a trial court ruling in the nature of estoppel or equity. *Cf. State v. Ross,* 1996–NMSC–031, 122 N.M. 15, 22–23, 919 P.2d 1080, 1087–88 (1996) (holding that objection to hearsay on the ground that it violated constitution and due process was sufficient to raise Confrontation Clause of Sixth Amendment issue). Third, although evidence of some facts relevant to the estoppel question was adduced below, Husband prevailed on the basis of only one fact, that of the bigamous marriage. In our analysis below, we determine that factual matters regarding the parties' knowl-

edge and conduct subsequent to the bigamous marriage are relevant to the question of whether Wife should be deprived of some of the benefits of the marriage. In these circumstances, it is appropriate to remand for the trial court to find the facts related to these issues. *See City of Carlsbad v. Grace*, 1998–NMCA–144, ¶¶ 27, 38, 126 N.M. 95, 966 P.2d 1178 (holding, in a case in which the trial court ruled on the basis of the statute of limitations, but in which this Court held that equitable recoupment might apply, the remedy was to remand for the trial court to weigh the various equitable factors and to also consider an award of interest notwithstanding the lack of a specific argument on the interest issue).

{17} Husband argues that Wife should be estopped from claiming what would otherwise be her share of his retirement benefits on the basis that she knowingly entered into a bigamous marriage with Orozco. In support of his arguments, Husband cites a number of out-of-jurisdiction cases, which we have separated into three categories below.

{18} We first address a line of cases cited by Husband in which a spouse was estopped from escaping support obligations or avoiding distribution of property on divorce by arguing that his or her current marriage was bigamous and void. Many of these cases involved irregularities in the prior divorce proceedings of one of the spouses that called the validity of the prior divorce into question. *See Spellens v. Spellens*, 49 Cal.2d 210, 317 P.2d 613, 615, 619 (1957) (in bank) (holding that the husband was estopped from denying validity of marriage on grounds that the wife's prior divorce was not final at time of marriage when the husband knew of these circumstances and assured the wife that marriage would be valid); *State ex rel. Howell v. Howell*, 818 S.W.2d 704, 707–08 (Mo.Ct.App. 1991) (holding that the husband was estopped from denying the validity of his own prior divorce in order to avoid obligations to his second wife); *Heuer v. Heuer*, 152 N.J. 226, 704 A.2d 913, 915, 919–20 (1998) (holding that the husband was estopped from avoiding obligations by challenging the wife's prior divorce where the husband knew of prior divorce, but apparently had no reason to question its validity, and held himself out as married to the wife for almost twelve years). *See also Yun v. Yun*, 908 S.W.2d 787, 790–91 (Mo.Ct.App.1995) (holding that the husband was estopped from attempting to shirk his obligations by denying validity of marriage based on lack of a proper marriage license where the husband held himself out as married and reaped all the benefits of the marriage).

{19} We do not agree with Husband that these cases are relevant to the issue in this case. Unlike the spouses in the above cases, Wife is not trying to shirk her duties or obligations with regard to her marriage to Husband. Rather, she is trying to collect what is presumed to be her share of the community property. *See* § 40–3–12(A). Thus, we find these cases to be inapplicable.

{20} Next, and more relevant to the present situation, Husband relies on a series of cases which hold a spouse estopped from claiming the benefits of a prior marriage on the ground that the spouse has repudiated the marital relationship by his or her conduct. Husband relies particularly on *Estate of Anderson*, 60 Cal.App.4th 436, 70 Cal. Rptr.2d 266. In that case, the husband filed a petition to determine distribution of the estate of his first wife, who had died intestate. *Id.* at 268. The husband and his first wife were married in 1955 and separated in 1958, but they had never obtained a divorce. *Id.* Shortly after the separation, the husband began a relationship with another woman. *Id.* They had five children together and eventually married in 1993. *Id.* On the application for the second marriage license, the husband stated that he had never been married before. *Id.* The first wife had entered into a subsequent marriage as well. *Id.*

{21} The court held that the husband was estopped from claiming to be the first wife's surviving spouse in order to make a claim on her estate. *Id.* at 271. The court applied what it referred to as "quasi estoppel," which it said barred a person from "act[ing] in a manner inconsistent with his former position or conduct to the injury of another." *Id.* at 269–70 (internal citations and quotation marks omitted). It decided that the husband was estopped from denying the truth of the

statement he made in the marriage license application that he had never been married before. *Id.* Particularly because the husband and his first wife had been separated for nearly 38 years, the court characterized the husband's behavior as "a complete repudiation of his marital status as [the first wife's] husband." *Id.* at 271. Finally, the court held as follows: "[U]nder the facts before us, where both parties knew the pertinent facts and over a long passage of time remarried and conducted their affairs as if their marriage was dissolved, principles of equity demand that [the husband] be estopped from asserting rights in [the first wife's] estate." *Id. See also Brown v. Brown,* 274 Cal.App.2d 178, 82 Cal.Rptr. 238, 245–46 (1969) (holding that the wife was estopped from claiming community property accumulated by the husband and his second wife where the first wife filed suit 28 years after an invalid divorce and after collecting alimony during that period, even though she filed suit soon after becoming aware of the invalidity of the divorce); *In re Estate of Butler,* 444 So.2d 477, 479 (Fla.Dist.Ct.App.1984) (holding that the wife was estopped from asserting inheritance rights in 1981 where she repudiated a 1946 first marriage by entering into a bigamous second marriage in 1947 when she thought she had been validly divorced from first husband); *Taylor v. Taylor,* 321 N.C. 244, 362 S.E.2d 542, 547 (1987) (holding that the wife was estopped from arguing the invalidity of a bigamous marriage in order to enforce an alimony provision in an earlier separation agreement).

{22} Husband argues under these cases that Wife should be estopped from claiming Husband's benefits because she repudiated her marital status with Husband when she married Orozco. Husband notes that Wife, like the husband in *Estate of Anderson,* applied for a second marriage license, affirmatively stating that she was not currently married. Husband, in accordance with *Estate of Anderson,* characterizes this action as a complete repudiation of Wife's marriage to Husband. We disagree with Husband that bigamy is a per se repudiation of a prior marriage, and we note substantial factual differences that distinguish the present case from *Estate of Anderson.*

{23} In *Estate of Anderson,* the estopped party, the husband, had been separated from his first wife for 38 years, after living with her for only three years. 70 Cal.Rptr.2d at 268. Both he and his first wife had entered into subsequent marriages, and he had lived with his second wife, having five children with her, for the period from 1958 until the first wife's death in 1996. *Id.* At least as of the commencement of the litigation, he still lived with his second wife. *Id.* Moreover, there is no indication in the *Estate of Anderson* opinion that the husband and his first wife had any contact with one another during the thirty-some years between their separation and the first wife's death. Finally, the primary assets at stake were assets that the first wife had acquired as community property with her second husband. *Id.* Under these circumstances, it is hardly a surprise that the court found the husband estopped from gaining a share of his first wife's estate by claiming to be her surviving spouse.

{24} As explained above, we must remand this case because the trial court did not make findings with regard to the parties' conduct subsequent to Wife's marriage to Orozco or Husband's knowledge of the marriage. However, it is apparent from what we do know about this case that the facts are not nearly so dramatic as those in *Estate of Anderson.* The record reveals that Wife and Orozco were married for only three years before Orozco died. While it is not clear when Wife and Husband lived together following Wife's marriage to Orozco, it appears that they may have lived together for some of that time. Evidence was adduced that they had contact with one another. There was also evidence that Husband and Wife filed a joint tax return in 2002. Finally, the assets in dispute here are assets that Wife would normally receive a share of, unlike the assets at stake in *Estate of Anderson.* Thus, even based on the scant evidence that the record contains concerning the parties' actions following Wife's marriage to Orozco, it is apparent that Wife cannot be said to have repudiated her marriage to Husband in the way that the husband repudiated his marriage to the first wife in *Estate of Anderson.*

On the record before us, we cannot say as a matter of law that Wife is estopped from claiming the benefits based on *Estate of Anderson.* We reject Husband's argument that the fact that Wife, like the husband in *Estate of Anderson,* filled out an application for a marriage license stating that she was not married changes this conclusion. We find the other cases cited by Husband to be similarly inapplicable.

{25} Finally, Husband cites cases where a spouse is barred by the doctrine of unclean hands from contesting the validity or invalidity of either a marriage or a divorce. *See Untermann v. Untermann,* 19 N.J. 507, 117 A.2d 599, 605 (1955) (holding that the wife was barred by unclean hands from contesting validity of ex parte Mexican divorce obtained by the husband where the wife had obtained a divorce from her first husband under like questionable circumstances); *McNeir v. McNeir,* 178 Va. 285, 16 S.E.2d 632, 633 (1941) (holding that the wife was prevented by estoppel, laches, and unclean hands from denying validity of divorce that she fraudulently obtained in order to re-divorce and get a more favorable settlement). We believe that this theory is closely related to the estoppel doctrine, and we find that the same factors that are relevant to the estoppel determination are relevant to an unclean hands analysis.

{26} We next address two arguments by Wife that would support our simply reversing the trial court. First, Wife argues that community property must be divided evenly and that a trial court lacks the power to make an unequal distribution of community property. We cannot completely agree with this statement. Equal distribution is certainly the general rule, but we are not prepared to establish a rule that a court can never distribute community property unequally no matter the circumstances. *See Foutz,* 110 N.M. at 644, 798 P.2d at 594 ("Proper apportionment of community property and debts depends on what is fair, considering all of the evidence with reference to the facts and circumstances of each case."); *In re Marriage of Economou,* 224 Cal.App.3d 1466, 274 Cal. Rptr. 473, 484 (1990) (noting that under California community property statutes, the court may divide property unequally when one party has deliberately misappropriated assets). *But see Beals,* 25 N.M. at 499–500, 185 P. at 793 ("[T]here is no statute in this state conferring upon the district court the power to divide the community property between the parties at its discretion.... [W]hile it has power to divide the property, this power does not extend further than to set apart to each of the spouses their undivided half interest in the property."). If we adopted Wife's rule, a spouse could never be precluded from receiving an equal share of community property, even under extreme circumstances like those present in *Estate of Anderson.* Thus, we decline to adopt Wife's rule.

{27} Second, Wife argues that Husband should not be permitted to pursue his estoppel argument against Wife because he knew about the bigamous marriage and yet continued to live with Wife and enjoy the benefits of the marriage. We believe this argument has merit. If a spouse is aware of the bigamous marriage and does nothing, then it would seem inequitable to allow that spouse to retain community assets to which the bigamous spouse would ordinarily be entitled.

{28} However, as we have explained, Wife's factual allegations as to the parties' conduct following the bigamous marriage were not fully explored at trial. The trial court declined to make findings regarding the date on which the parties separated and whether they cohabited at any time following the marriage to Orozco. Nor did the court make a ruling as to when Husband became aware of the marriage. Because those issues are relevant to the trial court's determination, we must remand for additional factual findings and, in the trial court's discretion, a further hearing at which the parties may develop the facts related to the estoppel argument first clearly raised on appeal. *See Martinez v. Martinez,* 1997–NMCA–125, ¶¶ 19–20, 124 N.M. 313, 950 P.2d 286 (remanding for findings and, in the discretion of the trial court, the presentation of additional evidence where trial court did not make findings that appellate court held were necessary to resolve issues in the case).

{29} Having surveyed the case law in this area and addressed the parties' arguments, we believe it prudent to provide

some guidelines on the issue of when a bigamous spouse should be deprived of his or her share of the community property. As we have detailed above, established law in New Mexico dictates that marriage establishes a contractual relationship that generally cannot be repudiated except through formal divorce or separation proceedings. Moreover, moral fault is irrelevant in divorce actions. In accordance with these principles, we hold that a spouse should only be deprived of community property due to bigamy if the circumstances of the case shock the conscience of the court. Equal division of community property should be the norm even where bigamy is involved, and the burden falls on the spouse seeking an unequal division to prove circumstances that shock the conscience.

{30} While this case does not require us to set forth exhaustive guidelines regarding hypothetical situations that might rise to the appropriate level, we do note that the trial court should consider when the non-bigamous spouse became aware of the bigamy. If the non-bigamous spouse knows or should know that the other spouse is committing bigamy, then he or she has the option of taking steps, such as getting a divorce, to protect his or her assets. If the non-bigamous spouse chooses not to take any such steps, community property should likely be divided equally. Conversely, if the non-bigamous spouse has no actual or constructive knowledge of the bigamous marriage, then perhaps he or she should not be required to divorce in order to protect his or her assets. This would be particularly true if there was evidence that the bigamous spouse took affirmative steps to hide the second marriage.

{31} Husband appears to argue that knowledge of the bigamy should be irrelevant. He argues that the type of estoppel implicated here, unlike other estoppel doctrines, does not require the party asserting estoppel to show detrimental reliance on the conduct of the other party. Husband points out several cases that specifically state that rule. *See, e.g., Taylor,* 362 S.E.2d at 546 ("Under quasi-estoppel doctrine, one is not permitted to injure another by taking a position inconsistent with prior conduct, regardless of whether the person had actually relied upon that conduct." (internal quotation marks and citations omitted)).

{32} We agree with Husband that a showing of detrimental reliance is not absolutely required. In *Estate of Anderson,* for example, it seems that the first wife did not detrimentally rely on the husband's conduct, because there was testimony that she knew and told others that she had never been divorced from the husband. 70 Cal.Rptr.2d at 268. As we have stated above, it is difficult to see how any court could have failed to find that it would be inequitable to allow the husband to claim inheritance rights as his first wife's surviving spouse. However, we have found knowledge of the bigamous marriage, with the concomitant duty to take affirmative steps such as divorce to protect one's assets, to be a crucial factor. Thus we think it would be an extraordinary case, such as *Estate of Anderson,* in which the non-bigamous spouse should succeed on an estoppel theory despite his or her knowledge of the bigamy and failure to take any action.

{33} In sum, we emphasize that the trial court should consider the overall equities of the situation, and it should only order an unequal distribution of community property in those rare cases in which it would be a violation of equity and good conscience to allow the bigamous spouse who has also demonstrated aggravated conduct to enjoy an equal share of the community.

CONCLUSION

{34} We remand for the trial court to reconsider its decision with regard to the proper distribution of Husband's retirement benefits and to make findings regarding the factors that it finds to be controlling. In its discretion, it may take additional evidence. If the trial court does not choose to allow further evidence to be taken or if the evidence adduced does not vary materially from the evidence presented below, then the trial court should enter an order equally dividing the retirement benefits earned for the entire duration of the parties' marriage.

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

WE CONCUR: CYNTHIA A. FRY and MICHAEL E. VIGIL, Judges.

2006-NMSC-013

131 P.3d 1282

In the Matter of Robert Dale TREINEN.

An Attorney Licensed to Practice Before the Courts of the State of New Mexico.

No. 29,424.

Supreme Court of New Mexico.

March 28, 2006.

Virginia L. Ferrara, Chief Disciplinary Counsel, Albuquerque, NM, for Petitioner.

Briggs F. Cheney, Esq., Albuquerque, NM, for Respondent.

OPINION

PER CURIAM.

{1} This matter is before the Court following attorney disciplinary proceedings conducted according to the Rules Governing Discipline. This Court is called upon to resolve two issues. First, whether this Court has the authority to impose discipline on an attorney who has pled no contest to a criminal act and who has been given a conditional discharge pursuant to NMSA 1978, Section 31–20–13(A) (1994). And second, whether there may be an exception in this case to this

Court's general rule that attorneys on probation for a criminal offense will not be permitted to practice law. *See In re Griffin*, 101 N.M. 1, 1, 677 P.2d 614, 614 (1983) ("[I]t 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."). We answer both questions in the affirmative and adopt the recommendation of the Disciplinary Board that Robert Dale Treinen (Respondent) receive a deferred suspension and be placed on disciplinary probation pursuant to Rule 17-206(A)(2), (B)(1) NMRA 2006.

BACKGROUND

{2} Respondent entered a plea of no contest to one misdemeanor count for battery against a household member and two felony counts for intimidation of a witness and false imprisonment. He initially was given a deferred sentence and placed on supervised probation for a period of five years. However, the lower court reconsidered its previous sentence and instead placed Respondent on supervised probation under a conditional discharge pursuant to Section 31-20-13(A). The amended order of conditional discharge included the following recommendation by the district court judge:

> This Court/Judge VERY STRONGLY and EMPHATICALLY recommends that the Defendant NOT be suspended or disbarred from the practice of law. Except for this unfortunate and highly uncharacteristic incident, he has no other felony arrests, and provides highly needed legal services to poor and disadvantaged persons (in one of the VERY FEW law firms to provide these critical services—commonly at little or no charge to these disadvantaged persons—and these many disadvantaged victims and persons in particular, and the public in general would be greatly damaged by any suspension or disbarment.) Also, on his own initiative (without suggestion or request of the Court) he entered, attended and fully participated in and completed anger/conflict management, Domestic Violence counseling & treatment and alcohol counseling, is highly and sincerely remorseful of the present incidents, took full responsibility in the Pleas and at Sentencing, and his counselors emphasize that Defendant is HIGHLY UNLIKELY to ever repeat any violent conduct, toward anyone.

DISCUSSION

{3} A sentence of conditional discharge may be imposed under Section 31-20-13(A), which provides, in pertinent part, that

> [w]hen a person who has not been previously convicted of a felony offense is found guilty of a crime for which a deferred or suspended sentence is authorized, the court may, *without entering an adjudication of guilt*, enter a conditional discharge order and place the person on probation on terms and conditions authorized by [NMSA 1978, Section 31-20-5 (2003) and NMSA 1978, Section 31-20-6 (2004)].

(Emphasis added.)

{4} Respondent argues that the imposition of a conditional discharge precludes the imposition of discipline by this Court on the basis of his probationary status because there has been no "adjudication of guilt." *See State v. Fairbanks*, 2004-NMCA-005, ¶ 8, 134 N.M. 783, 82 P.3d 954 (ruling that if a conditional discharge is granted "[o]nce the probationary period has been successfully completed, the person must be discharged and charges must be dismissed, without an adjudication of guilt, and the discharge or dismissal *may not be deemed a 'conviction' for any purpose*"); *State v. Brothers*, 2002-NMCA-110, ¶ 10, 133 N.M. 36, 59 P.3d 1268 (emphasizing that there is a clear distinction between a deferred sentence and a conditional discharge and noting that to hold otherwise would "render the legislative enactment of the conditional discharge statute meaningless"); *State v. Herbstman*, 1999-NMCA-014, ¶ 11, 126 N.M. 683, 974 P.2d 177 (1998) ("The legislature enacted the conditional discharge statute as an alternative to a suspended or deferred sentence. [A] conditional discharge order is entered without entry of an adjudication of guilt.") (citation omitted).

{5} We reject the notion that a conditional discharge precludes this Court from imposing discipline against an attorney who violates our Rules of Professional Conduct. We

recognize that Rule 16–804(B) NMRA 2006 provides that "[i]t is professional misconduct for a lawyer to ... commit a criminal act," but that rule does not require that the lawyer must be convicted of a criminal act. Accordingly, we have in the past disbarred attorneys for engaging in apparent criminal conduct even though there had been no criminal prosecution or conviction. *See, e.g., In re Duffy,* 102 N.M. 524, 526, 697 P.2d 943, 945 (1985) (Riordan, J., specially concurring) (noting that the disciplinary matter was not referred for possible criminal prosecution even though the attorney was disbarred for conversion of client funds to personal use); *In re Ortega,* 101 N.M. 719, 723, 688 P.2d 329, 333 (1984) (disbarring attorney and providing record of disciplinary proceedings to the district attorney to determine whether criminal charges were warranted); *cf. In re Segal,* 430 Mass. 359, 719 N.E.2d 480, 485 (1999) (ruling that disciplinary proceeding not precluded by acquittal of lawyer in criminal prosecution arising from same conduct); *In re Karahalis,* 429 Mass. 121, 706 N.E.2d 655, 658 (1999) (suspending lawyer for bribing a member of Congress although lawyer was never charged with crime); *In re McEnaney,* 718 A.2d 920, 921 (R.I.1998) ("An attorney does not need to be convicted of a crime to be charged with misconduct that violates the Rules of Professional Conduct.").

{6} Despite Respondent's suggestion that the conditional discharge statute was intended to preclude disciplinary proceedings, and despite what the Court of Appeals has interpreted the statute to mean in other contexts, we simply note that this Court has the sole authority to direct what constitutes grounds for the discipline of lawyers. The authority of the New Mexico Supreme Court emanates from the New Mexico Constitution, Article VI, Section 3, which gives the Court "superintending control over all inferior courts" and carries with it the inherent power to regulate all pleading, practice, and procedure affecting the judicial branch of government. *See* NMSA 1978, § 36–2–1 (1941) (codifying the Supreme Court's constitutional authority to define and regulate practice of law); *State ex rel. Anaya v. McBride,* 88 N.M. 244, 246, 539 P.2d 1006, 1008 (1975) (recognizing that the Supreme Court's constitutional power of superintending control carries with it inherent power to regulate all pleading, practice, and procedure affecting the judicial branch of government). Our inherent power of superintending control encompasses as well this Court's authority and duty to prescribe the qualifications for admission to the bar, to prescribe standards of conduct for lawyers, to determine what constitutes grounds for the discipline of lawyers, and to discipline, for cause, any person admitted to practice law in this state. *See* NMRA, Discipline Rules, Preface.

{7} Any legislative attempt to limit what conduct we may consider as grounds for imposing attorney discipline would be an unconstitutional infringement of this Court's authority to regulate the practice of law. *Cf. Application of Sedillo,* 66 N.M. 267, 273, 347 P.2d 162, 166 (1959) (invalidating a statute that sought to establish less restrictive educational requirements for the practice of law than prescribed by this Court's rules for admission to the bar because the legislation was "an unconstitutional invasion of the judicial powers"); *State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.,* 85 N.M. 521, 528–29, 514 P.2d 40, 47–48 (1973) (rejecting an interpretation of two statutes that would permit unlicensed persons to practice law in magistrate court as an unconstitutional invasion of the Court's "exclusive constitutional prerogative" to regulate the practice of law).

{8} In sum, a criminal conviction is not a prerequisite to disciplining an attorney for criminal conduct, and any legislative attempt to provide otherwise would be unconstitutional. In any event, we do not believe the Legislature intended to encroach upon our disciplinary authority with its enactment of Section 31–20–13(A). For these reasons, we conclude that a sentence of conditional discharge does not prevent this Court from imposing discipline for criminal conduct. We now consider what discipline would be appropriate in this instance.

{9} We have repeatedly ruled that attorneys on probation for a criminal offense will not be permitted to practice law pursuant to a license granted by this Court and have routinely disbarred or suspended attorneys

for the duration of any sentence of probation. *See, e.g., In re Lopez,* 116 N.M. 699, 866 P.2d 1166 (1994); *In re Bryan,* 116 N.M. 745, 867 P.2d 415 (1993); *In re Kraemer,* 112 N.M. 101, 811 P.2d 1312 (1991); *In re McCulloch,* 103 N.M. 542, 710 P.2d 736 (1985); *In re Griffin,* 101 N.M. 1, 677 P.2d 614; *In re Norrid,* 100 N.M. 326, 670 P.2d 580 (1983). This policy was most recently reiterated in *In re Key,* 2005–NMSC–014, 137 N.M. 517, 113 P.3d 340, and *In re Mikus,* 2006–NMSC–012, 139 N.M. 653, 131 P.3d 653.

{10} In *In re Key,* we also had occasion to allude to one, very limited, exception that we made to our policy in an unreported case. 2005–NMSC–014, ¶ 11, 137 N.M. 517, 113 P.3d 340. In that unreported case, *In re Stribling,* No. 26,781, the attorney received a conditional discharge in a state court criminal proceeding, and his suspension from the practice of law was deferred and probation imposed pursuant to Rule 17–206(B)(1). Respondent Key argued for similar treatment in his case because he also was on criminal probation following his conviction in federal court for tax-related crimes. *In re Key,* 2005–NMSC–014, ¶ 11, 137 N.M. 517, 113 P.3d 340. Although Key did not receive a conditional discharge, he pointed out that the option of a conditional discharge was not available in the federal system. *Id.* Key also argued that his conduct was less reprehensible than the conduct for which the attorney in *Stribling* was disciplined. *Id.* Despite those arguments, we concluded that the circumstances in *In re Key* did not warrant what should only be a very limited exception to this Court's policy of prohibiting attorneys from practicing law while serving a criminal sentence of probation. *Id.* Consequently, though we acknowledged in *In re Key* that "there might conceivably be a situation where" we would depart from our general policy, we did not need to decide in *In re Key* whether that "very-limited exception" should be extended to other situations. *Id.* For the reasons that follow, we determine that the narrow, very limited exception alluded to in *In re Key* should be applied in this case.

{11} We must first emphasize that it is by no means this Court's policy that imposition of a conditional discharge in a criminal case automatically will result in a deferred sanction in a disciplinary case. Each case will be evaluated on its own merits, and the record must be clear that the continued practice of law by the respondent-attorney will in no way endanger either the public or the reputation of the profession. We are convinced that the continued practice of law by Respondent will pose no threat to the public or reputation of the profession.

{12} Not only will Respondent's practice of law pose no danger to the public, but as noted in the comments made by the judge in his sentencing order, prohibiting Respondent from continuing to practice law may prove detrimental to the public because Respondent "provides highly needed legal services to poor and disadvantaged persons . . . commonly at little or no charge." The sentencing judge's assessment that Respondent is highly unlikely to repeat any violent conduct in the future underscores that Respondent's continued practice of law will not harm the public. That assessment is bolstered by the fact that Respondent took the initiative to seek, and successfully complete, counseling and treatment to address his behavioral problems. While we stress that this assessment does not excuse his conduct, it indicates that this was, in all probability, an isolated incident of violence and that the likelihood of it being repeated is remote.

{13} Other factors also militate against Respondent's suspension because his continued practice of law will not harm the reputation of the legal profession. As noted above, the sentencing judge recognized that Respondent was devoted to providing legal services to the poor and disadvantaged. Allowing him to continue to do so will enhance the reputation of our profession. The fact that Respondent also took responsibility for his criminal conduct and was sincerely remorseful alleviates any concern that his continued practice of law would harm the profession's reputation, which is buttressed by the fact that Respondent self-reported his convictions to the office of disciplinary counsel, was cooperative and remorseful throughout these proceedings, and has no previous history of disciplinary complaints or criminal conduct.

{14} We also note that the hearing committee reluctantly recommended Respondent's suspension only out of a presumption that it had no authority to recommend a lesser sanction. However, because of the specific facts of this case, the Disciplinary Board declined to recommend suspension. While this Court does not abdicate its disciplinary authority to any other court and reserves its prerogative under Rule 17–316(D)(1) NMRA 2006 to reject recommendations of the Disciplinary Board, we are in agreement with, and give due weight to, the opinions of both the Disciplinary Board and the trial court judge regarding the appropriate attorney discipline in this case.

{15} **NOW, THEREFORE, IT IS ORDERED** that the recommendation of the Disciplinary Board hereby is adopted and Respondent Robert Dale Treinen hereby is suspended from the practice of law pursuant to Rule 17–206(A)(2), effective October 5, 2005;

{16} **IT IS FURTHER ORDERED** that the entire period of suspension shall be deferred for the duration of the five-year period of probation ordered on August 26, 2004, by the Second Judicial District Court in cause No. CR–03–03490;

{17} **IT IS FURTHER ORDERED** that Respondent shall be placed on probationary active status for the duration of the five-year period of the district court's probation on condition that he abide by all of the terms imposed by the district court; and

{18} **IT IS FURTHER ORDERED** that Respondent shall pay costs to the disciplinary board in the amount of $442.20 on or before November 7, 2005, and any balance remaining thereafter shall accrue interest at the rate of 8.75% per annum until paid in full.

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

2006-NMCA-037

131 P.3d 1286

STATE of New Mexico, Plaintiff–Appellee,

v.

Ferney PATTERSON, Defendant–Appellant.

State of New Mexico, Plaintiff–Appellee,

v.

Dominique Lee Swanson a/k/a Dominic Swanson, Defendant–Appellant.

Nos. 24,853, 25,049.

Court of Appeals of New Mexico.

Feb. 3, 2006.

Certiorari Denied, No. 39,688, March 14, 2006.

Patricia A. Madrid, Attorney General, Santa Fe, NM, Jacqueline R. Medina, Assistant Attorney General, Albuquerque, NM, for Appellee in No. 24,853.

John Bigelow, Chief Public Defender, Catherine A. Begaye, Assistant Appellate Defender, Santa Fe, NM, for Appellant in No. 24,853.

Patricia A. Madrid, Attorney General, James O. Bell, Assistant Attorney General, Santa Fe, NM, for Appellee in No. 25,049.

John Bigelow, Chief Public Defender, Santa Fe, NM, Josephine H. Ford, Assistant Appellate Defender, Albuquerque, NM, for Appellant in No. 25,049.

OPINION

WECHSLER, Judge.

{1} These two appeals allow us to address the requirement that law enforcement officers have individualized, particular suspicion with regard to a passenger in a vehicle prior to initiating a seizure, when the circumstances of the encounter and the actions of other passengers contribute to the suspicious nature of the encounter. In both cases, the officers approached occupants of a car stopped in a business parking lot, found drug paraphernalia in a patdown search of an occupant of the car, and observed other suspicious behavior or circumstances. An officer asked Defendant Patterson for his identification. Defendant Swanson was initially asked to remain in the vehicle. The district court in both cases denied motions to suppress evidence obtained during the encounters. Because we conclude that there was no individualized reasonable suspicion that Defendant Patterson and Defendant Swanson had been or were engaged in criminal activity, we reverse the convictions in both cases.

FACTS OF *STATE V. PATTERSON*

{2} Defendant Patterson appeals his conviction for possession of methamphetamine after pleading guilty to the charge. The facts are undisputed. While on patrol at about 10:40 p.m., Officer Ray Merritt observed a car drive into the parking lot of a closed business, behavior which he thought was odd. Because there had been several burglaries in the twenty-block area, Officer Merritt pulled his patrol car behind the stopped car to investigate why it had stopped at that location. Someone, later identified as William Wilson, was standing outside the open rear passenger door on the driver's side of the car. Defendant Patterson was sitting in the front passenger seat. There were also two women in the car, the driver and a passenger in the backseat.

{3} Officer Merritt identified himself and asked Wilson what they were doing there. Wilson stated that they were there to pick up a truck from a friend, but he did not know the friend's name. Officer Merritt observed that there was no truck in the area and found this answer to be suspicious. As he was talking with Wilson, Officer Merritt observed an open can of beer on the backseat floorboard closest to where Wilson had been sitting behind the driver. He conducted a patdown search of Wilson for officer safety because he was alone and it was dark. This search revealed a glass smoking pipe, and he placed Wilson in handcuffs. After Wilson was secured in the patrol car and as Officer Merritt was ready to make contact with De-

fendant Patterson, a second officer arrived on the scene.

{4} After Officer Merritt discovered the drug paraphernalia on Wilson's person and saw the open container of beer on the floorboard near where Wilson had been sitting, he asked all the occupants of the vehicle for their identification. Officer Merritt testified that he asked for the identifications to check for warrants for arrest, to see "who [he] was dealing with," and to give him "a point of reference" if there were burglaries later that evening. He testified that he had no reason to detain Defendant Patterson initially, but that he did have Defendant Patterson's identification card.

{5} Officer Merritt recognized Defendant Patterson's name from his identification card and recognized the picture on the card as being that of someone he had seen being booked a few days earlier. A check on Defendant Patterson's identification card revealed that it was valid and that there were no warrants for his arrest. Although he did not know why Defendant Patterson had been booked a few days previously, Officer Merritt testified that he believed Defendant Patterson was violating conditions of release because he was in a car with an open container of beer and because he was with someone who had drug paraphernalia. Based on this suspicion, Officer Merritt asked Defendant Patterson to get out of the car to ask about his conditions of release and to check to see whether he was on probation.

{6} As Defendant Patterson was getting out, Officer Merritt saw Defendant Patterson pull something out of his pocket and move as if throwing it toward the center console. Officer Merritt immediately handcuffed Defendant Patterson because of concern for his own safety and because he suspected that Defendant Patterson had discarded contraband into the vehicle. After looking inside the vehicle, Officer Merritt saw a clear plastic sandwich-type baggie containing a white powdery substance, which later tested positive for methamphetamine. Defendant Patterson was then arrested and, as he was being searched, told Officer Merritt that he had a syringe in his sock.

{7} Defendant Patterson was charged with possession of a controlled substance (methamphetamine) in violation of NMSA 1978, § 30–31–23(D) (1990) (amended 2005) and possession of drug paraphernalia in violation of NMSA 1978, § 30–31–25.1(A) (2001). After his motion to suppress was denied, Defendant Patterson pleaded guilty to possession of methamphetamine.

FACTS OF *STATE V. SWANSON*

{8} On August 23, 2003, at around 1:30 a.m., Officer Terry McCoy observed a car pull into a parking lot of a business about 150 yards before a DWI roadblock. There were three occupants of the car: the driver; Defendant Swanson, seated in the front passenger seat; and another passenger, seated in the backseat.

{9} Officer McCoy stopped behind the car and told the driver and Defendant Swanson to stay in the vehicle. Officer McCoy asked why they were avoiding the roadblock. The backseat passenger stated that the car was overheating and leaking fluid. Two other officers, who had arrived on the scene, looked under the hood but saw nothing wrong with the car. Officer McCoy noted that "all three occupants of the car were very nervous and avoiding eye contact." He also observed the backseat passenger rummaging around the floorboard area.

{10} The officers then asked the occupants to step out of the car so that they could be interviewed separately. When asked for identification, Defendant Swanson provided a Colorado driver's license. Officer McCoy asked Defendant Swanson why the driver was trying to avoid the DWI checkpoint. Defendant Swanson replied that he did not know.

{11} One of the other officers found a marijuana pipe in the driver's possession. After this discovery, Officer McCoy asked Defendant Swanson if he had anything the officers should know about. Defendant Swanson said he did not. Officer McCoy asked Defendant Swanson whether he would mind emptying his pockets. Defendant Swanson answered "sure," displaying the contents of his pockets, including items that were alleged to be drug paraphernalia. When Officer McCoy asked Defendant Swan-

son if he had anything else, Defendant Swanson handed him a coat, which contained marijuana and methamphetamine.

{12} Defendant Swanson was charged with possession of a controlled substance (methamphetamine) in violation of Section 30–31–23(D), possession of one ounce or less of marijuana in violation of Section 30–31–23(B)(1), and possession of drug paraphernalia in violation of Section 30–31–25.1(A). Defendant Swanson subsequently entered a plea to one charge of possession of methamphetamine.

STANDARD OF REVIEW

{13} In reviewing the denial of a motion to suppress evidence, this Court will view the facts in the light most favorable to the decision below and will review the application of the law to these facts, including determinations of reasonable suspicion, under a de novo standard of review. *See generally State v. Urioste,* 2002–NMSC–023, ¶ 6, 132 N.M. 592, 52 P.3d 964; *State v. Affsprung,* 2004–NMCA–038, ¶ 6, 135 N.M. 306, 87 P.3d 1088. With respect to the issues we find dispositive, Defendants do not argue that the New Mexico Constitution affords greater protection than the Federal Constitution and we will assume, without deciding, that both constitutions provide the same protection against unreasonable searches and seizures in this context. *See State v. Ochoa,* 2004–NMSC–023, ¶ 6, 135 N.M. 781, 93 P.3d 1286; *cf. State v. Gomez,* 1997–NMSC–006, ¶¶ 22–23, 122 N.M. 777, 932 P.2d 1 (outlining the requirements for preserving a state constitutional issue).

GENERAL FOURTH AMENDMENT PRINCIPLES

{14} The Fourth Amendment to the United States Constitution establishes an individual's right to be free from unreasonable searches and seizures. Generally, a search or seizure is an intrusion that requires a warrant based upon a demonstration of probable cause. *See State v. Wagoner,* 1998–NMCA–124, ¶ 9, 126 N.M. 9, 966 P.2d 176; *see also Maryland v. Dyson,* 527 U.S. 465, 466, 119 S.Ct. 2013, 144 L.Ed.2d 442 (1999) (per curiam) ("The Fourth Amendment generally requires police to secure a warrant before conducting a search."). The Fourth Amendment, however, establishes a reasonableness standard that permits lesser intrusions without warrants, based on a balance of "the degree of intrusion into an individual's privacy against the interest of the government in promoting crime prevention and detection." *State v. Jones,* 114 N.M. 147, 150, 835 P.2d 863, 866 (Ct.App.1992); *see Terry v. Ohio,* 392 U.S. 1, 20–27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

{15} Based on this balancing of interests, an officer may briefly detain an individual suspected of criminal activity without breaching Fourth Amendment rights. *See State v. Werner,* 117 N.M. 315, 317, 871 P.2d 971, 973 (1994). While arrests require probable cause and either a warrant or exigent circumstances, *Campos v. State,* 117 N.M. 155, 158–59, 870 P.2d 117, 120–21 (1994), investigatory detentions need only be supported by reasonable suspicion of criminal activity, *State v. Contreras,* 2003–NMCA–129, ¶ 5, 134 N.M. 503, 79 P.3d 1111.

{16} To justify detention, suspicion must be particular to the individual being detained. *See State v. Jason L.,* 2000–NMSC–018, ¶ 20, 129 N.M. 119, 2 P.3d 856. The Fourth Amendment is violated when an officer detains an individual with no more than a generalized suspicion, or unarticulated hunch or suspicion, because the government's interest in crime prevention will not outweigh the intrusion into the individual's privacy. *Jason L.,* 2000–NMSC–018, ¶ 20, 129 N.M. 119, 2 P.3d 856; *Jones,* 114 N.M. at 150, 835 P.2d at 866; *State v. Cobbs,* 103 N.M. 623, 626, 711 P.2d 900, 903 (Ct.App.1985). The detention must also be reasonably related to the circumstances that initially justified the stop, and the scope of the investigation may expand only when "the officer has reasonable and articulable suspicion" of other criminal activity. *State v. Taylor,* 1999–NMCA–022, ¶ 20, 126 N.M. 569, 973 P.2d 246.

{17} The constitutional requirement of reasonable suspicion, thus, must be articulated and particular to the individual being detained. To avoid confusion, we will refer to articulated, particular reasonable suspicion

as "individualized suspicion" throughout the remainder of this opinion.

SEIZURE OF DEFENDANTS' PERSONS

{18} We first address whether Defendants were seized as part of an investigatory detention that required the officers to have an individualized suspicion that Defendants were engaged in criminal activity. There can be circumstances in which officers may have consensual encounters with citizens without invoking Fourth Amendment protections. *See Affsprung,* 2004–NMCA–038, ¶ 12, 135 N.M. 306, 87 P.3d 1088. A seizure takes place when the officer detains the individual in such a way that a reasonable person would not feel free to leave, given the totality of the circumstances. *Jason L.,* 2000–NMSC–018, ¶ 15, 129 N.M. 119, 2 P.3d 856. We review the district courts' determinations of the facts for substantial evidence, but the issue of whether Defendants were free to leave is a legal question, which we review de novo. *Id.* ¶ 19.

{19} We analyze under *Affsprung,* 2004–NMCA–038, ¶¶ 12–18, 135 N.M. 306, 87 P.3d 1088, whether Defendant Patterson was seized when Officer Merritt asked him for his identification. In *Affsprung,* we held that, in an investigation after an ordinary stop for a traffic violation, when "the officer requests both the driver's and the passenger's identification in connection with the violation and nothing more than a generalized concern about officer safety," there is a seizure with regard to the passenger. *Id.* ¶ 18. We acknowledge that the case of *State v. Patterson* differs factually from *Affsprung.* The car in *State v. Patterson* was already stopped with its lights off in a business district where burglaries had taken place. There were three passengers, rather than one. Officer Merritt did not activate his emergency equipment. There was no traffic violation leading to a stop, and the focus of the investigation when Officer Merritt requested Defendant Patterson's identification was not a faulty license plate light as in *Affsprung* but a violation of the open container law. *See id.* ¶ 2.

{20} Even though *Affsprung* differs factually, it nevertheless provides guidance in determining whether a passenger in a detained vehicle would feel free to leave the area and to refuse an officer's request for identification. In making this determination, three factors are to be considered: "(1) the conduct of the police, (2) the person of the individual citizen, and (3) the physical surroundings of the encounter." *Id.* ¶ 12 (internal quotation marks and citation omitted); *Jason L.,* 2000–NMSC–018, ¶ 15, 129 N.M. 119, 2 P.3d 856. In *State v. Patterson,* prior to asking Defendant Patterson for his identification, Officer Merritt parked his patrol car behind the stopped car and identified himself as a police officer to the occupants. Defendant Patterson was the front seat passenger. The area was a commercial area and it was dark. Because Officer Merritt believed that another passenger's answer to his inquiry about the reason for their presence was suspicious, Officer Merritt conducted a patdown search of this passenger, who was already standing outside the car. After he learned that this passenger possessed drug paraphernalia and observed an open container of beer on the rear floorboard near where this passenger had been sitting, Officer Merritt asked all the occupants of the car for their identification.

{21} Although the investigation was initially focused on another passenger and not the driver as in *Affsprung,* Officer Merritt's request of Defendant Patterson, a front-seat passenger, for his identifying information "can only reasonably be viewed as an integral part of the officer's ongoing investigatory detention." *Affsprung,* 2004–NMCA–038, ¶ 15, 135 N.M. 306, 87 P.3d 1088. As in *Affsprung,* the officer asked for identifying information in order to check for warrants and "to know who he was dealing with." *See id.* ¶ 19. Officer Merritt had clearly identified himself as a police officer, although he had not engaged his emergency equipment. He had just conducted a patdown search of another passenger. Based on this show of authority and the request for the driver's identification, as well as Officer Merritt's explicit purpose in asking for the identification, a reasonable person in Defendant Patterson's position would not feel free to leave when Officer Merritt asked for identifying information. *See State v. Boblick,*

2004–NMCA–078, ¶ 10, 135 N.M. 754, 93 P.3d 775. Defendant Patterson was seized at this point in the encounter as part of Officer Merritt's ongoing investigatory detention of the occupants of the vehicle. As stated above, investigatory detentions must be reasonable under the Fourth Amendment, which requires individualized suspicion.

{22} The seizure analysis in *State v. Swanson* is simpler. Officer McCoy drove his vehicle behind the car in which Defendant Swanson was an occupant and instructed Defendant Swanson and the other occupants to remain in the car. The State does not argue that Defendant Swanson was free to leave. A seizure had taken place. This seizure, like the seizure of Defendant Patterson, was illegal unless it was justified by individualized suspicion of criminal activity.

INDIVIDUALIZED REASONABLE SUSPICION

{23} Because Defendants' encounters with the officers in both cases were investigatory detentions, they could have been justified by "a reasonable suspicion that the law has been or is being violated." *Taylor,* 1999–NMCA–022, ¶ 7, 126 N.M. 569, 973 P.2d 246 (internal quotation marks and citation omitted). The critical question in both cases then becomes whether the officers had an individualized suspicion that Defendants were violating any law when they subjected Defendants to detention.

{24} This Court has consistently held that a finding of individualized suspicion requires the articulation of the suspicion in a manner that is particularized with regard to the individual who is stopped. In *Jones,* we declined to adjust the Fourth Amendment's balance between the interest of the individual and the government to accept the state's proposition that a generalized suspicion of gang membership was sufficient to support individualized suspicion of particular criminal activity. *Jones,* 114 N.M. at 150–51, 835 P.2d at 866–67. In *Affsprung,* we held that the defendant's mere presence as a passenger in a vehicle stopped for a traffic violation does not provide individualized suspicion for the officer to ask for the passenger's identification. *Affsprung,* 2004–NMCA–038, ¶ 20, 135 N.M. 306, 87 P.3d 1088.

{25} Our Supreme Court set forth the requirement of individualized suspicion in *Jason L.* In that case, the defendant was approached by an officer after the officer observed the defendant and his companion looking at the officer, with the companion looking repeatedly and adjusting his waistband underneath his coat. *Jason L.,* 2000–NMSC–018, ¶¶ 12–13, 129 N.M. 119, 2 P.3d 856. Upon the continued adjusting of the waistband and nervous behavior by the companion, the officer searched the companion and found a gun. *Id.* ¶ 13. After the officers found an additional gun on the companion, the officer searched the defendant. *Id.* ¶ 5. Our Supreme Court concluded that the conduct of the companion could not justify the detention of the defendant because there was no individualized suspicion that the defendant had committed or was about to commit a crime. *Id.* ¶ 22. In reaching that conclusion, our Supreme Court stated that there was no evidence that the defendant was involved in any disturbance and that it was not appropriate to rely on the fact that weapons were found on the companion. *Id.* ¶¶ 21–22. Viewing the totality of the circumstances, the behavior of the defendant was not criminal and did not give rise to individualized suspicion. *Id.*

{26} On the other hand, *State v. Williamson,* 2000–NMCA–068, 129 N.M. 387, 9 P.3d 70, illustrates circumstances in which an officer articulates more than a generalized suspicion of criminal activity in an investigative stop. In that case, the officer had detained the defendant for a traffic violation and became suspicious about possible impairment. *Id.* ¶ 2. This Court held that the defendant driver's possible impairment combined with the discovery of drugs on the passenger supported individualized suspicion sufficient to detain the defendant further for investigation into the possibility of the defendant's possession of drugs. *Id.* ¶¶ 10–15.

{27} Applying the requirement of individualized suspicion in the two cases on appeal indicates that the threshold has not been met. In *State v. Patterson,* Officer Merritt discovered drug paraphernalia in the posses-

sion of another occupant of the car and saw an open container in the car. The State contends that Officer Merritt's request for Defendant Patterson's identification was justified as part of the investigation of a violation of the open container law and an individualized suspicion that the occupants of the car were using illegal drugs.

{28} The difficulty with the State's argument is that it does not point to any facts particular to Defendant Patterson that would lead to individualized suspicion that he was violating a law. *See Jason L.*, 2000–NMSC–018, ¶ 21, 129 N.M. 119, 2 P.3d 856 (noting that New Mexico has not dispensed with the need for individualized suspicion and affirming the lower court's determination that the actions of the defendant's companion could not be used to justify the defendant's detention). The only fact concerning Defendant Patterson was that he was present in the car. This mere presence was not sufficient to create an individualized suspicion that Defendant Patterson was violating the open container law. *See* NMSA 1978, § 66–8–138 (2001) (prohibiting any person from knowingly drinking alcoholic beverages or having "in his possession on his person" an open container in a motor vehicle on a public highway); *Jason L.*, 2000–NMSC–018, ¶¶ 21–22, 129 N.M. 119, 2 P.3d 856. The fact that a can of beer may easily be passed between seats does not raise any greater individualized suspicion that Defendant Patterson possessed "on his person" an open container of alcohol. Officer Merritt had testified that he did not observe Defendant Patterson with an open container or observe any open container in the area near Defendant Patterson. Under these circumstances, Officer Merritt did not have an individualized suspicion that Defendant Patterson, as a passenger, was violating the open container law. Likewise, Officer Merritt articulated no facts beyond Defendant Patterson's mere presence that could justify individualized suspicion of possession of contraband.

{29} In *State v. Swanson*, the driver turned away from a roadblock, the backseat passenger lied about the reason and rummaged around the floorboard, and all three occupants, including Defendant Swanson, exhibited nervous behavior. An officer's statement concerning a person's nervousness without an articulation of specific reasons of concern is insufficient to support a finding of individualized suspicion. *See State v. Vandenberg*, 2003–NMSC–030, ¶ 31, 134 N.M. 566, 81 P.3d 19. Officer McCoy did not articulate any specific concern with regard to Defendant Swanson. Any concerns Officer McCoy may have had were merely generalized based upon the behavior of the other occupants of the car. We do not attribute the behavior of the other two occupants to Defendant Swanson because Officer McCoy did not produce any evidence or indication, other than nervousness, that Defendant Swanson had knowledge of criminal activity on the part of the others or that there was concerted activity. *Id.* No individualized suspicion justified the detention of Defendant Swanson.

CONCLUSION

{30} Because we conclude that Defendants were illegally seized and that the district courts should have suppressed any evidence discovered subsequent to the illegal seizures, we reverse Defendants' convictions. *See Wong Sun v. United States*, 371 U.S. 471, 487–88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State v. Bedolla*, 111 N.M. 448, 455, 806 P.2d 588, 595 (Ct.App.1991).

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

WE CONCUR: JONATHAN B. SUTIN and CYNTHIA A. FRY, Judges.

2006-NMSC-015
132 P.3d 587

Cari I. AGUILERA, Plaintiff–Respondent,

v.

BOARD OF EDUCATION OF the HATCH VALLEY SCHOOLS, Defendant–Petitioner.

No. 29,190.

Supreme Court of New Mexico.

March 14, 2006.

Corrected April 24, 2006.

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OPINION

BOSSON, Chief Justice.

{1} Pursuant to a reduction in force (RIF) arising from a district-wide financial shortfall, Plaintiff Cari I. Aguilera, a certified arts teacher with the Hatch Valley Schools, was discharged during the term of her contract. Under the New Mexico School Personnel Act, a certified teacher may only be discharged for "just cause," NMSA 1978, § 22–10A–27(A) (2003), defined as "a reason that is rationally related to an employee's competence or turpitude or the proper performance of his duties," NMSA 1978, § 22–10A–2(F) (2003). Ms. Aguilera was not charged with any infractions relating to competence, turpitude or performance.

{2} An independent arbitrator reviewed the School Board's decision to discharge Ms. Aguilera and found there was no "just cause" under Section 22–10A–2(F). However, the arbitrator also found that the discharge was authorized by the district's RIF policy, and therefore upheld the discharge. The Court of Appeals reversed, holding for Plaintiff that "just cause" was limited to reasons based upon performance, competence, or turpitude, and did not include a RIF arising from fiscal problems in the school district. We granted certiorari to clarify the state statute defining "just cause" and what constitutes grounds for teacher termination or discharge. We affirm the result reached by the Court of Appeals, but for different reasons. Contrary to the Court of Appeals, we determine that the plain meaning interpretation of the "just cause" definition is not appropriate, but instead we look to judicial interpretations of

"just cause" prior to the time the Legislature defined the term to inform our construction of the statute.

BACKGROUND

{3} At the end of Ms. Aguilera's second year as a high school art teacher, the Board agreed to employ her as an art teacher for a third consecutive year at the middle school, and the parties entered into a contract. However, in early fall of that year, the Superintendent of Hatch Valley, Mr. Billy Henson, notified Ms. Aguilera that he would be recommending to the Board that she be discharged pursuant to a RIF. Allegedly, the RIF was necessary because of shortfalls in state funding and the discontinuation of certain federal grant money. Superintendent Henson made the decision to eliminate Ms. Aguilera's position because art was considered a non-vital academic area. Due to low enrollment, it would have the least effect on the students. The Board accepted the Superintendent's RIF plan, along with his recommendation to discharge Ms. Aguilera in the middle of her contract.

{4} Ms. Aguilera requested a hearing, and the Board upheld its decision. Ms. Aguilera appealed to an independent arbitrator who conducted a *de novo* review of the Board's decision. *See* NMSA 1978, § 22–10A–28(D) (2003). After a hearing, the arbitrator found that Ms. Aguilera had an excellent work history with Hatch Valley, and was losing her job as a result of the school district failing "to get its financial house in order." The arbitrator noted that Ms. 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." The arbitrator also noted there was evidence that Hatch Valley could have finished the year with sufficient funds to pay Ms. Aguilera's salary. The arbitrator concluded, however, that Hatch Valley's RIF policy constituted "just cause" for the discharge of certified school personnel and termination of tenured employees.[1]

{5} Ms. Aguilera appealed the arbitrator's decision to the Court of Appeals which disagreed with the arbitrator's interpretation of state law, and held that the RIF policy did not constitute "just cause" under the School Personnel Act. *Aguilera v. Bd. of Educ.*, 2005–NMCA–069, ¶¶ 21, 23, 137 N.M. 642, 114 P.3d 322. The Court of Appeals determined that a plain reading of the definition of "just cause" and the requirement that a discharge "only" be for "just cause," meant that Ms. Aguilera could only be discharged for reasons personal to her qualifications and performance, and not for a RIF. *Id.* ¶ 13; *see* § 22–10A–27(A).

DISCUSSION

{6} The issue in this case is whether statutory "just cause" allows for discharge of a teacher when exigent fiscal circumstances justify a RIF, but the teacher's competence, turpitude and performance do not. Because we are interpreting the School Personnel Act, and its application to this case, we apply a *de novo* standard of review. *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n*, 2003–NMSC–005, ¶ 17, 133 N.M. 97, 61 P.3d 806; *Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005–NMCA–022, ¶ 16, 137 N.M. 26, 106 P.3d 1273.

{7} The term "just cause" was not defined by statute until the Legislature amended the Act in 1991. *See* 1991 N.M. Laws ch. 187, § 3. However, prior to the 1991 amendment, New Mexico courts had interpreted the meaning of "just cause" or comparable terms for almost half a century. To put the 1991 amendment in proper context, we look first to the history of our case law interpreting the predecessor statutes of the School Personnel Act, commonly known as teacher's tenure statutes. We consider whether the Legislature, in adding a "just cause" definition in 1991, intended to codify that case law and its history or reject it in favor of a new, more limited concept of "just cause." Finally, we examine specifically whether a RIF can be "just cause" for discharge under the Act, and if so, whether "just cause" was proven to discharge Ms. Aguilera.

1. The same definition of "just cause" in Section 22–10A–2(F), applies to both the discharge of certified school employees, see § 22–10A–27(A), and to the termination of tenured employees, see NMSA 1978, § 22–10A–24(D) (2003).

The History of the Teacher's Tenure Statute and the *Swisher* Rule

{8} Long before any statutory directive, this Court acknowledged over 80 years ago that a school board had the implicit right to terminate a teacher for "adequate cause," a right derived from its statutory power to employ that same teacher. *Tadlock v. Sch. Dist. No. 29 of Guadalupe County,* 27 N.M. 250, 256, 199 P. 1007, 1009 (1921); *accord Landers v. Bd. of Educ.,* 45 N.M. 446, 452–53, 116 P.2d 690, 693–94 (1941) (stating that a discharge cannot be without cause). Subsequently, in line with this Court's decisions, the Legislature amended the 1925 version of the Act, to say that no teacher could be discharged "except upon good cause." 1941 N.M. Laws, ch. 202, § 3; *see also Ortega v. Otero,* 48 N.M. 588, 592, 154 P.2d 252, 254–55 (1944). The Legislature did not define "good cause."

{9} Interpreting the public policy animating the 1941 amendment, we stated:

> The effect of the amendment is to further protect the employment status of teachers.
>
> Of greater significance, however, is the time and circumstance of the amendment.
>
> The Legislature of 1941 doubtless sensed the need to get in step with the march of progress toward a greater security to those who have become equipped through education and training to assume positions in our school system.
>
> What is known as Teachers' Tenure Acts have been adopted in most of the states of our union, the objects of which are to encourage men and women to make a lifetime profession of teaching and to stimulate them to seek positions in the school system requiring the qualifications of teachers, and to protect them in their employment from the whims of those possibly politically minded, and to insure their continuance in such employment.

Ortega, 48 N.M. at 593, 154 P.2d at 255; *see also Stapleton v. Huff,* 50 N.M. 208, 211, 173 P.2d 612, 613 (1946). In light of the legislative policy to protect teachers as professionals, this Court determined that "good cause" meant reasons related to satisfactory performance of duties. *Stapleton,* 50 N.M. at 211, 173 P.2d at 613; *see also Atencio v. Bd. of Educ.,* 99 N.M. 168, 170, 655 P.2d 1012, 1014 (1982) ("By statute [teachers] are assured an indefinite tenure of position during satisfactory performance of their duties.").

{10} It is from this statutory and jurisprudential genesis that this Court created the basis to analyze a discharge or termination of a teacher when the reason for severing the teacher's employment is not personal, but rather based on some exigent circumstance. In the *Swisher* case in 1955 this Court noted that "[a]bsent grounds personal to the teacher," the standard to be applied in a discharge resulting from a RIF required the Board "to show affirmatively that there was no position available [that the teacher] was qualified to teach." *Swisher v. Darden,* 59 N.M. 511, 516, 287 P.2d 73, 76 (1955), *superseded by statute on other grounds as stated in Sanchez v. Bd. of Educ.,* 80 N.M. 286, 454 P.2d 768 (1969). *Swisher* arose from the aftermath of racial desegregation in the Las Cruces school system. 59 N.M. at 513, 287 P.2d at 74. The local school board closed the segregated, blacks-only high school where Ms. Swisher taught because most of the students had been integrated into mixed-race schools. *Id.* The local board discharged Ms. Swisher, despite her tenure, because it concluded that her services could no longer be utilized within an integrated school system. *Id.*

{11} On appeal, the State Board of Education found no "just cause" for the termination, pointing out that none of the personal grounds under the law—immorality, insubordination, incompetency, or disloyalty to the United States—were present. *Id.* at 514, 287 P.2d at 75. On review, the district court upheld the State Board, and noted further that the local board chose not to retain Swisher because it believed that, as a black teacher, she would be unable to teach in a white or mixed-race school. *Id.* at 516, 287 P.2d at 77. On appeal to this Court, the local board argued that it had demonstrated sufficient cause because it made its decision in good faith and not for pretextual reasons. *Id.* at 516, 287 P.2d at 76. In our opinion, we agreed that under a "just cause" standard a teacher could be terminated for more than

just personal reasons, but if so, then "more was required" of the school board to justify its decision. *Id.* We stated: "Admittedly, the [school where Swisher taught] was closed for economic reasons. But more was required. Absent grounds personal to the teacher, to terminate her services it was necessary to show affirmatively that there was no position available which she was qualified to teach." *Id.* A mere statement of systemic shrinkage due to desegregation was not enough.

{12} *Swisher* remains today the seminal case on a school board's power to terminate a tenured teacher absent personal grounds. *See Penasco Indep. Sch. Dist. No. 4 v. Lucero,* 86 N.M. 683, 684, 526 P.2d 825, 826 (Ct.App.1974) ("The controlling rule on the local board's power to terminate a tenure teacher was stated in *Swisher.* . . ."). *Swisher* has been applied specifically to RIF situations, albeit with differing results. *See N.M. State Bd. of Educ. v. Abeyta,* 107 N.M. 1, 2, 751 P.2d 685, 686 (1988); *see also Hensley v. State Bd. of Educ.,* 71 N.M. 182, 185, 376 P.2d 968, 970 (1962) ("[A] reduction in the teaching staff, without more, would not appear to be a good and sufficient reason for the dismissal of a tenure teacher when other teachers without tenure are retained in her place and stead.").

{13} In *Fort Sumner Municipal School Board v. Parsons,* 82 N.M. 610, 612–14, 485 P.2d 366, 368–70 (Ct.App.1971), the school board was forced to conduct a RIF, and it decided to retain two non-tenured teachers instead of reemploying Parsons, a tenured teacher. The Court of Appeals held the *Swisher* requirement was met because, in a small school system, it was imperative to retain the two non-tenured teachers who could teach the same subjects as Parsons as well as other subjects that Parsons could not. *Parsons,* 82 N.M. at 613, 485 P.2d at 369. Therefore, it was necessary to retain these two teachers instead of Parsons to prevent the overall academic program at the school from being seriously compromised. *Id.* at 613–14, 485 P.2d at 369–70.

{14} Following *Parsons,* this Court was faced with a similar situation in *Abeyta,* 107 N.M. at 2, 751 P.2d at 686, where, because of a RIF, the school board had three tenured social studies teachers, but only two positions available. Based on a performance evaluation, Abeyta was identified for termination. *Id.* The board considered realignment, a rearranging of staff to different positions, but rejected it because realignment would detrimentally affect other academic areas at the school. *Id.* Based on this record, we held that the board had satisfied the *Swisher* requirement. *Id.* at 3, 751 P.2d at 687. Before resorting to termination, it had considered reasonable alternatives for which Abeyta was qualified and rejected them based on reasons solidly grounded in the academic welfare of the school. *Id.* at 2–3, 751 P.2d at 686–87.

{15} *Abeyta* and *Parsons* inform us that the *Swisher* rule is to be applied in the context of whatever special facts and circumstances pertain to each individual case. Pursuant to *Swisher,* a school board faced with a RIF must strive to find another eligible position for which the teacher is qualified. However, the school board is not required to imperil the quality of education, or conduct a realignment that is proven to have a deleterious effect on the overall academic program of the school system. *Abeyta* and *Parsons* represent the law in effect in 1991, before our Legislature, for the first time, enacted its own definition of "just cause."

Effect of the 1991 Amendment to the School Personnel Act

{16} The 1991 amendment to the School Personnel Act defined "just cause" as "a reason that is rationally related to an employee's competence or turpitude or the proper performance of his duties." Section 22–10A–2(F).[2] Given *Swisher's* dominant po-

2. We note this case involves only the discharge of a certified teacher, and not termination. "[D]ischarge" is defined as "the act of severing the employment relationship with a certified school employee prior to the expiration of the current employment contract." Section 22–10A–2(A). "[T]ermina[tion]" is "the act of not reemploying an employee for the ensuing school year." Section 22–10A–2(D). In all cases of discharge, the teacher may only lose her position for "just cause." Section 22–10A–27(A). In termination cases, if the teacher is tenured, the teacher may

sition at that time in our case law, the question is whether the 1991 amendment defining "just cause" was intended to codify *Swisher* or to overturn it. The Court of Appeals strictly interpreted the language of the "just cause" definition to reach its conclusion. We believe, however, that the Legislature intended to incorporate this Court's case law when it defined "just cause."

{17} At first glance, the "just cause" definition might appear to give no room for the balance struck in *Swisher*, because it limits the grounds for discharge and termination to reasons rationally related to competence, turpitude, or proper performance of duties. *See* § 22–10A–2(F). Indeed, this is how Ms. Aguilera argues her case—that reasons external to teacher performance, such as a RIF, can never be grounds for termination. On the other hand, the Board argues that a properly justified RIF will always constitute "just cause," and nothing more need be shown. Notably, neither view allows for any compromise in the middle, much as this Court crafted in *Swisher* years ago.

{18} We believe both positions are extreme, and neither captures the essence of legislative intent. We look to the amendment to determine if the middle ground struck in *Swisher* survives. Put another way, we look for any indication that the Legislature intended such a radical change that would eliminate its essential compromise. We first determine the intent of the Legislature in deciding to define "just cause" for the first time, and then interpret the language of the definition itself based on that legislative intent.

{19} The primary goal of statutory construction is to give effect to the intent of the Legislature. *State v. Young*, 2004–NMSC–015, ¶ 5, 135 N.M. 458, 90 P.3d 477. Normally, when the Legislature amends a statute, we presume it intends to change existing law. *Wasko v. N.M. Dep't of Labor*, 118 N.M. 82, 84, 879 P.2d 83, 85 (1994). However, "an amendment may clarify existing law, rather than change the law, if the statute was ambiguous or unclear prior to the amendment." *Wasko*, 118 N.M. at 85, 879 P.2d at 86; *accord Resolution Trust Corp. v. Binford*, 114 N.M. 560, 568, 844 P.2d 810, 818 (1992); *See generally* 1A NORMAN J. SINGER, STATUTES & STATUTORY CONSTRUCTION § 22:1, at 239, 241–42; § 22.30, at 357, 357–76 (6th ed.2002 revision). The Legislature may also amend a statute to adopt prior interpretations by the courts. *See* 2B SINGER, *supra*, § 50:02, at 144, 144–50; *State v. Ortega*, 112 N.M. 554, 579, 817 P.2d 1196, 1221 (1991) (Baca, J., concurring in part and dissenting in part) (arguing the Legislature amended felony murder statute to adopt the judicial interpretation given the prior act); 1A SINGER, *supra*, § 22:31, at 380.

{20} The 1991 amendment did not alter any terms of the School Personnel Act dealing with grounds for discharge, or make substantive changes; it simply added a definition. Such a modest step is not usually a harbinger of radical change. *See State v. Morrison*, 1999–NMCA–041, ¶¶ 11–13, 127 N.M. 63, 976 P.2d 1015; *cf. Blackwood & Nichols Co. v. N.M. Taxation & Revenue Dep't*, 1998–NMCA–113, ¶ 15, 125 N.M. 576, 964 P.2d 137 (holding that substantial revision of statute materially changed existing law, rather than clarifying it). Normally, the Legislature will signal its intent to effect a substantial change in the law, and it did not do so in this instance. The 1991 amendment, adding only the "just cause" definition, appears more like a supplementary act rather than an amendatory act, as it simply "adds to, or completes, or extends that which is already in existence without changing or modifying the original." 1A SINGER, *supra*, § 22:24, at 330–31 (quoting *McCleary v. Babcock*, 169 Ind. 228, 82 N.E. 453, 455 (1907)).

{21} The statutory evolution of the "just cause" requirement for discharge and termination supports our conclusion that no substantive change in the law was intended.

not be fired except for "just cause." Section 22–10A–24(D). A teacher obtains tenure by remaining employed by "a school district or state agency for three consecutive years." *Id.* A non-tenured teacher may be terminated for any reason deemed sufficient by the school board. Section 22–10A–24(A). "Just cause," as defined in Section 22–10A–2(F), applies to both discharge of any teacher and termination of a tenured teacher. Our decision regarding when an RIF is "just cause" to discharge a teacher, is equally applicable to termination of a tenured teacher.

Since it first required "good cause," *see* 1941 N.M. Laws, ch. 202, § 3, the Legislature has consistently required a showing of "good" or "just cause" for discharge. In the original codification of the 1978 statutes, the current version we follow, the Legislature required "good and just cause" for both discharge and termination. *See* 1978 Comp., § 22–10–17 (discharge), as enacted by 1967 N.M. Laws, ch. 16, § 119 (recompiled as 1978 Comp., § 22–10A–27 by 2003 N.M. Laws, ch. 153, § 72); 1978 Comp., § 22–10–14 (termination), as enacted by 1967 N.M. Laws, ch. 16, § 116 (recompiled as 1978 Comp., § 22–10A–24 by 2003 N.M. Laws, ch. 153, § 72). In 1986, the Legislature changed the standard for termination of tenured employees, prohibiting only those terminations that were "based upon grounds that are arbitrary or capricious or legally impermissible." 1986 N.M. Laws, ch. 33, § 22. However, in the same amendment, the Legislature left intact the "good and just cause" requirement for discharge. 1986 N.M. Laws, ch. 33, § 24. Finally, in 1991, the Legislature restored the "just cause" requirement for termination and made only slight changes to the discharge statute by removing "good and" from "good and just cause," in addition to defining "just cause." *See* 1991 N.M. Laws, ch. 187, §§ 3, 4, 7.

{22} Thus, it seems clear that the 1991 amendment was aimed at restoring "just cause" as a condition to termination, thereby restoring to tenured teachers the protections they had enjoyed before 1986. It is equally clear that the Legislature made no substantive changes to the discharge statute, leaving intact the protections tenured teachers had enjoyed for decades. We discern no legislative intent from this textual history to effect the kind of radical change now suggested by Plaintiff: an intent to create a kind of "super-tenure," strictly limiting the grounds for either termination or discharge to personal factors and making teachers entirely immune from the economic consequences of a valid RIF. If that is the legislative intent, we await a clearer manifestation from the legislative branch.

{23} We also observe that any plain meaning analysis of the amendment could lead to harsh, even absurd results. *See State ex rel. Helman v. Gallegos*, 117 N.M. 346, 351–52, 871 P.2d 1352, 1357–58 (1994) (holding that courts may look beyond the plain language of a statute where it would lead to absurd or unreasonable results); *Santa Fe County Bd. of County Comm'rs v. Town of Edgewood*, 2004–NMCA–111, ¶ 5, 136 N.M. 301, 97 P.3d 633. It would mean that a school board could never discharge or terminate a teacher even when compelled by economic reasons to reduce its teacher force. Absent a clear-cut legislative directive, we will not assume the Legislature intended to leave a school board powerless to respond to financial crisis.

{24} Instead of being forced to choose between two all-or-nothing positions, we believe the Legislature intended a more moderate view. It did not intend to tie the hands of a school board faced with the necessity of a RIF, but neither did the Legislature intend to place tenure teachers at the mercy of school administrators. We presume the 1991 legislature was aware of existing law, including the case law of our appellate courts. *State v. Cleve*, 1999–NMSC–017, ¶ 14, 127 N.M. 240, 980 P.2d 23 (stating that the Legislature is presumed to know existing law when enacting a statute). In the absence of a clear legislative directive to abandon existing law, we continue to apply it. Existing law includes the balance struck in *Swisher* and its progeny between the competing demands of tenure protection and administrative exigency.

{25} *Swisher* recognizes the limited circumstance when a board is forced to discharge or terminate a competent teacher for reasons external to the personal context. When we view "just cause" in light of the legislative intent to protect both teachers and school systems, and our precedent dating back over half a century, we conclude that the 1991 statutory definition intended to codify and incorporate the *Swisher* rule into the School Personnel Act. Accordingly, we hold that when a school board is forced to reduce its teaching staff by way of a RIF, it must satisfy the *Swisher* requirement and prove that there is no other position for which the teacher is *qualified* consistent with the academic necessities of the district. This rule

gives considerable protection to teachers and tenured employees, while still allowing a school board to conduct a RIF when faced with compelling circumstances.

The *Swisher* Rule was not Properly Applied in this Case

{26} Because we hold that the *Swisher* rule applies to this case, we must now determine if the Hatch Valley School Board satisfied it. Unfortunately for the Board, we find nothing in the record to indicate the Board even considered the rule, much less satisfied it. We also determine that in his *de novo* review, the arbitrator applied the wrong standard, one that was inconsistent with *Swisher*.

{27} The School Board's written decision makes no mention of any consideration by the Board of *Swisher*-type alternatives, and no evidence was presented to the Board to this effect. The Board's minutes of the meeting when it was suggested that a RIF was needed, show that Superintendent Henson informed the Board that attempts had already been made to reduce the work force through attrition, and he had considered cutting some extra-curricular activities. However, Superintendent Henson suggested that "extra-curricular activities not be eliminated at this time because of the large numbers of students . . . involved," and their importance to student success. Interestingly, the Superintendent also testified that of the 70 teachers in the Hatch Valley system, six are football coaches, and just that year, the number was increased from five to six. While these broad-based "alternatives" may be valid considerations to determine where to apply the RIF, they do not address the individually based requirement of *Swisher* once a teacher is identified for discharge. They do not discuss particular alternatives for Ms. Aguilera and her particular qualifications. Similarly, the minutes of the September 30, 2002, meeting in which the Board actually approved the elimination of the middle school art program, reflect no determinations about whether there were other qualified positions for the only teacher in that program, Ms. Aguilera.

{28} Under *Swisher*, it is the Board's burden and duty to make the proper determination that no other positions exist. The record is devoid of any evidence that this occurred. In his memorandum to the Board, purporting to lay out the RIF plan, Superintendent Henson indicated that substandard licensed personnel are the first people to be discharged. The arbitrator concluded this statement referred to Ms. Aguilera, as she had a substandard license. However, Superintendent Henson's plan to the Board never identified Ms. Aguilera as having a substandard license, and never indicated to the Board the significance of the statement. This information should have been presented to the Board to satisfy *Swisher*, as it had the ultimate authority to discharge Ms. Aguilera.

{29} Because the Board never considered the *Swisher* standard or any evidence that Superintendent Henson applied *Swisher*, we hold the Board's decision was invalid. However, because the arbitrator conducted a *de novo* review, we must also determine if *Swisher* was properly applied in that proceeding. We hold it was not.

{30} In the findings of fact and conclusions of law, the arbitrator found the RIF policy constituted "just cause" for discharge or termination. The only limiting principle was that the RIF "must be exercised by the board in good faith and based on bonafide educational considerations, and not as a subterfuge for discharging . . . without good or just cause or for any other impermissible reason." This surely does not satisfy *Swisher*. This Court expressly rejected the same argument of good faith when advanced by the Las Cruces Board in its attempt to terminate Ms. Swisher. *See Swisher*, 59 N.M. at 516, 287 P.2d at 76.

{31} The arbitrator also noted the RIF plan requires "a discussion of alternatives considered by the superintendent with an explanation as to why such alternatives were rejected." This requirement is much broader than the *Swisher* rule and focuses on school programs rather than individual affected teachers. Counsel for the Board, during closing statements argued for a more relaxed standard, stating:

> The manner in which a company chooses to conduct a RIF is within its sound business discretion. And plaintiffs in this case, having failed to introduce any evidence that the RIF criteria or pretext for discriminatory motives.... [T]here is nothing that suggests that Mr. Henson ... targeted [Plaintiff] for the loss of [her job] for either impermissible discriminatory kinds of reasons....

Swisher and *Abeyta* were mentioned by both counsel, but only in a vague fashion without ever really focusing on the specific requirement of *Swisher* that was applied to a RIF in *Abeyta.*[3]

{32} Unlike termination, which applies to the coming year, discharge results in a teacher losing her job in the middle of the school year, when there may be no opportunity to find other employment. Given the extreme hardship to the teacher, the justifications must be substantial to allow a school board to layoff qualified teachers in the middle of a school year pursuant to a RIF. The school board has to show not just projected financial burdens in the future, but that it cannot survive financially for the present year, which is already underway. To avoid such draconian consequences, the Legislature has authorized a school district to reserve up to 5 percent of its cash balance for an emergency fund to help get through the year when it experiences "unforeseen expenditures incurred after the annual budget was approved." NMSA 1978, § 22–8–41(B) (2004).

CONCLUSION

{33} We conclude that the Board failed to make the requisite showing under *Swisher,* both in its decision and before the arbitrator, and therefore failed to prove "just cause" for the discharge of Ms. Aguilera. Accordingly, we affirm the result reached by the Court of Appeals, reverse the arbitrator's decision and remand for whatever further proceedings are necessary to implement this Opinion.

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

WE CONCUR: PAMELA B. MINZNER, PATRICIO M. SERNA, PETRA JIMENEZ MAES, and EDWARD L. CHÁVEZ, Justices.

3. There was evidence before the arbitrator similar in nature to that required by *Swisher.* Superintendent Henson testified about the nature of Ms. Aguilera's substandard license as compared to the high school art teacher's, and he also claimed to have considered a realignment. Theoretically, this evidence might have satisfied the *Swisher* requirement that the school consider other alternatives for which the teacher is qualified. However, nothing in the record indicates the arbitrator considered this evidence in light of *Swisher* or followed *Swisher.*

2006-NMCA-043

132 P.3d 598

STATE of New Mexico, Plaintiff–Appellant,

v.

Leroy ROYBAL, Defendant–Appellee.

No. 24,897.

Court of Appeals of New Mexico.

Feb. 1, 2006.

Certiorari Denied, No. 29,684, March 30, 2006.

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

OPINION

FRY, Judge.

{1} The State appeals the dismissal of criminal charges against Defendant for lack of venue. Defendant was in Santa Fe County when a police officer clocked his car speeding and began pursuing him. Defendant pulled over and stopped just after crossing the county line into Rio Arriba County. There, he was arrested on an outstanding warrant. During an inventory search, the police discovered drugs and drug paraphernalia in his car. As a result, Defendant was charged in Santa Fe County with two counts of trafficking in a controlled substance. The trial court dismissed with prejudice the charges filed in Santa Fe County for improper venue, concluding that the charges should have been filed in Rio Arriba County where Defendant was stopped and the drugs were discovered. We hold that venue was proper in Santa Fe County because the crime of trafficking in a controlled substance by possession with intent to distribute is a continuing offense that was committed in both counties in which Defendant traveled while in possession of the drugs. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

DISCUSSION

I. The State's Notice of Appeal Was Timely Filed

{2} Initially, we determine whether the State filed a timely notice of appeal from the trial court's dismissal of the charges. The timely filing of a notice of appeal is a mandatory precondition to this Court's jurisdiction and must be addressed even if neither party raises the issue. *Valley Bank of Commerce v. Hilburn*, 2005-NMCA-004, ¶ 12, 136 N.M. 741, 105 P.3d 294. Upon assigning this case to the general calendar, we instructed the parties to brief the issue of whether the State's notice of appeal was timely filed. We conclude that the notice was timely filed.

{3} Our review of the record establishes the following facts. After the State rested its case at trial, Defendant moved for a directed verdict on the ground that the State failed to prove that venue in Santa Fe County was proper. After hearing argument from both parties, the trial court granted Defendant's motion, concluding that Defendant's speeding violation was insufficient to establish venue in Santa Fe County for purposes of the trafficking charges, and that venue rested in Rio Arriba County where Defendant was stopped and the drugs were found.

{4} On November 19, 2003, two days after the jury trial was terminated, the trial court entered an order dismissing with prejudice all counts against Defendant on the ground that "the State's evidence failed to support a[v]erdict[.]" The dismissal order, as worded, appeared to be an acquittal on the merits and thus did not accurately reflect the trial court's oral ruling that the charges be dismissed for lack of venue. *See State v. Joe*, 2003-NMCA-071, ¶ 16, 133 N.M. 741, 69 P.3d 251 (explaining that a directed verdict, based on the State's failure to produce sufficient evidence to carry its burden at trial, amounts to an acquittal); *see also State v. Lopez*, 84 N.M. 805, 808-09, 508 P.2d 1292, 1295-96 (1973) (explaining that venue is not jurisdictional, and therefore, the defendant's motion for a directed verdict based on the state's failure to prove all essential elements of a prima facie case was insufficient to preserve venue objection); *State v. Wise*, 90 N.M. 659, 662, 567 P.2d 970, 973 (Ct.App.1977) (discussing that venue need not be proved beyond a reasonable doubt because it is not an essential element of the crime, but a personal right or privilege). On appeal, both parties agree that a dismissal for lack of venue is not an adjudication on the merits, *see Bracken v. Yates Petroleum Corp.*, 107 N.M. 463, 463, 760 P.2d 155, 155 (1988), *disagreed with on other grounds by Team Bank v. Meridian Oil Inc.*, 118 N.M. 147, 151, 879 P.2d 779, 783 (1994), and is thus distinguishable from a directed verdict of acquittal. *Cf. Joe*, 2003-NMCA-071, ¶ 16, 133 N.M. 741, 69 P.3d 251.

{5} On November 21, 2003, the State filed a motion to set aside the order of dismissal, arguing that (1) the order had been entered without first being submitted to the State for approval as required by Rule 5-121(D) NMRA; (2) the order, as entered, did not reflect the ruling of the trial court and was contrary to the applicable law; and (3) the order was signed by a judge other than the presiding judge. Along with the motion to set aside, the State filed a request for a presentment hearing.

{6} On November 26, 2003, the State also filed a motion to reconsider the trial court's ruling on venue. Defendant filed a response to both motions on December 11, 2003. Because no presentment hearing had yet been set by the trial court, the State filed a second request for hearing on February 5, 2004. The trial court finally heard both motions on March 23, 2004, approximately four months after the State's post-dismissal motions were filed. At the conclusion of the hearing, the trial court denied the State's motions but instructed the parties to prepare an amended order clarifying that the charges were dismissed with prejudice based upon the State's failure to prove that venue was proper in Santa Fe County. The amended order of dismissal, accurately setting forth the trial court's ruling on venue, was filed on March 25, 2004. The State's notice of appeal was filed on April 20, 2004, within thirty days of the amended order of dismissal but more than five months after the original dismissal order. Rule 12-201(A)(2) NMRA.

{7} In determining whether the State's appeal was timely filed, we consider the following questions: (A) whether the time for

appeal began to run from the original dismissal order and thus the State was required to appeal from that order; and (B) whether the State's motion to set aside and motion to reconsider tolled the time for appeal, thus allowing the trial court to have jurisdiction to enter the amended order of dismissal. For the reasons that follow, we conclude that (A) the time for appeal did not begin to run from the original dismissal order because that order was unappealable on its face and did not accurately reflect the trial court's ruling of improper venue, and (B) the State's post-dismissal motions suspended the finality of the original dismissal order and delayed the time for appeal until the trial court disposed of the State's motions. Therefore, the trial court had jurisdiction to enter the amended order of dismissal.

A. The Time for Appeal Did Not Run From the Original Dismissal

{8} As discussed above, on November 19, 2003, the trial court entered an order upon Defendant's motion for directed verdict, dismissing with prejudice the trafficking counts on the ground that the State's evidence failed to support a verdict. On its face, the dismissal appeared to be an acquittal on the merits and thus was not appealable by the State. *See Joe*, 2003-NMCA-071, ¶ 16, 133 N.M. 741, 69 P.3d 251. When a defendant is acquitted of a charge, the double jeopardy clause prohibits a second prosecution on the same charge and thus bars appellate review of the final judgment. NMSA 1978, § 39-3-3(C) (1972) ("No appeal shall be taken by the state when the double jeopardy clause of the United States constitution or the constitution of the state of New Mexico prohibits further prosecution."); *State v. Archuleta*, 112 N.M. 55, 58, 811 P.2d 88, 91 (Ct.App.1991) (explaining that the double jeopardy clause does not permit an appeal of a judgment of acquittal, "whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict" (internal quotation marks and citation omitted)). Consequently, on its terms, the first order of dismissal did not appear to be appealable by the State.

{9} As the transcript of the trial reveals, however, the trial court did not intend to acquit Defendant of the charges but rather sought to dismiss the charges based upon a determination that the State failed to prove that venue was proper in Santa Fe County. *Compare Joe*, 2003-NMCA-071, ¶ 16, 133 N.M. 741, 69 P.3d 251 (stating that a trial court's determination that the state did not produce sufficient evidence to carry its burden constitutes a judgment of acquittal), *with Wise*, 90 N.M. at 662, 567 P.2d at 973 (explaining that venue is not an essential element of a crime but "a personal right or privilege of the accused which may be waived"). In dismissing the action for improper venue, the trial court fully anticipated that the State would appeal the ruling on venue and encouraged such an appeal, believing the venue question to be one of first impression in New Mexico. *See Ledbetter v. Webb*, 103 N.M. 597, 604, 711 P.2d 874, 881 (1985) (indicating that the trial court's verbal comments can be used to clarify ruling). However, the dismissal, as entered by the trial court, not only precluded an appeal by the State but incorrectly stated the legal basis for dismissal.

[4] {10} The State argues that it should not have been required to file a notice of appeal until it obtained an order that correctly set forth the trial court's ruling and was final and appealable on its terms. We agree. Because the first dismissal order failed to accurately state the basis for dismissal, and the State sought to appeal the trial court's ruling on venue, the State had both an interest and a duty to obtain an order that correctly set forth the substance of the trial court's ruling before appealing. *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 by the reviewing court in favor of the correctness and regularity of the [trial] court's judgment.' " (quoting *In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 19, 121 N.M. 562, 915 P.2d 318)); *see State v. Jim*, 107 N.M. 779, 780, 765 P.2d 195, 196 (Ct.App.1988) (noting that it is the appellant's burden to bring up a record sufficient for review of the issues presented on appeal).

{11} Moreover, where a final order is entered incorrectly through no fault of the State, we conclude that it would be improper to penalize the State for any delay in filing the notice of appeal caused by its attempt to reasonably and diligently correct the order prior to appealing. *Cf. Trujillo v. Serrano,* 117 N.M. 273, 278, 871 P.2d 369, 374 (1994) (determining that an untimely appeal should be heard when the actions of the court from which the appeal was taken caused the untimely filing). Here, it appears the dismissal order not only wrongly stated the basis for dismissal but was filed without the State's prior examination or approval, as required by Rule 5–121(D), and was signed by a district judge other than the presiding judge. We determine that, under these circumstances, the time for appeal should not commence to run from the original dismissal.

B. The State's Post-dismissal Motions Suspended the Time for Appeal

{12} Further, in attempting to clarify and correct the first dismissal order, the State promptly filed a motion to set aside the dismissal. NMSA 1978, § 39–1–1 (1917) (providing the district court with jurisdiction for thirty days after entry of judgment). The State filed the motion to set aside the order of dismissal on November 21, 2003, two days after the original dismissal order was entered. The State also promptly filed a motion to reconsider on November 26, 2003. Although the motion to reconsider cited no provision authorizing the motion, the State presumably sought reconsideration of the trial court's ruling based on the same statutory authority as the motion to set aside. Below, Defendant argued that no rule or statute permitted the State's motions.

{13} "Although Section 39–1–1 ordinarily is invoked in civil cases, it also applies to criminal proceedings." *State v. Gonzales,* 110 N.M. 218, 226, 794 P.2d 361, 369 (Ct.App.1990), *aff'd,* 111 N.M. 363, 805 P.2d 630 (1991). Under Section 39–1–1, "the district court retains control of its judgments and decrees for a period of thirty days after entry and for such further time as may be necessary to pass upon and dispose of any motion directed against a judgment or decree." *Id.* However, as this Court recently clarified, Section 39–1–1 applies only to non-jury trial cases, as the plain language of the statute suggests. *Valley Bank of Commerce,* 2005–NMCA–004, ¶ 18, 136 N.M. 741, 105 P.3d 294; *see also Gonzales,* 110 N.M. at 226, 794 P.2d at 369 (determining that Section 39–1–1 authorized the State to seek reconsideration of a *pre-trial* motion to dismiss an indictment because no jury trial had occurred at that stage of the proceedings). Because, in this case, the dismissal was ordered after the State rested its case at the jury trial, Section 39–1–1 does not apply and provides no authority for the State's post-dismissal motions.

{14} This Court is unaware of any rule of procedure that specifically allows the State to file a motion to reconsider or set aside an order of dismissal in a criminal case. *See Gonzales,* 110 N.M. at 226, 794 P.2d at 369 (acknowledging that "our rules of criminal procedure do not expressly provide for motions for reconsideration of a judgment of dismissal"). Although the rules of criminal procedure contain a number of provisions allowing a *defendant* to obtain relief from a conviction or sentence, *see, e.g.,* Rule 5–614 NMRA (motion for new trial), Rule 5–801 NMRA (modification of sentence), Rule 5–802 NMRA (writ of habeas corpus), we find no corresponding provisions in the rules authorizing the *state* to reopen or reconsider a judgment or order of dismissal. *See generally State v. Peppers,* 110 N.M. 393, 395–96, 796 P.2d 614, 616–17 (Ct.App.1990) (discussing post-conviction relief afforded to defendants under the rules of criminal procedure).

{15} Nor may we resort to the rules of civil procedure to find support for the State's post-dismissal motions. The only instances in which the rules of civil procedure have been held to apply in a criminal matter are when the particular proceeding involved was arguably civil in nature. *See, e.g., State v. Nunez,* 2000–NMSC–013, ¶ 123, 129 N.M. 63, 2 P.3d 264 (determining that, in a forfeiture proceeding, the State may move to set aside a default judgment pursuant to either Rule 1–055(C) NMRA, or Rule 1–060(B) NMRA, so that the State may proceed in a single bifurcated criminal trial); *State v. Romero,* 76 N.M. 449, 452, 415 P.2d 837, 838 (1966)

(permitting the defendant in a criminal case to seek relief from a criminal judgment claimed to be void pursuant to Rule 1–060(B) because he filed a petition for writ of coram nobis, which at common law was civil in nature). We cannot say in this purely criminal case that the State's post-dismissal motions were authorized under the rules of civil procedure. *See State ex rel. Task Force of the Region I Drug Enforcement Coordinating Council v.1990 Ford Truck,* 2001–NMCA–064, ¶ 15, 130 N.M. 767, 32 P.3d 210 (noting that there is no procedure in criminal cases analogous to Rule 1–055(C) or Rule 1–060(B) for the state to set aside a plea agreement).

{16} Although there is no rule or statute expressly authorizing the State's post-dismissal motions in this case, we nonetheless find support for the motions in common law. In *Gonzales,* this Court, in determining that the trial court had authority to reconsider an order dismissing an indictment based upon the State's motion, relied in part on the common law doctrine and the policy considerations set forth in *United States v. Healy,* 376 U.S. 75, 84 S.Ct. 553, 11 L.Ed.2d 527 (1964). *Gonzales,* 110 N.M. at 226, 794 P.2d at 369. In *Healy,* the United States Supreme Court explained that although there was no federal rule or statute expressly authorizing the state's motion to reconsider a dismissal of an indictment, such motions are "a traditional and virtually unquestioned practice" and serve judicial economy by permitting lower courts to correct possible errors and thus avoid time-consuming and potentially unnecessary appeals. 376 U.S. at 78–80, 84 S.Ct. 553; *see also State v. Lucero,* 2001–NMSC–024, ¶ 8, 130 N.M. 676, 30 P.3d 365 (indicating that federal case law is persuasive in interpreting our state rules of criminal procedure when they are essentially identical to the federal rules); *Gonzales,* 110 N.M. at 226, 794 P.2d at 369. Under *Healy,* a motion for reconsideration brought by the state within the permissible time for appeal renders the dismissal not final for purposes of appeal and suspends the time for appeal until the motion is decided by the trial court. 376 U.S. at 77–78, 84 S.Ct. 553; *United States v. Ibarra,* 502 U.S. 1, 6, 112 S.Ct. 4, 116 L.Ed.2d 1 (1991).

{17} Applying the *Healy* doctrine to this case, we conclude that the State's timely motion to set aside and motion to reconsider suspended the finality of the original dismissal order and tolled the time for appeal until the trial court ruled on the motions. Although the State's motion to set aside was erroneously predicated on Section 39–1–1, it is the substance of the motion, and not its form or label, that controls. *See Century Bank v. Hymans,* 120 N.M. 684, 689, 905 P.2d 722, 727 (Ct.App.1995) ("The movant need not cite the provision authorizing the motion; the substance of the motion, not its title, controls."). Thus, the trial court had jurisdiction to enter the amended order of dismissal on March 25, 2004, and the time for appeal began to run on that date. The State's notice of appeal, filed within thirty days of the amended order of dismissal, was timely.

II. Double Jeopardy Does Not Bar the State's Appeal

{18} Defendant argues that the State had no right to appeal because the trial court dismissed the charges with prejudice after Defendant had already been placed in jeopardy. Generally, the State may appeal from an order dismissing an indictment. § 39–3–3(B)(1). However, no appeal is allowed when the double jeopardy clause prohibits further prosecution of the defendant. § 39–3–3(C). We hold that the double jeopardy clause does not bar the State's appeal because although jeopardy attached once the jury was empaneled and sworn, jeopardy never terminated. *See Sattazahn v. Pennsylvania,* 537 U.S. 101, 106, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003) (stating that "once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense"); *see also County of Los Alamos v. Tapia,* 109 N.M. 736, 739–41, 790 P.2d 1017, 1020–23 (1990) (describing situations in which jeopardy may terminate after jeopardy has begun or attached).

{19} As discussed above, the trial court dismissed the charges based upon a

finding that the State failed to prove venue in Santa Fe County. Venue refers to the county or counties where a crime was committed. NMSA 1978, § 30-1-14 (1963); *Wise*, 90 N.M. at 662, 567 P.2d at 973. Venue is not an element of the crime charged and does not go to the guilt or innocence of the defendant. *See Wise*, 90 N.M. at 662, 567 P.2d at 973 (discussing that venue need not be proved beyond a reasonable doubt). Consequently, it may be established by a mere preponderance of the evidence. *State v. Nelson*, 65 N.M. 403, 410, 338 P.2d 301, 305 (1959). A dismissal based upon lack of venue, therefore, is not an adjudication of the merits and does not amount to an acquittal. *See State v. Arevalo*, 2002-NMCA-062, ¶ 6, 132 N.M. 306, 47 P.3d 866. Thus, ordinarily, double jeopardy is not implicated by a dismissal for lack of venue. *See also Archuleta*, 112 N.M. at 58, 811 P.2d at 91 (explaining that the double jeopardy clause prohibits an appeal of a judgment of acquittal).

{20} This case, however, presents two complications with respect to double jeopardy, which we address briefly. First, as noted above, the trial court initially entered a dismissal that erroneously issued a directed verdict for Defendant. In *State v. Vaughn*, 2005-NMCA-076, ¶ 9, 137 N.M. 674, 114 P.3d 354, this Court explained that under the doctrine of double jeopardy a defendant cannot be retried "after a verdict of acquittal, even if that verdict is egregiously erroneous." *See also State v. Rodriguez*, 2004-NMCA-125, ¶ 14, 136 N.M. 494, 100 P.3d 200 (holding that double jeopardy prohibited the re-trial of the defendant even though the jury mistakenly returned a verdict of acquittal and issued a new and corrected verdict within minutes), *cert. granted*, 2004-NMCERT-010, 136 N.M. 542, 101 P.3d 808. Thus, in this case, it could be argued that the trial court's first dismissal order, although erroneously entered and subsequently amended, precludes the State's appeal under the double jeopardy clause.

{21} However, "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[.]" *Vaughn*, 2005-NMCA-076, ¶ 9, 137 N.M. 674, 114 P.3d 354 (internal quotation marks and citation omitted); *cf. Martinez v. Friede*, 2004-NMSC-006, ¶ 27, 135 N.M. 171, 86 P.3d 596 ("The substance of the order controls, not its title or form."). In this case, there is no question that the trial judge did not decide any factual elements of the trafficking charges, and simply dismissed for lack of venue. Therefore, we conclude that double jeopardy is not implicated by the trial court's original, erroneous dismissal order.

{22} Second, we consider what effect, if any, the timing of the dismissal has on the State's right to appeal. Defendant apparently first challenged venue at jury selection and raised the issue again at the start of trial before the jury was sworn in. The trial court, however, reserved ruling on the issue until the close of the State's case in chief. In dismissing the case, the trial court was correct in observing that jeopardy had already attached. "Jeopardy attaches in a jury trial when the jury is empaneled and sworn[.]" *Tapia*, 109 N.M. at 737 n. 1, 790 P.2d at 1018 n. 1.

{23} In *Tapia*, our Supreme Court confronted the exact question presented in this case: whether the State's appeal is barred when jeopardy has attached but the trial is aborted by a ruling of the trial court before the fact-finder has determined the guilt or innocence of the defendant. In that case, the trial court ordered a dismissal of the criminal charge when it ruled, mid-trial, that the defendant's arrest was unlawful and that all evidence in support of the charge must be suppressed. 109 N.M. at 737, 790 P.2d at 1018. After thoroughly analyzing the policies underlying the double jeopardy clause, our Supreme Court concluded that further proceedings were not barred by double jeopardy. *Id.* at 739-44, 790 P.2d at 1020-25. The Court discussed, with approval, United States Supreme Court precedent and case law from other jurisdictions, holding that double jeopardy is not offended when a mid-trial dismissal results from a "trial error" raised by the defendant's objection, as opposed to a factual determination of the guilt

or innocence of the defendant. *Id.* at 738–41, 790 P.2d at 1019–22. In that situation, jeopardy has attached but has not terminated with respect to the charged offense. *See Vaughn,* 2005–NMCA–076, ¶ 8, 137 N.M. 674, 114 P.3d 354 ("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."). The Court also noted that the right to be free from double jeopardy is not an absolute right. *Tapia,* 109 N.M. at 742, 790 P.2d at 1023. Based on the principles discussed in *Tapia,* we hold that the State's appeal, and any proceedings on remand, are not barred by double jeopardy. *See also Arevalo,* 2002–NMCA–062, ¶ 7, 132 N.M. 306, 47 P.3d 866; *State v. Davis,* 1998–NMCA–148, ¶¶ 14–16, 126 N.M. 297, 968 P.2d 808.

{24} In a final argument that double jeopardy bars the State's appeal, Defendant maintains that the prosecutor acted with willful disregard for the consequences of his misconduct by continuing to prosecute in Santa Fe County even after being informed that venue was problematic in Santa Fe County. Citing *State v. Breit,* 1996–NMSC–067, ¶ 15, 122 N.M. 655, 930 P.2d 792, Defendant argues that due to prosecutorial misconduct, the trial court's dismissal with prejudice was appropriate, and double jeopardy bars the State's appeal. Defendant's argument is without merit. While it is true that Defendant first raised his venue objection at jury selection, and the State was therefore alerted to the potential venue problem before jeopardy attached, it was not misconduct for the State to continue prosecuting in Santa Fe County, particularly when the trial judge himself found the venue issue to be unclear and novel and declined ruling on it until after the State rested at trial. Thus, in light of the trial court's own actions and our reversal of the venue question on appeal, we reject Defendant's argument.

III. Venue Was Proper in Santa Fe County

{25} Finally, we turn to the merits of the appeal. The State argues that the trial court erred in dismissing the charges against Defendant for improper venue. The parties disagree on the applicable standard of review. The State urges us to apply de novo review, while Defendant contends that we must review the trial court's dismissal for abuse of discretion. We conclude that the trial court's dismissal raises questions of law that we review de novo. *See Williams v. Bd. of County Comm'rs of San Juan County,* 1998–NMCA–090, ¶ 28, 125 N.M. 445, 963 P.2d 522 ("The motion to dismiss for improper venue raises a question of law, which we review de novo.").

{26} Defendant was charged in Santa Fe County with two counts of trafficking in a controlled substance by possession with intent to distribute. Defendant was driving in Santa Fe County when a police officer clocked his car speeding and began following him. Defendant pulled over and stopped at a Sonic fast-food restaurant just after crossing the county line and upon entering Rio Arriba County. Because it was determined there was an outstanding warrant for his arrest, he was placed under arrest. During an inventory search of his car, the police discovered cocaine, heroin, and drug paraphernalia. At the close of the State's evidence at trial, and upon Defendant's motion for a directed verdict, the trial court dismissed with prejudice the charges filed in Santa Fe County for improper venue, concluding that the charges should have been filed in Rio Arriba County where Defendant was stopped and the drugs were discovered.

{27} As we discussed above, because venue is not an element of the crime charged, it may be established by a mere preponderance of the evidence. *Wise,* 90 N.M. at 662, 567 P.2d at 973; *Nelson,* 65 N.M. at 410, 338 P.2d at 305. "And when there is nothing in the record to raise an inference to the contrary, slight circumstances are sufficient to prove venue by a preponderance of the evidence." *Nelson,* 65 N.M. at 410, 338 P.2d at 305.

{28} The State argues that venue was proper in Santa Fe County because trafficking by possession with intent to distribute is a "continuing offense" which occurred in each county through which Defendant trav-

eled while in possession of the drugs. We agree, applying our Supreme Court's holding in *Marsh v. State,* 95 N.M. 224, 226, 620 P.2d 878, 880 (1980).

{29} In *Marsh,* the defendant flew a small plane carrying several hundred pounds of marijuana over Valencia County en route to McKinley County where he met with the co-defendant and the marijuana was unloaded. *Id.* at 225, 620 P.2d at 879. The defendants were charged in Valencia County with possession of marijuana with intent to distribute and conspiracy to commit a felony. *Id.* at 224, 620 P.2d at 878. Our Supreme Court held that venue was proper in Valencia County for both charges. *Id.* at 226, 620 P.2d at 880. In so holding, it agreed with this Court's reasoning "that venue was proper in Valencia County for the possession charge because a 'material element' of the crime was committed in Valencia County, and where there is a continuing crime, venue lies in any county through which the defendant travel[ ]ed." *Id.; accord State v. Chapman,* 252 Kan. 606, 847 P.2d 1247, 1251–52 (1993). Nonetheless, our Supreme Court went on to hold that "it would be more appropriate to try the case, if at all, in McKinley County where there is a more substantial nexus between the criminal acts and the county." *Marsh,* 95 N.M. at 226, 620 P.2d at 880. Thus, invoking its power of superintending control, our Supreme Court remanded and ordered that the case be transferred to McKinley County as the more proper venue. *Id.*

{30} Defendant argues that, when a crime is committed in multiple counties, *Marsh* mandates that the state prosecute in the most proper venue, and therefore, the trial court properly dismissed the charges because Rio Arriba County had the most "significant contacts with the alleged criminal acts" of Defendant and was thus the more proper venue. *Id.* at 227, 620 P.2d at 881. However, we do not read *Marsh* as justifying the trial court's dismissal or requiring the state to prosecute a continuing crime case in the venue with the greatest weight of the contacts.

{31} "All decisions regarding the venue of a criminal trial are guided by the constitutional guarantee of a fair and impartial trial." *State v. House,* 1999–NMSC–014, ¶ 26, 127 N.M. 151, 978 P.2d 967. The New Mexico constitution and the venue statute provide only that the defendant is entitled to a trial in the county or district in which the crime was alleged to have been committed. N.M. Const. art. II, § 14; § 30–1–14. For purposes of a continuing crime, venue is proper in any county in which the continuing conduct has occurred. *Cf. United States v. Barnard,* 490 F.2d 907, 910 (9th Cir.1973) (stating the rule that venue is proper in any federal district in which continuing conduct has occurred); *see also Marsh,* 95 N.M. at 226, 620 P.2d at 880. Moreover, although Section 30–1–14 contains express provisions regarding venue as to crimes "committed in different counties," there is no specific language in the statute requiring the chosen venue to be the county with the "most significant contacts" or the "more substantial nexus" with the criminal acts of Defendant. *Marsh,* 95 N.M. at 226–27, 620 P.2d at 880–81; *see State v. Herrera,* 2001–NMCA–073, ¶ 10, 131 N.M. 22, 33 P.3d 22 (stating that we will not read language into a statute when it makes sense as written). To the contrary, Section 30–1–14 requires only that trial "be had in any county in which a material element of the crime was committed."

{32} It is significant to point out that, in *Marsh,* the Supreme Court ordered that venue be transferred to McKinley County under its power of superintending control. 95 N.M. at 226, 620 P.2d at 880. This Court does not have that authority. *See* N.M. Const. art. VI, § 3 (vesting exclusive superintending control in the Supreme Court over all inferior courts); *Albuquerque Gas & Elec. Co. v. Curtis,* 43 N.M. 234, 236, 89 P.2d 615, 616 (1939) (stating "the power of superintending control is an extraordinary power. It is hampered by no specific rules or means for its exercise" (internal quotation marks and citation omitted)). Moreover, in ordering the transfer, the Supreme Court was compelled by certain policy considerations that do not appear to be implicated in this case. *Marsh,* 95 N.M. at 226–27, 620 P.2d at 880–81. In *Marsh,* "the only contact with Valencia County was the passage of the airplane carrying

the marijuana over it," which was incidental, while most of the purposeful contacts were with McKinley County, where the marijuana was located, the co-defendant was present, and the alleged conspiracy completed. *Id.* at 226, 620 P.2d at 880. In this case, the same criminal act of traveling with the drugs occurred in both counties, so it is not even clear that a more substantial nexus existed with Rio Arriba County. Moreover, because the continuing conduct in *Marsh* occurred by airplane and covered a much larger geographical area than in this case, there was a concern in *Marsh* that the prosecution was remote from the home of the defendant and witnesses. *Id.* at 227, 620 P.2d at 881; *see also House,* 1999–NMSC–014, ¶ 27, 127 N.M. 151, 978 P.2d 967. Finally, in *Marsh* there was evidence that the state's venue decision was based, in part, on a desire to avoid a potential conflict with a judge, while no such circumstance appears in the record of this case. 95 N.M. at 227, 620 P.2d at 881. Thus, where venue was established by a preponderance of the evidence in Santa Fe County, we hold that the trial court erred in dismissing the charges.

CONCLUSION

{33} We conclude that the State's notice of appeal was timely filed and that double jeopardy does not bar the State's appeal. With regard to the merits of the appeal, we conclude that venue in Santa Fe County was proper as to the trafficking charges. Accordingly, we reverse the trial court's dismissal and remand for further proceedings consistent with this opinion.

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

WE CONCUR: LYNN PICKARD and RODERICK T. KENNEDY, Judges.

2006-NMCA-044

132 P.3d 1040

STATE of New Mexico,
Plaintiff–Appellee,

v.

Patrick RYAN, Defendant–Appellant.

No. 24,013.

Court of Appeals of New Mexico.

Feb. 16, 2006.

Certiorari Denied, No. 29,703, April 7, 2006.

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OPINION

WECHSLER, Judge.

{1} A jury found Defendant guilty of twenty counts of criminal sexual penetration in the second degree in violation of NMSA 1978, § 30–9–11(D) (1995) (amended 2003), nine counts of criminal sexual contact in violation of NMSA 1978, § 30–9–12(D) (1993), one count of aggravated battery in violation of NMSA 1978, § 30–3–5(C) (1969), two counts of aggravated battery in violation of Section 30–3–5(B), three counts of kidnapping in violation of NMSA 1978, § 30–4–1 (1995) (amended 2003), and one count of attempted criminal sexual penetration in violation of NMSA 1978, § 30–28–1 (1963), and Section 30–9–11(D). Defendant raises three issues that we consider on appeal. First and foremost, Defendant challenges the admission of evidence obtained in the course of several warrantless searches of the building in which he lived and worked. We conclude that Defendant had no standing to challenge two of the searches and that police obtained valid consent from third parties prior to the other two searches. Second, Defendant argues that the State's lead investigative agent should not have been allowed to sit at counsel table after the rule of exclusion had been invoked. We disagree, and apply the exception for lead investigative agents. Finally, Defendant contends that the district court erred in admitting evidence of certain statements that he made to a physician, in violation of New Mexico's doctor-patient privilege. We conclude that the statements at issue were not privileged because they were made for the purpose of treating the Victim rather than Defendant. We affirm.

{2} Defendant also raises three arguments that we will not consider because we determine that they were not preserved in the district court. First, he contends that the district court erred in refusing to allow evidence that the searches were illegal. Second, Defendant argues that he was unfairly denied the opportunity to interview the State's medical expert prior to trial. Third, Defendant challenges the exclusion of his expert medical witness.

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

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

{3} Finally, Defendant raises two issues that we do not consider on appeal because he failed to properly support his arguments. Without explanation or citation to authority, he suggests that the jury may have been improperly influenced by the investigator's presence at counsel table and claims that the district court erred in excluding evidence of his poor health. We will not consider arguments not supported by authority. *Lee v. Lee* (*In re Adoption of Doe*), 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984).

BACKGROUND

{4} The events at issue in this case took place over a period of several months, from the fall of 1996 through the spring of 1997. Both Defendant and Jennifer Lisignoli (formerly Cashman) (the Victim) worked as biologists for the Hornocker Wildlife Institute, studying black bears in a rural area near Reserve, New Mexico. They worked in a trailer or "bunkhouse" owned by Hornocker. Both the Victim and Defendant stayed overnight in the bunkhouse frequently, although Defendant maintained a home in Gallup throughout the charged period.

{5} In late 1996, the Victim began to experience serious medical problems. She suffered a number of symptoms, including amnesia, blurred vision, exhaustion, fevers, hallucinations, headaches, insomnia, light sensitivity, nausea, respiratory dysfunction, ringing in the ears, slurred speech, tremors, and vertigo, among other ailments. The Victim's illness persisted throughout the following months, despite periodic medical treatment. She was hospitalized on several occasions. The first such event took place on December 17, 1996, after the Victim fell unconscious. At that time, she was treated for suspected carbon monoxide poisoning. She collapsed again on March 23, 1997; a friend, Margaret Kirkeminde, found her at the bunkhouse with Defendant and called an ambulance over his objection. The Victim was briefly hospitalized and then released, on the theory that she had suffered a relapse relating to an earlier carbon monoxide poisoning event.

{6} The situation became even more critical on March 26, 1997, when the officers with the Sheriff's Department discovered the Victim lying incoherent in the back of a truck. She remarked, "We're all dead.... We're all dead in the trailer." The officers were aware of the apparent carbon monoxide problem at the Hornocker trailer, so they traveled to the bunkhouse to search for anyone else who might require medical assistance. They did not find anyone in the trailer.

{7} The Victim was briefly treated at the hospital in Silver City and then airlifted to Presbyterian Hospital in Albuquerque. Her condition was regarded as very serious, and there was concern that she might not survive. She remained at Presbyterian Hospital for more than two weeks, suffering a serious relapse during that time, while doctors struggled to diagnose her illness and treat it. Doctors were able to rule out carbon monoxide poisoning, but could not determine the cause of her symptoms. They suspected that some other environmental toxin, a rare disorder, or a recreational drug might be at fault.

{8} Officers Tom Ennist and Nick Smith, from the Forest Service and the Department of Fish and Game respectively, were both on friendly terms with Defendant and the Victim. Nick Smith's wife, Margaret Kirkeminde, was a close friend of the Victim and had previously worked for Hornocker. Nick Smith had a key to the bunkhouse, and Defendant had pointed out the location of a hidden key to both Nick Smith and Tom Ennist, a close neighbor. Defendant had invited both officers to use the bunkhouse whenever they liked. Around March 28, 1997, Tom Ennist went to the bunkhouse to feed Defendant's dog; Nick Smith accompanied him and looked around for toxins while he was there. The officers found no environmental toxins, but Nick Smith saw a drug vial in Defendant's room.

{9} After seeing the vial on March 28, Nick Smith became suspicious that Defendant might be the cause of the Victim's illness. Nick Smith expressed his suspicion to fellow law enforcement officers at a local café. His wife, Margaret Kirkeminde, who was frequently at the Victim's bedside, asked an Albuquerque doctor about the possibility that someone had drugged the Victim with bear sedatives. When hospital tests failed to

reveal any evidence of bear sedatives in the Victim's system, Nick Smith assumed he had been mistaken about the drugs, but remained suspicious that something odd was going on.

{10} On April 10, 1997, at around noon, an Albuquerque doctor telephoned several local officials and Margaret Kirkeminde to report that Defendant was in distress and needed assistance. Emergency services were dispatched to the Hornocker trailer, and Tom Ennist also responded. They searched for Defendant without success. Having failed to locate Defendant in the trailer, the officers began searching the surrounding area, until they received word that Defendant was being transported to the hospital in Albuquerque.

{11} Later that day, Nick Smith and Tom Ennist searched the trailer for sources of toxins. They checked the vents for carbon monoxide emissions and the cabinets for pesticides. While looking for the vents in the room in which Defendant slept, Tom Ennist saw three videotapes laying outside of a garbage bag. He noticed that the label of one of the tapes indicated that it contained home improvement footage. He believed that the tape might show whether or how the environmental toxins were being introduced. The officers took the home improvement tape and two others, labeled "XXO" and "XXX," to the Sheriff's Office for the purpose of viewing them on video equipment that was available there.

{12} The first few minutes of the home improvement videotape showed the Victim, Defendant, and Margaret Kirkeminde working on the bunkhouse. Then the angle changed, such that the image appeared from the vantage point of a floor vent in the bathroom. The footage showed the Victim getting out of the shower. At this point, the officers suspected that Defendant was involved in misdemeanor, peeping-tom-type activity.

{13} The officers contacted a Hornocker supervisor, Cecile Costello, and obtained permission to search the common areas of the bunkhouse. They returned to the bunkhouse shortly before dark. Tom Ennist climbed under the trailer and found the place the video camera had been mounted to the floor joists, below the bathroom vent.

{14} The officers next contacted the Victim in the hospital to request permission to search the trailer in its entirety. She gave them broad consent: "Search. Search everything. You guys—somebody needs to find out what's wrong with me. You guys search whatever you want." The officers returned to the bunkhouse around midnight and, after a very thorough search that began in the Victim's room, seized the remaining videotapes. When they watched these tapes, the officers saw footage of Defendant engaging in sex acts with the Victim, who appeared to be cataleptic or unconscious. Sophisticated techniques were eventually developed to test the Victim's hair, which revealed traces of several powerful animal sedatives and an anesthetic known as Ketamine that were consistent with her symptomatology. Defendant's trial and convictions followed.

SUPPRESSION OF EVIDENCE

{15} Defendant contends that the district court erred in denying his motion to suppress the evidence obtained as a consequence of the warrantless searches of the bunkhouse. This evidence includes the videotapes containing the bathroom and the sexual assault footage, as well as evidence about bear sedatives seen in the room. Defendant asserts that he had a reasonable expectation of privacy in his bedroom, giving him standing to challenge the searches. He also maintains that no exception to the warrant requirement applies.

{16} "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. We need not limit our review to the record of the suppression hearing. *Id.* ¶ 10.

{17} Defendant moved to suppress the evidence seized in the course of the searches. The district court considered all of the issues

raised on appeal, including standing, state action, the community caretaking doctrine, exigent circumstances, and consent.

{18} The district court did not enter extensive findings of fact, focusing instead on articulating the legal bases for the denial of the motion to suppress. The district court determined that Defendant lacked standing to challenge the searches. It further concluded that both the March 26 search and the first of the challenged April 10 searches were justified by medical concerns, and thereafter, valid consent was obtained. As described above, law enforcement officers entered the bunkhouse to perform searches on six occasions: once on March 26, once on March 28, and four times on April 10, 1997. Defendant acknowledges that the March 26 search and the first search on April 10 were conducted for the valid purpose of addressing medical emergencies; accordingly, he has limited his challenge to the legality of the March 28 search and the last three searches on April 10. We discuss the application of the various legal doctrines to the evidence, viewed in the light most favorable to the State, while acknowledging all uncontradicted evidence. *See State v. Gonzales,* 1999–NMCA–027, ¶¶ 15–16, 126 N.M. 742, 975 P.2d 355.

DEFENDANT'S PRIVACY EXPECTATION

{19} "The touchstone of search and seizure analysis is whether a person has a constitutionally recognized expectation of privacy." *State v. Ryon,* 2005–NMSC–005, ¶ 23, 137 N.M. 174, 108 P.3d 1032. A defendant's ability to challenge a search turns on 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." *See State v. Esguerra,* 113 N.M. 310, 313, 825 P.2d 243, 246 (Ct.App.1991); *accord Smith v. Maryland,* 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). It is not clear whether the district court concluded that Defendant had no actual expectation of privacy or whether the district court concluded that any actual expectation of privacy that Defendant had was not reasonable. We discuss both inquiries below.

{20} Defendant testified that he had an actual, subjective expectation of privacy in the room in which he routinely slept. He characterized the room as his personal place to live, and as his residence. However, Defendant's testimony was contradicted by testimony that he knew others had used his room without his prior knowledge and when he was not present. For example, there was testimony that Nick Smith had once returned a borrowed object by leaving it in Defendant's room when he was not there. There was also testimony that a prior supervisor had spent the night in Defendant's bed, notifying him later by leaving a note. Defendant's testimony was also contradicted by his actions. *See State v. Bolton,* 111 N.M. 28, 42, 801 P.2d 98, 112 (Ct.App.1990) (relying on the defendant's lack of action to show no subjective expectation of privacy); *State v. Warsaw,* 1998–NMCA–044, ¶ 15, 125 N.M. 8, 956 P.2d 139 (relying on the defendant's actions to show a subjective expectation of privacy). Defendant admitted that he gave a visitor permission to use the Victim's room without her knowledge or prior approval. It was inconsistent for Defendant to claim that he did not expect his room to be used by others given these facts. It is the factfinder's prerogative to weigh the evidence and to judge the credibility of the witnesses. *State v. Gonzales,* 1997–NMSC–050, ¶ 18, 124 N.M. 171, 947 P.2d 128. There was sufficient evidence for the district court to have found that Defendant did not have an actual expectation of privacy.

{21} Turning to the second inquiry, concerning the objective reasonableness of Defendant's expectation of privacy, the Court is presented with an unusual scenario. The area at issue was Defendant's bedroom when he chose to stay at the bunkhouse rather than at his home in Gallup. Such spaces are generally afforded intense Fourth Amendment protection. *See generally Esguerra,* 113 N.M. at 313–14, 825 P.2d at 246–47 ("A person's dwelling receives the highest degree of protection from unreasonable intrusion by the government and a defendant's standing to assert his rights with respect to his home is well established in our [F]ourth [A]mendment jurisprudence."). However, the bed-

room was located in a trailer that was owned by Defendant's employer and used as the main base of operations for the southern portion of its bear study. The trailer was frequently unlocked, and keys were made available to a number of people, including the UPS driver, a neighbor boy, Tom Ennist, Nick Smith and his wife Margaret Kirkeminde, the current Hornocker supervisor and her partner, and a past Hornocker supervisor. Defendant made the bunkhouse available to acquaintances for unlimited purposes, including spending the night. Further, the central portion of the trailer was utilized as a common area, in which work-related activities were conducted. The bunkhouse was used by many other Hornocker employees and volunteers. With regard to Defendant's room more specifically, there was evidence that work-related equipment and supplies were stored there. The Victim testified that she felt free to come and go throughout the trailer, including in Defendant's room. Nick Smith even testified that if he needed a change of socks or pants, he would feel free to borrow some from Defendant's room. Finally, the Victim testified that she did not consider her own room in the bunkhouse to be private, that she did not consider it to be her bedroom despite the fact that she had no other residence, and that she could not exclude others when she was not present.

{22} If these facts alone are not enough to make any expectation of privacy unreasonable, circumstances in this case make it even more clear that a reasonable person would not expect privacy in any area of the bunkhouse. Early on, doctors were working under the assumption that the Victim's illness stemmed from carbon monoxide poisoning. Defendant had also claimed to suffer from carbon monoxide poisoning. By April 10, doctors no longer suspected carbon monoxide poisoning, but did include other environmental toxins in their list of possible causes. Defendant, at the Victim's bedside shortly before the April 10 search, gave a key to the Victim's father and asked him to search the bunkhouse for a possible cause. Defendant also voiced no objection when Nick Smith told him about the March 28 search for environmental toxins. Not only did Defendant know that searches for sources of the Victim's illness and his own were likely, he also actively encouraged such searches.

{23} While we agree with established precedent that a defendant's reasonable expectation of privacy in the home is usually very high, *see State v. Halpern*, 2001–NMCA–049, ¶ 14, 130 N.M. 694, 30 P.3d 383 ("The sanctity of the home is not abandoned simply by leaving a door cracked."), we cannot conclude that the district court erred in holding that Defendant had no reasonable expectation of privacy in the bunkhouse with respect to searches for environmental toxins. Even if Defendant had a subjective expectation of privacy in his bedroom, that expectation was not reasonable in light of his actions and the surrounding circumstances. Defendant did not protect his privacy rights, and in fact actively worked to undermine them. *See United States v. Torres*, 949 F.2d 606, 608 (2d Cir.1991) ("Neither possession nor ownership of property establishes a legitimate expectation of privacy unless the party vigilantly protects the right to exclude others."); *cf. United States v. Dunn*, 480 U.S. 294, 301–03, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987) (concluding that the defendant had no reasonable expectation of privacy in an area in part because he "did little to protect" that area). Defendant knew that the entire bunkhouse would be searched for environmental toxins and took absolutely no steps to protect his privacy. He did not have a reasonable expectation of privacy related to the March 28 search and the second April 10 search for environmental hazards in the bunkhouse.

{24} Defendant also could not have had a reasonable expectation of privacy in a videotape labeled "home improvement" laying on his floor next to a vent when he knew that the entire bunkhouse would be searched for environmental hazards. Given the link between home improvements and the introduction of environmental toxins into the home, Defendant must have known that someone searching for toxins might view the "home improvement" tape. He took no steps to protect the privacy of the tape, such as changing its label or locking it in his desk. Under the circumstances, we view this failure to act as indicative of a lack of any reasonable expectation of privacy. While two other

tapes, "XXO" and "XXX," were taken to the station to be viewed with the "home improvement" tape, Defendant fails to point to any indication in the record that these tapes were actually viewed, that they contained any evidence of wrongdoing, or that they influenced subsequent police activity.

{25} The third bunkhouse search on April 10 was somewhat different. Officers, having seen the "peeping tom" footage on the "home improvement" tape, obtained consent from a Hornocker supervisor and searched the common areas of the bunkhouse. Most notably, Tom Ennist crawled under the house to find the place the camera had been mounted under the bathroom vent. Although a search of the crawlspace of the bunkhouse might have been a necessary component to a thorough search for environmental toxins, this search was motivated by a desire to find evidence. If the evidence of under-vent videotaping had been discovered during a search for environmental hazards, we would have no difficulty in concluding that Defendant could not challenge its admission. But the officers searched more thoroughly and with more direction because they were looking for evidence of a crime. And while Defendant made the inside of the bunkhouse available to many others for unlimited use, no evidence suggests that Defendant encouraged others to examine the underside of the bunkhouse. It was neither open to public access nor readily viewable. *But cf. Bolton*, 111 N.M. at 41–42, 801 P.2d at 111–12 (holding that the defendant had no reasonable expectation of privacy in the undercarriage of his truck). As a result, Defendant did have the ability to challenge the third April 10 search.

{26} Once the officers confirmed that the video camera had been mounted under the bathroom vent, they obtained consent from the Victim and returned to the bunkhouse to search more thoroughly and to seize the rest of the videotapes. They did so to gather evidence of criminal activity by Defendant. Videotapes are containers, *see United States v. Albers*, 136 F.3d 670, 674 (9th Cir.1998), and a defendant may retain a reasonable expectation of privacy in the contents of a container despite the fact that it is in an area open to the public. *See State v. Courtney*, 102 S.W.3d 81, 85–87 (Mo.Ct.App. 2003). While Defendant abandoned any expectation of privacy he may have had with respect to the "home improvement" tape, the same cannot be said of other tapes in Defendant's room. Although Defendant did tell the Victim that she could watch his videotapes whenever she wished, no evidence was introduced that others were given similar invitations. Defendant therefore did have a reasonable expectation of privacy in the videotapes found within his room that were not clearly related to introduction of environmental hazards. Similarly, Defendant had a reasonable expectation of privacy in areas of his room that were not logical places to look for environmental toxins. Therefore, Defendant could challenge the final April 10 search, including the viewing of the videotapes.

{27} The district court properly considered the totality of all of the circumstances to determine the reasonableness of any expectation of privacy Defendant had. *See Rawlings v. Kentucky*, 448 U.S. 98, 104, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980) (approving review of the totality of the circumstances in determining whether a reasonable expectation of privacy existed); *cf. State v. Morales*, 2005–NMCA–027, ¶ 14, 137 N.M. 73, 107 P.3d 513 (applying review of the totality of the circumstances in determining whether an officer's suspicion was reasonable), *cert. granted*, 2005–NMCERT–002, 137 N.M. 266, 110 P.3d 74, *and cert. quashed*, 2005–NMCERT–008, 138 N.M. 330, 119 P.3d 1267. The district court's conclusion that Defendant had no standing to challenge the bunkhouse search of March 28, the second bunkhouse search of April 10, and the viewing of the "home improvement" videotape, is supported by the law and the evidence. However, because Defendant did have a reasonable expectation of privacy in other videotapes found within his room, we consider whether these tapes were admissible under an alternate theory. We also consider whether the third and fourth bunkhouse searches, which were largely for the purpose of gathering evidence, violated Defendant's constitutional rights.

CONSENT

{28} In the absence of probable cause or a search warrant, a search will generally be deemed lawful if voluntary consent is obtained from an authorized person. *See State v. Duffy,* 1998–NMSC–014, ¶ 72, 126 N.M. 132, 967 P.2d 807. In this case, consent to search the crawlspace under the trailer was given by Cecile Costello. Consent to view the videotapes was given by the Victim when she said, "Search. Search everything. You guys—somebody needs to find out what's wrong with me. You guys search whatever you want." Defendant argues that Cecile Costello did not have authority to consent to a search of the common areas of the bunkhouse and that the Victim did not have authority to consent to a search of Defendant's room and a viewing of the videotapes. We disagree.

{29} Neither Cecile Costello nor the Victim could validly consent to the searches of the bunkhouse unless they had common authority over the specific areas that were searched " 'or other sufficient relationship to the premises.' " *State v. Madrid,* 91 N.M. 375, 378, 574 P.2d 594, 597 (Ct.App. 1978) (quoting *United States v. Matlock,* 415 U.S. 164, 171, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974)); *see Duffy,* 1998–NMSC–014, ¶ 74, 126 N.M. 132, 967 P.2d 807 ("It is constitutionally permissible for the police to search a person's home if they have received valid consent from a person who . . . has common authority over the premises."). In this context, common authority is defined as " 'mutual use of the property by persons generally having joint access or control for most purposes.' " *State v. Diaz,* 1996–NMCA–104, ¶ 10, 122 N.M. 384, 925 P.2d 4 (quoting *Matlock,* 415 U.S. at 171, 94 S.Ct. 988). A sufficient relationship may be established by the following: (1) a right to occupy the premises, (2) unrestricted access to the premises, and (3) storage of property on the premises. *Madrid,* 91 N.M. at 378, 574 P.2d at 597.

{30} Cecile Costello was the regional supervisor for Hornocker, and she had free access to the Hornocker bunkhouse. In light of her supervisory position and her use of and control over the bunkhouse, she certainly had common authority over the workspaces within it and the crawlspace underneath it. She limited her consent accordingly, only granting the officers clear permission to the search of the "common areas" of the bunkhouse. As a result, her consent validated subsequent searches of the common areas, including the third April 10 search of the crawlspace under the trailer. *See State v. Garcia,* 1999–NMCA–097, ¶ 9, 127 N.M. 695, 986 P.2d 491 (stating that the scope of a search is limited to the consent given, as measured by an objective reasonableness standard). The evidence found in the common areas of the trailer was the camera mount under the floor joists, by which the video camera was positioned in order to record the peeping-tom footage of the Victim in the shower. That evidence was therefore properly admitted.

{31} Unlike Cecile Costello, the Victim unequivocally granted the officers permission to search the trailer in its entirety: "Search. Search everything. You guys—somebody needs to find out what's wrong with me. You guys search whatever you want." Accordingly, her consent would supply the basis for the seizure of the videotapes from Defendant's room if she had common authority over that area or a sufficient relationship to that area. If her consent to search Defendant's room was valid, we must then determine whether the Victim had authority to consent to the officers' viewing of the tapes seized.

{32} The Victim lived and worked in the trailer. She testified that she made free use of the entire structure. She specifically stated that "there was no restriction as far as who could go in whose room or if you needed something, you had to ask for permission. Nothing like that." Defendant did not contradict her testimony. The Victim entered Defendant's room for a variety of purposes. According to Defendant's own statements, the Victim sometimes spent the night in Defendant's room. She stored her guns in Defendant's gun safe in his closet. She went into his room to borrow books or to look for office supplies. She also went into Defendant's room to gather laundry.

{33} Accordingly, the Court must determine whether the foregoing evidence was sufficient to establish the Victim's common authority over Defendant's room. In *Diaz*, a father consented to a search of the home that he shared with his adult son. *Diaz*, 1996–NMCA–104, ¶¶ 3–4, 122 N.M. 384, 925 P.2d 4. In the course of the search, the police entered the son's room and found narcotics. *Id.* ¶ 5. The search of that room was subsequently challenged on the theory that the father lacked common authority. The father testified that he had permission to enter the son's room, but he did so rarely. *Id.* ¶ 15. The Court held that while this testimony might have satisfied the joint access requirement, it did not establish mutual use. *Id.* Because the son "had far greater access and control," the Court concluded that he had a "superior privacy interest." *Id.* ¶ 16. As a result, the Court upheld the district court's determination that the father lacked common authority over the room. *Id.*

{34} *Diaz* suggests that common authority for the purpose of granting consent to search depends on a showing of a similar degree of access, control, and use of a space. *Id.* Applying this approach to the facts of this case, the extent of the Victim's access to, control over, and use of Defendant's bedroom may not have been comparable to that of Defendant. While Defendant admitted that the Victim sometimes slept in his room, no evidence has been introduced to show how frequently this cohabitation took place. Because it is the State's burden to establish consent, *State v. Flores*, 1996–NMCA–059, ¶ 26, 122 N.M. 84, 920 P.2d 1038, we decline to speculate as to whether the Victim and Defendant used Defendant's room to a similar degree. *But see State v. Cline*, 1998–NMCA–154, ¶ 13, 126 N.M. 77, 966 P.2d 785 (discussing the difference between father/son relationships and cohabitant spousal relationships for the purposes of the *Matlock* common authority test). Accordingly, the State has not established common authority over Defendant's room sufficient to authorize the Victim to give consent to search.

{35} We must next determine whether the Victim had another sufficient relationship that validated her consent. In *Madrid*, this Court held that a wife's consent to search her husband's home was valid, even though she did not live there at the time of the search and had not lived there for some time prior. *Madrid*, 91 N.M. at 377–78, 574 P.2d at 596–97. We relied on three factors: (1) she had a right to occupancy; (2) she had a key, which created an "inference ... of unrestricted access"; and (3) she "use[d] the residence to some extent" by keeping some of her property there. *Id.* at 378, 574 P.2d at 597. *State v. Walker*, 1998–NMCA–117, 125 N.M. 603, 964 P.2d 164, similarly held valid the consent to search given by the victim in an alleged kidnaping case, despite the fact that she did not have a key or an intent to return to the residence except to retrieve her belongings. The court reasoned that her consent was valid because (1) she had cohabitated with defendant in the residence for some time prior to the alleged crime, (2) she had access to all rooms in the residence during the time she lived there, and (3) she had personal belongings in the residence. *Id.* ¶ 9.

{36} *Madrid* and *Walker* relied on three factors to determine that the consenting party had a sufficient relationship to the premises that validated the search, all of which are present in this case. First, they found consent because of a right to occupancy or an actual prior co-occupancy. In this case, the Defendant and the Victim lived in the same trailer, and, according to the Defendant, both stayed together in his bedroom at times. The Victim had a further right to access the Defendant's bedroom because her job required it. Second, *Madrid* and *Walker* relied on the unrestricted access in the consenting parties. In this case, the Victim similarly had never found her access to the Defendant's room restricted. She entered his room frequently and for a variety of purposes. Third, both cases relied on the storage of personal belongings in the relevant area. In this case, the Victim stored her guns in the Defendant's bedroom, and business materials she needed to access were also stored in that room. Nothing more is required for a finding of a relationship to premises sufficient to validate consent. The fourth and final bunkhouse search on April 10 was therefore based on valid consent.

{37} Finally, we must determine whether the Victim's consent could also validate the officers' viewing of the videotapes. *Cf. State v. Johnson,* 85 N.M. 465, 466, 513 P.2d 399, 400 (Ct.App.1973) (noting that valid consent to search of premises does not necessarily validate search of container found therein). If so, her broad consent to the search of the trailer, "You guys search whatever you want," would render the officers' viewing of the videotapes legal, and the videotapes admissible. The Victim and Defendant both used the video camera in their bear research, and the Victim sometimes entered Defendant's room to get the camera and tapes. Defendant had given the Victim explicit authority to enter his room to get videotapes to watch. The tapes were found on Defendant's floor and had not been hidden. The Victim therefore had the authority to view the tapes and to authorize others to view them. Because the Victim had a sufficient relationship to Defendant's room that allowed the officers to search it, and because she also had a sufficient relationship to the videotapes found in the room, she had the authority to give the officers valid consent to view the videotapes.

{38} We affirm the district court's admission of evidence seized in the March 28 search and the second of the April 10 searches on the ground that Defendant did not have a sufficient privacy interest to challenge those searches. Because we determine that the officers obtained valid consent prior to the third and fourth April 10 searches, we also affirm admission of evidence obtained during those searches. Defendant does not challenge the other searches.

THE INVESTIGATIVE AGENT'S PRESENCE AT COUNSEL TABLE

{39} Defendant contends that a witness for the State, Agent Virginia Melvin, was improperly permitted to sit at counsel table as the State's lead investigator throughout the trial notwithstanding the fact that she had supervised the jury venire prior to impanelment. The district court's ruling is reviewable for abuse of discretion. *See, e.g., State v. Hernandez,* 115 N.M. 6, 18, 846 P.2d 312, 324 (1993); *State v. Chavez,* 100 N.M. 730, 732, 676 P.2d 257, 259 (Ct.App. 1983).

{40} Defendant contends that the rule of exclusion should have prevented Agent Melvin's presence at counsel table. Generally speaking, the parties have the right to invoke the rule of exclusion, thereby preventing witnesses from sitting in the courtroom throughout the trial. *See* Rule 11–615 NMRA. However, several exceptions apply. Among these is the exception for investigative agents. *See Chavez,* 100 N.M. at 732, 676 P.2d at 259; *e.g., Hernandez,* 115 N.M. at 18–19, 846 P.2d at 324–25. Below, the State clearly identified Agent Melvin as its lead investigative agent. Defendant has not challenged this characterization, either in argument to the district court or on appeal. Accordingly, the district court acted well within established jurisprudence by allowing Agent Melvin to remain in the courtroom, at counsel table, throughout the proceedings.

STATEMENTS MADE BY DEFENDANT TO HIS PHYSICIAN

{41} Defendant contends that the district court erred in admitting evidence of certain out-of-court statements that he made to a physician. The district court ruled that Defendant's statements to physicians about the Victim's condition were not privileged; moreover, any privilege was waived when such statements were made in the presence of third parties. The New Mexico Rules of Evidence establish a limited privilege for communications between a doctor and a patient. To invoke the privilege, a claimant must establish that he or she was a patient at the time the statement was made, that the communication at issue was confidential, and that the statement was made for the purpose of diagnosing or treating the patient. *See* Rule 11–504(B) NMRA; *State v. Roper,* 1996–NMCA–073, ¶ 7, 122 N.M. 126, 921 P.2d 322. The application of Rule 11–504 and the law to the facts is reviewed de novo. *Roper,* 1996–NMCA–073, ¶ 4, 122 N.M. 126, 921 P.2d 322. The statements at issue were not made for the purpose of diagnosing or treating Defendant, but rather, for the purpose of diagnosing or treating the Victim. Consequently, the statements are

outside the scope of the privilege, and the district court's ruling was well supported.

LIMITATIONS ON EVIDENCE OF THE LEGALITY OF THE SEARCHES

{42} Defendant asserts that the district court prevented him from presenting his key defense when it ruled that he could not develop evidence at trial that the police acted illegally throughout the course of their investigation. The admission or exclusion of evidence is within the sound discretion of the district court. *State v. Stanley,* 2001–NMSC–037, ¶ 5, 131 N.M. 368, 37 P.3d 85. Evidentiary rulings are affirmed unless they can be characterized 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).

{43} Generally, in order to preserve claimed error for review, a timely and reasonably specific objection must be made. *State v. Varela,* 1999–NMSC–045, ¶ 25, 128 N.M. 454, 993 P.2d 1280; *State v. Lucero,* 1999–NMCA–102, ¶ 23, 127 N.M. 672, 986 P.2d 468. However, Defendant indicated to the district court that he had no interest in presenting evidence challenging the legality of the searches, and he agreed that such legal issues should not be submitted to the jury for its consideration. Defendant has not preserved this issue and we will not consider it on appeal. *See State v. Mercer,* 2005–NMCA–023, ¶ 31, 137 N.M. 36, 106 P.3d 1283 (holding that where counsel specifically agreed not to question a witness about particular matters, those limitations on the presentation were not preserved for appeal); *State v. Goss,* 111 N.M. 530, 533, 807 P.2d 228, 231 (Ct.App.1991) (stating that non-jurisdictional issues will not be considered unless preserved).

INTERVIEW OF THE STATE'S MEDICAL EXPERT

{44} Defendant asserts that he was unfairly denied the opportunity to interview the State's medical expert prior to trial. The grant or denial of discovery in a criminal case "is a matter peculiarly within the discretion of the trial court," which we review under an abuse of discretion standard. *State v. Bobbin,* 103 N.M. 375, 377, 707 P.2d 1185, 1187 (Ct.App.1985).

{45} Defendant raised the issue of his lack of opportunity to interview Dr. Fisher in the course of a pretrial conference on June 12, 2002. The district court ruled that the State was not required to arrange an interview. The matter was raised again immediately before trial. At that juncture, counsel for Defendant appears to have agreed that the extensive testimony given by Dr. Fisher in the course of the suppression hearing was adequate to allow preparation for trial. Accordingly, counsel sought an opportunity for a very brief interview immediately before Dr. Fisher was called as a witness at trial, to ask whether anything had changed since the suppression hearing. The district court granted this request. As such, any objection to the district court's ruling was not preserved. *Cf. Eldorado at Santa Fe, Inc. v. Cook,* 113 N.M. 33, 37, 822 P.2d 672, 676 (Ct.App.1991) (observing that a procedural defect was not preserved for appeal when counsel failed to object to the district court's proposed solution).

EXCLUSION OF DEFENDANT'S MEDICAL EXPERT

{46} Lastly, Defendant challenges the exclusion of his expert medical witness, Dr. Walls. The district court ruled that Defendant failed to make the witness available to the State for an interview by a reasonable time prior to trial. When Defendant argued the issue to the district court in the course of the pretrial motions hearing on July 11, 2002, Defendant lacked information about the probable substance of Dr. Walls' testimony, and he therefore made no offer of proof. As a result, the district court's ruling is not subject to review on appeal. *See* Rule 11–103(A)(2) NMRA; *State v. Garcia,* 100 N.M. 120, 123, 666 P.2d 1267, 1270 (Ct.App.1983) (concluding that the defendant failed to make an offer of proof as required in order to preserve an issue of whether the district court properly excluded testimony).

CONCLUSION

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

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Chief Judge and A. JOSEPH ALARID, Judge.

2006-NMSC-014

133 P.3d 258

Ellis B. and Laverne HERRINGTON, Petitioners,

v.

STATE of New Mexico ex rel. OFFICE OF the STATE ENGINEER, Respondent.

No. 28,628.

Supreme Court of New Mexico.

March 9, 2006.

Corrected April 26, 2006.

Law & Resource Planning Associates, P.C., Charles T. DuMars, Christina Bruff DuMars, Albuquerque, NM, for Petitioners.

D.L. Sanders, Stacey J. Goodwin, Santa Fe, NM, for Respondent.

Patricia A. Madrid, Attorney General, Stephen Robert Farris, Assistant Attorney General, Keitha Anne Leonard, Special Assistant Attorney General, Tanya M. Trujillo, Special Assistant Attorney General, for Amicus Curiae New Mexico Interstate Stream Commission.

Stein & Brockmann, P.A., Jay F. Stein, James C. Brockmann, Montgomery & Andrews, P.A., John B. Draper, Santa Fe, NM, for Amicus Curiae.

OPINION

BOSSON, Chief Justice.

{1} The Herringtons, long time irrigators in the Rio de Arenas Valley in southwestern New Mexico, applied to the New Mexico State Engineer for a supplemental well. The Herringtons claimed their surface right had been diminished by groundwater wells in the basin, having a priority date junior to the surface right of the Herringtons. Applying the principles of fairness that underscore the doctrine in *Templeton v. Pecos Valley Artesian Conservancy District*, 65 N.M. 59, 332 P.2d 465 (1958), the Herringtons sought to supplement their surface water rights with a well.

{2} We granted certiorari to clarify certain confusion that adheres to the *Templeton* doctrine generally, and as applied to this case by the district court and the Court of Appeals. We also briefly discuss the important distinctions that continue to exist between a *Templeton* well and a statutory transfer of water rights pursuant to state statute. We reverse and remand to the district court with instructions for further proceedings consistent herewith.[1]

BACKGROUND[2]

{3} The Rio de Arenas is a tributary of the Mimbres River in southwestern New Mexico, originating in the mountains northeast of Silver City. The Herringtons' history as irrigators in the Rio de Arenas Valley extends back many years as does the Herringtons' contentious history with the State Engineer. The Herringtons' relationship with the State Engineer began over 25 years ago, during the general stream adjudication of the Rio Mimbres stream system.

{4} During the adjudication, the Herringtons claimed a pre–1907 right to divert a total of 49.73 acre-feet of water per year from the Rio de Arenas, or 2.7 acre-feet per year per acre on their 18.42 acres of land. The State Engineer contested this claim, arguing that groundwater discharged through springs becomes baseflow in the Rio de Arenas. The State Engineer therefore likened the Herringtons' case to *Templeton*, and asserted the Herringtons had not only the right, but the responsibility to drill a supplemental well to preserve their right and avoid abandonment. As a result, the State Engi-

1. The Court is grateful for the amici curiae efforts of attorneys Jay Stein and John Draper, who responded to this Court's request for advice pursuant to Rule 21–300(B)(7)(b) NMRA, and amici curiae the New Mexico Attorney General's Office and the New Mexico Interstate Stream Commission.

2. Due to the technical nature of this case, the following terms are defined:

groundwater—water moving or residing beneath the earth's surface
baseflow—the sustained low flow of a stream, usually groundwater inflow to the stream channel
flood flow—portion of precipitation that flows over the land surface
alluvium—sediments deposited by a flowing watercourse
ephemeral stream—streams that form only during and immediately after precipitation
perennial stream—stream that flows throughout the year, generally fed in part by baseflow
intermittent stream—stream that flows for part of the year, can be fed by flood flow and/or baseflow

neer concluded that the Herringtons were not actually using water in that amount and had abandoned their water right. *See Templeton,* 65 N.M. 59, 332 P.2d 465; *see also State ex rel. Reynolds v. South Springs Co.,* 80 N.M. 144, 452 P.2d 478 (1969). Ultimately, the State Engineer's abandonment argument was rejected, and the Herringtons prevailed in establishing a pre–1907 water right for 49.73 acre-feet of water per year.

{5} In 1982, on the heels of the adjudication, the Herringtons filed an application to change their point of surface diversion from the original point at the Frazier–Bateman Ditch to a 100–foot–deep well. In pursuing the application, the Herringtons relied on the State Engineer's hydrologic assessment during the adjudication proceedings that their case was similar to the *Templeton* case, and therefore warranted a supplemental well. The Herringtons argued that groundwater pumping by upstream junior appropriators had diminished the surface water available at their existing point of diversion, thereby requiring the Herringtons to seek an alternative means of drawing water from the same source. The proposed well was to be located roughly a quarter mile downstream of the original diversion point, and would reach a depth of 100 feet. At this depth, the well would tap fractured sandstone and shale, or the "fractured bedrock aquifer," which underlies the alluvium. Potentially, the well could be screened to draw water from any depth down to 100 feet. No protests were filed with the State Engineer from neighboring well owners. Nonetheless, the State Engineer opposed the well, despite having suggested just such a well during the earlier stream adjudication.

{6} In 1983, the State Engineer denied the application. The Herringtons sought a hearing in front of a hearing examiner from the State Engineer. Inexplicably, the State Engineer did not set a hearing for eighteen years. At the 2001 hearing, the State Engineer reversed its position taken during the earlier adjudication and argued that the Herringtons' surface diversion consisted only of flood flows, and not of baseflow. The State Engineer also argued that the groundwater diversion would cause impairment to existing water rights owners, despite the fact that none of those other well owners filed a protest. Thus, according to the State Engineer, the Herringtons were not entitled to a supplemental well because the well would draw from a different source of water and comprise a new appropriation that would impair others. Agreeing with the State Engineer, the hearing examiner denied their application.

{7} The Herringtons appealed de novo to the district court as provided by NMSA 1978, Section 72–7–1 (1971). Both parties presented significant evidence regarding the effect of the proposed well on neighboring wells. The district court concluded that pumping at a rate of 49.73 acre-feet per year would impair existing rights, but pumping at a rate of 24.86 would not. Regarding the source of the Rio de Arenas streamflow, the Herringtons argued that the Rio de Arenas is a perennial stream fed by both flood flow and baseflow, and that a portion of the baseflow had been depleted by groundwater wells. The State Engineer argued to the contrary that the Rio de Arenas consisted only of flood flows, and is therefore an ephemeral stream. Significantly for the appeal before us, the district court accepted the Herringtons' view of the hydrology, finding that the Rio de Arenas is an interrupted perennial stream fed by baseflow, and that the Herringtons' supply had been diminished by local groundwater wells.

{8} However, the district court also appeared to find that at the proposed depth of 100 feet, the Herringtons' well would draw from a different source of water than that which supplied their original surface diversion. Finally, the district court found that moving the point of diversion to a downstream location conflicted with its understanding of principles announced under the *Templeton* line of cases, which permit a supplemental well under specific hydrologic conditions. As a result, the district court denied the application.

{9} The Court of Appeals affirmed the district court. The Court of Appeals agreed that both the topographic location and the depth of the proposed well would result in the Herringtons' access to a new source of

water, and thus ran contrary to the *Templeton* doctrine. *Herrington v. State ex rel. Office of State Engineer,* 2004–NMCA–062, ¶¶ 13–14, 135 N.M. 585, 92 P.3d 31. The Court of Appeals also concluded that the Herringtons did not have a right to change their point of diversion to a groundwater well independent of the requirements of *Templeton,* even under statutory provisions. *Id.* ¶¶ 17–20, 332 P.2d 465; NMSA 1978, §§ 72–5–23, –24 (1985).

{10} The Herringtons petitioned for certiorari to this Court, arguing that theirs is a paradigmatic *Templeton* case, under which they have a legal right to a well that draws water from the same source that formerly fed the stream. The Herringtons argue that in rejecting the well application, both the district court and Court of Appeals misinterpreted the law surrounding the *Templeton* line of cases. Given the importance of the *Templeton* doctrine to water policy in New Mexico, we granted certiorari to address significant legal issues raised by this petition.

DISCUSSION

Templeton Doctrine

{11} Both parties agree that *Templeton* is the central legal authority for this case, and that the Herringtons must satisfy the *Templeton* predicates to be successful in their well application. *Templeton,* 65 N.M. at 68, 332 P.2d at 471, defines a specific hydrologic circumstance where junior wells intercept groundwater that previously discharged to the surface, thereby depriving a senior appropriator of their water right. To address this circumstance, this Court in *Templeton* fashioned an equitable remedy to allow senior surface water appropriators, impacted by junior wells, to timely reassert their priority by drilling a supplemental well. *Id.* Through the well, the senior surface right owner can supplement existing surface supply, if any, by drawing upon groundwater that originally fed the surface water supply. Although the New Mexico prior appropriation doctrine [3] theoretically does not allow for sharing of water shortages, the *Templeton* doctrine permits both the aggrieved senior surface appropriator and the junior to divert their full share of water. NMSA 1978, § 72–1–2 (1907).

{12} The only two cases decided by this Court in which the applicants were granted a right to drill *Templeton* supplemental wells are the original *Templeton* case, and *Langenegger v. Carlsbad Irrigation District,* 82 N.M. 416, 417, 483 P.2d 297, 298 (1971). Both parties here agree that a successful supplemental well application depends on whether the Herrington facts track *Templeton* or *Langenegger.* It is therefore important to understand the specific facts of these two cases.

{13} The applicants in *Templeton,* 65 N.M. at 61, 332 P.2d at 466, had surface water rights to the Rio Felix, a tributary to the Pecos River. The Rio Felix originated in the Sacramento Mountains and consisted of both flood flow and baseflow from the shallow aquifer, known as the Roswell Shallow Water Basin. The shallow aquifer underlying the Rio Felix was composed of up to 215 feet of topsoil, sand, gravel, shale, clay, and boulders. *Id.* at 62, 332 P.2d at 466. In certain areas, and during periods of flooding, water levels in the shallow aquifer would rise to meet the stream bed and discharge baseflow, or groundwater, into the Rio Felix, creating a perennial, interrupted stream. *Id.*

{14} As groundwater pumping in the area increased, the amount of baseflow decreased. *Id.* To supplement their decreasing surface water, the Templetons sought a supplemental well to tap into the shallow aquifer, and thereby obtain the full amount of their appropriation. *Id.* at 61, 332 P.2d at 466. Based in part on principles of fairness, we approved the well, holding that:

> Applying the foregoing principles to this case would lead to the conclusion that the appellees were entitled to the waters of the Valley Fill that flowed into the Rio Felix at the time of their [surface] appropriation. It seems that there is nothing in the law that would prevent them from following

3. Under the doctrine of prior appropriation, the right to use water is determined by the date of appropriation. Section 72–1–2; *Yeo v. Tweedy,* 34 N.M. 611, 617, 286 P. 970, 974 (1929). For an in-depth discussion, see State ex rel. *Martinez v. City of Las Vegas,* 2004–NMSC–009, 135 N.M. 375, 89 P.3d 47.

> this water through an application for a change of point of diversion, provided that it does not impair any other existing rights. *In other words, their applications do not amount to a request for a new appropriation in the underground water basin, but merely a request to follow the source of their original appropriation.*

Id. at 68, 332 P.2d at 471 (emphasis added).

{15} *Langenegger,* 82 N.M. at 417, 483 P.2d at 298, the second case permitting an applicant to drill a *Templeton* supplemental well, represents a narrow, fact-specific corollary in which we expanded the *Templeton* doctrine. The applicants in *Langenegger* were appropriators of surface water from the Pecos River. Two aquifers underlie the Pecos River: the shallow aquifer, and the deeper artesian, or pressurized, aquifer. The Pecos Red Beds, a semi-confining layer, separates the two aquifers by restricting the flow of water from one aquifer to the other. *See id.* at 417–18, 483 P.2d at 298–99. Surface flows consisted both of flood flow and baseflow, which had diminished substantially due to withdrawals by local wells. The applicants proposed to tap the deeper aquifer to meet their shortfall.

{16} Evidence at trial established that there was upward leakage from the artesian aquifer to the shallow aquifer. This leakage ultimately fed the surface flow by virtue of the hydrologic connection, even though the connection was indirect. This Court found for the applicants. Because the artesian aquifer was an indirect source of the Pecos River at the location where the groundwater well was proposed, the requirements of *Templeton* were satisfied. As a result, we allowed the senior appropriator to install the well and draw from the artesian aquifer. The artesian basin was hydrologically connected to the shallow basin, and thus, to the surface.

{17} Aside from the unique circumstances of *Langenegger,* the remaining cases emphasize the narrowness of the original *Templeton* requirements. *See Brantley v. Carlsbad Irrigation Dist.,* 92 N.M. 280, 587 P.2d 427 (1978); *Kelley v. Carlsbad Irrigation Dist.,* 76 N.M. 466, 415 P.2d 849 (1966). In *Brantley* and *Kelley,* we carefully analyzed whether groundwater actually fed the surface as baseflow, and whether the proposed *Templeton* well would draw from the same groundwater source of the original surface diversion. Both the New Mexico Attorney General's Office and the Interstate Stream Commission, amici curiae in this case, emphasize the importance of the *Templeton* baseflow requirement, and we take this opportunity to explore the baseflow requirement through the lens of *Brantley* and *Kelley.*

{18} Baseflow is that portion of streamflow coming from groundwater that discharges into a stream or river. Where the groundwater table intersects with the ground surface, groundwater discharges to the surface and becomes surface water in the form of wetlands, lakes, streams, or springs. This often occurs at the lower elevations of a valley. Baseflow provides a consistent contribution of groundwater to perennial rivers, and is the primary source of stable streamflow between rainstorms.

{19} A corollary to the baseflow requirement in *Templeton,* 65 N.M. at 61, 332 P.2d at 466, is that neighboring wells reduce surface flows by intercepting groundwater that, but for the interception, would still discharge into the surface stream. If the stream derives its flow only from flood waters, and not from groundwater, groundwater wells in the area would have no effect upon the streamflow.

{20} The baseflow requirement was pivotal in *Kelley* and *Brantley,* both of which involved applications for *Templeton* supplemental wells that were ultimately unsuccessful. The applicant in *Kelley* operated a farm near the Hondo River, downstream of the Hondo Reservoir. *Kelley,* 76 N.M. at 470, 415 P.2d at 853. The Hondo Reservoir was part of a federal project to divert and store water from the Hondo River, and then release to downstream irrigators. However, the reservoir contained holes and most of the diverted water quickly infiltrated into the Roswell Artesian Basin. *Id.* at 467, 415 P.2d at 852. Mr. Kelley sought a permit to divert Rio Hondo surface flow into the abandoned reservoir, and install a well to capture the water that percolated into the ground.

{21} This Court determined that *Templeton* did not apply because the *Templeton* baseflow relationship did not exist. Mr. Kelley did not seek to capture groundwater that had once fed his surface supply; instead, he sought to pump surface water that infiltrated into the Roswell Artesian Basin. "The water sought to be used from the well in this instance is not underground water which, if not intercepted, would reach and become a part of a natural stream," *Id.* at 472, 415 P.2d at 853. The well application was denied.

{22} We also determined that a *Templeton* supplemental well was unavailable to the applicant in *Brantley*. *Brantley*, 92 N.M. at 281, 587 P.2d at 428. The applicant in *Brantley* owned rights to surface water that traveled a 25-mile long canal from the point of diversion to reach his property. The applicant sought to recapture the water lost to seepage beneath the canal, through a well drilled into the valley fill or shallow aquifer. *Id.* As in *Kelley*, the applicant's water right did not originate from baseflow. "There is no evidence that the ground water under Brantley's farm is a source of the surface flow of the Pecos at Avalon Dam." *Id.* at 282, 587 P.2d 427, 587 P.2d at 429. Instead of the groundwater discharging to the surface, the surface flows recharged the groundwater. *Id.* Moreover, we observed that the proposed well might draw from a hydrologically distinct aquifer, frustrating the *Templeton* requirement that the supplemental well draw from the same source that fed the surface. *Id.* Again, the well application was denied.

{23} These cases articulate the narrow circumstances under which a *Templeton* supplemental well is permissible. A senior surface water appropriator diverts surface water that consists in part of baseflow. The senior's water supply is then depleted by junior wells in the area. The senior can follow the source of the baseflow into the local aquifer that fed the surface system, and install a well to draw from the same source used by the offending junior wells. In a *Langenegger* type of case, a senior can tap into a deeper, separate aquifer only if the deeper aquifer feeds the shallow aquifer, and ultimately the surface flow, because the water in the deeper aquifer is under pressure forcing it upward, as in an artesian aquifer. The senior continues using water in the manner, amount, and location originally intended. Therefore, the core requirements for a successful *Templeton* supplemental well include: (1) a valid surface water right; (2) surface water fed in part by groundwater (baseflow); (3) junior appropriators intercepting that groundwater by pumping; and (4) a proposed well that taps the same groundwater that was the source of the applicant's original appropriation.

How *Templeton* Fits the Herringtons' Well Application

{24} In applying the *Templeton* predicates to the Herrington's application, we first observe that the validity and seniority of the Herringtons' water right is not in dispute. At the heart of this case lie the other *Templeton* requirements: whether the Herringtons' surface diversion was fed by baseflow, and if so, whether the Herringtons' proposed well will draw from the same source that fed the baseflow.[4]

{25} At trial, the issue of baseflow was a primary focus. Originally, the State Engineer likened this case to *Kelley*, arguing unsuccessfully before the district court that the Rio de Arenas consisted only of flood flow, and therefore a *Templeton* supplemental well was unavailable to the Herringtons. The Herringtons presented a different view of the Rio de Arenas hydrology. The Herringtons asserted that groundwater fed the stream system, as in *Templeton*. On this vital point, the Herringtons prevailed:

> **[Finding of Fact 16:]** The Rio de Arenas is naturally an interrupted *perennial* stream with dry and flowing reaches that vary in length depending on climate and

4. The trial court found that a supplemental well drawing 24.86 acre-feet per year, half the Herringtons' water right, would not impair other appropriators. Because the Herringtons have agreed that their well will be limited to pumping at a maximum rate of 24.86 acre-feet per year, we limit our analysis to this amount without discussing whether a Templeton well could properly impair other, junior appropriators. See *City of Albuquerque v. Reynolds*, 71 N.M. 428, 379 P.2d 73 (1962).

usage conditions. Groundwater above elevation 6,200 feet converges onto the Rio de Arenas watercourse and is the *source of baseflow* and discharge by riparian vegetation.

. . . .

[**Finding of Fact 17:**] The Rio de Arenas at [the] Herrington's property previously was an *interrupted perennial stream,* and is now an interrupted intermittent stream. The frequency *of surface flow* in the Rio de Arenas has declined in more recent years *due to numerous upstream junior diversions of water by well.*

. . . .

[**Finding of Fact 19:**] Rio de Arenas moves down gradient from north to south. As the stream flows, at times and places it falls below the surface. At other times and places, it may resurface when it confronts various dikes that form underground barriers to the underground flow. As the water moves to the surface, it creates surface flow for a time, and will then sink back below the ground surface.

(Emphasis added).

{26} The district court also found that the groundwater that fed the surface was intercepted by junior wells drawing from the fractured bedrock aquifer, as required by *Templeton:*

[**Finding of Fact 36:**] The valley of the Rio de Arenas has a history of well depletion, followed by the drilling of new wells, or the deepening of old wells. *This is caused by the pumping and depletion of pockets of water in the fractured bedrock aquifer.*

. . . .

[**Conclusion of Law 7:**] The level of the flow of surface water rights is lower at the current point of diversion at the Frazier–Bateman Ditch *because of upstream junior drillers* and the upstream impoundment of surface waters.

[**Conclusion of Law 8:**] Herringtons' surface water rights have been reduced at the current point of diversion because of a *lowering of the water table as a result of the junior drillers* and the upstream impoundments.

(Emphasis added).

{27} These uncontested findings and conclusions establish the initial *Templeton* predicates enumerated above. The Herringtons have a valid surface water right that consists of surface water fed in part by groundwater. Junior appropriators have intercepted groundwater that fed the surface, thereby diminishing the Herringtons' surface flows. Notably, Finding of Fact 36 is specific that neighboring wells completed at the depth of the "deep bedrock aquifer," deplete the Rio de Arenas, and as we shall see, the fractured bedrock aquifer occurs at roughly the same depth as the well proposed by the Herringtons. This particular finding supports the Herringtons' claim that they are merely reasserting their priority by tapping the same source as the junior appropriators who have depleted their surface right. Or, as stated in *Templeton,* the Herringtons appear not to request "a new appropriation in the underground water basin, but merely a request to follow the source of their original appropriation." 65 N.M. at 68, 332 P.2d at 471. The other findings and conclusions above remain unchallenged by the State Engineer, and are therefore the law of the case. *See Trujillo v. City of Albuquerque,* 1998–NMSC–031, ¶ 40, 125 N.M. 721, 965 P.2d 305.

{28} These factors that appear undisputed strongly suggest that the same principles of fairness that underlie *Templeton* apply here as well. As a result, the Herringtons would appear entitled to some relief in the form of a supplemental well, at least at some depth and at some location. A holder of a senior water right is generally entitled to protection in our courts of law from the effects of junior interceptors. However, the question remains whether the Herringtons senior rights entitle them to this particular well, at the proposed depth and the proposed location. For that answer, we look to the remaining conditions of *Templeton.*

{29} In addressing these remaining questions, the district court found that the Herringtons' proposed well did not satisfy the source requirement of *Templeton.* Despite finding that the Herringtons' surface appro-

priation consisted of baseflow intercepted by junior wells, the district court found that both the completion of the well in the fractured bedrock aquifer and the downstream location of the well precluded application of *Templeton* because it would grant the Herringtons access to a new source of water.

{30} On appeal, the Herringtons argue that the findings and conclusions relative to the proposed well result from an incorrect interpretation, and perhaps confusion, regarding New Mexico law governing supplemental groundwater wells, specifically the *Templeton* doctrine. We review the question of whether the district court properly interpreted the applicable law de novo, and the findings of fact for sufficiency of the evidence. *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 address, in turn, the issues of the well depth and the well location, in relation to the *Templeton* source requirement.

The Depth of the Proposed Well—Completion Into the Fractured Bedrock Aquifer

{31} The key Findings of Fact and Conclusions of Law relied upon by the district court and the Court of Appeals, and disputed by the Herringtons, are as follows:

> **[Finding of Fact 27:]** There is no evidence that the groundwater from the deep bedrock aquifer underlying [the] Rio de Arenas contributes to the flow of the Rio de Arenas at Herringtons' point of diversion on the Frazier–Bateman Ditch.
>
> . . . .
>
> **[Finding of Fact 31:]** A well this deep will not capture the water that would be available to [the] Herringtons as surface water, or surface water that has seeped into the ground, because the depth of the well will extend into the deep bedrock aquifer which does not contribute to the flow of the Rio de Arenas.
>
> . . . .
>
> **[Conclusion of Law 10:]** The proposed well sought by Herringtons goes into the deep bedrock aquifer and there is no evidence of an upward leakage from the aquifer that contributes to the flow of surface water at Herringtons' current point of diversion on the Frazier–Bateman Ditch.

{32} The parties agree that the proposed well is to extend 100 feet into fractured shale and sandstone (the fractured bedrock aquifer) which underlie the alluvial sediments. The State Engineer seems to characterize the underlying system as consisting of two aquifers: the shallow aquifer, and the deeper fractured bedrock aquifer. Under this view, the fractured bedrock aquifer would be like the artesian aquifer in *Langenegger* that was separated from the higher, shallow aquifer by an impermeable barrier. Consistent with *Langenegger*, the Herringtons would have to show that the deep bedrock aquifer contributes water via leakage through an impermeable, or semi-permeable layer to the shallow aquifer and ultimately to the Rio de Arenas.

{33} The Herringtons, however, claim that this is a one-aquifer case like *Templeton*, and not a two-aquifer case like *Langenegger*. The Herringtons argue that no semi-confining, impermeable layer separates the alluvium from the fractured bedrock aquifer where they propose their well. As a result, the Herringtons maintain that both the alluvium and fractured sandstone are parts of the same continuous, hydrologically connected aquifer that feeds the Rio de Arenas baseflow. Therefore, the Herringtons conclude that a well that pumps water from this depth draws from the same source as the baseflow, exactly as in *Templeton*.

{34} In analyzing how the district court viewed the system, we discern an analogy between this case and *Langenegger*. The disputed Findings of Fact and Conclusions of Law stating that there is no upward leakage from the deep aquifer up to the shallow aquifer address the requirement in *Langenegger*, that in order to drill a *Templeton* well into a deeper, hydrologically discontinuous aquifer, the applicant must demonstrate that the lower aquifer leaks upward, through the semi-confining layer, into the shallow aquifer as happens in an artesian system under pressure. *Langenegger*, 82 N.M. at 421–22, 483 P.2d at 302–03. The district court therefore

may have treated the Rio de Arenas aquifer system as consisting of two separate aquifers, and raised the inquiry of leakage from the fractured sandstone up to the shallow alluvium and surface flow. As stated by the Court of Appeals, "[i]n addition, we note that the Herringtons repeatedly assert on appeal that there is no impermeable layer between the deep and shallow aquifers. This directly contradicts the district court's finding that there is no leakage from the deep to the shallow aquifer." *Herrington,* 2004–NMCA–062, ¶ 34, 135 N.M. 585, 92 P.3d 31.

{35} Yet other findings of the district court appear to assume that the underlying alluvium and fractured sandstone are all part of the same, continuous aquifer, as in *Templeton.* In Finding of Fact 24, the district court specifically found no subsurface impermeable separation within the underlying aquifer. The district court also suggests a direct hydrologic connection between the surface and the proposed well depth in Finding of Fact 36, stating that the Rio de Arenas Valley had experienced depletion from wells specifically from "the pumping and depletion of pockets of water in the *fractured bedrock aquifer,*" which appears to be the same description of where the Herringtons seek to put their well (emphasis added). This finding is significant because if junior domestic wells completed in the fractured sandstone intercepted water that fed the Rio de Arenas, and the Herringtons seek to drill a well to the same depth, they may be tapping the same source that fed the surface stream.[5] Again, this finding is at odds with other findings that the groundwater from the deep bedrock aquifer does not contribute to the Rio de Arenas flow, and that the Herrington's well would capture surface water that had seeped into the ground.

{36} Ultimately, this case presents a series of irreconcilable and conflicting findings and conclusions that only the district court can resolve. It is clear that the Herringtons may be entitled to a well of some depth, as they have demonstrated the *Templeton* predicates discussed *supra.* We therefore think the fairest solution is to remand to the district court for an opportunity to clarify its findings and conclusions. *See State ex rel. Human Servs. Dep't v. Coleman,* 104 N.M. 500, 505–06, 723 P.2d 971, 976–77 (Ct.App.1986) (stating if ambiguity or doubt exists as to the trial court's findings of fact, court can remand when the ends of justice so require), *abrogated on other grounds by State v. Alberico,* 116 N.M. 156, 861 P.2d 192 (1993). Specifically, the court is to determine whether the proposed well in this case taps one aquifer, or two aquifers separated by an impermeable or semipermeable boundary. If the proposed well taps the same, hydrologically continuous aquifer that feeds baseflow to the Rio de Arenas and provides water to the offending wells as discussed herein, then the proposed well at this depth may not be prohibited under *Templeton.* If the well taps a second deeper aquifer, then the well is prohibited under *Templeton* and *Langenegger,* because the trial court has already established that there is no upward leakage at a depth of 100 feet.

Downstream Location of the Well

{37} The district court concluded that because the Herringtons propose to place their supplemental well roughly 1500 feet downstream of the original point of diversion, *Templeton* could not apply:

> [**Conclusion of Law 9:**] The proposed well sought by Herringtons will be located downstream from the current point of diversion at the Frazier–Bateman Ditch and, therefore, this application is not governed by the principles announced in *Templeton* . . . .

The Court of Appeals affirmed this conclusion as a correct interpretation of the law, relying upon *Brantley v. Carlsbad Irrigation Dist., supra,* and *State ex rel. Martinez v. City of Roswell,* 114 N.M. 581, 588, 844 P.2d 831, 838 (Ct.App.1992) (hereinafter "*Roswell*"), for the proposition that a *Templeton* supplemental well must be located upstream.

5. A table of neighboring wells in the basin, compiled by the Herringtons for analyzing the effect of their proposed well on other wells, indicates that of 73 local wells where the depth information is known, 8 have a well depth of less than 100 feet, and 52 wells have a depth of 150 feet or greater. The Herringtons propose a depth of 100 feet.

{38} The Herringtons challenge this conclusion. They argue that a *Templeton* supplemental well need not, in all cases, be positioned upstream of a surface point of diversion. The challenge is well-taken. Specifically, the Herringtons question whether *Brantley,* the case cited by *Roswell* as the source of the upstream requirement, actually imposes such a requirement. *See Herrington,* 2004–NMCA–062, ¶¶ 9, 10, 135 N.M. 585, 92 P.3d 31. The Herringtons also call into question the reasoning posited by the Court of Appeals to support a universal requirement that a supplemental well can never be placed downstream of a surface diversion point. Interestingly, the State Engineer has requested that we refrain from recognizing such a universal requirement, and amici curiae Stein and Draper strongly question the propriety of the requirement. We therefore take this opportunity to examine the original language of this Court in *Brantley,* and the Court of Appeals' reasoning for the upstream requirement.

{39} We begin by noting the documentary evidence provided by amici curiae Stein and Draper, demonstrating that Mr. Templeton's supplemental well was actually located *downstream* of his original point of diversion. Strangely, if we were to apply the upstream requirement, Mr. Templeton would not be entitled to a supplemental well today, under the very doctrine that bears his name. This suggests that something may be amiss.

{40} In concluding that a *Templeton* supplemental well cannot be positioned downstream of the point of surface diversion, *Roswell* relied upon its reading of *Brantley,* in which the applicant proposed to place a well 25 miles downstream of the point of diversion (as opposed to the 1500 feet sought by the Herringtons). In *Brantley,* this Court found that there was no baseflow, and that Mr. Brantley sought to drill into a separate aquifer. We concluded in *Brantley* that "the 'Templeton Doctrine' does not apply since Brantley seeks to drill *below* his point of diversion into waters which are not a source of his surface right." *Brantley,* 92 N.M. at 282, 587 P.2d at 429. The location of the well was clearly an important factor, but was tied to the fact that the well drew water from a distinct aquifer. *Id.* We never intended to say in *Brantley* that the well could not be a short distance downstream if it drew from groundwater that was the *same* source of the surface right. Thus, the question in *Brantley* was not so much the particular location of the proposed well as it was whether, at that location, the proposed well would draw from the same source as the surface right.

{41} The Court of Appeals' explanation in this case for the upstream requirement also warrants clarification. The Court of Appeals concluded that by definition, a downstream well would necessarily draw upon different water than the original diversion.

> A downstream ground water well necessarily draws on seepage and percolation that occurs after, i.e., downstream from, the surface water diversion. That seepage and percolation could not have been a source of the surface water to which the applicant has a right, and, as in *Brantley* and *Kelley,* it is more likely that the surface water is the source of the ground water at that location.

Herrington, 2004–NMCA–062, ¶ 13, 135 N.M. 585, 92 P.3d 31. In so stating, the Court of Appeals suggests that all downstream wells result in a new appropriation.

{42} This suggestion is overly broad. As described in *Templeton,* and in the district court's Findings of Facts 16, 19, and 24 in this case, water may often recharge an aquifer in the mountainous portion of the basin, and migrate downward through the aquifer to discharge as baseflow at the lower elevations of the valley. *Templeton,* 65 N.M. at 62, 332 P.2d at 466–67. In contrast to the suggestion by the Court of Appeals, very little rainfall and runoff across the Mimbres basin floor actually recharges the groundwater. In the Mimbres Basin, less than two percent of the rainfall recharges the groundwater. *See generally* New Mexico Water Resources Research Institute & California State University, Trans-International Boundary Aquifers In Southwestern New Mexico (2000). Furthermore, if the water table in an aquifer is lowered by wells, the same water that formerly discharged at one surface location may now discharge to the surface downstream, at a point of lower ele-

vation. Finally, amici curiae Stein and Draper point out the confusion related to the upstream requirement, and describe the ease with which the requirement can be circumvented.[6]

{43} We therefore take this opportunity to clarify *Brantley*. A downstream location of the proposed well may be, but is not necessarily, an indicator of whether the new well draws from groundwater that is the same source of the surface right. The determination of the source of water for a well is always case-specific. It all depends on whether an applicant's proposed point of diversion will tap "into waters which are not a source of his surface right." *Brantley,* 92 N.M. at 282, 587 P.2d at 429. A downstream location may properly be a cause for concern, placing a burden on the applicant to demonstrate that their proposed well draws water from the same source that fed the baseflow at the original point of diversion. But the downstream location, particularly if only a short distance from the point of diversion, is not dispositive of an otherwise valid *Templeton* application. Therefore, any upstream well requirement is not, and cannot be, a universal requirement.

{44} We must note that the Herringtons may not position the well such that seepage losses are eliminated. The Court in *Roswell* properly stated that an appropriator may not move a well to capture seepage lost along a conveyance canal. "If it were otherwise, every irrigator with surface rights could drill supplemental wells seeking to capture their own irrigation water return flow, upon which downstream surface appropriators rely." *Roswell,* 114 N.M. at 586, 844 P.2d at 836. As noted by the State Engineer, the Mimbres Basin is fully appropriated, and the Herringtons' ditch seepage is therefore part of the fully appropriated system. If, on remand, the district court determines that the proposed well location will result in a greater appropriation to the Herringtons, the Herringtons' pumpage must be reduced accordingly. *See City of Roswell v. Reynolds,* 86 N.M. 249, 251, 522 P.2d 796, 798 (1974) (holding that permits involving changes in points of appropriation may be conditioned to reduce pumpage).

The Herringtons May Be Entitled to a Supplemental Well at a Depth of 100 Feet Under the Transfer Statute

{45} In addition to the analysis of the Herringtons' *Templeton* claim, the Court of Appeals examined whether the Herringtons qualified for a statutory transfer. *See* §§ 72–5–23, –24. The Court of Appeals concluded that even statutory transfers must meet the *Templeton* source requirements, and as a result, the Herringtons did not qualify. *Herrington,* 2004–NMCA–062, ¶¶ 17–20, 135 N.M. 585, 92 P.3d 31. In this appeal, both parties to this case as well as amici Stein and Draper support reversal of this point. As noted by the Herringtons, no source requirement is articulated either in the transfer or supplemental well statutes, nor in *Clodfelter v. Reynolds,* 68 N.M. 61, 66, 358 P.2d 626, 630 (1961). *See* § 72–5–24 (1985); NMSA 1978, § 72–12–24 (1959).

{46} As stated by this Court in *Clodfelter,* "the right to change the point of diversion, or place of use, of water which has been obtained as a result of an appropriation, is one of the incidents of ownership." 68 N.M. at 66, 358 P.2d at 630 (citing *Lower Latham Ditch Co. v. Bijou Irrigation Co.,* 41 Colo. 212, 93 P. 483 (1907)). Yet the statutory right to transfer is subject to close review by the State Engineer. Section 72–5–24 directs the State Engineer to determine whether the proposed transfer will be detrimental to existing water rights, will not be contrary to the conservation of water in the State, and will not be detrimental to the public welfare of the state. *See W.S. Ranch Co. v. Kaiser Steel Corp.,* 79 N.M. 65, 69, 439 P.2d 714, 718 (1968); *Pub. Serv. Co. v. Reynolds,* 68 N.M. 54, 60, 358 P.2d 621, 625 (1960). Embedded within the requirement that the transfer not result in a new appropriation is the condition that water at the move-to location be hydrologically connected to water at the move-from location. The State Engineer must therefore inspect proposed transfers

6. Amici note that an appropriator could first move the surface point of diversion downstream, and then apply for a supplemental well at the desired downstream location.

closely to ensure that the applicant will draw from the same hydrologic unit.

{47} Ensuring that a transfer occurs within a continuous hydrologic unit is different from applying the narrow *Templeton* same-source requirement. *Templeton* supplemental wells service the original parcel, while statutory transfers may apply to new uses for the water, over significant distances. *See, e.g., Turner v. Bassett,* 2005–NMSC–009, 137 N.M. 381, 111 P.3d 701 (groundwater applied to irrigation transferred to municipal applications); *Montgomery v. N.M. State Eng'r,* 2005–NMCA–071, 137 N.M. 659, 114 P.3d 339 (surface water applied to irrigation transferred to groundwater use two counties north of original diversion), *cert. granted,* 2005–NMCERT–006, 137 N.M. 767, 115 P.3d 230. Imposing *Templeton* same-source requirements would greatly restrict such transfers, curtailing State Engineer administrative discretion, and threatening sound water policy.

{48} Holding that all surface water to groundwater transfers are bound by the *Templeton* same-source requirements would unduly restrict the administrative authority of the State Engineer to evaluate the facts in each specific case, and determine the propriety of a proposed supplemental well or transfer. Although surface to ground transfers require a hydrologic connection, this may be a more general determination than the *Templeton* baseflow source requirement. Significant discretion is afforded to the State Engineer in making this determination. *See* § 72–5–24; *City of Albuquerque,* 71 N.M. at 434, 379 P.2d at 77; *Clodfelter,* 68 N.M. at 61, 358 P.2d at 626. Current administrative schemes, such as the requirement that groundwater appropriators in the Middle Rio Grande acquire surface rights to offset the surface depletions caused by pumping, or future attempts by municipalities to acquire agricultural surface diversions, are dependent upon more flexibility than permitted by the restrictive *Templeton* source requirement. Accordingly, we specifically reject any statement in the opinion below that would impose the *Templeton* predicates on all statutory transfers.

{49} In analyzing whether the Herringtons maintain an independent statutory right to transfer their surface right to the ground, we observe that the district court has already determined that a supplemental well pumping at a maximum rate of 24.86 acre-feet per year would not impair existing rights, and would not exceed the drawdown profiles established for the basin. The State Engineer has not appealed those conclusions. Therefore, at some depth within the aquifer feeding the Rio de Arenas stream, a supplemental well drawing at no more than 24.86 acre-feet per year is permissible under Sections 72–5–23 and 72–5–24. Yet, as with the *Templeton* analysis, the question remains whether at 100 feet a supplemental well will draw from a different aquifer altogether, hydrologically unrelated to the Rio de Arenas, rendering the well a new, and impermissible, appropriation. This determination is for the district court on remand.

{50} Parenthetically, we note the difficulty presented by NMSA 1978, Section 72–12–1.1 (2003), which directs the State Engineer to issue permits to domestic well applicants subject to municipal ordinances. This requirement complicates the State Engineer's efforts to manage a limited water supply in a sustainable way. Furthermore, we recognize the practical difficulty of terminating continued use of existing junior domestic wells when they result in a shortfall to senior appropriators. As a result, protecting the surface rights of senior appropriators, like the Herringtons, may prove difficult when many domestic wells draw from the same basin.

CONCLUSION

{51} For the foregoing reasons, we reverse the Court of Appeals and remand to the district court for further proceedings consistent with this Opinion.

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

WE CONCUR: PAMELA B. MINZNER, PATRICIO M. SERNA, PETRA JIMENEZ MAES, and EDWARD L. CHÁVEZ, Justices.

2006-NMCA-040
133 P.3d 271

CITY OF ROSWELL, Plaintiff–Appellee,

v.

Henry M. SMITH, Defendant–Appellant.

No. 24,272.

Court of Appeals of New Mexico.

Feb. 20, 2006.

Certiorari Denied, No. 29,742, April 24, 2006.

Judy A. Pittman, City Attorney, Roswell, NM, for Appellee.

Henry M. Smith, Roswell, NM, Pro Se Appellant.

OPINION

WECHSLER, Judge.

{1} Defendant Henry M. Smith appeals his conviction of one count of obstructing an officer in violation of Roswell, N.M., Code

§ 10–48 (1984). Defendant argues that his conviction should be reversed because there was insufficient evidence that his conduct met the definition of obstructing and because police officers violated his Fourth Amendment rights in arresting him on private property in the absence of the commission of a crime. In addition, we address whether Defendant's conviction should be reversed for lack of jurisdiction because the city attorney who prosecuted him in district court did not have authorization from the district attorney. We conclude that the evidence was sufficient to convict Defendant of obstructing and that his Fourth Amendment rights were not violated. We further conclude that city attorneys have authority to prosecute cases in district court for violations of municipal ordinances without district attorney authorization. Defendant's conviction is affirmed.

FACTUAL AND PROCEDURAL HISTORY

{2} Defendant was arrested for obstructing an officer after he failed to comply with repeated instructions of several City of Roswell police officers to leave the parking lot of a Roswell Denny's restaurant. The uncontroverted testimony at trial indicates that Defendant was engaged in a loud argument with one or more other persons in the parking lot when the police officers arrived. The officers apparently determined that no crimes had been committed and ordered everyone in the parking lot to go their separate ways. Testimony of one officer indicated that all parties to the dispute other than Defendant did leave the parking lot, but two other officers testified that the other parties could not leave because Defendant's van was blocking their exit. It is undisputed that Defendant refused to leave the parking lot and was arrested instead.

{3} Defendant was prosecuted by his arresting officer in municipal court, a practice allowed by Rule 8–111 NMRA. He was convicted and appealed to district court. In district court, the city was represented by an assistant city attorney. Defendant moved for dismissal of the charge on the ground that city attorneys have no authority to prosecute criminal matters in district court. Although the basis for its ruling is unclear, the district court denied that motion, apparently because it believed the case to be civil on appeal. Immediately before and after the trial, Defendant argued that the case should be dismissed because he had been arrested on private property without a warrant in violation of the Fourth Amendment. The district court upheld Defendant's conviction and remanded the matter to the municipal court for execution of Defendant's sentence.

SUFFICIENCY OF THE EVIDENCE

{4} To determine whether there is sufficient evidence to support a criminal conviction, "[w]e ask whether '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Barber*, 2004–NMSC–019, ¶ 33, 135 N.M. 621, 92 P.3d 633 (quoting *State v. Cunningham*, 2000–NMSC–009, ¶ 26, 128 N.M. 711, 998 P.2d 176). "Such review involves a two-step process, consisting of 'deference to the resolution of factual conflicts and inferences derived therefrom, and a legal determination of whether the evidence viewed in this manner could support the conviction.'" *State v. Nieto*, 2000–NMSC–031, ¶ 27, 129 N.M. 688, 12 P.3d 442 (quoting *State v. Orgain*, 115 N.M. 123, 126, 847 P.2d 1377, 1380 (Ct.App.1993)).

{5} Section 10–48(a)(2) prohibits obstructing an officer, which it defines as "[r]esisting, obstructing or abusing any . . . peace officer in the lawful discharge of his duties." The district court found that Defendant had been "instructed . . . on several occasions to leave the parking lot" and that he had "refused." Three police officers testified to these facts, and Defendant does not challenge them. We defer to the district court's findings of fact since they are supported by the evidence. *See Nieto*, 2000–NMSC–031, ¶ 27, 129 N.M. 688, 12 P.3d 442.

{6} Defendant argues that there was insufficient evidence to convict him of obstruction because the police officers could not lawfully ask him to leave. It is true that he could not be guilty of obstruction if police officers were not "in the lawful discharge of [their] duties" when they ordered him to leave the parking lot. Section 10–48(a)(2). However, municipal police officers have a duty to "suppress all riots, disturbances and

breaches of the peace." NMSA 1978, § 3-13-2(A)(4)(a) (1988). Police officers may intervene when they have "reasonable grounds . . . to believe in good faith that intervention [is] necessary to prevent further disturbance or physical violence." *State v. Hilliard,* 107 N.M. 506, 508, 760 P.2d 799, 801 (Ct.App. 1988); *see also State v. Prince,* 1999-NMCA-010, ¶ 12, 126 N.M. 547, 972 P.2d 859 ("The power and duty of a law enforcement officer to suppress breaches of the peace includes the right to take any reasonable steps to prevent such breaches from occurring when the officer has good reason to believe that a disturbance may occur.").

{7} In *Hilliard,* we affirmed the defendant's conviction of battery on a police officer because the officers were acting lawfully to prevent a breach of the peace. *Hilliard,* 107 N.M. at 508-09, 760 P.2d at 801-02. In that case, police officers were investigating a report of a domestic disturbance. *Id.* at 507, 760 P.2d at 800. When the officers arrived, the defendant was not present, but he returned shortly. *Id.* Recognizing him as one of the parties to the disturbance, the officers refused him entry into the house. *Id.* at 507-08, 760 P.2d at 800-01. The defendant tried to push past the officers, hitting one officer in the face, and was arrested. *Id.* We held that the officers were acting reasonably and that there was sufficient evidence to support the conviction. *Id.* at 508, 760 P.2d at 801.

{8} We can see no reason to distinguish this case from *Hilliard.* Defendant was lawfully instructed to leave the parking lot to prevent a breach of the peace. Because Defendant was yelling loudly when the police officers arrived, they certainly had reason to believe a breach of the peace was imminent, if not already transpiring. Asking Defendant to forego a meal at Denny's was certainly less intrusive than asking the defendant in *Hilliard* to refrain from entering the house. *See id.* at 507-08, 760 P.2d at 800-01. The police order was therefore reasonable and lawful. Because Defendant had no right to refuse to follow the order, there is sufficient evidence that he was in violation of Section 10-48.

LEGALITY OF ARREST

{9} Defendant argues that police officers could not lawfully arrest him on private property without a warrant, consent of the property owner, or the commission of a crime. However, Defendant has not moved to suppress any evidence that he contends is the fruit on any alleged unlawful arrest, *see State v. Jutte,* 1998-NMCA-150, ¶ 22, 126 N.M. 244, 968 P.2d 334 (indicating that fruits of illegal arrests are generally barred from admission into evidence), and our cases hold that an illegal arrest by itself does not raise any issue as to the power of the court to try a defendant or provide any relief from a conviction, *see State v. Nysus,* 2001-NMCA-023, ¶ 5, 130 N.M. 431, 25 P.3d 270; *Herring v. State,* 81 N.M. 21, 21-22, 462 P.2d 468, 468-69 (Ct.App.1969). In addition, even if we found it necessary to decide the issue, as noted above, Defendant had committed the crime of obstructing an officer prior to the arrest in plain view of the arresting officer, and the arrest was therefore legal. *Cf. State v. Luna,* 93 N.M. 773, 777, 606 P.2d 183, 187 (1980) ("A warrantless arrest of a person for violation of a misdemeanor is valid only if the offense occurred in the arresting officer's presence.").

AUTHORITY OF CITY ATTORNEY TO PROSECUTE IN DISTRICT COURT

{10} Defendant also argued before the district court and in his docketing statement that the district court erred in denying his motion to dismiss for improper prosecution by an unauthorized assistant city attorney. We address this issue despite Defendant's failure to argue it in his brief in chief because it concerns the jurisdiction of the district court. *See Alvarez v. State Taxation & Revenue Dep't,* 1999-NMCA-006, ¶¶ 1, 6, 126 N.M. 490, 971 P.2d 1280 (reversing the district court's order for lack of jurisdiction sua sponte). The district court lacks jurisdiction to hear a criminal case brought by an unauthorized attorney. *See State v. Baca,* 101 N.M. 716, 717, 688 P.2d 34, 35 (Ct.App. 1984) (holding that the metropolitan court had no jurisdiction to hear a criminal matter in which the private prosecutor was not authorized to represent the state). The ques-

tion of whether the district court had jurisdiction is a question of law and is reviewed de novo. *See Gallegos v. Pueblo of Tesuque,* 2002–NMSC–012, ¶ 6, 132 N.M. 207, 46 P.3d 668.

{11} To show that the assistant city attorney was unauthorized, Defendant relied on NMSA 1978, § 36–1–19(A) (1985), which provides that:

> no one shall represent the state or any county thereof in any matter in which the state or county is interested except the attorney general, his legally appointed and qualified assistants or the district attorney or his legally appointed and qualified assistants and such associate counsel as may appear on order of the court, with the consent of the attorney general or district attorney.

Section 36–1–19(B) provides an exception for private representation of counties in civil matters. After reiterating that Subsection B applies only to civil matters, Subsection C provides that "permission [of the district attorney] shall not be required for the prosecution of any violation of a county ordinance." Section 36–1–19(C).

{12} We will not look beyond the plain language of a statute unless that language is ambiguous. *E.g., State v. Rivera,* 2004–NMSC–001, ¶ 10, 134 N.M. 768, 82 P.3d 939. Ambiguity is a question of law, which we review de novo. *E.g., Envtl. Control, Inc. v. City of Santa Fe,* 2002–NMCA–003, ¶ 14, 131 N.M. 450, 38 P.3d 891. The plain language of Section 36–1–19(A) explicitly prohibits unauthorized representation of "the state or any county . . . in any matter in which the state or county is interested." This provision applies to representation of the state or a county; it does not apply to the representation of a municipality. *See* NMSA 1978, § 35–15–1(A) (1969) (providing that in suits to enforce municipal ordinances the plaintiff is the municipality). *But cf.* 89–27 Op. Att'y Gen. 1–3 (1989) (advising that police officers may not prosecute criminal cases in district court without violating Section 36–1–19). If the legislature had wished to regulate representation of municipalities, it would have done so. *Cf. Brooks v. Hobbs Mun. Sch.,* 101 N.M. 707, 710, 688 P.2d 25, 28 (Ct.App.1984) (noting that the legislature "could easily" have included additional language in a statute had it desired to do so).

{13} Defendant has cited no authority for the proposition that the state or a county is interested in the enforcement of the Roswell City Code or that the state or a county was represented by the assistant city attorney. Instead, Defendant appears to believe that he was convicted of NMSA 1978, § 30–22–1 (1981) (resisting, evading, or obstructing an officer). On the contrary, the record shows that Defendant's conviction was for violation of Section 10–48 of the Roswell City Code.

{14} Defendant also argued in his docketing statement that the district court ruled incorrectly, given that the assistant city attorney admitted in court that she was unauthorized. We agree that the attorney's statements to the district court were misleading, but that fact is of no consequence in our determination of the presence or absence of jurisdiction. *Cf. Chavez v. County of Valencia,* 86 N.M. 205, 209, 521 P.2d 1154, 1158 (1974) ("Subject matter jurisdiction cannot be conferred by consent of the parties."); *State v. Maes,* 100 N.M. 78, 80–81, 665 P.2d 1169, 1171–72 (Ct.App.1983) (noting that the courts must decide important issues in criminal cases regardless of concession by a party). Furthermore, we agree that the district court did not rule on the correct ground. Nonetheless, the ruling of the court was correct. We will affirm a ruling of the district court that reaches the correct result, even if it is for the wrong reason, when the district court had all the facts before it and the parties had a full opportunity to present evidence. *State v. Franks,* 119 N.M. 174, 177, 889 P.2d 209, 212 (Ct.App.1994) (noting that this Court will not affirm on a fact-dependent ground not raised in the district court because this Court does not find facts and because of the resulting unfairness to parties who did not have a full opportunity to present evidence in the district court).

CONCLUSION

{15} Because the record contains evidence sufficient to support Defendant's conviction for obstructing an officer, and because the

prosecution in district court by an assistant city attorney was not improper, we affirm.

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

WE CONCUR: LYNN PICKARD and MICHAEL E. VIGIL, Judges.

2006-NMCA-045
133 P.3d 842

STATE of New Mexico,
Plaintiff–Appellee,

v.

Anthony ROMERO, Defendant–Appellant.

No. 24,389.

Court of Appeals of New Mexico.

Feb. 6, 2006.

Certiorari Granted, No. 29,690,
April 10, 2006.

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

John Bigelow, Chief Public Defender, Will O'Connell, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

PICKARD, Judge.

{1} This case requires us to decide whether several statements made by a domestic violence victim were "testimonial" for purposes of Confrontation Clause analysis under *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). We also address whether Defendant forfeited his confrontation rights because he was convicted in a separate proceeding of having murdered the victim several months after the domestic violence incident with which this case is concerned. Finally, we address Defendant's assertion that other witness testimony was admitted in violation of Rule 11–404(B) NMRA. We hold that some of the victim's statements were testimonial in nature, that Defendant properly preserved his objections to their admission, and that the admission of the statements was not harmless error. Because we also hold that the State is required to prove the factual elements of the "forfeiture by wrongdoing" doctrine, we remand for the trial court to make the necessary factual findings.

BACKGROUND

{2} A jury convicted Defendant of aggravated battery against a household member, aggravated assault against a household member, false imprisonment, and intimidation of a witness. He was acquitted of criminal sexual penetration. The charges arose out of an incident that occurred on October 12–13, 2001, between Defendant and his estranged wife, Jessica Romero de Herrera (the victim). On December 28, 2001, the victim was found dead in Defendant's bed. In a separate proceeding, Defendant was convicted of second-degree murder in connection with his wife's death, but this Court overturned his conviction based on an error in jury instructions. *State v. Romero,* 2005–NMCA–060, ¶¶ 22–23, 137 N.M. 456, 112 P.3d 1113, *cert. granted,* 2005–NMCERT–005, 137 N.M. 523, 113 P.3d 346.

{3} At the trial concerning the October 2001 domestic violence charges, the State relied heavily on several of the victim's statements, the admission of which Defendant contests in this appeal. First, the State relied on the victim's grand jury testimony, which set forth the following facts. Defendant and the victim were separated, and Defendant called the victim wanting to get back together and threatening suicide. Sometime during the late hours of October 12th or early hours of October 13th, the victim went looking for Defendant and when she found him, they went back to Defendant's mother's house. While the victim was lying on the bed, Defendant got on top of her and choked her, saying that "if he couldn't have [her] . . . nobody could." The next thing the victim remembered was waking up the following morning, but she could not say whether she had passed out.

{4} At some point on the 13th, the victim was able to call her roommate, Lisa Chavez, and ask for help. Chavez called the police, who came to investigate. When the police arrived, Defendant forced the victim to go into the bathroom, where he held a knife to her abdomen and told her to be quiet. The police left, but eventually came back. This time, Defendant let the victim go and told her to tell everyone that the marks on her neck were a result of "rough sex." She then left the house, went to meet the police, and told them what had happened. Defendant was not apprehended at this time, as he apparently ran out the back door.

{5} Next, the State relied on the testimony of Officer Lewandowski, who responded to the incident. Lewandowski testified that the victim came out of the residence, drove her car about 15 feet toward the officers' location, and then got out and ran toward the officers. He said the victim was "crying [and] asking for help" and that she had red marks on her neck and watery eyes. Lewandowski also testified that the victim told him that Defendant "choked her, held a knife to her throat while she was in the bathroom, and ... stated that if he couldn't have her, no one could, and that he would kill her." Through Lewandowski, the State also introduced several photographs, taken by Lewandowski on the evening of October 13th, which documented the victim's injuries, including "marks" on her neck.

{6} The State also relied on two additional statements of the victim. One was a statement taken at the police station by Lewandowski at approximately 5 p.m. on October 13th. This statement essentially duplicated the grand jury testimony. The other was a statement taken by a Sexual Assault Nurse Examiner (SANE) practitioner. Although the victim had not mentioned being raped in any of her prior statements, she told Lewandowski on approximately November 1, 2001, that Defendant had raped her during the incident. As a result, Lewandowski arranged for the victim to meet with a SANE practitioner for an examination and interview on November 8, 2001. The SANE practitioner, Melinda Tucker, testified at trial and read the victim's statement to the jury. This statement essentially duplicated the grand jury testimony and the stationhouse statement, but added that Defendant had raped the victim.

{7} Finally, Chavez and the victim's mother both testified regarding telephone conversations they had with the victim during the incident. Chavez testified as to the following facts. The victim had called her, sounding "scared." The victim said that she was at Defendant's house and that she wanted to leave, but Defendant would not let her. After the conversation ended, Chavez waited almost half an hour and then called the victim back. At this point, Chavez asked the victim whether she was okay and whether Chavez should call the police. The victim stated that she was not okay and agreed that Chavez should call the police.

{8} The victim's mother testified that the victim called her on the afternoon of October 13th and said that Defendant would not let her leave. The mother said that the victim sounded scared and like she had been crying. Finally, the mother testified that the victim said Defendant was holding a knife to her throat and telling her that if she said anything, she would never see her kids again.

{9} Chavez and another of the victim's friends, Elaine Jaramillo, were also allowed to testify regarding two past incidents of domestic violence between Defendant and the victim. The trial court allowed this testimony under Rule 11–404(B), and we discuss the specifics of the testimony below where we address Defendant's Rule 11–404(B) arguments.

{10} Before trial, Defendant argued that all of the victim's statements should be excluded "on the grounds of hearsay and on the grounds that she is unavailable and not subject to cross examination." Defendant initially filed a notice to have the SANE statement admitted and eventually introduced the grand jury testimony himself. However, Defendant was clear throughout the proceedings on his position that all of the victim's statements should be excluded, but that if some were going to be admitted, he wanted to introduce others for purposes of impeachment. *See* Rule 11–806 NMRA (allowing attack on the credibility of a hearsay declar-

ant with "any evidence which would be admissible ... if declarant had testified as a witness"). Ultimately, the trial court let all of the statements in, ruling that they met various hearsay exceptions.

{11} Because the hearings and trial were held before the United States Supreme Court issued its decision in *Crawford,* the parties argued under the old *Roberts* test, which required only a showing that a statement either falls within a " 'firmly rooted hearsay exception' " or bears " 'particularized guarantees of trustworthiness.' " *Crawford,* 541 U.S. at 60, 124 S.Ct. 1354 (quoting *Ohio v. Roberts,* 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)). The trial court apparently found that all of the statements were admissible under *Roberts.* On appeal, Defendant argues that admission of four of the statements (the grand jury testimony, the stationhouse statement, the statement to the SANE practitioner, and the statement to Lewandowski at the scene) violated his rights under the Confrontation Clause, as that Clause was interpreted in *Crawford.* The parties agree that *Crawford* applies in this case. We begin by addressing several preliminary matters, and we then analyze each statement under *Crawford.*

STANDARD OF REVIEW

{12} Defendant's claim that the victim's statements were admitted in violation of his Confrontation Clause rights presents a constitutional question that we review de novo. *State v. Lasner,* 2000–NMSC–038, ¶ 24, 129 N.M. 806, 14 P.3d 1282 (holding that Confrontation Clause claims are reviewed de novo). We review the trial court's decision to admit evidence under Rule 11–404(B) for abuse of discretion. *State v. Williams,* 117 N.M. 551, 557, 874 P.2d 12, 18 (1994), *questioned on other grounds as recognized in State v. Kerby,* 2005–NMCA–106, 138 N.M. 232, 118 P.3d 740.

DISCUSSION

I. Preservation of the *Crawford* Issues

{13} The State first argues that Defendant failed to preserve his Confrontation Clause arguments. In the alternative, the State argues that Defendant waived his right to object to certain statements by himself arguing for their admission. We disagree with both of these contentions.

{14} The State argues that Defendant failed to preserve his Confrontation Clause claims because he did not argue that the contested statements were "testimonial," as statements must be for the *Crawford* holding to apply. In order to preserve an issue for appeal, it must "appear that [the] appellant fairly invoked a ruling of the trial 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). In this case, we note the following statement by the trial court:

> THE COURT: What I'm hearing is people are talking about—you're talking about [Rule 11–804(B)(5)], and what's being argued, which I guess is not too surprising, is confrontation clause stuff. Right? Nobody's used the term, but that's what I'm hearing.
>
> [DEFENSE ATTORNEY]: That's right, your Honor.

We also note that in his initial motion to exclude all of the victim's statements, Defendant stated as one ground for doing so that "Defendant has never had the opportunity to cross examin[e] or confront the witness regarding her statements."

{15} The State appears to argue that Defendant's trial counsel should have been able to anticipate *Crawford's* holding by piecing together statements from various concurring opinions by individual United States Supreme Court Justices. We do not believe defendants should be required to scour concurring opinions to determine the direction in which the Supreme Court may or may not be heading in the future. We also note that other jurisdictions have been fairly liberal with regard to preservation of Confrontation Clause claims that are based on *Crawford* but were litigated before the opinion came out. *See, e.g., Commonwealth v. Whitaker,* 878 A.2d 914, 921 n. 3 (Pa.Super.2005) (noting that in order to preserve a *Crawford* argument, a defendant need only "object to admissibility on Sixth Amendment Confrontation Clause grounds"); *People v. Ruiz,* No. H026609, 2005 WL 1670426, at *3 (Cal.Ct.

App. July 19, 2005) (unpublished) ("[C]ounsel expressly argued that the admission of the wife's hearsay statements violated the confrontation clause in the sense that they were not trustworthy.... Under the circumstances, this was more than adequate to preserve defendant's *Crawford* contention."). Given the trial court's statement and Defendant's assertions in his motion, we hold that Defendant "fairly invoked a ruling [by] the trial court" that admission of the victim's statements would violate his confrontation rights. Accordingly, we hold that Defendant's general Confrontation Clause arguments were sufficient to preserve his *Crawford* claims. *See also State v. Lopez,* 2000-NMSC-003, ¶ 11, 128 N.M. 410, 993 P.2d 727 (holding that objection on the grounds of "inability to cross examine or confront the witness" was adequate to raise Confrontation Clause claims even though the defendant did not mention the Sixth Amendment).

{16} The State next argues that Defendant waived his objections to both the grand jury testimony and the victim's statement to the SANE practitioner because he either admitted those statements himself or acquiesced in their admission. We disagree. As explained above, Defendant made clear throughout the proceedings that none of the victim's statements should be admitted, but that, if some statements were admitted, he wanted to introduce others for impeachment purposes. This does not constitute a waiver. In *State v. Martinez,* we said, "The law in this jurisdiction is that if improper evidence is admitted over objection, resort may be had to like evidence without waiving the original error." 95 N.M. 795, 802, 626 P.2d 1292, 1299 (Ct.App.1979). *See also State v. Kile,* 29 N.M. 55, 70, 218 P. 347, 351 (1923) ("[W]here incompetent evidence is admitted over objection, and where it becomes expedient or necessary to rebut the same, ... resort may be had to the same class of objectionable evidence without waiving the original error."); 1 John W. Strong, *McCormick on Evidence* § 55, at 246–47 (5th ed. 1999) ("If a party who has objected to evidence of a certain fact himself produces evidence from his own witness of the same fact, he has waived his objection.... However, when his objection is made and overruled, he is entitled to ... explain or rebut, if he can, the evidence admitted over his protest. Consequently, there is no waiver ... if he meets the testimony with other evidence which, under the theory of his objection, would be inadmissible." (footnotes omitted)). Thus, we hold that Defendant properly preserved, and did not waive, his objections to the admission of each of the victim's four statements.

II. Application of the Forfeiture by Wrongdoing Doctrine

{17} We next address the State's contention that Defendant forfeited all of his Confrontation Clause objections under the doctrine of "forfeiture by wrongdoing" because he was later convicted of murdering the victim. The doctrine of forfeiture by wrongdoing was first explained by the United States Supreme Court in *Reynolds v. United States,* 98 U.S. 145, 25 L.Ed. 244 (1878). In *Reynolds,* the defendant was charged with bigamy and the evidence showed that he had tried to keep the whereabouts of one of his alleged wives from the police. *Id.* at 159–60. At trial, the defendant objected to the admission of the alleged wife's statement from a prior proceeding. The Court stated:

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts.

Id. at 158. The *Reynolds* Court based its decision on "the maxim that no one shall be permitted to take advantage of his own wrong[.]" *Id.* at 159.

{18} The forfeiture by wrongdoing doctrine has been accepted in many jurisdictions and *Crawford* specifically recognizes that it does not run afoul of the Confrontation Clause: "[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds[.]" 541 U.S. at 62, 124 S.Ct. 1354. In 1997, the doctrine was incorporated into

the Federal Rules of Evidence. Federal Rule of Evidence 804(b)(6) (FRE 804(b)(6)), which applies when the declarant is unavailable, creates a hearsay exception for "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

{19} Despite widespread acceptance of the doctrine of forfeiture by wrongdoing, however, there has been some confusion over its requirements. Specifically, and of significance to the present case, courts have disagreed over the intent requirement present in the federal rule. The federal rule was enacted to prevent defendants from gaining an advantage by intimidating witnesses. 30B Michael H. Graham, *Federal Practice and Procedure: Evidence* § 7078, at 702 (Interim ed. 2000) ("Rule 804(b)(6) is an attempt to respond to the problem of witness intimidation[.]"). As a result, the plain language of the rule requires that the defendant not only be involved in causing the witness's unavailability, but also that the defendant commit the relevant act with the *intent* to prevent the witness from testifying.

{20} Some state and federal courts, however, have decided that the "intent to silence" requirement is only mandated by the federal rules and not by the constitution. *See, e.g., United States v. Garcia–Meza,* 403 F.3d 364, 370 (6th Cir.2005) ("Though the Federal Rules of Evidence may contain [the intent to silence] requirement, the right secured by the Sixth Amendment does not[.]" (internal citation omitted)); *Gonzalez v. State,* 155 S.W.3d 603, 611 (Tex.App.2004) (holding that while some courts have adopted the intent to silence requirement, "we see no reason why the [forfeiture] doctrine should be limited to such cases"); *Ruiz,* 2005 WL 1670426, at *6 ("Ultimately, if the forfeiture rule is to further the maxim that no one shall be permitted to take advantage of his own wrong, then the motivation for the wrongdoing must be deemed irrelevant." (internal quotation marks and citation omitted)).

{21} Other courts have stated the intent to silence requirement as an element of their forfeiture by wrongdoing doctrine, but those courts have generally not analyzed the relative benefits of adopting or not adopting that element. *See, e.g., United States v. Houlihan,* 92 F.3d 1271, 1279 (1st Cir.1996) ("[A] defendant who wrongfully procures a witness's absence for the purpose of denying the government that witness's testimony waives his right under the Confrontation Clause to object to the admission of the absent witness's hearsay statements."); *Commonwealth v. Edwards,* 444 Mass. 526, 830 N.E.2d 158, 170 (2005) (holding the doctrine applicable where "the defendant acted with the intent to procure the witness's unavailability"); *State v. Wright,* 701 N.W.2d 802, 814–15 (Minn.2005) (en banc) ("In Minnesota, a defendant will be found to have forfeited by his own wrongdoing his right to confront a witness against him if the state proves that the defendant engaged in wrongful conduct, that he intended to procure the witness's unavailability, and that the wrongful conduct actually did procure the witness's unavailability.").

{22} Our Supreme Court has recognized the forfeiture by wrongdoing doctrine and has also required the State to prove the defendant's intent to silence the witness. In *State v. Alvarez–Lopez,* the defendant had absconded from the jurisdiction and remained a fugitive for seven years. 2004–NMSC–030, ¶ 5, 136 N.M. 309, 98 P.3d 699. By the time he turned himself in, one of the State's key witnesses had been deported to Mexico and could not be found. *Id.* The witness would have been available to testify had the defendant's trial been held when it was supposed to be. *Id.* ¶ 12. Thus, in a sense, the defendant's action of absconding prevented the State from putting on its witness. *See id.* The trial court allowed the State to present a statement that the witness had made to the police shortly after the incident in question. *Id.* ¶ 5. The defendant argued that the admission of the statement violated his confrontation rights, and the State responded that the defendant had forfeited his right to confrontation by absconding. *Id.* ¶ 7.

{23} The Court began its analysis by citing *Reynolds* and explaining the general contours of the forfeiture by wrongdoing doctrine. *Id.* ¶ 8. It then cited a Tenth Circuit

case, *United States v. Cherry,* 217 F.3d 811 (10th Cir.2000), which held that the Confrontation Clause and FRE 804(b)(6) are essentially coextensive and that the elements of the rule are constitutionally mandated. *Alvarez–Lopez,* 2004–NMSC–030, ¶ 9, 136 N.M. 309, 98 P.3d 699; *see Cherry,* 217 F.3d at 816 ("We ... read the plain language of Rule 804(b)(6) to permit the admission of those hearsay statements that would be admissible under the *constitutional* doctrine of waiver by misconduct[.]" (emphasis added)). Our Court noted that New Mexico has not adopted a rule of evidence that parallels FRE 804(b)(6). *Alvarez–Lopez,* 2004–NMSC–030, ¶ 9, 136 N.M. 309, 98 P.3d 699. But stating that "we are bound to apply federal law in determining the minimum level of a criminal defendant's constitutional right to confrontation," the Court then proceeded to apply the four-part test under FRE 804(b)(6). *Alvarez–Lopez,* 2004–NMSC–030, ¶¶ 9–10, 136 N.M. 309, 98 P.3d 699. The Court thus implied, but did not explicitly state, that it was bound to follow the Tenth Circuit's interpretation of the forfeiture by wrongdoing doctrine.

{24} The test the Court adopted requires the State to prove the following four elements by a preponderance of the evidence: "(1) the declarant was expected to be a witness; (2) the declarant became unavailable; (3) the defendant's misconduct caused the unavailability of the declarant; and (4) the defendant intended by his misconduct to prevent the declarant from testifying." *Id.* ¶ 10. In applying the test, the Court held that the defendant had not forfeited his confrontation rights for two reasons. *Id.* ¶¶ 12–13. First, the Court held that while the defendant's conduct may have been an "attenuated" cause of the declarant's absence, his conduct did not "procure" that absence. *Id.* ¶ 12. Second, the Court held that "the State failed to show [the d]efendant absconded with the specific intent of preventing [the declarant] from testifying." *Id.* ¶ 13.

{25} With regard to the intent requirement, the Court noted that "[t]he State need not ... show that [the d]efendant's sole motivation was to procure the declarant's absence; rather, it need only show that the defendant was motivated *in part* by a desire to silence the witness." *Id.* (internal quotation marks and citation omitted). The Court also stated that intent could be "inferred" in some cases:

> It may be sufficient to infer under certain facts that a defendant intended by his misconduct to prevent the witness from testifying. For example, we may be able to infer a criminal defendant's murder of a key prosecution witness was intended to prevent the witness from testifying at the defendant's trial.

Id. Lastly, the Court noted that the policy behind the forfeiture by wrongdoing doctrine is to "deter criminals from intimidating or 'taking care of' potential witnesses." *Id.* ¶ 14 (internal quotation marks and citation omitted). It determined that that policy would not be served by admitting the testimony because the defendant had not "intentionally prevented [the declarant] from being a witness against him." *Id.*

{26} In this case, Defendant and the State agree that the first three elements of the forfeiture by wrongdoing doctrine are met: the victim testified before the grand jury about the domestic violence incident and would likely have testified at trial; the victim is dead and is thus "unavailable"; and Defendant was involved in the victim's death. With regard to the intent element, the State argues that (1) a showing of intent to silence is not required and (2) even if it is, we should infer an intent to silence on the facts of this case. We reject both of these arguments.

{27} In support of its position that a showing of intent to silence is not required, the State argues that *Alvarez–Lopez* should not be applied in this case because in *Alvarez–Lopez* the witness had been deported during the period of the defendant's flight rather than murdered. Moreover, the State argues, the *Alvarez–Lopez* Court only chose to apply the test from FRE 804(b)(6) to the particular facts of that case but did not establish that test as the rule for all cases. We disagree with these contentions and hold that we are bound to apply the test set forth in *Alvarez–Lopez.*

{28} We certainly agree with the State that the rationale for requiring a showing of

the defendant's intent to silence the witness is much stronger in a case of deportation during the period when the defendant is a fugitive than it is in a case of murder. In a deportation case, the causal connection between the defendant's misconduct and the witness's unavailability will generally be quite attenuated. Indeed, the relationship might be better characterized as coincidental. *See People v. Melchor*, 362 Ill.App.3d 335, 355, 299 Ill.Dec. 8, 24, 841 N.E.2d 420, 436(2005), (stating that the "defendant's conduct was merely an act that incidentally rendered [the witness] unavailable"). In the case of murder, on the other hand, the defendant's misconduct is the direct cause of the witness's unavailability. Moreover, the defendant has likely committed misconduct that is more morally reprehensible than absconding. *See id.* at 354, 299 Ill.Dec. at 24, 841 N.E.2d at 436 ("Although defendant's flight was reprehensible and showed a complete disrespect for the court and the administration of justice, we do not find it constitutes wrongdoing sufficient to invoke the forfeiture by wrongdoing rule.").

{29} Nevertheless, we disagree with the State that *Alvarez–Lopez* can be limited to deportation cases. First, while the Court phrased its holding in terms of applying the FRE 804(b)(6) test to the particular case, it applied the rule because it felt itself "bound to apply federal law." 2004–NMSC–030, ¶ 9, 136 N.M. 309, 98 P.3d 699. In view of this, we read *Alvarez–Lopez* to hold that the intent to silence requirement applies to all cases where forfeiture by wrongdoing is argued. Second, and more importantly, the Court specifically referred to murder cases. The Court's acknowledgment that "we may be able to infer a criminal defendant's murder of a key prosecution witness was intended to prevent the witness from testifying at the defendant's trial," *id.* ¶ 13, clearly indicates that the Court considered whether the test it was adopting should be applicable in other types of cases, specifically cases involving the murder of a witness, and decided that it should. Thus, we hold that the test announced in *Alvarez–Lopez* applies to all cases in New Mexico involving forfeiture by wrongdoing.

{30} Despite our decision that we are bound by *Alvarez–Lopez*, we note that the State has presented several compelling reasons why a showing of intent to silence should not be required in cases where the defendant has killed the witness. First, the State cites to cases positing that the differing opinions over the intent requirement stem from confusion surrounding the proper terminology. It seems that the majority of courts have used the term "forfeiture." *See, e.g., Edwards*, 830 N.E.2d at 168 ("Given the overwhelming precedential and policy support for its adoption, we recognize the 'forfeiture by wrongdoing' doctrine in the Commonwealth."); *Gonzalez*, 155 S.W.3d at 609 ("[The defendant] forfeited his right of confrontation under the doctrine of forfeiture by wrongdoing."). Some courts, however, have referred to the doctrine in terms of "waiver." *See, e.g., United States v. Thompson*, 286 F.3d 950, 963 (7th Cir.2002); *State v. Meeks*, 277 Kan. 609, 88 P.3d 789, 794 (Kan.2004) ("[W]hen confrontation becomes impossible due to the actions of the very person who would assert the right, logic dictates that the right has been waived." (internal quotation marks and citation omitted)).

{31} The California Court of Appeal has explained the confusion caused by the use of these two terms as follows:

> We glean that the intent-to-silence element arises from the erroneous use of a "waiver-by-misconduct" label. Because a "waiver" is an intelligent relinquishment of a known right, the intent-to-silence element was added in order to establish that the defendant was on notice that the declarant was a potential witness and therefore knowingly relinquished the right to cross-examine that witness. But the rule in question is characterized by the Supreme Court as a "forfeiture" that "extinguishes confrontation claims on essentially equitable grounds," not a waiver. As a forfeiture, there is no need to prove an intelligent relinquishment of a known right[.]

Ruiz, 2005 WL 1670426, at *6 (quoting *Crawford*, 541 U.S. at 62, 124 S.Ct. 1354, other internal quotation marks and citations omitted).

{32} The State also cites cases noting that *Crawford's* reference to the doctrine's "equitable" nature counsels against imposing an intent to silence requirement on constitutional grounds. As the Second Circuit has explained it,

> The Supreme Court's recent affirmation of the "essentially equitable grounds" for the rule of forfeiture strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive. The Defendant, regardless of whether he intended to prevent the witness from testifying against him or not, would benefit through his own wrongdoing if such a witness's statements could not be used against him, which the rule of forfeiture, based on principles of equity, does not permit.

Garcia–Meza, 403 F.3d at 370–71 (quoting *Crawford,* 541 U.S. at 62, 124 S.Ct. 1354).

{33} We find both the California court's explanation of the waiver/forfeiture distinction and the Second Circuit's point regarding the equitable nature of the doctrine to be persuasive, at least in cases of the murder of the witness or the death of the witness arising out of a domestic violence situation. *See Melchor,* 362 Ill.App.3d at 344–45, 299 Ill. Dec. at 16–17, 841 N.E.2d at 438–29,. We also note that our Supreme Court may not have had the benefit of these thoughtful analyses when it decided *Alvarez–Lopez.* We take judicial notice of the briefs filed in *Alvarez–Lopez,* and we note that the State in that case agreed that intent to silence must be proved. *See Garcia v. Mora Painting & Decorating,* 112 N.M. 596, 601, 817 P.2d 1238, 1243 (Ct.App.1991) (taking judicial notice of the briefs in another case).

{34} In addition, we note that while our Court in *Alvarez–Lopez* consistently used the term "forfeiture," *Cherry,* the Tenth Circuit case relied on by our Court, consistently uses the term "waiver." *See Cherry,* 217 F.3d at 815 ("There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege." (internal quotation marks and citation omitted)). We also note that the *Cherry* Court may not have considered the waiver/forfeiture distinction, because *Cherry* was decided before *Crawford,* and *Crawford* appears to be the first case in which the United States Supreme Court referred to the doctrine as a "forfeiture."

{35} We also find the reasoning in *Cherry* to be less than compelling. The issue in *Cherry* was whether participants in a drug conspiracy could be said to have waived their confrontation rights when one member of the conspiracy clearly and intentionally procured the witness's absence. *Id.* at 814, 816. The court framed that issue as one of "imputed waiver." The court said:

> The proper scope of such imputed waiver as applied to a criminal defendant is best defined in the context of the Confrontation Clause doctrine of waiver by misconduct. While the Confrontation Clause and the hearsay rules are not coextensive, it is beyond doubt that evidentiary rules cannot abrogate constitutional rights. We therefore read the plain language of Rule 804(b)(6) to permit the admission of those hearsay statements that would be admissible under the constitutional doctrine of waiver by misconduct[.]

Id. (internal citation omitted). Despite the court's acknowledgment that the rules of evidence and the Confrontation Clause are not coextensive, this statement seems to boil down to nothing more than an unsupported assertion that they are indeed coextensive with regard to the forfeiture doctrine. In fact, the *Cherry* court offered no other support for its conclusion that the elements of the federal rule are constitutionally mandated. Unlike the special concurrence, ¶ 85, we do not believe that *Reynolds* says anything about whether the intent to silence requirement is required by the constitution. *See Reynolds,* 98 U.S. at 158–61 (holding that the defendant forfeited his confrontation rights where he kept the police from finding his wife so she could not testify, but not addressing the intent requirement). Further, we have been able to find no authority besides *Cherry* that supports the proposition that it is.

{36} Moreover, we do not agree with the *Cherry* Court's rationale for holding that the elements of FRE 804(b)(6) are constitutional-

ly mandated. While it is clear that congressionally promulgated rules cannot afford defendants *narrower* rights than those afforded by the constitution, such rules can certainly afford *broader* rights. That is arguably what FRE 804(b)(6) does. For example, the rule mandates that the forfeiture by wrongdoing doctrine can only be successfully invoked in cases in which the prosecution can show that the defendant procured the witness's absence with the specific intent of preventing the witness from testifying. The prosecution will surely be able to show that the defendant procured the witness's absence in more cases than it will be able to show that the defendant did so with the specific intent of preventing the witness from testifying. As a result, the better reading of the federal rule seems to be that it simply narrows the class of cases in which the doctrine can be invoked, thereby broadening the rights of defendants. Thus, *Cherry* itself does not support the proposition that the elements of the federal rule are constitutionally mandated. We also note that because *Cherry* was exclusively concerned with whether members of a conspiracy could be deprived of their confrontation rights on the basis of actions taken by other members of the conspiracy, the case did not directly consider the intent to silence requirement at all.

{37} In view of the briefs in *Alvarez-Lopez* and *Cherry's* reliance on the waiver doctrine and questionable constitutionalization of the elements of the federal rule, we suspect that our Supreme Court may not have fully considered the pros and cons of imposing the intent to silence requirement in all cases involving forfeiture by wrongdoing. The special concurrence believes that our Supreme Court was aware of the distinction and made a deliberate choice to follow the cases that require an intent to silence. *See* special concurrence at ¶¶ 82–83. In support of this conclusion, the special concurrence cites two cases that were cited in *Alvarez-Lopez, United States v. Dhinsa,* 243 F.3d 635 (2d Cir.2001); *United States v. Mastrangelo,* 693 F.2d 269 (2d Cir.1982), and one case that was cited in *Dhinsa* with a *cf.* signal on the page prior to the page cited in *Alvarez-Lopez, United States v. Miller,* 116 F.3d 641 (2d Cir.1997), *abrogated on other grounds, Rutledge v. United States,* 517 U.S. 292, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996). However, like the cases we referred to above, which required intent to silence, and like the cases cited at ¶ 85 of the special concurrence, these cases did not examine the relative advantages and disadvantages of the requirement. Rather, except for *United States v. Rouco,* 765 F.2d 983, 985–87 (11th Cir.1985), which involved a gun battle with the police in which the defendant shot the officer in an attempt to escape arrest, and except for *Miller,* which involved extreme culpability and little reasoning for its holding that intent to silence is not a prerequisite to admissibility, these cases generally involved fact situations where the intent to silence was clear, and thus there was no reason to question whether the requirement was constitutionally mandated or beneficial from a policy standpoint. *See Dhinsa,* 243 F.3d at 642–43, 650–54 (applying doctrine to the defendant, who was head of a "vast racketeering organization" and was convicted of numerous counts of killing and threatening people who cooperated with police); *Miller,* 116 F.3d at 652–53, 667–69 (applying doctrine to the defendants, who were involved in "a RICO enterprise conducted through a campaign of violent enforcement and retribution"); *Mastrangelo,* 693 F.2d at 271, 273–74 (remanding for evidentiary hearing on the defendant's involvement in death of a witness who was killed on his way to the courthouse to testify against the defendant). In addition, we question whether it can be inferred from an incidental citation contained in a portion of *Dhinsa* other than the portion our Supreme Court cited that our Supreme Court was put on notice of the split in relevant authority.

{38} The special concurrence is also concerned about cases in which domestic violence victims recant, and it cites a few cases in which the allegations are based on revenge or other improper motive. *See* special concurrence at ¶ 79. To be sure, any examination of policy in this area must be informed by the possibility of improper motivation for testimony. Yet, the examination of policy must also be informed by fact that the overwhelming majority of cases of recantation or refusal to cooperate are due to "financial

reasons, fear of retaliation, low self-esteem, or sympathy for the assailant." *See* Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 Ind. L.Rev. 687, 707 n. 68 (2003); *see also id.* at 709 n. 76 (indicating that nonprosecution or recantation is epidemic in domestic violence cases, with estimates that such occurs in 80 to 90 percent of the cases).

{39} In sum, we find the circumstances of this case to be materially different from the circumstances of *Alvarez–Lopez*. In this case, for example, it might be inequitable to allow Defendant to reap a benefit, even if an unintended one, from his involvement in the victim's death. Nonetheless, if our Supreme Court misconstrued the law in *Alvarez–Lopez*, it is not our place to attempt to correct any such error. *See State ex rel. Martinez v. City of Las Vegas*, 2004–NMSC–009, ¶ 22, 135 N.M. 375, 89 P.3d 47 ("[W]hile the Court of Appeals is bound by Supreme Court precedent, the Court is invited to explain any reservations it might harbor over its application of our precedent so that we will be in a more informed position to decide whether to reassess prior case law[.]"). Thus, we reiterate our holding that the State is required to prove the elements of the forfeiture by wrongdoing doctrine as they are articulated in *Alvarez–Lopez*.

{40} The State next argues that even if we hold that intent to silence must be shown, we should infer such an intent on the facts of this case because "no reasonable factfinder could fail to infer by a preponderance of the evidence that a desire to silence [the victim] was among Defendant's motives." The State draws support for its conclusion from the fact that the jury in this case found Defendant guilty of intimidating the victim in order to prevent her from reporting the domestic violence to the police. The State also relies on the passage in *Alvarez–Lopez* which notes that:

> It may be sufficient to infer under certain facts that a defendant intended by his misconduct to prevent the witness from testifying. For example, we may be able to infer a criminal defendant's murder of a key prosecution witness was intended to prevent the witness from testifying at the defendant's trial.

2004–NMSC–030, ¶ 13, 136 N.M. 309, 98 P.3d 699.

{41} We agree with the State that in some cases, a trial court could simply "infer" from the evidence presented to it that the defendant intended by his misconduct to prevent the witness from testifying. We even agree that such an inference could possibly be made by an appellate court in a case such as the present one where, due to an intervening change in the law, the appellate court is making a decision on the forfeiture doctrine without the benefit of the trial court's having done so. However, this is not such a case.

{42} In order to explain why this is not such a case, we must delve briefly into the evidence that was presented at Defendant's murder trial. *See Romero*, 2005–NMCA–060, 137 N.M. 456, 112 P.3d 1113. The evidence presented consisted primarily of Defendant's statements about the events of the night in question and forensic evidence. *Id.* ¶ 5. Defendant's statements set forth the following facts. Defendant and the victim were together at Defendant's residence, watching television. *Id.* They began to fight and Defendant struck the victim several times. *Id.* Defendant and the victim made up and had consensual sex, and then fought some more. *Id.* At one point, the victim "pinn[ed] Defendant beneath her, punching him in the face and elbowing him in the mouth." *Id.* Then, "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." *Id.* Eventually, they stopped fighting and went to sleep. *Id.* When Defendant awoke the next morning, the victim was not breathing, so Defendant went to summon help. *Id.*

{43} The forensic evidence was arguably inconclusive, with the State's expert conceding that there was "no obvious cause of death." *Id.* ¶ 7. However, the expert did state that the death was caused by "complications of mechanical injuries to the head." *Id.* (internal quotation marks omitted). The defense expert testified that the victim died "a natural or accidental death as a result of

[an unrelated] liver condition." *Id.* The jury found Defendant guilty of second-degree murder. *Id.* ¶ 3.

{44} We reversed and remanded for a new trial on the basis that the trial court should have given Defendant's requested jury instructions on nondeadly force self-defense and involuntary manslaughter. *Id.* ¶ 2. Defendant's theory of the case was that when he hit and bit the victim, he was lawfully defending himself with nondeadly force, but due to unusual circumstances including the victim's liver condition, the victim unexpectedly died. *Id.* ¶ 16. We held that on this theory, Defendant was entitled to his requested jury instructions: "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." *Id.* ¶ 15.

{45} As we held in the murder case, evidence was presented based on which the jury could have found that the victim's death was accidental. A finding of accidental death might support the inference that Defendant did not intend to silence the victim when he committed the acts that contributed to her death. Whether a court would make such a finding as part of its duties to find preliminary questions of fact under Rule 11–104 NMRA by a preponderance of the evidence standard, as opposed to a reasonable doubt standard, is something on which we can only speculate. Thus, because we find below that some of the contested statements do give rise to valid objections under *Crawford*, we remand for the trial court to make factual findings with regard to the elements of the forfeiture by wrongdoing doctrine articulated in *Alvarez–Lopez*. Specifically, the State is required to prove that Defendant procured the victim's absence with the intent to prevent her from testifying. We express no opinion on a proper finding under these facts. We do note that the trial court should hold a new trial and exclude those statements which are testimonial in nature only if it finds that Defendant was not in any way motivated by a desire to prevent the victim from testifying when he committed the acts that contributed to her death. *See Alvarez–Lopez*, 2004–NMSC–030, ¶ 13, 136 N.M. 309, 98 P.3d 699 ("The State need not show ... that [the d]efendant's sole motivation was to procure the declarant's absence; rather, it need only show that the defendant was motivated *in part* by a desire to silence the witness." (internal quotation marks and citation omitted)). If the trial court finds the requisite intent, Defendant's convictions will stand.

III. Analysis of Whether the Victim's Statements Were "Testimonial" in Nature

{46} We now turn to an examination of whether the victim's statements present valid Confrontation Clause objections under *Crawford*. In *Crawford*, the Supreme Court overruled prior precedent and established a new framework for analyzing Confrontation Clause claims. The Court held that the Confrontation Clause is always implicated when "testimonial" statements of an absent witness are admitted. *Crawford*, 541 U.S. at 68, 124 S.Ct. 1354. The Court specifically declined to provide a comprehensive definition of "testimonial," *id.* n. 10, but did set forth the following three categories of statements that are clearly testimonial: (1) "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; (2) "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 51–52, 124 S.Ct. 1354 (internal quotation marks and citations omitted). The Court then held that "[w]hatever else the term ["testimonial"] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68, 124 S.Ct. 1354. Finally, the Court held that if a statement is testimonial, it may only be admitted if two conditions are satisfied: (1) the declarant is unavailable and (2) the defendant has had a

prior opportunity to cross-examine the declarant. *Id.*

{47} In this case, it is undisputed that the victim is unavailable and that Defendant had no prior opportunity to cross-examine her. Thus, if any of her statements are testimonial, they are inadmissible unless the trial court finds that Defendant forfeited his confrontation rights under the forfeiture by wrongdoing doctrine. We now examine each of the statements individually to determine whether they are testimonial in nature.

A. The Grand Jury Testimony and the Stationhouse Statement

{48} Under the plain language of *Crawford,* the victim's testimony before the grand jury is testimonial in nature. *See id.* ("Whatever else the term covers, it applies at a minimum to prior testimony . . . before a grand jury[.]"). Thus, the grand jury testimony is inadmissible absent a finding that Defendant forfeited his confrontation rights.

{49} We also hold that the statement taken by Lewandowski at the police station is testimonial because it was given in response to a "police interrogation." In *Crawford,* the defendant and his wife Sylvia were both given *Miranda* warnings and questioned at the police station. *Crawford,* 541 U.S. at 38, 65, 124 S.Ct. 1354. The Court held that Sylvia's statement was testimonial because it was given in response to "police interrogation." *Id.* at 52, 53 n. 4, 124 S.Ct. 1354. While declining to give a more specific definition of the term "interrogation," the Court held that "Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition." *Id.*

{50} Many courts have held that statements given in response to formal, structured interviews by law enforcement personnel qualify as testimonial under *Crawford. See, e.g., United States v. Saget,* 377 F.3d 223, 228 (2d Cir.2004) (holding testimonial statements to include those involving "a declarant's knowing responses to structured questioning in an investigative environment"); *Commonwealth v. Foley,* 445 Mass. 1001, 833 N.E.2d 130, 133 (2005) ("[S]tatements made in response to police questioning after the scene was secure and the victim had assured the officer she did not want emergency medical attention were made in response to investigatory interrogation. As such, they were testimonial per se."); *State v. Walker,* 129 Wash.App. 258, 118 P.3d 935, 940 (2005) (holding victim's statement testimonial where it was "elicited in response to structured police questioning pursuant to a police investigation").

{51} In this case, the State acknowledges that out-of-state authority supports a holding that the statement taken at the police station is testimonial. The State urges us, however, to hold that the statement is not testimonial because it was introduced to show two types of information: the victim's actual words and her emotional state, i.e., the fact that she was crying and upset. This second type of information, the State argues, provides evidence of physical characteristics and is not testimonial in nature. The State provides no authority for the proposition that when a statement is introduced in part to show the declarant's emotional state, it is somehow removed from the purview of *Crawford.* We note that individuals giving statements to the police are likely to be upset, and we decline to exempt this entire category of statements from scrutiny under the Confrontation Clause.

{52} The circumstances surrounding the statement taken by Lewandowski bear numerous indicia of a formal police interrogation. The interview took place at the police station. Lewandowski testified that his reason for taking the statement was that "[a]t this point I needed to know what really happened." The victim gave responses to a number of questions asked by Lewandowski. All of these factors indicate that the statement, like the statement in *Crawford,* was "knowingly given in response to structured police questioning." *See Crawford,* 541 U.S. at 53 n. 4, 124 S.Ct. 1354. Moreover, the statement was tape recorded, which indicates that the purpose of both Lewandowski and the victim was to memorialize it for future use. We thus hold that the statement is testimonial in nature and, as such, should be

excluded unless the trial court finds that Defendant forfeited his confrontation rights.

B. The Victim's Statement to the SANE Practitioner

{53} We next address whether the victim's statement to the SANE practitioner is testimonial. We begin by providing some additional background on the circumstances surrounding the statement. As detailed above, the victim did not initially report that any sexual assault had occurred during the incident in question. Approximately three weeks after the incident, the victim told Lewandowski that Defendant had sexually assaulted her. As a result, Lewandowski made an appointment for the victim to see a SANE practitioner. At trial, Tucker, the SANE practitioner who interviewed the victim, testified that she is a registered nurse who has had "additional classroom and clinical training in dealing with forensic evidence collection, how to obtain the evidence collection, what to do with it, chain of custody, et cetera." She testified that during her interview with the victim, she took a complete statement from the victim and conducted a "head to toe assessment and a genital exam." The trial court allowed Tucker to read the victim's statement into the record and certified Tucker as "an expert in Sexual Assault Nurse Examiner."

{54} We hold that the victim's statement to the SANE practitioner is testimonial because it falls into the third category of evidence labeled testimonial by *Crawford*, "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." 541 U.S. at 52, 124 S.Ct. 1354 (internal quotation marks and citation omitted).

{55} We first note that the fact that the SANE practitioner is not a government official does not preclude statements given to her from being testimonial. *See, e.g., State v. Mack*, 337 Or. 586, 101 P.3d 349, 352 (Or. 2004) (en banc) (holding statements made to a social worker to be testimonial because she was acting as a "proxy" for the police). However, many cases involving statements given during examinations by non-government personnel have focused on the degree to which law enforcement is involved in the examination. This focus makes sense in light of *Crawford's* admonition that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse." 541 U.S. at 56 n. 7, 124 S.Ct. 1354. In *State v. Snowden*, for example, the Maryland Court of Appeals held that statements made by child victims to a "sexual abuse investigator" were testimonial. 385 Md. 64, 867 A.2d 314, 325 (2005). The court noted that the interviews were "initiated, and conducted, as part of a formal law enforcement investigation," and took place "subsequent to initial questioning . . . by the police and after the identity of a suspect was known." *Id.* The court did also note that "the express purpose of bringing the children to the facility to be interviewed was to develop their testimony for possible use at trial." *Id.* at 326.

{56} Here, the victim went to the interview at Lewandowski's suggestion. He set the interview up and drove her to it. While he did not attend the interview, he apparently waited for the victim while the interview took place. He testified that he did so "just . . . to make sure everything went okay." As in *Snowden*, the interview took place "subsequent to initial questioning" and "after the identity of a suspect was known." *See id.* at 325. Moreover, the victim had already made a formal statement to the police, was aware of the ongoing investigation, and had already testified before the grand jury. Thus, Lewandowski's involvement suggests that a person in the victim's position would likely have recognized that her statements could later be used prosecutorially.

{57} Next, the State argues that the statement cannot be testimonial because the trial court made a preliminary finding that it was admissible under the hearsay exception for statements made for purposes of medical diagnosis or treatment. *See* Rule 11-803(D) NMRA. The State contends that this ruling necessarily indicates that "[the victim's] motive for making the statement, and . . . Tucker's motive for eliciting it, was *not* to perpetuate her testimony for use in a future trial."

{58} We disagree. Even if a statement falls within the hearsay exception for statements made for the purpose of obtaining medical diagnosis or treatment, it may still be testimonial. *See, e.g., State v. Stahl,* 2005-Ohio-1137, ¶ 13, 2005 WL 602687, at *4 (Ohio Ct.App. Mar. 16, 2005) (rejecting the State's contention that statements made for purposes of diagnosis and treatment are categorically non-testimonial). Indeed, it seems logical that a sexual assault victim might submit to a SANE examination both to seek medical or psychological treatment and to preserve his or her account of the incident. However, while a victim might have both of these reasons in mind, the first counsels against a finding that the statement is testimonial, while the second indicates that the statement should be considered testimonial. Thus, if a victim's primary motivation was to seek medical attention, the statement would be less likely to be testimonial. *See, e.g., People v. West,* 355 Ill.App.3d 28, 291 Ill.Dec. 72, 823 N.E.2d 82, 89 (2005) (holding that parts of the adult sexual assault victim's statement to emergency room personnel that described "the nature of the alleged attack, and the cause of her symptoms and pain" were not testimonial because they fell into the category of statements "made by a patient with a selfish interest in treatment" and were not "accusatory" in nature. (internal quotation marks and citation omitted)); *State v. Moses,* 129 Wash.App. 718, 119 P.3d 906, 912 (2005) (holding a victim's statements to emergency room doctor not testimonial where "the purpose of [the] examination was for medical diagnosis and treatment").

{59} In this case, the facts suggest that the victim's purpose in attending the SANE interview was not merely to obtain medical treatment. First, nearly three weeks elapsed between the incident and the examination, indicating that the victim was not in need of immediate care. Second, in the physical examination, the SANE practitioner found "no evidence of trauma," although she also testified that her findings were not inconsistent with the type of sexual assault the victim had reported. Finally, the content of the statement indicates that the victim was not primarily concerned with getting treatment. The statement did not focus on the sexual assault, but rather recounted the entire incident. There are only two places in the statement where the victim actually referred to the sexual assault. She said, "That's when he sexually assaulted me on the floor. He took off my pants and underwear and penetrated me." When the SANE practitioner asked her what she meant, she replied, "[P]enis in my vagina.... I kept telling him no and to stop." Other than these two statements, the victim did not mention the sexual assault. Given these facts, it does not seem that the victim's primary motivation was to obtain treatment. This leads to the conclusion that a person in her position would have known that the information given might be later used at trial.

{60} Finally, we note that some courts have considered the intent of not only the declarant, but also of the person eliciting the statement. For example, in *Hammon v. State,* the Indiana Supreme Court held that a statement is testimonial if it was "given *or taken* in significant part for purposes of preserving it for potential future use in legal proceedings." 829 N.E.2d 444, 456 (Ind.), *cert. granted,* — U.S. —, 126 S.Ct. 552, 163 L.Ed.2d 459 (2005) (emphasis added). We agree with this approach and believe that the motive of the person eliciting the statement is relevant for two reasons. First, it bears on the intent and understanding of the declarant. As the Supreme Court put it in *Crawford,* "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." 541 U.S. at 51, 124 S.Ct. 1354. Second, the motivation of the listener is relevant due to *Crawford's* admonition regarding "production of testimony with an eye toward trial." *Id.* at 56 n. 7, 124 S.Ct. 1354. If the listener is motivated by a desire to gather evidence, he or she will be more likely to elicit responses that will be useful in a later prosecution, thereby implicating the concerns of *Crawford.*

{61} Here, the SANE practitioner testified that she is specifically trained in "forensic evidence collection" and "chain of custody," and that she has testified as an expert witness on four occasions. Tucker's descrip-

tions of her qualifications and training further lead us to conclude that both Tucker and the victims she interviews significantly after the event would likely realize that the statements given might be used at trial. In view of all of these factors, we hold that the victim's statement to Tucker was testimonial and should thus be excluded absent a finding by the trial court of forfeiture.

C. The Victim's Statement to Lewandowski at the Scene

{62} Finally, we turn to the statement the victim made to Lewandowski at the time of the incident. We begin by briefly reiterating Lewandowski's testimony. Lewandowski testified that the victim came out of the residence, drove her car about 15 feet toward the officers' location and then got out and ran toward the officers. He said the victim was "crying [and] asking for help" and that she had red marks on her neck and watery eyes. Lewandowski also testified that the victim told him that Defendant "choked her, held a knife to her throat while she was in the bathroom, and ... stated that if he couldn't have her, no one could, and that he would kill her." The trial court apparently ruled that this latter statement was admissible as either an excited utterance or a present sense impression.

{63} This type of on-scene statement to police officers has perhaps generated the most post-*Crawford* caselaw. Many jurisdictions have held statements similar to the one in this case to be non-testimonial. *See Anderson v. State,* 111 P.3d 350, 354 (Alaska Ct.App.2005) ("The great majority of courts which have considered this question have concluded that an excited utterance by a crime victim to a police officer, made in response to minimal questioning, is not testimonial."). As with other statements that are arguably testimonial under *Crawford,* the primary concern is the intent of the declarant and the listener. Many courts have noted that responses to initial, on-scene questions from a police officer are likely motivated by goals other than perpetuating testimony. In *Hammon,* the Indiana Supreme Court held that statements made at the scene to a police officer answering a domestic violence call were not testimonial. The court based its decision on the fact that the officer was "principally in the process of accomplishing the preliminary tasks of securing and assessing the scene." 829 N.E.2d at 458. *See also State v. Greene,* 274 Conn. 134, 874 A.2d 750, 775 (2005) ("[W]here a victim contacts a police officer immediately following a criminal incident to report a possible injury and the officer receives information or asks questions to ensure that the victim receives proper medical attention and that the crime scene is properly secured, the victim's statements are not testimonial in nature because they can be seen as part of the criminal incident itself, rather than as part of the prosecution that follows." (internal quotation marks and citation omitted)); *Commonwealth v. Gonsalves,* 445 Mass. 1, 833 N.E.2d 549, 555–56 (2005) ("We conclude that questioning by law enforcement agents ... other than to secure a volatile scene or to establish the need for or provide medical care, is interrogation [and thus testimonial.]"); *People v. Bradley,* 22 A.D.3d 33, 799 N.Y.S.2d 472, 477 (N.Y.App. Div.2005) ("Preliminary, on-scene interviews are clearly distinguishable from the ex parte testimony found to be excludable on Sixth Amendment grounds in *Crawford.*"); *Spencer v. State,* 162 S.W.3d 877, 881 (Tex.App. 2005) ("[S]tatements made to officers responding to a call during the initial assessment and securing of a crime scene are not testimonial.").

{64} However, some courts have held such statements to be testimonial. In *Lopez v. State,* the court held that a statement made by an upset victim to an officer at the scene of the crime was testimonial. 888 So.2d 693, 700 (Fla.Dist.Ct.App.2004). The court reasoned that "a startled person who identifies a suspect in a statement made to a police officer at the scene of a crime surely knows that the statement is a form of accusation that will be used against the suspect." *Id.* at 699. This appears to be the minority view. *See Contreras v. State,* 910 So.2d 901, 912–13 (Fla.Dist.Ct.App. Sept.14, 2005) (May, J., dissenting) (noting that "*Lopez* has been distinguished and disagreed with by courts across the country" and citing cases).

{65} Many cases have held that this type of statement will usually be non-testimonial, but that the inquiry should be fact-specific and if there are articulable indications that either the declarant or the officer was trying to do more than simply get help or secure the scene, then the statement might be considered testimonial. *See, e.g., State v. Parks,* 211 Ariz. 19, 116 P.3d 631, 642 (Ariz.Ct.App. 2005) ("[P]olice questioning during a field investigation does not automatically exempt the statements from being testimonial."); *Wright,* 701 N.W.2d at 812–13 (holding that "statements made to the police during a field investigation should be analyzed on a case-by-case basis" and establishing an eight-factor test that includes consideration of the purpose of both the declarant and the officer); *State v. Allen,* 171 N.C.App. 71, 614 S.E.2d 361, 365 (2005) ("[W]hether 'interrogation' encompasses a statement made in response to police questioning at the scene of a crime is a factual question that must be determined on a case-by-case basis.").

{66} We prefer this fact-specific inquiry. While on-scene statements to police officers in response to initial questioning will generally be non-testimonial, we hold that such statements should be considered testimonial if there are articulable indications that either the officer or the declarant was trying to procure or provide testimony. However, when it appears that the officer's primary goal was to secure the scene or give immediate aid to victims and the declarant's primary goal was to get aid, the statements will be considered non-testimonial.

{67} We now turn to the facts of this case to see where they fit in the above standard. Lewandowski testified that the victim ran toward the officers, that she had no shoes on and was running through gravel, and that she was "upset" and "crying for help." Lewandowski testified that he "talked to her for just a minute" and then put her in the back of a police car "for her safety and ours" and that "basically all she did was just hold on to me asking for help." Apparently it was during this brief conversation that the victim made the statement about Defendant holding a knife to her throat. Lewandowski also testified as follows: "A few questions we did ask was is there a weapon, are you okay, and it was a real fast conversation. Our main point was to get her into a safe environment just in case he was out somewhere with a weapon." Finally, he testified that "at that point our main concern wasn't [to] investigate her, interview her, our main point was to make sure she was safe and that we were safe and that we were able to get in the house and clear it and maybe try to obtain the subject to detain him."

{68} Under these circumstances, we hold that the victim's statement to Lewandowski that Defendant held her at knifepoint and threatened to kill her was not testimonial under *Crawford.* It is clear from Lewandowski's testimony that his primary goal was to secure the scene and give aid to the victim. He was not conducting an investigation and he was not attempting to procure or preserve testimony for later use at trial. Moreover, his descriptions of the victim indicate that she was primarily concerned with getting help from the police, not with making accusations against Defendant. Thus, we hold that the statement was not testimonial and was properly admitted at trial.

IV. Admission of the Victim's Statements Was Not Harmless Error

{69} The State next contends that only the victim's statement given at the stationhouse could possibly be testimonial, and that if it is testimonial, its admission constituted harmless error because it was cumulative of other properly admitted evidence. However, we have held that the stationhouse statement, the grand jury statement, and the statement made to Tucker were all testimonial in nature and must be excluded absent a finding that Defendant forfeited his confrontation rights. The State does not argue that the admission of all three of these statements could be considered harmless error. However, we briefly address that possibility and hold that the error was not harmless.

{70} When a constitutional trial error has been committed, "the burden is on the State to demonstrate the error is harmless beyond a reasonable doubt." *State v. Johnson,* 2004–NMSC–029, ¶ 9, 136 N.M.

348, 98 P.3d 998. The "central focus" of this inquiry is "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* (internal quotation marks and citation omitted). A reviewing court must make "an objective reconstruction of the record of evidence the jury either heard or should have heard absent the error." *Johnson,* 2004–NMSC–029, ¶ 10, 136 N.M. 348, 98 P.3d 998. An error is not necessarily harmless even when the evidence that was properly admitted constitutes "overwhelming evidence of the defendant's guilt." *Id.* ¶ 11. Error is not automatically harmless when the improperly admitted evidence was cumulative of other properly admitted evidence. *Id.* ¶ 37. Moreover, evidence is not considered "cumulative" if it "corroborates, and therefore strengthens, the prosecution's evidence." *Id.*

{71} In this case, we have held that admission of all three of the victim's detailed statements about the incident are inadmissible under *Crawford.* The State relied heavily on these statements at trial. For example, at the end of closing argument, the prosecutor stated: "Ladies and Gentlemen, you've had ample evidence ... to conclude that [the victim] told police, told ... Tucker, told the Grand Jury and through those statements told you exactly what ... Defendant did to her." Examining the evidence the jury would have heard absent the erroneous admission of these three statements, we note that the State would have had little direct evidence of Defendant's involvement in the victim's injuries. It would have had to rely solely on the statement the victim made at the scene and the testimony of the other witnesses, who essentially testified only to the victim's statements over the phone that Defendant would not let her leave and was holding a knife to her throat. At a minimum, the improperly admitted evidence corroborated this other testimony. Thus, we conclude that the State has not shown beyond a reasonable doubt that there was no " 'reasonable possibility that the evidence complained of might have contributed to the conviction.' " *See Johnson,* 2004–NMSC–029, ¶ 9, 136 N.M. 348, 98 P.3d 998 (quoting *Chapman,* 386 U.S. at 23, 87 S.Ct. 824).

V. Defendant's Rule 11–404(B) Objections

{72} Lastly, Defendant argues that witness testimony regarding past incidents of domestic violence between himself and the victim was erroneously admitted under Rule 11–404(B). Over Defendant's objection, the trial court allowed Chavez, the victim's roommate, to testify that a few weeks before the events giving rise to the trial, she saw Defendant "shove[ ] [the victim's] head into the wall." Another friend of the victim, Jaramillo, testified regarding an occasion when she had gone with the victim to Defendant's house because Defendant had taken the victim's keys. Jaramillo testified that the victim went into Defendant's house and came out and handed her a folder that contained "personal papers, like her past income tax returns." Then, according to Jaramillo, Defendant took the folder out of her hands and the three of them engaged in a "shoving match over the folders."

{73} Rule 11–404(B) prohibits the admission of "[e]vidence of other crimes, wrongs or acts ... to prove the character of a person in order to show action in conformity therewith." However, the rule allows evidence of such prior acts "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." We review a trial court's decision to admit evidence under Rule 11–404(B) for abuse of discretion. *Williams,* 117 N.M. at 557, 874 P.2d at 18.

{74} Before the trial court, the State argued that the testimony of Chavez and Jaramillo was admissible under Rule 11–404(B) to show why the victim's friends were concerned about her when she called on the day of the incident and said that Defendant would not let her leave his house. The State also argued that the testimony "goes to ... Defendant's motive, intent and plan in terms of why [the victim] was over there, and that the bruises and marks were not accidental, and that he was, in fact, holding her against her will[.]" The trial court allowed the testimony of both witnesses for purposes of showing "the motive of ... Defendant, the intent

in this particular instance, [and] absence of mistake."

{75} Defendant testified that the victim liked experimental sexual practices, such as having him pretend to be a rapist. He testified that on the night of the incident, the victim wanted him to "pull her by the hair and to hit her" and to call her "a bitch and a slut." He also testified that the next morning, the victim was upset because there were "a lot of hickeys on her neck." Defendant claimed the marks on the victim's neck that appeared in the photos introduced by the State were hickeys and not cuts. This testimony indicates that Defendant was arguing that he caused the marks on the victim's neck either by mistake or with the victim's consent. In view of Defendant's testimony, we agree that the testimony of Chavez and Jaramillo was not improper propensity evidence, and we hold that the trial court did not abuse its discretion in ruling that the testimony was relevant to show, among other things, absence of mistake regarding the victim's injuries. *See State v. Jones,* 120 N.M. 185, 187, 899 P.2d 1139, 1141 (Ct.App.1995) (holding prior bad acts evidence is admissible where there is an "articulation or identification of the consequential fact to which the proffered evidence of other acts is directed").

CONCLUSION

{76} We hold that the victim's statements before the grand jury, to Lewandowski at the stationhouse, and to the SANE practitioner were testimonial under *Crawford* and that their admission was not harmless error. We also hold that the State is required to prove the four elements of the forfeiture by wrongdoing doctrine. Thus, we remand for the trial court to make factual findings with regard to those elements. If the trial court finds that Defendant forfeited his confrontation rights under *Alvarez–Lopez,* his convictions will stand. If the trial court finds that he did not, the Defendant is entitled to a new trial, at which the three testimonial statements will be inadmissible.

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

I CONCUR: CELIA FOY CASTILLO, Judge.

MICHAEL E. VIGIL, Judge (specially concurring).

VIGIL, Judge (specially concurring).

{78} I write separately only to disagree with the majority's criticism of the *Alvarez–Lopez* requirement of a foundation showing that a defendant intended by his misconduct to prevent the declarant from testifying before hearsay of that unavailable witness may be admitted as substantive evidence against a defendant in a criminal trial under the constitutional doctrine of waiver by misconduct. Under this doctrine, a defendant's constitutional right to confrontation under the Sixth Amendment, and therefore his hearsay objection as well, is forfeited by his own wrongdoing. *Reynolds,* 98 U.S. at 158.

{79} I do not agree that the State has presented "several compelling reasons why a showing of intent to silence should not be required" (Majority Opinion, ¶ 30), in "cases of the murder of the witness or the death of the witness arising out of a domestic violence situation." Majority Opinion ¶ 33. My disagreement is primarily on policy grounds. It is well documented that victims of domestic violence may recant their testimony on the witness stand or seek to minimize the effects of domestic violence on themselves or others. *See* Cynthia L. Barnes, Annotation, *Admissibility of Expert Testimony Concerning Domestic–Violence Syndromes to Assist Jury in Evaluating Victim's Testimony or Behavior,* 57 A.L.R. 5th 315, 1998 WL 141644 (1992). It is also equally true that self-serving, untrue statements, sometimes motivated by revenge, are made by partners in the context of domestic violence allegations. *See Adams v. State,* 727 So.2d 983, 983 (Fla. Dist.Ct.App.1999) (affirming conviction of perjury after wife filed a false affidavit in a domestic violence action); *Dix v. State,* 267 Ga. 429, 479 S.E.2d 739, 742 (1997) (recognizing that a client can make self-serving statements to her attorney and paint a picture of the marital relationship that is inaccurate and biased in considering whether statements made to her attorney are admissible in a prosecution of husband for murdering his ex-wife). Practitioners dealing with domestic violence know of these contradictions, and our own cases recognize the problem. *See*

Lujan ex rel. Lujan v. Casados–Lujan, 2004–NMCA–036, ¶ 10, 135 N.M. 285, 87 P.3d 1067 (recognizing that the motivation for a domestic abuse case can be to further the parent's interest); *State v. Buck*, 33 N.M. 334, 338, 266 P. 917, 919 (1927) (recognizing, in a domestic violence case, that the admission of a spontaneous declaration is often sought where the declarant has died. "In such cases great caution is to be exercised. The danger of admitting merely self-serving declarations, or those prompted by revenge, must be guarded against."). I therefore hesitate to recognize a special exception to admit hearsay evidence substantively in a category of cases where contradictory, self-serving statements are known to be made. It must be remembered that once a determination is made that the constitutional right of confrontation has been waived, the hearsay is admissible as substantive evidence, regardless of its reliability. Even the catch-all provision governing the admissibility of hearsay of an "unavailable" witness in our own Rules of Evidence recognizes that intent is relevant. "A declarant is not unavailable as a witness if [her] exemption, refusal, claim of lack of memory, inability or absence is *due to the procurement or wrongdoing* of the proponent of a statement *for the purpose of preventing the witness from attending or testifying.*" Rule 11–804(A) NMRA (emphasis added).

{80} Further, I cannot agree to recognizing a special hearsay exception "in cases of the murder of the witness or the death of the witness arising out of a domestic violence situation." It is perfectly conceivable, as this case demonstrates, for a defendant to have *accidentally* killed someone with no intention of preventing them from testifying. Nevertheless, the majority would allow admission of the deceased's hearsay. This is contrary with the principle that there is a presumption against the waiver of a constitutional right, and that for a waiver to be effective, there must be an intentional relinquishment or abandonment of the right. *See State v. Herrera*, 2004–NMCA–015, ¶ 8, 135 N.M. 79, 84 P.3d 696. Additionally, it would be anomalous for the hearsay to be excluded in a white collar crime case because no showing could be made that the defendant intended by his misconduct to prevent the declarant from testifying, but admitted in a homicide case even if all the evidence was that the defendant did not have such an intent.

{81} The first basis for the majority's criticism is its view that the requirement arises out of a confusion over the "proper terminology" used to describe the constitutional doctrine. Specifically, the majority agrees with certain post *Alvarez–Lopez* cases which describe a distinction between "waiver" which conceptually supports an intent element and "forfeiture" which does not conceptually require an intent element. The majority agrees that it is more appropriate to view the constitutional doctrine as grounded on "forfeiture" than "waiver" and therefore supports disposing of the intent element. Further, since the authorities cited were decided after *Alvarez–Lopez*, the majority suggests that our Supreme Court may have been misled by this confusion over the "proper terminology" used to describe the constitutional doctrine. Majority Opinion ¶ 30–34.

{82} I do not believe our Supreme Court was misled by any such confusion. Instead, I believe our Supreme Court was fully conscious of cases holding there is no intent requirement for the constitutional doctrine to apply, and deliberately chose to follow those cases which require intent.

{83} *Alvarez–Lopez* quotes the following from the Second Circuit opinion of *Mastrangelo*, 693 F.2d at 272–73: "If a witness' silence is procured by the defendant himself, whether by chicanery, by threats, or by actual violence or murder, the defendant cannot then assert his confrontation clause rights[.]" *Alvarez–Lopez*, 2004–NMSC–030, ¶ 8, 136 N.M. 309, 98 P.3d 699. *Alvarez–Lopez* also specifically quotes *Dhinsa*, 243 F.3d at 653, that "Rule 804(b)(6) [of the Federal Rules of Evidence] 'was intended to codify the waiver-by-misconduct rule as it was applied by the courts at that time.' " *Alvarez–Lopez*, 2004–NMSC–030, ¶ 9, 136 N.M. 309, 98 P.3d 699. On the very same page referenced by *Alvarez–Lopez*, the Second Circuit *Dhinsa* court refers to its own opinion of *Miller*, 116 F.3d at 668, as "holding that neither the existence of an ongoing proceeding nor a finding that the defendant's intention was to prevent the

declarant from testifying is required to admit the declarant's out-of-court statement." *Dhinsa,* 243 F.3d at 652–53. *Miller* specifically states, "Although a finding that defendants' purpose was to prevent a declarant from testifying[ ] is relevant, such a finding is not required." *Id.* at 668 (internal quotation marks, brackets, and citation omitted).

{84} Despite its clear knowledge of these authorities, our Supreme Court made a conscious decision in *Alvarez–Lopez* to reject them and to require the State to establish by a preponderance of the evidence that "the defendant intended by his misconduct to prevent the declarant from testifying" as one of the elements of waiver by misconduct. 2004–NMSC–030, ¶ 10, 136 N.M. 309, 98 P.3d 699. Finally, our Supreme Court stated in *Alvarez–Lopez* that "[o]ne of the primary purposes of the forfeiture by wrongdoing rule is to deter criminals from intimidating or 'taking care of' potential witnesses." *Id.* ¶ 14 (internal quotation marks and citation omitted). Our Supreme Court therefore concluded, "[w]ithout a showing that [the defendant] intentionally prevented [the witness] from being a witness against him, this purpose is not served by admitting the [hearsay] testimony." *Id.*

{85} Secondly, the majority suggests that the requirement arises out of misplaced reliance upon *Cherry,* because *Cherry* improperly equates the Federal Rule of Evidence 804(b)(6) requirement that "the defendant intended by his misconduct to prevent the declarant from testifying" as also being constitutionally required to admit the hearsay of an unavailable witness. Majority Opinion ¶¶ 24, 35–36. This reasoning overlooks the fact that when Rule 804(b)(6) was adopted in 1997, the defendant intended by his misconduct to prevent the witness from testifying in virtually every case in which the constitutional waiver doctrine was recognized. *See, e.g., United States v. White,* 116 F.3d 903, 909–12 (D.C.Cir.1997) (involving the murder of a potential witness that the defendant suspected was working with the police); *Houlihan,* 92 F.3d at 1278 (concluding that a defendant waives his constitutional confrontation rights by murdering a potential witness to prevent the witness from testifying); *United States v. Thai,* 29 F.3d 785, 814–15 (2d Cir.1994) (involving murder of potential witness); *United States v. Aguiar,* 975 F.2d 45, 47 (2d Cir. 1992) (holding that defendant waived his confrontation rights by threatening witness not to testify); *Rouco,* 765 F.2d at 985, 995 (involving murder of undercover police officer involved with the defendant in drug transactions while in the process of arresting the defendant); *United States v. Thevis,* 665 F.2d 616, 630 (5th Cir.1982) ("We conclude that a defendant who causes a witness to be unavailable for trial [by murdering him] for the purpose of preventing that witness from testifying also waives his right of confrontation[.]"); *Steele v. Taylor,* 684 F.2d 1193, 1199, 1201 (6th Cir.1982) (concluding that the constitutional waiver was applicable where the defendant caused a witness under his control to refuse to testify based on the fifth amendment privilege); *United States v. Balano,* 618 F.2d 624, 629–30 (10th Cir.1979) (holding that witness grand jury testimony was admissible when defendant waived his constitutional right of confrontation by making witness unavailable by threats to his life), *overruled on other grounds as recognized by United States v. Cherry,* 217 F.3d 811 (10th Cir.2000); *United States v. Carlson,* 547 F.2d 1346, 1354 (8th Cir.1976) (same). *But see Miller,* 116 F.3d at 668 (stating that while a finding that the defendant's purpose is to prevent witness from testifying is relevant, it is not necessary); *Mastrangelo,* 693 F.2d at 272–73 ("[I]f a witness' silence is procured by the defendant himself, whether by chicanery, by threats, or by actual violence or murder, the defendant cannot then assert his confrontation clause rights[.]") (internal quotation marks and citations omitted). Moreover, the United States Supreme Court has not stated that this requirement of the rule is not constitutionally required. In fact, *Crawford* cites *Reynolds,* 98 U.S. at 158–59, as recognizing the doctrine of forfeiture by wrongdoing. *Crawford,* 541 U.S. at 62, 124 S.Ct. 1354. *Reynolds* applied the common law and held that when the defendant kept the witness away from his trial, that conduct waived his constitutional right of confrontation. *Id.* at 158–60. Since *Reynolds* was not criticized, and Rule 804(b)(6) remains unchanged, I disagree with the majority's criticisms.

{86} For the foregoing reasons, I specially concur.

2006-NMCA-048

133 P.3d 866

Peter SMITH, Barbara Smith, Patricia Stillman Trust, Guy Stillman Trust, and GWP Investments, INC., a New Mexico Corporation, Plaintiffs–Appellees,

v.

CITY OF SANTA FE, Defendant–Appellant.

No. 24,801.

Court of Appeals of New Mexico.

Feb. 16, 2006.

Certiorari Granted, No. 29,712, April 28, 2006.

Corrected May 10, 2006.

Sommer, Udall, Hardwick, Ahern & Hyatt, L.L.P., Karl H. Sommer, Santa Fe, NM, for Appellees.

Sutin, Thayer & Browne, P.C., Germaine R. Chappelle, Santa Fe, NM, for Appellant.

OPINION

CASTILLO, Judge.

{1} This case presents us with procedural and substantive issues regarding the validity of a 1999 Santa Fe ordinance as it relates to the drilling of domestic wells within the city limits. On cross-motions for summary judgment, the district court determined, as a matter of law, that the City of Santa Fe (City) did not have the authority to prohibit the drilling of wells within the city's corporate limits. We hold that the City did have the authority to prohibit domestic wells within the city limits; therefore, we reverse the district court.

I. BACKGROUND

{2} The parties do not dispute any material facts. The City became a home rule charter municipality in 1997. In 1999, the City Council passed the Domestic Well Ordinance, Ordinance No. 1999–3, codified at Santa Fe, N.M., Code [hereinafter Santa Fe Code] ch. XXV, § 1.10 (1999). This ordinance required any person wishing to drill a well within the City's municipal water service area to apply for a domestic well permit and prohibited the drilling of new domestic wells when the well applicant's property boundary was located within 200 feet of the City's water distribution main. *Id.* In 2001, Plaintiffs Peter Smith, Barbara Smith, and GWP Investments (together referred to as Smiths) and Plaintiffs Patricia Stillman Trust and Guy Stillman Trust (together referred to as Trusts) applied for domestic well permits from the Office of the State Engineer (OSE), pursuant to NMSA 1978, § 72–12–1 (1998). The OSE granted the permits, and the City advised Plaintiffs that they were also required to obtain a permit from the City. The proposed wells were to be drilled on Plaintiffs' properties located within the city; all of the Plaintiffs were water customers of the City.

{3} In February 2001, Smiths filed applications for domestic well permits from the City. The permits were denied because the boundary of Smiths' property was located within 200 feet of the City's water distribution lines. Smiths followed the City's appeal process and appealed the decision to the City Manager, then to the Public Utilities Committee, and finally to the City Council; all appeals were denied. Trusts, however, did not apply for a City permit because they were informed, through their legal representatives, that the application would be denied.[1]

{4} In January 2002, Smiths and Trusts filed a complaint for declaratory relief, asking the district court to declare that the City has no authority to deny the applications or to prohibit Plaintiffs from drilling wells on their properties. Trial was vacated; instead, the parties entered a stipulated order of facts and briefing schedule. After a hearing on the parties' motions for summary judgment, the district court granted Plaintiffs' motion and denied the City's motion. The court ruled that it had jurisdiction to hear Plaintiffs' declaratory judgment action, that Trusts were not required to exhaust administrative remedies and were therefore proper parties to the action, and that the City was preempted from enacting the Domestic Well Ordinance and had no home rule or other statutory power authorizing such enactment. The City appeals this ruling.

II. DISCUSSION

A. Procedure and Jurisdiction

{5} The City, in its first argument, contends that the district court had no jurisdiction to consider the complaint for a declaratory judgment because (1) Trusts failed to exhaust their administrative remedies by not applying for a drilling permit and (2) Smiths, who did exhaust their administrative remedies, were limited to appellate review by petition for writ of certiorari, as set forth in Rule 1–075 NMRA (regarding writs of certiorari when there is no statutory right to appeal or review). We need not decide these issues because however we decide them will make no difference to the outcome of this appeal; on the merits, we conclude that the City did in fact have the authority to enact the Domestic Well Ordinance and could thus prohibit Plaintiffs from drilling a domestic well. We acknowledge that the special concurrence and dissent relies on cases supporting a determination that jurisdiction does not lie in this case. There is other authority, however, that indicates an ordinance may be challenged by declaratory action, as well as by administrative appeal. *See Pan Am. Petroleum Corp. v. El Paso Natural Gas Co.*, 77 N.M. 481, 487, 424 P.2d 397, 401 (1966) (holding that an action for declaratory judgment is not barred because the plaintiff failed to exhaust administrative remedies if the question is one of law and not fact); *Moriarty Mun. Sch. v. Pub. Sch. Ins. Auth.*, 2001-NMCA-096, ¶¶ 1, 10, 34, 131 N.M. 180, 34 P.3d 124 (holding that the school could sue the insurance authority in contract, even though it failed to timely file a petition for writ of certiorari under Rule 1–075); *see also* NMSA 1978, § 44–6–2 (1975) ("[D]istrict courts within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed."); NMSA 1978, § 44–6–4 (1975) ("Any person ... whose rights ... are affected by a ... municipal ordinance ... may have determined any question of construction or validity arising under the ... ordinance ... and obtain a declaration of rights ... thereunder."); NMSA 1978, § 44–6–14 (1975) (noting that the Declaratory Judgment Act is remedial and should be liberally construed and administered to serve its purpose, that is, "to afford relief from uncertainty and insecurity with respect to rights"); *cf. Grand Lodge of*

1. Also in 2001, the legislature enacted NMSA 1978, § 3–53–1.1 (2001), which specifically authorized municipalities to enact ordinances restricting the drilling of new domestic water wells, as long as (1) the property line of the applicant is within 300 feet of the municipal water distribution lines, (2) the property is located within the municipal boundaries, and (3) the property is not zoned agricultural. This statute became effective on June 15, 2001. It is not applicable to this case. In 2004, the City Council amended the Domestic Well Ordinance in Ordinance No. 2004–7, § 1. *See* Santa Fe Code ch. XXV, § 1.10 (2004). The amended ordinance similarly does not apply to this case.

Ancient & Accepted Masons of N.M. v. Taxation & Revenue Dep't, 106 N.M. 179, 181, 740 P.2d 1163, 1165 (Ct.App.1987) (concluding that declaratory judgment action is not available when there is a complete, *statutory* remedy, "obviously intended to be exclusive"). While the question of jurisdiction is debatable, a full analysis of this issue is not necessary because our disposition on the merits fully resolves the case. *See Taos Mun. Sch. Charter Sch. v. Davis,* 2004-NMCA-129, ¶ 6, 136 N.M. 543, 102 P.3d 102 ("Because a decision on this jurisdictional issue is not necessary in light of our ruling on the merits . . ., we will address the merits . . . and leave the complex and interesting issue of jurisdiction to another day."). Accordingly, we assume, without deciding, that the district court had jurisdiction to entertain Plaintiffs' declaratory judgment action, and we now explain our analysis of the merits of this case. *See id.*

B. Validity of the Ordinance

{6} The City's substantive argument goes to the validity of the Domestic Well Ordinance. The City maintains that its home rule powers and police powers provide the requisite authority for enacting the ordinance. Plaintiffs contend that any authority relied upon by the City is expressly denied or preempted by state law.

1. Standard of Review

{7} Summary judgment is reviewed de novo. *McGarry v. Scott,* 2003-NMSC-016, ¶ 5, 134 N.M. 32, 72 P.3d 608. In the present case, we specifically determine whether a municipality has authority to enact an ordinance pursuant to home rule; this requires interpretation of a constitutional amendment and statutes, both questions of law, which are reviewed de novo. *New Mexicans for Free Enter. v. City of Santa Fe,* 2006-NMCA-007, ¶ 11, 138 N.M. 785, 126 P.3d 1149.

2. Home Rule Authority and Its Limitations

{8} In the Home Rule Amendment, N.M. Const. art. X, § 6, the New Mexico Constitution provides municipalities with the right to adopt a charter and thereby "exercise all legislative powers . . . not expressly denied by general law or charter." N.M. Const. art. X, § 6(D). Although the power granted under home rule is broad, limitations do exist. *New Mexicans for Free Enter.,* 2006-NMCA-007, ¶¶ 16–17, 138 N.M. 785, 126 P.3d 1149; *see also* N.M. Const. art. X, § 6(E) ("The purpose of this section is to provide for maximum local self-government. A liberal construction shall be given to the powers of municipalities.").

{9} Limitations on home rule authority are evaluated in a two-step process. *State ex rel. Haynes v. Bonem,* 114 N.M. 627, 631, 845 P.2d 150, 154 (1992). In the first step, a court asks whether a state law is a "general law," *id.,* that is, a law that applies generally throughout the state, relates to a matter of statewide concern, and impacts inhabitants across the entire state. *New Mexicans for Free Enter.,* 2006-NMCA-007, ¶ 18, 138 N.M. 785, 126 P.3d 1149 (concluding that "the Minimum Wage Act is a general law"). Section 72–12–1, regarding permits for domestic wells, applies generally throughout the state. Moreover, the permitting of domestic wells is a statewide concern because access to water is a necessity for all inhabitants of the state. Thus, we conclude that Section 72–12–1 is a general law.

{10} In the second step, we determine whether the general law "expressly denies" the City's power to prohibit the drilling of domestic wells permitted by the OSE. *Haynes,* 114 N.M. at 631, 845 P.2d at 154; *see also New Mexicans for Free Enter.,* 2006-NMCA-007, ¶ 19, 138 N.M. 785, 126 P.3d 1149. The Court must consider (a) whether the statute "evinces any intent to negate such municipal power," *New Mexicans for Free Enterprise,* 2006-NMCA-007, ¶ 19, 138 N.M. 785, 126 P.3d 1149; (b) whether the effect of the statute implies "a clear intent to preempt that governmental area from municipal policymaking," *id.; see also Haynes,* 114 N.M. at 634, 845 P.2d at 157 ("[W]ords or expressions which are tantamount or equivalent to such a negation are equally effective."); and (c) whether the grant of authority to another governmental body "makes its exercise by [the City] so inconsistent with

the [statute] that it is equivalent to an express denial." *In re Generic Investigation into Cable Television Servs.*, 103 N.M. 345, 351, 707 P.2d 1155, 1161 (1985).

a. Intent to Negate Municipal Power

{11} We look at the language of the statute and the permit to determine whether the statute evinces an intent to negate municipal authority to act in a particular area. Plaintiffs argue that the City's authority to deny a permit to drill is prohibited by "state water law and the terms of the [OSE] permit which specifically authorized Plaintiffs' well to be drilled." Although Plaintiffs do not use the language from the home rule cases, it appears they contend that the language of Section 72–12–1, coupled with that of the OSE permit, evinces an intent to negate municipal power to prohibit drilling. *See New Mexicans for Free Enter.*, 2006-NMCA-007, ¶ 19, 138 N.M. 785, 126 P.3d 1149. We disagree.

{12} We turn our attention to the language of Section 72–12–1, which designates all underground waters as "public waters" and provides the state engineer with authority to issue a permit when an application is made for domestic use:

> [A]ny person ... desiring to use ... waters ... for irrigation of not to exceed one acre of noncommercial trees, lawn or garden[ ] or for household or other domestic use shall make application to the state engineer.... [T]he state engineer *shall* issue a permit to the applicant to so use the waters applied for[.]

Section 72–12–1(A) (emphasis added).

{13} In interpreting the statute and its effect on home rule authority, we look to the statute's plain language. *See High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (stating that the primary indicator of legislative intent is the plain language of the statute). Our Supreme Court considered whether the language of a statute negated home rule authority in *Westgate Families v. County Clerk*, 100 N.M. 146, 148, 667 P.2d 453, 455 (1983). The Court held that the word "only" in a statute precluded zoning by referendum. *Id.* The statute provided that a zoning ordinance "shall be passed *only* by a majority vote of all the members of the board." NMSA 1978, § 3–21–14(C) (1981) (emphasis added). The Court concluded that this language expressly denied the municipal power to zone by referendum because the statute expressly provided for zoning by representative bodies. *Westgate Families*, 100 N.M. at 148, 667 P.2d at 455.

{14} We recognize that both Section 72–12–1(A) and the statute construed in *Westgate Families* contain the mandatory word "shall." *Compare* § 72–12–1(A) ("[T]he state engineer shall issue a permit[.]"), *with* § 3–21–14(C) (providing that a zoning ordinance "shall be passed only by a majority vote"). However, we note the conspicuous absence of the word "only" in the statute governing domestic well permits. *See High Ridge Hinkle Joint Venture*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (noting that the court "will not read into a statute or ordinance language which is not there" (internal quotation marks and citation omitted)). We conclude that the statute does not evince an intent to negate home rule authority. *See New Mexicans for Free Enter.*, 2006-NMCA-007, ¶¶ 19, 20, 138 N.M. 785, 126 P.3d 1149 (concluding that the word "all" within the Minimum Wage Act was not a limitation on municipal authority to set a higher minimum wage); *see also Apodaca v. Wilson*, 86 N.M. 516, 521, 525 P.2d 876, 881 (1974) (discussing the statutory prohibition on municipal authority to tax in NMSA 1978, Section 3–18–2 (1980), as an example of an express denial of home rule authority), *modified as recognized by Haynes*, 114 N.M. at 631–32, 634, 845 P.2d at 154–55, 157.

{15} Further, the language of the OSE permit does not negate such authority. *See Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995) (stating that a reviewing court accords some deference to an agency's interpretation of the statute that governs the agency). Without citing to any regulations on which the permit relies, Plaintiffs extract phrases from within the permit and assert that these phrases prohibit the City from denying a permit to drill a domestic well. Specifically, Plaintiffs contend that certain

language in the permit, such as "application is approved" and the "well shall be drilled," precludes the City's authority to deny a permit to drill. Plaintiffs pluck this language out of context to make their argument.

{16} The permit reads as follows: "This *application is approved* for the use indicated, subject to all general conditions and to specific conditions listed above." (Emphasis added.) The conditions and approvals listed within the permit include Condition H: "The amount and uses of water permitted under this Application are subject to such limitations as may be imposed by . . . lawful municipal and county ordinances which are more restrictive than applicable State Engineer Regulations and the conditions of this permit." We conclude that the plain meaning of the permit language of approval, read together with Condition H, is clear and unambiguous—the applicant may drill a well if he or she is not limited by a more restrictive municipal ordinance. *See Sims v. Sims*, 1996-NMSC-078, ¶ 17, 122 N.M. 618, 930 P.2d 153 ("[W]hen a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." (internal quotation marks and citation omitted)); *cf. High Ridge Hinkle Joint Venture*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (noting that when several sections of a statute are involved, we read them together so that all parts are given effect). Condition B provides that the "*well shall be drilled* by a driller licensed in the State of New Mexico." (Emphasis added.) We do not interpret the language of this condition, as suggested by Plaintiffs, to be a mandate that Plaintiffs must be allowed to drill a well. Rather, we interpret this language to be a limitation on who may actually drill the well for the permittee. Plaintiffs argue that the permit rests on regulations, but Plaintiffs do not cite to these regulations. Therefore, we rely on the permit's language, read as a whole, which clearly contemplates municipal authority to regulate in this area. We conclude that the language of the statute, as interpreted by the OSE in its permit, does not evince an intent to negate municipal authority to deny drilling of domestic wells.

b. Statutory Implication of Intent to Preempt

{17} We examine the effect of the statute to determine whether legislative intent to preempt is implied. Plaintiffs argue that municipal authority to prohibit domestic wells is implicitly preempted because the ordinance conflicts with the "contents, purposes, or pervasive scheme of the statute." *See San Pedro Mining Corp. v. Bd. of County Comm'rs*, 1996-NMCA-002, ¶ 9, 121 N.M. 194, 909 P.2d 754. Plaintiffs contend that the City's denial of a permit to drill would "frustrate or violate established public policy." *See City of Albuquerque v. N.M. Pub. Regulation Comm'n*, 2003-NMSC-028, ¶ 7, 134 N.M. 472, 79 P.3d 297 (discussing limitations on home rule authority). "[W]hen two statutes that are governmental or regulatory in nature conflict, the law of the sovereign controls." *Casuse v. City of Gallup*, 106 N.M. 571, 573, 746 P.2d 1103, 1105 (1987) (holding that the statute requiring members of governing bodies to come from single-member districts clearly intended to preempt a municipality's right to have at-large elections). We ask whether the effect of the statute implies "a clear intent to preempt [a] governmental area from municipal policy-making." *New Mexicans for Free Enter.*, 2006-NMCA-007, ¶ 19, 138 N.M. 785, 126 P.3d 1149; *see also ACLU v. City of Albuquerque*, 1999-NMSC-044, ¶¶ 10, 13, 15, 128 N.M. 315, 992 P.2d 866.

{18} In *ACLU*, our Supreme Court held that the legislature clearly intended to preempt municipal authority to criminalize the behavior of juveniles. 1999-NMSC-044, ¶ 1, 128 N.M. 315, 992 P.2d 866. This was the case because the Delinquency Act comprehensively and exhaustively addressed juvenile delinquency and the local ordinance attempted to expose juveniles to criminal punishment, including a fine of up to $500 and imprisonment of up to ninety days. *Id.* ¶¶ 2, 10–15. This punishment effectively subjected a juvenile to criminal sanctions, contrary to the Delinquency Act; therefore, the ordinance "would circumvent and thereby frustrate the [l]egislature's intent to . . . uniformly enforce laws of a penal nature against [children]." *Id.* ¶ 13. In the present case,

Plaintiffs are correct that the domestic well exception in Section 72–12–1 mandates application to the OSE by a person seeking to drill a domestic well. However, this basic premise does not mean that any local regulation of domestic wells is therefore inconsistent with the state scheme. Our reading of the statute is that it is intended to ensure that the OSE is simply aware of new domestic wells and that they are drilled by a qualified person. This application to the OSE, which results in an automatic and unrestricted permit, does not approximate a comprehensive or exhaustive regulation of such wells. Additional regulation at the local level does not inhibit the notice-oriented mandates of Section 72–12–1. Thus, local regulation, in our view, is consistent with the state statute and, unlike the situation in *ACLU,* does not circumvent or frustrate the policy established by state law.

{19} Both parties cite to *San Pedro.* We first note that *San Pedro* does not construe home rule authority. However, we find its discussion of implied preemption instructive. In *San Pedro,* this Court focused on the purposes of the New Mexico Mining Act, its regulations, and the county ordinance, and the Court determined that the ordinance was not preempted. 1996–NMCA–002, ¶ 10, 121 N.M. 194, 909 P.2d 754. The state law did not preempt the county ordinance because the ordinance addressed concerns that were not a focus of the state law. *Id.* ¶¶ 10, 11, 14. In particular, the primary focus of the state law was to minimize the damage to the land being mined, whereas the focus of the county ordinance was on "development issues with which local governments are traditionally concerned, such as traffic congestion, increased noise, possible nuisances . . ., compatibility . . . with the use made of surrounding lands, appropriate distribution of land use and development, and the effect . . . on surrounding property values." *Id.* ¶ 12. Thus, we concluded there was "room for concurrent jurisdiction and regulation" in those aspects of the regulated activity that were left unaddressed by the state law. *Id.*

{20} As in *San Pedro,* we find room in the present case for concurrent jurisdiction and regulation. As we have noted, the domestic well exception is primarily aimed at informing the OSE of new domestic wells. Section 72–12–1. There are no statutory requirements that must be met before a domestic well application is approved. *See id.* The application requires information regarding the location of the well and the use of water, as well as information regarding the driller and the technical specifications of the well. There is no evidence of intent to regulate the use of domestic wells in areas of concern to a municipality, such as depletion of the local aquifers, impact on the quality of the local water, and reliability of the water system. Clearly, state law and the City's ordinance regarding domestic wells address different areas of concern. Because there is room for concurrent jurisdiction, Section 72–12–1 and the OSE permit do not preempt the City's power to prohibit the drilling of wells when the applicant can be served by the municipal water system.

c. Local Regulation Barred by Grant of Authority to Another Governmental Body

{21} Plaintiffs contend that the state's plenary control of water and the grant of authority to the state engineer expressly deny the use of home rule authority to prohibit drilling a domestic well. *State ex rel. State Game Comm'n v. Red River Valley Co.,* 51 N.M. 207, 273, 182 P.2d 421, 462 (1945) ("[F]ollowing the act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states[.]" (internal quotation marks and citation omitted)). Plaintiffs assert that the grant of authority to the state engineer "makes its exercise by [the City] so inconsistent with the [law] that it is equivalent to an express denial." *See In re Generic Investigation into Cable Television Servs.,* 103 N.M. at 348, 351, 707 P.2d at 1158, 1161 (concluding that the constitutional grant of authority to the Commission for "fixing, determining, supervising, regulating and controlling all charges and rates of . . . *transmission companies* . . . and of determining any matters of public convenience and necessity relating to such facilities" expressly denied municipal home rule authority over cable companies (internal quotation

marks and citation omitted)); *see also N.M. Pub. Regulation Comm'n,* 2003–NMSC–028, ¶ 10, 134 N.M. 472, 79 P.3d 297 (holding that local governments are precluded from requiring utilities to pay the expense of undergrounding on public highways because the legislature delegated the power to a state agency). We do not agree.

{22} In *New Mexico Public Regulation Commission,* our Supreme Court concluded that a grant of authority was equivalent to an express denial when "[t]he [l]egislature delegated the power to provide for the relocation of utility facilities within a public highway to the State Highway and Transportation Department." *Id.* ¶¶ 8, 10 (internal quotation marks and citation omitted); *see In re Generic Investigation into Cable Television Servs.,* 103 N.M. at 351, 707 P.2d at 1161. The Department could provide for relocation if it made a "finding that the action provided for is necessitated by highway improvement." *N.M. Pub. Regulation Comm'n,* 2003–NMSC–028, ¶ 10, 134 N.M. 472, 79 P.3d 297 (internal quotation marks and citation omitted). The Department was further directed "to promote the public interest in the highway improvement without undue cost or risk and without impairment of utility service." *Id.* (internal quotation marks and citation omitted). The legislature's grant of authority to the Department made the municipal body's exercise of that authority "so inconsistent with the [law] that it [was] equivalent to an express denial" when the legislature delegated a definite power to be exercised by a specific governmental entity and provided detailed guidelines and a specific purpose for the Department's discretionary authority. *See In re Generic Investigation into Cable Television Servs.,* 103 N.M. at 351, 707 P.2d at 1161. We find *New Mexico Public Regulation Commission* distinguishable from our case.

{23} The authority granted to the state engineer regarding domestic wells in Section 72–12–1 is limited and without discretion. *See* § 72–12–1(A) (directing a prospective domestic well owner to apply to the state engineer and directing the state engineer to issue a permit). We conclude that this limited grant of authority in regard to domestic wells does not rise to the level of an express denial of home rule authority to act in this area.

{24} Plaintiffs also rely on *State ex rel. Reynolds v. Mears,* 86 N.M. 510, 515, 525 P.2d 870, 875 (1974), to assert that the grant of authority to the state engineer expressly denies the City's home rule power to prohibit the drilling of a domestic well. *See id.* ("It is the function and duty of the State Engineer to regulate and supervise the appropriation, measurement and distribution of the public waters of the State and the apportionment thereof in accordance with the law, so as to prevent waste, prevent the improper location and drilling of wells . . ., to the end that said waters be conserved and be put to beneficial use as contemplated by law, and so as to protect the rights therein of appropriators in accordance with their priorities." (internal quotation marks and citation omitted)). *Mears* is distinguishable from the case at hand. In *Mears,* our Supreme Court specifically addressed wells permitted for beneficial use under the doctrine of appropriation. *Id.* at 512, 525 P.2d at 872. *See generally* NMSA 1978, § 72–12–3 (2001) (identifying the information necessary for an application to appropriate water for beneficial use). However, the circumstances here present a question of municipal authority over domestic wells, pursuant to Section 72–12–1. Thus, we conclude that *Mears* is not applicable to the facts presented in this case.

{25} We also note that the legislature has expressly provided for municipal regulation and conservation of water. We read Section 72–12–1 together with the remainder of the municipal water statutes and the express grants of power to municipalities regarding water. *In re Estate of Holt,* 95 N.M. 412, 414, 622 P.2d 1032, 1034 (1981) ("It is a familiar rule of statutory construction that all of the provisions of a statute, together with other statutes in pari materia, must be read together to ascertain the legislative intent." (internal quotation marks and citation omitted)); *see* NMSA 1978, §§ 72–12–1 to –28 (1931, as amended through 1998); NMSA 1978, § 3–53–1 (1965) (granting municipalities the authority to regulate, inter alia, wells); NMSA 1978, § 3–53–2 (1965) (granting municipalities the authority to regulate

and restrict the use of water); NMSA 1978, § 3–27–1 (1965) (granting municipalities the authority to acquire and operate water facilities, including wells); NMSA 1978, § 3–27–3 (1994) (granting jurisdiction over water supply for the purpose of providing a municipal water system). The statutory provisions that grant powers to municipalities in other areas of water indicate the legislature did not intend to grant exclusive authority regarding domestic wells to the state engineer.

III. CONCLUSION

{26} We reverse the judgment of the district court on the issue regarding municipal authority. We hold that under the City's home rule powers, it had authority to prohibit the drilling of a domestic well within the municipal boundaries and that this authority was not preempted by existing state law.

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

I CONCUR: CYNTHIA A. FRY, Judge.

MICHAEL E. VIGIL, Judge (specially concurring and dissenting).

VIGIL, Judge (specially concurring and dissenting).

{28} I dissent from the proposition that we may assume without deciding that the district court had jurisdiction to entertain Plaintiffs' declaratory judgment action. "Subject matter jurisdiction gives a court power and authority to act. Without it, the court has no power or authority to act." *Amica Mut. Ins. Co. v. McRostie,* 2006–NMCA–046, ¶ 17, 139 N.M. 486, 134 P.3d 773, 2006 WL 1161392, *cert. denied,* 2006–NMCERT–004, 139 N.M. 429, 134 P.3d 120 [No. 29,723]. However, because existing precedent leads me to conclude that the district court lacked jurisdiction, I agree with the conclusion of the majority to reverse the judgment of the district court. My reasoning follows.

{29} Smiths filed applications for well permits from the City. The City Manager denied the applications and Smiths appealed as provided in the City's appeal process. On September 19, 2001, the City Council rendered the final decision upholding the decision of the City Manager to deny the permits. Trusts never applied for a permit.

{30} The sole method of obtaining judicial review of the City's final administrative decision is by way of a writ of certiorari because no appeal or other mode of review is allowed or provided for the district court to review the decision of the City Council. Article VI, Section 13 of the New Mexico Constitution authorizes district courts to issue writs of certiorari to an inferior court or tribunal. "A writ of certiorari . . . lies when it is shown that an inferior court or tribunal has exceeded its jurisdiction or has proceeded illegally, and no appeal or other mode of review is allowed or provided." *Rainaldi v. Pub. Employees Ret. Bd.,* 115 N.M. 650, 654, 857 P.2d 761, 765 (1993). *Masterman v. State Taxation & Revenue Department,* 1998–NMCA–126, 125 N.M. 705, 964 P.2d 869, specifically states that since the applicable statute in that case did not provide for a right to appeal the administrative decision, "a writ of certiorari provided the only mode of review." *Id.* ¶ 11.

{31} Rule 1–075 governs writs of certiorari when there is no statutory right to an appeal or other statutory right of review. Under Subsection (D) of the Rule, a petition for writ of certiorari "shall" be filed in the district court within thirty days after the date of the filed decision or order of the agency. The City Council issued the final order on September 19, 2001. The deadline for filing a petition for writ of certiorari in the district court to review the administrative decision was thirty days later on October 19, 2001. No petition was filed by that date. Instead, well after the deadline expired on January 7, 2002, Smiths and Trusts filed a complaint for declaratory judgment. The complaint for declaratory judgment appears to be an attempt to circumvent the time requirement for filing a petition for writ of certiorari.

{32} I therefore respectfully submit that under well-settled precedent, the district court lacked jurisdiction to rule on the complaint for declaratory judgment. In *Masterman,* a "Petition for Judicial Review" was filed seeking judicial review of an administrative decision when no statutory right to appeal the administrative decision was provided for. 1998–NMCA–126, ¶¶ 1, 10, 125 N.M. 705, 964 P.2d 869. This Court analyzed the petition as a writ of certiorari. Since the

petition for judicial review failed to allege the necessary jurisdictional prerequisites as provided in Rule 1–075, we held that the district court's jurisdiction was not properly invoked and we *sua sponte* reversed the order of the district court on grounds it had no jurisdiction to issue the order in the first place. *Masterman,* 1998–NMCA–126, ¶¶ 12–14, 125 N.M. 705, 964 P.2d 869. Similarly, in *City of Albuquerque v. Ryon,* 106 N.M. 600, 747 P.2d 246 (1987), the City of Albuquerque failed to timely appeal a final administrative decision to the district court as provided in the applicable ordinance. Instead, "the City attempted to reach by a declaratory judgment suit what it had waived by failure to timely appeal." *Id.* at 603, 747 P.2d at 249. Our Supreme Court first said that, "declaratory judgment actions are not intended to provide a substitute for other available actions." *Id.* Then, our Supreme Court specifically held that since the right to appeal had expired, the time for filing a declaratory judgment likewise had expired because "declaratory judgment actions are subject to the same limitations as the nature of the action sued upon in the underlying case." *Id.* In coming to this conclusion, the Supreme Court cited *Taylor v. Lovelace Clinic,* 78 N.M. 460, 432 P.2d 816 (1967), in which the Court affirmed dismissal of a declaratory judgment action because the statute of limitations had run on the underlying action. *Id.* at 461, 432 P.2d at 817. Therefore, held the Supreme Court, since the city's right to appeal had expired, so did its right to seek a declaratory judgment to obtain the identical relief that it could have obtained in an appeal. *Ryon,* 106 N.M. at 603, 747 P.2d at 249. The foregoing decisions are directly applicable here.

{33} If there is a basis for concluding that the district court did have jurisdiction over the declaratory judgment action, then we should say what that basis is. The majority cites *Pan American Petroleum Corp., Moriarty Municipal Schools, Grand Lodge of Ancient & Accepted Masons of New Mexico,* and *Taos Municipal Schools Charter School,* together with Sections 44–6–2, 44–6–4, and 44–6–14, in paragraph 5 to suggest that the district court had jurisdiction. Without belaboring the point, the cases are distinguishable and do not resolve the jurisdictional question presented. The majority acknowledges this fact by not answering whether there was jurisdiction, choosing instead to assume without deciding that the district court had jurisdiction. The majority does so for the purpose of reaching the merits of the case. However, no standards are provided for determining when and under what circumstances any court, including this Court, may properly do so.

{34} The City vigorously argued in the district court and on appeal that there was no jurisdiction in the district court to hear the declaratory judgment action. However, since the majority has ruled in favor of the City on the merits, it has no incentive to seek a determination from the Supreme Court about whether the district court had jurisdiction in the first place. Therefore, the jurisdictional issue remains unresolved. This leaves the impression that our courts are able to pick and choose when they have jurisdiction over an administrative appeal depending on whether they wish to address the merits. I am unwilling to leave this impression.

{35} For the foregoing reasons, I concur only in the result reached to reverse the judgment of the district court, and I dissent from assuming without deciding that the district court had jurisdiction to entertain the declaratory judgment action. I therefore express no opinion about the merits.

2006-NMCA-049

133 P.3d 875

Rory A. McMINN, Plaintiff–Appellant/Cross–Appellee,

v.

MBF OPERATING, INC., a New Mexico Corporation, Defendant–Appellee/Cross–Appellant.

No. 25,006.

Court of Appeals of New Mexico.

March 1, 2006.

Certiorari Granted, No. 29,725, April 20, 2006.

Sanders, Bruin, Coll & Worley, P.A., Clay H. Paulos, Ian D. McKelvy, Roswell, NM, for Appellant/Cross–Appellee.

Tucker Law Firm, P.C., Steven L. Tucker, Santa Fe, NM, for Appellee/Cross–Appellant.

OPINION

WECHSLER, Judge.

{1} This case involves the contested merger and reformation of a small, closely held corporation, MBF Operating, Inc. (MBF), pursuant to a cash out of a minority shareholder, Plaintiff Rory A. McMinn. After a jury trial, judgment was entered in favor of Plaintiff. Plaintiff appeals the trial court's refusal to award attorney fees and contends that the trial court erred in excluding certain testimony of his expert, Dr. Nini. Defendant MBF cross appeals, arguing that it was entitled to summary judgment because Plaintiff failed to avail himself of the exclusive appraisal remedy set forth in NMSA 1978, §§ 53–15–3 to –4 (1983), for dissenting shareholders. We agree with MBF and reverse the judgment. In light of our disposition, we do not reach the issues raised in Plaintiff's appeal.

BACKGROUND

{2} The three founding shareholders and directors of MBF, a New Mexico corporation engaged in the business of rendering pipeline

inspection services, were Plaintiff, Frank L. Sturges, and Mark W. Daniels. They formed the corporation in 1992. All three shareholders devoted significant time to MBF and agreed to use their "best efforts to make the company successful" so that all of them could share in the profits. The shares were divided equally among the three shareholders. Until 2001, the shareholders received equal salaries, bonuses, and benefits and, when voting as directors, made all decisions unanimously. MBF never declared dividends because to do so would result in double taxation.

{3} In 2001, Plaintiff applied for, and achieved, appointment to the Public Regulation Commission (PRC) effective May 1, 2001. The PRC regulates pipelines and therefore regulates MBF. Due to the potential conflict of interest between the PRC and MBF, Plaintiff resigned his employment with MBF effective April 30, 2001. For the same reason, Plaintiff placed his MBF shares into a blind trust effective April 30, 2001. He chose Bruce Ritter as the trustee of the blind trust (Trustee).

{4} After his resignation, Plaintiff never performed any services for MBF. He could no longer be employed by MBF and could no longer be on the Board of Directors. Trustee requested that Sturges and Daniels buy out Plaintiff's interest in MBF. Trustee also requested that the corporation institute a dividend policy now that it had a passive shareholder, but such a policy was never adopted.

{5} Trustee informed Sturges and Daniels that, if they did not want to make a fair offer for the stock, liquidation of the company might be an alternative. On September 19 and November 14, 2001, Trustee's counsel informed MBF that he was still considering liquidation if an agreement could not be reached as to a fair price and that he had begun to prepare pleadings to institute such an action. If MBF was liquidated, Plaintiff was likely to receive less than $20,000.

{6} MBF, acting through its directors, Sturges and Daniels, decided to effect a cash-out merger in order to resolve the stalemate with Plaintiff. A second corporation, MBF Operating Acquisition Corporation (Acquisition), was created solely for the purpose of reorganizing the ownership of MBF and paying Plaintiff the value of his MBF shares. Sturges and Daniels were the sole shareholders and directors of Acquisition. Under the merger, Plaintiff's shares would be cancelled and Acquisition would cease to exist. After merger, the new company, still named MBF Operating, Inc., would be owned by Daniels and Sturges alone. MBF determined that Plaintiff's one-third share of the company was $247,605.48 and, after subtracting one-third of the shareholder debt, MBF agreed to purchase Plaintiff's shares for $134,411.38.

{7} On March 29, 2002, Trustee received written notice from MBF of the special meeting of shareholders for a vote on the merger set for April 18, 2002, along with the plan of merger and the agreement of directors in lieu of special meeting. The plan of merger included a price of $743.56 per share less shareholder debt.

{8} On April 9, 2002, counsel for Trustee wrote MBF's counsel requesting information on the statutory authority for the merger and the manner in which the price was determined. MBF's counsel responded, citing NMSA 1978, § 53–14–1 (1975) (describing the statutory procedures for corporate mergers), and explaining the determination of the price. On April 17, 2002, articles of incorporation were filed forming Acquisition with Sturges and Daniels as the sole directors.

{9} At a meeting on April 18, 2002, the shareholders of MBF approved the plan of merger by a vote of 666 shares in favor and the 333 shares owned by the trust on behalf of Plaintiff opposed to the merger. Acquisition approved the plan of merger, and it merged out of existence. The articles of merger were duly filed, the merger was approved by the PRC, and a certificate of merger was issued.

{10} On April 19, 2002, Trustee's counsel wrote a letter to MBF's counsel reiterating his objection to the merger on the grounds that it was not authorized by statute and that it grossly underestimated the value of Plaintiff's shares. Trustee requested issuance of shares in the surviving corporation, but was refused. On April 30, 2002, MBF wrote a

letter to Plaintiff's counsel, advising that because Plaintiff had made no written demand for payment of fair value, he was bound by the terms of the merger. It enclosed a certified check for $134,411.38 for payment of Plaintiff's shares in accordance with the plan of merger. Plaintiff rejected the check, claiming that no statute authorized the majority shareholders to force a purchase of the minority's shares. On September 6, 2002, Plaintiff filed a complaint for money damages alleging breach of obligations MBF owed shareholders, breach of fiduciary duties, oppressive conduct, prima facie tort, unjust enrichment, and punitive damages. The complaint named Sturges, Daniels, Acquisition, and MBF as defendants.

{11} Defendants filed two separate motions for summary judgment, contending that because Plaintiff was essentially claiming that he was not paid fair value for his stock and that he objected to the merger, Plaintiff's exclusive remedy was an appraisal proceeding pursuant to Section 53–15–4 (describing the rights of minority shareholders who dissent to corporate actions, including mergers). Defendants claimed that Plaintiff was bound by the terms of the merger because he failed to comply with the provisions of Section 53–15–4. Defendants also moved to strike the jury demand on the ground that there is no right to a jury trial in an appraisal proceeding. After Defendants filed the second motion for summary judgment and a motion to dismiss, the trial court dismissed the complaint against Sturges, Daniels, and Acquisition. Although Plaintiff attempted to appeal the dismissal of Sturges and Daniels, that appeal was dismissed for untimely filing.

{12} The trial court denied summary judgment as to MBF and denied the motion to strike the jury demand. The claims against MBF were tried to a jury on the overarching claim of breach of fiduciary duty. The jury awarded Plaintiff $864,000 in compensatory damages and $20,000 in punitive damages.

STANDARD OF REVIEW

{13} The issue of whether Section 53–15–4 provides the exclusive remedy for dissenting shareholders against a corporation is one of statutory interpretation that we review de novo. *See N.M. Dep't of Labor v. A.C. Elec., Inc.*, 1998–NMCA–141, ¶ 8, 125 N.M. 779, 965 P.2d 363; *Morgan Keegan Mortgage Co. v. Candelaria*, 1998–NMCA–008, ¶ 5, 124 N.M. 405, 951 P.2d 1066. If the appraisal remedy excludes some, but not all, potential claims of a dissenting shareholder, the issue of whether all of the claims asserted fall within the exclusivity of the appraisal remedy requires an application of law to the facts, which is also subject to de novo review. *Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005–NMCA–022, ¶ 16, 137 N.M. 26, 106 P.3d 1273 (holding that "[i]nterpretation of statutes and their application to facts require[s] de novo review").

{14} We begin by reviewing the rights of minority shareholders and then discuss the exclusivity of the relevant statutes by examining their language and intent and by considering how other jurisdictions with similar statutes have applied exclusivity. We then discuss how allegations of fraud or unlawful conduct relate to exclusivity.

STATUTORY REMEDIES OF MINORITY SHAREHOLDERS

{15} "At common law, the unanimous consent of shareholders was required to effect a corporate merger." *Smith v. First Alamogordo Bancorp, Inc.*, 114 N.M. 340, 342, 838 P.2d 494, 496 (Ct.App.1992). The common law was changed by statutes allowing shareholders to approve mergers by less than unanimous vote. *Id.; see Stringer v. Car Data Sys., Inc.*, 314 Or. 576, 841 P.2d 1183, 1184 (1992) (en banc) ("The general rule today is that decision-making by the majority must take precedence over the objection of a lone dissenter."). Statutes have conferred upon the dissenting minority the right to force the corporation to buy out the minority interest in the corporation in order to avoid oppression of the dissenting minority shareholder and to compensate the minority for the loss of its traditional common law veto power. *Smith*, 114 N.M. at 342–43, 838 P.2d at 496–97. Appraisal statutes allow a dissenting shareholder to obtain the fair cash value of the shareholder's stock. *See id.; Stringer*, 841 P.2d at 1184 ("The linchpin of a dissenter's protection in merger cases is found in the statutory appraisal remedy.").

{16} Section 53–15–3 affords a shareholder the right to dissent from a proposed merger. It provides, in part, that "[a]ny shareholder of a corporation may dissent from, and obtain payment for the shareholder's shares in the event of, ... any plan of merger or consolidation to which the corporation is a party." Section 53–15–3(A)(1). A shareholder wishing to dissent from a proposed merger must comply with the provisions set forth in Section 53–15–4(A) by filing, "prior to or at the meeting of shareholders at which the proposed corporate action is submitted to a vote, a written objection to the proposed corporate action." *Id.* If, despite the dissenting votes, a requisite majority approves the merger, a dissenting shareholder may pursue a right to appraisal under the provisions of Section 53–15–4(A), which require the shareholder to "within ten days after the date on which the vote [is] taken ... make written demand on the corporation ... for payment of the fair value of the shareholder's shares." *Id.* If a shareholder makes such a demand, the corporation must make a written offer to the shareholder to pay for the shares at a "price deemed by the corporation to be the fair value thereof." Section 53–15–4(C). If the fair value is contested after thirty days, either the corporation or the shareholder may institute an appraisal proceeding. Section 53–15–4(E).

{17} A shareholder who fails to make the requisite statutory demand within the prescribed period is "bound by the terms of the proposed corporate action." Section 53–15–4(A). Further,

> [a] shareholder of a corporation who has a right under this section to obtain payment for his shares shall have no right at law or in equity to attack the validity of the corporate action that gives rise to his right to obtain payment, nor to have the action set aside or rescinded, except when the corporate action is unlawful or fraudulent with regard to the complaining shareholder or to the corporation.

Section 53–15–3(D).

EXCLUSIVITY OF THE STATUTORY APPRAISAL REMEDY

{18} "The guiding principle of statutory construction is that a statute should be interpreted in a manner consistent with legislative intent." *Hovet v. Allstate Ins. Co.*, 2004–NMSC–010, ¶ 10, 135 N.M. 397, 89 P.3d 69. "To determine legislative intent, we look not only to the language used in the statute, but also to the purpose to be achieved and the wrong to be remedied." *Id.* The plain language of Sections 53–15–3 and 53–15–4 allows a shareholder to dissent and obtain the fair value of his or her stock, but the dissenter cannot prevent or undo the merger in the absence of fraud or illegality. *Cf. Lett v. Westland Dev. Co.*, 112 N.M. 327, 330 n. 4, 815 P.2d 623, 626 n. 4 (1991) (noting that "the [appraisal] remedy was intended to be exclusive" and therefore a dissenting shareholder "has no right at law or in equity to attack the validity of the corporate action"). In this case, it is undisputed that Plaintiff never made the statutory demand required by Section 53–15–4(A) but instead "elected not to go under the appraisal remedy." As we discuss below, we conclude that Plaintiff's failure to proceed under Section 53–15–4 would normally bar any additional litigation. However, Plaintiff is contending that the exception for fraud or unlawful action applies. We consider the intent of the legislature in adopting Sections 53–15–3 and 53–15–4, because the exception for fraud or unlawful action renders the statute less than perfectly clear. *See Cummings v. X–Ray Assocs. of N.M., P.C.*, 1996–NMSC–035, ¶¶ 44–45, 121 N.M. 821, 918 P.2d 1321 (indicating that it is rare for any statute to be utterly free from ambiguity and that the task of the courts is always to search for and give effect to legislative intent).

LEGISLATIVE INTENT

{19} In determining whether a statute should be interpreted as providing an exclusive remedy, we consider whether the statute provides new rights and duties from those existing at common law and whether there is any indication in the statute that the legislature intended the statutory remedy to be exclusive, thus preempting common law remedies. *See Gutierrez v. Sundancer Indian Jewelry, Inc.*, 117 N.M. 41, 46–47, 868 P.2d 1266, 1271–72 (Ct.App.1993). Whenever a statute creates a new right and remedy not

provided at common law, there is a presumption that the remedy is exclusive. *See Hovet*, 2004-NMSC-010, ¶ 28, 135 N.M. 397, 89 P.3d 69 ("[I]f a statute creates a new right for protection of the public where none existed before and at the same time provides an adequate remedy for enforcement of the right created, the remedy thus afforded is exclusive.") (internal quotation marks and citation omitted); *Gutierrez*, 117 N.M. at 46, 868 P.2d at 1271 ("When a statute creates a new right or imposes a new duty, having no counterpart in common law, the remedies provided in the statute are generally deemed to be exclusive and not cumulative."). The application of these considerations leads us to a presumption of exclusivity. Sections 53-15-3 and 53-15-4 provide a dissenting shareholder with a new right and create an appraisal remedy that was not recognized at common law. *See Smith*, 114 N.M. at 343, 838 P.2d at 497 (holding that "[t]he right to dissent from a merger ... and be paid fair value is a new right that did not exist at common law"). Plaintiff admits that the appraisal "statute limits a dissenting shareholder to that remedy, except if the action is unlawful or fraudulent." Although Plaintiff suggests that New Mexico's appraisal remedy should not be exclusive because it does not provide the full panoply of remedies available at common law for breach of fiduciary duty, he does not cite, and we are not aware of, contrary evidence of legislative intent that would rebut the presumption of exclusivity. We therefore conclude that the legislature did intend the appraisal remedy to be exclusive.

CONSISTENCY WITH OTHER JURISDICTIONS

{20} Because the question of the exclusivity of the remedy set forth in Section 53-15-4 is an issue of first impression in New Mexico, we test this conclusion against the holding of cases in other jurisdictions. *E.g., Kimura v. Wauford*, 104 N.M. 3, 6, 715 P.2d 451, 454 (1986) ("Since this is a case of first impression, we look to jurisdictions with similar provisions...."). The Business Corporation Act, NMSA 1978, §§ 53-11-1 to -18-12 (1967, as amended through 2003), was adopted from the Model Business Corporation Act, and many other states have similar provisions. *Smith*, 114 N.M. at 342, 838 P.2d at 496 (describing the pedigree of the New Mexico Business Corporation Act as adopted from the Model Act).

{21} Plaintiff admits that most appraisal statutes are exclusive remedies for a claim by a dissenting shareholder in the absence of fraud or illegality. However, he argues that there is disagreement and ambiguity regarding the extent to which a claim for breach of fiduciary duty is included in the fraud or illegality exception to exclusivity. We agree that breach of fiduciary duty may sometimes rise to the level of fraud or illegality, but we decline to extend the statutory exception to all claims of breach of fiduciary duty. Other jurisdictions hold similarly. *E.g., Rosenstein v. CMC Real Estate Corp.*, 168 Ill.App.3d 92, 118 Ill.Dec. 766, 522 N.E.2d 221, 223, 226 (1988) (holding that Wisconsin's appraisal remedy excluded the plaintiff's claim for breach of fiduciary duty based on an improper purpose for the merger and an undervaluation of the shares because that claim did not fit within the statutory exception for fraud or illegal conduct); *Osher v. Ridinger*, 162 N.C.App. 155, 589 S.E.2d 905, 907-08 (N.C.Ct.App.2004) (holding that North Carolina's appraisal remedy excluded plaintiff's claim for breach of fiduciary duty because that claim was "essentially about the price received in a merger" and therefore no fraud or unlawful action had been alleged); *Am. Network Group, Inc. v. Kostyk*, 834 S.W.2d 296, 298-99 (Tenn.Ct. App.1991) (holding that Tennessee's appraisal remedy does not exclude all claims for breach of fiduciary duty, but that the plaintiff's claim was excluded because he had an appraisal right and sought compensation only for loss of economic advantage). *But see, e.g., Krieger v. Gast*, 122 F.Supp.2d 836, 846 (W.D.Mich.2000) (characterizing breach of fiduciary duty as "other unlawful action").

{22} We need not attempt to catalog all the types of conduct that might fall within the statutory exception for fraud or unlawful conduct. However, for future litigants, we suggest that the Delaware Supreme Court's list in *Weinberger* might be helpful in defin-

ing the types of claims that are not adequately remedied by the statutory appraisal proceeding: "fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching." *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983).

{23} Plaintiff argues that two of MBF's key authorities are distinguishable. Specifically, he argues that *Szaloczi v. John R. Behrmann Revocable Trust*, 90 P.3d 835 (Colo.2004) (en banc), and *Steinberg v. Amplica, Inc.*, 42 Cal.3d 1198, 233 Cal.Rptr. 249, 729 P.2d 683 (1986) (en banc), should not inform our decision. We agree that these cases are not directly on point but nonetheless find their reasoning persuasive.

{24} We turn first to *Szaloczi* in which the minority shareholder alleged that, in connection with the sale of the assets of a closely held corporation, the officers withheld information, granted themselves advantageous stock options, negotiated personal employment contracts, and arranged to take improper amounts from the sale of assets, thus adversely affecting the value of the dissenter's shares in the corporation. *Szaloczi*, 90 P.3d at 837–38. The Colorado Supreme Court held that the action for compensatory damages was properly dismissed because the minority shareholder was bound by the exclusivity provision found in the appraisal statute. *Id.* at 838.

{25} Plaintiff argues that this Court should not consider *Szaloczi* as persuasive authority because the Colorado statute at issue in that case required that all shareholders be provided with notice of the right to dissent, the right to demand payment, and the deadline for filing the requisite appraisal demand. *See id.* at 839. We consider this distinction to be without import because, in this case, Plaintiff makes no claim as to lack of notice of his appraisal rights. To the contrary, evidence shows that Plaintiff had ample notice regarding his rights to dissent and appraisal. Before the merger, MBF's counsel advised Trustee's counsel that it considered Section 53–14–1 to be the statutory authority for the merger. Plaintiff acknowledges that neither he nor Trustee made a written demand "for payment of the fair value" as required by Section 53–15–4(A) "because the Trust elected not to go under the appraisal remedy," not because they were unaware of the remedy. *See Steinberg*, 233 Cal.Rptr. 249, 729 P.2d at 689 (noting that the plaintiff admitted having "discussed his right to appraisal with his attorney before the merger [and having] decided not to seek that remedy").

{26} Plaintiff additionally seeks to distinguish *Szaloczi* because the Colorado Court limited the dissenting shareholder to the statutory appraisal remedy to avoid duplicate recovery. *Szaloczi*, 90 P.3d at 841. The Colorado court's recognition that any recovery on a claim for breach of fiduciary duty would duplicate the recovery available under the appraisal remedy supports MBF's contention that the recovery sought by Plaintiff in his claim for breach of fiduciary duty could have been considered, and possibly awarded, in an appraisal proceeding. *See Steinberg*, 233 Cal.Rptr. 249, 729 P.2d at 690 (observing that the appraisal statute does not "prevent vindication of a shareholder's claim of misconduct in an appraisal proceeding"). Moreover, *Szaloczi* interpreted the Colorado statute's exceptions for fraud or illegality very narrowly and excluded all but equitable proceedings. *Szaloczi*, 90 P.3d at 840.

{27} Plaintiff seeks to distinguish *Steinberg* based on differences in the underlying facts and the applicable law. Again, we are unpersuaded. In *Steinberg*, the minority shareholder alleged fraud and breach of fiduciary duty, as well as an unlawful merger, based on misrepresentations made by corporate officers. *Id.* at 686. The Supreme Court of California held that the action was barred by California's appraisal remedy because the plaintiff knew all of the relevant facts prior to the merger but "deliberately opted to sue for damages instead of seeking appraisal." *Id.* at 694. For his factual argument, Plaintiff notes that *Steinberg* involved an offering price that exceeded the price the plaintiff paid for his stock. *Id.* at 686. However, the evidence in this case also shows that, in light of the lack of any cash contribution made by Plaintiff, MBF offered to purchase Plaintiff's stock for much more than he paid.

{28} We also disagree that the differences in the law render *Steinberg* irrelevant. First, for the same reasons discussed above as to *Szaloczi*, we disagree that *Steinberg* is unreliable authority merely because the statute in that case required specific notice that is not required in this case. Second, we recognize that the court in *Steinberg* limited its holding to mergers of two separate corporations, not under common control or controlled by each other. *Steinberg,* 233 Cal. Rptr. 249, 729 P.2d at 685 n. 3, 694. Despite these differences, the California court's interpretation of the general exclusivity provision set forth in Cal. Corp.Code § 1312(a) (1990), *see Steinberg,* 233 Cal.Rptr. 249, 729 P.2d at 689–94, is relevant authority on the issue of determining whether New Mexico's similarly-worded appraisal remedy is exclusive, even though the New Mexico legislature has chosen not to enact the more specific provisions contained in the California Code.

ABSENCE OF FRAUD OR UNLAWFUL CONDUCT

{29} We next consider whether Plaintiff's claims fall within the exception to exclusivity for fraud or unlawful conduct. Ordinarily, a plaintiff's claims may be examined at the pleading stage, and a court may determine that the plaintiff has failed to plead a legally cognizable claim for fraud or unlawful conduct so as to escape the exclusive remedy of appraisal. *See, e.g., Weinberger,* 457 A.2d at 703 (affirming lower court's ruling that "[a] plaintiff in a suit challenging a cash-out merger must allege specific acts of fraud, misrepresentation, or other items of misconduct to demonstrate the unfairness of the merger terms to the minority"); *Werner v. Alexander,* 130 N.C.App. 435, 502 S.E.2d 897, 901–02 (1998) (affirming dismissal of minority shareholders' complaint because the complaint did not allege "circumstances constituting unlawful or fraudulent conduct," so that exclusive remedy for minority shareholders' claims about undervalued shares in a cash-out merger was the appraisal statute); *Walk v. Balt. & Ohio R.R.,* 847 F.2d 1100, 1107–08 (4th Cir.1988) (noting that, under Maryland law, allegations of fraud in the context of corporate mergers should be carefully scrutinized to determine whether the plaintiff was complaining only about the valuation of minority shares, in which case the plaintiff's claim would be a matter that could be resolved in a statutory appraisal proceeding), *vacated on other grounds,* 492 U.S. 914, 109 S.Ct. 3235, 106 L.Ed.2d 583 (1989). However, in this case, the trial court denied Defendant's motion to dismiss and the matter went to trial. We therefore review the evidence to determine whether Plaintiff proved fraud or unlawful conduct.

{30} Plaintiff has not established any fraud or illegality in the form of dishonesty or misrepresentation on the part of Sturges and Daniels while acting on behalf of the corporation that would allow Plaintiff to assert his claim outside of the appraisal remedy. The record establishes that Trustee received all of MBF's financial statements. Furthermore, although Plaintiff contends that valuations were not disclosed to Trustee, the record shows that these calculations were disclosed to Plaintiff at the time. In fact, the memoranda at issue are directed to Plaintiff.

{31} Likewise, no fraud or illegal conduct was established based upon the shareholders' individual financial statements prepared by Sturges and Daniels in 1998 through 2000 showing their respective one-third corporate interests at $700,000. Before trial, the trial court held that any alleged failure to disclose personal financial statements to the other shareholders would not support a claim of failure to disclose because there was no authority requiring shareholders in a closely held corporation to exchange personal financial statements. Plaintiff cites no authority to contradict the trial court's finding on this issue. Furthermore, Plaintiff admitted that he was aware of these figures and that he reported the same amounts on his own financial statements.

{32} Plaintiff further argues that the majority shareholders acted fraudulently or unlawfully by using the voting mechanism to cash out Plaintiff for no reason other than to eliminate him. When there is disagreement in the corporate decision-making process, the majority may vote to eliminate the minority shareholders by implementing a cash-out or "freeze-out" merger. *Stringer,*

841 P.2d at 1184. In a "freeze-out" merger, like the one in this case, the minority ownership is forced to give up its shares in the corporation in exchange for cash while the controlling interest is allowed to retain its equity. *Sifferle v. Micom Corp.*, 384 N.W.2d 503, 506 n. 1 (Minn.Ct.App.1986). Even if the majority sought to freeze out Plaintiff for no legitimate reason, claims that the majority instituted the merger only to freeze out the minority do not state a claim for fraud or illegal conduct that is recognized outside of the appraisal remedy. *See, e.g., Rosenstein,* 118 Ill.Dec. 766, 522 N.E.2d at 224 (noting that "even if the sole purpose of a merger is to eliminate minority shareholders, this does not make the merger itself improper"); *Fleming v. Int'l Pizza Supply Corp.*, 676 N.E.2d 1051, 1056–57 (Ind.1997) (holding that the legislature did not intend to permit judicial inquiry into the purpose, or lack of purpose, for the merger, but that a shareholder who believes he was treated unfairly can litigate the breach of fiduciary duty claim in the appraisal proceeding).

{33} Because Plaintiff failed to show any fraud or illegal activity, his citation to *Turner v. Bernstein,* 776 A.2d 530 (Del.Ch.2000), for the proposition that appraisal is not the exclusive remedy for "defrauded shareholders" is irrelevant. *See id.* at 531–32 (granting partial summary judgment in favor of the dissenting shareholders on their claim for breach of fiduciary duty against the directors, not the corporation, because the directors had deprived the shareholders of information that was necessary to make an informed decision as to whether to accept the price offered in the merger or whether to seek an appraisal).

CONCLUSION

{34} We conclude that this is a case, at its core, about a freeze out of the minority shareholder and the fairness of the price per share paid to him. These are matters for an appraisal proceeding, and Plaintiff has not proved any fraudulent or unlawful conduct. Therefore, Plaintiff had no ability to sue outside of the statutory appraisal process.

{35} Moreover, in this case, we are only considering whether the appraisal remedy is the exclusive remedy in a suit against the corporation for breach of fiduciary duty. Because the trial court dismissed Defendants Sturges and Daniels, we need not decide whether and under what circumstances a dissenting shareholder may have a common law claim against the majority shareholders or the officers and directors.

{36} We reverse the judgment in favor of Plaintiff because he failed to avail himself of his exclusive appraisal remedy pursuant to Sections 53–15–3 and 53–15–4. Because Plaintiff failed to take advantage of his statutory right to appraisal, he took the risk of being held to the amount offered in the merger and is now bound by the terms of the corporate action. *See* §§ 53–15–3(D), –4(A). In light of our decision to reverse the judgment, we do not reach the issues raised by Plaintiff in his appeal. *See Srader v. Verant,* 1998–NMSC–025, ¶ 40, 125 N.M. 521, 964 P.2d 82 (noting that reviewing court will not determine academic or moot questions); *State ex rel. Battershell v. City of Albuquerque,* 108 N.M. 658, 664, 777 P.2d 386, 392 (Ct.App.1989) (declining to address issues raised on appeal that are not necessary to disposition of the case).

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

WE CONCUR: LYNN PICKARD and CYNTHIA A. FRY, Judges.

[redacted]

2006-NMCA-051
134 P.3d 122

STATE of New Mexico,
Plaintiff–Appellee,

v.

Wayne LOBATO, Defendant–Appellant.

No. 24,910.

Court of Appeals of New Mexico.

March 15, 2006.

Certiorari Denied, No. 29,749, May 1, 2006.

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

John Bigelow, Chief Public Defender, Vicki W. Zelle, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

PICKARD, Judge.

{1} Defendant appeals his conviction for one count of criminal sexual penetration of a minor (CSPM). Defendant contends that (1) the trial court erred in admitting Defendant's videotaped confession over a defense objection that the confession was involuntary; (2) the trial court erred in declaring a mistrial, and because the mistrial ruling was erroneous, Defendant's retrial violated the six-month rule; and (3) the trial court lacked jurisdiction to try and convict Defendant because at the time of the trial, Defendant's appeal of the mistrial order was pending in this Court. We affirm.

FACTS

{2} On the evening of September 24, 2002, the five-year-old victim reported to her mother that Defendant had molested her. The mother called the police, and at about 11:00 p.m., officers went to Defendant's house to question him. Defendant agreed to go to the police station for questioning. Defendant was given *Miranda* warnings and read and signed a waiver indicating that he understood his rights. Defendant was questioned, beginning just before midnight, for between one and two hours. Defendant eventually confessed to one incident of molestation. We provide further detail about the confession in our analysis below.

{3} Defendant was arraigned on November 12, 2002, and charged with three counts of CSPM. The trial court granted an extension of time under Rule 5-604 NMRA to August 12, 2003. Defendant's trial was set for August 7, 2003. On that day, the trial court began jury selection. In the course of questioning the potential jurors, defense counsel apparently asked a question regarding whether jurors thought a person might make a false confession if coerced. In doing so, defense counsel made reference to the

eighteen-year sentence that is possible upon a conviction of first degree CSPM. Counsel also stated that Defendant would spend "the rest of his life in prison" if convicted.

{4} Immediately after these remarks, the State moved for a mistrial on the theory that the venire was tainted because the jurors would know the possible consequences of a guilty verdict. The State argued that this knowledge would be problematic in light of the standard jury instruction that jurors are not to consider the consequences of their verdict. The trial court allowed defense counsel an opportunity to rehabilitate the venire, but ultimately declared a mistrial, finding manifest necessity because the panel was beyond rehabilitation.

{5} On September 5, 2003, Defendant filed a notice of appeal in connection with the order declaring a mistrial. On September 16, 2003, the trial court entered an order granting free process on appeal and appointing appellate counsel.

{6} In the docketing statement for that appeal, Defendant argued that the mistrial should not have been granted due to the lack of manifest necessity. Defendant's apparent theory was as follows: in the absence of a mistrial, the six-month rule would have run on August 12, 2003; the mistrial ruling was error; therefore, the six-month rule kept running despite the mistrial, and any subsequent prosecution would be untimely.

{7} On December 4, 2003, this Court filed a notice of proposed summary disposition. We proposed to affirm on the ground that the trial court had not abused its discretion in declaring the mistrial. Rather than responding to the notice, Defendant filed a motion to withdraw the appeal. On February 5, 2004, we granted Defendant's motion, ordering mandate to issue immediately. The mandate was issued on February 20 and filed in the district court on February 23.

{8} In the meantime, the trial court proceeded with Defendant's trial. There were at least four pretrial conferences and motion hearings in late 2003 and early 2004. The trial was held on February 18, 2004. At trial, the victim and her mother testified, and the videotaped confession was played for the jury. Defendant was convicted of one of the three counts of CSPM and sentenced to eighteen years.

DISCUSSION

1. Defendant's Confession Was Voluntary

{9} Defendant first argues that the trial court violated his due process rights by admitting his videotaped confession because the confession was involuntary. A confession is involuntary only if official coercion has occurred. *State v. Munoz*, 1998–NMSC–048, ¶ 21, 126 N.M. 535, 972 P.2d 847. Official coercion occurs when "a defendant's will has been overborne and his capacity for self-determination [has been] critically impaired." *Id.* ¶ 20 (internal quotation marks and citation omitted). If, however, the confession is "the product of an essentially free and unconstrained choice by its maker," it may be used against the defendant without offending due process. *Id.* ¶ 21 (internal quotation marks and citation omitted). On appeal, we review the totality of the circumstances to determine as a threshold matter of law whether the State has proved by a preponderance of the evidence that Defendant's confession was voluntary. *Id.* ¶ 23.

{10} Defendant argues that the following facts show involuntariness: (1) the questioning occurred late at night and Defendant was tired; (2) the questioning officer repeatedly asserted that the State would have a strong case against Defendant based on physical evidence, but no physical evidence was presented at trial; and (3) the officer repeatedly assured Defendant that if he confessed, he would get treatment and a short prison term, but if he refused to confess, he would get an eighteen-year sentence. We address these issues in order, relying, as do the parties, on the contents of the videotaped confession.

{11} Defendant's first argument is that his fatigue at the time of the interview contributed to the involuntariness of his confession. Defendant notes that it was late at night, that he had gotten little sleep the night before, and that he had worked a full day. As stated, the test for voluntariness is whether official coercion occurred. While a finding that officers took advantage of a defendant's fatigue or weakened mental state

might be relevant, the fact that a defendant was tired does not in itself resolve the issue of whether a confession was involuntary. *See People v. Valdez,* 969 P.2d 208, 213 (Colo. 1998) (en banc) ("Absent evidence that the officers deprived [the defendant] of food and rest as a means of physical punishment, the fact that [the defendant] happened to be hungry and tired does not support a conclusion that his statements were involuntary."); *Commonwealth v. Fernette,* 398 Mass. 658, 500 N.E.2d 1290, 1294 (1986) (upholding trial court's finding of voluntariness where "[t]he judge found that even if the defendant were tired and hungry . . . that did not necessarily make the statement involuntary," and where the defendant's manner of speech and responses to questions on tape of confession indicated voluntariness); *United States v. DiLorenzo,* 1995 WL 366377, at *8 (S.D.N.Y. June 19, 1995) (unpublished) ("[A] claim that a defendant was exhausted or suffering from the effects of alcohol is not, in the absence of coercive law enforcement activity, sufficient to characterize his confession as involuntary.").

{12} Defendant does not argue that the interviewing officer took advantage of his fatigue. Nor does he argue that he was not able to understand the officer's questions or think rationally due to his fatigue. Our review of the confession indicates that while Defendant did tell the officer that he was tired on several occasions, at no point did he ask the officer to terminate the interview or otherwise indicate that he was concerned about proceeding due to fatigue. Moreover, Defendant's demeanor indicates that he was not too tired to proceed. At all times, he appears alert and responsive to the officer's questions. Under these circumstances, we hold that Defendant's fatigue does not contribute to a finding of involuntariness.

{13} Defendant next argues that the interviewing officer misled Defendant regarding the physical evidence in the case. His brief states, "Throughout the interview, the interviewing officer asserted that the state had a strong case against him—based on the physical evidence." We first note that while such misrepresentations, if supported by the record, are relevant to the voluntariness inquiry, they do not necessarily invalidate a confession. *See, e.g., Frazier v. Cupp,* 394 U.S. 731, 737, 739, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969) (noting that while it was relevant that police had falsely told the defendant that co-conspirator had already confessed, such circumstances were "insufficient . . . to make this otherwise voluntary confession inadmissible"); *Holland v. McGinnis,* 963 F.2d 1044, 1051 (7th Cir.1992) (explaining why official deceit about the strength of the case against a defendant does not necessarily rise to the level of official coercion).

{14} More importantly, the record does not support Defendant's contentions. Defendant does not point to any specific instances during the interview where the officer misrepresented the evidence. We have reviewed the videotape, and we note only the following four instances where the officer referred to the evidence. First, near the beginning of the interview, the officer stated,

> I have a pretty good case against you, okay? Right now in the other room here just across the hallway there's a rack in there, and it's a stainless steel rack and it's where we put items of clothing that are involved in circumstances like this, okay? And it's my opinion that I'm going to find saliva from you on that clothing.

Second, after Defendant had denied any inappropriate behavior, the officer asked, "Why then would I be in possession of panties belonging to [the victim] that I think I'm gonna find your DNA on?" Third, the officer stated that if Defendant was not going to tell the truth and admit what he had done, then he "shouldn't have given [the victim] her panties back." Finally, the officer asked the following question: "What's gonna happen when they pull your DNA from your saliva off of the inside of her panties?" He then explained how saliva can mix with bodily fluids from the victim and would be detectable on clothing.

{15} We disagree with Defendant that these comments constitute police deception about the strength of the physical evidence. The first time the officer mentioned the physical evidence, he stated only that it was his "opinion" that the evidence would inculpate Defendant. None of the officer's refer-

ences constitute affirmative statements that inculpating evidence had been found. Rather, all of the statements clearly indicate that scientific testing had not yet been performed on the clothing. Under these circumstances, we cannot say that the officer made untruthful statements about the physical evidence that would contribute to a finding that the confession was involuntary.

{16} Finally, Defendant argues that his confession was involuntary because he was repeatedly promised treatment and a short sentence if he confessed and a lengthy sentence if he did not. Early in the interview, the officer read Defendant the criminal sexual penetration (CSP) statute, *see* NMSA 1978, § 30–9–11 (2003), and the criminal sexual contact of a minor (CSCM) statute, *see* NMSA 1978, § 30–9–13 (2003). The officer then pointed out that CSP, when committed on a child under thirteen, is a first degree felony that can carry a prison sentence of eighteen years. *See* NMSA 1978, § 31–18–15 (2005) (providing a basic sentence of eighteen years for a first degree felony). The officer also pointed out that CSCM carries a mandatory minimum of three years' imprisonment. *See* § 30–9–13(B).

{17} Defendant argues that the officer implied that Defendant would get the lesser of these two sentences if he confessed. However, the statements to which Defendant refers mention either a lengthy prison sentence or treatment, not a lengthy sentence or a short sentence. We reproduce two of the statements by way of example.

> And then all of this story about "I didn't do anything" ... makes you look like a person who is not remorseful. It makes you look like a predator.... You're making a mistake. I think you need help. If you don't see that, tell me. Say, "Hey I think what I'm doing is okay," and then this discussion is over and I'll go about my business of making sure that you spend the next eighteen years in prison. I assure you that that's what I'll do, because that's what's best for everybody involved.

Then, the officer indicated that if Defendant confessed, he would get treatment.

> If you're somebody that has a problem and you want help overcoming this problem, 'cause it can be done, it can be fixed. If you're a person that wants that help, you're the only one that can tell me, "Hey, I need help[,]" and I'll get you that help. I'll make sure that you get the treatment you need so that this never happens again.

{18} After reviewing the tape in its entirety, we agree that the overarching impression left by the officer's statements was that Defendant would get treatment if he confessed. However, we disagree that the officer implied that Defendant would get treatment instead of prison time or made any inappropriate promises regarding conviction or sentencing that would render the confession involuntary.

{19} In *State v. Tindle*, 104 N.M. 195, 718 P.2d 705 (Ct.App.1986), this Court explained when a promise regarding leniency could make a confession involuntary. We began by noting that an express promise of leniency "renders a confession involuntary as a matter of law." *Id.* at 199, 718 P.2d at 709. We then held that if a promise is implied, the promise is only one factor to be considered in the totality of the circumstances analysis. *See id.*

{20} The statements made in this case are certainly not express promises of leniency. We doubt that they even rise to the level of implied promises of leniency. While the officer repeatedly stated that Defendant should confess in order to get needed treatment, Defendant has not cited, nor have we found, any point in the interview where the officer promised Defendant that he would get a lesser sentence, such as the three-year minimum sentence provided for in the CSCM statute, if he confessed. Moreover, the officer never stated that Defendant would receive treatment *instead of* prison time. In fact, at the end of the interview, Defendant acknowledged that he would be spending some time in prison. Thus, we hold that the statements regarding treatment and prison time, while marginally persuasive, do not contribute materially to a showing that Defendant's confession was involuntary. *Cf. State v. Cooper*, 1997–NMSC–058, ¶¶ 48–49, 124 N.M. 277, 949 P.2d 660 (holding confession voluntary where SWAT team offered the

defendant treatment and counseling, but offer was not contingent on confession and team was trying to diffuse potentially violent situation); *State v. Munoz*, 111 N.M. 118, 121, 802 P.2d 23, 26 (Ct.App.1990) (holding confession voluntary where officer responded to the defendant's question by stating that "in his experience, first offenders who cooperated were less likely to go to jail than other defendants").

{21} Under the totality of the circumstances analysis, we hold that the videotape shows that Defendant's confession was voluntary. Despite Defendant's fatigue and the officer's suggestion that he should confess in order to get treatment, we cannot say that Defendant's "will [was] overborne and his capacity for self-determination critically impaired." *See Munoz*, 1998-NMSC-048, ¶ 20, 126 N.M. 535, 972 P.2d 847 (internal quotation marks and citation omitted). Thus, we hold that the State proved the voluntariness of Defendant's confession by a preponderance of the evidence and the trial court did not err in admitting it.

2. Defendant's Trial Was Timely Under Rule 5-604 Because Even an Erroneous Mistrial Order Causes the Six-Month Rule to Begin Anew

{22} Defendant next argues that the trial court erred in declaring a mistrial. Consequently, Defendant argues, the six-month rule kept running despite the mistrial, and his eventual trial was untimely.

{23} Rule 5-604(B), known as the "six-month rule," dictates that a criminal trial must be commenced no more than six months after the latest of several enumerated events occurs. Subsection (B)(3) states that if a mistrial is declared, the six months begins to run on the date that the order declaring a mistrial is filed. The rule also states that if the trial has not been commenced within the relevant time limits, "the information or indictment ... shall be dismissed with prejudice." Rule 5-604(F).

{24} As explained above, Defendant was initially scheduled to be tried on August 7, 2003, and, pursuant to an extension granted by the trial court, the six-month period mandated by the rule would have expired on August 12, 2003. On August 7, 2003, following jury selection but before the jury had been sworn in, the trial court found manifest necessity and declared a mistrial, due to statements made by defense counsel.

{25} Defendant acknowledges that ordinarily, the six months starts to run anew upon the filing of an order declaring mistrial. However, Defendant argues, the trial court erred in granting the mistrial, and thus the rule did not begin to run anew. If this was the case, the six-month period expired on August 12, 2003, and Defendant's subsequent retrial on February 18, 2004, was untimely. Defendant acknowledges that he filed a notice of appeal from the order granting a mistrial, and he agrees that ordinarily when an appeal is filed, Rule 5-604(B)(4) dictates that the six-month period begins to run anew when the mandate from the appellate court is filed in the district court. Defendant argues, however, that the appeal could not have "reset" the clock because the six months had already run out on August 12, 2003, before the notice of appeal was filed. We reject Defendant's arguments.

{26} The six-month rule is a "bright-line rule, designed to assure prompt disposition of criminal cases." *State v. Jaramillo*, 2004-NMCA-041, ¶ 1, 135 N.M. 322, 88 P.3d 264 (internal quotation marks and citation omitted). However, "the rule is to be read with common sense and not to effectuate technical dismissals." *Id.*

{27} In this case, a literal reading of the rule, a common sense interpretation of it, and policy concerns all require us to hold that the mistrial operated to restart the six-month rule, making Defendant's eventual trial timely. First, a literal reading of the rule defeats Defendant's arguments. The rule states that the six months begin to run upon "the date [a mistrial] order is filed." Rule 5-604(B)(3). The rule does not make any distinction between those orders granting mistrial that are later found to be proper and those that are not. It simply states that the order commences the six-month period. Thus, a literal interpretation of the rule supports our holding.

{28} Second, common sense dictates a holding against Defendant under these circumstances. Applying the common sense approach, past cases have held against defendants despite a delay that technically violates the rule where (1) the delay inures to the benefit of the defendant or (2) the defendant acquiesces in the delay or fails to raise the issue of the six-month rule in a timely manner. *See State v. Mendoza,* 108 N.M. 446, 449–50, 774 P.2d 440, 443–44 (1989) (holding no violation where delay was for purposes of evaluating the defendant's competency, which evaluation benefitted the defendant, also taking into account failure to raise issue for nearly six months following technical expiration of the period), *modified on other grounds as recognized in County of Los Alamos v. Beckman,* 120 N.M. 596, 904 P.2d 45 (Ct.App.1995); *State v. Sanchez,* 109 N.M. 313, 316–17, 785 P.2d 224, 227–28 (1989) (holding no violation where the defendant acquiesced in delay due to plea bargain, which delay inured to his benefit); *Jaramillo,* 2004–NMCA–041, ¶ 15, 88 P.3d 264 (holding no violation of rule where the defendant acted as though the co-defendant's appeal would apply to him and stay the rule; also noting that the defendant failed to raise the issue on at least four occasions after the rule had technically run).

{29} In this case, we acknowledge that the delay caused by the mistrial did not inure to Defendant's benefit. Defendant argued vehemently against the mistrial, and we do not see how it benefitted him. However, Defendant did acquiesce in the delay and his objection to it was untimely. The record reveals that, during the approximately six months between the time Defendant now argues the rule had run and the time he objected to the delay, Defendant participated in at least four pretrial conferences and hearings without making any objection. In fact, it appears from Defendant's briefing that he did not make any objection on Rule 5–604 grounds until the morning of his trial on February 18, 2004. *See Jaramillo,* 2004–NMCA–041, ¶ 15, 88 P.3d 264 (noting that the defendant was likely not bothered by the delay because he failed to raise the issue on at least four occasions after the rule had technically run). Moreover, not only did Defendant acquiesce in the delay, he took affirmative action, in the form of appealing the mistrial order, that could have further delayed his trial. Under these circumstances, only a hypertechnical reading of the rule would dictate dismissal. *See Mendoza,* 108 N.M. at 447, 774 P.2d at 441 (rejecting this Court's "hypertechnical analysis" of the six-month rule). We decline to read the rule in such a way.

{30} Third, policy concerns require us to reject Defendant's arguments. Although the six-month rule is not to be used to effectuate technical dismissals, one of its benefits is that it is a bright-line rule that is easily applied. *See State v. Cardenas,* 2003–NMCA–051, ¶ 12, 133 N.M. 516, 64 P.3d 543. Were we to accept Defendant's argument, we could be required to evaluate every order declaring a mistrial to determine whether it was properly granted. If it was not, we would have to order dismissal of charges if the six-month rule had expired in the meantime. Such a scenario would be sure to cause additional delay during the appellate process and would defeat the six-month rule's bright-line nature and ease of application. For all of these reasons, we reject Defendant's argument that an improperly granted mistrial does not restart the six-month period under Rule 5–604.

3. The Trial Court Had Jurisdiction to Try Defendant Despite His Pending Appeal of the Mistrial Order

{31} Finally, Defendant argues that the trial court lacked jurisdiction to try him because, at the time of trial, Defendant had appealed the mistrial order, but mandate had not yet been issued by this Court. As explained above, Defendant filed a notice of appeal in connection with the order declaring a mistrial on September 5, 2003. On September 16, 2003, the trial court entered an order granting free process on appeal and appointing appellate counsel. On December 4, 2003, this Court filed a notice of proposed summary disposition. Defendant filed a motion to withdraw the appeal, and on February 5, 2003, we granted Defendant's motion, ordering mandate to issue immediately. The mandate was issued on February 20 and filed in the district court on February 23. In the

meantime, Defendant's trial was held and the jury convicted him on February 18, 2004. Although the record clearly shows that Defendant's trial was held before the mandate was formally issued by this Court or filed in the district court, we reject Defendant's arguments.

{32} Defendant argues that because the appeal of the order declaring mistrial was pending in this Court at the time of his trial, jurisdiction was vested in this Court and the district court lacked jurisdiction to try him. Defendant does not cite any cases for this proposition, citing instead an A.L.R. annotation. *See* A. Petry, Annotation, *Jurisdiction to Proceed with Trial of Criminal Case Pending Appeal from Order Overruling Demurrer, Motion to Quash, or Similar Motion for Dismissal,* 89 A.L.R.2d 1236 (1963). But that annotation, by its express terms, applies only to appeals that are properly before the appellate court. *Id.* n. 1. A number of civil cases in our state have set forth this same general rule. *See, e.g., Kelly Inn No. 102, Inc. v. Kapnison,* 113 N.M. 231, 241, 824 P.2d 1033, 1043 (1992) (noting that the filing of a proper notice of appeal divests the trial court of jurisdiction and transfers jurisdiction to the appellate court), *limited on other grounds by Trujillo v. Hilton of Santa Fe,* 115 N.M. 397, 851 P.2d 1064 (1993). We assume that the rule would apply in this case. *See State v. Clemons,* 83 N.M. 674, 675, 496 P.2d 167, 168 (Ct.App.1972) (applying rule in criminal case).

{33} With a few exceptions, this Court has jurisdiction over an appeal only where there is a final judgment or where an appellant has properly filed an application for interlocutory appeal. *See generally In re Larry K.,* 1999–NMCA–078, 127 N.M. 461, 982 P.2d 1060 (setting forth this general rule and noting the few, narrow exceptions to it). Defendant has not argued that any exception to the final judgment/interlocutory appeal rule applies here. Moreover, our cases make clear that, under the New Mexico Constitution, this Court has jurisdiction only "as provided by law." *State v. Griego,* 2004–NMCA–107, ¶ 3, 136 N.M. 272, 96 P.3d 1192 (internal quotation marks and citations omitted). Thus, this Court had jurisdiction over Defendant's prior appeal (thus presumably divesting the trial court of jurisdiction) only if (1) the order declaring mistrial can be characterized as a final judgment or (2) Defendant properly requested, and this Court properly granted, interlocutory review.

{34} Defendant implicitly acknowledges that the order declaring mistrial was not a final order. The general rule is that "an order or judgment is not considered final unless it resolves all of the factual and legal issues before the court and completely disposes of the case." *State v. Heinsen,* 2005–NMSC–035, ¶ 14, 138 N.M. 441, 121 P.3d 1040. Unlike orders that match this description, an order declaring mistrial simply terminates the trial before a verdict is reached and does not finally determine any issues in the case. This is especially true where, as here, the order expressly reserves the State's right to retry the defendant. Thus, we hold that the order declaring mistrial was not a final order that Defendant could appeal as a matter of right. *See State v. Apodaca,* 1997–NMCA–051, ¶¶ 7–17, 123 N.M. 372, 940 P.2d 478 (implying but not deciding that an order denying to dismiss a charge on double jeopardy grounds following mistrial was not a final judgment appealable of right, but deciding that the defendant nonetheless had a constitutional right to an immediate appeal); *see also Larry K.,* 1999–NMCA–078, ¶ 13, 127 N.M. 461, 982 P.2d 1060 (characterizing *Apodaca* as "permit[ting] appeal of an otherwise non-final order").

{35} Where a non-final order is improperly appealed, the trial court is not divested of jurisdiction. *In re Byrnes,* 2002–NMCA–102, ¶ 39, 132 N.M. 718, 54 P.3d 996 ("An appeal from a manifestly non-final order cannot divest a court of jurisdiction. Otherwise a litigant could temporarily deprive a court of jurisdiction at any and every critical juncture." (internal quotation marks and citations omitted)). Thus, Defendant's notice of appeal did not divest the trial court of jurisdiction under the general rule as set forth in *Kelly Inn* and *Clemons.*

{36} Because a mistrial order is not a final order, Defendant argues that we should treat

his notice of appeal and/or docketing statement in the prior appeal as an application for interlocutory review. Defendant notes that under Rule 12–203(E) NMRA, "[t]he granting of an application [for interlocutory appeal] shall automatically stay the proceedings in the district court unless otherwise ordered by the appellate court." We hold that Defendant did not file a proper application for interlocutory review and that this Court did not grant such an application. Thus, we need not address whether the "stay" mandated by Rule 12–203 would deprive the trial court of jurisdiction in the same way that we have assumed a proper appeal of a final order would under the *Kelly Inn* rule.

{37} We reject Defendant's request to treat his notice of appeal as a request for interlocutory review because we note at least two procedural requirements for interlocutory review that were not complied with in this case. First, the application must be filed in this Court, and it must be filed within ten days of the filing of the contested interlocutory order of the district court. NMSA 1978, § 39–3–3(A)(3) (1972). We note that the applicable Supreme Court rule appears to allow fifteen days in which to file an application. *See* Rule 12–203(A). However, under the circumstances of this case, the statute trumps the rule and Defendant would have been required to file his application within ten days of the order declaring mistrial. *See State v. Alvarez,* 113 N.M. 82, 85, 823 P.2d 324, 327 (Ct.App.1991) (holding that the State had to file its appeal that was not constitutionally as of right within statutorily mandated ten days because Supreme Court rule that allowed thirty days in which to appeal only applied to appeals as of right, stating that "[t]he [S]upreme [C]ourt cannot create its own appellate jurisdiction for an extra twenty days by virtue of [a rule]"). Thus, the notice of appeal in this case would have been untimely as an application for interlocutory review because the order declaring mistrial was filed on August 21, 2003, and Defendant's notice of appeal was filed on September 5, 2003, and was filed in the district court, not this Court.

{38} Second, the district court must certify the order for interlocutory review by stating that "the order or decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from such order or decision may materially advance the ultimate termination of the litigation." Section 39–3–3(A)(3). The order in this case contains no such language. Defendant argues that by entering an order granting free process on appeal and appointing appellate counsel, the trial court effectively certified its decision for interlocutory review. We disagree. The content required by the statute is clear. We decline to hold that all orders by the trial court that acknowledge that an appeal has been filed operate to certify an issue for interlocutory review. *See Sys. Tech., Inc. v. Hall,* 2004–NMCA–130, ¶ 10, 136 N.M. 548, 102 P.3d 107 (referring to the language of the trial court that authorizes interlocutory appeal as "required"); *Romero v. Pueblo of Sandia/Sandia Casino,* 2003–NMCA–137, ¶ 5, 134 N.M. 553, 80 P.3d 490 (referring to such language as "requisite"); *Ford v. N.M. Dep't of Pub. Safety,* 119 N.M. 405, 408, 891 P.2d 546, 549 (Ct.App.1994) (referring to such language as "required"); *see also* Comment, *New Mexico's Analogue to 28 U.S.C. § 1292(b): Interlocutory Appeals Come to the State Courts,* 2 N.M. L.Rev. 113, 116 (1972) (noting that "[f]ederal courts also have required that the certificate contain an actual statement that the question meets the criteria imposed by the statute"). We in New Mexico may in fact allow more flexibility than the federal courts, but we do require at least some statement by the trial court that it intends to certify the question.

{39} Relying on *State v. Garcia,* 91 N.M. 131, 571 P.2d 123 (Ct.App.1977), Defendant argues that by calendaring his appeal and issuing a notice of proposed summary disposition, this Court treated his notice of appeal and docketing statement as an application for interlocutory appeal. However, in *Garcia,* we denied the application. It was unclear from the opinion whether we denied it on the merits or because the appeal was not properly before us. Thus, that case is not authority for us to say that Defendant's prior, improper appeal was properly before us. *See Candelaria v. Middle Rio Grande Conservancy Dist.,* 107 N.M. 579, 581, 761 P.2d 457,

459 (Ct.App.1988) (holding that interlocutory appeals are permitted only where statutory procedures have been complied with). Thus, because Defendant's notice of appeal and docketing statement would have been untimely as applications for interlocutory review, we lacked the authority to grant interlocutory review.

{40} Finally, Defendant argues that by calendaring his appeal and filing a notice of proposed summary disposition, the Court took jurisdiction of his case, properly or not, and thus the trial court lacked jurisdiction to try him. Defendant argues that under a theory of "apparent authority," the "orderly administration of justice" required the trial court to stay its hand while this Court decided the appeal. We disagree.

{41} The orderly administration of justice would not require a trial court to delay a trial where the defendant did not even suggest to it a lack of jurisdiction and where the procedural posture at the time the trial took place was such that this Court's jurisdiction, if any, was concluded for all practical purposes. Defendant had moved to dismiss his appeal. We granted the motion and ordered that mandate be issued immediately. There was nothing further for this Court to do except formally issue the mandate. As in *Saudi v. Brieven*, 176 S.W.3d 108, 113–15, 117 (Tex. App.2004), we think that the orderly administration of justice would counsel against nullifying trial court proceedings that occurred at a time when this Court's proceedings were effectively at an end.

{42} Thus, because jurisdiction was not properly in this Court and, even if it was, this Court's jurisdiction was for all practical purposes concluded, we hold that the trial court had jurisdiction when it tried Defendant.

CONCLUSION

{43} We affirm.

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

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

2006-NMCA-055

134 P.3d 131

Dominic ROMERO, Worker–Appellant,

v.

CITY OF SANTA FE, Self–Insured, Employer–Appellee.

No. 25,573.

Court of Appeals of New Mexico.

March 28, 2006.

Law Offices of Jeffrey C. Brown, Jeffrey C. Brown, Albuquerque, NM, for Appellant.

French & Associates, P.C., Katherine E. Tourek, Albuquerque, NM, for Appellee.

OPINION

PICKARD, Judge.

{1} In this case, we examine the requirement in NMSA 1978, § 52–1–24(B) (1990), that a worker must suffer a "psychologically traumatic event" in order to receive workers' compensation benefits for a work-related mental illness that is unaccompanied by physical injury. Because the worker in this case did not suffer a psychologically traumatic event within the meaning of the statute, we affirm the order of the workers' compensation judge (WCJ) denying compensation.

FACTS AND PROCEEDINGS BELOW

{2} Dominic Romero (Worker) worked as a swimming pool manager for the City of Santa Fe. As part of his duties, Worker was required to perform cleaning and maintenance tasks at one of the City's pools, which was an outdoor pool. Worker had com-

plained to his supervisors on several occasions about ongoing problems with pigeons in the pool area and on the roof of the building adjoining the pool. Worker testified that on two occasions in March 2003, he went up onto the roof to clean up pigeon detritus. Worker estimated that he cleaned up about 160 pounds of pigeon feces and carcasses. Worker testified that he would get headaches after dealing with the pigeon matter. Subsequently, the City hired an independent company to clean up the roof. The company removed approximately one and one-half tons of pigeon matter from the roof.

{3} On June 5, 2003, Worker became ill. He began to experience photophobia, nausea, disturbing dreams, and body tremors. Worker saw several doctors and underwent extensive testing, but none of the testing revealed any non-psychological condition that could be causing his symptoms. Worker also saw a psychiatrist, Dr. Davis, who stated that Worker met most of the criteria for post-traumatic stress disorder (PTSD). Davis was initially skeptical that Worker suffered from PTSD, because a diagnosis of PTSD generally requires that the patient's symptoms are precipitated by an event that is objectively life threatening. Davis initially felt that Worker's experiences cleaning up pigeon detritus did not qualify as an objectively life-threatening event that would cause PTSD. Contrary to Worker's claim that Davis diagnosed him with PTSD, Davis did not clearly state an opinion on whether Worker suffered from PTSD. Davis stated that if he had to provide an alternate diagnosis, he would say that Worker was suffering from "major depressive disorder, generalized anxiety disorder and panic disorder, and adjustment disorder with depression and behavioral features." Davis further opined that having to clean up large amounts of pigeon detritus was outside of the usual experiences of most pool workers and doing so would evoke symptoms of distress in other workers.

{4} Worker brought a claim for compensation under Section 52–1–24(B), which states in full:

> "primary mental impairment" means a mental illness arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances, but is not an event in connection with disciplinary, corrective or job evaluation action or cessation of the worker's employment[.]

{5} After a hearing, the WCJ denied compensation. The WCJ found that Worker had been in an "accident" on June 5, 2003, the date on which Worker first began to suffer significant symptoms. The WCJ also made the following findings:

> 23. As a direct and proximate result of the accident of June 5, 2003, to a reasonable medical probability, Worker suffered a mental impairment. The nature of the injury fits neither primary, nor secondary mental impairment. There was no physical injury, and no psychologically traumatic event outside of the Worker's usual experience.
>
> 24. The events of June 5, 2003, would not have evoked distress in a worker in similar circumstances.

{6} The WCJ entered the following conclusions:

> 2. [Worker's] accident of June 5, 2003, arose out of employment with Employer.
>
> 3. The accident of June 5, 2003, was in the course of employment with Employer.
>
> . . . .
>
> 6. Worker's injuries are purely psychological, but were *not* the result of a traumatic event so as to qualify as a primary mental impairment. *Jensen v. New Mexico State Police*, 109 N.M. 626[, 788 P.2d 382] (Ct.App.1990).

{7} Worker appeals from the order denying compensation. Worker advances three arguments on appeal: (1) the WCJ's finding that Worker did not suffer a psychologically traumatic event that was outside of his usual experiences and would evoke symptoms of distress in similarly situated workers is not

supported by substantial evidence; (2) the WCJ misinterpreted the law in determining that, in order for an injury to be compensable, the psychologically traumatic event must be catastrophic in nature; and (3) if the statute does require the traumatic event to be catastrophic in nature, it violates the equal protection clause of the New Mexico Constitution by discriminating against workers with mental disabilities. We reject all of Worker's arguments.

DISCUSSION

1. The WCJ Did Not Err in Determining That Worker Did Not Suffer a Psychologically Traumatic Event Under Section 52–1–24(B)

{8} Worker contends that (1) the WCJ erred in requiring Worker to show a "catastrophic" event in order to satisfy the "psychologically traumatic event" requirement of Section 52–1–24(B) and (2) the WCJ's decision that Worker did not suffer any event that would meet the requirements of the statute was not supported by substantial evidence.

{9} Worker's real disagreement is with the WCJ's determination that Worker did not suffer a psychologically traumatic event within the meaning of the statute. This is a conclusion of law and not a finding of fact that we would review for substantial evidence. Indeed, the WCJ did not make any underlying factual findings that Worker disputes. Accordingly, we will address Worker's arguments in the following manner. We will first set forth the requirements of the statute as established in prior cases. In so doing, we will address Worker's contention that the statute does not require a "catastrophic" event. We will then address the WCJ's determination that Worker did not experience a psychologically traumatic event within the meaning of the statute. Because the WCJ did not make underlying findings of historical fact to support his ruling, we will examine the record to ascertain the historical facts on which the WCJ based his decision, in order to ensure that there was substantial evidence in the record that would support the WCJ's decision. *See State v. Lopez*, 2005–NMSC–018, ¶ 22, 138 N.M. 9, 116 P.3d 80 (noting that where trial court has not entered specific findings, "we must draw from the record to derive findings based on reasonable facts and inferences and determine whether those facts and inferences support the conclusion reached by the court" (internal quotation marks and citation omitted)). Finally, we will address whether those facts show that Worker did not suffer a psychologically traumatic event within the meaning of the statute. This step requires us to review the WCJ's application of the law to the facts, making sure that the WCJ applied the correct law. This is a task we perform de novo. *See Tom Growney Equip. Co. v. Jouett*, 2005–NMSC–015, ¶ 13, 137 N.M. 497, 113 P.3d 320 (reviewing WCJ's application of law to facts de novo).

{10} In order to demonstrate a psychologically traumatic event under Section 52–1–24(B), a worker must show three things: (1) that a specific and identifiable psychologically traumatic event has occurred, (2) that the event is "generally outside of a worker's usual experience," and (3) that the event "would evoke significant symptoms of distress in a worker in similar circumstances." *Jensen*, 109 N.M. at 628, 788 P.2d at 384 (internal quotation marks, citation, and emphasis omitted). The first element, a psychologically traumatic event, is a "threshold criterion." *Id.* If no psychologically traumatic event is shown, a court need not analyze the second and third elements. *Id.* at 629, 788 P.2d at 385. In this case, we conclude that Worker did not suffer a psychologically traumatic event within the meaning of the statute. Thus, we do not reach the other elements.

{11} *Jensen* was the first case to examine what constitutes a psychologically traumatic event. In *Jensen*, the worker was a police dispatcher. *Id.* at 627, 788 P.2d at 383. Due to other employees quitting, the worker's facility experienced understaffing. *Id.* The dispatchers were required to work eight-hour shifts alone and often could not take any breaks. *Id.* The worker filed a claim seeking compensation due to an alleged primary mental impairment, which he contended was brought on by the understaffing. *Id.* Although this Court noted that being a dispatcher was considered a stressful job even

under normal circumstances, *id.*, we affirmed the WCJ, holding that understaffing did not qualify as a psychologically traumatic event under Section 52–1–24(B). *Jensen*, 109 N.M. at 629, 788 P.2d at 385.

{12} We began our analysis by noting the important changes that had recently been made to New Mexico workers' compensation law involving mental disabilities. We first examined *Candelaria v. General Electric Co.*, 105 N.M. 167, 730 P.2d 470 (Ct.App.1986), *superceded by statute as stated in Breen v. Carlsbad Mun. Schs.*, 2005–NMSC–028, ¶ 33, 138 N.M. 331, 120 P.3d 413, in which we had held that a mental disability accruing gradually and resulting from stress caused by a worker's "day-to-day activities" was compensable under the Workers' Compensation Act. *Jensen*, 109 N.M. at 628, 788 P.2d at 384. We noted that in the legislative session immediately following the filing of *Candelaria*, our Legislature had amended the Act to include Section 52–1–24(B). *Jensen*, 109 N.M. at 628, 788 P.2d at 384. We implied that Section 52–1–24(B) was intended to supercede *Candelaria*. *Jensen*, 109 N.M. at 629, 788 P.2d at 385.

{13} We then proceeded to examine what type of event would satisfy Section 52–1–24(B). We noted that the language of the statute was substantially similar to the language used in the discussion of PTSD found in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM). *Jensen*, 109 N.M. at 629, 788 P.2d at 385. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed.2000). We noted that events described by the DSM as producing PTSD included rape, assault, military combat, floods, earthquakes, car accidents, airplane crashes, large fires, bombing, torture, and death camps. *Jensen*, 109 N.M. at 629, 788 P.2d at 385. We then held as follows:

> Section 52–1–24(B) reflects a legislative intent to limit primary impairment to sudden, emotion-provoking events of a catastrophic nature as described [in the DSM description of PTSD] as opposed to gradual, progressive stress-producing causes such as occurred in *Candelaria* (harassment by supervisor over period of time).

Id. Applying this standard, we concluded that "[t]he event that precipitated worker's symptoms, understaffing, does not meet the definition of a 'psychologically traumatic event' under the facts of this appeal." *Id.*

{14} The *Jensen* rule has become well established, and numerous subsequent cases have quoted or referred to the above-mentioned holding, either in dicta, or in support of their substantive holdings. *See Chavez v. Mountain States Constructors*, 122 N.M. 579, 586, 929 P.2d 971, 978 (1996) (citing *Jensen* and reciting the list of events from the DSM in examining whether a rollover accident involving a dump truck satisfied the "would evoke significant symptoms of distress in a worker in similar circumstances" element of Section 52–1–24(B)); *Breen*, 2005–NMSC–028, ¶ 40, 138 N.M. 331, 120 P.3d 413 (citing *Jensen* in discussing the legislative goals behind the proof requirements of Section 52–1–24(B)); *Coates v. Wal–Mart Stores, Inc.*, 1999–NMSC–013, ¶¶ 32–34, 127 N.M. 47, 976 P.2d 999 (quoting above-mentioned portion of *Jensen* in holding that tort claims were not barred by exclusivity provisions of the Workers' Compensation Act because mental distress caused by ongoing sexual harassment was not compensable under the Act); *Collado v. City of Albuquerque*, 120 N.M. 608, 613–14, 904 P.2d 57, 62–63 (Ct.App.1995) (repeating the list of events from the DSM and citing *Jensen* for the proposition that Section 52–1–24(B) uses language similar to that found in the DSM); *Douglass v. State Regulation & Licensing Dep't*, 112 N.M. 183, 186, 812 P.2d 1331, 1334 (Ct.App.1991) (citing relevant portion of *Jensen* for the proposition that the Legislature intended to "make gradual, stress-caused mental injuries non-compensable under the New Act" (emphasis omitted)); *Holford v. Regents of Univ. of Cal.*, 110 N.M. 366, 368, 796 P.2d 259, 261 (Ct.App.1990) (quoting *Jensen* in support of holding that work environment allegedly leading to "derangement which resulted in . . . suicide" was not a sufficient event under Section 52–1–24(B)).

{15} It is clear from *Jensen* and the subsequent cases that in order to prevail on a Section 52–1–24(B) claim, a worker must allege a specific, identifiable, and significant

traumatic event. Work-related mental injuries are not compensable under the Act where (1) they are caused by a specific and identifiable event that is arguably traumatic but is not significant enough to qualify as a psychologically traumatic event under the statute and our cases interpreting it or (2) they accrue gradually over time as a result of ongoing, distressing work-related experiences. *See Breen,* 2005–NMSC–028, ¶ 40, 138 N.M. 331, 120 P.3d 413 (noting that the definition of primary mental impairment is "purposefully narrow in scope so that it covers only mental illnesses that arise from a specific and definite occurrence, and not mental illnesses that develop gradually over time").

{16} Worker appears to argue that the WCJ's decision was based on category (1) above, i.e., Worker believes that the WCJ determined that Worker's experiences may have been "traumatic events" in the colloquial sense, but were not traumatic enough, or "catastrophic" enough, to qualify as predicate events under Section 52–1–24(B). Worker further argues that the statute itself does not require a "catastrophic" event and that *Jensen* wrongly imposed that requirement. Worker points out that the other proof requirements in the statute already guard against recovery for mental illnesses caused by mundane events.

{17} Worker may be correct that *Jensen* may have overstated how severe an event must be to satisfy Section 52–1–24(B) and may have overemphasized the importance of the list of traumatic events from the DSM. Specifically, we note that *Jensen* was concerned with gradually accruing mental problems caused by ongoing stress. *Jensen,* 109 N.M. at 629, 788 P.2d at 385. Thus, the *Jensen* Court was not required to decide "how traumatic" a traumatic event must be in order to satisfy the statute. While the Legislature did use language "markedly similar to the medical definition of PTSD," *Collado,* 120 N.M. at 613–14, 904 P.2d at 62–63, we doubt that the Legislature intended to limit recovery to those workers suffering from mental illnesses caused by an event that is scientifically proven to cause PTSD. Certainly our courts have not intended the DSM list to be exclusive. *See Chavez,* 122 N.M. at 586, 929 P.2d at 978 (noting that even if the DSM list did not include severe car accidents, "it is self-evident that for almost any person ... rolling a loaded dump truck would be traumatic").

{18} However, our cases clearly require the traumatic event to be "catastrophic" in nature, and Worker has not persuaded us that those cases were wrongly decided. In enacting Section 52–1–24(B), the Legislature clearly intended to supercede this Court's holding in *Candelaria* and allow for compensation only in cases where a significant traumatic event has occurred. The use of the word "catastrophic" in past cases is simply a way of defining the category of cases in which the Legislature intended to allow compensation. It is not a separate requirement that our courts have imposed.

{19} In any event, we need not further address our concerns regarding the breadth of the holding in *Jensen,* because we are confident that the WCJ's decision was based on category (2) above. In other words, we believe the WCJ found that Worker's illness was caused by his ongoing, distressing experiences of having to clean up pigeon matter. We do not believe the WCJ found that Worker suffered a specific and identifiable, but not sufficiently catastrophic, event. We base this interpretation of the order on two factors. First, the WCJ found that Worker's illness was "*not* the result of a traumatic event." We do not think the WCJ would have made this statement had he in fact meant that Worker's illness was caused by a traumatic event, but that the event was not traumatic enough, or was not "catastrophic" enough, to satisfy the statute. Second, we note the following finding, which was requested by Worker and rejected by the WCJ:

> 26. If not for the dicta in *Jensen* delineating what that Court considered to be a psychologically traumatic event, this [c]ourt would have found that Worker's accidental injury and resulting psychological illness was compensable.

By "the dicta in *Jensen,*" Worker was clearly referring to the section that quotes the DSM, and not to *Jensen's* central holding that inju-

ries caused by "gradual, progressive stress-producing causes" are not compensable. *See Jensen,* 109 N.M. at 629, 788 P.2d at 385.

{20} When a party bearing the burden of proof requests a finding on a particular issue and that finding is rejected, we view the rejection as a rejection of the position advocated for in the requested finding. *Gonzales v. Lopez,* 2002–NMCA–086, ¶ 27, 132 N.M. 558, 52 P.3d 418. Thus, it is clear to us that the WCJ was rejecting Worker's argument that Worker should be found ineligible for compensation only because the events he experienced were not traumatic enough. Rather, we think the WCJ found this case to be factually analogous to *Jensen,* because Worker's illness was caused by ongoing work-related stress, rather than by one or more specific and identifiable traumatic events. We agree with the WCJ.

{21} As we have stated, the WCJ did not make factual findings regarding the relevant historical facts in this case. Rather, he merely entered a conclusion of law stating that Worker did not suffer a traumatic event under *Jensen.* Thus, we must examine the record to determine whether the evidence presented below supports the conclusion that Worker's experiences were analogous to those in *Jensen. See Lopez,* 2005–NMSC–018, ¶ 22, 138 N.M. 9, 116 P.3d 80 (drawing from the record to establish historical facts where the trial court did not enter specific findings). We believe that Worker's own testimony and his requested findings of fact were sufficient to establish that his illness was caused by the type of ongoing, stress-producing causes referred to in *Jensen.* We proceed to briefly outline his testimony and requested findings.

{22} In March of 2003, Worker was assigned to prepare the outdoor pool for opening in the summertime. Worker testified that he spent a significant amount of time during the spring of 2003 cleaning the matting in the building adjacent to the pool because the roof had leaked and the matting was soiled with pigeon feces. Worker also testified that there was pigeon feces in the pool and in the deck area. He stated that he would often have to clean out the pool strainers because they would become clogged with feces, carcasses, and feathers. Worker estimated that during April and May, he spent one to two hours a day cleaning up pigeon feces on the matting and in the area surrounding the pool. Worker testified that he would experience mild headaches after dealing with the pigeon matter.

{23} Worker testified that he went up on the roof and removed pigeon matter on two occasions. He stated that he used 45–gallon garbage bags, which he would fill approximately half to three-quarters of the way full. Worker's exhibits establish that he removed two bags of pigeon matter on each of the two occasions when he worked on the roof. Worker stated that on these two occasions, he "didn't even dent" the amount of pigeon detritus on the roof. Worker stated that the odor on the roof was "horrible" and that it made him nauseous and gave him headaches.

{24} Worker requested the following findings of fact:

> 1. Worker testified that from the time that he started working at the [outdoor pool] there was a problem with pigeons and pigeon droppings.
>
> . . . .
>
> 4. Worker testified credibly that before June 5, 2003, he and other people suffered from headaches and nausea when they worked at the pool. . . .
>
> . . . .
>
> 6. Worker's Trial Exhibits . . . give ample evidence to support Worker's testimony that the [pool] area, especially the roof, was inundated with pigeon fecal matter and produced foul odors.
>
> 7. Worker testified that he was asked to clean up the pigeon feces and carcasses from the [pool] roof. . . .
>
> . . . .
>
> 19. Worker has a psychological condition caused by his exposure to the pigeon feces and detriment [sic] at his place of employment.

{25} Worker's testimony and his requested findings do not indicate that Worker suffered a psychologically traumatic event. In fact, we cannot say that Worker has alleged any "event" at all. We note that while Worker's

appellate brief puts some emphasis on the occasions when Worker cleaned up pigeon matter on the roof, his requested findings of fact do not make significant mention of those occasions. The requested findings state only that he "was asked to clean up the pigeon feces and carcasses from the [pool] roof." The requested findings do not mention any details about those occasions, such as how many times he worked on the roof, the relevant dates, or how much pigeon matter he removed. On balance, Worker's statements indicate an ongoing problem with pigeon detritus, not one or more specific and identifiable distressing events. *Jensen* speaks to precisely such an ongoing pattern of occurrences that are relatively insignificant when viewed in isolation but combine to distress a worker. Thus, we hold that the WCJ did not err in ruling that Worker did not suffer a psychologically traumatic event under Section 52–1–24(B).

{26} Before turning to Worker's constitutional argument, we briefly address two additional arguments he makes with regard to the WCJ's finding that he did not suffer a psychologically traumatic event. First, Worker appears to argue as follows: Worker's expert witness, a psychiatrist, testified that Worker suffered a "traumatic event"; this testimony was uncontroverted; thus the WCJ was required to accept the testimony. Worker appears to be referring to the "uncontroverted medical evidence rule," which dictates that where expert medical testimony regarding the "causal connection between disability and accident" in a workers' compensation case is uncontroverted, that testimony is binding on the trier of fact. *Hernandez v. Mead Foods, Inc.,* 104 N.M. 67, 70, 716 P.2d 645, 648 (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). Worker's argument is unavailing. The uncontroverted medical evidence rule applies to issues of causation, and the question of whether Worker experienced a traumatic event is not a causation issue. Moreover, the term "traumatic event" is a term of art with a specific meaning under the Act. Thus, whether Worker experienced a "traumatic event" is a question of law that is not subject to conclusive proof by expert testimony. *Cf. State v. Elliott,* 2001–NMCA–108, ¶ 22, 131 N.M. 390, 37 P.3d 107 ("[O]pinion testimony that seeks to state a legal conclusion is inadmissible."). We reject Worker's argument with regard to the expert testimony.

{27} Second, Worker argues that he should prevail based on one of this Court's unpublished memorandum opinions, *Carrasco v. Carlsbad Mun. Schs.,* Nos. 20,833/20,832 (May 29, 2001). As Worker acknowledges, memorandum opinions have no precedential value and should not be cited. Rule 12–405(C) NMRA ("An order, decision or memorandum opinion ... shall not be published nor shall it be cited as precedent in any court."). As we have made clear in the past,

> Unpublished decisions are not meant to be used as precedent; they are written solely for the benefit of the parties. Because the parties know the facts of the case, a memorandum opinion may not describe fully the critical facts upon which the case was decided. When the facts of a case are not fully known, it is not possible to know whether it can be accurately distinguished from similar cases.

Winrock Inn Co. v. Prudential Ins. Co., 122 N.M. 562, 569, 928 P.2d 947, 954 (Ct.App. 1996) (internal citations omitted). We agree that on the surface, the facts of *Carrasco* bear some similarities to the facts of this case. We also note some distinguishing factors between the two cases. However, in light of the above policies, we decline to address the facts of *Carrasco.*

2. Section 52–1–24(B) Does Not Violate Equal Protection

{28} Finally, Worker argues that if Section 52–1–24(B) is interpreted to require a showing of a "catastrophic event," that requirement violates equal protection under the New Mexico Constitution. Worker argues that requiring a showing of a catastrophic event discriminates against workers with mental disabilities because workers with physical disabilities are not required to make such a showing. Worker also argues that, if a catastrophic event is required, the statute violates equal protection by creating two

classes of workers who have mental disabilities—those who have suffered a catastrophic event and those who have not. We review challenges based on equal protection de novo. *See Pinnell v. Bd. of County Comm'rs*, 1999-NMCA-074, ¶ 17, 127 N.M. 452, 982 P.2d 503 (reviewing equal protection challenge de novo).

{29} As we have already held, the requirement that a worker must demonstrate a catastrophic event in order to prevail on a Section 52-1-24(B) claim is not a new or additional requirement that our courts have imposed. Rather, it is an attempt by our courts to define and clarify what the Legislature has already required. As such, the requirement does not merit a different analysis from the analysis that would be performed with regard to the other proof requirements in the statute. Those proof requirements have already been challenged and held to be constitutional, a decision that was reaffirmed by our Supreme Court just last year.

{30} In *Breen*, 2005-NMSC-028, 138 N.M. 331, 120 P.3d 413, our Supreme Court conducted an equal protection analysis of NMSA 1978, § 52-1-41(B) (1999), of the Worker's Compensation Act, which limited compensation for workers with mental disabilities to 100 weeks. *Breen*, 2005-NMSC-028, ¶ 1, 138 N.M. 331, 120 P.3d 413. Because the statute made a legislative classification on the basis of mental disability, the Court applied intermediate scrutiny. *Id.* ¶ 28. The Court held that the 100-week limitation violated the equal protection clause of the New Mexico Constitution because it was not "substantially related to furthering the purposes and goals of the Act." *Id.* ¶ 50.

{31} As part of its analysis, the Court examined Section 52-1-24(B). *Breen*, 2005-NMSC-028, ¶ 40, 138 N.M. 331, 120 P.3d 413. The Court determined that the proof requirements of Section 52-1-24(B) represented "a valid way to prevent fraudulent claims from being compensated in the first place." *Breen*, 2005-NMSC-028, ¶ 40, 138 N.M. 331, 120 P.3d 413. The Court then cited *Jensen*, noting that the definition of primary mental impairment was "purposefully narrow in scope." *Breen*, 2005-NMSC-028, ¶ 40, 138 N.M. 331, 120 P.3d 413. The Court stated that the elements of the statute constituted "permissible proof requirement[s]." *Id.* The Court followed this point with a cite to *Holford*, 110 N.M. 366, 796 P.2d 259, in which this Court had held that the proof requirements of Section 52-1-24(B) did not violate equal protection. *Breen*, 2005-NMSC-028, ¶ 40, 138 N.M. 331, 120 P.3d 413.

{32} We acknowledge that *Holford* applied rational basis review, rather than intermediate scrutiny. *See Holford*, 110 N.M. at 368, 796 P.2d at 261 ("[W]e find that the limitations on proof of primary mental impairment in Section 52-1-24(B) are not arbitrary and unreasonable, but are rationally related to a legitimate legislative purpose."). We agree with Worker that Section 52-1-24(B) does make a legislative classification based on mental disability—it imposes a proof requirement on workers with mental disabilities that is not imposed on workers with physical disabilities. *See* NMSA 1978, § 52-1-28 (1987) (setting forth the proof requirements for all workers' compensation claims). We also acknowledge that, after *Breen*, legislative classifications based on mental disability should receive intermediate scrutiny. 2005-NMSC-028, ¶ 28, 138 N.M. 331, 120 P.3d 413 ("Based on our development of New Mexico's Equal Protection Clause, it is appropriate to apply intermediate scrutiny to classifications based on mental disability because such persons are a sensitive class."). Finally, we acknowledge that the *Breen* Court did not directly examine the constitutionality of Section 52-1-24(B). *See Breen*, 2005-NMSC-028, ¶¶ 40-44, 138 N.M. 331, 120 P.3d 413 (examining the proof requirements of Section 52-1-24(B) in order to demonstrate that there are less restrictive means of preventing fraudulent claims than placing a cap of 100 weeks on all claims of mental disability).

{33} Despite all these factors, however, we are constrained to hold that the proof requirements of Section 52-1-24(B), including the clarification that traumatic events must be catastrophic in nature, do not violate equal protection. It would simply be inappropriate for this Court to strike the statute down, or even to examine its constitutionality, when our Supreme Court clearly stated,

just a few months ago, that the proof requirements were "valid" and "permissible." *See State ex rel. Martinez v. City of Las Vegas,* 2004–NMSC–009, ¶¶ 18–22, 135 N.M. 375, 89 P.3d 47 (disapproving of this Court's decision that we could ignore Supreme Court precedent if we concluded that the Supreme Court would reverse itself if given the opportunity, and holding that this Court is bound by Supreme Court precedent, even if a case is old, has not been reaffirmed, and has been subject to scholarly criticism). Under these circumstances, we reject both of Worker's equal protection arguments, and we hold that Section 52–1–24(B) does not violate the equal protection clause of the New Mexico Constitution.

CONCLUSION

{34} The judgment of the WCJ is affirmed.

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

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

2006-NMSC-018
134 P.3d 737

STATE of New Mexico, Plaintiff-Petitioner,

v.

Conrado RODRIGUEZ, Defendant-Respondent.

No. 28,867.

Supreme Court of New Mexico.

April 19, 2006.

Patricia A. Madrid, Attorney General, Anita Carlson, Assistant Attorney General, Santa Fe, NM, for Petitioner.

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

OPINION

CHÁVEZ, Justice.

{1} It is undisputed in this case that, with respect to the DWI charge against Defendant, the jury foreman mistakenly signed the not guilty verdict form when the jury had unanimously found Defendant guilty. The error was reported to the bailiff by some of the jurors shortly after the trial judge announced that the jury was discharged. The question in this case is whether, having announced that the jury was discharged, the trial court could correct the verdict form to reflect the true verdict of the jury. The trial court corrected the error while the jury was still in its presence and control by polling each juror and confirming that none of them intended to acquit Defendant of DWI but, instead, that they had unanimously found him guilty of DWI. Defendant appealed the correction of the verdict form to the Court of Appeals arguing that double jeopardy precluded the correction. The Court of Appeals reversed the trial court holding that the verdict form could not be corrected because "even the slightest possibility of juror contamination should preclude reassembling the jury to inquire into the validity of its verdict," *State v. Rodriguez,* 2004–NMCA–125, ¶ 11, 136 N.M. 494, 100 P.3d 200, and the State failed to specifically rebut the presumption of prejudice that attached once the trial judge announced the jury was discharged. *Id.* ¶ 13. Because the jury remained together in the presence and control of the court and had not been subjected to outside influence or contamination, we hold that the trial court was entitled to correct the verdict form to reflect the true verdict of the jury. Therefore, there was no double jeopardy violation. The Court of Appeals is reversed and Defendant's conviction for DWI is reinstated.

PROCEDURAL BACKGROUND

{2} Defendant was tried before a jury for DWI, driving on a suspended or revoked license, and concealing his identity from a police officer. After the jury concluded its deliberations, it returned to open court at 3:12 p.m. to announce its verdict. In accordance with local practice, the verdicts were handed to the court clerk to be read aloud and into the record. The clerk read that Defendant had been found guilty of driving on a suspended or revoked license and of concealing his identity, but not guilty of driving while intoxicated. After the prosecution and the defense declined to poll the jury, the record reflects the following:

> THE COURT: All right. I'm going to discharge the jury. And thank you for working with us and for us today. Please call the Code–a–Phone over the weekend. Thank you.
>
> THE BAILIFF: Please stand for the jury.
>
> (Note: Jury out at 3:15 p.m.)
>
> THE BAILIFF: One moment, Your Honor. I'm moving the jury back into the jury room. They're saying that a verdict was read wrong.
>
> THE COURT: All right. That's fine.
>
> THE BAILIFF: Let us see what's going on. Okay? I'll be right back with you in just a moment.
>
> THE COURT: It was not read wrong.
>
> THE BAILIFF: They were saying the DWI verdict was read wrong.
>
> THE CLERK: I read what it says.
>
> THE COURT: Let's have the verdict forms.
>
> [DEFENSE COUNSEL]: And I thought I was a legal genius.
>
> THE COURT: Please be seated. I'm thinking. All right. What I'm going to do—the jury is still intact. The Court is going to ask them to come back in. I'm, going to—
>
> [PROSECUTOR]: Poll.
>
> THE COURT:—show the verdict forms to the foreman. I'm going to ask him to read that and ask him if it is correct. We are going to have a poll—
>
> [DEFENSE COUNSEL]: That's what I was going to suggest.
>
> THE COURT:—of the jury.

At 3:20 p.m. the jury was brought back into open court from the adjacent jury room and all twelve jurors stated that the verdict read aloud announcing that Defendant was not guilty of DWI was not their verdict. The foreman stated that he had signed the not

guilty verdict form by mistake. The trial judge found that the mistake was clerical and entered the true verdict as guilty of DWI. The trial judge then polled the jury again, this time asking whether their verdict on DWI was guilty. The jurors each stated that their verdict was guilty of DWI.

DISCUSSION

{3} Defendant appealed to the Court of Appeals contending that the trial court violated his right to be free from double jeopardy when it reassembled the jury to correct the verdict form. We generally review double jeopardy claims de novo. *City of Albuquerque v. One (1) 1984 White Chevy Ut.*, 2002–NMSC–014, ¶ 5, 132 N.M. 187, 46 P.3d 94; *State v. Reyes–Arreola*, 1999–NMCA–086, ¶ 5, 127 N.M. 528, 984 P.2d 775. However, where factual issues are intertwined with the double jeopardy analysis, we review the trial court's fact determinations under a deferential substantial evidence standard of review. *State v. Gonzales*, 2002–NMCA–071, ¶ 10, 132 N.M. 420, 49 P.3d 681. In doing so, we will not weigh the evidence or substitute our judgment for that of the trial court, *State v. Garcia*, 2005–NMSC–017, ¶ 12, 138 N.M. 1, 116 P.3d 72, and all reasonable inferences supporting the fact findings will be accepted even if some evidence may have supported a contrary finding. *State v. Bankert*, 117 N.M. 614, 618, 875 P.2d 370, 374 (1994). As discussed below, the double jeopardy analysis does involve fact issues.

{4} To decide whether the correction of the verdict form from not guilty to guilty violated Defendant's constitutional right to be free from double jeopardy, we must first determine whether the trial judge erred in reassembling the jury once he announced he was going to discharge the jury. As the Court of Appeals pointed out in its opinion, "[w]hether a trial court may reassemble a discharged jury to amend, clarify, or correct a verdict is the subject of a surprising number of cases throughout the country." *Rodriguez*, 2004–NMCA–125, ¶ 7, 136 N.M. 494, 100 P.3d 200. Some states categorically preclude the reassembly of a jury to correct a verdict once the trial judge announces his or her intent to discharge the jury. *See, e.g., West v. State*, 228 Ind. 431, 92 N.E.2d 852, 855 (1950). Other states analyze whether the jury was discharged by investigating whether the jury actually left the presence and control of the court. *See, e.g., State v. Brandenburg*, 38 N.J.Super. 561, 120 A.2d 59, 61 (Hudson County Ct.1956). In New Mexico, in a case where the jury was called back to the courtroom to correct a verdict one day after they were discharged, we stated that "[a]fter a verdict has been received and entered upon the minutes, and the jury has been dismissed, they have not the power to reassemble and alter their verdict." *Murry v. Belmore*, 21 N.M. 313, 319, 154 P. 705, 707 (1916). Despite this statement, we refused to set aside the corrected verdict because appellant's attorney "purposely refrained" from objecting to the reassembly of the jury in an apparent attempt to force a new trial for his client. *Id.* at 319–20, 154 P. at 707–08.

{5} What remains unanswered in New Mexico law is: when is a jury actually discharged? The Court of Appeals held that a functional approach to answering the question was consistent with New Mexico law. *Rodriguez*, 2004–NMCA–125, ¶ 13, 136 N.M. 494, 100 P.3d 200. We agree with the Court of Appeals on this point. The functional approach to determining whether a jury has been discharged requires a determination of whether the jury is still in the presence and control of the trial court, and if not, whether the jury was possibly influenced by an unauthorized contact. *See State v. Green*, 995 S.W.2d 591, 609–613 (Tenn.Crim.App.1998) (reviewing cases from several jurisdictions). We find the analysis in *Green* persuasive. In *Green*, the court held that a verbal discharge or dismissal of the jury does not render the jury discharged for purposes of subsequent reassembly to correct or amend a verdict. *Id.* at 609. Instead, the court considered two issues: (1) whether the jury was separated from the presence and control of the trial court; and (2) whether there was a possibility of outside contacts or influence on the jury. *Id.* at 612–13; *see also Commonwealth v. Brown*, 367 Mass. 24, 323 N.E.2d 902, 904–05 (1975) (holding reassembly permissible where jurors remained in control of the trial court by virtue of being in custody of court

officers and had no opportunity for outside influence). An important query on the second issue is whether the record reflects that one or more jurors entered an area occupied by the general public.

{6} In this case, although the Court of Appeals adopted the functional approach, it went further and presumed prejudice because, in its view, the record was silent with respect to whether any juror was contaminated by a bystander or court official. *Rodriguez*, 2004–NMCA–125, ¶¶ 11–13, 136 N.M. 494, 100 P.3d 200. The Court of Appeals would require the State to specifically rebut the presumption of prejudice. *Id.* ¶ 13. Presumably, the burden was on the State because the change to the verdict form favored the State. Implicit in its holding is that the State was obligated to present evidence that no juror was near a member of the general public; for example, providing testimony or a statement that members of the public were not in proximity to any juror. The Court of Appeals would also implicitly require proof that court officials themselves did not speak to any juror in an attempt to influence a change in the verdict. *Id.*

{7} Although we think it is reasonable to presume prejudice once a juror has left the presence and control of the court into an area occupied by the general public, we decline to presume prejudice when the judge is able to articulate a finding that the jury did not leave the court's presence and control and remained intact. In addition, because they are officers of the court, we decline to presume that court officials have contaminated a juror or the jury, although counsel are at liberty to raise the issue. In any event, the party who would benefit from the correction of the jury verdict form should be given an opportunity to rebut any presumption of prejudice.

{8} In this case, we believe the record is clear that the jury did not leave the presence and control of the court. Immediately after announcing that the jury was discharged, the trial court stated: "The court has been told by the bailiff, before you people exited, that the verdict had been read wrong as to count 1." The judge specifically found that the jury was intact. At a subsequent hearing regarding an appeal bond, the trial court judge reiterated his observations of the events. "[A]s the jury left—before they exited the Court, before they even left the jury room, the foreman of the jury informed the bailiff that the judge had misread the verdict, that [it] was not the correct verdict." It is undisputed that the only reason the jury was reassembled before they left the courtroom was to correct a jury verdict form that did not accurately reflect the result of the jury's deliberations.

{9} Had defense counsel or the prosecutor observed that a juror had left the court's presence and control or had been in contact with a member of the public between the reading of the verdict and its correction, it would have been incumbent on them to make their statement for the record. Instead, both parties seemed to be in agreement with the trial court that the jury remained intact and had not left the presence and control of the court. During the appeals bond hearing, the prosecutor stated:

> [T]he jury was exiting the room and actually hadn't even gone in to collect their items from the jury room when the bailiff who was also present, stopped and the Court and everyone else and said there's an error here, they claim an error and they were immediately brought back into the Court. They never left the courtroom itself proper totally, and I'm including the jury room in that, because it is sequestered from the rest of the building, so no tampering or any other type of (inaudible) may be given to those members and they were brought back in and immediately polled.

{10} Defense counsel has never disputed the statements for the record made by the judge or the prosecutor. At the same hearing where the prosecutor made his statements for the record, defense counsel commented as follows:

> Defense Counsel: I could find no case law except case law that went back to like 1873 that said that the jury had been discharged and were wandering about "gaily" I believe it said and then were called back.

District Judge: Well, our people, our people really didn't even get out of the chute.

Defense Counsel: Yeah.

District Judge: They were right there....

No doubt a better record of the proceedings might have been made. For example, the trial judge or either party could have made a more specific statement that the jurors, while leaving the jury box to return to the adjacent jury room to retrieve their personal items, alerted the court that a verdict had been incorrectly reported. Or, the trial judge or either party could have made a more specific statement that no juror had left the courtroom, jury room, or entered an area occupied by the general public. More specific statements would have made clear that the jury room was immediately adjacent to the courtroom and that the jurors were not entering the spectator section of the courtroom, and any disagreement by the parties could have been recorded. Alternatively, each juror could have been asked on the record whether he or she had left the courtroom or entered an area occupied by members of the general public and, if so, whether the juror or any member of the general public commented about the jury verdict. Finally, because of the events of this case, we encourage litigants to take advantage of the rule which permits either party or the court to poll the jury. Had the jury been polled immediately after the verdict was read in this case, we are confident the error with the verdict form would have been revealed even before the judge announced that he intended to discharge the jury.

{11} Although a better record might have been made, we believe the record in this case was adequate. Reviewing the record in the light most favorable to the trial court's findings, we are satisfied that the jury was not separated from the presence and control of the trial court and that no juror exited into an area occupied by the general public permitting the possibility of outside contacts or influence on the jury. Because no outside influence tainted the corrected verdict, we cannot find that entry of the jury's chosen verdict was barred by the constitution. For these reasons, the trial court is affirmed and the Court of Appeals is reversed.

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

WE CONCUR: RICHARD C. BOSSON, Chief Justice, PAMELA B. MINZNER, PATRICIO M. SERNA, and PETRA JIMENEZ MAES, Justices.

2006-NMSC-020

134 P.3d 741

Karleen CAMPOS, as parent and next friend of J.C., a minor, Plaintiff,

v.

Lawrence MURRAY and Chad Davis, in their individual capacities, Defendants.

No. 29,422.

Supreme Court of New Mexico.

April 20, 2006.

Corrected May 10, 2006.

Kennedy & Han, P.C., Paul J. Kennedy, Mary Y.C. Han, Adam S. Baker, Albuquerque, NM, for Plaintiff.

Keleher & McLeod, P.A., Sean Olivas, Melanie L. Frassanito, Albuquerque, NM, for Defendants.

Serra, Garrity & Masiowski, L.L.C., Diane Garrity, Santa Fe, NM, for Amicus Curiae New Mexico Association of Counties, New Mexico Municipal League.

Coppler & Mannick, P.C., Gerald A. Coppler, Santa Fe, NM, for Amicus Curiae New Mexico Public Schools Insurance Authority.

OPINION

BOSSON, Chief Justice.

{1} Plaintiff Karleen Campos' minor daughter, J.C., was sexually assaulted for several months during 2001 and early 2002. Plaintiff filed a claim on behalf of her daughter in the United States District Court for the District of New Mexico, pursuant to 42 U.S.C. § 1983 (2000), against Defendants Lawrence Murray and Chad Davis in their official capacities as New Mexico State Police officers. Plaintiff's claim stems from the alleged actions and omissions of the Officers relating to a failure to protect J.C. from sexual abuse. Plaintiff also filed a claim alleging negligence under the New Mexico Tort Claims Act (TCA). NMSA 1978, § 41–4–12 (1977).

{2} Prior to the federal trial, the Officers filed a Motion to Dismiss the state law claims based on the statute of limitations in the TCA. Based on the motion, United States District Judge Black certified two questions to this Court pursuant to Rule 12–607 NMRA 2006:

> (A) Whether NMSA § 41–4–15, which requires a child of the age of seven years or more to file a claim within two years after the date of occurrence resulting in loss, injury, or death, violates Due Process principles under the New Mexico Constitution.
>
> (B) Whether a claim alleging that government officials created a dangerous situation in which a child was sexually abused by a third party is "based upon personal injury caused by childhood sexual abuse" within the meaning of NMSA § 37–1–30.

We accepted certification and now answer the first question in the affirmative and, having done so, find it unnecessary to answer the second question.

BACKGROUND

{3} During the summer of 2001, while Plaintiff was incarcerated, she left her eight-year-old daughter, J.C., in the care of her boyfriend. Around July 28, 2001, Officer Davis was assigned to conduct a criminal investigation of the boyfriend, having received information that he had sexually abused J.C.'s cousin. Allegedly, Officer Davis also discovered on this date that J.C. was residing with the boyfriend, but did nothing to notify J.C.'s family that she may be in danger.

{4} Officer Murray then took over the case and allegedly told Plaintiff's family not to inform Plaintiff about the allegations of sexual abuse because he feared the boyfriend would flee. On December 14, 2001, almost five months after the police found out about the allegations against J.C.'s cousin, that cousin, in a safehouse interview, informed the police that J.C. was also being sexually

abused. Plaintiff claims that the Officers still did not contact Plaintiff to warn her of the danger to J.C. Then, in January of 2002, J.C. disclosed to the police that since the summer of 2001 she had been continually raped and sexually assaulted by the boyfriend. Plaintiff filed her claim against the Officers on November 30, 2004, when J.C. was eleven, and nearly three years after the alleged abuse against J.C. was discovered.

{5} Having moved to dismiss the state law claims, the Officers argue that the two-year statute of limitations in the TCA bars the claim. NMSA 1978, § 41–4–15(A) (1977) (stating actions against a government entity or employee are barred "unless such action is commenced within two years . . . except that a minor under the full age of seven years shall have until his ninth birthday in which to file"). In response, Plaintiff asserts that the TCA does not apply in the instant case because the statute of limitations found in NMSA 1978, Section 37–1–30 (1995) applies in sexual abuse cases involving minors rather than the TCA. *Id.* (allowing victims of "childhood sexual abuse" until their twenty-fourth birthday or three years after victim "knew or had reason to know" of the abuse to file a claim). Alternatively, Plaintiff claims that even if the TCA statute of limitations governs the claim, and not Section 37–1–30, Plaintiff's claim is not barred because as a matter of due process J.C. was incapable of meeting its statutory deadline.

{6} The federal court certified both questions to us under Rule 12–607(A):

> The Supreme Court may answer by formal written opinion questions of law certified to it by a court of the United States . . . if the answer may be determinative of an issue in pending litigation in the certifying court and the question is one for which answer is not provided by a controlling:
>
> (1) appellate opinion of the New Mexico Supreme Court or the New Mexico Court of Appeals.

See also NMSA 1978, § 39–7–1 (1997) (providing for the "Uniform Certification of Questions of Law Act"). We begin by addressing Plaintiff's alternative argument, which is the first of the two certified questions.

DISCUSSION

The Tort Claims Act Statute of Limitations as Applied to Minors

{7} The TCA states that "[a]ctions against a governmental entity or a public employee for torts shall be forever barred, unless . . . commenced within two years . . . except that a minor under the full age of seven years shall have until his ninth birthday in which to file." Section 41–4–15(A). The Officers argue that since J.C. was eight years old at the time of the alleged abuse, then under the TCA she had to file her claim within two years, which she failed to do.

{8} The New Mexico Court of Appeals has previously addressed the issue we are being asked to decide here, the only difference being that the case involved a child that was under the age of seven when the injury occurred. *Jaramillo v. Bd. of Regents of the Univ. of N.M. Health & Scis. Ctr.*, 2001–NMCA–024, 130 N.M. 256, 23 P.3d 931. In *Jaramillo,* the Court adopted a reasonableness standard, and found that, under the facts, the child's due process rights were violated because he was incapable of meeting the TCA deadline. *Id.* ¶¶ 7, 10. Under this standard when a court addresses a minor's due process challenge to the TCA's two-year statute of limitations, it must determine "whether it is reasonable to expect a person in the injured child's circumstances to meet the [TCA] requirement." *Id.* ¶ 7. In certifying this question to this Court, the federal court determined that it would be helpful for us to address the "legal standard of reasonableness of this limitation period" as applied to the facts of this case.

{9} In *Jaramillo,* the plaintiff's son suffered severe brain damage at the age of two after a doctor allegedly mistreated his seizure disorder. *Id.* ¶¶ 2, 9. The mother filed the complaint six years later, shortly after the child's ninth birthday, and beyond the tolling period for children injured under the age of seven. *Id.* ¶ 2. In examining whether the TCA statute of limitations violated the child's due process rights, our Court of Appeals examined its precedent pertaining to a related question of whether the TCA's ninety-day notice of a claim provision violates a

minor's due process rights. *Id.* ¶ 4. The notice provision requires a victim to notify the government entity against which the claim is being asserted "within ninety days after an occurrence giving rise to a claim." NMSA 1978, § 41–4–16(A) (1977). In the notice cases, our Court of Appeals has held that the ninety-day notice requirement can be unreasonable as applied to minors, depending on the circumstances, and further that the "burden of giving notice could not be placed on another," such as a parent or grandparent, absent legislative creation of such a duty. *Jaramillo,* 2001–NMCA–024, ¶¶ 4–5, 130 N.M. 256, 23 P.3d 931 (citing *Tafoya v. Doe,* 100 N.M. 328, 331–32, 670 P.2d 582, 585–86 (Ct.App.1983) and *Rider v. Albuquerque Pub. Schs.,* 1996–NMCA–090, ¶¶ 9, 11–15, 122 N.M. 237, 923 P.2d 604).

{10} In examining these notice cases, the Court of Appeals in *Jaramillo* acknowledged the factual distinction between a ninety-day notice provision and a two-year statute of limitations, but questioned the relevance of any difference in terms of the effect on a young child. *Id.* ¶ 6. In both instances a child is being asked to hurdle obstacles that are impossible to overcome at a young age. Based on the disability of being a minor, the Court in *Jaramillo* held that "cases involving children do not focus on the absolute or relative length of time of the requirement, and instead focus on whether it is reasonable to expect a person in the injured child's circumstances to be able to meet the requirement." *Id.* ¶ 7. Accordingly, there can be factual situations, such as a teenage victim who has legal representation, where "it is reasonable to expect" a child to be able to meet the requirements of the notice provision or the two-year statute of limitations. *See, e.g., Erwin v. City of Santa Fe,* 115 N.M. 596, 597–99, 855 P.2d 1060, 1061–63 (Ct.App. 1993) (finding that a teenager who had retained counsel will be expected to comply with the ninety-day notice provision).

{11} In *Jaramillo,* however, a severely injured two-year-old, without legal representation, clearly had no capacity to file suit by his ninth birthday. 2001–NMCA–024, ¶¶ 9–10, 130 N.M. 256, 23 P.3d 931. Accordingly, our Court of Appeals held that the child could not reasonably be expected to comply with the statute of limitations, and thus, as applied, the TCA violated the child's constitutional due process rights. *Id.; see also Tafoya,* 100 N.M. at 332, 670 P.2d at 586 (finding that "one unable to comply with a notice requirement by reason of minority is protected by the reasonableness requirements of the common law, the Fourteenth Amendment to the United States Constitution, or similar provisions in their state constitution").

{12} *Jaramillo* accurately articulates the law of this State. The only difference with the case before us is that, contrary to *Jaramillo* where the child was two when the injury occurred and nine when the claim was filed, J.C. was eight when the injury occurred and eleven when the claim was filed. We must determine whether there is any reason the standard articulated in *Jaramillo* should not apply equally to J.C.'s situation.

{13} The courts of this State have a "long tradition of interpreting laws carefully to safeguard minors." *Rider,* 1996–NMCA–090, ¶ 13, 122 N.M. 237, 923 P.2d 604. The reasonableness standard articulated in *Jaramillo* is part of that tradition. *See Jaramillo,* 2001–NMCA–024, ¶ 7, 130 N.M. 256, 23 P.3d 931; *see also Jaramillo v. Heaton,* 2004–NMCA–123, ¶¶ 9, 19, 136 N.M. 498, 100 P.3d 204 (applying the reasonableness standard in holding the three-year statute of limitations found in the Medical Malpractice Act violated a minor's due process rights). This standard is meant to protect children whose claims involve "the special disability of being a minor." *Jaramillo,* 2001–NMCA–024, ¶ 8, 130 N.M. 256, 23 P.3d 931. Minors are entitled to such protection because "as a matter of due process, a child who is incapable of meeting a statutory deadline cannot have that deadline applied to bar the child's right to legal relief." *Id.* ¶ 10 (citing *Rider,* 1996–NMCA–090, 122 N.M. 237, 923 P.2d 604).

{14} Based on this legal background, and the reasoning of the Court of Appeals in *Jaramillo,* we see no appreciable difference between an injury that occurs when a child is two or an injury that occurs when the child is eight. A two-year-old, an eight-year-old, or

even an eleven-year-old, are all equally unable to comply with the statute of limitations requirement at such a young age. Age is not the sole determinative inquiry in these cases, but it is a primary factor to be taken into account in determining whether the statute of limitations is being reasonably applied. According to the facts presented to us, J.C. was eight when she was assaulted, and the TCA statute of limitations required that she file suit by age ten. It is unreasonable as a matter of law to ignore the effects of such an extreme burden on a child of such tender years.

{15} Furthermore, we agree with the Court of Appeals that absent some legislatively imposed duty, we cannot presume that parents will adequately care for their child by filing such a claim in a timely manner. *See Jaramillo,* 2001–NMCA–024, ¶ 5, 130 N.M. 256, 23 P.3d 931 (citing *Rider,* 1996–NMCA–090, ¶¶ 9, 11–15, 122 N.M. 237, 923 P.2d 604). Common experience teaches us differently. It would be a poor policy choice for our Legislature to penalize a child, already injured, for the subsequent neglect of that child's parent in failing to file suit in a timely manner. And such a choice becomes all too arbitrary in due process terms when one realizes that the parent who was supposed to file a timely suit on J.C.'s behalf is the same parent who, when incarcerated, left her daughter with the boyfriend who then sexually assaulted her. For these reasons, Section 41–4–15, as applied to J.C. violates her right to due process of law and cannot bar her claim under the TCA.

Childhood Sexual Abuse Under Section 37–1–30

{16} The United States District Court also asked us to determine "[w]hether a claim alleging that government officials created a dangerous situation in which a child was sexually abused by a third party is 'based upon personal injury caused by childhood sexual abuse' within the meaning of NMSA § 37–1–30." Section 37–1–30 states:

> (A) An action for damages based on personal injury caused by childhood sexual abuse shall be commenced by a person before the latest of the following dates:
>
> (1) the first instant of the person's twenty-fourth birthday; or
>
> (2) three years from the date of the time that a person knew or had reason to know of the childhood sexual abuse and that the childhood sexual abuse resulted in an injury . . .

The statute defines "childhood sexual abuse" as any violation of NMSA 1978, Section 30–9–11 (2003), regarding criminal sexual penetration of a minor; NMSA 1978, Section 30–9–13 (2003), regarding criminal sexual contact of a minor; or any violation of the Sexual Exploitation of Children Act, NMSA 1978, Section 30–6A–1 (1984). Section 37–1–30(B). In the case before us, the child suffered "childhood sexual abuse" as defined by the statute. However, the Officers argue that Section 37–1–30 does not apply because they are third parties to the sexual abuse, in essence that the section only applies to claims between the victim and the alleged perpetrator. The Officers also assert that the TCA provides the exclusive remedy for suits against governmental entities, thus Section 37–1–30 cannot govern this claim.

{17} This Court is authorized to answer certified questions "if the answer may be determinative of any issue in pending litigation in the certifying court. . . ." NMSA 1978, § 39–7–4 (1997). Here, the second question presented to this Court seems to have been asked in the event that we answered the first question differently. Having answered the first question in the affirmative there is no need to answer the second question, as doing so is not determinative of any issue before the federal court here. For this reason we need not resolve any of the statutory issues raised by the parties regarding Section 37–1–30.

CONCLUSION

{18} Following the Court of Appeals reasoning in *Jaramillo,* we discern no meaningful distinction with the case certified. Accordingly we conclude that the two-year statute of limitations in the TCA violates J.C.'s due process rights, and does not apply to bar her claim.

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

WE CONCUR: PAMELA B. MINZNER, PATRICIO M. SERNA, PETRA JIMENEZ MAES, and EDWARD L. CHÁVEZ, Justices.

2006-NMSC-019

134 P.3d 746

IN THE MATTER OF PAMELA A.G., a child,

State of New Mexico, ex rel., Children, Youth and Families Department, Petitioner–Respondent,

v.

Pamela R.D.G. and Frank G., Respondents–Petitioners.

In the Matter of Pamela A.G., a child,

State of New Mexico, ex rel., Children, Youth and Families Department, Petitioner–Respondent,

v.

Frank G., Respondent–Petitioner.

Nos. 29,018, 29,042.

Supreme Court of New Mexico.

April 20, 2006.

Law Offices of Nancy L. Simmons, P.C., Nancy L. Simmons, Albuquerque, NM, Jane Bloom Yohalem, Santa Fe, NM, for Petitioners.

Rebecca J. Liggett, Santa Fe, NM, for Respondent.

OPINION

CHÁVEZ, Justice.

{1} In this neglect and abuse proceeding we consider whether the Petitioners' procedural due process rights were violated when Child's out-of-court statements were admitted to prove allegations of sexual abuse. Petitioners contend their due process rights were violated because four hearsay statements of Child were admitted without giving them an opportunity to question Child regarding the allegations. The Children's Court admitted the statements under the catch-all exception to the hearsay rule, finding that the statements by the child were spontaneous, consistent, and contained language that a child four years of age normally would not use, thus concluding the statements were trustworthy and reliable. The Court of Appeals affirmed and held that the Children's Court adequately safeguarded the Petitioners' due process rights by investigating the reliability of the statements before admitting the statements as evidence of sexual abuse. We affirm the Court of Appeals. Although we agree with the hearsay analysis employed by the Court of Appeals, we take this opportunity to emphasize those procedural safeguards that are necessary to afford a minimum level of due process in an neglect and abuse proceeding when the child does not testify.

{2} Petitioners are the natural grandparents and adoptive parents of Child (hereinafter referred to as "Parents" and/or "Mother" and/or "Father"). In November 2001, nine days before Child's fourth birthday, the New Mexico Children, Youth and Families Department ("CYFD") filed an Abuse and Neglect Petition against Parents and took Child into custody. The Petition was based on allegations of unsafe, unsanitary, and uninhabitable living conditions. Approximately four months later, after Child had lived with two different sets of foster parents, CYFD amended the Abuse and Neglect Petition to allege that Father had sexually abused Child, and Mother failed to protect Child from the abuse.

{3} The allegations of sexual abuse were based on statements made by Child to four different individuals: first to her foster mother, then to a CYFD social worker, later during a "Safe House" interview, and finally to Child's therapist. The initial statement was made spontaneously to the foster mother while Child was taking a bath. The foster mother noticed that Child was "trying to stick a washcloth up her bottom" and asked Child what she was doing. Child announced that she was "sexing" herself. When the foster mother asked Child, "Who told you about that?", Child said, "My dad Chico," referring to her natural grandfather/adopted father. Child announced, "This is the way my mom Pam and my dad Chico have sex, my dad sexes my mom back here," pointing to her anus, and "He sexes my mom here too," pointing to her vaginal area. Child went on to state, "And when my dad 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."

{4} The foster mother then called the CYFD social worker, who visited Child that same day. The social worker asked Child what she had talked to her foster mother about during her bath. Child told the social worker "Chico tried to sex me" and that

Chico had gotten on top of her, and that she had tried to push him off but he was too big. Child said that Chico had "put his here," pointing to her crotch. Child also told the social worker that her mom Pam was in the room and had told her "to get up, or get off and pull up her pants."

{5} Twelve days later Child was taken to a "Children's Safe House" where she was interviewed on videotape by a trained clinical forensic interviewer. The interviewer did not ask Child about the allegation of sexual abuse until Child brought it up herself. Child again said that her dad Chico had "poked her 'wee-wee' (which she identified by pointing to her crotch) with his 'wee-wee' (which she described as something that comes out of his pants)." Child also reported that she had seen Father and Mother "f—ing" and that Mother had seen Father "f—ing" Child.

{6} The fourth statement was made to Child's therapist. Child told the therapist that "Chico put his wee to mine and I put mine to his." During a private therapy session, Child also spontaneously told her therapist "I don't like it when Chico f—ks me," and that "Mom was mad because Chico f—ked me."

{7} Prior to the adjudication hearing on the sexual abuse allegations, CYFD gave notice to Father and Mother of its intent to offer the Child's statements as evidence under the hearsay rule. The notice did not indicate which hearsay exception CYFD was relying on, but Rule 11–803(X) NMRA, requires prior notice to an adverse party. Rule 11–804 B(5) NMRA, similarly requires notice to the adverse party when the declarant is unavailable. These two exceptions, often called "catch-all" or residual exceptions, provide that statements not specifically covered by any of the other hearsay exceptions, but with the "equivalent circumstantial guarantees of trustworthiness" of the other hearsay exceptions, may be admissible under circumstances when:

(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 be served by the admission of the statement into evidence.

Rule 11–803(X) NMRA; *see also* Rule 11–804 B(5) NMRA.

{8} Father filed a Motion in Limine to exclude the hearsay statements of Child, arguing the statements lack the "equivalent circumstantial guarantees of trustworthiness" required by 11–803(X); admission of the statements would deny Father due process because of his lack of opportunity to participate in the questioning of Child; and Child was not competent to testify. The Children's Court judge considered the motion at the beginning of the adjudicatory hearing. After hearing argument the judge decided to reserve his ruling until he heard the evidence relating to the statements.

{9} The foster mother, the CYFD social worker, the safe house interviewer, and Child's therapist all testified regarding the statements made to them by Child. In addition, Child's therapist offered uncontroverted testimony that it would be hurtful, rather than helpful, to have Child testify, and stated that in her opinion, it was not likely that Child would say anything in the court setting. At the conclusion of the testimony, the Children's Court judge ruled that Child's hearsay statements were admissible. The court found the circumstances surrounding Child's statements made them trustworthy, particularly due to the spontaneity, repetition, and consistency of the statements, and the fact that a child of age three or four would not normally know about sexual matters. In light of all the evidence, the court found the statements reliable and admissible under 11–803(X). The court then concluded that clear and convincing evidence supported the allegations of neglect and abuse as defined in the Children's Code, NMSA 1978, § 32A–4–2(B)(3) and (4), and § 32A–4–2(E)(3)(2006).[1]

1. § 32A–4–2(B)(3) defines an abused child as one "who has suffered sexual abuse or sexual exploitation inflicted by the child's parent, guardian or custodian." § 32A–4–2(B)(4) defines an abused

{10} The question we consider is whether Parents' due process rights were violated when Child's out-of-court statements were admitted without Parents having an opportunity to question or confront Child. We review the constitutional claim of denial of due process de novo. *State ex rel. Children, Youth and Families Dep't v. Mafin M.*, 2003–NMSC–015, ¶ 17, 133 N.M. 827, 70 P.3d 1266.

{11} The interest of parents in the care, custody, and control of their children is a fundamental liberty interest. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). Whenever a proceeding affects or interferes with the parent-child relationship courts must be careful to afford constitutional due process. *State ex rel. Children, Youth and Families Dep't v. Stella P.*, 1999–NMCA–100, ¶ 14, 127 N.M. 699, 986 P.2d 495. Although we recognize the proceeding at issue was not for the termination of parental rights, the statutory scheme enacted by our Legislature to protect children and adjudicate parental rights "represents a continuum of proceedings which begins with the filing of a petition for neglect and abuse and culminates in the termination of parental rights." *State ex rel. Children, Youth and Families Dep't v. Maria C.*, 2004–NMCA–083, ¶ 25, 136 N.M. 53, 94 P.3d 796. While it has been held that termination proceedings must be conducted in a constitutional manner, *Mafin M.*, 2003–NMSC–015, ¶ 18, 133 N.M. 827, 70 P.3d 1266, neglect and abuse proceedings must also be conducted in a manner that affords the parents constitutional due process. The question is how much process is due, and did Parents in this case receive the minimum level of due process?

{12} The amount of process due depends on the particular circumstances of each case because procedural due process is a flexible right. *See State ex rel. Children, Youth and Families Dep't v. Lorena R.*, 1999–NMCA–035, ¶ 17, 126 N.M. 670, 974 P.2d 164. Due process requires "timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decisionmaker." *Lorena R.* 1999–NMCA–035, ¶ 26, 126 N.M. 670, 974 P.2d 164 (quoting *In re L.V.*, 240 Neb. 404, 482 N.W.2d 250, 257 (1992)). It is the right to confront and cross-examine adverse witnesses that is the main issue in this case. Because neglect and abuse proceedings are civil proceedings, the Confrontation Clause of the Sixth Amendment of the U.S. Constitution, as interpreted in *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (holding that out-of-court statements by witnesses are barred under the Confrontation Clause, unless witness is unavailable and defendant had prior opportunity to cross-examine witness, regardless of whether such statements are deemed reliable by the court), is not at issue here. *See In re Esperanza M.*, 1998–NMCA–039, ¶ 15, 124 N.M. 735, 955 P.2d 204. The opportunity to confront a witness in a civil neglect and abuse proceeding is not an absolute right. Instead the right requires that parents be given a reasonable opportunity to confront and cross-examine a witness, including a child witness.

{13} To determine whether Parents' right to confront and cross-examine a witness comported with the reasonableness requirement of due process, we employ the balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). *See Mafin M.*, 2003–NMSC–015, ¶ 19, 133 N.M. 827, 70 P.3d 1266. This balancing test requires the weighing of three factors. One, the private interest at stake. Two, the government's interest. Three,

child as one "whose parent has knowingly, intentionally or negligently placed the child in a situation that may endanger the child's life or health." § 32A–4–2(E)(3) defines a neglected child as one "who has been physically or sexually abused, when the child's parent, guardian or custodian knew or should have known of the abuse and failed to take reasonable steps to protect the child from further harm."

whether the procedures used increased the risk of erroneous deprivation of the private interest. *See Mathews,* 424 U.S. at 335, 96 S.Ct. 893. Parents' interest in maintaining "a parental relationship with [their] children is a fundamental right that merits strong protection." *Mafin M.,* 2003–NMSC–015, ¶ 20, 133 N.M. 827, 70 P.3d 1266 (quoting *State ex rel. Children, Youth and Families Dep't v. B.J.,* 1997–NMCA–021, ¶ 11, 123 N.M. 99, 934 P.2d 293). The government's interest in protecting the welfare of children is equally significant. *See State ex rel. Children, Youth and Families Dep't v. Anne McD.,* 2000–NMCA–020, ¶ 23, 128 N.M. 618, 995 P.2d 1060. Therefore, whether Parents were given due process turns on whether the procedures used for the admission of Child's hearsay statements increased the risk of an erroneous finding of abuse which could lead to the deprivation of Parents' fundamental right to maintain their relationship with Child, and whether additional procedural safeguards would eliminate or lower that risk. *Id.* ¶ 24.

{14} Significantly, whether Parents were afforded due process does not depend on a showing that they would have prevailed had they cross-examined Child or excluded the hearsay statements. Parents "need only demonstrate that there is a reasonable likelihood that the outcome might have been different." *Maria C.,* 2004–NMCA–083, ¶ 37, 136 N.M. 53, 94 P.3d 796 (citing *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 544, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)).

{15} In this case, the Children's Court judge analyzed the admissibility of Child's statements following the procedure required by Rule 11–803(X) for determining whether the statements were trustworthy and reliable. Parents contend that without the right to confront and cross-examine Child this procedure was inadequate to eliminate or minimize the risk of an erroneous finding of abuse. "In evaluating whether this procedure created a risk of an erroneous deprivation . . . we look to the purpose of confrontation and cross-examination. The purpose is to ensure the integrity of the fact-finding process by 'subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.' " *In re A.M.,* 13 P.3d 484, 488 (Okla.2000) (quoting *Maryland v. Craig,* 497 U.S. 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990)). The Oklahoma court concluded: "It is evident that any restriction a judge places on the opportunity for face-to-face confrontation and cross-examination of adverse witnesses enhances the risk of an erroneous deprivation of parental rights." *Id.* Although we agree with this statement, in this case the Children's Court judge did not restrict Parents' opportunity for cross-examination. Neither parent called Child as a witness, nor did they ask permission of the court to allow them to question Child. Instead, they simply sought to exclude Child's hearsay statements. It was only during closing arguments that Parents suggested that the judge himself interview Child before admitting the out-of-court statements. *Cf. In re Tamara G.,* 295 A.D.2d 194, 200, 745 N.Y.S.2d 6 (N.Y.App.Div.2002) (finding that the balancing of interests in a sexual abuse case weighed in favor of examining the 11–year–old daughter, at least in camera, in order to clarify numerous unexplained inconsistencies in her statements). Indeed, Parents did not indicate below nor have they indicated on appeal what questions they might ask Child, making it difficult to determine what value, if any, cross-examination of this four-year-old child would have offered. Although there are situations where cross-examination, even of a very young child, will enhance the integrity of the fact-finding process, Parents have failed to articulate with any degree of specificity how confrontation of Child would have enhanced the fact-finding process in this case.

{16} In this case the Children's Court judge did not admit the hearsay statements as substantive evidence until he was convinced of their reliability under Rule 11–803(X). He made the finding that the hearsay statements were inherently reliable based on Child's age, the manner in which the statements were made, and the consistency of the statements. The trial judge's adherence to the requirements of Rule 11–803(X) helped to ensure due process for Parents. As detailed previously, Child's statements were unambiguous in both the descrip-

tion of the abuse and the identity of the abuser. The terms used by Child to describe the details of the abuse were consistent with her age, refuting any implication that Child was coached or influenced in her statements. The foster mother testified to behavior by Child that included frequent masturbating with her hand, with her dolls and with the family dog. Child also simulated acts of sexual intercourse between her unclothed dolls. The program therapist testified that Child exhibited sexualized behavior, and that this would typically be a learned activity in a four-year-old child. The therapist also testified that Child suffered from nightmares and sleep disturbances, behaviors she found consistent with Post Traumatic Stress Disorder caused by a traumatic event, such as sexual abuse. Here, Child's sexualized behavior and the expert testimony of the therapist that Child's behavior was consistent with child sexual abuse make it more probable that Child was abused and supports a logical inference that the act of abuse described in Child's hearsay statement occurred. Child's identification of Father as the abuser was also consistent and spontaneous, as were Child's statements regarding Mother's knowledge of the abuse. This evidence provided the circumstantial guarantee of trustworthiness required by the hearsay catch-all exceptions.

{17} In addition, the safe house interview was both audio and video recorded, affording Parents the opportunity to point out any impropriety in the questioning techniques employed by the interviewer. No such improprieties have been noted by Parents, and thus we are not persuaded that Parents have shown that admission of the out-of-court statements increased the risk of an erroneous deprivation of their relationship with Child.

{18} Although it is almost always true that the integrity of the fact-finding process is enhanced by rigorous testing in the context of an adversary proceeding before the trier of fact, as this case demonstrates there are circumstances when other procedural protections and safeguards must supply the "scrupulous fairness" required when the State "interferes with a parent's right to raise their children." *Maria C.*, 2004–NMCA–083, ¶ 50, 136 N.M. 53, 94 P.3d 796 (citing *Lorena R.*, 1999–NMCA–035, ¶ 19, 126 N.M. 670, 974 P.2d 164). The trial judge must determine the proper procedure and safeguards to be utilized in each case, based on factors such as the age of the child, the nature of the parent-child relationship, and the particular emotional state of the child. *See In re Michael C.*, 557 A.2d 1219, 1221 (R.I.1989) (discussing the age of child, the potentially violent relationship between father and child, and possible psychological trauma to the child). Although Rule 11–803(X) does not require a finding of unavailability, the trial judge should probe for an explanation as to why a child will not testify, such as the explanation offered here by the Child's therapist. Even in civil cases, in-court confrontation is preferred. We emphasize that trial judges should explore alternatives for the questioning of a child in order to help the fact-finder test the reliability of the child's statements while also protecting the child's emotional state. Alternative procedures such as videotaped depositions or testimony in camera have been used to prevent possible psychological trauma to the child. *See In re C.K.*, 164 Vt. 462, 671 A.2d 1270, 1275 (1995) (stating that use of alternative procedures for testimony is left to discretion of trial judge); *In re Michael C.*, 557 A.2d at 1220 (describing procedures used for a thirteen year old boy accusing his father of sexual abuse to testify in camera, answering questions written by father's attorney); *In re A.M.*, 13 P.3d at 488 (recognizing that due process does not entitle a parent to personally confront and cross-examine a child witness if the child would be traumatized by the experience).

{19} In addition, this Court agrees that:

> "[w]hile we do not expect CYFD to act as [parent's] counsel, we remind counsel that their role as an attorney for CYFD is analogous to the role of prosecuting attorneys. The prosecutor's obligation is to protect not only the public interest but also the rights of the accused. Similarly, CYFD must seek not only to protect the children involved; they must see to it also

that the parents are dealt with in scrupulous fairness."

Maria C., 2004–NMCA–083, ¶ 51, 136 N.M. 53, 94 P.3d 796 (internal quotations and citations omitted). We note that the Legislature in 2005 amended the Children's Code related to the investigation of reports of child abuse to include an obligation for CYFD to notify parents of a safe house interview, unless CYFD determines that notification would adversely affect the safety of the child or compromise the investigation. NMSA 1978, § 32A–4–5(F)(2005). Although the legislation is silent on what role the parents may play during the interview, this may provide an adequate opportunity for parents or their attorneys to ask questions of the child through the safe house interviewer, provided careful procedures are in place to avoid any manipulation or intimidation of the child by the parents. In this case, parents do not point to any improprieties in the questioning of Child during the safe house interview, and we find none.

{20} Although Parents' due process challenge centers around their right to confront Child, we find it significant to our due process analysis in this case that Parents were allowed to cross-examine the hearsay witnesses and to challenge the reliability of the methods in which the statements were obtained from Child. Parents were also provided with proper notice, the assistance of counsel, and the opportunity to review and present evidence. Combined, these factors weigh heavily against a reasonable likelihood that the outcome would have been different if any additional procedures had been utilized. We conclude Parents were not denied due process. The Court of Appeals is affirmed.

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

WE CONCUR: RICHARD C. BOSSON, Chief Justice, PAMELA B. MINZNER, PATRICIO M. SERNA, and PETRA JIMENEZ MAES, Justices.

2006-NMSC-023

134 P.3d 753

STATE of New Mexico, Plaintiff–Respondent,

v.

William P. BROWN, Defendant–Petitioner.

No. 28,471.

Supreme Court of New Mexico.

April 24, 2006.

The Kortemeier Law Firm, Stephen Karl Kortemeier, Elephant Butte, NM, for Petitioner.

Patricia A. Madrid, Attorney General, Jacqueline R. Medina, Assistant Attorney General, Albuquerque, NM, for Respondent.

MCCML, P.A., Randi McGinn, Albuquerque, New Mexico, for Amicus Curiae, New Mexico Trial Lawyers Association.

Jones, Snead, Wertheim & Wentworth, P.A., Jerry Todd Wertheim, Santa Fe, NM, for Amicus Curiae, New Mexico Criminal Defense Lawyers Association.

Melissa Hill, Corrales, NM, for Amicus Curiae, New Mexico Criminal Defense Lawyers and New Mexico Trial Lawyers Association.

John Bigelow, Chief Public Defender, Sue Herrmann, Appellate Defender, for Amicus Curiae, New Mexico Public Defender Department.

OPINION

MAES, Justice.

{1} Defendant–Petitioner William P. Brown (Brown), an indigent defendant represented by *pro bono* counsel, sought funding for expert witness fees from the New Mexico Public Defender Department (Department) in the district court. The district court denied Brown's request for funding, concluding that such funding was available only to indigent defendants represented by the Department. The Court of Appeals affirmed. We reverse. We hold that funding for expert witnesses should extend to those indigent defendants represented by *pro bono* counsel, in addition to those represented by the Department. This rule applies to the case at bar, similar pending actions, and to cases arising in the future.

Background

{2} Brown was charged with three felony offenses and a misdemeanor offense in magistrate court. Stephen Kortemeier, a private defense attorney, entered his appearance on behalf of Brown. Brown completed an Eligibility Determination for Indigent Defense Services form. The magistrate court found Brown to be indigent and unable to obtain counsel, and ordered the appointment of Gregory Gaudette, a contract attorney for the Department, to represent Brown on the criminal charges. Mr. Gaudette filed an Entry of Appearance on behalf of Brown, along with a Notice of Intent to Interview State's Witnesses. Those were the only documents submitted by Mr. Gaudette in connection with Brown's case. Further, the record indicates that Mr. Kortemeier, not Mr. Gaudette, was listed as Brown's attorney of record on several documents. Therefore, it appears that Mr. Kortemeier served continuously as Brown's attorney since his initial entry of appearance, despite the appointment of Department counsel by the magistrate court.

{3} Brown was bound over to the district court for trial. Mr. Kortemeier filed a Declaration of Counsel stating that he had refunded to Brown his original retainer fee and had agreed to represent Brown without charge. Attached to that statement was an Agreed Order of Indigency, in which the State and Brown stipulated that Brown was indigent and had obtained *pro bono* representation. The Order provided that Brown was "entitled to all services, including waivers of fees and costs, normally provided by the State of New Mexico to an indigent defendant."

{4} Upon determining that Brown's case would require the use of experts, Mr. Kortemeier contacted the Department to request funds for expert witness fees. The Department denied the request on the grounds that it was only required to pay expert witness fees for indigent defendants represented by the Department or attorneys on contract with the Department. Mr. Kortemeier was informed that he was not eligible to become a contract attorney for the Department until the next contract period.

{5} Brown then filed a Request for Authorization to Incur Expenses & Fees in the district court. In that request, Brown asked the court for an order authorizing Brown to incur fees to be paid by the State. At the hearing on the request, the district court judge indicated that he could not order the Department to act without giving it notice and an opportunity to respond and issued an Order to Show Cause against the Department.

{6} The State filed a response to Brown's request to incur fees, arguing that the court could not order the Department to pay expert witness fees for a criminal defendant not represented by the Department. The district court set a presentment hearing on Brown's request to incur expenses and fees

and the proposed Order to Show Cause against the Department. At the conclusion of the hearing, the district court judge stated that he would not enter an order that interfered with the Department's management of its budget and its attorneys; if Defendant were to accept Department representation, he would receive attorney representation and an array of services standard to the Department, including expert witness fees; and if Brown wished to continue with private defense counsel, he would have to provide for his own expert witness fees. The judge then issued an order stating the above. The court certified the order for interlocutory appeal, noting that the case involved "a controlling question of law as to which there is substantial ground for difference of opinion and further, that an immediate appeal from this order may materially advance the ultimate termination of this case."

{7} The Court of Appeals granted interlocutory appeal from the order of the district court, and upheld the district court's decision. *State v. Brown,* 2004–NMCA–037, 135 N.M. 291, 87 P.3d 1073. Relying heavily on *Subin v. Ulmer,* 2001–NMCA–105, 131 N.M. 350, 36 P.3d 441, the Court of Appeals held that the district court had no authority to order the payment of expert witness fees for an indigent defendant who is represented by *pro bono* defense counsel. Brown appealed.

Discussion

{8} Because this case implicates two important constitutional rights, the constitutional right to counsel and the constitutional right to be provided with the basic tools of an adequate defense, our review is *de novo. See State v. Attaway,* 117 N.M. 141, 145, 870 P.2d 103, 107 (1994) (applying *de novo* standard of review to constitutional claims).

{9} Brown claims that under the Court of Appeals Opinion, he is being forced to choose between *pro bono* representation without expert witness funding and Department representation with expert witness funding which, Brown contends, is essentially a choice between the constitutional right to counsel and the constitutional right to be provided with the basic tools of an adequate defense. Brown asserts that such a choice is constitutionally impermissible. Judge Vigil, dissenting below, agreed, stating: "The holding of the majority requires Brown to choose between these constitutional rights. However, it is well settled that forcing a criminal defendant to 'surrender' one constitutional right 'in order to assert another' is 'intolerable.' " *Brown,* 2004–NMCA–037, ¶ 47, 135 N.M. 291, 87 P.3d 1073 (Vigil, J., dissenting) (quoting *Simmons v. United States,* 390 U.S. 377, 394, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)).

{10} The State, in contrast, argues that Brown's constitutional rights have not been impaired by the denial of funding for expert witnesses by the Department. The State argues that since the Department stood ready to represent Brown, "no one was proposing to deny [Brown] anything to which he was constitutionally entitled," and asserts that "the test is not whether [Brown] was offended by the choice offered to him, which in his mind, amounts to the denial of the right to counsel of choice, but rather, whether the system meets the State's constitutional obligations." The State argues that the administrative system enacted by the Legislature (the Indigent Defense Act and the Public Defender Act, discussed in depth below) establishes the constitutional requirements to be satisfied by the Department, and that the Department has fully complied with those standards. In order to refute Brown's claims to the contrary, the State goes to great lengths to demonstrate that American jurisprudence has clearly established that the Sixth Amendment merely guarantees the right to counsel, not the right to counsel of choice. The State maintains that Brown was offered the right to counsel through the Department, and thus cannot claim that he has been denied a constitutionally protected right.

{11} Our discussion will analyze these constitutional arguments as addressed by the United States Constitution, the New Mexico Constitution, New Mexico's legislation, and relevant case law.

{12} The right to counsel has long been recognized as a fundamental right at both the federal and state levels. The Sixth

Amendment of the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." U.S. CONST. amend. VI. That Sixth Amendment guarantee requires that an indigent criminal defendant be provided with counsel at public expense in order to ensure fairness in his or her trial. *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) ("[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."). The New Mexico counterpart to the federal rule is embodied in the New Mexico Constitution, which states: "In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel." N.M. CONST. art. II, § 14.

{13} The New Mexico Legislature has responded to these constitutional rights by enacting the Indigent Defense Act, NMSA 1978, §§ 31-16-1 to 31-16-10 (1968), and the Public Defender Act, NMSA 1978, §§ 31-15-1 to 31-15-12 (1973, as amended through 2001). These acts comprise the statutory framework for providing counsel to indigent criminal defendants and must be read in *pari materia*. *Herrera v. Sedillo*, 106 N.M. 206, 207, 740 P.2d 1190, 1191 (N.M.Ct.App.1987). The Indigent Defense Act states:

> A needy person ... is entitled to be represented by an attorney to the same extent as a person having his own counsel and to be provided with the necessary services ... of representation, including investigation and other preparation. The attorney, services and facilities and expenses ... shall be provided at public expense for needy persons.

Section 31-16-3(A). A "needy person" is defined as one "who, at the time his need is determined by the court, is unable, without undue hardship, to provide for all or a part of the expenses of legal representation from available present income and assets." Section 31-16-2(C).

{14} The Public Defender Act obligates the Public Defender's Office to "represent every person without counsel who is financially unable to obtain counsel and who is charged in any court within the district with any crime that carries a possible sentence of imprisonment." Section 31-15-10(B). The Public Defender Act also provides that the Chief Public Defender is to "adopt a standard to determine indigency." Section 31-15-7(B)(12).

{15} Taken together, the Indigent Defense Act and the Public Defender Act are complementary. The purpose of the Indigent Defense Act is to ensure the protection of a defendant's Sixth Amendment constitutional rights and the Public Defender Act provides the administrative framework for accomplishing that objective. *Herrera*, 106 N.M. at 207, 740 P.2d at 1191. However, our primary question in this case—whether indigent defendants represented by *pro bono* counsel are constitutionally or statutorily entitled to public funding for expert witness fees—is not addressed by these statutes and remains unanswered.

{16} The fundamental right to counsel has been developed and refined in several ways relevant to the issues presented in this case. The Sixth Amendment right to counsel includes the right of a criminal defendant to the effective assistance of counsel, *see Cuyler v. Sullivan*, 446 U.S. 335, 344, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), and the obligation of states to "provide indigent prisoners with the basic tools of an adequate defense." *Britt v. N.C.*, 404 U.S. 226, 227, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971). The United States Supreme Court expanded this principle in *Ake v. Oklahoma*, 470 U.S. 68, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), and declared that an expert witness can constitute a basic tool of an adequate defense. New Mexico has embraced these ideals. In *State v. Turner*, 90 N.M. 79, 82, 559 P.2d 1206, 1209 (N.M.Ct. App.1976), the Court of Appeals explicitly acknowledged that the basic tools of an adequate defense must be made available to an indigent defendant, provided that the material requested is necessary to the defense. *See also State v. Delgado*, 112 N.M. 335, 345, 815 P.2d 631, 641 (N.M.Ct.App.1991) (recognizing, generally, the right of indigent defendants to be provided with the basic tools of an adequate defense).

{17} To decide the issue of whether the rights of indigent defendants to expert witnesses includes the right to funding to pay for those witnesses when the defendant is represented by a *pro bono* attorney, we must address two relevant New Mexico cases, *State ex rel. Quintana v. Schnedar*, 115 N.M. 573, 855 P.2d 562 (1993) and *Subin*, 2001–NMCA–105, 131 N.M. 350, 36 P.3d 441. At the outset, it is interesting to note that *Quintana* was decided earlier and enjoyed the full support of the members of this Court, while *Subin* resulted in a 2–1 split among the Court of Appeals panel in 2001. Neither party in *Subin* sought certiorari review by this Court.

{18} In *Quintana*, this Court held that New Mexico courts have the statutory power to order the Public Defender Department to represent a particular defendant when the Department has declined to do so. 115 N.M. at 575, 855 P.2d at 564. Noting the constitutional protections afforded indigent defendants, we stated, "[t]here is no doubt that the judiciary has the inherent authority to guarantee the enforcement of constitutional civil liberty protections in criminal prosecutions." *Id.* Further, courts "retain the ultimate authority to determine indigence and the discretionary ability to order the appointment of a public defender when . . . necessary to protect the defendant's constitutional or statutory rights." *Id.* at 578, 855 P.2d at 567.

{19} As mentioned previously, the Court of Appeals relied heavily on *Subin* in reaching its decision in this case. In *Subin*, the Court of Appeals held that the district court had neither the constitutional nor statutory authority to order the Department to pay the expert witness fees for an indigent defendant who was represented by counsel *paid for* by members of the defendant's family. 2001–NMCA–105, ¶ 4, 131 N.M. 350, 36 P.3d 441. In reaching that conclusion, the court emphasized that the Department was not declining to represent the defendant and thus was not denying the defendant anything to which she was constitutionally entitled. *Id.* ¶ 5. Instead, the court asserted that the defendant wished to "pick and choose what services she wanted and from whom" and concluded that "indigent defendants have no right to choose their own counsel or to insist that one attorney be substituted for another." *Id.* ¶ 6. The court upheld the Department policy requiring that an individual must be a client of the Department, or represented by an attorney on contract with the Department, in order to utilize Department procedures to receive defense services, including expert witness services. *Id.* ¶ 4.

{20} The *Subin* court also cited its reluctance to impose "an unwarranted intrusion into the administrative affairs of another agency." *Id.* Based on its practical and prudential concerns, together with its determination that there was no constitutional or statutory authority to rule otherwise, the court held that the district court had erred in ordering the payment of expert witness fees for that indigent defendant. *Id.* Despite that ruling, the Court of Appeals nonetheless ordered payment of the defendant's expert witness fees by the Department, reasoning that requiring the defendant to abide by its decision would unduly burden the defendant's constitutional right to a speedy trial. *Id.* ¶ 15.

{21} Judge Bustamante dissented in *Subin*. He stated that where "the constitutional right is clear and the statutory law [i.e., the Indigent Defense Act and the Public Defender Act] is honestly open to interpretation, the courts have an obligation to act." *Id.* ¶ 22 (Bustamante, J., concurring in part and dissenting in part). Relying on what he termed the "broader rule" of *Quintana*, he argued that courts "retain power and inherent authority to act 'to guarantee the enforcement of constitutional civil liberty protections in criminal prosecutions.' " *Subin*, 2001–NMCA–105, ¶ 20, 131 N.M. 350, 36 P.3d 441 (Bustamante, J., concurring in part and dissenting in part) (quoting *Quintana*, 115 N.M. at 575, 855 P.2d at 564). Quoting the district court's decision which had relied on *Quintana*, Judge Bustamante wrote: "It seems logical to me that if I can appoint a lawyer to represent a criminal defendant I should be able to insure that that lawyer can have the resources to provide that defense." *Subin*, 2001–NMCA–105, ¶ 21, 131 N.M. 350, 36 P.3d 441 (Bustamante, J., concurring in

part and dissenting in part) (quoted authority omitted).

{22} Brown argues that the holdings in *Subin* and *Quintana* are contradictory and asserts that *Quintana* should be the proper precedent for this Court to follow. The State argues that the Court of Appeals below was correct in its assertion that *Subin* and *Quintana* were not inconsistent and could be reconciled.

{23} Because there is apparent confusion regarding the holdings of these two cases, we hereby clarify that *Quintana* stands for the broad proposition that the courts serve as the ultimate guardians of an indigent defendant's constitutional rights. *Subin* addressed the situation in which the defendant, although indigent, nonetheless retained *paid* private counsel and was therefore not entitled to receive Department funding for expert witnesses.

{24} The facts in this case are distinguishable from *Subin*, because Brown's counsel is *pro bono*. We believe, therefore, that this case is more logically an extension of *Quintana*, rather than a "sequel" to *Subin*. In *Quintana*, this Court explicitly recognized the inherent authority of the district courts to ensure protection of the rights of indigent defendants. Here too, the Court is being asked to ensure the protection of an indigent defendant's constitutional and statutory rights.

{25} Therefore, we agree that Brown, an indigent defendant represented by *pro bono* counsel, is entitled both to the constitutional right to counsel and the constitutional right to be provided with the basic tools of an adequate defense. Although Brown was initially appointed a Department attorney, we do not believe that alone is enough to ensure that his constitutional rights are protected. Brown is also constitutionally entitled to be provided with the basic tools of an adequate defense. That right is not contingent upon the appointment of Department counsel; it is inherent under the state and federal Constitutions. We agree with Judge Vigil's dissenting opinion, that the majority in *Brown* "fail[ed] to give full recognition to Brown's constitutional right to Mr. Kortemeier's representation as his *pro bono* counsel and his constitutional right as an indigent to obtain the basic tools of an adequate defense at public expense." *Brown*, 2004–NMCA–037, ¶ 49, 135 N.M. 291, 87 P.3d 1073 (Vigil, J., dissenting). Thus, we conclude that since Brown's constitutional rights are compromised by his having been denied public funding for expert witness fees, there is a strong constitutional basis for us to reverse the Court of Appeals. We conclude that the more persuasive and reasoned approach in this case is that argued by Brown. That is, indigent defendants represented by *pro bono*, contract, or Department counsel should have equal access to expert witness funding *provided that* the expert witness meets all of the standards promulgated by the Department.

{26} We find additional, albeit secondary, support for our decision from the cases of our sister states. It appears that the majority of state courts that have examined this issue have concluded that under the U.S. Constitution and their respective state statutes, indigent defendants represented by *pro bono* or retained counsel are entitled to state funding for various defense costs, including expert witness fees.[1]

1. Each of the following states have recognized the right to state funded experts for indigent defendants with pro bono or retained counsel: *Ex Parte Sanders v. State*, 612 So.2d 1199 (Ala. 1993); *Dubose v. State*, 662 So.2d 1156 (Ala. Crim.App.1993); *Jacobson v. Anderson*, 203 Ariz. 543, 57 P.3d 733 (Ct.App.2002); *Tran v. Superior Court*, 92 Cal.App.4th 1149, 112 Cal.Rptr.2d 506 (2001); *People v. Worthy*, 109 Cal.App.3d 514, 167 Cal.Rptr. 402 (1980); *Cain v. State*, 758 So.2d 1257 (Fla.Dist.Ct.App.2000); *Thompson v. State*, 525 So.2d 1011 (Fla.Dist.Ct.App.1988); *Arnold v. Higa*, 61 Haw. 203, 600 P.2d 1383 (1979); *State v. Evans*, 271 Ill.App.3d 495, 208 Ill.Dec. 42, 648 N.E.2d 964 (1995); *Beauchamp v. State*, 788 N.E.2d 881 (Ind.Ct.App.2003); *English v. Missildine*, 311 N.W.2d 292 (Iowa 1981); *Kenton–Gallatin–Boone Public Defender, Inc. v. Stephens*, 819 S.W.2d 37 (Ky.1991); *Morton v. Commonwealth*, 817 S.W.2d 218 (Ky.1991); *State v. Green*, 631 So.2d 11 (La.Ct.App.1993); *Howell v. State*, 860 So.2d 704 (Miss.2003); *Widdis v. Second Judicial Dist. Court*, 114 Nev. 1224, 968 P.2d 1165 (1998); *In re Cannady*, 126 N.J. 486, 600 A.2d 459 (1991); *State v. Manning*, 234 N.J.Super. 147, 560 A.2d 693 (Ct.App.Div.1989); *State v. Boyd*, 332 N.C. 101, 418 S.E.2d 471 (1992); *State v. Burns*, 4 P.3d 795 (Utah 2000); *State v. Wool*, 162 Vt. 342, 648 A.2d 655 (1994); *State v. Wilkes*, 193 W.Va. 206, 455 S.E.2d 575 (1995).

{27} We disagree with the majority position taken below, that the Public Defender Act, enacted after the Indigent Defense Act, designated the Department as the exclusive source of services and funding for indigent defendants. *Brown*, 2004–NMCA–037, ¶¶ 25, 27, 29, 135 N.M. 291, 87 P.3d 1073. Instead, we again note that the courts are the ultimate guardians of indigent defendants' rights, and that the failure of the Legislature to identify a budget appropriation to the district courts does not indicate that it intended to disallow the district courts from taking action to obtain funding necessary to protect those rights.

{28} We also consider the conflicting policy interests implicated in this matter, specifically, the limited resources and the administrative burden on the Department versus the protection of indigent defendants' constitutional rights. In its brief as amicus curiae, the Department asserts that it should not be ordered to pay the expenses of non-clients. We recognize the enormous caseload carried by the Department and the ongoing budgetary constraints under which the Department must operate. The Department notes that it "is responsible for administering the limited funds appropriated by the Legislature for expert services for each of its nearly 60,000 clients statewide." We believe, however, the administrative mechanism already exists to facilitate distribution of funds to indigent defendants in need of expert witness fees who are represented by non-Department counsel. In at least some, if not all, of the judicial districts of New Mexico, the Department retains contract attorneys who are not officially employed by the Department, but who provide defense services for indigent defendants in lieu of official Department representation.[2] These attorneys typically work in areas without district offices or handle cases where there are ethical conflicts with Department representation. The Department has set up procedures for those attorneys to apply for and receive funding for the expert witnesses and other services their clients may require. It would seem that those procedures would work equally well for those attorneys who are representing indigent clients *pro bono*. Therefore, the administrative mechanism is already in place to handle requests for funding made by lawyers outside of the Department.

{29} Finally, there is the important consideration of the role of *pro bono* work in the legal profession. In their brief of amicus curiae, the New Mexico Criminal Defense Lawyers Association and the New Mexico Trial Lawyers Association (NMCDLA/NMTLA) argue strongly that following the Court of Appeals Opinion in this case would chill participation by the private bar in providing *pro bono* defense services for indigent defendants. According to the NMCDLA/NMTLA, "[m]ost volunteer lawyers cannot afford and should not be required to fund the investigators, expert witnesses and other costs involved in preparing an adequate defense." Noting the emphasis placed on *pro bono* work in the New Mexico Rules of Professional Conduct, the NMCDLA/NMTLA warns that most of its attorneys will not be able to continue *pro bono* criminal representation if the out-of-pocket costs of the case are not funded by the State. The State's only response to the *pro bono* issue is that attorneys offering to undertake *pro bono* representation may only take on those cases he or she can competently handle. If he or she does not have the financial resources to handle the case, he or she is obligated not to do so.

{30} We believe that *pro bono* representation should be encouraged and furthered wherever possible. Given the heavy workload of the Department and the emphasis on *pro bono* service throughout the legal community, it would seem that any lawyer who wishes to take on *pro bono* cases should not be discouraged solely because of lack of access to needed defense funds, such as expert witness fees.

{31} Based on the above discussion, we hold that constitutional considerations, together with the particular statutory framework in New Mexico and the important policy interests at stake, mandate that a

2. Some New Mexico counties are served entirely by contract counsel, including San Miguel, Mora, Guadalupe, Grant, Hidalgo, Luna, Socorro, Catron, Sierra, Torrance, Quay, Harding, De Baca, McKinley, Valencia, Sandoval, and Cibola.

defendant, established as indigent and represented by *pro bono* counsel, be afforded the same access to expert witness funding as other defendants represented by the Department. More specifically, where a defendant's indigence has been conclusively established, he or she is entitled to obtain funding for expert witness fees regardless of whether he or she is represented by the Department, by a contract attorney, or by a private *pro bono* attorney, subject, of course, to the same requirements imposed on all Department clients. Therefore, each defendant who seeks to establish his or her indigence should first obtain the necessary declaration from the court, as mandated by the Indigent Defense Act. Once indigence is conclusively established, each defendant should utilize the same procedures to apply for funding for expert services from the Department. Each application should be subject to identical review with funds distributed in some objective way, regardless of whether the defendant is represented by *pro bono* counsel, contract counsel, or the Department, and should be subject to the standard fee schedule promulgated by the Department. Treating similarly situated indigent defendants the same under the law will promote the "fair administration of justice" and ensure that constitutional and statutory obligations are satisfied.

Conclusion

{32} For the reasons discussed above, we hold that indigent defendants represented by *pro bono* counsel are entitled to apply for and receive expert witness fees from the Department. This Opinion shall apply to the case at bar, similar pending actions, and to cases arising in the future. We remand to the district court for proceedings consistent with this Opinion and order that Brown's expert witness fees be paid from Department funds.

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

WE CONCUR: RICHARD C. BOSSON, Chief Justice, PAMELA B. MINZNER, PATRICIO M. SERNA, and EDWARD L. CHÁVEZ, Justices.

2006-NMSC-022

134 P.3d 761

Lajusta SAM, individually and as personal representative of the Estate of Tyler Dexter Sam, deceased, and as next friend of Bronte Kieran S., Cory Deyoung S., and Britney Lynn S., minor children, Plaintiffs–Respondents,

v.

The Estate of Benny SAM, Jr., and Arizona School Risk Retention Trust, Inc., an Arizona non-profit corporation, Defendants–Petitioners.

No. 28,426.

Supreme Court of New Mexico.

April 24, 2006.

Briones Law Firm, P.A., Kyle Michael Finch, Farmington, NM, Jones, Skelton & Hochuli, P.L.C., Eileen Dennis Gilbride, Phoenix, AZ, for Petitioners.

Keleher & McLeod, P.A., David W. Peterson, Albuquerque, NM, Ascione, Heideman & McKay, L.L.C., Patrick J. Ascione, Justin D. Heideman, Provo, UT, for Respondents.

OPINION

MAES, Justice.

{1} This case arises from an accident that occurred in New Mexico and involved an Arizona government employee. As a matter of first impression, we must determine whether a New Mexico district court should, as a matter of comity, recognize the sovereign immunity of a sister state, Arizona. Petitioners urge us to reverse the Court of Appeals' findings that neither New Mexico's nor Arizona's limits on waiver of sovereign immunity apply to Respondents' claim and that the claim is not barred by either state's statute of limitations. Both Arizona and New Mexico have waived sovereign immunity through their respective Tort Claims Acts. *See* NMSA 1978, §§ 41–4–1 to –27 (1976, as amended through 2004); ARIZ.REV.STAT. ANN. §§ 12–820 to –823 (1984, as amended through 2002). However, the waiver of sovereign immunity in both states is restrained by strict statutes of limitations that bar suits filed a certain amount of time after the alleged tort. Section 41–4–15(A); ARIZ.REV. STAT. ANN. § 12–821. We hold that, in the interests of comity, New Mexico should extend the Tort Claims Act statute of limitations to states with similar tort claims acts

when they are sued in New Mexico district courts. We reverse the Court of Appeals' decision in this case and affirm, with modification, the district court's ruling that Respondents' claim was not timely filed.

BACKGROUND

{2} The tragic accident that gave rise to this case occurred in Gallup, New Mexico. Mr. Benny Sam, Jr. ("Sam") ran over and killed his four-year-old son while backing out of his driveway. The truck Sam was driving belonged to his employer, the Window Rock Unified School District, an Arizona governmental entity. Sam was authorized to drive the truck home for the weekend, and was moving it out of his driveway to work on his personal vehicle when the accident occurred. Throughout the course of the litigation both sides have assumed that Sam was acting in the course and scope of his employment.

{3} Sam later passed away. Subsequently, his wife, both individually and as personal representative of her son's estate ("Respondents"), sued Sam's estate ("the Estate") and the Arizona School Retention Trust, Inc. ("the Trust") in the New Mexico District Court of McKinley County. The suit was filed one day prior to exactly three years after the accident occurred. Thus, Respondents' suit was timely filed if New Mexico's three-year statute of limitations for general tort actions applied, *see* NMSA 1978, § 37–1–8 (1976), but the New Mexico Tort Claims Act's two-year statute of limitations for actions against New Mexico governmental entities would bar the suit if applied to the case. *See* § 41–4–15(A).

{4} The two original defendants, the Trust and the Estate (collectively, "Petitioners"), each filed separate motions for summary judgment based on different rationales. In two separate rulings the district court judge granted the motions. First, the judge dismissed the suit against the Trust because Respondents failed to comply with Arizona's notice of claim under ARIZ.REV.STAT. ANN. § 12–821.01(A) (requiring persons with a claim against an Arizona governmental entity or employee to give notice to the entity within one hundred and eighty days after the cause of action accrues). Second, the judge granted summary judgment against Respondents for failing to file the complaint within either the one-year statute of limitations period of the Arizona Tort Claims Act, *see* ARIZ.REV.STAT. ANN. § 12–821, or the two-year statute of limitations period of the New Mexico Tort Claims Act. *See* § 41–4–15(A).

{5} The district judge concluded that Respondents' action was barred by "the statute of limitations of both Arizona and New Mexico." This conclusion was based on his legal findings that: (1) the public policy behind both states' tort claims acts is the same; (2) a "public employee in either state in the same situation would only be subject to a one [sic] or two-year statute" of limitations; and (3) to "allow this suit to go forward . . . would undermine the policies and laws of both Arizona and New Mexico."

{6} Respondents appealed both rulings to the Court of Appeals. The Court first upheld the district court's determination that Respondents failed to timely appeal the judge's order of dismissal against the Trust. *Sam v. Estate of Sam*, 2004–NMCA–018, ¶ 1, 135 N.M. 101, 84 P.3d 1066. Respondents did not challenge this ruling on appeal and it is deemed abandoned. *See Deaton v. Gutierrez*, 2004–NMCA–043, ¶ 26, 135 N.M. 423, 89 P.3d 672. Second, under a *de novo* standard of review, the Court reversed the district court's determination that either Arizona's or New Mexico's tort claims act statute of limitations applied to this case. *Sam*, 2004–NMCA–018, ¶¶ 1, 12, 135 N.M. 101, 84 P.3d 1066. It first determined that the Arizona Tort Claims Act was inapplicable because New Mexico courts are "not required to recognize Arizona's statute of limitations . . . or the sovereign immunity granted to its public employees." *Id.* ¶ 13. Second, it held that the New Mexico Tort Claims Act was inapplicable because Sam was not employed by New Mexico and was therefore not covered by New Mexico's Tort Claims Act. *Id.* ¶ 14. The Court decided that the correct statute of limitations was New Mexico's general three-year statute of limitations governing tort actions. *Id.* ¶ 15; *see* § 37–1–8. The Court determined that because New Mexico generally applies the law of the place where the wrong or tort occurred, the general three-year statute of limitations was appropriate in

this case. *Sam,* 2004–NMCA–018, ¶ 15, 135 N.M. 101, 84 P.3d 1066 (citing *Torres v. State,* 119 N.M. 609, 613, 894 P.2d 386, 390 (1995)).

DISCUSSION

{7} Petitioners argue that the Court of Appeals erred when it applied the general rule that the law of the place of the wrong controls. They claim that the Court of Appeals should have instead performed a comity analysis to determine whether New Mexico should recognize and apply the Arizona one-year statute of limitations or apply the New Mexico Tort Claims Act two-year statute of limitations to Arizona governmental entities sued in New Mexico. Conversely, Respondents urge us to uphold the Court of Appeals decision. Their principal policy arguments in favor of applying the three-year statute of limitations are that New Mexico's Mandatory Financial Responsibility Act (NMMFRA) evinces a strong state interest in compensating victims of negligent acts and that a three-year statute of limitations would make the determination easy and promote predictability and uniformity. Additionally, they argue that a comity analysis is not warranted in this case, but assert that even if we decide to engage in a comity analysis, public policy would dictate that New Mexico's general three-year statute of limitations applies.

{8} Whether a district court should extend immunity to a sister state as a matter of comity is an issue of first impression in New Mexico. Comity is a principle whereby a sovereign forum state recognizes and applies the laws of another state sued in the forum state's courts. The sovereign forum state has discretion whether or not to apply the laws of the other state. In order to fully explore this topic, we will discuss the principles behind comity and what factors a New Mexico court should consider to determine if comity should be extended.

{9} The parties disagree about the preliminary matter of what standard of review an appellate court should apply to this issue. Generally, when the facts of a case are not in dispute, we review the grant or denial of a motion to dismiss *de novo. See Self v. United Parcel Serv., Inc.,* 1998–NMSC–046, ¶ 6, 126 N.M. 396, 970 P.2d 582 (reviewing summary judgment). This includes whether a governmental entity has immunity. *See Godwin v. Mem'l Med. Ctr.,* 2001–NMCA–033, ¶ 23, 130 N.M. 434, 25 P.3d 273 (reviewing the New Mexico Tort Claims Act). Respondents urge us to adopt this standard of review for this case. Petitioners argue that we should adopt a dual standard of review for cases involving a district court's decision to extend comity. They argue that we should review the district court's decision to use a comity analysis *de novo,* and then review a district court's application of comity for abuse of discretion. They argue that an abuse of discretion standard is appropriate because the analysis is fact-sensitive. *See, e.g., Jackett v. Los Angeles Dep't of Water & Power,* 771 P.2d 1074, 1075 (Utah Ct.App. 1989). This two-tiered standard of review is based on analyses from other state courts and federal circuit courts. *See Lee v. Miller County, Arkansas,* 800 F.2d 1372, 1376 (5th Cir.1986); *Levert v. Univ. of Ill. at Urbana/Champaign,* 857 So.2d 611, 618 (La.Ct. App. 1st Cir.2003); *Univ. of Ia. Press v. Urrea,* 211 Ga.App. 564, 440 S.E.2d 203, 204 (1993). We agree with Petitioners and adopt this two-tiered standard of review. Therefore, we must first determine whether the district court used a comity analysis to arrive at the proper standard of review.

{10} The district court's findings of fact and conclusions of law in this case are brief. Although it appears that Petitioners' Estate did say the word "comity" at the hearing on the motion for summary judgment, comity was not mentioned in either its Brief in Support of Motion for Summary Judgment or its Reply Brief in Support of Motion for Summary Judgment. In fact, Petitioners' Estate did not cite any case law supporting its position in either of those briefs. It only argued that since the Estate was being sued in New Mexico based on Sam's capacity as an employee of Arizona, either the Arizona or New Mexico statute of limitations for tort actions involving public employees should apply.

{11} Petitioners argue that if we determine that the district court did not apply a

comity analysis we should still affirm the district court under the "right for any reason" doctrine. *See Maralex Res., Inc. v. Gilbreath,* 2003–NMSC–023, ¶ 13, 134 N.M. 308, 76 P.3d 626. "[A]n appellate court 'will affirm the district court if it is right for any reason and if affirmance is not unfair to the appellant.'" *Id.* (quoting *Moffat v. Branch,* 2002–NMCA–067, ¶ 13, 132 N.M. 412, 49 P.3d 673).

{12} There is no clear indication that the trial court analyzed this case under the principles of comity. Although it structured its conclusions of law in a way that reflects a comity analysis, it did not do so expressly. Therefore, review of the district court's decision should be *de novo* because the district court only stated it was granting a motion for summary judgment. In future cases, we will utilize the approach urged by Petitioners. We will review the appropriateness of a district court's decision to engage in a comity analysis *de novo,* but will review the district court's fact-intensive comity analysis for abuse of discretion.

{13} The seminal cases dealing with when and how a forum state should extend immunity under comity to a sister state sued in its courts are *Nevada v. Hall,* 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979), and *Franchise Tax Board of California v. Hyatt,* 538 U.S. 488, 123 S.Ct. 1683, 155 L.Ed.2d 702 (2003). Both of these cases stand for the principle that a forum state is not required to extend immunity to other states sued in its courts, but the forum state should extend immunity as a matter of comity if doing so will not violate the forum state's public policies. The Court of Appeals recognized that New Mexico was not required to extend immunity to Arizona. *See Sam,* 2004–NMCA–018, ¶ 13, 135 N.M. 101, 84 P.3d 1066. However, it then stated that Arizona's one-year statute of limitations "is not applicable to actions involving [Arizona] employees when the cause of action accrues in New Mexico." *Id.* We review *Hall* and *Hyatt* as well as decisions from other state courts that have addressed this issue.

{14} In *Hall,* 440 U.S. 410, 99 S.Ct. 1182, California residents were injured in an automobile accident negligently caused by an employee of the University of Nevada driving a University of Nevada vehicle in California. The plaintiffs sued and won in a California court, where the University of Nevada claimed its damages should be limited to $25,000, the maximum recovery allowed under Nevada's limited waiver of sovereign immunity through its tort claims act. The United States Supreme Court began by recognizing that no state may be sued in its own court without its permission, unless it has expressly waived its sovereign immunity in some manner. Next, the Court stated that a claim of immunity in another state's courts is possible, but "must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity." *Id.* at 416, 99 S.Ct. 1182.

{15} The University of Nevada argued in favor of a federally enforced mandate of interstate comity that would require California to honor Nevada's limited waiver of sovereign immunity. In rejecting the University of Nevada's argument, the Court found that while the United States Constitution, through the Eleventh Amendment, "places explicit limits on the powers of federal courts to entertain suits against a State;" there is no such limitation on a state court entertaining a suit against another state. *Id.* at 420, 99 S.Ct. 1182. Further, the Court held that the Full Faith and Credit Clause only requires "each State to give effect to official acts of other States," *id.* at 411, 99 S.Ct. 1182, but "does not require a State to apply another State's law in violation of its own legitimate public policy." *Id.* at 422, 99 S.Ct. 1182.

{16} However, the Court stated that nothing prevented a forum state from recognizing another state's immunity, or limited waiver of immunity, in the forum state's courts based on comity. *Id.* at 425, 99 S.Ct. 1182. The Court noted the presumption that "the States intended to adopt policies of broad comity toward one another." *Id.* This presumption is based on the "intimate union of these states, as members of the same great political family," and the "deep and vital interests which bind them so closely together." *Id.* at 425–26, 99 S.Ct. 1182 (quoting *Bank of*

Augusta v. Earle, 38 U.S.(13 Pet.) 517, 590 (1839)). However, in order to refuse to honor the laws of another state, a forum state only needs to declare that the other state's law would violate its own legitimate public policy. To require more would allow the citizens of one state to determine the public policy of another. *Id.* In other words, the Court was stating that it would be "wise policy, as a matter of harmonious interstate relations, for States to accord each other immunity or to respect any established limits on liability," as long as doing so did not violate the forum state's public policy. *Id.* at 426, 99 S.Ct. 1182.

{17} The Court concluded that the waiver of immunity in both states was sufficiently different and to apply Nevada law would violate California's public policy. California law did not set a cap on the damages an injured person could recover from the state when it waived immunity, while Nevada set the limit at $25,000. *Id.* at 424, 99 S.Ct. 1182. This difference was sufficient for California to justify not extending comity to Nevada. *Id.* at 427–28, 99 S.Ct. 1182.

{18} The Court reaffirmed *Hall* in *Hyatt,* 538 U.S. 488, 123 S.Ct. 1683. There, a taxpayer, a former California resident living in Nevada, brought an action in Nevada state court against a California tax-collection agency for both negligent and intentional torts. *Id.* at 490–91, 123 S.Ct. 1683. Nevada had waived sovereign immunity for intentional acts by similar Nevada agencies, but had not waived immunity for merely negligent acts. *Id.* at 492–93, 123 S.Ct. 1683. The Nevada Supreme Court denied in part the agency's writ of mandamus by allowing the taxpayer's claims of intentional torts to proceed in Nevada's courts, but dismissing the claims for negligent acts. *Id.* at 492–94, 123 S.Ct. 1683. The United States Supreme Court affirmed this decision, stating that the "Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Id.* at 499, 123 S.Ct. 1683.

{19} While the particular issue in this case is new to New Mexico, our courts have used a similar comity analysis in other situations. "Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Leszinske v. Poole,* 110 N.M. 663, 668, 798 P.2d 1049, 1054 (N.M.Ct.App.1990) (quoting *Societe Nationale Industrielle Aerospatiale v. United States District Court,* 482 U.S. 522, 543 n. 27, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987)). In *Leszinske,* a father sued to gain full custody of his children after his ex-wife married her uncle in Costa Rica. The district court in that case conditioned the award of primary custody to the mother on her entering into a valid marriage with the uncle. *Id.* at 664, 798 P.2d 1049. The mother went to Costa Rica to marry her uncle because New Mexico considers marriage between an uncle and a niece to be an invalid marriage. *Id.* at 664–65, 798 P.2d 1049. In deciding whether to recognize the Costa Rican marriage that undoubtably went against the public policy of New Mexico to some degree, the Court of Appeals stated that "the dispositive question is whether the marriage offends a sufficiently strong public policy to outweigh the purposes served by the rule of comity." *Id.* at 669, 798 P.2d 1049. The Court found that recognizing a marriage that was invalid under New Mexico law was not sufficiently offensive to New Mexico public policy to outweigh the principles of comity.

{20} Of course, it is well settled that another state court cannot compel a New Mexico court to dismiss a case or refuse to hear one. *See Spear v. McDermott,* 1996–NMCA–048, ¶ 48, 121 N.M. 609, 916 P.2d 228 ("[N]either the full-faith-and-credit principle nor the concept of comity requires recognition of an attempt by one court to abate or stay proceedings in a different court."). This case presents a different issue than was involved in *Spear.* Here, the issue is whether the New Mexico courts should apply Arizona's statute of limitations or extend New Mexico's statute of limitations to an Arizona public employee based on the principles of comity, not whether it is compelled to do so. Clearly, *Hall* establishes that New Mexico courts are not compelled to extend immunity, but rather, they are encouraged to do so if it

would not violate New Mexico's public policy. This is where the Court of Appeals in this case erred. It stated that because New Mexico is not required to recognize Arizona's statute of limitations, it "is not applicable to actions involving [Arizona public] employees when the cause of action accrues in New Mexico." *Sam*, 2004–NMCA–018, ¶ 13, 135 N.M. 101, 84 P.3d 1066. By stating that the Arizona statute of limitations was not applicable without further discussion, it is uncertain whether the Court considered the question of comity fully or simply felt that it was incapable of applying Arizona law.

{21} Thus, following *Leszinske* and the seminal cases from the United States Supreme Court, the question in this case is whether the Arizona Tort Claims Act "offends a sufficiently strong public policy to outweigh the purposes served by the rule of comity." *Leszinske*, 110 N.M. at 669, 798 P.2d at 1055. As a general rule, comity should be extended. Only if doing so would undermine New Mexico's own public policy will comity not be extended.

{22} Several other jurisdictions have considered similar issues to the one we decide today. The courts have applied a variety of factors to determine if the forum state should extend immunity based on comity. The factors assist in determining whether extending immunity through comity would violate the forum state's public policy. These factors include: (1) whether the forum state would enjoy similar immunity under similar circumstances, *see, e.g., Head v. Platte County, Missouri*, 242 Kan. 442, 749 P.2d 6, 10 (1988); (2) whether the state sued has or is likely to extend immunity to other states, *see, e.g., Morrison v. Budget Rent A Car Sys.*, 230 A.D.2d 253, 657 N.Y.S.2d 721, 731 (1997); (3) whether the forum state has a strong interest in litigating the case, *see, e.g., Ehrlich–Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 427 N.Y.S.2d 604, 404 N.E.2d 726, 730 (1980); and (4) whether extending immunity would prevent forum shopping, *see, e.g., Newberry v. Ga. Dep't of Indus. & Trade*, 286 S.C. 574, 336 S.E.2d 464, 465 (1985). We likewise consider each of these factors when determining whether recognizing the sovereign immunity of a sister state would be contrary to the public policy of New Mexico.

{23} First, it is clear that a similar action brought against a New Mexico entity or government employee would be barred by the two-year statute of limitations in the New Mexico Tort Claims Act. *See* § 41–4–15. Like Arizona, New Mexico waived immunity on this type of claim, but did so with a strict statute of limitations. The New Mexico Tort Claims Act expresses a clear public policy that tort claims against negligent New Mexico governmental entities should be allowed, but only if brought within two years of the date of the alleged tort.

{24} The second factor, whether Arizona would extend immunity to New Mexico, has not been addressed by Arizona's courts. Thus, it is unclear whether Arizona would extend immunity to this state under a comity analysis. However, we believe that New Mexico has an interest in according immunity by comity in this instance in order to encourage Arizona to extend immunity to a New Mexico governmental entity in the future. When faced with deciding whether to grant New Mexico immunity, Arizona and other states will likely consider our decisional law on the subject of comity. Those states may be reluctant to extend immunity to our state if we have previously declined to extend immunity to a sister state. *See Morrison*, 657 N.Y.S.2d 721 (when determining whether to extend immunity to South Carolina, the New York court examined the Supreme Court of South Carolina's decision declining to extend immunity to North Carolina by comity).

{25} Regarding the third factor, New Mexico certainly has an interest in litigating this case, but that interest is tempered by the concept of comity and the New Mexico Tort Claims Act. Respondents' arguments address this factor. They argue that to apply the Arizona statute of limitations would contravene New Mexico's public policy of adequately compensating victims of automobile accidents. This public policy is contained in the New Mexico Mandatory Financial Responsibility Act (NMMFRA). *See* NMSA 1978, §§ 66–5–201 and –201.1 (1983, as amended in 1998); *see also Estep v. State Farm Mut. Auto. Ins. Co.*, 103 N.M. 105, 108,

703 P.2d 882, 885 (1985) ("[t]he fundamental purpose for the enactment of financial responsibility laws [is] protecting innocent accident victims from financial hardship"). Even Respondents note, however, that the NMMFRA does not specifically apply to this case. The NMMFRA requires automobile insurance to ensure compensation for victims of automobile accidents. Sections 66–5–205 to –208. In this case there was insurance, but the statute of limitations may bar Respondents' recovery under the insurance policy. While the NMMFRA embodies strong public policy in New Mexico, we believe it must be balanced against the equally clear New Mexico public policy of limiting claims against the government contained in the Tort Claims Act. Section 41–4–2.

{26} Through the Tort Claims Act, our Legislature has determined that it is appropriate to allow persons harmed by the negligent acts of New Mexico public employees to recover, but only if they file suit within two years. Arizona has similarly determined that persons harmed by the negligent acts of Arizona public employees can file suit, but they must do so within one year. New Mexico has a particular interest in providing compensation or access to the courts to residents of the state. We believe that we are faced with a situation similar to that which Nevada faced in *Hyatt*. In *Hyatt*, the United States Supreme Court approved of Nevada applying its own limited waiver of immunity to California. *Hyatt*, 538 U.S. at 499, 123 S.Ct. 1683. Nevada recognized that both states waived immunity, but differed in how they waived immunity. Nevada had waived immunity for intentional acts but not for negligent acts, while California retained complete immunity for the agency sued. *Id.* at 493–94, 123 S.Ct. 1683. Therefore, not only was it appropriate for Nevada to grant California immunity, but also to only grant to California what it deemed appropriate for itself.

{27} Similarly, we believe that New Mexico should extend a limited grant of immunity to Arizona because both states have done so through tort claims acts. However, we should only extend New Mexico's two-year statute of limitations instead of applying Arizona's one-year statute of limitations. Applying Arizona's one-year statute of limitations is not in accordance with the public policy behind our own two-year statute of limitations. To apply Arizona's one-year statute of limitations would violate our own public policy of allowing two years to file suit against a governmental agency. This way, we are extending a limited grant of immunity to a sister state under the principles of comity in accordance with our state's public policy. Extending New Mexico's two-year statute of limitations fulfills the principles of comity without violating our own public policy.

{28} Finally, extending New Mexico's statute of limitations to Arizona governmental entities will limit forum shopping. While we have decided not to recognize Arizona's one-year statute of limitations because it is not in accordance with New Mexico's public policy, we are extending New Mexico's two-year statute of limitations instead of the general three-year statute of limitations. Although this solution may not completely eliminate forum shopping, we believe it will prevent forum shopping to some degree.

CONCLUSION

{29} While we affirm the district court's grant of Petitioners' Motion to Dismiss the Estate, we do so for reasons not addressed by the district court. We reverse the Court of Appeals on this issue. The district court should have applied a comity analysis and concluded that the two-year statute of limitations in the New Mexico Tort Claims Act applies to this case. Because Respondents did not file suit within two years of the accident, their suit is barred.

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

WE CONCUR: RICHARD C. BOSSON, Chief Justice, PAMELA B. MINZNER, PATRICIO M. SERNA, EDWARD L. CHÁVEZ, Justices.

2006-NMSC-024

134 P.3d 769

Inquiry Concerning a Judge, No. 2004-011, IN THE MATTER OF HONORABLE WILLIAM A. McBEE, District Judge, Fifth Judicial District, New Mexico.

No. 29,265.

Supreme Court of New Mexico.

May 16, 2006.

James A. Noel, Esq., Randall D. Roybal, Esq., Albuquerque, N.M., for Judicial Standards Commission.

Law Offices of Templeman and Crutchfield C. Barry Crutchfield, Esq., Lovington, N.M., for Respondent.

FORMAL REPRIMAND AND OPINION

PER CURIAM.

{1} This matter has come before the Court twice following disciplinary proceedings in the Judicial Standards Commission concerning the Honorable William A. McBee (Respondent). After the Commission filed its first petition for discipline upon stipulation in this Court, we set the matter for oral argument. During oral argument, disputes arose regarding the findings of fact and conclusions of law issued by the Commission, which Respondent ostensibly stipulated to in a contemporaneously filed stipulation agreement and consent to discipline with the Commission. As a result, upon request of the Commission's general counsel, we remanded this matter to the Commission for further proceedings.

{2} Upon remand, the Commission's general counsel, who was the examiner assigned to prosecute the disciplinary charges against Respondent, filed a motion for order to show cause why Respondent should not be held in contempt of the Commission for his alleged intentional misrepresentation of material facts during the hearing before this Court. The Commission also amended its notice of formal proceedings against Respondent to add a second count alleging violation of Commission rules and the Code of Judicial Conduct based on the same conduct at issue in the contempt motion. Both the motion and the second count of the amended notice of formal proceedings remain pending before the Commission and are not before this Court at this time. Accordingly, we express no opinion on the merits of those pending proceedings.

{3} Although the proceedings against Respondent remain pending before the Commission, the Commission nevertheless filed with this Court a second petition for discipline upon stipulation, which included findings of fact and conclusions of law based on a second stipulation agreement and consent to discipline between the Commission and Respondent. The pertinent findings of fact are summarized below. Following a second hearing before this Court, we granted the stipulated petition and ordered the stipulated discipline against Respondent. Among other

things, we ordered that Respondent receive a public reprimand, which we now issue in the form of this opinion.

FACTUAL BACKGROUND

{4} These proceedings are the result of actions Respondent took in relation to a criminal proceeding filed in the Fifth Judicial District, where Respondent was at all times relevant to this matter, and is currently, a sitting district court judge. Specifically, the State of New Mexico filed a criminal information charging Tami Busch with two felony counts of trafficking cocaine and five felony counts of distribution of methamphetamine. The case was initially assigned to Judge Gary L. Clingman, who was excused from the case by Ms. Busch.

{5} The following day, Respondent was assigned the case. Respondent did not recuse himself from the case at that time. However, during the course of these proceedings Respondent stipulated "that he was aware that presiding over [Ms. Busch's] case could give, at a minimum, the appearance to a reasonable person that Respondent was not impartial in that matter on the basis of his personal relationship with Max Proctor, boyfriend to, and attorney for, [Ms. Busch], who subsequently became [Ms. Busch's] husband."

{6} At the arraignment, Ms. Busch pled no contest to all seven felony counts filed against her. Her plea was accepted at that time but did not contain an agreement as to sentencing, and Respondent ordered a presentence report at the conclusion of the hearing. The report concluded that Ms. Busch "was a drug dealer" and should be "held accountable for her actions." The pre-sentence report recommended sentencing Ms. Busch to 18 years for the cocaine charges and 15 years for the methamphetamine charges, to run consecutively for a total of 33 years. The report further recommended suspending all but 5 years, to be served in the Penitentiary of New Mexico, followed by 2 years mandatory parole.

{7} Upon review of the pre-sentence report and all factors surrounding the case, Respondent indicated at a sentencing hearing the following week that he would consider assigning Ms. Busch to participate in a new program, the Lea County Family Drug Court, in lieu of incarceration. However, Respondent continued the hearing to a future unspecified date because the Lea County Family Drug Court was not yet an available sentencing alternative for Ms. Busch.

{8} Approximately two months later, the chief judge for the Fifth Judicial District, the Honorable Jay Forbes, met with Respondent to discuss whether it would be proper for Respondent to preside over Ms. Busch's case because of the appearance of a personal bias. As the result of the meeting, they agreed that Respondent's continued involvement in Ms. Busch's case gave, at a minimum, the appearance that his integrity and impartiality was impaired. Respondent therefore recused from the case one week later.

{9} Following Respondent's recusal, the case was reassigned to Judge William P. Lynch, who set the matter for sentencing. Prior to the sentencing hearing, Ms. Busch requested that the State be bound by Respondent's comments during the previous sentencing hearing regarding family drug court. Specifically, Ms. Busch wanted to require Judge Lynch to order family drug court as a sentencing alternative for her. However, at the sentencing hearing, Judge Lynch indicated that he was not bound by Respondent's consideration of family drug court. At that point, Ms. Busch requested to withdraw her plea to all charges, since she pled no contest believing she would avoid incarceration and be sentenced to family drug court. Judge Lynch indicated that he was not inclined to allow Ms. Busch to withdraw her plea because there was no official court record memorializing any agreement on sentencing associated with her no contest plea. Nevertheless, Judge Lynch continued the sentencing hearing to allow Ms. Busch time to file any motions she believed were necessary to support her position that she should be sentenced to family drug court.

{10} When the sentencing hearing resumed, Ms. Busch argued that Respondent had already sentenced her to family drug court, that Respondent had improperly recused himself from her case, and that her case was not properly assigned to Judge

Lynch for sentencing purposes. Shortly after the sentencing hearing Judge Lynch recused himself from the case for procedural reasons and issued an order expressing concern that "Ms Busch [through her counsel] seemed unusually well-informed about matters outside the record in [her] case." Specifically, Judge Lynch noted that:

> Defendant Busch [through her counsel] told me that, if I recuse, Judge McBee will enter an order that will withdraw the recusal he filed as being improvidently ordered. Defendant Busch further told me that Judge McBee does not think he should have recused from this case. Perhaps there was no *ex parte* contact because the case was no longer pending before Judge McBee, or perhaps Judge McBee thought no party would gain a procedural or tactical advantage as a result of the communications. Because Assistant District Attorney Terry Haake told me that he was not privy to those conversations, the conversations raise questions [of propriety] in my mind.

{11} Consistent with what Judge Lynch noted in his order, Respondent subsequently revoked his recusal from Ms. Busch's case in contravention of the agreement Respondent reached with Chief Judge Forbes. Respondent also accepted jurisdiction over sentencing, despite having acknowledged that his participation in Ms. Busch's case, at a minimum, gave the appearance of impropriety. Respondent now admits that his revocation of recusal and acceptance of jurisdiction in Ms. Busch's case gave, at a minimum, the appearance to a reasonable person that his integrity and impartiality were impaired. Nevertheless, Respondent ultimately deferred Ms. Busch's sentence for five years, ordered that she be placed on two years supervised probation, and allowed her to enroll in the Lea County Family Drug Court with the last three years of her deferral to be on unsupervised probation.

DISCUSSION

{12} As Respondent concedes, his conduct violated several provisions of the Code of Judicial Conduct and constitutes willful misconduct in office. Indeed, at every turn, the choices Respondent made with regard to Ms. Busch's case were in conflict with his obligations under the Code of Judicial Conduct. And at the center of it all was Respondent's unwillingness to acknowledge the appearance of personal bias in favor of Ms. Busch and his failure to take action to eliminate any appearance of impropriety arising from his participation in Ms. Busch's case.

{13} For example, from the outset, Respondent should have recused when he was assigned to Ms. Busch's case in light of his personal relationship with her counsel and his acknowledgment that his continued involvement in the case would foster the appearance of impropriety. Instead, Respondent engaged in persistent attempts to remain involved in Ms. Busch's case even though he knew, and agreed, that he should not. By failing to step aside even though he knew he should, Respondent's conduct breached several fundamental ethical duties that every judge is obligated to uphold under the Code of Judicial Conduct. *See* Rule 21-100 NMRA ("A judge shall participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved."); Rule 21-200(A) NMRA ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."); Rule 21-200(B) NMRA ("A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment."); Rule 21-400(A)(1) NMRA ("A judge is disqualified and shall recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where the judge has a personal bias or prejudice concerning a party or a party's lawyer or personal knowledge of disputed evidentiary facts concerning the proceeding.").

{14} We recognize that Respondent eventually conceded that his continued involvement in Ms. Busch's case would create, at a minimum, the appearance of impropriety. In fact Respondent initially agreed to recuse

from the case after his meeting with Chief Judge Forbes. But by ultimately breaching that agreement and reinserting himself in Ms. Busch's case, Respondent again displayed an ignorance of, or indifference to, basic judicial responsibilities embodied in our Code of Judicial Conduct. *See* Rule 21–300(C)(1) NMRA ("A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice, maintain professional competence in judicial administration and should cooperate with other judges and court officials in the administration of court business."). And by temporarily recusing only to reassert jurisdiction over Ms. Busch's case, even though he knew and agreed he should not, Respondent also breached his duty to perform his adjudicative responsibilities in a prompt, efficient, and fair manner. *See* Rule 21–300(B)(8) NMRA ("A judge shall dispose of all judicial matters promptly, efficiently, and fairly.")

{15} Perhaps most troubling are the indications that Respondent may have engaged in *ex parte* communications concerning his plans to reassert control over the sentencing of Ms. Busch. As noted above, Judge Lynch learned through Ms. Busch's attorneys that Respondent wanted to revoke his initial recusal and reassume jurisdiction over the case. But because the prosecutor was not aware of Respondent's plans, Judge Lynch was rightly concerned that Respondent may have engaged in *ex parte* communications. As evidenced by Respondent's conceded violations of the Code of Judicial Conduct, such actions are plainly at odds with a judge's duty to uphold the integrity and impartiality of the judicial system. *See* Rule 21–300(B)(7) NMRA ("A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding."). Although the prosecution did not object to Respondent's decision to revoke his recusal and ultimately accepted Respondent's authority to assume control over the sentencing of Ms. Busch, it does not ameliorate Respondent's ethical lapses nor does it make legitimate Respondent's ill-conceived plan to reassert control over Ms. Busch's case. *See* Rule 21–400(C) NMRA (providing that a judge who should be disqualified under the terms of the Code may ask the parties to agree to waive disqualification unless the basis for disqualification is personal bias or prejudice).

{16} In light of the foregoing, we agree that the stipulated disciplinary measures for Respondent's violations of the Code of Judicial Conduct are appropriate. Accordingly, Respondent, the Honorable William A. McBee, is hereby disciplined as follows:

a. Respondent shall receive a public reprimand, which shall be published in the *Bar Bulletin;*

b. Respondent shall recuse from the matter of *State v. Tami Busch,* CR–2002–378, as well as any additional current or future matters involving Ms. Busch, and all matters coming before Respondent in which attorney Max Proctor is a party or serves as counsel;

c. Respondent shall disclose to all parties appearing before him in matters in which attorney C. Barry Crutchfield appears as either a party or counsel to a party, all instances in which Mr. Crutchfield represented Respondent;

d. Respondent shall abide by all terms and conditions of the second stipulation and consent to discipline as well as the Code of Judicial Conduct;

e. Respondent shall abide by all orders, directives, guidelines, agreements, and rules issued by, or entered into with, the Chief Judge of the Fifth Judicial District;

f. Respondent shall pay a $1,000.00 fine to a non-profit drug treatment organization or affiliated state agency upon approval by this Court of the intended recipient;

g. Respondent shall pay $2,500.00 in cost reimbursement to the Judicial Standards Commission on or before November 30, 2005, by certified check made payable to the State of New Mexico. Respondent shall promptly file proof of payment with the Commission.

h. Respondent shall be suspended for seven (7) days without pay on or before February 2, 2006, in consultation with the Human Resources Division of the Administrative Office of the Courts;

i. Respondent shall be suspended for an additional thirty (30) days without pay, which shall be deferred for a period of one year and which shall be dismissed upon successful completion of a twelve-month (12) probationary period during which he shall have a mentor who shall monitor Respondent's docket and provide periodic reports to the Judicial Standards Commission. Upon successful completion of probation, the mentor shall certify to the Commission that Respondent has completed his probation. The thirty-day (30) suspension shall be imposed only by this Court by order following notice and opportunity to be heard; and

j. Respondent shall be held in contempt of the Judicial Standards Commission should he fail to comply with any one of the conditions and terms contained in this formal reprimand and opinion, the second stipulation agreement and consent to discipline, or the amended order of discipline entered by this Court on November 2, 2005.

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

2006-NMCA-046

134 P.3d 773

AMICA MUTUAL INSURANCE COMPANY, a foreign corporation, Plaintiff–Appellant,

and

Diane Raleigh, Involuntary Plaintiff–Appellant,

v.

Gordon Peter McROSTIE, Defendant–Appellee.

No. 25,432.

Court of Appeals of New Mexico.

Feb. 3, 2006.

Certiorari Denied, No. 29,723, April 20, 2006.

O'Brien & Ulibarri, P.C., Daniel P. Ulibarri, Beatriz Aguirre–Strong, Albuquerque, NM, for Appellants.

The Ross Firm, Gregory Ross, Santa Fe, NM, for Appellee.

OPINION

SUTIN, Judge.

{1} New Mexico has a savings statute which states that once a suit has been commenced, if it "fail[s] . . . for any cause, except negligence in its prosecution," a second suit can be brought within six months and the second suit will be considered a continuation of the first suit. NMSA 1978, § 37–1–14 (1880). This statute has the effect of preventing a statute of limitations from barring a suit where the original suit was brought in a timely fashion but the statute ran before the second suit was filed. *See Gathman–Matotan Architects & Planners, Inc. v. State Dep't of Fin. & Admin.*, 109 N.M. 492, 493–94, 787 P.2d 411, 412–13 (1990). In this case, we are presented with the question of whether an original suit failed for "negligence in its prosecution" when it was filed in an improper venue. We conclude that the suit did not fail.

{2} We are also presented with the question of whether it was proper for the district court to refuse under a local court rule to entertain a motion to amend the complaint to add an indispensable party. The local rule prohibits a party from making a cross-motion in a response to a motion. We hold that the district court erred in refusing to hear the motion. Finally, we also hold that the court erred in refusing to grant the motion given the policy of Rule 1–015 NMRA to freely grant amendments.

BACKGROUND

{3} Plaintiff Amica Mutual Insurance Company, joining Diane Raleigh as an involuntary plaintiff, sued Defendant Gordon Peter McRostie in the Second Judicial District Court, in Bernalillo County, New Mexico, on a subrogation claim. The claim arose out of payments Plaintiff made to Raleigh after Raleigh's vehicle accident in Florida and treatment by Defendant in New Mexico.

{4} More particularly, Plaintiff alleged that Defendant was professionally negligent in giving Raleigh a trigger point injection that caused Raleigh personal injuries. The alleged negligent injection occurred on September 5, 2000. Plaintiff's complaint was filed on September 5, 2003. For jurisdiction and/or venue purposes, Plaintiff alleged that it was authorized to do business in New Mexico, "with its principle [sic] place for claims handling in Bernalillo County [New Mexico], and all other parties to this action are residents of New Mexico or otherwise subject to the jurisdiction of this Court." Plaintiff attached an affidavit of Sheryl Heiner, a regional sales executive for Plaintiff in New Mexico, who stated that Plaintiff had only one office in New Mexico and that the office was located at "P.O. Box 67620, Albuquerque, New Mexico 87193–7620."

{5} Defendant filed a verified answer raising the defense that venue was improper. Defendant also filed a motion to dismiss Plaintiff's complaint for improper venue. Defendant denied that Plaintiff's principal place for claims handling was Bernalillo County, and denied that Raleigh was a resident of New Mexico. Defendant also defended on the ground that he was not a proper party because "the entity providing medical services [to Raleigh] was G.P. McRostie, D.O.M., N.D., P.A.[,]" which was a professional corporation (Corporation). *See* NMSA 1978, §§ 53–6–1 to –14 (1963, as amended through 2001) (authorizing the incorporation of an individual to render professional services).

{6} At the hearing on the motion to dismiss for lack of venue, Plaintiff's only witness was an employee of Stevenson & Associates, Inc., an independent insurance adjusting company. This witness testified that she had not worked on the claim in question and did not have personal knowledge of whether her firm handled the claim. She further testified that Plaintiff did not employ persons in New Mexico and did not have an office or physical address in the State. There was no testimony concerning the residence of Raleigh, and Defendant's contention that Raleigh was not a resident of New Mexico remained uncontradicted. Verbally, on January 22, 2004, and in an order entered on March 18, 2004, the district court dismissed Plaintiff's Bernalillo County complaint without prejudice for lack of venue.

{7} Plaintiff filed a new complaint against Defendant on March 25, 2004, this time in the First Judicial District Court, in Santa Fe County, New Mexico. Defendant filed an answer on May 3, 2004, affirmatively stating that the medical services in question were provided by Corporation and that Defendant was not a proper party to the action because the medical services were provided by Corporation. Defendant then filed a verified motion to dismiss on July 20, 2004, asserting that (1) the statute of limitations in NMSA 1978, § 37–1–8 (1976) barred the action and Section 37–1–14 did not save Plaintiff's action because Plaintiff was negligent in the prosecution of its first action; and (2) Defendant was not a proper party and Corporation was a necessary and indispensable party.

{8} In one document filed on August 5, 2004, Plaintiff both responded to Defendant's motion to dismiss and moved for leave to file an amended complaint to add Corporation as a party. Plaintiff took the position that its actions did not constitute negligent prosecution, asserting that, based on Heiner's affidavit, it filed its Bernalillo County complaint

with the good faith belief that Plaintiff's principal place for handling claims in New Mexico was Albuquerque, New Mexico, which is in Bernalillo County. Plaintiff also took the position that Corporation was not a necessary or indispensable party because Plaintiff was entitled to sue Defendant directly for professional negligence. Still, Plaintiff attached to its motion to amend a proposed amended complaint against Defendant individually and as principal of Corporation.

{9} Defendant countered on August 19, 2004, with a reply asserting that not only had Defendant alerted Plaintiff early on in Plaintiff's first action that it was Corporation and not Defendant that had provided the service, Plaintiff had in its possession an invoice showing "the McRostie corporate name." Further, Defendant pointed out that Plaintiff made no attempt to refute Defendant's allegation that Raleigh was not a resident of New Mexico and that the Heiner affidavit's indication of a post office box for Plaintiff and nothing more was insufficient to trigger either jurisdiction or venue. As to Plaintiff's motion to amend, Defendant asserted, among other things, that Plaintiff violated First Judicial District Rule LR1–306(E) NMRA by filing a cross-motion which operated as both a response to Defendant's motion to dismiss and a motion to amend.

{10} Following a hearing in the Santa Fe County district court on Defendant's motion to dismiss, the court entered an order granting the motion and dismissing Plaintiff's action with prejudice. As to the statute of limitations, the court determined that under *Barbeau v. Hoppenrath*, 2001–NMCA–077, 131 N.M. 124, 33 P.3d 675, Section 37–1–14 could not overcome the bar of the statute of limitations. The court also determined that under LR1–306(E) Plaintiff's motion to amend was not properly before the court and even were it properly before the court, the amendment would be futile because Plaintiff would be barred from suing Corporation under Section 37–1–8. The district court further determined that Corporation was a necessary and indispensable party.

{11} Plaintiff appeals asserting the court erred (1) in determining that its prosecution of the Bernalillo County action was negligent under Section 37–1–14, (2) by not allowing its motion to amend for violation of LR1–306(E), and (3) by denying its motion to amend to include Corporation as a defendant. We discuss each of these points and determine that the district court misapplied *Barbeau* and should not have disallowed or denied Plaintiff's motion to amend.

INITIAL CONSIDERATION AND PRESERVATION

{12} Defendant asserts that Plaintiff failed to preserve relation back and continuation arguments. We disagree. These arguments were preserved through Plaintiff's proposed amended complaint that expressly sought to overcome the bar of the statute of limitations because "[p]ursuant to [Section] 37–1–14, suit is proper," and when Plaintiff argued at the hearing on Defendant's motion to dismiss that its proffered amendment would relate back and allow the cause of action to go forward. Also at that hearing, Plaintiff stated that refiling in Santa Fe County was "contemplated by all of the parties" and requested that the matter be allowed to continue before the court. Further, the district court was fully aware of Section 37–1–14, and even discussed at the hearing a case questioning whether a second action "was a continuation" of the first under that statute. Although the court did not specifically rule in regard to the application of Rule 1–015(C) or Section 37–1–14's language that a second suit is "deemed a continuation of the first," it is apparent that the court was aware of Plaintiff's relation back contention in light of the issues brought before it by the motion to amend to add Corporation and by Plaintiff's proposed amended complaint alleging that Section 37–1–14 allowed it to proceed in spite of the statute of limitations.

DISCUSSION

A. Section 37–1–14 and Negligent Prosecution

{13} No facts are in dispute. We will treat the court's dismissal as a summary judgment under Rule 1–056 NMRA based on undisputed facts. Where no material facts are "in dispute, and only a legal interpretation of the facts remains," the standard of review is whether the moving party is enti-

tled to summary judgment as a matter of law. *Barbeau*, 2001–NMCA–077, ¶ 2, 131 N.M. 124, 33 P.3d 675.

{14} Section 37–1–14 reads: "If, after the commencement of an action, the plaintiff fail[s] therein for any cause, except negligence in its prosecution, and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first." The question is whether Plaintiff's prosecution of the Bernalillo County action was negligent, thereby erasing the otherwise saving grace of Section 37–1–14.

{15} Defendant argues that our holding in *Barbeau* governs this case. In *Barbeau*, based on a traffic accident occurring in New Mexico, and two days before the expiration of the applicable New Mexico statute of limitations, the plaintiffs filed their original action against the alleged tortfeasor and an insurer in federal court in Oregon. 2001–NMCA–077, ¶¶ 1, 5, 131 N.M. 124, 33 P.3d 675. The federal court dismissed the action. *Id.* The plaintiffs' second action in New Mexico was dismissed when the district court determined that Section 37–1–14 did not save the plaintiffs' claim. *Id.* ¶¶ 1, 6. Noting that "whatever forum chosen must at least arguably provide personal and subject matter jurisdiction" and have "the power to decide the matter involved[,]" this Court stated that the plaintiffs "defeated subject matter jurisdiction by the very allegations in their [Oregon federal court] complaint." *Id.* ¶¶ 11, 15. Also, the plaintiffs conceded that the Oregon federal court lacked personal jurisdiction. *Id.* ¶ 11. We determined that "the claim was clearly improperly filed in Oregon federal court[,]" and that the plaintiffs' actions were not strategic but instead demonstrated "a clear disregard of the elementary requirements of jurisdiction." *Id.* ¶¶ 3, 11. Based on the foregoing circumstances, we held that the facts amounted to negligence in the prosecution of the Oregon federal court action, and we declined to save the New Mexico action under Section 37–1–14. *Barbeau*, 2001–NMCA–077, ¶ 16, 131 N.M. 124, 33 P.3d 675.

{16} The reasoning of *Barbeau* does not automatically transfer to the facts in the present case. While we cannot say that Plaintiff was free of carelessness in its lack of basis for venue in the Bernalillo County action, we are not prepared to extend *Barbeau* and conclude that the circumstances in the present case constitute negligent prosecution thereby eliminating the savings statute as a safe harbour for Plaintiff. There is a valid distinction to be made between filing a complaint that on its face defeats subject matter jurisdiction, and filing an action without a thorough investigation as to whether venue is proper.

{17} Subject matter jurisdiction gives a court power and authority to act. Without it, the court has no power or authority to act. Venue, required for convenience of parties, can be waived. Once venue is waived, the court can act. Section 37–1–14 applies to a dismissal for lack of venue. Were it not for the foot in the door given Defendant by *Barbeau*, a case in which it was evident from the complaint itself that the Oregon federal court lacked jurisdiction, we tend to doubt the present case would have reached the appellate level on this issue. We are not persuaded that we should extend the jurisdiction error in *Barbeau* to the venue mistake here. When balancing the policy favoring access to judicial resolution of disputes, including that embodied in Section 37–1–14, against the venue mistake in this case, we think it appropriate to hold, and we do hold, that the circumstances do not constitute negligent prosecution. Under Section 37–1–14, the Santa Fe County action is deemed a continuation of the Bernalillo County action. The action, therefore, is not barred under Section 37–1–8.

B. Disallowance and Denial of Motion to Amend

{18} The district court order stated: "Pursuant to LR1–306(E), [the motion to amend the complaint] was not properly before the Court[.] Notwithstanding, and even if this Court had granted such motion, Plaintiffs could not have maintained an action against the corporation pursuant to NMSA 37–1–8 (1978)." The court appears to have both (1) disallowed the motion to amend, by determining that the motion "was not prop-

erly before the Court," and (2) denied Plaintiff's motion to amend. We review for abuse of discretion. *See Lujan v. City of Albuquerque,* 2003–NMCA–104, ¶ 8, 134 N.M. 207, 75 P.3d 423 (reviewing for an abuse of discretion the dismissal for failing to file a timely response to a motion for summary judgment); *Lovato v. Crawford & Co.,* 2003–NMCA–088, ¶ 6, 134 N.M. 108, 73 P.3d 246 (reviewing for an abuse of discretion the denial of a motion to amend); *see also Cottonwood Enters. v. McAlpin,* 109 N.M. 78, 79–80, 781 P.2d 1156, 1157–58 (1989) (determining whether the district court abused its discretion in granting a motion to dismiss under Rule 1–041(E) NMRA).

1. Disallowance Based on LR1–306(E)

{19} LR1–306(E) states: "The practice of filing cross-motions to operate as both a motion and as a response to the original motion is prohibited." It is arguable whether Plaintiff violated the rule. Nevertheless for the purpose of deciding the issue at hand, we will assume that the district court's interpretation of the rule to include a motion to amend within the meaning of "cross-motion" was not erroneous. However, although we normally would prefer not to argue with a district court's enforcement of its local rule, we cannot defer to the court's enforcement here.

{20} Disallowance, resulting in dismissal of Plaintiff's action, effectively disengages the saving power of Rule 1–015. Rule 1–015(A) requires amendments to be freely given, absent prejudice. *See Crumpacker v. DeNaples,* 1998–NMCA–169, ¶ 17, 126 N.M. 288, 968 P.2d 799 (stating that the district court is required to allow amendments freely "if the objecting party fails to show ... prejudice[ ]"). The rule's clear policy is that amendments should be freely granted. Amendments are favored and should be liberally permitted as justice requires. *Martinez v. Research Park, Inc.,* 75 N.M. 672, 679–80, 410 P.2d 200, 205 (1965), *overruled on other grounds by Lakeview Invs., Inc. v. Alamogordo Lake Vill., Inc.,* 86 N.M. 151, 520 P.2d 1096 (1974). We see nothing in the record indicating that Defendant or Corporation would be prejudiced by the amendment. The district court did not indicate that it disallowed the motion based on undue delay or undue prejudice and Defendant does not point out any prejudice in the record before us. *See Lovato,* 2003–NMCA–088, ¶ 6, 134 N.M. 108, 73 P.3d 246 ("Amendments should be denied only where the motion is unduly delayed or where amendment would unduly prejudice the non-movant."). We hold that LR1–306(E) cannot override the policies underlying Rule 1–015 under the circumstances in this case.

2. Denial Based on Futility; Relation Back

{21} Our determination that LR1–306(E) should not result in disallowance of Plaintiff's motion does not, however, end the matter. The court determined that even if it had granted the motion to amend, adding Corporation would have been futile because the action would be barred under Section 37–1–8. The circumstances raise the specific questions of whether the claims against Corporation would relate back under Rule 1–015(C) in a way that would escape the bar of Section 37–1–8 by way of Section 37–1–14.

{22} Any discussion of these statutory rules and their application, of course, requires us to assume that Corporation is a necessary and indispensable party such that, without joinder, the complaint was subject to dismissal with prejudice. On appeal, Plaintiff has not attacked the district court's determination that Corporation is a necessary and indispensable party. Therefore, for the purposes of resolution of the issues in this appeal, Plaintiff has waived any error in regard to the district court's determination that Corporation is an indispensable party. We therefore do not address and leave for another day the propriety of the district court's ruling in this regard.[1]

{23} Rule 1–015(C) states:

1. It is not clear in the New Mexico law cited to us by the parties that a medical provider who commits negligence in the performance of professional duties, resulting in personal injury to a patient, cannot be sued individually for damages without joining the provider's professional corporation. *See Sanders, Bruin, Coll & Worley, P.A. v. McKay Oil Corp.,* 1997–NMSC–030, ¶ 9, 123

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment:

(1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and

(2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

{24} The case of *Romero v. Bachicha,* 2001–NMCA–048, 130 N.M. 610, 28 P.3d 1151, interpreting Rule 1–015, is similar to the present case. In *Romero,* the plaintiff sued "Frank" Bachicha eight days before the statute of limitations was to expire. 2001–NMCA–048, ¶ 3, 130 N.M. 610, 28 P.3d 1151. The plaintiff knew that it was "Paul" Bachicha who should have been named, but nevertheless did not amend the pleading. *Id.* "The process server refused to serve the complaint due to the error." *Id.* The district court dismissed the complaint for lack of prosecution but reinstated the action, following which the plaintiff filed an amended complaint and served it on Paul Bachicha about a year after the statute of limitations had run. *Id.* ¶¶ 3–4, 14. Paul Bachicha moved to dismiss asserting that the action was barred under the statute of limitations. *Id.* ¶ 5. This Court held that because the plaintiff had not served Paul Bachicha before amending the complaint and the amended complaint changed the party against whom the action was brought, the issues were governed by Rule 1–015(C)(1) and (2), *Romero,* 2001–NMCA–048, ¶¶ 11, 14, 130 N.M. 610, 28 P.3d 1151, and, particularly, whether Paul Bachicha had been notified of the institution of the action within the statute of limitations period, which included the time for service of process. *Id.* ¶¶ 15, 17, 21.

{25} Here, we have held that Plaintiff's Santa Fe County action survived the statute of limitations bar under the application of the savings statute and is therefore a continuation of the Bernalillo County action. We have also held that under Rule 1–015(A) Plaintiff should have been permitted to amend unless, of course, amendment would be futile. The district court's determination of futility rested solely on the application of Section 37–1–8, without regard to the application of the factors in Rule 1–015(C)(1) and (2). This was an abuse of discretion. *See Stinson v. Berry,* 1997–NMCA–076, ¶ 9, 123 N.M. 482, 943 P.2d 129 (stating that we will reverse the denial of a motion to amend only upon a showing of clear abuse of discretion).

{26} The first Rule 1–015(C) factor, stated in subpart (C)(1), would be whether Corporation was on notice from the Bernalillo County action of the institution of the action against Defendant such that Corporation would not be prejudiced in the joinder and in having to maintain a defense on the merits of Plaintiff's claim. This notice issue obviously would involve factual analyses of whether Defendant was the principal professional in the professional corporation "G.P. McRostie, D.O.M., N.D., P.A.," and whether, based on Defendant's position in Corporation, Corporation had received such notice of the institution of the Bernalillo County action that Corporation would not be prejudiced in maintaining its defense on the merits. *See Rivera v. King,* 108 N.M. 5, 11, 765 P.2d 1187, 1193 (Ct.App. 1988) (holding that the defendants had received sufficient notice where the original defendants and the newly added defendants shared an identity of interests and were represented by attorneys who were involved in the litigation from its inception). The second factor, stated in subpart (C)(2), would be whether Corporation knew or should have known that, but for Plaintiff's mistake as to the identity of the proper party, the action would have been brought against Corporation. This knowledge issue would involve the same factual analyses to be made in considering the notice issue under Rule 1–015(C)(1).

N.M. 457, 943 P.2d 104 (holding "that, as a general matter, membership or shareholder status in a professional corporation does not shield an attorney from individual liability for his own mistakes or professional misdeeds").

{27} Thus, still open for determination are the factors set out in Rule 1–015(C)(1) and (2). If those notice and knowledge factors are met, the amendment to add Corporation will not be futile. The amendment would not be futile because Plaintiff's claims against Corporation will relate back to the date of the filing of the Santa Fe County action, the Santa Fe County action being a continuation of the Bernalillo County action. Thus, for the same reason Plaintiff's claims against Defendant in the Santa Fe County action are not barred under Section 37–1–8 based on the application of Section 37–1–14, Plaintiff's claims against Corporation would similarly not be barred under Section 37–1–8. We hold that the district court erred by prematurely holding that granting the proposed amendment would be futile. Section 37–1–8 will not bar Plaintiff's claims against Corporation if the factors in Rule 1–015(C)(1) and (2) are satisfied.

CONCLUSION

{28} We reverse the district court's dismissal with prejudice of Plaintiff's action and remand for further proceedings consistent with this opinion.

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Chief Judge, and A. JOSEPH ALARID, Judge.

2006-NMCA-047

134 P.3d 780

DIRECTOR, LABOR AND INDUSTRIAL DIVISION, NEW MEXICO DEPARTMENT OF LABOR, Plaintiff–Appellee,

v.

ECHOSTAR COMMUNICATIONS CORPORATION, Defendant–Appellant.

No. 25,777.

Court of Appeals of New Mexico.

Feb. 28, 2006.

Certiorari Granted, No. 29,724, April 20, 2006.

Patricia A. Madrid, Attorney General, Andrea R. Buzzard, Assistant Attorney General, Santa Fe, NM, for Appellee.

Bannerman & Williams, P.A., James T. Reist, Katherine Gibson, Albuquerque, NM, for Appellant.

OPINION

PICKARD, Judge.

{1} The Minimum Wage Act, NMSA 1978, §§ 50–4–19 to –30 (1955, as amended through 2005) (the Act), establishes a floor below which employers cannot pay employees wages and also requires the payment of time and a half for work in excess of a forty-hour workweek. *See especially* § 50–4–22(A) (providing generally for a minimum wage of $5.15 per hour); § 50–4–22(C) (providing that employees "shall not be required to work more than forty hours in any week of seven days, unless the employee is paid one and one-half times the employee's regular hourly rate of pay for all hours worked in excess of forty hours"). The question we address in this case is whether an employer and employee may agree to a fluctuating rate of pay, pursuant to which the employee is paid a fixed weekly salary plus an overtime factor of one-half of the hourly rate, which hourly rate is calculated such that it decreases as the number of hours worked increases. We agree with both courts below and hold that the Act does not permit such agreements, which conflict with the Act's prohibition against overtime paid at less than time and a half.

I. FACTS AND PROCEEDINGS

{2} Echostar Communications Corporation is a national corporation. It employed Terri Wendt in its Albuquerque office. Wendt and Echostar executed an agreement setting forth Wendt's salary and how overtime would be calculated. Pursuant to the agreement, Wendt would be paid $509.62 per week regardless of whether she actually worked less than forty hours or forty hours, but she would be paid overtime calculated by dividing the number of hours worked into $509.62 and then multiplying one-half of that result by the number of hours worked in excess of forty and adding that figure to $509.62. Thus, for example, if Wendt worked forty-five hours, her regular hourly rate would be $509.62 divided by 45, or $11.32, one-half of which would be $5.66. This $5.66 would be multiplied by 5, the number of overtime hours worked, for a total of $28.30, which would be added to the $509.62, for a total of $537.92 remuneration for the week.

{3} Wendt initiated this case by filing a wage claim with the Director of the Labor and Industrial Division of the Department of Labor (DOL), which ruled in her favor. After Wendt assigned her wage claim to the DOL, it filed a complaint in metropolitan court, which Echostar duly answered. Echostar moved for summary judgment. In metropolitan court, the parties agreed that there were no genuine issues of material fact, and each party claimed to be entitled to judgment as a matter of law. The metropolitan court ruled in favor of the DOL. Echostar appealed to the district court, which affirmed the judgment of the metropolitan court. Echostar now appeals to this Court.

{4} The DOL's position is that instead of being paid $537.92 in the above example, Wendt should have been paid $605.17, calculated as follows: $509.62 divided by 40 equals $12.74, which is the regular hourly rate. One and one-half times this hourly rate is $19.11; $19.11 multiplied by 5 equals $95.55, which should be added to $509.62, for a total of $605.17. If Wendt worked sixty hours, instead of forty-five, the calculations would be:

Echostar method	DOL method
$509.62 ÷ 60 = $8.49	$509.62 ÷ 40 = $12.74
½ × $8.49 = $4.25	1½ × $12.74 = $19.11
$4.25 × 20 = $85.00	$19.11 × 20 = $382.20
$85 + $509.62 = $594.62	$382.20 + $509.62 = $891.82

It can be readily seen that Echostar's method results in significantly less overtime pay. For a week of eighty hours of work, the results are even more dramatic: $637.22 for that week under Echostar's method versus $1274.02 under the DOL method.

II. DISCUSSION

A. STANDARD OF REVIEW

{5} The issue raised on appeal is whether the words "regular hourly rate of pay" contained in Section 50-4-22(C) permit employers and employees to negotiate a fluctuating workweek and resulting fluctuating rate of pay on which to calculate overtime. Construction of statutes is a question of law that we review de novo. *Blackwood & Nichols Co. v. N.M. Taxation & Revenue Dep't*, 1998-NMCA-113, ¶ 5, 125 N.M. 576, 964 P.2d 137. In addition, the parties agreed in the trial court that there were no genuine issues of material fact and that summary judgment was proper for one party or another. In these circumstances also, our review is de novo. *See Wilger Enters., Inc. v. Broadway Vista Partners*, 2005-NMCA-088, ¶ 5, 137 N.M. 806, 115 P.3d 822.

B. GENERAL RULES OF STATUTORY CONSTRUCTION

{6} The primary goal in interpreting a statute is to give effect to the legislature's intent. *State v. Davis*, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064. "Statutes are to be read in a way that facilitates their operation and the achievement of their goals." *Miller v. N.M. Dep't of Transp.*, 106 N.M. 253, 255, 741 P.2d 1374, 1376 (1987), *superceded by statute on other grounds as stated in Gallegos v. Sch. Dist. of W. Las Vegas*, 115 N.M. 779, 858 P.2d 867 (Ct.App.1993). Statutes are not to be read in a manner that would make portions of them superfluous. *State v. Rivera*, 2004-NMSC-001, ¶ 18, 134 N.M. 768, 82 P.3d 939.

C. MEANING OF "REGULAR HOURLY RATE OF PAY"

{7} Our cases recognize that the Act is a statute with a remedial purpose and that it must be construed liberally to accomplish that purpose. *See N.M. Dep't of Labor v. A.C. Elec., Inc.*, 1998-NMCA-141, ¶ 13, 125 N.M. 779, 965 P.2d 363. The Act itself declares that its policy is "to establish minimum wage and overtime compensation standards for all workers at levels consistent with their health, efficiency and general well-being" and to protect "workers against the unfair competition of wage and hours standards which do not provide adequate standards of living." Section 50-4-19. Construing a similar statute, one of our sister states has noted that these acts' "purposes are to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra work and to spread employment through inducing employers to shorten hours because of the pressure of extra cost." *Janes v. Otis Eng'g Corp.*, 757 P.2d 50, 53 (Alaska 1988) (internal quotation marks and citation omitted). Another jurisdiction with a similar statute has noted that "[p]remium pay for overtime is the primary device for enforcing limitations on the maximum hours of work." *Skyline Homes, Inc. v. Dep't of Indus. Relations*, 165 Cal.App.3d 239, 211 Cal.Rptr. 792, 798 (Ct. App.1985), *overruled on other grounds by Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal.4th 557, 59 Cal.Rptr.2d 186, 196, 927 P.2d 296 (1996). In light of these purposes, it makes little sense to construe the statute to lessen the financial impact on employers the more hours that employees are required to work.

{8} We also find support for our conclusion in a 1999 amendment to Section 50-4-22(C). Prior to the amendment, Section 50-4-22(C) provided that "[n]o employee covered by the provisions of Subsection A of this section shall be required to work more than forty hours in any week of seven days, unless he is paid one and one-half times his regular hourly rate of pay for all hours worked in excess of forty hours." In 1999, the legislature added the following language:

> For an employee who is paid a fixed salary for fluctuating hours and who is employed by an employer a majority of whose business in New Mexico consists of providing investigative services to the federal government, the hourly rate may be calculated in accordance with the provisions of the

federal Fair Labor Standards Act and the regulations pursuant to that act; provided that in no case shall the hourly rate be less than the federal minimum wage.

1999 N.M. Laws, ch. 164, § 1.

{9} This additional provision specifically allows what Echostar contends should be the general rule for all employers. *See* 29 C.F.R. § 778.114(a), (c) (2005). Yet it expressly applies only to certain employers. Had calculating overtime based on a fixed salary for fluctuating hours been permissible under the original version of Section 50–4–22(C), there would have been no reason for the legislative amendment in 1999. Similarly, the legislative amendment would be superfluous if Echostar is correct that "regular hourly rate of pay" contemplates fixed salaries for fluctuating hours generally. As stated above, we will not construe portions of a statute to be superfluous. *Rivera,* 2004–NMSC–001, ¶ 18, 134 N.M. 768, 82 P.3d 939.

D. ECHOSTAR'S ARGUMENTS

{10} Echostar's basic argument is that its agreement with Wendt is not clearly prohibited by the applicable statutes inasmuch as Section 50–4–22(C) does not define "regular rate of pay." Further, Echostar argues that because Section 50–4–26(A) provides criminal penalties for violations of the Act, the definition of "regular hourly rate" should encompass its agreement with Wendt unless such is clearly and unambiguously prohibited. Echostar also points out that the DOL has not enacted a specific regulation containing its definition, despite statutory authority to do so. *See* § 50–4–27. In light of New Mexico's strong public policy favoring freedom of contract, Echostar contends that the DOL's interpretation must be struck down because its contract with Wendt does not "clearly contravene some law or rule of public morals." *See United Wholesale Liquor Co. v. Brown–Forman Distillers Corp.,* 108 N.M. 467, 471, 775 P.2d 233, 237 (1989). Due to the notice and hearing requirements for enacting regulations, *see* § 50–4–27, as well as the provision of the State Rules Act requiring filing and publication, NMSA 1978, § 14–4–5 (1995), Echostar contends that any interpretation of "regular rate of pay" that prohibits its agreement with Wendt is unenforceable.

{11} As additional support for these arguments, Echostar relies on two United States Supreme Court cases decided shortly after the enactment of the federal Fair Labor Standards Act: *Overnight Motor Transp. Co. v. Missel,* 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942), *superceded by statute on other grounds as stated in Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985), and *Walling v. A.H. Belo Corp.,* 316 U.S. 624, 62 S.Ct. 1223, 86 L.Ed. 1716 (1942), *superceded by statute on other grounds as stated in Condo v. Sysco Corp.,* 1 F.3d 599 (1993). We acknowledge that these cases support Echostar's argument that a fixed rate of pay for fluctuating hours is not prohibited by the words "regular rate." *See Overnight Motor Transp. Co.,* 316 U.S. at 580, 62 S.Ct. 1216 (indicating that employees can have different regular rates every week and that the rate is regular because it provides the same rate of pay for every hour in one week). Further, the *Walling* Court pointed out that it should not provide a definition of "regular rate" when Congress failed to do so, and it also pointed to the benefits for the employee of having the security of a fixed weekly income. *Walling,* 316 U.S. at 634–35, 62 S.Ct. 1223.

{12} We do not believe that these cases and arguments weigh in favor of permitting an employee to contract for diminishing overtime wages because, as we have stated, (1) the statute provides for time and a half; (2) the intent of the statute is to adequately compensate for overtime, to discourage overtime, and to encourage the employment of more workers; (3) a specific provision of the statute provides for basing overtime on fluctuating rates of pay for one limited category of employees; and (4) the Supreme Court authorities relied upon addressed a differently worded statute. Accordingly, we hold that the contract between Wendt and Echostar violates the public policy set forth in the Minimum Wage Act. *See DiGesu v. Weingardt,* 91 N.M. 441, 443, 575 P.2d 950, 952 (1978) (holding that contracts in violation of public policy are unenforceable). Thus, too, cases such as *Inniss v. Tandy Corp.,* 141

Wash.2d 517, 7 P.3d 807, 816 (2000) (en banc) (permitting a fluctuating workweek under a statute which is similar to the federal statute, but different from New Mexico's), are not persuasive either.

{13} Moreover, we are not moved by Echostar's arguments about the State Rules Act or notice to employers under the circumstances of this case. We are aware of cases holding that administrative procedures, such as notice, hearing, and publication, are required when an agency promulgates an interpretation of a law, regulation, or order that is intended to apply generally to all cases of a particular type. *See, e.g., Tidewater Marine W., Inc.,* 59 Cal.Rptr.2d at 194, 927 P.2d 296. However, that holding does not apply to an interpretation that arises in the context of a case-specific adjudication, even if that interpretation acts as precedent in future cases. *See id.* The DOL contends that the interpretation here arose in the context of this specific case. Echostar, on the other hand, points to a 1971 letter from the Attorney General to the Labor Commissioner, which seems to interpret our law to disallow "the fluctuating workweek computation of overtime pay," and a 1987 letter from the Labor Commissioner to an attorney whose client wished to avail itself of the fluctuating workweek computation of overtime, in which the Labor Commissioner appeared to respond that such would not be permissible under New Mexico law. Thus, Echostar contends that the interpretation here was generally applicable.

{14} We need not decide whether the DOL's interpretation amounts to a general rule that is subject to being declared void for failure of process in this case. That is because we agree with the DOL's interpretation of the law. "If, when we agreed with an agency's application of a controlling law, we nevertheless rejected that application simply because the agency failed to comply with [required administrative procedures], then we would undermine the legal force of the controlling law." *Id.* at 198, 927 P.2d 296. This we will not do.

{15} Finally, we see nothing improper in the DOL's calculation of Wendt's wages based on a forty-hour week. Echostar contends that it is entirely arbitrary to select forty as the number of "regular" hours per week when Wendt admittedly works irregular hours each week. Echostar urges that, in some situations, the use of a forty-hour week would result in wages less than the minimum wage. For example, if a worker ordinarily worked between ten and twenty hours per week for a weekly salary of $120 and then worked fifty hours in one week, the use of a forty-hour week would result in a regular wage of $3.00 per hour. Our response is that if such ever happened, we are confident that the DOL would not use the forty-hour baseline. The facts of this case, however, indicate that Wendt worked in the vicinity of forty hours per week, and her pay stubs found in the record show a "rate" of $12.7404, which is her weekly pay divided by forty.

{16} Along these lines, we are more concerned that Echostar's formula, permitting calculation of overtime based on a fluctuating workweek, would in extreme cases cause hourly wages to fall below the minimum wage threshold. Of course, Echostar points out that, with wages as high as Wendt's, there is little realistic possibility that the minimum wage threshold would be breached. But just as Echostar points out that there is no express statutory authorization for selecting forty as the number of hours to be used in determining the regular hourly wage, we point out that Echostar provides no coherent rationale for determining when wages are too low to allow the fluctuating workweek for which it advocates. Its view (that calculating overtime based on a fluctuating workweek so long as the hourly rate does not fall below the statutory minimum wage floor in a particular case) would, in our opinion, severely undercut the time-and-a-half provision also found in the statute. It is our duty to give effect to all parts of a statute. *See High Ridge Hinkle Joint Venture v. City of Albuquerque,* 1998–NMSC–050, ¶ 5, 126 N.M. 413, 970 P.2d 599.

III. CONCLUSION

{17} We affirm the judgment of both the metropolitan court and the district court that calculating overtime based on a fluctuating

workweek, pursuant to which an employee earns diminishing hourly overtime wages as the number of overtime hours increases, is inconsistent with Section 50–4–22(C).

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

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

2006-NMCA-050

134 P.3d 785

CHEVRON U.S.A., INC., Plaintiff–Appellant,

v.

STATE of New Mexico ex rel. DEPARTMENT OF TAXATION AND REVENUE, Defendant–Appellee.

No. 24,518.

Court of Appeals of New Mexico.

March 9, 2006.

Certiorari Denied, No. 29,740, May 1, 2006.

Hinkle, Hensley, Shanor & Martin, L.L.P., Andrew J. Cloutier, Joel M. Carson III, Lucas M. Williams, Roswell, NM for Appellant.

Peifer, Hanson & Mullins, P.A., Charles R. Peifer, Robert E. Hanson, Albuquerque, NM, Cavin & Ingram, P.A., Sealy H. Cavin, Jr., Stephen D. Ingram, Albuquerque, NM, White, Koch, Kelly & McCarthy, Mary E. Walta, Santa Fe, NM, Eaves Law Firm, P.C., John M. Eaves, Albuquerque, NM, Sutin, Thayer & Browne, P.C., Derek V. Larson, Albuquerque, NM, Law Offices of Mickey D. Barnett, P.A., Mickey D. Barnett, Albuquerque, NM, for Appellee.

OPINION

CASTILLO, Judge.

{1} In this case, we determine whether the New Mexico Department of Taxation and Revenue (Department) properly assessed a gas severance tax deficiency, plus interest and penalties, in the total amount of $1,781,690.35 against Chevron U.S.A., Inc., (Chevron) on gas produced and processed at the Eunice Gas Plant (Eunice Plant) and the Indian Basin Gas Plant (Indian Basin Plant) in New Mexico for the period beginning November 1, 1995, and ending October 1, 1998. Chevron is part owner of these processing plants. Chevron appeals from the order denying its motion for summary judgment and granting the Department's two motions for partial summary judgment. After entering the order, the district court granted Chevron's subsequent motion to dismiss Chevron's remaining claims with prejudice and entered final judgment on the order.

{2} Severance taxes on natural gas production are subject to various allowances, including deductions for the cost of processing the natural gas to remove liquid hydrocarbons and impurities. *See* 3.18.6.10 NMAC (2000) (describing the processing adjustment for natural gas). However, a number of gas producers own all or part of or are otherwise affiliated with the operators of the plants that process their natural gas. Because this relationship might result in an artificial valuation of processing costs, New Mexico has enacted various statutes and regulations to ensure fair valuation of natural gas in imposing severance taxes. *See, e.g.,* NMSA 1978, § 7–29–4.2 (1989) (providing for valuation by the Department under certain circum-

stances). These statutes and regulations are at issue here.

{3} Chevron has between a 10 percent and a 50 percent ownership interest in both the Eunice Plant and the Indian Basin Plant. Based on this interest and other facts, the Department found that Chevron was affiliated with the operators of these two plants. *See* 3.18.1.7(B)(2) NMAC (2000) (defining the term "affiliated persons"). Chevron does not raise the question of whether the Department correctly determined that Chevron owns this percentage in each of the processing plants. Instead, Chevron contends that 3.18.1.7(B)(2)(b) NMAC, which presumes that one company controls another when the first company owns 10 through 50 percent of the other company's stock, is irrational and hence invalid on its face. We first hold that Chevron did not meet its burden of showing that this regulation is invalid.

{4} Chevron's next argument relates to the interpretation of Section 7–29–4.2. Chevron contends that when the Department determines the value of a taxpayer's processing costs under the statute, the Department must compare the taxpayer's processing costs with the processing costs of other producers of "products of like quality, character and use which are severed in the same field or area." *Id.* Section 7–29–4.2 states that when two parties are affiliated or have engaged in non—arm's length transactions, the *value* that the Department sets for the products must be commensurate with "the actual price received" for similar products "severed in the same field or area." *Id.* This section then states that when there are no such sales, the Department must establish a "reasonable value." *Id.* We hold that the plain language of Section 7–29–4.2 does not mandate the way in which the Department must calculate processing costs—i.e., whether by a comparable value or by some other method. Rather, the final value of natural gas calculated by the Department must be commensurate with similar products. *See id.* We therefore affirm the district court's denial of summary judgment on this issue.

{5} We next move to the issues surrounding the district court's grant of summary judgment to the Department and denial of summary judgment to Chevron on whether Chevron was affiliated with the operators of the Eunice Plant and the Indian Basin Plant. We hold that there is no genuine issue of material fact as to Chevron's affiliation with the operators at issue, and we therefore affirm the district court's grant of summary judgment to the Department and the denial of Chevron's motion for summary judgment on the issues of affiliation and the absence of arm's length contracts with Chevron's processors.

I. BACKGROUND

{6} Under New Mexico statutes, Chevron's production of natural gas and/or extracted liquids within New Mexico is taxed under four different taxation schemes: the Oil and Gas Severance Tax Act, NMSA 1978, §§ 7–29–1 to –23 (1959, as amended through 2005); the Oil and Gas Conservation Tax Act, NMSA 1978, §§ 7–30–1 to –27 (1959, as amended through 2005); the Oil and Gas Emergency School Tax Act, NMSA 1978, §§ 7–31–1 to –27 (1959, as amended through 2005); and the Oil and Gas Ad Valorem Production Tax Act, NMSA 1978, §§ 7–32–1 to –28 (1959, as amended through 2005). Since the statutory framework of these four acts is substantially the same, they are collectively referred to herein as the "taxes" and collectively cited with reference to the applicable sections of the Oil and Gas Severance Tax Act (Act). *See Blackwood & Nichols Co. v. N.M. Taxation & Revenue Dep't*, 1998–NMCA–113, ¶ 12, 125 N.M. 576, 964 P.2d 137 (stating that these four statutes are to be interpreted as "a consistent statutory scheme").

{7} Severance taxes are imposed on the value of oil and gas at or near the production unit, i.e., at the well or near the well where oil and gas exits the ground. *Feerer v. Amoco Prod. Co.*, 242 F.3d 1259, 1262–63 (10th Cir.2001); *accord Flynn, Welch & Yates, Inc. v. State Tax Comm'n*, 38 N.M. 131, 136, 28 P.2d 889, 892 (1934) (stating that "[t]he tax is tied absolutely to the act or privilege of producing or severing"). Although severance taxes are to be paid on the value of oil and gas at the well or production unit, natural gas is often sold at locations away from

the production unit after the gas has been transported to a processing plant, where liquefiable hydrocarbons are removed from the gas stream. *See Blackwood & Nichols Co.*, 1998–NMCA–113, ¶ 9; *see also Sternberger v. Marathon Oil Co.*, 257 Kan. 315, 894 P.2d 788, 792 (1995) (discussing the necessity of a pipeline to carry gas from the well to the market, as well as the associated transportation costs). Because costs are incurred in transporting and processing the gas, natural gas producers (like Chevron) are generally allowed to deduct transportation and processing costs from the sales price of the gas when the producers are establishing the value at the production unit on which severance taxes are paid. *See* 3.18.6.9 NMAC (2000) (describing transportation adjustments); 3.18.6.10 NMAC (describing processing adjustments); *Feerer*, 242 F.3d at 1262–63 (observing that New Mexico allows operators to calculate taxable value by deducting costs for compression, dehydration, gathering, and transportation from the sales price).

{8} Chevron's southeastern New Mexico gas production consists primarily of "wet gas," which contains various entrained liquid hydrocarbons, such as propane and butane. *See* 8 Howard R. Williams & Charles J. Meyers, *Oil and Gas Law* 1181 (Patrick H. Martin & Bruce M. Kramer eds., 2004). The gas is "processed" at natural gas plants in order to remove the valuable liquid hydrocarbons from the gas stream. *Id.* at 831–832, 1181. Typically, the natural gas liquids (NGLs) that are removed and the "dry" gas stream are sold separately at a price that, after the producer nets out the processing fee, is higher than the price for which the unprocessed gas could be sold. *See id.* at 313.

{9} In 1999, the Department conducted an audit of Chevron's payment of severance taxes for the period beginning November 1, 1995, and ending October 1, 1998. On May 22, 2000, the Department issued an assessment to Chevron for additional taxes, penalties, and interest in the amount of $1,781,690.35 (Assessment). The Assessment was based on the Department's contention that Chevron had claimed excessive processing allowances for gas Chevron had processed at the Eunice Plant and the Indian Basin Plant. The Department contended that the processing allowances were excessive because Chevron's processing agreements at those plants were not arm's length and because Chevron maintained an "affiliate" relationship with the plant operators, Dynegy, Inc., (Dynegy) at the Eunice Plant and Marathon Oil Company (Marathon) at the Indian Basin Plant.

{10} Chevron paid the Assessment under protest. Chevron filed a refund application with the Department for the full amount of the Assessment or, alternatively, some lesser amount. *See* NMSA 1978, § 7–1–26(A) (2003) (specifying the requirements for seeking a refund of taxes paid). The Department denied Chevron's refund application. On December 7, 2001, Chevron elected to file a complaint in district court for money owing, instead of proceeding within the agency before a Department hearing officer. *See* § 7–1–26(C)(2) (providing that one of the remedies for denial of a claim for refund is a civil action in district court).

{11} Throughout 2002 and much of 2003, the parties engaged in discovery. Even after the district court appointed a special discovery master to assist with discovery disputes, intense litigation continued over the proper scope of discovery in interrogatories, document production requests, and depositions. In late August 2003, the Department filed two motions for partial summary judgment regarding Chevron's affiliation with the Indian Basin Plant and Chevron's transactions at the Eunice Plant. In response, Chevron filed its own motion for summary judgment, arguing that the Assessment should be dismissed and a refund issued because the Department had failed to compare Chevron's taxable values to others of like quality, character, and use, pursuant to statute. Each of the parties then filed a motion to strike the affidavit of the other's expert.

{12} The district court orally announced its rulings and entered a written order denying Chevron's motion for summary judgment, as well as Chevron's motion to strike the affidavit of the Department's expert. The district court also granted the Department's partial motions for summary judgment and

its motion to strike the affidavit of Chevron's expert. After Chevron moved to dismiss its remaining claims with prejudice, the district court entered final judgment. This appeal followed.

II. DISCUSSION

A. Standard of Review

{13} Our review of the district court's order granting summary judgment to the Department and denying summary judgment to Chevron is de novo. *Fikes v. Furst*, 2003-NMSC-033, ¶ 11, 134 N.M. 602, 81 P.3d 545. Moreover, legal conclusions and statutory interpretation are questions of law, subject to de novo review. *TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-007, ¶ 10, 133 N.M. 447, 64 P.3d 474.

{14} Summary judgment is "not generally favored and is to be used only with extreme caution." *Knapp v. Fraternal Order of Eagles*, 106 N.M. 11, 12, 738 P.2d 129, 130 (Ct.App.1987). It "is the appropriate disposition if there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Fikes*, 2003-NMSC-033, ¶ 11 (internal quotation marks and citation omitted); *see also* Rule 1-056(C) NMRA. In reviewing summary judgment, we look at the whole record in the light most favorable to the nonmoving party. *Pharmaseal Labs., Inc. v. Goffe*, 90 N.M. 753, 758, 568 P.2d 589, 594 (1977); *Reinhart v. Rauscher Pierce Sec. Corp.*, 83 N.M. 194, 196, 490 P.2d 240, 242 (Ct.App. 1971); *see also C & H Constr. & Paving Co. v. Citizens Bank*, 93 N.M. 150, 156, 597 P.2d 1190, 1196 (Ct.App.1979) ("In deciding whether summary judgment is proper, an appellate court must view the matters presented in the light most favorable to support the right to trial on the issues."). Therefore, on appeal, the burden is on the party who won summary judgment to demonstrate the absence of a genuine issue of material fact. *Reinhart*, 83 N.M. at 196, 490 P.2d at 242. "If the evidence is sufficient to create a reasonable doubt as to the existence of a genuine issue, summary judgment cannot be granted." *Poorbaugh v. Mullen*, 96 N.M. 598, 600, 633 P.2d 706, 708 (Ct.App.1981).

B. Provisions at Issue

{15} At issue in this case are Section 7-29-4.2 and several Department regulations. Section 7-29-4.2 states the following:

> The [D]epartment may determine the value of products severed from a production unit when:
>
> A. the operator and purchaser are affiliated persons;
>
> B. the sale and purchase of products is not an arm's length transaction; or when
>
> C. products are severed and removed from a production unit and a value as defined in the . . . Act . . . is not established for such products.
>
> The value determined by the [D]epartment shall be commensurate with the actual price received for products of like quality, character and use which are severed in the same field or area. If there are no sales of products of like quality, character and use severed in the same field or area, then the [D]epartment shall establish a reasonable value.

Id. Department regulations provide definitions for Section 7-29-4.2(A), (B). Pursuant to Department regulations, "[t]wo persons are affiliated if one of the persons either directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with the other person." 3.18.1.7(B)(2) NMAC. The Department may use evidence that a party owns 10 through 50 percent of another company's voting stock to presume that the party directly or indirectly controls and is hence affiliated with that company under Section 7-29-4.2(A) (hereinafter referred to as the "presumption of control"). 3.18.1.7(B)(2) NMAC. Furthermore, "arm's-length" is defined as a "transaction, contract or agreement that has been arrived at in the marketplace between independent, nonaffiliated persons with opposing economic interests regarding that transaction, contract or agreement." 3.18.1.7(B)(1) NMAC. If the operator and the purchaser are affiliated, there can be no arm's length transaction. *Id.* Therefore, the issue of affiliation affects the application of both Section 7-29-4.2(A) and Section 7-29-4.2(B). Be-

cause the issue of affiliation is pivotal in this case, we will address this issue, together with how value should be determined in Section 7–29–4.2, in the context of our review of the parties' motions for summary judgment.

C. Chevron's Motion for Summary Judgment

1. The Department's Presumption of Control Regulation Is Neither Irrational Nor Invalid

{16} Chevron argues that the district court erred in not granting Chevron's motion for summary judgment. Chevron does not contest the Department's underlying calculation of its ownership interests in the Eunice Plant and the Indian Basin Plant, which triggered the presumption of control regulation. *See* 3.18.1.7(B)(2) NMAC. Instead, Chevron seeks to have the Department regulation regarding presumption of control declared irrational and hence invalid on its face. Agency regulations that interpret statutes and are promulgated under statutory authority are presumed proper, "[a]nd, of course, it is hornbook law that an interpretation of a statute by the agency charged with its administration is to be given substantial weight." *Regents of the Univ. of N.M. v. Hughes,* 114 N.M. 304, 311–12, 838 P.2d 458, 465–66 (1992). At issue is the Department regulation that states the following:

> (2) Two persons are affiliated if one of the persons either directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with the other person. Based on the ownership of the voting securities of a person or based on other forms of ownership:
>
> (a) ownership in excess of fifty percent constitutes control;
>
> (b) ownership of 10 through 50 percent creates a presumption of control; and
>
> (c) ownership of less than ten percent creates a presumption of noncontrol which the department may rebut if it demonstrates actual or legal control, including the existence of interlocking directorates.

3.18.1.7(B)(2) NMAC.

{17} Chevron relies solely upon *National Mining Ass'n v. United States Department of the Interior,* 177 F.3d 1 (D.C.Cir.1999). There, the Circuit Court of Appeals invalidated an agency regulation that presumed control based on 10 through 50 percent ownership. *Id.* at 5–7. The Circuit Court of Appeals acknowledged that this presumption was rebuttable. *Id.* at 5. The sole basis for invalidating this provision was that the agency had not

> offered any basis to support [the provision's] presumption that an owner of as little as ten per cent of a company's stock controls it. While ten per cent ownership may, under specific circumstances, confer control, [the agency] has cited no authority for the proposition that it is ordinarily likely to do so.

Id. at 6–7 (footnote omitted).

{18} We agree with the Department that, contrary to New Mexico law, *National Mining Ass'n* puts the burden on the administrative agency to show that its regulation was proper. *Compare id., with Regents of the Univ. of N.M.,* 114 N.M. at 311–12, 838 P.2d at 465–66 (holding that a regulation promulgated pursuant to statutory authority is "presumed to be a proper implementation of the provisions" of the statute in question). We therefore hold that the reasoning of *National Mining Ass'n* is insufficiently forceful to invalidate 3.18.1.7(B)(2) NMAC. In addition, we are not persuaded that the reasoning, approach, or result in *National Mining Ass'n* is accurate. We refuse to consider its adoption in New Mexico.

2. Section 7–29–4.2 Does Not Require a Commensurate Analysis

{19} Chevron asserts that the district court incorrectly held that Chevron had waived its commensurate arguments because it did not raise such arguments in its refund application. We agree with Chevron. After the Department denied Chevron's request for refund, Chevron filed an action for money damages before the district court, rather than instituting a proceeding before a De-

partment hearing officer, pursuant to Section 7–1–26(C)(1). This Court's review encompasses the record developed at the district court level, including discovery and pleadings. Following discovery, during which Chevron obtained information regarding the calculation of processing costs, Chevron raised the issue of the Department's compliance with Section 7–29–4.2. We are thus not persuaded that Chevron was barred from district court or appellate review on this issue. We reverse the district court's order on this matter and consider Chevron's argument.

{20} The final paragraph of Section 7–29–4.2 has two sentences. The first sentence specifically requires that when the taxable product value is determined pursuant to the three circumstances listed in Section 7–29–4.2(A)–(C), the set value "shall be commensurate with the actual price received for products of like quality, character and use which are severed in the same field or area." Section 7–29–4.2. The last sentence then provides that the Department may set a reasonable value "[i]f there are no sales of products of like quality, character and use severed in the same field or area." *Id.* In this case, the Department utilized the actual processing costs that Chevron had reported as part of its federal royalty obligations, rather than Chevron's contractual processing deductions. Chevron contends that the Department's approach does not meet the requirements of Section 7–29–4.2. Chevron would require the Department to compare the taxpayer's processing charges to "the processing fees paid by other operators who processed gas at the Indian Basin and Eunice Plants." We do not agree that Section 7–29–4.2 requires the Department to make such comparisons when it determines the value of a taxpayer's processing fees.

{21} Section 7–29–4.2 states that the final *value,* or end figure as determined by the Department, must be commensurate with the "actual price received for products of like quality, character and use which are severed in the same field or area." *Id.* Section 7–29–4.2 does not mention the commensurate value of processing charges. In fact, this section does not mention processing deductions at all. Neither does this section mention, let alone mandate, a certain methodology for calculating final value. The complete absence of any language in Section 7–29–4.2 regarding methodology, let alone one as specific as commensurate analysis, leads us to hold that Section 7–29–4.2 does not compel the Department to use a particular analysis in arriving at the determination of commensurate value. *Cf. BP Am. Prod. Co. v. Dep't of Revenue,* 2005 WY 60, ¶ 5, 112 P.3d 596 (Wyo.2005) (describing how the "Wyoming Legislature has provided the Department with specific guidance on how it should determine the fair market value of natural gas production . . . that is not sold at or prior to the point of valuation by bona-fide arm[']s-length sale pursuant to one of four methods: 1) comparable sales; 2) comparable value; 3) netback; and 4) proportionate profits" (internal citation omitted)). The question is not "which of various appraisal methods is best or most accurately estimates [fair market value]; rather, it is to determine whether substantial evidence exists to support usage of the [chosen] method of appraisal." *State Dep't of Revenue v. Amoco Prod. Co.,* 7 P.3d 35, 38 (Wyo.2000) (internal quotation marks and citations omitted). While the Department's methodology is presumed correct, "[o]nce the presumption is successfully overcome, the burden of going forward shifts to the Department to defend its valuation." *BP Am. Prod. Co.,* 2005 WY 60, ¶ 26 (internal quotation marks and citation omitted). Further, Chevron has not raised the question of whether the Department's methodology was correct but only the very narrow question of whether the Department's methodology was impermissible under Section 7–29–4.2.

{22} The Department's methodology emanated from regulations providing that in transactions between affiliated persons, the Department calculates processing costs according to one of two "benchmark[s]." 3.18.6.10(F)-(H) NMAC. Under the benchmark applicable here, where "less than fifty percent of the natural gas processed during the reporting period is processed for non-affiliated persons in arm's-length transactions," the Department makes allowance for actual, allowable processing costs, *see* 3.18.6.10(H) NMAC, as opposed to contractu-

al processing costs, *see* 3.18.6.10(G) NMAC. In this case, the Department used the actual processing costs that Chevron reported as part of its federal royalty obligations.

{23} Chevron asserts that Section 7–29–4.2 "require[s] the Department to ensure that the value upon which it assesses natural gas producers is commensurate with the actual price received for petroleum products of like quality, character and use in the same field or area." Section 7–29–4.2 does not mandate that the Department perform an analysis that compares any particular factor. The meaning of this language lies apart from methodology. Once the Department arrives at a value by applying its regulations, the burden is on the taxpayer to show that the assessment does not comply with Section 7–29–4.2. *See Hawthorne v. Dir. of Revenue Div. Taxation & Revenue Dep't,* 94 N.M. 480, 481, 612 P.2d 710, 711 (Ct.App.1980). This burden is based on the presumption of correctness in the Department's assessments. *See* NMSA 1978, § 7–1–17(C) (1992) ("Any assessment of taxes or demand for payment made by the [D]epartment is presumed to be correct."). If the taxpayer meets its burden of demonstrating that the Department value is not "commensurate with the actual price received for products of like quality, character and use which are severed in the same field or area" under Section 7–29–4.2, then the assessment must be recalculated. *See Regents of N.M. Coll. of Agric. & Mech. Arts v. Acad. of Aviation, Inc.,* 83 N.M. 86, 89, 488 P.2d 343, 346 (1971) (stating that the presumption of correctness may be overcome if the taxpayer shows that the Department failed to comply with the relevant statute). The Department's use of relevant values that Chevron had reported for other purposes was therefore not improper. The taxpayer still has the right to challenge the value but also has the burden of showing noncompliance with the statute. If the taxpayer cannot meet this burden, then the final sentence of Section 7–29–4.2 is triggered, and the Department may simply set a reasonable value on the products. Here, Chevron did not even attempt to show that the Department's value was not commensurate with the actual price received for similar products. We therefore affirm the district court in this regard.

D. The Department's Motions for Partial Summary Judgment

1. Cooper's Affidavit

{24} Chevron argues that the district court should not have struck the affidavit of Chevron's expert, Stephen S. Cooper, because in doing so, the court compromised its decision on the parties' summary judgment motions. Chevron submitted the Cooper affidavit in support of its own motion for summary judgment. In his affidavit, Cooper generally asserted that the terms of Chevron's processing agreements were similar to the terms of the other producers' agreements. Cooper also asserted that Chevron's processing agreement with Marathon at the Indian Basin Plant was "quite favorable to Chevron." These assertions go to whether or not Chevron's processing agreements were arm's length (i.e., that the parties had opposing economic interests) and to support Chevron's position that the Department should have conducted a commensurate analysis to determine value. In the district court, Chevron claimed that Cooper's affidavit only applied to the commensurateness of Chevron's processing fees and that any alleged conflict between Cooper's deposition testimony and his affidavit did not relate to the issue of commensurateness.

{25} On appeal, however, Chevron changes its approach. It no longer argues that the affidavit provides evidence of and creates genuine issues of material fact regarding the method used to determine value. Rather, Chevron seems to be arguing that the contents of the affidavit establish the arm's length nature of Chevron's processing agreements and, accordingly, the absence of any affiliation between Chevron and the plant operators. We disagree with Chevron's recharacterization of the affidavit.

{26} Put another way, the only evidence that could arguably oppose the Department's motions for partial summary judgment is the Cooper affidavit. These motions, however, go to the interpretation of Section 7–29–4.2 as to when the Department can determine

value and how. If the producer and the operator are affiliated, the Department is allowed to determine value. Cooper's affidavit does describe the parties' opposing economic interests and thus supports the arm's length nature of the transactions. However, Cooper's affidavit does not address affiliation. Because Chevron is presumptively an affiliate, and nonaffiliation is required for an arm's length contract, *see* § 7–29–4.2(A), the Cooper affidavit does not overcome the presumption regarding affiliation. As to the method of determining value, Chevron does not argue on appeal that the contents of the affidavit relate to this issue. Thus, we conclude that even if the affidavit had been allowed in, its contents would have been irrelevant to Chevron's argument on appeal that the affidavit rebuts the presumption of affiliation. *See State Farm Mut. Auto. Ins. Co. v. Fennema,* 2005–NMSC–010, ¶¶ 14–15, 137 N.M. 275, 110 P.3d 491 (holding that a legal presumption on which summary judgment was based was not rebutted by the plaintiff's submission of evidence that did not address the presumption). Accordingly, any error in striking the Cooper affidavit would be harmless. *See Cooper v. Curry,* 92 N.M. 417, 420–21, 589 P.2d 201, 204–05 (Ct.App. 1978) (holding that preclusion of irrelevant evidence is not error).

2. The Parties' Arguments

{27} As described above, the Department may properly presume, pursuant to its regulations, that Chevron directly or indirectly controlled and is therefore affiliated with both Marathon at the Indian Basin Plant and Dynegy at the Eunice Plant. *See* 3.18.1.7(B)(2) NMAC. Chevron contends that the district court erred in granting summary judgment on the issues of affiliation and arm's length contracts at the Eunice and Indian Basin plants. Chevron does not argue that it owns less than 10 percent at either plant or that the regulatory presumption of control (discussed above) does not apply. Instead, Chevron argues that it rebutted this presumption with facts sufficient to create a genuine issue of material fact as to its affiliation with the plant operators at the Eunice and Indian Basin plants. We do note that while Chevron has the burden of production on this issue, the Department has the burden to show the nonexistence of a genuine issue of material fact. *See Reinhart,* 83 N.M. at 196, 490 P.2d at 242. In this case, the Department met that burden, and we affirm summary judgment on the issues of nonaffiliation and the absence of arm's length contracts between Dynegy and Chevron at the Eunice Plant and between Marathon and Chevron at the Indian Basin Plant. We explain below.

a. Eunice Plant

{28} Prior to September 1, 1996, Warren was an operating division of Chevron and sole owner of the Eunice Plant. This was during part of the assessed period. Chevron processed its gas at the Eunice Plant, pursuant to a memorandum of understanding (MOU) with the Warren operating division.

{29} After September 1, 1996, Chevron sold Warren to Natural Gas Clearinghouse (NGC), which immediately became Dynegy. (Both companies are hereinafter referred to as Dynegy). In exchange, Chevron received 28 percent of Dynegy's voting stock.[1] Chevron also had the authority to appoint three of Dynegy's board members. Chevron conceded that at this time, it entered into a long-term strategic alliance wherein Dynegy, through yet another of its subsidiaries, purchased "substantially all" of Chevron's residue gas and NGLs in the United States. Chevron thus listed Dynegy as an "affiliate" in its SEC filings.

{30} At the Eunice Plant, Chevron's gas was processed by Dynegy Midstream Services (DMS), a wholly owned Dynegy subsidiary. Companies other than Chevron had their gas processed at the Eunice Plant. The terms that Chevron had with Warren (i.e., Chevron itself) under the MOU re-

1. In other portions of the record, Chevron asserted that it owned 25.91 percent of Dynegy's voting stock and that Chevron held an equity interest of approximately 29 percent. Since Chevron does not dispute that its ownership interests bring it within the 10 through 50 percent range for the presumption of control, this minor discrepancy is without effect in this case. *See* 3.18.1.7(B)(2) NMAC.

mained the same when Dynegy took over. Chevron did not have the option under the terms of the MOU to process Chevron's gas anywhere else. Another company, Versado Gas Processors (Versado), took over these processing obligations at some point. Dynegy owned 63 percent of Versado. It was created via a Dynegy and Texaco deal, which brought the two companies' assets under one "umbrella." Versado kept as its processing fee 25 percent of Chevron's residue gas and NGLs processed at the Eunice Plant. Chevron was required to sell the remaining 75 percent of these products to Dynegy.

b. Indian Basin Plant

{31} The Dynegy–Chevron relationship is also extant at the Indian Basin Plant, in which Chevron had a 14 percent ownership interest prior to September 1, 1996. After this date, Chevron sold not only Warren and the Eunice Plant to Dynegy but also this 14 percent interest in the Indian Basin Plant. Again, Chevron retained 28 percent of Dynegy's stock.

{32} Marathon owned the largest interest and served as the operator at the Indian Basin Plant. In negotiating with Chevron, Marathon was acting on its own behalf and on behalf of the Indian Basin Plant owners (including Chevron). Under a tiered agreement, Marathon retained 75 percent of the NGLs produced in a day. When the month's average was more than 25 mmcf[2] NGLs produced per day, Marathon would retain a lower percentage of the NGLs. Chevron retained all of its residue gas under this agreement.

c. Discussion

{33} The question is whether, as a matter of law, Chevron is affiliated with Dynegy at the Eunice Plant and with Marathon at the Indian Basin Plant. Department regulations create a rebuttable presumption that Chevron was affiliated with the operators of the Indian Basin and Eunice plants, due to Chevron's ownership interests in those plants. *See* 3.18.1.7(B)(2) NMAC. Because nonaffiliation is also required for a processing agreement to be arm's length, we only address affiliation. *See* § 7–29–4.2(A), (B); 3.18.1.7(B)(1) NMAC (stating that an arm's length transaction is one between "nonaffiliated persons").

{34} In favor of its motions for summary judgment, the Department submitted an affidavit from Roger Riddlehoover. He asserted that when a producer (like Chevron) uses an affiliated company to provide services or purchase production, this "circumstance warrants special treatment because of the potential that intra-company transfers may mask, or bias, the true economic value of the resource in such a way as to reduce payments to ill-informed passive claimants" (like the Department). In analyzing Chevron's production at the Eunice Plant, Riddlehoover agreed that the terms of the 1996 processing agreement between Chevron and Dynegy were more favorable to Dynegy. He asserted that despite this fact, these less favorable terms did not necessarily harm Chevron because giving more to Dynegy was part of the consideration for the sale of Warren and the Eunice Plant to Dynegy.

{35} As far as the Indian Basin Plant was concerned, Riddlehoover noted that the Plant was actually built by a group of producers, which included Chevron and Marathon. The largest producer, Marathon, was appointed operator. He concluded that the terms between Marathon as plant operator and the plant owners were not meaningfully negotiated. Because Chevron was on both sides of the transaction (as a producer and as a part owner of the plant that was processing Chevron's products), what Chevron paid for processing did not have much meaning.

{36} Through the presumption of control (based on 10 through 50 percent ownership interests) and the other evidence of Chevron's relationships at the Indian Basin and Eunice plants, the Department met its burden of demonstrating that there is no genuine issue of material fact as to Chevron's affiliation with Marathon and Dynegy. Relying on its legal theory that the Department's regulation was irrational and invalid, Chevron provided no evidence to rebut the presumption of affiliation. In addition, Chev-

2. One million cubic feet. 8 Williams & Meyers, *supra,* at 632.

ron's assertions that the Department was biased and pre-judged the affiliation issue in an arbitrary and capricious fashion are equally without merit. To the extent that this argument is based upon testimony from a Department witness that it is impossible for a company like Chevron, which is both a producer and a plant owner, to have an arm's length contract, we again point out that Chevron is presumptively an affiliate and that nonaffiliation is required for an arm's length contract. *See id.* Further, to the extent that Chevron seeks by its arguments to create a genuine issue of material fact, the "arguments of counsel are not evidence." *In re Application of Metro. Invs., Inc.*, 110 N.M. 436, 441, 796 P.2d 1132, 1137 (Ct.App.1990). We therefore affirm the district court's grant of summary judgment to the Department on this issue and the court's denial of Chevron's motion for summary judgment.

III. CONCLUSION

{37} In this case, we hold that Chevron has not shown a sufficient basis for invalidating the Department's regulation that presumes control based on 10 through 50 percent ownership; therefore, we also hold that the presumption of control applies in this case. *See* 3.18.1.7(B)(2) NMAC. Further, we hold that Section 7–29–4.2 requires that the value of natural gas assessed by the Department must be commensurate with "the actual price received for products of like quality, character and use which are severed in the same field or area" and that the burden is on the taxpayer to demonstrate that the Department's assessment does not conform to this requirement. Also in this context, while Section 7–29–4.2 requires that the value be commensurate, we hold that this statute does not mandate a particular analysis the Department must use in order to arrive at that value. We therefore affirm the district court on this point. Finally, we hold that there is no genuine issue of material fact as to Chevron's affiliation with the operators at issue, and we therefore affirm the district court's grant of summary judgment to the Department and the denial of Chevron's motion for summary judgment on this issue. The affidavit of Chevron's expert, even if improperly struck, was insufficient to create an issue on this point.

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

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

2006-NMCA-053

134 P.3d 795

BUILDERS CONTRACT INTERIORS, INC., Plaintiff–Counter-defendant/Appellee,

v.

HI–LO INDUSTRIES, INC., Defendant–Counterclaimant/Appellant,

and

Hi–Lo Industries, Inc., Third-party Plaintiff/Appellant,

v.

Robert L. Novis, Third-party Defendant/Appellee.

No. 24,618.

Court of Appeals of New Mexico.

March 16, 2006.

Lastrapes, Spangler & Pacheco, PA, Matthew M. Spangler, Rio Rancho, NM, for Appellant.

Peter Everett IV, Albuquerque, NM, for Appellee.

OPINION

WECHSLER, Judge.

{1} In this appeal, we consider whether mere negligence in failing to perform a settlement agreement constitutes a basis in equity to set aside a judgment based on the settlement agreement itself. The conflict here arises in the context of a settlement agreement between Plaintiff Builders Contract Interiors, Inc., its president Third-party Defendant Robert L. Novis (together BCI), and Defendant Hi–Lo Industries, Inc. (Hi–Lo), requiring BCI to pay a settlement amount to Hi–Lo on or before a certain date. The settlement agreement provided that "[t]ime [was] of the essence" and, if the amount was not paid by that date, Hi–Lo was

entitled to file and enter with court a stipulated judgment against BCI. BCI did not pay within the specified time, and Hi–Lo filed the stipulated judgment. The district court set aside the judgment on equitable grounds. Because BCI's justification for failing to pay within the specified time was based on its own negligence rather than mistake, we reverse the district court, thereby upholding the settlement agreement.

BACKGROUND

{2} BCI, a cabinet subcontractor, purchased cabinets from Hi–Lo on open account. Novis was the guarantor of the account. After conducting business for more than a year, Plaintiff sued Hi–Lo, alleging claims for breach of contract, business interference, interference with prospective contract, and direct business damage. It requested compensatory and punitive damages. It alleged that Hi–Lo had overbilled, delivered substandard cabinets, filed false liens, and engaged in defamatory communications with Plaintiff's customers. Hi–Lo filed a counterclaim and a third-party complaint against Novis. It alleged that BCI had fallen behind on its payments, had exceeded its credit limit, and owed on the open account, plus interest and attorney fees.

{3} The night before trial was scheduled to start, the parties settled the case while represented by counsel. The settlement agreement, signed by the parties, provides that

> 1. BCI shall pay to Hi–Lo the sum of $27,703.00 on or before 5:00 p.m. on October 24, 2003.... Time is of the essence in this Settlement Agreement.
>
> ....
>
> 5. In the event BCI fails to timely deliver to Hi–Lo the sum required by paragraph 1 hereinabove, Hi–Lo may file and enter with this Court a full and final Judgment in this matter ... in the form of Exhibit C attached hereto....

The stipulated judgment approved by counsel for the respective parties provides, "Hi–Lo Industries, Inc. is awarded judgment for damages against Builders Contract Interiors, Inc. and Robert L Novis, jointly and severally, in the amount of $75,711.51." BCI did not make the agreed-upon payment on or before October 24. On October 28, Hi–Lo filed the stipulated judgment after it was approved by the district court. BCI then delivered Hi–Lo a cashier's check in the amount of $27,703 on October 31. Hi–Lo did not accept the late payment and so informed BCI by letter.

{4} On November 12, BCI filed a motion to set aside the stipulated judgment. The district court granted BCI's motion, finding that "[i]t would be unconscionable to allow the Judgment to stand."

EVIDENCE OF THE SETTLEMENT AGREEMENT

{5} In its answer brief, BCI points out that the settlement agreement was never placed in evidence before the court. However, BCI's motion to set aside is founded on the existence of the settlement agreement. Hi–Lo attached a copy of the settlement agreement to its response to the motion. At the hearing on the motion, the district court stated that it had read the submissions of the parties. Both parties addressed the settlement, and Hi–Lo did so very explicitly. BCI did not raise any objection or argue, in any way, that the court could not consider the settlement agreement. The fact that the court ruled "shortly after" Hi–Lo's counsel completed his argument does not excuse BCI from alerting the court to any defect in the proceeding. We will not address this argument made for the first time on appeal. *See Campos Enters., Inc. v. Edwin K. Williams & Co.*, 1998–NMCA–131, ¶ 12, 125 N.M. 691, 964 P.2d 855.

INAPPLICABILITY OF EQUITY TO CHANGE PARTIES' AGREEMENT

{6} BCI relied on mistake in the district court in seeking to set aside the stipulated judgment. Novis claimed that he had "the mistaken understanding" that payment was not due until October 31, rather than October 24. The district court thereupon set aside the stipulated judgment on equitable grounds, finding that "[i]t would be unconscionable to allow the Judgment to stand." Because the district court's finding of unconscionability depends on a showing of mistake, we analyze the district court's ruling based on BCI's claim of mistake. Whether the district court was permitted to exercise

its discretion for mistake on this set of facts presents a question of law. *United Props. Ltd. v. Walgreen Props., Inc.*, 2003–NMCA–140, ¶ 7, 134 N.M. 725, 82 P.3d 535 ("The question of whether, on a particular set of facts, the district court is permitted to exercise its equitable powers is a question of law. . . ."). If the district court was permitted to do so, we then review the district court's exercise of its equitable power for abuse of discretion. *Id.* ("[T]he issue of how the district court uses its equitable powers to provide an appropriate remedy is reviewed only for abuse of discretion.").

{7} We begin our analysis by recognizing and enforcing the strong policy of favoring settlement agreements. *See Navajo Tribe of Indians v. Hanosh Chevrolet–Buick, Inc.*, 106 N.M. 705, 707, 749 P.2d 90, 92 (1988) (discussing the policy of enforcing settlement agreements). Courts look favorably when parties resolve their disputes, and, as a result, hold such agreements in high regard and require a compelling basis to set them aside. *See Marrujo v. Chavez*, 77 N.M. 595, 599, 426 P.2d 199, 201 (1967); *Gonzales v. Atnip*, 102 N.M. 194, 195, 692 P.2d 1343, 1344 (Ct.App.1984). A lack of certainty of contract would be contrary to the policy favoring settlement because it would promote additional litigation with regard to the terms of the settlement agreement. Further, as in *United Properties*, we do not use equitable principles "to save a party from the circumstances it created." *United Props. Ltd.*, 2003–NMCA–140, ¶ 31, 134 N.M. 725, 82 P.3d 535 (internal quotation marks and citation omitted). BCI freely entered the unambiguous settlement agreement with knowledge of its terms. Unless there is "an affirmative showing of mistake, fraud or illegality," "the fact that some of the terms of [an] agreement resulted in a hard bargain or subjected a party to exposure of substantial risk, does not render a contract unconscionable." *Smith v. Price's Creameries*, 98 N.M. 541, 545, 650 P.2d 825, 829 (1982).

{8} Because a settlement agreement is a species of contract, we also recognize and give effect to the intersecting "strong public policy of freedom to contract" that has been enforced in New Mexico. *State ex rel. Udall v. Colonial Penn Ins. Co.*, 112 N.M. 123, 126, 812 P.2d 777, 780 (1991) (internal quotation marks and citation omitted). Our courts have consistently enforced clear contractual obligations. *United Props. Ltd.*, 2003–NMCA–140, ¶ 12, 134 N.M. 725, 82 P.3d 535. *See Nearburg v. Yates Petroleum Corp.*, 1997–NMCA–069, ¶ 31, 123 N.M. 526, 943 P.2d 560 ("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.") (citation omitted). We will allow equity to interfere with this consistency only when "well-defined equitable exceptions, such as unconscionability, mistake, fraud, or illegality" justify deviation from the parties' contract. *Id.; see Winrock Inn Co. v. Prudential Ins. Co. of Am.*, 1996–NMCA–113, ¶ 36, 122 N.M. 562, 928 P.2d 947 ("In the absence of fraud, unconscionability, or other grossly inequitable conduct, New Mexico courts do not have discretion . . . to interfere with contractual rights and remedies which go to the heart of the bargain.").

{9} In *United Properties*, we addressed the type of mistake that applies in the context of "freely negotiated bargains." *United Props. Ltd.*, 2003–NMCA–140, ¶ 30, 134 N.M. 725, 82 P.3d 535. We stated that a "mistake within the meaning of equity is a non-negligent but erroneous mental condition, conception, or conviction induced by ignorance, misapprehension, or misunderstanding, resulting in some act or omission done or suffered by one or both parties, without its erroneous character being intended or known at the time." *Id.* (internal quotation marks and citation omitted). In that case, a lessee forgot to provide written notice of its intent to renew a lease by a specified date. *Id.* ¶ 4. It sent notice the day after the lessor notified it that the date had passed, and the lessor rejected the notice. *Id.* In those circumstances of a commercial lease, we held that the lessee was negligent such that its mistake did not justify equitable relief and that "[f]orgetfulness is not the

equivalent of a mistake." *Id.* ¶ 30 (internal quotation marks and citation omitted).

{10} BCI's basis for missing its deadline shows its negligence. In his affidavit, Novis states that he had a mistaken understanding of the date the payment was due, that the time of year was extremely busy for BCI, and that it was "a completely inadvertent mistake" on his part. He does not point to any "clerical error or technical mix-up," as he argues on appeal. *See Brown v. Trujillo,* 2004–NMCA–040, ¶ 21, 135 N.M. 365, 88 P.3d 881 (noting that a "clerical error or technical mix-up" may enable a court to equitably grant a debtor an extension of the statutory redemption period). In *United Properties,* we stated: "Negligently and inadvertently omitting to perform a duty is far different than to omit it through mistake or accident." *United Props. Ltd.,* 2003–NMCA–140, ¶ 30, 134 N.M. 725, 82 P.3d 535 (internal quotation marks and citation omitted). We cannot characterize Novis' inadvertence as non-negligence.

{11} BCI argues that *United Properties* is distinguishable on its facts because it involves an extension of a commercial lease in which there was "quite late" notice. But the foundation for our opinion in *United Properties* applies with full force in this case. Our focus in both cases is the freedom of parties to enter into a clear agreement to cover their affairs without interference from the courts. Parties must be able to rely on the certainty of their voluntary, arm's-length relationships set forth in the contract in their business dealings. *See Colonial Penn Ins. Co.,* 112 N.M. at 126, 812 P.2d at 780; *United Props. Ltd.,* 2003–NMCA–140, ¶ 31, 134 N.M. 725, 82 P.3d 535. BCI does not argue that the settlement agreement was ambiguous. Not only are the terms clear, the agreement also makes time "of the essence." Equity does not apply to save BCI from its negligence. The district court erred as a matter of law when it found that Novis' negligence, characterized as mistake, gave rise to unconscionability in the contract.

ABSENCE OF ACCORD AND SATISFACTION

{12} BCI additionally argues that Hi–Lo should be held to have accepted its untimely tender of the settlement amount because Hi–Lo did not return the cashier's check. In *Warren v. New York Life Insurance Co.,* 40 N.M. 253, 58 P.2d 1175 (1936), cited by BCI, our Supreme Court, applying a principle used in cases of accord and satisfaction, stated that when a creditor receives a check "in full settlement of a disputed or unliquidated demand," the creditor must notify the debtor whether the offer of settlement is accepted within a reasonable time and return the amount received if it is not accepted. *Id.* at 261, 58 P.2d at 1180 (internal quotation marks and citation omitted). The Court stated that reasonableness of the time period depends on the circumstances of each case. *Id.* In *Miller v. Montgomery,* 77 N.M. 766, 427 P.2d 275 (1967), the Court held that a creditor who gave a cashier's check to counsel to bring a lawsuit on the claim and who brought the action within five weeks of receipt of the check acted within a reasonable period of time and that there was no accord and satisfaction precluding the creditor from bringing the action. *Id.* at 768–69, 427 P.2d at 276–77.

{13} The district court did not rule on this issue. We nevertheless conclude that Hi–Lo is not foreclosed from bringing its claim in this action. Notably, Hi–Lo did not bring any separate action on the debt but merely filed the stipulated judgment already approved by BCI's counsel. Then, it promptly, within eleven days, informed BCI that it was not accepting the check. It informed the court and BCI in its response to the motion to set aside that it would bring the check to the hearing on the motion. Hi–Lo's counsel informed the court at the hearing that he had the check. The district court told Hi–Lo's counsel at the hearing that "Your client can go ahead and negotiate that check now. . . . I understand why it was unwilling to do so earlier." Because of Hi–Lo's appeal, the matter has been pending since that time. Hi–Lo did not engage in any unreasonable delay.

CONCLUSION

{14} Because the district court did not have the equitable authority to alter the settlement agreement of the parties for BCI's negligence, we reverse the district court's

order setting aside the stipulated judgment and order the judgment reinstated.

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

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

2006-NMCA-052

134 P.3d 800

STATE of New Mexico, Plaintiff–Appellee,

v.

John BRICKER, Defendant–Appellant.

No. 24,719.

Court of Appeals of New Mexico.

March 16, 2006.

Certiorari Granted, No. 29,751, May 1, 2006.

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

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

OPINION

SUTIN, Judge.

{1} Defendant John Bricker appeals the denial of his motion to suppress evidence found in his wallet as he was being booked at the police station. He was taken to the police station after having been arrested for driving on a suspended license. The arresting officer observed Defendant driving and knew that Defendant's license had been suspended. After stopping Defendant, the officer confirmed that the license had been suspended.

{2} We first address whether the custodial arrest was lawful. A New Mexico Statute requires a citation and release under the circumstances here. We hold that the custodial arrest was unlawful. We then address whether the unlawful custodial arrest was a constitutionally unreasonable seizure, requiring suppression of the evidence obtained from the search of Defendant's wallet. We hold that the seizure was unreasonable under the New Mexico Constitution and, therefore, the ensuing search during booking was unlawful and the evidence from the search should have been suppressed as the fruit of an unreasonable seizure.

BACKGROUND

{3} Believing that Defendant's driver's license had been suspended, Officer Izzy Johnson stopped Defendant on suspicion of driving with a suspended license. Defendant could not produce a driver's license and Officer Johnson was informed by radio dispatch that the license was suspended. The officer arrested Defendant for driving on a suspended license and took him to the police station for booking.[1] Booking procedures included taking Defendant's personal property. While removing and going through Defendant's wallet, the detention officer found a loaded syringe. The contents tested positive for methamphetamine and Defendant was charged with possession of methamphetamine and possession of drug paraphernalia.

{4} Defendant moved to suppress the evidence as fruit of an unreasonable seizure under the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution. At the suppression hearing, Defendant argued that under NMSA 1978, §§ 66–8–122 (1985) and 66–8–123 (1989), Officer Johnson was not authorized to arrest him and take him to the police station to be booked for driving on a suspended license, but rather required the officer to issue him a citation and release him from custody. Defendant further argued that the detention was therefore unlawful, requiring suppression of the drug-related evidence.

{5} Section 66–8–122 requires a person who is arrested for driving on a suspended license to be immediately taken before a magistrate if the person's license was suspended pursuant to certain laws relating to driving while intoxicated (DWI). § 66–8–122(G). However, when the suspension is not pursuant to those DWI-related laws, Sec-

1. The arrest was pursuant to a municipal ordinance which purportedly permitted the officer to arrest Defendant and take him to the station. The ordinance was not made a part of the record. Further, the issue on appeal regarding the validity and constitutionality of the custodial arrest of Defendant does not require development of or decision in regard to the apparent conflict between the ordinance and the State Statutes that control the issue before us. The State does not contend that the ordinance controls or takes precedence in determining the validity or constitutionality of the custodial arrest.

tion 66–8–123 requires the arresting officer to release the violator from custody after the officer issues a citation pursuant to which the driver agrees to appear in court. § 66–8–123(A).

{6} The State did not offer evidence at the suppression hearing of the basis on which Defendant's license was suspended. Thus, there is no evidence in the record that Officer Johnson knew the basis on which Defendant's license had been suspended when he stopped Defendant or when he arrested Defendant and took him to the police station.

{7} There was no issue in the district court as to the validity of the traffic stop. The district court denied Defendant's motion to suppress. Defendant entered a conditional plea and appealed the court's ruling. The issues are legal questions which we review de novo. *State v. Rodarte,* 2005–NMCA–141, ¶ 5, 138 N.M. 668, 125 P.3d 647, *cert. granted,* 2005–NMCERT–012, 138 N.M. 773, 126 P.3d 1137.

The Lawfulness of the Custodial Arrest Under State Statute

{8} Sections 66–8–122 and –123 delineate an officer's authority to arrest and detain when, as in the present case, the traffic-related stop is grounded on the violation of driving on a suspended license. As it relates to a suspended license, Section 66–8–122 reads:

> Whenever any person is arrested for any violation of the Motor Vehicle Code . . . or other law relating to motor vehicles punishable as a misdemeanor, he shall be immediately taken before an available magistrate who has jurisdiction of the offense when the:
>
> . . .
>
> G. person is charged with driving when his privilege to do so was suspended or revoked pursuant to Section 66–8–111 NMSA 1978 [relating to refusal to submit to a breath test for DWI purposes] or pursuant to a conviction for driving while under the influence of intoxicating liquor or drugs.

It is a violation of the Motor Vehicle Code to drive on a suspended license. NMSA 1978, § 66–5–39(A) (1993). Section 66–8–123(A) reads:

> Except as provided in Section 66–8–122 NMSA 1978, unless a penalty assessment or warning notice is given, whenever a person is arrested for any violation of the Motor Vehicle Code . . . or other law relating to motor vehicles punishable as a misdemeanor, the arresting officer, using the uniform traffic citation, shall complete the information section and prepare a notice to appear in court, specifying the time and place to appear, have the arrested person sign the agreement to appear as specified, give a copy of the citation to the arrested person and release him from custody.

An officer who violates Section 66–8–123 "is guilty of a misconduct in office and is subject to removal." § 66–8–123(E).

{9} While the statute uses the words "arrest" and "custody," we believe the Legislature intended those terms to refer to a temporary detention rather than a traditional custodial arrest in which a person is arrested and taken to the police station for booking. *See United States v. Gonzalez,* 763 F.2d 1127, 1130 n. 1 (10th Cir.1985) (discussing Sections 66–8–122 and 66–8–123 and the use of the words "arrest" and "custody" in Section 66–8–123(A), and stating, "[d]espite the statute's use of the words 'arrest' and 'custody,' when a New Mexico police officer stops a car merely to issue a traffic summons for a minor speeding infraction, we think that for Fourth Amendment purposes that stop is more in the nature of an investigative detention than a traditional [custodial] arrest"); *State v. Reynolds,* 119 N.M. 383, 388, 890 P.2d 1315, 1320 (1995) (holding that continued detention in a traffic stop to request, review, and check a motorist's license, registration, and insurance documentation is not unreasonable and does not violate the Fourth Amendment or Article II, Section 10 of the New Mexico Constitution).

{10} Section 66–8–122 lists several circumstances in addition to that in Subpart G that require a person to be taken before a magistrate. As we pointed out earlier in this opinion, no evidence exists in the record that Officer Johnson knew at the time he arrested Defendant and took Defendant to the police

station for booking whether Defendant's license suspension was DWI-related. Nor was there evidence of any other circumstance listed in the statute requiring that Defendant be taken before a magistrate.

{11} The State attempts to change that focus by arguing that Defendant had the burden to show the reason for the suspension of his license as a condition precedent to arguing that the custodial arrest was unlawful under Section 66–8–123(A). We are unpersuaded. It is true that a defendant has the burden of establishing that a seizure or search is unlawful in order to suppress the fruits of an unlawful seizure or search. *See State v. Ponce,* 2004–NMCA–137, ¶ 7, 136 N.M. 614, 103 P.3d 54 (stating that a defendant moving to suppress has the burden to come forward with evidence to raise an issue as to an illegal search and seizure), *cert. granted,* 2004–NMCERT–012, 136 N.M. 666, 103 P.3d 1098. However, under the circumstances in this case, the State had the burden to justify the custodial arrest by showing that the arrest and detention were mandated by Section 66–8–122(G); otherwise, the State bore the consequences of the officer's wrongful custodial arrest in violation of Section 66–8–123(A). *See Ponce,* 2004–NMCA–137, ¶ 7, 136 N.M. 614, 103 P.3d 54 ("In the face of a defendant's challenge to the constitutionality of a warrantless arrest or search, the State is required to present testimony or other evidence showing that the arrest or search met constitutional muster.").

{12} Further, we reject the State's attempt to override Section 66–8–123(A) by contending that NMSA 1978, § 66–8–127 (1978) absolves an officer of the mandates in Section 66–8–123(A). Section 66–8–127 reads:

> Sections 66–8–122 through 66–8–125 NMSA 1978 govern all police officers in making arrests without warrant for violations of the Motor Vehicle Code ... and other laws relating to motor vehicles, but the procedure prescribed is not exclusive of any other method prescribed by law for the arrest and prosecution of a person violating these laws.

The State argues that this section evinces a legislative intent not to supplant the common law misdemeanor arrest rule for traffic violations. Thus, according to the State, the requirements in Section 66–8–123(A) regarding issuance of a citation and release from custody are inapplicable whenever an officer observes a driver violate any misdemeanor covered in the Motor Vehicle Code. Again, we are unpersuaded. The State's interpretation of Section 66–8–127 renders the citation and release from custody mandates in Section 66–8–123(A) virtually meaningless. *See State v. Herbstman,* 1999–NMCA–014, ¶¶ 18, 20, 126 N.M. 683, 974 P.2d 177 (stating that "[w]e presume the legislature was informed as to existing law and did not intend to enact a law inconsistent with other law[,]" that "[w]e will reject an interpretation of a statute that makes parts of it ... meaningless[,]" and we "will not render a legislative enactment meaningless").

{13} Furthermore, we are unaware of any strong government policy, and the State does not argue one, that would call for Section 66–8–127 to come into play and override Section 66–8–123(A) to permit an officer to engage in a custodial arrest, rather than to merely cite and release, simply because the officer knew before stopping the driver that the driver was driving with a suspended license. Given the careful and mandatory language in Sections 66–8–122(G) and 66–8–123(A) and (E), we do not believe the Legislature intended to give police officers unbridled discretion to either arrest and book a driver or merely cite and release the driver.

{14} We hold that Officer Johnson was authorized, pursuant to Section 66–8–123(A), only to issue Defendant a citation and release him. The officer was not authorized to make a traditional custodial arrest, that is, to arrest Defendant and take him to the police station for booking. The custodial arrest of Defendant violated Section 66–8–123(A) and was therefore unlawful. However, this holding alone does not resolve the question of whether the evidence obtained from the search of Defendant's wallet should have been suppressed. That question requires an analysis of whether the unlawful custodial arrest violated the Fourth Amendment to the United States Constitution or Article II, Section 10 of our State Constitu-

tion. *Cf. State v. Wilson,* 92 N.M. 54, 55–56, 582 P.2d 826, 827–28 (Ct.App.1978) (stating that a right to refuse the taking of blood may be an enlargement of a constitutional right, and holding that whether it was or not an enlargement of a constitutional right, the right was granted by the Legislature and violation of the statute granting the right required exclusion of the blood sample).

The Constitutional Reasonableness of the Seizure

{15} The Fourth Amendment and Article II, Section 10 of the New Mexico Constitution "simply state[ ] a right-the right to be free from unreasonable searches and seizures." *State v. Gutierrez,* 116 N.M. 431, 444, 863 P.2d 1052, 1065 (1993). It is fundamental "that every person in this state is entitled to be free from unwarranted governmental intrusions." *Id.* "New Mexico courts interpret Article II, Section 10 ... more broadly than its federal counterpart, and specifically appl[y] that broader protection to motorists." *State v. Cardenas–Alvarez,* 2001–NMSC–017, ¶ 15, 130 N.M. 386, 25 P.3d 225. "It is the duty of appellate courts to shape the parameters of police conduct by placing the constitutional requirement of reasonableness in factual context." *State v. Vandenberg,* 2003–NMSC–030, ¶ 19, 134 N.M. 566, 81 P.3d 19 (internal quotation marks and citation omitted).

{16} A routine traffic stop constitutes a seizure under the Fourth Amendment. *State v. Duran,* 2005–NMSC–034, ¶ 22, 138 N.M. 414, 120 P.3d 836; *State v. Reynolds,* 117 N.M. 23, 26, 868 P.2d 668, 671 (Ct.App. 1993), *rev'd on other grounds,* 119 N.M. 383, 890 P.2d 1315 (1995); *State v. Werner,* 117 N.M. 315, 317, 871 P.2d 971, 973 (1994) ("Stopping an automobile and detaining its occupants constitute a seizure under the Fourth and Fourteenth Amendments." (alteration, internal quotation marks, and citation omitted)). However only if the seizure is unreasonable is it constitutionally proscribed. *Id.* (stating that the Fourth Amendment only proscribes seizures that are unreasonable); *see also Duran,* 2005–NMSC–034, ¶ 22, 138 N.M. 414, 120 P.3d 836 (stating that "[t]raffic stops must ... be conducted in a reasonable manner to satisfy the Fourth Amendment").

{17} In the present case, it is undisputed that the traffic stop, based on the officer's reasonable suspicion that Defendant was driving with a suspended license, and the detention to investigate the status of the license, were reasonable under the Fourth Amendment. *See id.* However, this traffic stop seizure and investigative detention to check the status of Defendant's license dramatically changed posture immediately upon Officer Johnson's custodial arrest of Defendant for driving with a suspended license. The question of the constitutional reasonableness of the initial traffic stop and de minimis detention disappeared from the radar screen, supplanted by the question of the constitutional reasonableness of the custodial arrest of Defendant for driving with a suspended license.

{18} The State opens its argument to affirm the denial of Defendant's suppression motion by pointing out New Mexico's well-established common law misdemeanor arrest rule. Under that rule, a police officer is authorized to arrest a person violating a misdemeanor traffic law in the officer's presence. *See State v. Gutierrez,* 76 N.M. 429, 430, 415 P.2d 552, 553 (1966) (holding that police officers were justified in arresting driver without a warrant when officers knew before the arrest that the driver was driving with a revoked license, because the violation was committed in the officers' presence); *Cave v. Cooley,* 48 N.M. 478, 481, 152 P.2d 886, 888 (1944) ("It is the well-established doctrine now throughout the United States that for a crime, which they have probable cause to believe is being committed in their presence, though it be a misdemeanor, duly authorized peace officers may make arrest without a warrant." (internal quotation marks and citation omitted)).

{19} Based on an arrest that conforms to the misdemeanor arrest rule, the State argues that Defendant failed to establish the existence of a constitutional violation, thereby eliminating application of the exclusionary rule that would bar evidence as the poisonous fruit of an unconstitutional arrest. The State also argues that an arrest in violation of a

statute does not elevate the issue to a constitutional level. *See People v. Lyon,* 227 Mich. App. 599, 577 N.W.2d 124, 129 (1998) (hold that the exclusionary rule is "only applicable . . . if the seizure was constitutionally invalid," based on a lack of probable cause, and "not merely statutorily illegal"); *State v. Eubanks,* 283 N.C. 556, 196 S.E.2d 706, 708–09 (1973) (holding evidence obtained following arrest which is constitutionally valid as based on probable cause but unlawful under state law need not be excluded under the federal exclusionary rule); *Penn v. Commonwealth,* 13 Va.App. 399, 412 S.E.2d 189, 193–94 (1991) (holding that there is no constitutional violation requiring exclusion of evidence where police officers arrest a person in violation of a state statute that adopts a more stringent standard for arrests than the probable cause standard under the Federal Constitution).

{20} We do not find the State's arguments and authorities persuasive. New Mexico's Constitution and laws compel the conclusion that the seizure of Defendant by custodial arrest fails the test of constitutional reasonableness under Article II, Section 10. Under the circumstances here, two rationales dovetail to support this conclusion. First, the purpose underlying Section 66–8–123(A) is to protect liberty and privacy in circumstances in which the violation of law does not warrant a custodial arrest. Second, Article II, Section 10 provides the broader privacy protection needed.

{21} Were we to be guided solely by federal law interpreting the Fourth Amendment, the custodial arrest of Defendant would be reasonable. Under the Fourth Amendment, the constitutional reasonableness of a custodial arrest is measured by whether probable cause existed for the arrest. *See Atwater v. City of Lago Vista,* 532 U.S. 318, 354, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001) (confirming that the standard of probable cause applies to all arrests and holding that the Fourth Amendment does not proscribe any arrest made with probable cause). In *Atwater,* the United States Supreme Court held that under the Fourth Amendment a warrantless custodial arrest based only on probable cause of a mere seatbelt violation, for which jail time was not authorized, was permissible. *Id.* The Court preferred to remain with what it considered the traditional probable cause standard for constitutional reasonableness, rather than to "mint a new rule of constitutional law on the understanding that when historical practice fails to speak conclusively to a claim grounded on the Fourth Amendment, courts are left to strike a current balance between individual and societal interests by subjecting particular contemporary circumstances to traditional standards of reasonableness." *Id.* at 345–46, 121 S.Ct. 1536. Thus, the United States Supreme Court held fast with probable cause as the test of reasonableness, "without the need to balance the interests and circumstances involved in particular situations." *Id.* at 354, 121 S.Ct. 1536 (internal quotation marks and citation omitted). And the Court ultimately held that the arrest of the defendant satisfied constitutional requirements, stating: "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Id.*

{22} In *Atwater,* Justice O'Connor dissented, disagreeing that the constitutional propriety of the custodial arrest, which she characterized as "the quintessential seizure," should be limited to whether probable cause existed. *See id.* at 360–62, 121 S.Ct. 1536 (O'Connor, J., dissenting). In Justice O'Connor's view, the reasonableness inquiry required not only a determination of the existence of probable cause, but also an evaluation of the seizure under the standard rejected by the majority, namely, by assessing the intrusion upon individual privacy against the need to promote legitimate governmental interests. *Id.* at 361, 121 S.Ct. 1536.

{23} In *Rodarte,* this Court refused to follow the majority's decision in *Atwater,* preferring instead to follow Justice O'Connor's dissent. *See Rodarte,* 2005–NMCA–141, ¶¶ 1, 15, 138 N.M. 668, 125 P.3d 647. We held:

> that, under Article II, Section 10, probable cause that a non-jailable offense has been committed does not automatically make arrest reasonable, and that for such arrests

> to be reasonable, there must be specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion of a full custodial arrest.

Id. ¶ 14 (internal quotation marks and citation omitted) (alteration in original). Several state courts have distanced themselves from *Atwater*. *See State v. Bauer*, 307 Mont. 105, 36 P.3d 892, 897 (2001) (holding that under the Montana Constitution, it was unreasonable for a police officer to effect a custodial arrest for a non-jailable offense absent special circumstances); *State v. Bayard*, 119 Nev. 241, 71 P.3d 498, 501–02 (2003) (applying the Nevada Constitution to affirm the suppression of evidence, holding that an arrest for a minor traffic violation violated the state statute giving an officer discretion to cite or arrest an offender, where the officer abused his discretion in performing a full custodial arrest, and stating "[a]bsent special circumstances requiring immediate arrest, individuals should not be made to endure the humiliation of arrest and detention when a citation will satisfy the state's interest"); *State v. Brown*, 99 Ohio St.3d 323, 792 N.E.2d 175, 178–79 (2003) (applying the Ohio Constitution which provided greater protection than the Fourth Amendment and holding that arrest of jaywalker violated the constitutional provision against unreasonable seizures where the arresting officer violated a state statute). Pre-*Atwater* cases are also supportive. *See also State v. Toevs*, 327 Or. 525, 964 P.2d 1007, 1015 (1998) (en banc) (holding the detention of a defendant to be a violation of a statute relating to a traffic infraction, and requiring the suppression of evidence discovered following the unlawful detention "[b]ecause the object of [the statute] is to define the authority of officers to respond to a traffic infraction" and, in order to give effect to the statute, "denying the state the use of evidence that it would not have secured if its officer had respected the rights that the statute was designed to protect" (internal quotation marks, citations, and emphasis omitted)); *State v. Valdez*, 277 Or. 621, 561 P.2d 1006, 1011 (1977) (invoking the sanction of exclusion of evidence obtained after police arrested the defendant in violation of a statute governing the officer's authority to stop and interrogate a person concerning the possible commission of certain crimes).

{24} In addressing the custodial arrest at issue in *Rodarte*, we applied Article II, Section 10 in order to provide greater protection than the Federal Constitution provides to misdemeanor traffic violators where the infraction is punishable by fine and not jail. *Rodarte*, 2005–NMCA–141, ¶¶ 15–16, 21, 138 N.M. 668, 125 P.3d 647. Significantly, *Rodarte* adopted a test that required officers to "articulate a legitimate reason for the decision to escalate the seizure into a full custodial arrest." *Id.* ¶¶ 9, 16 (internal quotation marks and citation omitted). "[W]hen an individual has not committed an offense that our Legislature has deemed significant enough to warrant a loss of liberty, that individual should not be deprived of his or her liberty through arrest unless there is a legitimate reason for the deprivation." *Id.* ¶ 20. The ultimate disposition in *Rodarte* was to overturn a conviction that was based on evidence that should have been suppressed.

{25} Further, in *Rodarte*, as in Justice O'Connor's dissent in *Atwater*, upon balancing governmental and individual interests, little weight was given to the *Atwater* majority's concern about an officer's ability to decide on the spot what was and was not a jailable offense. *See Rodarte*, 2005–NMCA–141, ¶¶ 15–16, 138 N.M. 668, 125 P.3d 647. Importantly, the controlling statute in the present case, Section 66–8–123(A), requires an officer to make an on-the-spot decision whether a misdemeanor traffic offense comes within the exceptions listed in Section 66–8–122. Thus, our Legislature has indicated an intent that, with respect to misdemeanors covered in these statutes, and, implicitly, irrespective of whether the misdemeanor is a jailable or non-jailable offense, the officer must make a decision, at the time of the traffic stop and based on any permitted de minimis computer check, whether the driver's violation is one requiring citation and release or one requiring custodial arrest.

{26} As in *Rodarte*, we think Justice O'Connor's reasoning was correct and we are not, in the present case, restricted by *Atwa-*

ter's interpretation of constitutional reasonableness under the Fourth Amendment. Our appellate courts have preferred a balancing-of-interests test for reasonableness, rather than a bright-line test. *See Rodarte,* 2005–NMCA–141, ¶¶ 14–15, 138 N.M. 668, 125 P.3d 647; *see also Duran,* 2005–NMSC–034, ¶ 34, 138 N.M. 414, 120 P.3d 836 ("Our case law has consistently disfavored a bright-line test in analyzing Fourth Amendment questions."); *Werner,* 117 N.M. at 317, 871 P.2d at 973 ("A bright line test does not exist to evaluate whether an investigatory seizure is invasive enough to constitute an arrest requiring probable cause."). Our courts have approved a balancing-of-interests standard in several search and seizure cases. *See Duran,* 2005–NMSC–034, ¶ 34, 138 N.M. 414, 120 P.3d 836; *Vandenberg,* 2003–NMSC–030, ¶ 23, 134 N.M. 566, 81 P.3d 19; *State v. Jason L.,* 2000–NMSC–018, ¶ 14, 129 N.M. 119, 2 P.3d 856; *Reynolds,* 119 N.M. at 385, 890 P.2d at 1317; *Werner,* 117 N.M. at 317, 871 P.2d at 973; *Rodarte,* 2005–NMCA–141, ¶ 14, 138 N.M. 668, 125 P.3d 647; *State v. Jones,* 114 N.M. 147, 150, 835 P.2d 863, 866 (Ct.App.1992) (stating that the Fourth Amendment establishes a reasonableness standard that permits lesser intrusion without warrants, based on a balance of "the degree of intrusion into an individual's privacy against the interest of the government in promoting crime prevention and detection"). Thus, while probable cause is essential to the constitutionality of the custodial arrest in the present case, it is not the sole factor to be applied in the constitutional inquiry. We hold, as to the custodial arrest here, that it is appropriate to apply the balance-of-interests standard.

{27} We acknowledge that we are faced in this case with a jailable offense and not a fine-only offense such as in *Atwater* and *Rodarte.* *See* NMSA 1978, § 66–5–39(A) (1993) (stating that the crime of driving on a suspended license carries a mandatory sentence of a minimum of four days in jail and up to 364 days in jail, although the sentence can be suspended). However, that alters nothing. Our Legislature has stated in no uncertain terms that persons who violate a misdemeanor covered in Section 66–8–123(A) shall be cited and released from custody. That the traffic offense is jailable is irrelevant. Jailability cannot justify overlooking an unlawful custodial arrest and permitting searches based on the unlawful arrest. The intrusion upon one's liberty is no less significant in cases in which the offense is jailable than in cases in which the offense is non-jailable. While the Legislature has assigned greater punishment for some traffic misdemeanors than others, the Legislature has not indicated any particular distinction on the basis of punishment in regard to loss of liberty.

{28} It seems obvious from Sections 66–8–122(G) and 66–8–123(A) that our Legislature required more than merely driving with a suspended license to warrant the loss of liberty occasioned by custodial arrest, as long as the suspension is not DWI-related. We see no reason to think that the Legislature intended to leave a driving with a suspended license offense open to a custodial arrest that escapes constitutional scrutiny.

{29} That the Legislature has zeroed in on the traffic offense at issue here and has only required citation and release is evidence of an intent to protect individual liberty over perceived governmental need. This has constitutional bearing. *See Bingham v. City of Manhattan Beach,* 341 F.3d 939, 950 (9th Cir.2003) (determining that, in evaluating a custodial arrest for a traffic offense, including an unlicensed driver violation, "federal courts must determine the reasonableness of the arrest in reference to state law governing the arrest" (internal quotation marks and citation omitted)); *United States v. Mota,* 982 F.2d 1384, 1388–89 (9th Cir.1993) (holding that custodial arrest for a minor infraction to be unlawful under California law, that the unlawful arrest was unreasonable and therefore unlawful under the Fourth Amendment, that the search incident to the arrest was not therefore exempt from the warrant requirement of the Fourth Amendment, and that the evidence from the search was unlawfully obtained and should have been suppressed). It fits well within the constitutional reasonableness standard our courts often turn to in constitutional seizure inquiries.

{30} Therefore, for the reasons set out in this opinion, we hold the custodial arrest in

this case was unreasonable and the seizure was unconstitutional under Article II, Section 10 of the New Mexico Constitution. Defendant's motion to suppress should have been granted and the evidence obtained from the search of Defendant's wallet should have been excluded as poisonous fruit of an unconstitutional seizure. *See State v. Prince*, 2004–NMCA–127, ¶¶ 20–21, 136 N.M. 521, 101 P.3d 332 (holding exclusionary rule should be employed to suppress evidence obtained after unlawful detention irrespective of consent to search); *State v. Gutierrez*, 2004–NMCA–081, ¶ 6, 136 N.M. 18, 94 P.3d 18 (stating that under the exclusionary rule unconstitutionally obtained evidence is inadmissible at trial).

CONCLUSION

{31} We reverse the district court's denial of Defendant's motion to suppress.

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

WE CONCUR: A. JOSEPH ALARID and IRA ROBINSON, Judges.

2006-NMCA-054

134 P.3d 808

Benjamin GURULE, Worker–Appellant,

v.

DICAPERL MINERALS CORPORATION, Self-insured, Employer/Insurer–Appellee.

No. 25,547.

Court of Appeals of New Mexico.

March 22, 2006.

Joel V. Burstein, Santa Fe, NM, for Appellant.

Paul L. Civerolo, LLC, Paul L. Civerolo, Albuquerque, NM, for Appellee.

OPINION

CASTILLO, Judge.

{1} The question before us is how to calculate the reduction in the number of weeks of permanent partial disability (PPD) benefits, as set forth in NMSA 1978, § 52–1–42(B) (1990), when a worker has received partial temporary total disability (TTD) benefits, pursuant to NMSA 1978, § 52–1–25.1(C) (1990). We hold that the language of Section 52–1–42(B) authorizes a reduction of one week of PPD benefits for each week of TTD benefits paid, regardless of the percentage of TTD actually paid. Accordingly, we affirm the entry of summary judgment in favor of Employer.

I. BACKGROUND

{2} The facts of this case are not in dispute. Worker suffered an injury in the scope and course of his employment. The parties agreed to a stipulated compensation order (Stipulated Order), in which they resolved all outstanding issues in the case, except for the amount of credit due Employer for payment of TTD. As to this issue, the parties agreed to the following. From April 9, 2002, to December 8, 2002, a period of 35 weeks, Worker returned to work before he reached maximum medical improvement (MMI) for all of his injuries. During this 35-week period, Worker was paid partial TTD benefits in the aggregate amount of $3,840.86, which was an average payment of $109.73 per week in partial TTD benefits. Worker's compensation rate for TTD benefits is $492.98 per week. Worker's PPD benefit rate is $236.63 per week. As to the credit for the payment of TTD benefits, Employer argued that Employer should receive a week of credit for each week benefits were paid. Worker, on the other hand, contended that credit should be calculated on a dollar-for-dollar basis, which would allow Employer a week of credit when the payments made equal the TTD compensation rate of $492.98. Under Employer's argument, 35 weeks of payments equal 35 weeks of Section 52–1–42(B) credit. Under Worker's theory, Employer would receive only 7.8 weeks of credit under the statute.

{3} After the Stipulated Order was entered, Worker filed a second complaint, seeking resolution of the question regarding the appropriate credit to be given Employer. The parties filed cross-motions for summary judgment on this issue. The Workers' Compensation Judge (WCJ) granted Employer's motion and denied Worker's motion. Observing that partial TTD benefits are paid under a weekly scheme, the WCJ concluded that credit for payment should be applied in a similar fashion—that is, based on the weeks paid. Worker appealed.

II. DISCUSSION

A. Standard of Review

{4} Summary judgment is proper where there is no genuine issue of material fact and where the moving party is entitled to judgment as a matter of law. *Garcia v. Smith Pipe & Steel Co.*, 107 N.M. 808, 809, 765 P.2d 1176, 1177 (Ct.App.1988). The only issue before us relates to the interpretation of the statutes. Statutory interpretation is a question of law, which this Court reviews de novo. *Flores v. J.B. Henderson Constr.*, 2003–NMCA–116, ¶ 9, 134 N.M. 364, 76 P.3d 1121.

B. Statutory Interpretation

{5} Section 52–1–25.1(C) deals with payment of TTD benefits to a worker who has not reached MMI, is released to return to work, and earns less than his pre-injury wage. This section states the following:

> If, prior to the date of maximum medical improvement, an injured worker's health care provider releases the worker to return to work and the employer offers work at less than the worker's pre-injury wage, the worker is disabled and shall receive temporary total disability compensation benefits equal to sixty-six and two-thirds

percent of the difference between the worker's pre-injury wage and his post-injury wage.

Id.

{6} In this case, Worker received TTD benefits for a 35-week period, during which he received an average of $109.73 per week. When an employer pays TTD under Section 52-1-25.1(C), that employer receives credit for payment of those TTD benefits, pursuant to Section 52-1-42(B), which states the following:

> If an injured worker receives temporary total disability benefits prior to an award of partial disability benefits, the maximum period for partial disability benefits shall be reduced by the number of weeks the worker actually receives temporary total disability benefits.

Id.

{7} Worker and Employer urge differing interpretations of Section 52-1-42(B). We begin our analysis by looking to the plain language of the statute and to the intent of the legislature. *See Draper v. Mountain States Mut. Cas. Co.*, 116 N.M. 775, 777, 867 P.2d 1157, 1159 (1994) (stating that courts first look to the plain language of a statute and also examine an act in its entirety in order to construe legislative intent). The language of Section 52-1-42(B) is clear: the maximum period for PPD benefits is reduced by the "number of weeks" the worker actually receives TTD benefits. Section 52-1-42(B). One of the legislative goals of the Workers' Compensation Act (Act), NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2005), is to promote the rehiring of injured workers and thereby reduce their reliance on compensation benefits. *See Grubelnik v. Four-Four, Inc.*, 2001-NMCA-056, ¶ 20, 130 N.M. 633, 29 P.3d 533 (stating that Section 52-1-25.1 is intended to advance the purpose of rehiring injured workers); *Lackey v. Darrell Julian Constr.*, 1998-NMCA-121, ¶ 20, 125 N.M. 592, 964 P.2d 153 ("The Workers' Compensation Act provides statutory incentives to both employers and employees to encourage return to work with minimal dependence on compensation rewards.") Allowing an employer full credit for each week of TTD benefits paid under Section 52-1-25.1(C) fosters this goal. The employer is encouraged to rehire an injured worker, and compensation is provided to the worker who returns to work at less than his pre-injury wage.

{8} Worker argues that our case law also recognizes that because the Act is imprecise, the plain meaning rule should be cautiously applied in the workers' compensation context. *Chavez v. Mountain States Constructors*, 1996-NMSC-070, ¶ 25, 122 N.M. 579, 929 P.2d 971. Worker relies on the definitions in Section 52-1-25.1(A) and Section 52-1-50.1 for his argument that TTD is a benefit based on total disability but is awarded for a temporary period of time. Worker cites to several New Mexico cases in which the courts distinguished between partial and full TTD benefits. *See Lackey*, 1998-NMCA-121, ¶ 10, 125 N.M. 592, 964 P.2d 153 (recognizing that the award of benefits under Section 52-1-25.1(C) is a partial benefit); *Ortiz v. BTU Block & Concrete Co.*, 1996-NMCA-097, ¶¶ 8, 10, 122 N.M. 381, 925 P.2d 1 (holding that the worker was entitled to full TTD benefits because the employer never made an offer of employment once the worker was released to work). Worker acknowledges that the distinction between full and partial TTD benefits is only found in New Mexico case law because the legislature did not make such a distinction.

{9} Worker then argues that the language of Section 52-1-42(B) recognizes this distinction for purposes of calculating the reduction of future PPD benefits. According to Worker, the phrase "actually receives" in Section 52-1-42(B) creates an ambiguity: is the result of Worker's receipt of one week of partial TTD benefits a reduction of one full week of future PPD benefits or a reduction of future PPD benefits by a partial week? Worker contends that Section 52-1-42(B) must be interpreted so that the reduction to which the statute refers is an equitable and fair reduction. *See Garcia v. Mt. Taylor Millwork, Inc.*, 111 N.M. 17, 19, 801 P.2d 87, 89 (Ct.App.1989) (stating that when the courts interpret the Act, the guideline is fundamental fairness to both the worker and the employer).

{10} Worker's position is that a week-for-week reduction results in a substantial loss to him because his future benefits are calculated based on his PPD rate, which is paid at a higher weekly rate than the partial TTD benefits he received, and that a reduction in weeks of benefits received at the lower TTD benefit rate thus works to reduce the total benefit amount actually received by him during his benefit period. Worker resolves the ambiguity by contending that "to be paid an actual TTD benefit is to be paid a full TTD benefit." Thus, Worker concludes that Section 52–1–42(B) must be interpreted to mean that his future PPD benefits can only be reduced by 7.8 weeks.

{11} Employer argues that the plain language of the statutes supports a week-for-week credit and that there is no need to apply the doctrine of fundamental fairness. We agree that TTD benefits can be paid at a reduced rate or in full, depending on a worker's employment status during the period before the worker reaches MMI. *See* §§ 52–1–25.1; 52–1–50.1(B). We fail to see how this affects the language of Section 52–1–42(B). The term "actually receives" modifies a worker and refers to the benefits received by the worker. *See id.* Absent an ambiguity, there is no need to undertake a fundamental fairness analysis. *Grubelnik*, 2001–NMCA–056, ¶ 23, 130 N.M. 633, 29 P.3d 533 (stating that when there is no ambiguity, there is no need to analyze the statute for fundamental fairness); *Lackey*, 1998–NMCA–121, ¶ 20, 125 N.M. 592, 964 P.2d 153 (stating that when there is no explicit guidance in the Act, fundamental fairness is to be our guide); *Ortiz*, 1996–NMCA–097, ¶¶ 9–10, 122 N.M. 381, 925 P.2d 1 (rejecting application of fundamental fairness analysis because the language of the statute in question covered the issue under consideration).

{12} Even if we were to agree with Worker that we must analyze these statutes by using the fundamental fairness guideline, we are not persuaded by Worker's contention. While we agree that reducing the maximum period for PPD benefits one week for each week Employer pays partial TTD can result in the receipt of less money over the total benefit period, we do not consider this fundamentally unfair. As we stated before, Section 52–1–25.1, together with Section 52–1–42(B), encourages employers to rehire injured workers and therefore satisfies one of the intents of the Act. The WCJ's analysis of the issue provides additional support. In its order, the WCJ observed that the duration of a worker's benefit entitlement is based on a weekly scheme, rather than an absolute dollar amount, and that the rate of the benefit may vary over the duration of a worker's entitlement. Once we consider the intent of the legislature to give workers the opportunity to return to gainful employment, as well as the Act's general approach of paying benefits on a weekly basis, we are not persuaded that interpreting the statute according to its plain meaning is fundamentally unfair. Thus, we hold that Section 52–1–42(B) allows employers credit for payment of TTD benefits on a week-for-week basis, regardless of whether the benefits paid are full or partial.

III. CONCLUSION

{13} For the foregoing reasons, we affirm the WCJ's order granting Employer's motion for summary judgment and denying Worker's cross-motion.

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

WE CONCUR: LYNN PICKARD, and MICHAEL E. VIGIL, Judges.

2005-NMCA-056

134 P.3d 811

Gordon SMART and Sylvia Smart, husband and wife, and Sam Tyra and Lidia Tyra, husband and wife, Plaintiffs–Appellants,

v.

Jimmy CARPENTER, Defendant–Appellee.

No. 25,667.

Court of Appeals of New Mexico.

March 30, 2006.

Richard A. Hawthorne, P.A., Richard A. Hawthorne, Ruidoso, NM, for Appellants.

H. John Underwood, Ltd., Zach Cook, Ruidoso, NM, for Appellee.

OPINION

CASTILLO, Judge.

{1} This is an appeal of the trial court's dismissal of a complaint seeking enforcement of restrictive covenants governing a residential subdivision. We hold that the trial court erred in concluding that the actions of Appellee, Jimmy Carpenter (Carpenter), did not violate the covenants, and we therefore reverse the dismissal.

I. BACKGROUND

{2} Appellants are the owners of real property in River's Edge Subdivision (Subdi-

vision), located approximately fifteen miles east of Ruidoso in Lincoln County, New Mexico. Carpenter is also an owner of real property in the Subdivision. The Subdivision is subject to the covenants contained in the "Amended Declaration of Covenants, Conditions and Restrictions, Architectural Approval and Road Use and Maintenance Agreement of River's Edge Subdivision" (Covenants), recorded in the county records of Lincoln County. The parties purchased their real property after the Covenants were recorded. Paragraph 18 of the Covenants specifically restricts the use of all tracts of land within the Subdivision to residential purposes only. Paragraph 3 of the Covenants specifically prohibits the operation of any commercial or business activity within the Subdivision, with the exception of a personal home office.

{3} Carpenter owns Lot 6 in the Subdivision. At the time Carpenter purchased Lot 6, he received a copy of the Covenants, which he read and understood. Carpenter has not yet constructed a home on his lot, but he has constructed a 40–by 80–foot garage on the property. The garage is not used as a residence in any manner. Although the construction of the garage was an issue at trial, it is not an issue in this appeal.

{4} Carpenter owns and operates a trucking business with three commercial truck tractors and four commercial trailers pulled by the tractors (trucks and trailers). This business is currently operated out of Carpenter's home, which is located in Ruidoso. The trucking business is operated for profit. Carpenter stores and parks the trucks and trailers on Lot 6 when they are not in use. He also services and maintains the trucks and trailers in the garage located on Lot 6. During the periods the trucks are in use, Carpenter parks his personal vehicles on Lot 6. Before Carpenter began construction of the garage and before he began parking and storing his trucks and trailers on his lot in the Subdivision, Appellants complained to Carpenter and advised him that no commercial activity or business could be operated within the Subdivision.

{5} Based on the above findings, the trial court concluded that the Covenants run with the land, are binding on all of the parties, and are valid and enforceable. The trial court also concluded that Carpenter's activity on Lot 6 did not violate the Covenants and that Appellants therefore were not entitled to injunctive relief. We disagree.

II. DISCUSSION

A. Standard of Review

{6} Prior to beginning our analysis, we address the relevant standard of review. The parties contend abuse of discretion is the appropriate standard to apply. A complaint seeking injunctive relief is directed to the sound discretion of the trial court. *Wilcox v. Timberon Protective Ass'n,* 111 N.M. 478, 485, 806 P.2d 1068, 1075 (Ct.App.1990). When a trial court misapprehends the law, the court abuses its discretion. *See N.M. Right to Choose/NARAL v. Johnson,* 1999–NMSC–028, ¶ 7, 127 N.M. 654, 986 P.2d 450 (stating that a decision premised on a misapprehension of the law may be characterized as an abuse of discretion); *LaBalbo v. Hymes,* 115 N.M. 314, 318, 850 P.2d 1017, 1021 (Ct.App.1993) (stating that the trial court may abuse its discretion by applying an incorrect standard or incorrect substantive law in evaluating the grant of a preliminary injunction).

{7} Appellants challenge the finding that Carpenter was not engaging in prohibited commercial activity on the subject property. Although characterized as a finding, this determination actually functions as a conclusion. *See Webb v. N.M. Publ'g Co.,* 47 N.M. 279, 283, 141 P.2d 333, 335 (1943) (determining that the finding that an injury was accidental was a conclusion). Conclusions of law by the trial court are reviewed de novo. *Gutierrez v. Connick,* 2004–NMCA–017, ¶ 7, 135 N.M. 272, 87 P.3d 552 (applying a de novo standard of review to errors of law in the trial court's conclusions or in those findings that function as conclusions). We apply a de novo standard of review to the legal question to be answered in this case. *See Brooks v. Norwest Corp.,* 2004–NMCA–134, ¶ 7, 136 N.M. 599, 103 P.3d 39 ("Although a misapplication of the law is considered an abuse of discretion, our courts review de

novo the initial decision of whether the correct legal standard has been applied."); *Aragon v. Brown,* 2003–NMCA–126, ¶ 9, 134 N.M. 459, 78 P.3d 913 (stating that in cases seeking injunctive relief to enforce restrictive covenants, a question of law is reviewed de novo).

B. Covenant Restrictions Regarding Commercial Activity

{8} Paragraph 18 of the Covenants limits use of all of the tracts in the Subdivision to "residential purposes only." Paragraph 3 allows a personal home office, which is not at issue here, but that paragraph prohibits "commercial activity or business" on any tract in the Subdivision. The issue is whether Carpenter's actions on Lot 6 of the Subdivision violate these two restrictions.

{9} At the trial court level, Carpenter relied on *9394 LLC v. Farris,* 10 A.D.3d 708, 782 N.Y.S.2d 281 (N.Y.App.Div.2004), *County of Butte v. Bach,* 172 Cal.App.3d 848, 218 Cal.Rptr. 613 (1985), and *Liu v. Dunnigan,* 25 Md.App. 178, 333 A.2d 338 (Ct. Spec.App.1975), as support for his argument that he had not violated the Covenants. Appellants cite to these same cases to support their arguments on appeal. These cases relate primarily to the use of a residence for office purposes and are not sufficiently on point to assist in determining the nature of Carpenter's activities on Lot 6.

{10} Appellants contend that the trial court mistakenly relied on the fact that Carpenter was not in violation of paragraph 2 of the Covenants when it decided that Carpenter was not in violation of any of the covenant restrictions. Paragraph 2 prohibits the operation of junkyards, pipe yards, wrecking yards, auto sales, RV parks, or other similar businesses. We do not find this argument persuasive because Appellants did not allege that Carpenter violated paragraph 2 and because the trial court's determination that Carpenter complied with paragraph 2 has no direct bearing on the evaluation of the facts as to violations of paragraphs 3 and 18 of the Covenants. Appellants also argue that the trial court was wrong in relying on Carpenter's intent to build a home on Lot 6 in the future, as stated in finding of fact 15. We find no error. This fact is supported by substantial evidence and establishes the general residential use of the Carpenter lot. The fact does not, however, answer the basic question in this appeal: what is the nature of Carpenter's use of the property as it relates to his trucks and trailers?

{11} Relying on the trial court's finding that "[t]here is substantial evidence to establish that [Carpenter] is not engaging in prohibited commercial activity on the subject property," Carpenter points to his own testimony at trial, as well as that of two other lot owners in the Subdivision, all of whom testified that they did not consider Carpenter to be operating or running a business in the Subdivision. While we agree that these three witnesses provided their assessment of Carpenter's activities, the ultimate determination as to the nature of this activity is a question of law. *See State ex rel. Martinez v. Lewis,* 116 N.M. 194, 201, 861 P.2d 235, 242 (Ct.App.1993).

{12} The issue is whether Carpenter's actions on Lot 6 of the Subdivision constitute commercial activity or a business. There is no dispute that Carpenter operates his trucking business from a location outside the Subdivision. It is equally undisputed that the vehicles used in the business are parked and stored on Lot 6 when they are not in use. Part of the business of running a trucking enterprise involves the storage of the vehicles when they are not in use. *Overmier v. Traylor,* 484 So.2d 676, 677 (La.Ct. App.1986) (holding that the restriction prohibiting commercial activity in a strictly residential subdivision prohibits the storing of heavy equipment on a lot in the subdivision because "[p]art of the business of construction involves the storage of the heavy equipment when it is not in use"); *see also Gwatney v. Miller,* 371 So.2d 1355, 1361 (La.Ct. App.1979) (holding that the storage and repair of equipment, including two tractor-trailers, used in connection with the business of operating a street fair violated covenants that limited use of property to residential purposes only); *Baumgardner v. Stuckey,* 1999 PA Super. 182, ¶¶ 12–13, 735 A.2d 1272 ("[S]toring [a] truck-tractor and/or trailers was a clear violation of the restrictive cove-

nant requiring [the property owner to] use his property for solely residential purposes."); *Bubolz v. Dane County,* 159 Wis.2d 284, 464 N.W.2d 67, 72 (Ct.App.1990) (prohibiting an electrical contracting business from the permanent long-term storage of business inventory, supplies, and equipment on the premises in a subdivision restricted to residential purposes only). Consequently, we hold that the parking and storage on Lot 6 of the vehicles used in Carpenter's business enterprise are commercial activities and that Carpenter therefore violated the provisions of paragraphs 3 and 18 of the Covenants by this activity.

{13} Similarly, there is no dispute that Carpenter repairs the trucks and trailers in the garage located on Lot 6. In analyzing this action in light of the Covenants, it appears that the trial court relied exclusively on paragraph 10 of the Covenants. Paragraph 10 requires any motor vehicle being repaired to be "housed in a garage or outbuilding for that purpose." While we agree that Carpenter complied with the restriction regarding the location of vehicle repairs, conformance with the location for the repairs does not negate the prohibition on commercial activity or the requirement that the property be used for residential purposes only. The repair of vehicles used in a commercial business constitutes commercial activity. *See Holaday v. Fraker,* 323 Ark. 522, 920 S.W.2d 4, 7 (1996) (holding that construction of a shop building used for repairing vehicles and boats for compensation violated a covenant requiring the use of property for residential purposes exclusively); *Gwatney,* 371 So.2d at 1361 (stating that the storage and repair of equipment used in a business is commercial activity). Accordingly, we hold that Carpenter's use of the garage on Lot 6 to repair the vehicles used in his business also constitutes commercial activity and that Carpenter thus violated the Covenants by conducting this activity in the Subdivision.

III. CONCLUSION

{14} Carpenter violated paragraphs 3 and 18 of the Covenants by repairing, storing, and parking his business vehicles on Lot 6. The trial court's dismissal of Appellants' case is reversed, and the case is remanded to the trial court for further proceedings consistent with this opinion.

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

WE CONCUR: A. JOSEPH ALARID and MICHAEL E. VIGIL, Judges.

2006-NMSC-021

135 P.3d 230

Inquiry Concerning A Judge Nos.2004–097 & 2005–009.

IN THE MATTER OF HONORABLE FLORENCIO "LARRY" RAMIREZ, District Judge, Third Judicial District, New Mexico.

No. 29,552.

Supreme Court of New Mexico.

May 5, 2006.

As Corrected May 15, 2006.

James A. Noel, Esq., Randall D. Roybal, Esq., Albuquerque, New Mexico, for Judicial Standards Commission.

Lilley Law Offices, Michael W. Lilley, Esq., Lawrence W. Allred, Esq., Las Cruces, New Mexico, for Respondent.

FORMAL REPRIMAND AND OPINION

PER CURIAM.

{1} This matter comes before the Court on a petition for discipline upon stipulation filed by the Judicial Standards Commission concerning the Honorable Florencio "Larry" Ramirez (Respondent). Following oral argument before this Court, we granted the petition and ordered the stipulated discipline against Respondent. Among other things, we ordered that Respondent receive a public reprimand, which we now issue in the form of this opinion.

{2} These disciplinary proceedings arise out of two separate incidents of misconduct involving Respondent. The first incident concerns Respondent's actions in his own courtroom in an unrelated matter. The second incident concerns actions Respondent took when his son was cited for drinking in public. Based on the Commission's stipulated findings of fact, we summarize the events surrounding both of these incidents and then proceed to discuss why Respondent's actions warrant disciplinary sanctions.

FACTUAL BACKGROUND

{3} Respondent is a district court judge in the Third Judicial District. In the first incident, while acting in his judicial capacity during a juvenile court hearing, Respondent failed to be patient, dignified, and courteous toward a defense attorney appearing before him. In particular, Respondent raised his voice with the attorney, prevented the attorney from making her full objections for the record, and admonished her in front of her client.

{4} The second, unrelated, incident involved actions Respondent took when Las Cruces Police Department officers cited his son and his son's friends, all of whom were 21 years of age or older, for drinking alcoholic beverages in public in violation of local municipal ordinance. As the officers were issuing the citations, Respondent identified himself to one of the officers as his son's father by showing the officer his court identification card and his driver's license. Respondent also asked the other officer issuing citations if she remembered who he was. The officer said she did remember him but continued issuing the citations. Respondent maintains that he was not attempting to intimidate the officers or gain preferential treatment, but was merely identifying himself and confirming his son's identity at his son's request. However, Respondent now acknowledges the impropriety of using his judicial title and court identification card in connection with the matter.

{5} After the officers issued the citations, Respondent collected all eight citations from the recipients, who were now standing in a group. Respondent maintains that he collected the citations because he was going to inquire about the possible penalties for the citations. As the police officers were leaving the park, they reported hearing laughter from the group of young men with Respondent and that some of them were looking back at the officers. Respondent maintains that no laughter was directed at the officers. Respondent subsequently left the park in his vehicle, but his involvement in the matter did not end.

{6} Respondent subsequently asked his volunteer court bailiff to assist Respondent's son and his friends in responding to the citations in the Las Cruces Municipal Court. Specifically, Respondent gave the original citations to his bailiff, who prepared and filed written waiver of arraignment and entry of plea (not guilty) forms with the Las Cruces Municipal Court.

{7} Subsequently, notices of pretrial conference were mailed to all eight of the citation recipients. The pretrial conference was

scheduled before Judge Melissa Miller-Byrnes on August 11, 2004. However, prior to that date, Respondent called for Las Cruces Municipal Court Judge James T. Locatelli and left a message with Judge Locatelli's assistant. Respondent asked that Judge Locatelli return his call and advised that Respondent was sending in his son and a couple of his son's friends to change their pleas on August 4, 2004. However, Respondent maintains that his son and some of the other citation recipients wanted to appear on August 5, 2004.

{8} In any event, Judge Miller-Byrnes was scheduled to perform public arraignments on August 4, 2004, and Judge Locatelli was scheduled to perform public arraignments on August 5, 2004. Only one of the citation recipients appeared before Judge Miller-Byrnes on August 4. At that time, he changed his plea to "no contest," and received a deferred sentence, including a deferred fine of $500.

{9} In contrast, the next day five of the citation recipients, including Respondent's son, appeared before Judge Locatelli. Respondent also came to the court that day but maintains that he was there to confirm that his son had appeared for the hearing and left prior to the commencement of any hearings. In any event, all five citation recipients changed their pleas to "no contest," and four of the five men (including Respondent's son) received 90-day deferred sentences and were each required to pay $35 in fees. The fifth citation recipient had an outstanding DWI case pending before the court, so Judge Locatelli consolidated the cases and deferred the sentencing on the drinking in public citation until completion of the DWI trial.

{10} On August 11, the day originally scheduled for pre-trial conferences, the remaining two citation recipients appeared before Judge Miller-Byrnes. The prosecuting police officers also appeared at that time. In both cases, the citation recipients and the police officers agreed to a change of plea on stipulation that the sentences would be deferred. Judge Miller-Byrnes approved the agreements and sentenced each man to a 6-month deferred sentence and a deferred fine of $500.

{11} Respondent concedes that the foregoing conduct violates several provisions of the Code of Judicial Conduct and constitutes willful misconduct in office. For the reasons that follow, we agree.

DISCUSSION

{12} Respondent's actions illustrate the need for all judges to remain cognizant of their ethical obligations both on and off the bench. The first incident recounted above involves a task commonly faced by every judge—maintaining order and decorum in the courtroom while remaining patient, dignified and courteous to those appearing before the court. *See* Rules 21-300(B)(3) and (4) NMRA 2006. Respondent's conceded violations of the Code of Judicial Conduct establish that he failed to strike the proper balance in his courtroom. *See* Rule 21-300(4) Committee Commentary ("Judges can be efficient and businesslike while being patient and deliberate.").

{13} By raising his voice to an attorney appearing before him, Respondent did not maintain decorum in the courtroom or display the kind of dignified and courteous behavior expected of every judge. We are loathe to conceive of a situation when the behavior exhibited by Respondent would be appropriate, but suffice it to say that Respondent's outburst was not appropriate in this instance. And while there may be times when it is appropriate, and even necessary, for a judge to admonish an attorney, Respondent recognizes that his conduct was unwarranted in this instance.

{14} The most troubling aspect of Respondent's behavior toward the attorney appearing before him was that Respondent's actions prevented the attorney from making her full objections for the record. Attorneys are expected to make objections on the record to judicial rulings that they believe are in error. *See* Rule 1-046 NMRA 2006; Rule 5-601 NMRA 2006; Rule 11-103 NMRA 2006. Such objections are a basic precondition to effective appellate review. *See* Rule 12-216(A) NMRA 2006. Judicial outbursts that interfere with this common, necessary element of trial proceedings will not be condoned. *See* Rule 21-300(B)(7) NMRA 2006

("A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law."); Rule 21–300(B)(2) and (8).

{15} As for the second incident of misconduct recounted above, Respondent's actions are a reminder that the behavior of a judge should be as circumspect off the bench as it is on the bench. *See* Rule 21–200(A) ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."); Rule 21–500(A). From the perspective of a parent, Respondent's attempts to assist his son during a time of trouble may be understandable. And though the child may be an adult, we recognize that the protective impulses of a parent do not cease. Nevertheless, as a judge, Respondent is expected to regulate his behavior in a way that other parents are not. *See* Rule 21–200(B) ("A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment.").

> A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.
>
> * * *
>
> The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge.

Rule 21–200(A) Committee Commentary.

{16} We recognize that Respondent maintains he did not intend to threaten the officers who were issuing the citations or seek preferential treatment for his son and his son's friends. But by identifying himself as a judge and asking one of the officers if she knew who Respondent was, the only reasonable view of the encounter is that Respondent was attempting to curry favor based on his status as a judge. Such behavior is an obvious violation of the Code of Judicial Conduct and cannot go unsanctioned. *See* Rule 21–200(B) ("A judge shall not lend the prestige of judicial office to advance the private interest of the judge or others.").

{17} Moreover, even if we were to excuse Respondent's initial actions at the park as the protective impulses of a parent, Respondent's subsequent actions are simply inexcusable. By calling a municipal court judge to reset hearings and then appearing at the municipal court on the day his son was to appear, Respondent's actions can only be viewed as a flagrant attempt to use his status as a judge to influence the course of the criminal proceedings against his son and his son's friends. *Id.* We cannot expect the public to trust in the impartiality and integrity of the judiciary if we allow even the appearance of judicial impropriety to go unchecked.

> Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities.

Rule 21–200(B) Committee Commentary.

{18} Unfortunately, not only did Respondent act inappropriately in his own right, but regrettably, he also solicited his bailiff to do the same on his behalf. Regardless of the fact that his bailiff was not a paid employee, Respondent is responsible for ensuring that his staff behave with the same level of propriety that Respondent is expected to display. *See* Rule 21–300(C)(2) ("A judge shall inform and require the judge's staff, court officials and others subject to the judge's direction and control to observe the standards of confidentiality, fidelity and diligence that apply to the judge and to refrain from manifesting bias and prejudice in the performance of their official duties."). Instead, Respondent directed and encouraged his volunteer bailiff to violate the same standards of conduct that Respondent is sworn to uphold.

{19} In short, by failing to appreciate the impact of his actions inside and outside the courtroom, intended or not, Respondent violated several provisions of our Code of Judicial Conduct. Accordingly, we agree that the stipulated disciplinary sanctions for Respondent's violations of the Code of Judicial Conduct are appropriate. Therefore, Respondent, the Honorable Florencio "Larry" Ramirez, is hereby disciplined as follows:

a. Respondent shall receive a formal reprimand from the Supreme Court, which shall be published in the *Bar Bulletin.*

b. Respondent shall successfully complete six (6) months of supervised probation and formal mentorship concerning the obligations and restrictions imposed by the Code of Judicial Conduct, including but not limited to proper judicial temperament and demeanor, prohibitions against the use of judicial office to advance private interests, and restrictions on the use of the prestige and incidents of judicial office. The Judicial Standards Commission will recommend to the Supreme Court, for approval and appointment, the person to serve as Respondent's mentor while on probation. The Respondent's mentor shall report on the progress and outcome of the probation and mentorship program to the Supreme Court and the Commission.

c. Respondent shall successfully complete the October 2005 "Ethics for Judges" course at the National Judicial College at his own expense. Respondent shall provide the Commission with documented proof of his compliance with this provision by promptly providing a certificate of successful completion and an affidavit concerning course attendance at his own expense (including copies of receipts).

d. Respondent shall reimburse the Judicial Standards Commission in the amount of $1,500.00 for costs and expenses incurred up to the date of the stipulated agreement. Payment shall be by certified check made payable to the State of New Mexico and delivered to the Judicial Standards Commission.

e. Respondent shall abide by all terms and conditions of the plea and stipulated agreement and the Code of Judicial Conduct.

f. The parties shall bear their own costs and expenses incurred in this matter.

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

2006-NMCA-057

135 P.3d 234

Robert KOSIBA, Plaintiff–Appellant/Cross–Appellee,

v.

PUEBLO OF SAN JUAN, San Juan Gaming Commission, Defendants–Appellees/Cross–Appellants.

No. 24,725.

Court of Appeals of New Mexico.

Jan. 13, 2006.

Certiorari Denied, No. 29,648, March 3, 2006.

Familia Legal Services, Lorenzo E. Atencio, Espanola, NM, for Appellant/Cross–Appellee.

Bergen Law Offices, LLC, Leander Bergen, Albuquerque, NM, for Appellees/Cross–Appellants Pueblo of San Juan.

Chestnut Law Office, Peter C. Chestnut, Joe M. Tenorio, Albuquerque, NM, for Appellees/Cross–Appellants San Juan Pueblo Gaming Commission.

OPINION

ALARID, Judge.

{1} This case requires us to decide whether the Pueblo of San Juan (the Tribe) and its Gaming Commission are immune from suit on Plaintiff's complaint for money damages for actions in connection with the revocation of Plaintiff's gaming license. We conclude that they are immune from suit on the claims asserted by Plaintiff, and, accordingly, we affirm the district court's dismissal of this action.

BACKGROUND

{2} Plaintiff, Robert Kosiba, is the former executive director of the Pueblo of San Juan Gaming Commission. Plaintiff claims that, while employed as executive director, he disciplined certain employees of the Gaming Commission; and, that in retaliation against Plaintiff, these same employees instigated an investigation by the Gaming Commission that ultimately led the Gaming Commission to revoke Plaintiff's gaming license. Plaintiff alleges that, in revoking his license, the Gaming Commission failed to provide Plaintiff adequate notice of the accusations against him and denied him a fair hearing before an impartial trier of fact.

{3} Plaintiff appealed the revocation of his license to the San Juan Tribal Court. The Tribal Court affirmed the Gaming Commission's decision.

{4} Plaintiff then brought the present lawsuit in district court, naming the Tribe and the Gaming Commission as Defendants. Plaintiff sought money damages for the loss of his ability to earn a living in the gaming industry, for physical and mental distress, and for relocation costs. Defendants entered an appearance and moved to dismiss the complaint, citing a lack of subject matter jurisdiction, tribal sovereign immunity, and the failure of Plaintiff's complaint to state a claim upon which relief may be granted.

{5} The district court dismissed the complaint ruling that Defendants were immune from suit and that Plaintiff had not established a valid waiver of that immunity.

{6} Plaintiff appeals.

DISCUSSION

{7} The basic principles governing the sovereign immunity of tribes and tribal agencies are well settled. *E.g., Sanchez v. Santa Ana Golf Club, Inc.*, 2005–NMCA–003, ¶¶ 5–7, 136 N.M. 682, 104 P.3d 548. We review a district court's determination of tribal sovereign immunity under a de novo standard. *Id.* ¶ 4. There is no dispute that the Tribe is a federally recognized Indian Tribe. Accordingly, in the absence of congressional abrogation or an effective waiver of sovereign immunity, the Tribe and its agencies are immune from suit. *Id.* ¶ 5.

{8} At the time of the events described in the complaint, the Tribe and the State of New Mexico were parties to an Indian Gaming Compact as permitted by the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 through 2721 (2000). There is no dispute as to the validity of this compact. Plaintiff relies upon the following provision of the com-

pact to effect a waiver of sovereign immunity:

SECTION 8. Protection of Visitors

A. Policy Concerning Protection of Visitors. The safety and protection of visitors to a Gaming Facility is a priority of the Tribe, and it is the purpose of this Section to assure that any such persons who suffer bodily injury or *property damage* proximately caused by the conduct of the Gaming Enterprise have an effective remedy for obtaining fair and just compensation. To that end, in this Section, and subject to its terms, the Tribe agrees to carry insurance that covers such injury or loss, agrees to a limited waiver of its immunity from suit, and agrees to proceed either in binding arbitration proceedings or in a court of competent jurisdiction, at the visitor's election, with respect to claims for bodily injury or *property damage* proximately caused by the conduct of the Gaming Enterprise. For purposes of this Section, any such claim may be brought in state district court, including claims arising on tribal land, unless it is finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court. (Emphasis added).

{9} Citing a Nevada case, *Coury v. Robison,* 115 Nev. 84, 976 P.2d 518, 520 (1999), the district court reasoned that Plaintiff's interest in his gaming license was "a privilege and not a property right." The district court observed that *Coury* was consistent with prior New Mexico cases, which the district court believed "distinguish between licenses involving the prerequisite of a professional educational degree and those that do not require such degrees." The district court concluded that Plaintiff's license, as a mere privilege, did not constitute property within the meaning of Section 8 of the compact. While we agree with the district court that the waiver of immunity provided by Section 8 does not apply to Defendant's conduct as alleged in the complaint, we do not adopt the district court's rationale.

{10} Section 8 of the compact is limited to instances of "bodily injury or property damage proximately caused by the conduct *of the Gaming Enterprise.*" (Emphasis added). Unless Plaintiff's losses are caused by the conduct of the Gaming Enterprise, they cannot fall within Section 8's waiver of immunity, and this is so even if they indisputably constitute bodily injury or property damage. In other words, Section 8 imposes two conjunctive requirements: a plaintiff must suffer bodily injury [1] or property damage *and* such bodily injury or property damage must have been caused by the conduct of the Gaming Enterprise. Under the compact, "Gaming Enterprise" is used as a term of art and is defined as "the tribal entity created and designated by the Tribe as having authority to conduct Class III Gaming pursuant to this Compact." According to Plaintiff's complaint, Tsay Corporation is the entity through which the Tribe conducts its gaming enterprises. Documents attached to the complaint show that Tsay Corporation is a federally chartered business corporation organized by the Tribe for the purposes of establishing an independent San Juan Pueblo business enterprise. We are satisfied that Tsay Corporation is the Gaming Enterprise as defined by the compact. Plaintiff's complaint contains no allegations of wrongdoing by Tsay Corporation; rather, Plaintiff's complaint alleges that his injuries were proximately caused by the actions of the Gaming Commission in revoking his license.

{11} Under the compact, the Gaming Commission [2] is a distinct entity, separate and apart from the Gaming Enterprise. As Plaintiff's complaint acknowledges, the Gaming Commission is an agency of the Tribe.

The purpose of a tribal gaming commission is strictly regulatory, not managerial. The tribal gaming commission conducts

1. Plaintiff does not claim that he suffered bodily injury.

2. The compact, following the terminology used in NMSA 1978, § 11-13-1(N) (1997), uses the term "Tribal Gaming *Agency*" rather than tribal gaming commission. The Tribal Gaming Ordinance uses the term "Gaming Board" rather than gaming commission. There is no question that the powers and duties of the Gaming Commission correspond to those of the Tribal Gaming Agency as defined in the compact, and the Gaming Board as defined in the Gaming Ordinance.

oversight to ensure compliance with tribal, federal, and, if applicable, state laws and regulations. The commission serves as the licensing body for individuals employed in the gaming operation.

Tracy Burris, *How Tribal Gaming Commissions Are Evolving,* 8 Gaming L.Rev. 243, 244 (2004). Under Section 5 of the compact, the Gaming Commission is the entity that issues gaming licenses. Under the Gaming Ordinance, the Gaming Commission, not the Gaming Enterprise, is the entity with authority to suspend or revoke a previously issued gaming license.

{12} "[A] waiver of [tribal] sovereign immunity ... 'must be unequivocally expressed.'" *Sanchez,* 2005–NMCA–003, ¶ 7, 136 N.M. 682, 104 P.3d 548 (quoting *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)). Under the compact the governmental actions of the Gaming Commission in regulating gaming are clearly distinguishable from the commercial activities of the Gaming Enterprise. Plaintiff, whose loss of his gaming license is alleged to have been caused by improper governmental action of the Gaming Commission, lacks standing to assert the waiver of immunity contained in Section 8, which is limited to victims of whose injuries are caused by the conduct of the Gaming Enterprise. Plaintiff failed to establish a waiver of the Tribe's and the Gaming Commission's immunity from suit on the claims asserted by Plaintiff.

{13} The judgment of the district court dismissing Plaintiff's complaint is affirmed.

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

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

2006-NMCA-058

135 P.3d 237

John REHDERS and Shirley Rehders, husband and wife, d/b/a John G. Rehders, General Contractor, and Robert "Robbie" Rehders, Plaintiffs–Appellees,

v.

ALLSTATE INSURANCE COMPANY, Defendant–Appellant.

No. 25,284.

Court of Appeals of New Mexico.

April 11, 2006.

Certiorari Granted, No. 29,763, May 23, 2006.

As Corrected June 5, 2006.

David J. Berardinelli, Santa Fe, NM, for Appellees.

Modrall, Sperling, Roehl, Harris & Sisk, P.A., Lisa Mann, Jennifer A. Noya, Albuquerque, NM, for Appellant.

OPINION

VIGIL, Judge.

{1} Summary judgment was granted entitling Plaintiff Robert "Robbie" Rehders (Son) to stacked uninsured motorist coverage under a corporate commercial auto policy issued to a corporation owned by Plaintiffs John Rehders and Shirley Rehders (Parents). Son was not in a vehicle insured by the corporation at the time of the accident, and he is not in any way connected with the corporation as an officer, stockholder, employee, agent, or in any other capacity. Allstate appeals, arguing that Son is not an insured under the corporate commercial auto policy issued to Parents' corporation, and therefore not entitled to any UM benefits. We agree and reverse with instructions to enter judgment in favor of Allstate.

BACKGROUND

{2} On August 26, 2002, Son was a back seat passenger in a vehicle insured by Dairyland Insurance Company when it was struck by an uninsured vehicle, resulting in severe injuries to Son. Son settled his uninsured motorist (UM) claim with Dairyland for its policy limits. Son also made a claim for UM coverage with Allstate, which insured Parents' two personal automobiles. Even though he was an adult, Son was living with Parents at the time of the accident and was therefore covered as a Class 1 insured under that policy. Allstate also paid Son underinsured motorist (UIM) policy limits under Parents' personal policy.

{3} Son made a third claim for UM/UIM coverage on a commercial policy of John G. Rehders General Contractor, Inc. This company is a sub-chapter S corporation whose sole stockholders are Parents. At the time of the accident the corporation insured seven vehicles under a corporate commercial auto policy issued by Allstate with a UM endorsement covering each vehicle for $250,000. Son was not listed as a driver or a named insured under the corporate commercial auto policy, nor was he an officer, employee, stockholder, or agent of the corporation at the time of the accident. Nevertheless, Son asserted he was covered under the UM endorsement and entitled to stack the UM coverage of all seven vehicles for a total of $1,750,000. Allstate denied coverage.

{4} Parents and their adult Son therefore filed a verified complaint for a declaratory judgment that Son is entitled to stack the UM coverage for the seven vehicles insured by the corporation. Simultaneous with the complaint, Plaintiffs also filed a motion for summary judgment. Since the corporate commercial auto policy excluded stacking of UM coverages unless the business was an individual sole proprietorship even though a separate UM premium was paid for each vehicle, they sought a judgment declaring the exclusion invalid. They asserted that the motion did "*not* raise the issue of *who* could benefit from UM stacking" because if the policy validly prohibited stacking of UM coverages, "then the issue of *who* would benefit is moot." (Emphasis added.)

{5} Allstate answered the complaint, denying coverage on grounds that Son is not an "insured" under the corporate commercial auto policy. In response to Plaintiffs' motion for summary judgment, Allstate argued in part that Plaintiffs were attempting to "put the cart before the horse" by seeking a declaration that Allstate is required to stack UM coverages under the corporate commercial auto policy. It argued that even where an insurance policy expressly allows stacking, it is only required if the claimant is an "insured" under the policy. Since Son is not an "insured" under the express terms of the corporate commercial auto policy, Allstate argued that Plaintiffs' arguments were premature and irrelevant.

{6} The summary judgment pleadings disclose that Parents started the company "John G. Rehders, General Contractor" in 1983, as a sole proprietorship. From 1983 until 2001, Parents purchased commercial auto insurance policies from Allstate and paid a separate premium for UM coverage on each vehicle owned by the business. Under

those policies, the form of business of the named insured was designated as "individual/husband and wife/sole proprietorship," and Parents contended that as a result of this designation, there was UM coverage for parents individually and any family members resident in their household. The last such policy was in effect through September 13, 2001, (prior to Son's injury) and if the accident had occurred on or before September 13, 2001, Plaintiffs argued, Son would have been entitled to stack the UM coverage for each separately insured vehicle.

{7} In September 2001, Parents notified Allstate that they had changed the business from a sole proprietorship to a sub-chapter S corporation, and they requested that the policy be changed to reflect the change in the form of the business. Allstate thereupon issued a new policy which was in effect for the period from September 14, 2001 until September 14, 2002. The "named insured" was changed from "John G. Rehders, General Contractor" to "John G. Rehders General Contractor, Inc.," and the "form of named insured's business" was changed from "individual" to "corporation." However, substantially the same separate premium was charged and paid for UM coverage on each separately insured business vehicle. This was the policy in effect at the time of Son's accident.

{8} Plaintiffs argued that Parents intended the new policy to have the same coverage as the prior policy, and since Allstate did not provide them with a separate notice (apart from the policy itself) that changing the form of the insured from a sole proprietorship to a corporation would change the right to stack UM coverage, an ambiguity resulted. Further, Plaintiffs asserted, the ambiguity must be resolved in favor of stacking, notwithstanding any provisions in the corporate commercial policy which prohibit UM stacking. Father's affidavit was submitted concerning the change. In pertinent part, he said:

> 3. When [Wife and I] initially purchased auto insurance coverage for our business from Allstate in 1983, I intended and expected, as the overall manager of the business, for this business insurance coverage to protect and benefit myself and my wife as the owners of our family business. I also intended and expected our business policy to provide our children residing in our household with the benefit and protection of any coverages applicable to them.
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> . . . .
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> 6. Allstate never explained or informed us, either before or at the time the 2001 business policy was issued, that there would be a substantial reduction in the insurance protection afforded under the policy to myself, my wife and our resident children as a result of this change in the form of our family owned business. I always believed that our business policy in 2001 provided the same benefits and protection as it had between 1983 and 2000.
>
> 7. When we purchased business auto coverage in 2001 from Allstate I still intended and expected, as the overall manager of the business, for this business insurance coverage to protect and benefit myself and my wife as the sole owners of our family business. I also still expected and intended the policy to continue to provide our children residing in our household with the same benefits and protection in 2001 as it had in 2000.

{9} Allstate filed its own motion for summary judgment, seeking a ruling that Son was not an insured under the corporate commercial auto policy and therefore not entitled to stacked UM coverage, and Plaintiffs responded, repeating many of the same arguments they made in support of their own motion for summary judgment. Plaintiffs added that since a corporation cannot sustain bodily injury, and the object of UM coverage is to protect persons who suffer bodily injury by an uninsured motorist, providing UM coverage to a corporation by itself makes no sense. Therefore, Plaintiffs asserted, the policy must be construed to apply to persons, even if the named insured is a corporation, and when a policy is issued to a small family business, the logical persons to have coverage are Parents and family members living with them. Thus, the same coverages and same policy objectives are achieved as in the case where an individual is the named in-

sured and pays separate premiums for UM coverage on separate vehicles. Finally, Plaintiffs argued that the policy definitions relating to an "insured" for UM coverage are "ambiguous, if not inscrutable, to the average insured" and the ambiguities should be resolved in their favor. In reply, Allstate argued that public policy does not favor stacking in the case where a corporation is the named insured, and that the pertinent policy language is not ambiguous.

{10} The district court did not rule on Allstate's motion, and granted summary judgment in favor of Plaintiffs to allow Son to stack UM coverage for each of the seven vehicles insured under the corporate commercial auto policy. Pertinent to this appeal, the district court made the following findings:

1. The premiums paid under the subject policy were paid by or for the benefit of the John and Shirley Rehders and their family, as the exclusive owners and operators of the family business. The insured paid the separate and multiple underinsured/uninsured motorist ("UM") coverage premiums on each of the 7 vehicles insured under the policy.

2. A reasonable insured reading the policy terms would think that they are paying more than one premium for more than one coverage.

3. The insureds are entitled to the benefit of what they have paid for.

4. The insured's reasonable expectation under this policy was always to provide John and Shirley Rehders and their family with the benefit of stacking the multiple UM coverages purchased under their business policy.

5. Allstate's policy exclusion does not validly prohibit UM stacking where Allstate clearly charges multiple, separate UM premiums for each vehicle insured.

{11} Allstate appeals, arguing that the district court erred when it ruled that stacking is required under the policy without first determining whether Son is insured under the policy, because being insured is a precondition to receiving stacked coverage. Allstate further argues that Son is not an "insured" under the unambiguous terms of the corporate commercial auto policy. Plaintiffs argue that the district court's order should be affirmed on public policy grounds because: (1) the definition of who is insured in the policy is ambiguous and it should therefore be construed against Allstate and in Son's favor; (2) Plaintiffs had a reasonable expectation of stacked coverage for Son; and (3) the policy definitions that exclude Son as an insured are void because the definitions, in effect, prohibit UM stacking, and thus violate the public policy of New Mexico.

STANDARD OF REVIEW

{12} Summary judgment is proper only when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Rule 1–056 NMRA. The movant has the initial burden to show that there is no genuine issue as to a material fact and that judgment in its favor is therefore appropriate. *Spencer v. Health Force, Inc.*, 2005–NMSC–002, ¶ 7, 137 N.M. 64, 107 P.3d 504. The burden then shifts to the opponent to show at least a reasonable doubt as to the existence of a genuine issue of fact. *Id.* We view the facts in a light most favorable to the party opposing summary judgment, and draw all reasonable inferences in favor of a trial on the merits. *Id.* Where the material facts are undisputed, leaving only legal questions, our review of the district court order granting summary judgment is de novo. *Ocana v. Am. Furniture Co.*, 2004–NMSC–018, ¶ 12, 135 N.M. 539, 91 P.3d 58; *Barncastle v. Am. Nat'l Prop. & Casualty Cos.*, 2000–NMCA–095, ¶ 5, 129 N.M. 672, 11 P.3d 1234.

DISCUSSION

A. Son Is Not an "Insured" Under the Corporate Commercial Auto Policy

{13} Allstate argues that before deciding whether stacked UM coverage is available under the corporate commercial auto policy, the first question which must be resolved is whether Son is an "insured" under the policy. We agree. It is fundamental that a person must be insured under an insurance policy to be entitled to receive benefits pursuant to the policy.

{14} "Stacking refers to an insured's attempted recovery of damages by aggregat-

ing the coverage under more than one policy or under one policy covering more than one automobile." *Gamboa v. Allstate Ins. Co.*, 104 N.M. 756, 757, 726 P.2d 1386, 1387 (1986). It follows that "the 'stacking' issue arises only when it is determined that the person seeking to cumulate benefits on two or more uninsured motorist coverages is an insured under those policies." *Id.* at 758, 726 P.2d at 1388 (citing *Seaton v. Kelly*, 339 So.2d 731, 733 (La.1976)); *see Lucero v. N.M. Pub. Sch. Ins. Auth.*, 119 N.M. 465, 466, 892 P.2d 598, 599 (1995) (holding that claimant not entitled to UM coverage because she was not an "insured" as defined in the policy); *Jaramillo v. Providence Wash. Ins. Co.*, 117 N.M. 337, 343, 871 P.2d 1343, 1349 (1994) ("The burden of proof is on the claimant to show that he or she belongs to the class of intended beneficiaries."); *Konnick v. Farmers Ins. Co. of Ariz.*, 103 N.M. 112, 115–16, 703 P.2d 889, 892–93 (1985) (holding that step-daughter was an "insured" under the policy and entitled to stack underinsured motorist coverage).

{15} It is not our task to determine *who* may stack coverage under the policy, it is our task to determine whether Son himself is entitled to stacked UM coverage. *See Jaramillo*, 117 N.M. at 342, 871 P.2d at 1348. We make this determination by analyzing whether Son was covered by the UM endorsement of the policy, which presents a question of law. *See Gamboa*, 104 N.M. at 758, 726 P.2d at 1388 (stating that when reviewing policy coverage, the language of the policy must be given its natural and ordinary meaning unless the language is ambiguous). While we determine whether the insurance policy is ambiguous as a question of law, *Richardson v. Farmers Insurance Co. of Arizona*, 112 N.M. 73, 74, 811 P.2d 571, 572 (1991), we remain mindful that "the language at issue should be considered not from the viewpoint of a lawyer, or a person with training in the insurance field, but from the standpoint of a reasonably intelligent layman, viewing the matter fairly and reasonably, in accordance with the usual and natural meaning of the words." *Rummel v. Lexington Ins. Co.*, 1997–NMSC–041, ¶ 19, 123 N.M. 752, 945 P.2d 970 (internal quotation marks and citation omitted).

{16} Plaintiffs' briefs suggest that the failure to set forth the complete name of the corporation in the endorsement somehow misled them. However, the policy was specifically changed at the request and direction of Parents to reflect that the corporation is the insured, and the policy documents as a whole clearly demonstrate that the insured is the corporation. Moreover, the suggestion is not supported by any facts establishing that Parents believed anyone other than the corporation was the insured, and it is undisputed that the corporation was in fact the insured. Therefore, we do not further discuss or consider the suggestion. The UM endorsement of the policy states, consistent with the wishes of Parents, that the "Named Insured" is the corporation "John G. Rehders General." The UM endorsement then explicitly defines who is an insured for UM coverage. It states:

> If the *Named Insured* is designated in the Declarations as:
>
> 1. *An individual*, then the following are "insureds":
>
> a. Any Class 1 "insured", meaning the Named Insured and any "family members".
>
> b. Anyone other than a Class 1 "insured" "occupying" a covered "auto" or a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, "loss" or destruction.
>
> c. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".
>
> 2. A partnership, limited liability company, *corporation* or any other form of organization, then the following are "insureds".
>
> a. Any Class 2 "insured", meaning the Named Insured is not an individual Named Insured.
>
> b. Anyone other than a Class 1 "insured" while "occupying" a covered "auto" or a temporary substitute for a covered "auto". The covered auto

must be out of service because of its breakdown, repair, servicing, "loss" or destruction. Anyone other than a Class 1 "insured" includes the Named Insured's partners (if the Named Insured is a partnership), or members (if the Named Insured is a limited liability company), "employees", directors or shareholders;

c. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".

(Emphasis added.) Considering the foregoing language in accordance with the usual and natural meaning of the words used from the standpoint of a reasonably intelligent layman, we discern the following.

{17} First, the UM endorsement establishes two classes of an "insured" by reference to whether the "named insured" is an individual or a business organization. Unless Son qualifies as a "Class 1 insured" or a "Class 2 insured" he is not an "insured" qualified to receive UM benefits under the express terms of the policy.

{18} Second, Son does not qualify as a "Class 1 insured" under the terms of the policy because the "named insured" is not an individual, but the corporation, John G. Rehders General Contractor, Inc. An "insured" falls into "Class 1" only when an individual is designated in the declarations as the "named insured." A "Class 1 insured" is then specifically described as that person and any "family member" of that person. A separate provision of the policy defines "family member" as "a person related to an individual Named Insured by blood, marriage or adoption who is a resident of such Named Insured's household, including a ward or foster child."

{19} Third, any other "insured" falls into "Class 2." A "Class 2 insured" is specifically described as a partner of the partnership, a member of the limited liability company and employees, directors, and stockholders of the corporation where a partnership, limited liability company, or corporation is designated in the declarations as the named insured. Son is not an employee, director, or stockholder of John G. Rehders General Contractor, Inc., the corporation designated in the declarations as the named insured. Therefore, he does not satisfy this criteria. A "Class 2 insured" also specifically includes a person "occupying" a "covered 'auto'" or a "temporary substitute for a covered auto" which was "out of service because of its breakdown, repair, servicing, 'loss,' or destruction" at the time of the accident, and a person who is seeking to recover because of bodily injury sustained by someone else insured under the policy. There is no claim or evidence that Son satisfies any of these criteria either. Son is therefore not a "Class 2 insured."

{20} Both New Mexico case law and cases from other jurisdictions demonstrate that individuals who fail to meet the definition of "insured" as unambiguously defined by the policy language cannot stack UM coverage under the policy. In *Gamboa*, the plaintiff's decedent was a passenger in his father's Chevrolet that was driven by his friend. The decedent and the driver were both killed in a head-on collision with an uninsured motorist. 104 N.M. at 757, 726 P.2d at 1387. The insurer of the Chevrolet paid the estates of the decedent and the driver the limits of its UM coverage. The plaintiff also sought UM coverage under a policy insuring a Ford owned by the driver's father that was not in any manner involved in the accident. The Supreme Court framed the sole issue on appeal as whether the decedent was an "insured" under both policies and therefore allowed to stack the UM coverages of the Chevrolet and the Ford. 104 N.M. at 757–58, 726 P.2d at 1387–88. In deciding this question of law, our Supreme Court specifically said that it "'must look to the provisions of the policy; if the terms of the policy are not ambiguous, the language used must be given its natural and ordinary meaning.'" *Id.* at 758, 726 P.2d at 1388 (quoting *Sears v. Wilson*, 10 Kan.App.2d 494, 704 P.2d 389, 390 (1985)). The Supreme Court concluded that the decedent was not an "insured" under the clear, unambiguous terms of the policy providing UM coverage for the Ford. Therefore, he was not entitled to stacked UM coverage. *Gamboa*, 104 N.M. at 760, 726 P.2d at 1390.

{21} In *Herrera v. Mountain States Mutual Casualty Co.*, 115 N.M. 57, 846 P.2d

1066 (1993), the plaintiff was injured in an accident while occupying an automobile owned by her parents and operated by her mother. *Id.* at 58, 846 P.2d at 1067. The plaintiff attempted to stack the UM coverage of four trucks owned by a corporation which employed her father. *Id.* Our Supreme Court affirmed the district court order granting summary judgment to the insurer, because the plaintiff was not insured under the unambiguous language of the commercial policy issued to the corporation. *Id.* at 59, 846 P.2d at 1068.

{22} Finally, in *Lucero,* the plaintiff was injured while driving a vehicle owned and insured by her employer, and she sought damages under the UM coverage provided for the automobile. 119 N.M. at 465–66, 892 P.2d at 598–99. The policy expressly excluded UM coverage for injuries suffered by employees in the course of their employment. *Id.* at 466, 892 P.2d at 599. Our Supreme Court held as a matter of law that the plaintiff was not entitled to UM benefits given her status under the express terms of the policy. *Id.*

{23} The trial court did not find the applicable language of the policy ambiguous, and neither do we. In *American Economy Insurance Co. v. Bogdahn,* 2004 OK 9, ¶ 0, 89 P.3d 1051, the insured was a closely-held corporation which operated a pharmacy. The UM endorsement identified the pharmacy as the sole "named insured" and listed the "form of business" as a "corporation." *Id.* ¶ 7 (internal quotation marks omitted). In part, the endorsement defined "who is an insured" as "1. You [; and] 2. If you are an individual, any 'family member.'" A "family member" was then defined as "a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child." *Id.* The court concluded that the word "You" was not susceptible to interpretation: it plainly referred to the corporation as the named insured. Just as clearly, since the named insured was not an individual, family members were not insured. *Id.* ¶ 13. Therefore, the owner's minor son was not entitled to UM benefits. *Id.* The court noted that the vast majority of jurisdictions conclude as a matter of law that similar policy language is not ambiguous. *Id.* ¶ 20 & n. 3.

{24} We conclude that Son is not an "insured" under the clear, unambiguous language of the UM endorsement and not entitled to any UM benefits under the corporate commercial auto policy issued to John G. Rehders General Contractor, Inc. Since he is not entitled to UM coverage, he is not entitled to stacked UM benefits.

B. The Insured's Reasonable Expectations and Public Policy

{25} The district court granted Plaintiffs summary judgment on public policy grounds. It concluded that the reasonable expectation of Parents was that they had purchased stacked UM coverage for themselves and their family and that stacking of UM coverage cannot be prohibited by language of the policy when the insurance company charges separate UM premiums for each vehicle insured. The effect of the district court order is that Son is a Class 1 Insured of the corporate commercial auto policy under our UM case law, and Son is therefore entitled to stacked UM coverage for each of the seven vehicles insured by the corporation. Plaintiffs' argument that the district court order should be affirmed is also based on public policy. They argue that Plaintiffs had a reasonable expectation of stacked coverage for Son and that the policy definitions excluding Son as an insured, in effect, prohibit UM stacking, which violates the public policy of New Mexico.

{26} We begin our analysis by examining the background of our stacking jurisprudence. Again, "stacking" refers to the right of an insured to aggregate the coverage under two or more UM policies (interpolicy stacking), or under one UM policy covering more than one automobile (intrapolicy stacking), until all the damages of the insured are satisfied or until the limits of the applicable policies are exhausted. *Morro v. Farmers Ins. Group,* 106 N.M. 669, 670, 748 P.2d 512, 513 (1988); *Gamboa,* 104 N.M. at 757, 726 P.2d at 1387; *see Lopez v. Found. Reserve Ins. Co.,* 98 N.M. 166, 646 P.2d 1230 (1982) (allowing intrapolicy stacking), *modified in other respects by Montano v. Allstate Indem.*

Co., 2004–NMSC–020, ¶ 1, 135 N.M. 681, 92 P.3d 1255; *Sloan v. Dairyland Ins. Co.*, 86 N.M. 65, 519 P.2d 301 (1974) (allowing inter-policy stacking).

{27} "Policy stacking" refers to stacked UM coverage which is granted by the express terms of the policy itself. *Jaramillo,* 117 N.M. at 339 n. 1, 871 P.2d at 1345 n. 1. This is not a "policy stacking" case. "Judicial stacking" refers to stacked UM coverage which results from a rule of construction applied to the policy by the courts on grounds of public policy. *Id.* For example, in *Lopez,* the insured purchased a single policy insuring two vehicles and he paid a separate premium for UM coverage on each vehicle. 98 N.M. at 167, 646 P.2d at 1231. Since the policy did not clearly explain the effect of the multiple premiums paid under the single policy insuring the two vehicles, our Supreme Court determined that the policy was ambiguous. *Id.* at 168, 646 P.2d at 1232. Stacking was allowed on the basis of two closely related rationales: (1) because the payment of separate premiums entitled the insured to two recoveries, and (2) to fulfill the reasonable expectations of the insured. *Id.* at 170–71, 646 P.2d at 1234–35.

{28} It is now well settled in New Mexico that our Supreme Court has favored "stacked" UM coverage that is issued pursuant to NMSA 1978, § 66–5–301 (1983) (requiring every automobile liability insurance policy issued in New Mexico to provide for insurance against uninsured motorists unless such coverage is rejected by the insured).

> Our past cases have evolved a strong judicial policy, rooted in this state's uninsured motorists insurance statute (NMSA 1978, Section 66–5–301[1983]), favoring stacking in order that a person injured by an uninsured ... motorist may receive compensation for his or her damages to the extent of the insurance purchased for his or her protection.

Rodriguez v. Windsor Ins. Co., 118 N.M. 127, 127, 879 P.2d 759, 759 (1994), *modified in other respects by Montano,* 2004–NMSC–020, ¶ 1, 135 N.M. 681, 92 P.3d 1255. The public policy in support of stacking in New Mexico "has always been tied to the notion that it is unfair not to allow stacking when multiple premiums are paid or when the policy is otherwise ambiguous." *Montano,* 2004–NMSC–020, ¶ 15, 135 N.M. 681, 92 P.3d 1255 (emphasis omitted). In this way, our stacking jurisprudence effectuates the two functions enunciated in *Lopez:* to ensure that the insured gets what he or she pays for, and to fulfill the reasonable expectations of the insured. *Montano,* 2004–NMSC–020, ¶ 21, 135 N.M. 681, 92 P.3d 1255. *Montano* reiterates that "when multiple premiums are charged for UM coverage on multiple cars, even in the face of a truly unambiguous limitation-of-liability clause, stacking will be required." *Id.* ¶ 23. Therefore, stacking is not required only when the policy clearly charges only a single premium for the UM coverage *and* it also unambiguously precludes stacking. *Id.* ¶ 15. Discussing the two objectives achieved by stacking, *Montano* states:

> If the primary goal is to fulfill the reasonable expectations of the insured, then there is no need to look at anything beyond the language of the policy itself. If, on the other hand, the primary goal is to give insureds what they pay for, then we should, at the very least, be concerned with the actuarial methods used to arrive at the premium and should look behind the policy language itself.

Id. ¶ 23.

{29} To achieve the objective of our uninsured motorist statute, Section 66–5–301, our common law stacking jurisprudence recognizes two classes of insureds. In *Konnick,* 103 N.M. at 114–15, 703 P.2d at 891–92, the policy defined, and our Supreme Court recognized, two classes of insureds: class-one, consisting of the named insured as stated in the policy and, while residents of the same household, the spouse of that named insured and relatives of either; and class-two, consisting of any other person while occupying an insured vehicle. We note that the court-defined terms "class-one insured" and "class-two insured" do not necessarily square with the definitions for classes of insureds as articulated within insurance policies such as the one in the case at bar. Assuming that the purchaser of the policy was the same person named as the insured in the policy, our Supreme Court recognized that he could rightly

expect to be covered, no matter what his location was at the time of the accident. *Id.* at 115 & n. 2, 703 P.2d at 892 & n. 2. By further referencing the two classes of insureds defined in the policy, the purchaser could also rightly expect that his spouse and relatives, while residents of the same household, would be afforded the same protection, no matter what their location. *Id.* Accordingly, class-one insureds were recognized as having UM coverage no matter where they were or the circumstances, because coverage was not limited to a particular vehicle, and class-two insureds were afforded coverage only because they occupied a covered vehicle. *Morro,* 106 N.M. at 671, 748 P.2d at 514. This classification continues to be recognized as part of our common law stacking jurisprudence. *See Ponder v. State Farm Mut. Auto. Ins. Co.,* 2000–NMSC–033, ¶ 22, 129 N.M. 698, 12 P.3d 960; *Samora v. State Farm Mut. Auto. Ins. Co.,* 119 N.M. 467, 469, 892 P.2d 600, 602 (1995); *Jaramillo,* 117 N.M. at 339 n. 1, 871 P.2d at 1345 n. 1; *Padilla v. Dairyland Ins. Co.,* 109 N.M. 555, 557, 787 P.2d 835, 837 (1990); *Gamboa,* 104 N.M. at 758, 726 P.2d at 1388.

{30} A subcategory of class-two has also recently been recognized, giving rise to three classes of UM insureds: " '(1) the named insureds and members of a named insured's household [(class-one insureds)], (2) persons who are injured while occupying an insured vehicle [(class-two insureds)], and (3) persons who sustain consequential damages as a result of personal injuries sustained by persons who are class (1) or class (2) insureds.' " *Phoenix Indem. Ins. Co. v. Pulis,* 2000–NMSC–023, ¶ 7, 129 N.M. 395, 9 P.3d 639 (quoting Robert E. Keeton & Alan I. Widiss, *Insurance Law* § 4.9(e), at 400 (1988)) (alteration in original). *See also Gamboa,* 104 N.M. at 760, 726 P.2d at 1390, in which our Supreme Court noted that the policy at issue expressly created these three classes of insureds.

{31} Whether an UM insured falls in "Class 1" or "Class 2" has important consequences.

> Class I insureds may stack all uninsured motorist policies purchased by the named insured because those policies were purchased to benefit the named insured and his or her family, but Class II insureds may only recover under the policy on the car in which they rode because the purchaser only intended occupants to benefit from that particular policy.

Ponder, 2000–NMSC–033, ¶ 22, 129 N.M. 698, 12 P.3d 960. Our strong public policy favoring stacking applies to Class 1 insureds. *Id.* ¶ 33.

{32} The judgment of the district court and Plaintiffs' arguments in support of the judgment are based on the following reasoning. When the insured business was identified as a sole proprietorship and Parents were the named insureds, Parents were Class 1 insureds. Since Parents paid a separate UM premium for each vehicle, they were entitled to stack the UM coverage on all seven vehicles they insured. This fulfilled their reasonable expectation of having a recovery under each policy they paid for. Son was a Class 1 insured only because he lived with Parents, but this status also entitled Son to stacked UM coverage. When the insured business was changed from a sole proprietorship to a corporation, nothing really changed because separate UM premiums were still charged and paid for each of the vehicles in substantially the same amounts, and Parents were the stockholders of the corporation. Therefore, the reasonable expectation of Parents was that they remained Class 1 insureds and entitled to stacked UM coverage, as did Son because he lived with Parents at the time of his accident. We reject this reasoning.

{33} The doctrine of reasonable expectations may be invoked when the language of an insurance policy or representations of the insurance company lead an insured to reasonably expect coverage. *See, e.g., Barth v. Coleman,* 118 N.M. 1, 5, 878 P.2d 319, 323 (1994); *Martinez v. Allstate Ins. Co.,* 1997–NMCA–100, ¶ 11, 124 N.M. 36, 946 P.2d 240. The doctrine is also available where policy language is ambiguous, *see Rummel,* 1997–NMSC–041, ¶¶ 21–22, 123 N.M. 752, 945 P.2d 970, and when the "dynamics of the insurance transaction" make way for its application. *Barth,* 118 N.M. at 5, 878 P.2d at 323. For example,

in *Ponder*, the parents purchased UM coverage on eight vehicles they owned, and their daughter was a Class 1 insured entitled to stacked UM coverage because she lived with her parents. 2000-NMSC-033, ¶ 2, 129 N.M. 698, 12 P.3d 960. The daughter got married but continued living in her parents' home with her husband. When the daughter and her husband decided to move, the mother reported to the insurance agency her daughter's marriage and change of residence. She said she inquired on several occasions about the adequacy of the daughter's coverage and wanted to make sure that the daughter continued to have "full coverage." *Id.* ¶ 3 (internal quotation marks omitted). Specifically, she said that the daughter had married, she was expecting a baby, and was moving in and out of the home. The mother wanted to know whether the change in the daughter's marital status limited her coverage so that, if necessary, the mother could take the necessary steps to obtain coverage that would cover the daughter on all the vehicles. *Id.* ¶¶ 15-16. The insurance agency repeatedly assured the mother that the daughter continued to have "full coverage" and at no time did the insurance agency tell the mother that the change in the daughter's residence would affect the extent of her UM motorist coverage. *Id.* ¶¶ 3, 16. After the daughter moved out of her parents' home, she was in an accident with an uninsured driver. *Id.* ¶ 1. Considering the surrounding circumstances, the conduct of the parties, and the oral expressions of their intentions, our Supreme Court held there was an ambiguity concerning the daughter's coverage and that the mother had a reasonable expectation that the daughter had the same type and extent of coverage as when she lived with her parents. *Id.* ¶¶ 15, 29. The daughter was therefore afforded stacked UM coverage.

{34} On the other hand, judgment against an insured is appropriate as a matter of law when the insured's expectations do not extend to the facts of the case, or when the insured's expectations conflict with the clear language of the policy itself. *Samora*, 119 N.M. at 470-71, 892 P.2d at 603-04; *Martinez*, 1997-NMCA-100, ¶ 11, 124 N.M. 36, 946 P.2d 240. In this case, Plaintiffs' expectations of UM coverage for Son were not reasonable as a matter of law in light of the undisputed facts and the unambiguous language of the policy excluding Son as an insured.

{35} Parents operated their business as a sole proprietorship for several years and made a conscious decision to change the business to a corporation and thereby obtain benefits associated with being a corporation such as tax benefits and limited personal liability. Parents then expressly directed that the insurance policy be changed to reflect that the named insured be changed to the corporation they formed to own and operate the business. We will not assume that Parents did not know that changing the form in which they operated the business had insurance coverage implications. Plaintiffs presented no evidence that Parents were confused by the unambiguous terms of the UM endorsement defining who is an insured when they received the new policy from Allstate. Father's affidavit really only says that before and after the new policy for the corporation, he expected the insurance to provide Son with the coverage that was applicable to him. Parents now ask that we hold that the very change that they directed to be made is void and rewrite the policy back to state that Parents individually are the named insured, not the corporation. We hold that this is not a reasonable expectation under the circumstances.

{36} Plaintiffs' remaining arguments are premised on the assumption that because Allstate charges a separate premium for UM coverage on seven different vehicles, *someone* must be entitled to stacked UM coverage. The UM endorsement provides that only a Class 1 insured is entitled to stacked UM coverage. Moreover, the UM endorsement limits Class 1 insureds to those policies in which the named insured is designated in the Declarations as an individual. Thus, the policy, in effect, prohibits stacking when the named insured is a corporation. Therefore, when the named insured is a corporation, as in this case, *no one* has stacked coverage under the terms of the policy, even though Plaintiffs assert that *someone* should be enti-

tled to stacked coverage because separate premiums were charged. Plaintiffs accordingly contend that the definition of an insured in the UM endorsement and the prohibition against stacking are void because they result in an ambiguity and they violate our public policy. Plaintiffs therefore urge us to conclude that Parents and Son are Class 1 insureds and that Son is entitled to stacked UM coverage.

{37} Plaintiffs in effect contend that a corporate commercial auto policy must always include coverage for both a Class 1 insured and Class 2 insured when a separate UM premium is charged for each vehicle. Plaintiffs' arguments assume that the risk assumed by Allstate for insuring the business as a sole proprietorship is identical to the risk it assumed for insuring the business as a corporation. We decline to make that assumption in this case. While *Montano* recognizes that actuarial methods used to arrive at the premiums are considered to determine whether the insured gets what he pays for, we have no such evidence in this case. Moreover, the authorities which pronounce the public policy that Plaintiffs rely upon are cases in which separate UM premiums were paid by or on behalf of an individual who was insured by the policy. The insured in this case, on the other hand, is clearly and unambiguously the corporation which was named as such at the specific direction of Parents. Under the circumstances, the public policy considerations relating to UM coverage for a corporation are different.

{38} When a corporation purchases UM coverage for the vehicles it owns and operates, it is not insuring against personal injury to itself, because a corporation does not suffer personal injuries. Instead, it is purchasing UM coverage for each person who is occupying a covered automobile. Our public policy does not require each occupant of a covered vehicle, who is not a party to the contract, to expect stacked UM coverage. Nor does our public policy require stacked UM coverage to be further extended to family members who are not even occupants of a covered vehicle when they are injured. In *Benns v. Continental Casualty Co.*, 982 F.2d 461, 461 (10th Cir.1993), the driver was injured by an uninsured motorist while driving a vehicle owned by his employer. *Id.* After receiving UM payments applicable under his employer's policy, he sought UM coverage under a commercial auto policy issued to two corporations owned by his father because his personal vehicle was included in the policy along with the vehicles actually owned by the corporations. *Id.* In pertinent part, two classes of insureds defined in the policy were: "1. You[; and] 2. If you are an individual, any 'family member.' " The policy further defined "you" as the person or entity that was listed in the policy as the named insured. *Id.* at 462. The corporations were listed in the policy as the named insured; therefore the driver was neither a named insured nor a 'family member' of a named insured, and the court held he was not entitled to UM benefits under the corporate policy. *Id.* The court acknowledged New Mexico's public policy of placing an injured policy holder in the same position of recovering damages as if the tortfeasor had possessed liability insurance, but concluded that applying the policy as written did not violate our public policy because, it "granted coverage to the insured entities and over the insured vehicles in a manner that was otherwise consistent with New Mexico law and policy." *Id.* at 464. The prevailing view in the United States is that when "you" in the UM endorsement is a corporation, coverage is not extended to a "family member." *See Ins. Co. of Evanston v. Bowers*, 758 A.2d 213, ¶ 18 (Pa.Super.Ct.2000) (collecting and summarizing authorities); *see also* 24 Eric Mills Holmes, *Appleman on Insurance 2d* § 148.1[B][2] (2004) (collecting and summarizing cases where courts have refused to extend UM coverage to an individual because the named insured is a legal entity). Based on these authorities, we conclude that our public policy does not extend to Son under the circumstances of this case.

CONCLUSION

{39} The summary judgment entered in favor of Plaintiffs is reversed and the case is remanded with instructions to enter judgment in favor of Allstate.

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

I CONCUR: CELIA FOY CASTILLO, Judge.

CYNTHIA A. FRY, Judge (dissenting).

FRY, Judge (dissenting).

{41} I respectfully dissent. I would affirm the district court's summary judgment in favor of Plaintiffs on the ground that the definition of "insured" in the UM endorsement is ambiguous and should be construed according to the reasonable expectations of the insured.

{42} In determining whether an insurance policy provision is ambiguous, we consider whether the language "is susceptible to more than one meaning, when the structure of the contract is illogical, or when a particular matter of coverage is not explicitly addressed by the policy." *Rummel,* 1997–NMSC–041, ¶ 19, 123 N.M. 752, 945 P.2d 970. We engage in this analysis by asking "what understanding a reasonably intelligent, non-lawyer lay person might glean from the policy, in light of the usual meaning of the words and the circumstances leading to purchase of the policy." *Berry v. Fed. Kemper Life Assur. Co.,* 2004–NMCA–116, ¶ 61, 136 N.M. 454, 99 P.3d 1166. "Specialized knowledge of the insurance industry case law, academic treatments, and industry norms or standards should not enter into the inquiry." *Id.*

{43} Referencing *Rummel's* definition of ambiguity, I am convinced the UM endorsement is ambiguous because the structure of the endorsement's definitions is illogical, and the definitions do not explicitly address the particular matter of coverage for family members when the insured is a closely held corporation. Reading the endorsement as a whole, it is clear that Allstate tried to establish two classes of insureds by reference to whether the "named insured" is an individual or a business organization, but it failed to communicate to a reasonable hypothetical insured an intelligible distinction between the two classes.

{44} If the named insured is an individual, the endorsement plainly states in Section (B)(1)(a) that an "insured" includes "[a]ny Class 1 'insured', meaning the Named Insured and any 'family members'." Majority opinion, ¶ 16. There is nothing confusing about this definition of a Class 1 insured. The endorsement then goes on to provide in Section (B)(2)(a) that if the named insured is "[a] partnership, limited liability company, corporation or any other form of organization," then an insured includes "[a]ny Class 2 'insured', meaning the Named Insured is not an individual Named Insured." Majority opinion, ¶ 16. This language is far from clear. If the sentence had read, "any Class 2 'insured', meaning the Named Insured," it would be clear that a Class 2 insured is the business organization listed on the policy as the named insured. But the sentence does not read this way, and the purported definition of "Class 2 insured" adds language that creates confusion. The endorsement defines a Class 2 insured as "the Named Insured is not an individual Named Insured." This sentence appears to be a statement of fact rather than a definition; consequently, a reasonable insured may well surmise that a "Class 2 insured" has a separate, unstated meaning. The insured would then flip through the remaining pages of the policy, looking in vain for a definition of "Class 2 insured."

{45} The majority's approach to this difficult language is one familiar to lawyers and members of the insurance industry: it overlooks the absence of a definition for Class 2 insured and fills in the blanks by resorting to an approach that probably makes no sense to "a reasonably intelligent, non-lawyer lay person." *Berry,* 2004–NMCA–116, ¶ 61, 136 N.M. 454, 99 P.3d 1166. The majority first appropriately concludes that Son is not a Class 1 insured because the family business was a corporation. The majority then concludes that Class 2 must not include family members because only Class 1 does. This approach would be fine if the endorsement actually defined Class 2 insureds in some intelligible fashion. It is certainly possible to draft an intelligible definition, as illustrated by the definitions discussed in other cases. For example, in *Bogdahn,* 2004 OK 9, ¶ 7, 89 P.3d 1051, the policy defined "AN INSURED" as "1. You[; and] 2. If you are an individual, any 'family member.'" The term "You" refers to the named insured, and the second paragraph makes it clear that family members are included only if the named

insured is an individual. *See also Benns*, 982 F.2d at 462 (quoting the same definition as in *Bogdahn*). Here, however, the endorsement provides no definition of Class 2 at all. Instead, it provides an ambiguous statement that the majority must interpret through extensive legal analysis.

{46} Our Supreme Court has noted that "the insurer who drafts the policy must reasonably anticipate ... the effect of the language used upon an untrained mind, or ... how the language is understood by the ordinary person." *Rodriguez*, 118 N.M. at 131, 879 P.2d at 763 (internal quotation marks and citation omitted). "[T]he insurer has the responsibility of issuing an intelligible policy." *Id.* The insurer did not issue an understandable policy in this case; despite my legal training, even I could make no sense of the endorsement's definition of Class 2 insureds. And, while my legal training allows me to follow the majority's interpretive path, it is unfair to expect a lay person to be able to negotiate the necessary twists and turns.

{47} Given the ambiguity created by the endorsement's inscrutable definition of Class 2 insureds, we should give effect to the insured's reasonable expectations. *See id.* at 130, 879 P.2d at 762 ("Giving effect to the insured's reasonable expectations, in cases of policy ambiguity, is of course a well-settled approach to construing and applying language in insurance policies." (internal quotation marks and citation omitted)). In this endeavor, we consider "what the hypothetical reasonable insured would glean from the wording of the policy and the kind of insurance at issue," rather than the expectations of the specific insured who purchased the policy. *Id.* In this case, a hypothetical reasonable insured would be able to glean little from reading the UM endorsement's definition of "insured." But we must consider the kind of insurance being purchased, so we assume the existence of the same circumstances surrounding Parents' purchase of insurance. Thus, we assume the hypothetical insured had purchased a policy when he was a sole proprietor and understood from the intelligible language of Section (B)(1)(a) of the definition of "insured" that family members were covered. We then assume the hypothetical insured changed his form of business to a corporation. Although the record does not contain a complete copy of the policy that was in effect before the change in business form, there is no evidence suggesting that anything significant changed about the policy except the description of the form of the business on the declarations page and a minor change in the premiums charged. No one notified the insured that coverage had changed materially. Because the language of the policy did not intelligibly convey anything different, a reasonable insured could expect that UM coverage remained the same and that family members were still covered. Because Allstate failed its responsibility to communicate clearly to its insured, we should give effect to these expectations and conclude that Son is an insured under the UM endorsement.

{48} In my view, our courts should not endeavor to make sense of language that is not sensible because "by doing so we encourage the perpetuation of ... unintelligible language" in insurance policies. *Computer Corner, Inc. v. Fireman's Fund Ins. Co.*, 2002-NMCA-054, ¶ 21, 132 N.M. 264, 46 P.3d 1264. The concepts insurers seek to communicate to insureds are not beyond understandable expression. By our holdings, we should discourage insurers from using obfuscation in drafting and encourage them to communicate clearly.

2006-NMSC-016

135 P.3d 814

In the Matter Before the New Mexico Public Regulation Commission of the Application of Socorro Taxi, Inc., d/b/a American Transportation, for a Contract Motor Carrier Permit, Case No. 04–00228–TR–M.

T–N–T TAXI, LTD. Co., a New Mexico limited liability company, James P. Moore, d/b/a Dollar Cab Co., a sole proprietorship, and A–1 Taxi, Inc., Appellants,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION, Appellee,

and

Socorro Taxi, Inc., d/b/a American Transportation, Real Party in Interest.

No. 28,996.

Supreme Court of New Mexico.

March 28, 2006.

Rehearing Denied May 1, 2006.

Yarbro & Associates, P.A., Roger E. Yarbro, Cloudcroft, NM, for Appellants.

Lee W. Huffman, Santa Fe, NM, for Appellee.

Smith Law Offices, P.A., Jack A. Smith, Albuquerque, NM, for Real Party.

OPINION

CHÁVEZ, Justice.

{1} Socorro Taxi Inc., d/b/a American Transportation, ("American") is an intrastate motor carrier of persons in New Mexico. In July 2004, American filed an application with the Public Regulation Commission ("PRC") for a permit to provide non-emergency medical transport services throughout New Mexico under a contract with the New Mexico Human Services Department. Before the permit could be granted, the PRC, among other things, had to consider "whether granting the permit would endanger or impair the operations of motor carriers protesting the application for a permit to an extent contrary to the public interest," NMSA 1978, Section 65–2A–10(C)(3) (2003) [1].

{2} Written notice of American's application was sent to potentially interested persons and the PRC published notice in the Albuquerque Journal. *See* NMSA 1978, § 65–2A–6 (2003). In the notices, all persons desiring to intervene, object or be heard regarding the application were instructed to file a Motion to Intervene with the PRC. T–N–T Taxi, Dollar Cab and A–1 Taxi ("Intervenors") were among many who were mailed notice as interested persons. Apparently wanting to object or be heard, Intervenors complied with the notice from the PRC and filed timely motion(s) to intervene as certificated intrastate common motor carriers of persons. In their motions, Intervenors allege that granting the permit would be contrary to the public's best interest, would impair their provision of services in the same territory sought to be serviced by American, and that the application by American is supported by fraudulent documents. American moved to strike the motions to intervene contending that NMSA 1978, Section 65–2A–13(B) (2003) precludes all common and contract motor carriers from protesting an application for a permit.

{3} The PRC agreed with American and denied the Intervenors' motions to intervene. The PRC entered a Final Order approving American's application, finding in part that the matter was uncontested. Intervenors appealed directly to this Court. *See* NMSA 1978, § 65–2A–35 (2006). We reverse and remand to the PRC for a hearing because the Motor Carrier Act at the time of American's application, when construed as a harmonious whole, requires the PRC to conduct a hearing when under Section 65–2A–10(C)(3) common motor carriers of persons protest an application for a permit. Intervenors qualify because they are certificated

1. Effective June 17, 2005, Subsection C(3) was amended to read "whether granting the permit would endanger or impair the operations of motor carriers to an extent contrary to the public interest" deleting the requirement that when considering the public interest the PRC consider only those operations of motor carriers who actually protest an application for a permit.

common motor carriers of persons servicing the same territory covered in American's application and have alleged that granting the permit would be contrary to the public's best interest.

CONSTRUING THE MOTOR CARRIER ACT AS A HARMONIOUS WHOLE, MOTOR CARRIERS OF PERSONS OPERATING WITHIN THE SAME GEOGRAPHIC TERRITORY AS AN APPLICANT MAY PROTEST AN APPLICATION FOR A PERMIT TO PROTEST WHETHER GRANTING THE APPLICATION WOULD IMPAIR OR ENDANGER THEIR OPERATIONS CONTRARY TO THE PUBLIC INTEREST

{4} Whether Intervenors may protest American's permit application turns on whether the Legislature intended to preclude all motor carriers from protesting an application for a permit under the Motor Carrier Act. The PRC concluded that by adding Section 65–2A–13(B) the Legislature intended to prohibit all motor carriers from protesting an application for a permit in furtherance of the legislative goal to streamline the regulation of motor carriers. *See* NMSA 1978 §§ 65–2A–2, 65–2A–5(B) (2003).

{5} When an administrative agency determines legislative intent we review de novo. *State v. Rivera,* 2004–NMSC–001, ¶ 9, 134 N.M. 768, 82 P.3d 939 (applying de novo review to determine ambiguity). The primary goal in interpreting a statute is to give effect to the Legislature's intent. *State v. Smith,* 2004–NMSC–032, ¶ 8, 136 N.M. 372, 98 P.3d 1022. We begin the search for legislative intent by looking first to the words chosen by the Legislature and the plain meaning of the Legislature's language, closely examining the overall structure of the statute, as well as the particular statute's function within a comprehensive legislative scheme. *Rivera,* 2004–NMSC–001, ¶ 13, 134 N.M. 768, 82 P.3d 939 (citing *Sims v. Sims,* 1996–NMSC–078, ¶ 21, 122 N.M. 618, 930 P.2d 153). Under the plain meaning rule, statutes are given effect as written without room for construction unless the language is doubtful, ambiguous, or adherence to the literal use of the words would lead to injustice, absurdity or contradiction, in which case the statute is to be construed according to its obvious purpose. *Rivera,* 2004–NMSC–001, ¶ 10, 134 N.M. 768, 82 P.3d 939 (citing *State v. Jonathan M,* 109 N.M. 789, 790, 791 P.2d 64, 65 (1990) and quoting *State ex rel. Helman v. Gallegos,* 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994)). As will be seen, application of the plain meaning rule will lead to contradictions within the Motor Carrier Act. Therefore, in attempting to construe the Act consistent with legislative intent we must determine whether the Act may be interpreted as a harmonious whole. *Rivera,* 2004–NMSC–001, ¶ 13, 134 N.M. 768, 82 P.3d 939 (quoting *State v. Muniz,* 2003–NMSC–021, ¶ 14, 134 N.M. 152, 74 P.3d 86) ("Whenever possible . . . we must read different legislative enactments as harmonious instead of as contradicting one another").

{6} There are three sections of the Act which require our interpretation since the first two may be contradicted by the third. The first, Section 65–2A–5(C), requires the PRC to conduct a hearing "whenever an interested person protests the application during the notice period." Section 65–2A–3(S), defines interested person as "a motor carrier operating over the routes or in the territory involved in an application." As instructed by the PRC in the mailed and published notice regarding American's application for a permit, Intervenors filed timely motions to intervene as certificated intrastate common motor carriers of persons operating in the territory involved in the application. The second provision, Section 65–2A–10(C)(3), requires the PRC to consider "whether granting the permit would endanger or impair the operations of motor carriers *protesting the application* for a permit to an extent contrary to the public interest." (Emphasis added). Intervenors have protested the application because they contend, among other things, that granting the application will endanger or impair their operations in a manner that would be contrary to the public interest. However, these provisions are called into question by the third provision, Section 65–2A–13(B), which provides that "a common or contract motor car-

rier shall not protest an application for a permit."

{7} The PRC and American contend that the legislative purpose for enacting Section 65–2A–13(B) was to streamline the permit process and, therefore, this subsection should be interpreted to repeal by implication subsections 5 and 10. Alternatively, they argue that Section 65–2A–13(B) is more specific and therefore should be given effect over Sections 65–2A–5 & 10. We do not agree. Repeals by implication are not favored and are not resorted to unless necessary to give effect to the legislative intent. *Citation Bingo, Ltd. v. Otten* 1996–NMSC–003, ¶¶ 21–24, 121 N.M. 205, 910 P.2d 281. In this case, a repeal by implication is not necessary because the provisions at issue may be construed harmoniously to effect the legislative intent. In addition, because these provisions may be construed harmoniously we decline the PRC's and American's invitation to interpret Section 65–2A–13(B) as a more specific section that should be given effect over Sections 65–2A–5 & 10. *City of Albuquerque v. New Mexico State Corp. Comm'n,* 93 N.M. 719, 721, 605 P.2d 227, 229 (1979) (the problem with applying the rule that specific sections of a statute govern over more general sections "is that one section is not readily identifiable as the more specific one of the two").

{8} Although our interpretation of the Motor Carrier Act is influenced by the legislative declaration that it sought to streamline the regulation of motor carriers, NMSA 1978, § 65–2A–2 (2003), we are not convinced that the Legislature wanted to streamline the regulation of motor carriers by having the PRC review all applications for permits as uncontested matters. Although the Legislature encouraged the PRC to streamline and simplify its process for approving applications, Section 65–2A–5(B), it also mandated the PRC to hold a public hearing on an application whenever an interested person protests the application during the notice period. § 65–2A–5(C). Section 65–2A–3(II) defines protest to mean "a document filed with the commission by an interested person that expresses an objection to a matter before the commission." As related to motor carriers, the Legislature limited interested persons to those motor carriers operating over the routes or in the territory involved in the application. § 65–2A–3(S). However, not just any motor carrier is an interested person entitled to file a protest, as confirmed by Section 65–2A–13(B). Indeed, had the Legislature not recognized in Section 65–2A–10(C)(3) that some motor carriers might protest, the search for legislative intent would be over and no motor carrier would be allowed to protest an application for a permit even if otherwise an interested person.

{9} However, the Legislature did acknowledge in Section 65–2A–10(C)(3) that some motor carriers might indeed protest. Perhaps a slip of the pen, but we think not. Section 65–2A–10(C)(3) imposes certain duties and responsibilities on the PRC before the PRC can grant a permit to a common motor carrier of persons. Under Section 65–2A–10(C)(3), the PRC must consider whether granting the permit would endanger or impair the operations of motor carriers protesting the application for a permit to an extent contrary to the public interest. Before the 2003 amendment, the PRC had to consider whether "the transportation to be provided under the permit is or will be consistent with the public interest." NMSA 1978, § 65–2–87(1981). The Legislature streamlined the application process in 2003 by limiting the scope of the public interest inquiry to an inquiry dependent on the filing of protests by motor carriers. If no motor carrier protested an application, the PRC was relieved of its responsibilities under Section 65–2A–10(C)(3). Stated differently, the PRC is directed to consider only the operations of those motor carriers who actually protest when evaluating whether granting the application will impair operations contrary to the public interest. Otherwise, if we rewrite Section 65–2A–10(C)(3) to exclude the words "protesting the application for a permit" as proposed by the PRC and American, the PRC would have to consider the effect on operations of motor carriers in general when measuring the effect on the public interest. We note that Intervenors are only three of one hundred and nine motor carriers operating in the same territory. Thus the operations of only three motor carriers not one

hundred and nine need to be considered by the PRC in considering the public interest. Our interpretation honors the legislative goal of streamlining the application process since before the 2003 amendments to the Motor Carrier Act, a permit could not be issued until after a mandatory public hearing was held. NMSA 1978, § 65–2–88(B)(1981).

{10} We also believe the 2005 amendment to Section 65–2A–10(C)(3) supports our analysis. The amendment expands the public interest analysis, yet the process is streamlined even further because the amendment now effectively precludes common motor carriers from protesting whether an application impairs or endangers the operations of motor carriers contrary to the public interest. Although the PRC must still assess whether the application for a permit is or will be consistent with the public interest, such a protest by a motor carrier is no longer recognized and as such intervention would not be appropriate and a hearing is not required for this purpose.

{11} We believe it also important that Intervenors filed their motions to intervene pursuant to the instructions provided them by the PRC in the notice of American's application. The PRC was presumably adhering to Commission Rule 27, which was in effect at the time of American's application.[2] Rule 27 grants an intervention of right whenever the moving party demonstrates a substantial interest in PRC actions. Since Intervenors have demonstrated a substantial interest as interested persons and as motor carriers whose operations and transportation services must be considered by the PRC before issuing a permit, we conclude that intervention was appropriate. *See Thriftway v. State*, 111 N.M. 763, 767, 810 P.2d 349, 353 (Ct.App. 1990) (indicating that when person(s) are adversely affected by the outcome of an agency action, and it will be difficult to protect that interest if intervention is not allowed, then, even absent statutory provisions intervention should be granted); *see also Pueblo Picuris v. New Mexico Energy and Natural Resources Dept.*, 2001–NMCA–084, ¶¶ 4, 10, 131 N.M. 166, 33 P.3d 916 (stating that the Pueblo was deemed to fall within the ambit of interested persons entitled to intervene in an agency permit proceeding because the Pueblo was located in the vicinity of the proposed permit area and opposed the permit as affecting its vital interests).

{12} In *Thriftway*, the Court of Appeals considered whether the Nageezi Chapter, a governmental unit of the Navajo Tribe, had a right to intervene in a San Juan County Commission proceeding where Thriftway's liquor license application was under consideration. Under the statute which governs applications relating to a liquor license, prior to approving an application, the Commission must consider whether approving the application would adversely affect the public health, safety, or morals of residents located in the territory covered by the application. Thriftway argued that the Nageezi did not have a special interest in their transfer action because as a Tribal government, the Nageezi were different from other members of the general public, and the statute applied only to municipalities, not to Chapters. Despite Thriftway's contention, and even though the transfer was on private land, the court held that the Nageezi Chapter could intervene because it was located within the same geographic territory to be affected by Thriftway's liquor license. The Court reasoned that the Nageezi's participation was necessary to Thriftway's action because they held a sufficient interest which would otherwise be jeopardized by the San Juan County Commission action.

{13} Like the Nageezi Chapter in *Thriftway*, Intervenors' operations and transportation services are in the same geographic location covered in American's permit application. The Motor Carrier Act requires the PRC to consider whether the operations of these motor carriers will be endangered or impaired to an extent contrary to the public interest. Intervenors, therefore, have a substantial interest in the proceedings regarding American's application for a permit. Because we conclude that the PRC must con-

2. Whether a protest can only be considered if the protesting party is allowed to intervene is not before this court.

duct a hearing and grant Intervenors' motion to intervene, we do not need to reach the due process argument.

CONCLUSION

{14} Under the provisions of the Motor Carrier Act at the time of Intervenors' protest, motor carriers operating over the routes or in the territory involved in an application for a permit may protest an application for a permit to be heard on whether granting the permit would endanger or impair their operations contrary to the public interest. Under Commission Rule 27, such motor carriers have a right to intervene in the PRC proceedings and the PRC must conduct a public hearing on the application. We reverse and remand to the PRC for proceedings consistent with this opinion.

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

WE CONCUR: PATRICIO M. SERNA, PETRA JIMENEZ MAES, Justices and RICHARD C. BOSSON, Chief Justice (dissenting).

MINZNER, Justice (dissenting).

{16} I respectfully dissent. I would hold that NMSA 1978, Section 65–2A–13 (2003), does not permit common or contract motor carriers to protest an application for a permit or for a change in a permit, and therefore I would affirm the Public Regulatory Commission's final order denying the motions of T–N–T Taxi, Ltd. Co. and others to intervene in the permit application filed by Socorro Taxi, Inc. d/b/a American Transportation. The majority has not persuaded me that the Legislature intended to create any exceptions to its rule in Section 65–2A–13(B) and I would conclude that T–N–T's protest is barred.

{17} When interpreting a statute, our primary goal is to give effect to the Legislature's intent. *See State v. Smith*, 2004–NMSC–032, ¶ 8, 136 N.M. 372, 98 P.3d 1022; *Block v. Vigil–Giron*, 2004–NMSC–003, ¶ 4, 135 N.M. 24, 84 P.3d 72. I have several reasons for concluding that the Legislature intended to prevent common carriers like T–N–T from protesting permit applications. First, the language relating to permit applications appears clear on its face. "A common or contract motor carrier shall not protest an application for a permit or for a change in a permit." Section 65–2A–13(B). In addition, Section 65–2A–13, when read as a whole, appears to have a single purpose, to limit protests.[1] Each subsection of the statute limits a particular category of protests. The comprehensiveness of the statute suggests that it was intended as a definitive statement regarding when motor carriers may protest applications made by their competitors. The limited exception created by subsection (C) illustrates this comprehensiveness. If the Legislature had intended to create other exceptions to the rules set out in Section 65–2A–13, it seems likely that it would have included them in this statute, as it did with subsection (C). Finally, this limitation on protests by motor carriers is consistent with the Legislature's stated purpose of "streamlining and promoting uniformity of state regulation of motor carriers." NMSA 1978, § 65–2A–2 (2003).

{18} Because the text of a statute provides us with the best evidence of the intent of the Legislature, we depart from the meaning of

1. Section 65–2A–13 provides as follows:
   A. contract motor carrier shall not protest an application for a certificate or for a change in a certificate.
   B. A common or contract motor carrier shall not protest an application for a permit or for a change in a permit.
   C. A common motor carrier shall not protest an application for a certificate or for a change in a certificate unless:
   (1) it possesses authority to handle, in whole or in part, the traffic for which the applicant seeks authority, or it has pending before the commission an application for authority for substantially the same traffic filed prior to the application to be protested; and
   (2) it is willing and able to provide service that meets the reasonable needs of the customers or shippers involved; and
   (3) it has provided service within the scope of the protested application during the previous twelve-month period, or has actively and in good faith solicited service within the scope of the protested application during such period; or
   (4) the commission grants leave to intervene upon a showing of other interests that are not contrary to the provisions of the Motor Carrier Act [65–2A–1 to 65–2A–40 NMSA 1978].

an unambiguous statute only if we are persuaded that the obvious or natural interpretation of the text is inconsistent with the actual intent of the Legislature. *See State ex rel. Helman v. Gallegos,* 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994) (observing that consideration of the history and background of a statute, the structure of a statute, and the statute's place within a comprehensive legislative scheme may in some cases give rise to "genuine uncertainty as to what the legislature was trying to accomplish").

{19} The majority concludes that the Legislature's intention was not fully captured by the text of Section 65–2A–13 because NMSA 1978 Sections 65–2A–5(C) (2003) and 65–2A–10(C)(3) (2003, prior to 2005 amendment) refer to protests that Section 65–2A–13 largely eliminates, which creates a conflict within the statutory scheme. The Legislature has enacted the Uniform Statute and Rule Construction Act, *see* NMSA 1978, 12–2A–1, which offers some guidance regarding the construction of statutes and the Legislature's intent in situations where statutes appear to conflict. Section 12–2A–10(A) provides:

> If statutes appear to conflict, they must be construed, if possible, to give effect to each. If the conflict is irreconcilable, the later-enacted statute prevails. However, an earlier-enacted specific, special or local statute prevails over a later-enacted general statute unless the context of the later-enacted statute indicates otherwise.

NMSA 1978, § 12–2A–10(A) (1997). I believe the apparent conflict in these statutes can be reconciled while still giving full effect to the prohibition in Section 65–2A–13, and that this interpretation is more consistent with the legislative intent than the interpretation adopted by the majority.

{20} First, Section 65–2A–5(C) instructs the Commission to hold a hearing when an interested person protests an application. Although Section 65–2A–13 significantly reduces the number of protests that may be filed, it does not wholly eliminate protests. Any tension between these sections is resolved by recognizing that a hearing must be held when a protest that is not prohibited by Section 65–2A–13 is filed. Second, in 2003, Section 65–2A–10(C)(3) required the Commission to consider "whether granting the permit would endanger or impair the operations of motor carriers protesting the application for a permit to an extent contrary to the public interest." Thus, in 2003, the Legislature had ordered the Commission to consider the impact of the proposed permit on protesting motor carriers even though no motor carriers are permitted to protest an application for a permit under Section 65–2A–13. While this is an odd result, the sections are not in direct conflict. Section 65–2A–10(C) simply addresses a situation which, after the addition of Section 65–2A–13, will no longer occur. Although Section 65–2A–10(C) was enacted at the same time as Section 65–2A–13, as the hearing examiner observed in his order denying the motions to intervene, Section 65–2A–10 "is substantially similar in both format and language to" a comparable provision of its predecessor, enacted in 1981. Section 65–2A–13, on the other hand, appears to be entirely new. I would treat Section 65–2A–13 as the later-enacted statute under Section 12–2A–10(A) and give it full effect to the extent that there is any conflict with Section 65–2A–10(C).

{21} Interestingly, in the face of this potential conflict the Legislature did not choose to alter Section 65–2A–13 to emphasize the right of motor carriers to appear before the Commission. Instead, in 2005, it deleted the phrase "protesting the application for a permit" from Section 65–2A–10(C)(3). *Compare* § 65–2A–10(C)(3) (2003, prior to 2005 amendment), *with* § 65–2A–10(C)(3) (2005). It seems reasonable to conclude that the Legislature took this action to remove language it determined was superfluous after the addition of Section 65–2A–13 in 2003.

{22} I believe that the majority's resolution of the conflict within the statutory scheme does not give full effect to the Legislature's intent. In creating this statute, I am persuaded the Legislature made a policy decision to move away from a formal, adversarial application process and prohibit formal protests by most potential competitors. The Legislature chose between the competing goals of simplifying the application process and fully informing the Commission, and decided in favor of simplifying the application

process. While the holding the majority reaches may serve better the interests of competitors, I respectfully suggest the Legislature made a different choice, to which we should defer. Unlike *Thriftway Marketing Corp. v. State,* 111 N.M. 763, 764, 810 P.2d 349, 350 (Ct.App.1990), this is not a case in which we have the discretion to permit intervention. The specificity of Section 65–2A–13 seems to preclude implying a right to protest on the basis of Section 65–2A–10(C)(3). I would view the former as comparable to a comprehensive statement about standing, making an implied right in Section 65–2A–10(C)(3) inappropriate. *Cf.* NMSA 1978, § 12–2A–10(C) (1997) (providing that a comprehensive revision prevails over previous statutes, even if irreconcilably conflicting).

{23} For these reasons, I would affirm the Commission's order. A majority of the Court being of a different view, I respectfully dissent.

I CONCUR: RICHARD C. BOSSON, Chief Justice.

2006-NMCA-060
135 P.3d 1277

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff–Appellee,

v.

Mary Beth JONES, Defendant–Appellant.

No. 25,507.

Court of Appeals of New Mexico.

March 8, 2006.

Certiorari Denied, No. 29,779 and No. 29,781, May 25, 2006.

Miller Stratvert, P.A., Rudolph A. Lucero, Todd A. Schwarz, Albuquerque, NM, for Appellee.

Salazar & Sullivan, Patrick W. Sullivan, Albuquerque, NM, William H. Lazar, Tesuque, NM, for Appellant.

OPINION

BUSTAMANTE, Chief Judge.

{1} This case presents an opportunity to clarify how an insurer may claim an offset against its underinsured motorist coverage when a third party pays a portion of a victim's damages. We conclude that in such a case, any statutory offset will be determined by the insurer's status as either the primary or a secondary insurer. We also conclude that any contractual offset in the circumstances presented here would violate public policy.

BACKGROUND

{2} Mary Beth Jones was injured when the car in which she was a passenger, driven by Kathy Williams, was struck by a car driven by Ethel Dorand. The accident was entirely the fault of Dorand, who had automobile liability insurance with limits of $100,000. Williams carried $100,000 of uninsured motorist (UM) coverage with State Farm Mutual Automobile Insurance Company. Jones carried UM insurance with Twin City Fire Insurance Company, with policy limits of $500,000. Jones settled her liability claim with Dorand's insurance company for the policy limits of $100,000, and then made claims against State Farm and Twin City for the payment of the policy limits of underinsured (UIM) motorist benefits. The parties do not dispute that Jones's damages are at least equal to the aggregate of all underin-

sured motorist coverage, or $600,000. Twin City is not a party to this dispute.

{3} State Farm filed an action for a declaratory judgment denying any liability to Jones under its UIM policy covering Williams's car. In its complaint and motion for summary judgment, State Farm asked the district court to determine as a matter of law that Dorand's vehicle did not meet State Farm policy's definition of an underinsured vehicle or, alternatively, that State Farm was entitled to a contractual offset of its Class II UIM coverage by the payment of the tortfeasor's $100,000 policy limits, effectively reducing its liability to zero. The district court held that although the State Farm policy did cover Jones (as Williams's passenger), State Farm ultimately had no liability since its $100,000 coverage could be offset by the $100,000 paid by the tortfeasor. Thus, the district court granted summary judgment in favor of State Farm, and Jones appeals. As we discuss below, we agree that Jones was covered by the State Farm policy. We more fully address the contractual language of that policy and its nature in connection with our discussion of the issues.

DISCUSSION

{4} We address the following issue: Where an injured passenger stacks Class II primary coverage and Class I secondary UIM coverage, and the amount of damages exceed the available aggregate coverage, how is the statutory offset for liability payments received from a third-party tortfeasor applied? In deciding who gets the statutory offset, we must necessarily address State Farm's contention that it is entitled to a contractual offset for the liability payments. We hold that State Farm is not entitled to a contractual offset, and that the statutory offset for liability payments applies to the primary insurer, which in this case is State Farm. We therefore affirm.

{5} To effectively understand the parties' arguments about contractual and statutory offsets, we must first lay out the basic rules of UM/UIM coverage. These rules allow us to evaluate the extent to which Jones is entitled to UIM coverage. We then discuss the rules governing offsets and analyze whether in these circumstances an insurer may benefit from either a statutory or contractual offset.

STANDARD OF REVIEW

{6} "Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Martinez v. Allstate Ins. Co.*, 1997–NMCA–100, ¶ 5, 124 N.M. 36, 946 P.2d 240 (internal quotation marks and citation omitted). This is an appeal from an order granting a motion for summary judgment based only on issues of law without any issues of fact. When the parties agree that the material facts are not disputed, this Court reviews the question of law presented de novo. *State Farm Fire & Cas. Co. v. Farmers Alliance Mut. Ins. Co.*, 2004–NMCA–101, ¶ 5, 136 N.M. 259, 96 P.3d 1179.

ANALYSIS

{7} As a starting point, we note that our courts have not yet had an occasion to directly address the issue presented in this case. Therefore, as context for our discussion, we begin with a brief overview of the UIM statute and case law interpreting the statute. In light of these rules, we describe the situation facing Jones in this case. We then address the application of the statutory liability offset, and State Farm's contention that it is entitled to a contractual liability offset.

1. Underinsured Motorist Coverage

{8} An UIM is defined by the New Mexico Uninsured Motorist statute, NMSA 1978, § 66–5–301(B) (1983) as follows:

> [An] "underinsured motorist" means an operator of a motor vehicle with respect to the ownership, maintenance or use of which the sum of the limits of liability under all bodily injury liability insurance applicable at the time of the accident is less than the limits of liability under the insured's uninsured motorist coverage.

(Internal quotation marks omitted). The underlying policy of the UM/UIM statute is "to compensate persons injured through no fault of their own," by uninsured or inadequately insured motorists. *Konnick v. Farmers Ins. Co.*, 103 N.M. 112, 114, 703 P.2d 889, 891 (1985). "[T]he intent of the Legislature was to put an injured insured in the same posi-

tion he would have been in had the tortfeasor had liability coverage in an amount equal to the uninusured/underinsured motorist protection purchased for the insured's benefit." *Schmick v. State Farm Mut. Auto. Ins. Co.*, 103 N.M. 216, 219, 704 P.2d 1092, 1095 (1985). New Mexico cases interpreting the statute are guided by the intent of the Legislature and the strong public policy of protecting injured insureds.

2. Class I and Class II Insureds and Stacking

{9} In order to effectuate the intent of the Legislature, our Supreme Court has created different categories of insureds and insurers: Class I and Class II insureds, and primary and secondary insurers. "New Mexico recognizes two classes of insureds, each with attendant rights for purposes of stacking [(combining)] uninsured motorist coverage benefits." *Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000–NMSC–033, ¶ 22, 129 N.M. 698, 12 P.3d 960. A Class I insured is "the named insured ... [on] the policy, the spouse, and [those] relatives" that reside in the household. *Konnick*, 103 N.M. at 115, 703 P.2d at 892. A Class II insured is insured by virtue of his or her presence in "an insured ... vehicle." *Id.*

> Class I insureds may stack all uninsured motorist policies purchased by the named insured because those policies were purchased to benefit the named insured and his or her family, but Class II insureds may only recover under the policy on the car in which they rode because the purchaser only intended occupants to benefit from that particular policy.

Ponder, 2000–NMSC–033, ¶ 22, 129 N.M. 698, 12 P.3d 960 (citations omitted). The law in New Mexico is clear that "when an injured insured is the beneficiary of a policy and either the insured or another has paid premiums for the benefit of the injured insured, then all policy coverages under which [the injured insured] is a beneficiary may be stacked." *Jimenez v. Found. Reserve Ins. Co.*, 107 N.M. 322, 325, 757 P.2d 792, 795 (1988) (citation omitted). The term "coverage" in the UIM statute is liberally construed to include coverage from one or more policies purchased for the injured insured's benefit, including Class I policies, and the Class II policy on the car in which the insured was a passenger. *Schmick*, 103 N.M. at 219–20, 704 P.2d at 1095–96. The "only limitations to be placed on uninsured/underinsured motorist coverage are that the insured legally be entitled to recover damages and that the negligent driver be either uninsured or underinsured." *Morro v. Farmers Ins. Group*, 106 N.M. 669, 671, 748 P.2d 512, 514 (1988) (internal quotation marks and citation omitted).

{10} Thus, the amount of coverage available to an injured insured is determined by the aggregate of their Class II and Class I coverage. *See Jimenez*, 107 N.M. at 325, 757 P.2d at 795 (stating that the law in New Mexico is clear that when an injured insured is the beneficiary of a policy, and either the insured or another has paid premiums for the benefit of the injured insured, then all policy coverage under which the injured insured is a beneficiary may be stacked); *Morro*, 106 N.M. at 671–72, 748 P.2d at 514–15 (holding that an injured insured may stack Class I and Class II coverage to determine a tortfeasor's underinsured status).

{11} Therefore, in this case, Jones is a Class II insured under the State Farm policy, with a limit of $100,000 in UIM coverage. Jones is a Class I insured under the Twin City policy, with a limit of $500,000 in available UIM coverage. Stacking the Class II and the Class I coverages, Jones has a total of $600,000 aggregate UIM coverage. We next turn to the distinction between primary and secondary insurers.

3. Primary Versus Secondary Liability for UIM Payments

{12} In addition to Class I and Class II insured status, New Mexico cases also distinguish between a primary and secondary UM/UIM insurer. A primary insurer is the insurer of the vehicle involved in the accident, and owes primary coverage to the limits of its policy if less than the loss suffered. *Branchal v. Safeco Ins. Co.*, 106 N.M. 70, 71, 738 P.2d 1315, 1316 (1987). Any other available insurance becomes secondary to the extent of the injured insured's injuries and the

limits of the secondary insurer's UIM coverage. *Id.* In making the distinction between primary and secondary insurers, our Supreme Court in *Branchal* reasoned that the automobile policy "closest to the risk" ranks ahead of other policies insofar as priority for payment is concerned, and thus is the primary insurer. *Id.* (internal quotation marks omitted).

{13} In this case State Farm, as the insurer of the vehicle involved in the accident, is the primary insurer. Twin City is the secondary insurer. Thus, to summarize the classifications, Jones has Class II, primary UIM coverage through State Farm in the amount of $100,000, and Class I, secondary UIM coverage through Twin City in the amount of $500,000. Applying the foregoing rules, we conclude that aggregate UIM coverage available to Jones is $600,000. As we describe below, the primary/secondary classification is central to the statutory offset while the Class I/Class II distinction is relevant to the contractual offset.

4. Statutory Offset for Liability Payments

{14} The UIM statute contemplates that any applicable UIM coverage will be offset by the amount of liability coverage recovered by the insured. *Schmick,* 103 N.M. at 220, 704 P.2d at 1096. The Court in *Schmick* stated that "[w]hile our statute does not specifically provide that the insured's underinsured motorist liability insurance is to be offset by the tortfeasor's liability coverage, ... such an offset is inherent in our statutory definition of underinsured motorist." *Id.* at 223, 704 P.2d at 1099. The Court reasoned that it is apparent from the language of the statute that the amount of the insured's recovery is limited to the amount of uninsured motorist coverage purchased for the insured's benefit and "that amount will be paid in part by the tortfeasor's liability carrier and the remainder by the insured's uninsured motorist insurance carrier." *Id.* Thus, an offset in the amount of the tortfeasor's liability is required. *Id.* The issue of which insurer gets the benefit of the statutory liability offset has not been directly decided in New Mexico, though two cases with similar facts to the present case have indirectly addressed the issue.

{15} In *Morro,* the issue presented to our Supreme Court was whether an injured passenger could stack Class I and Class II coverage. 106 N.M. at 672–73, 748 P.2d at 515–16. The plaintiff was injured when she was struck by a third-party tortfeasor while loading groceries into the trunk of her daughter's car. *Id.* at 669–70, 748 P.2d at 512–13. The plaintiff's damages, as in this case, exceeded the total amount of available coverage. *Id.* at 672, 748 P.2d at 515. The Court held that the plaintiff was entitled to stack all UIM policies under which she was a beneficiary to determine the tortfeasor's status as an UIM. *Id.* The Court then applied the liability offset on a pro rata basis, dividing the offset by the number of policies provided by each insurer; a one-third offset for each of three policies issued by two insurers. *Id.* at 672–73, 748 P.2d at 515–16. The Court noted that "there was anything unfair in such an allocation of credit toward the liability of both insurers to plaintiff under all three underinsurance policies." *Id.* at 673, 748 P.2d at 516. This observation does not solve our problem because in *Morro,* unlike the present case, neither party raised the issue of primary versus secondary insurer, and the Class I carrier apparently did not object to a pro rata credit. Approval of the pro rata credit was not an essential holding of the case and does not stand as authority resolving the issue argued by the parties here.

{16} Another variation of the issue arose in *Tarango v. Farmers Ins. Co.,* 115 N.M. 225, 849 P.2d 368 (1993). The plaintiff in *Tarango* sustained damages of $40,000 when she was hit by a third party while standing near the trunk of a car in which she was a passenger. The plaintiff received a $25,000 liability payment from the third-party tortfeasor. The issue presented was whether the Class II insurer was responsible for paying the entire $15,000 of UIM benefits due to the plaintiff, or whether the Class II and Class I insurers' must each pay on a pro rated basis. Our Supreme Court adopted the following reasoning from *Branchal:*

> [I]t is the better and more reasonable rule to require the insurer of the vehicle in

> which the injured party was riding as a passenger, rather than as an owner or driver, to first pay uninsured motorist benefits before the injured party's insurer may be required to pay under its uninsured motorist coverage.

106 N.M. at 70, 738 P.2d at 1315. The Court reasoned that the Class II insurer was the primary insurer; its policy was written to cover passengers in its insured's vehicle, and premiums were paid specifically for that coverage. *Tarango,* 115 N.M. at 227, 849 P.2d at 370. The Court held that the amount of damages not covered by the liability payment must be paid by the primary, Class II insurer. However, unlike the present case, it was not necessary in *Tarango* to stack coverage with the secondary, Class I insurers' because the amount of UIM benefits required was less than the limit of the Class II insurers UIM coverage benefit.

{17} Although the facts in *Tarango* are distinguishable, we find the reasoning persuasive. Specifically, we agree that the insurer closest to the risk, that is the one insuring the vehicle involved in the accident, is primary. The primary insurer should first provide UIM coverage up to the limits of coverage as stated in the policy. After the primary coverage is exhausted, the secondary coverage kicks in to pay the remaining UIM benefit. In the present case, unlike in *Tarango,* the damages exceed the amount of available UIM coverage, and therefore the primary Class II and secondary Class I coverage may be stacked.

{18} Consistent with the rule that the primary insurer is the first responsible to pay UIM benefits, we believe that the primary insurer should be the first to receive the benefit of the statutory offset. We agree with the district court's reasoning that since the primary insurer bears the greatest risk, it is also entitled to offset the full amount of liability proceeds recovered before any remaining liability is assessed. We conclude that this rule is clear and easy to apply, consistent with existing case law, and consistent with the intent of the Legislature. *See Schmick,* 103 N.M. at 219, 704 P.2d at 1095 ("[T]he intent of the Legislature was to put an injured insured in the same position he would have been in had the tortfeasor had liability coverage in an amount equal to the uninsured/underinsured motorist protection purchased for the insured's benefit."). Coverage under the primary insurer must be exhausted before any excess coverage from the secondary insurer applies; however, the primary insurer is entitled to the full benefit of the statutory offset for any liability payments received.

{19} Jones purchased $500,000 of UIM coverage for herself through Twin City. Williams purchased $100,000 of UIM coverage from State Farm for passengers in her vehicle, such as Jones. Therefore, the total UIM protection purchased for the benefit of Jones is $600,000. The total UIM benefit Jones can expect to receive, assuming damages exceed the amount of available coverage, is $600,000. Jones settled her liability claim with the tortfeasor for $100,000. State Farm, as the primary insurer, is entitled to offset the entire $100,000 in liability proceeds, thereby reducing State Farm's liability to zero. However, Twin City's UIM coverage applies as the excess, secondary insurer, in the amount of $500,000. Applying this method of stacking and the statutory offset, Jones receives her entire expected UIM coverage benefit of $600,000; $100,000 from the tortfeasor's liability payment, and $500,000 from Twin City.

{20} We emphasize that the holding in this case is specific to the facts presented. Where a passenger is injured by a third-party tortfeasor who is entirely at fault and the damages exceed the amount of available UIM coverage from both the primary Class II insurer and the secondary Class I insurer, the primary insurer, who is required to pay first, is entitled to the statutory liability offset. Under a different set of facts, a different result may be warranted. We do not decide how the offset would be applied, for example, if both the driver of the vehicle in which the insured is a passenger and a third-party tortfeasor have a degree of fault in causing the accident or where, as in *Valencia,* there are multiple claimants. *See State Farm Mut. Auto. Ins. Co. v. Valencia,* 120 N.M. 662, 665, 905 P.2d 202, 205 (Ct.App. 1995) (holding that in the case of multiple

claimants, the statutory offset is the amount of the tortfeasor's liability coverage paid to the injured insured, which is not necessarily equal to the amount of liability coverage available). Additionally, we are not deciding a case like *Samora v. State Farm Mutual Automobile Insurance Co.*, 119 N.M. 467, 892 P.2d 600 (1995), or *Mountain States Mutual Casualty Co. v. Martinez*, 115 N.M. 141, 848 P.2d 527 (1993) (hereinafter *Martinez*), where there is no third-party tortfeasor, and the driver is solely at fault.

{21} We now turn to *Samora* and *Martinez*, and State Farm's argument that it is entitled to a contractual liability offset based on the language of the State Farm policy.

5. Contractual Offset

{22} State Farm argues that the district court reached the correct decision, but misapprehended the law. State Farm contends that its policy clearly and unambiguously provides for an offset of UIM coverage equal to the insured's liability recovery. Therefore, State Farm argues that it is entitled to a contractual offset of $100,000, and Twin City is entitled to a statutory offset of $100,000. We have already determined that State Farm, not Twin City, is the party entitled to the statutory offset. We now turn to the language of the policy. The State Farm policy contains the following contractual offset provision:

> 3. a. the most we will pay any one ***insured*** is the least of:
>
> (1) the amount by which the ***insured's*** damages for ***bodily injury*** exceed the amount paid to the ***insured*** by or for any ***person*** or organization who is or may be held legally liable for the ***bodily injury;*** or
>
> (2) the amount by which the ***insured's*** damages for ***bodily injury*** exceed the sum of the "each person" limits of liability of all bodily injury liability insurance coverages that apply to the accident; or
>
> (3) the amount by which the "each person" limit of this coverage exceeds the sum of the "each person" limits of liability of all bodily injury liability insurance coverages that apply to the accident. (Emphasis in original).

State Farm contends that since the "each person" limits of the liability insurance recovered by Jones and State Farm's UM coverage are both $100,000, there is a total offset of coverage. The amount of liability coverage received by Jones, the insured, is $100,000. The "each person" limit of UM/UIM coverage under the State Farm policy is $100,000. Therefore, according to State Farm, since the "each person" limit of $100,000 does not exceed the amount of liability insurance coverage that applies to the accident, which is $100,000, State Farm's net liability is zero. State Farm relies on *Samora* and *Martinez* to support its position that Class II coverage is governed by the terms of the insurance contract, thus the offset provision in the policy must be upheld. We disagree.

{23} The district court found, and we agree, that this policy language "simply follows the statutory language and confirms that as a primary insurer, [State Farm] is entitled to offset its coverage with any recoverable liability proceeds." The district court further found that *Martinez* and *Samora* are unpersuasive as applied to the facts of this case, and distinguishable from the present case. The district court held that State Farm was not entitled to a contractual offset. We agree that *Martinez* and *Samora* are distinguishable.

{24} The issue presented in *Martinez* was "whether a guest passenger should be allowed to recover . . . under both the liability and [UIM] provisions of a negligent host driver's insurance policy, even though a provision in the policy would prevent [such a] double recovery." *Martinez*, 115 N.M. at 141, 848 P.2d at 527. Rejecting a public policy argument to the contrary, our Supreme Court allowed the contractual limitation in the policy to stand, thus preventing *Martinez* from recovering under both the liability and UIM provisions of the host driver's policy. *Id.* at 143, 848 P.2d at 529. In upholding the contractual offset, the Court reasoned that Class II insured passengers are insured by virtue of their host driver's UIM provision, not by mandate of the stat-

ute, thus a Class II insured's coverage may be limited by the terms of an insurance contract without thwarting public policy. *Id.* at 142, 848 P.2d at 528. Martinez, as a Class II insured, did not pay a premium to the insurer of the vehicle in which she was a passenger, and thus she had no personal expectation of UIM coverage on that policy. *Id.* at 143, 848 P.2d at 529. The Court in *Martinez* found persuasive that to disallow a limitation on coverage that prevents a Class II injured passenger from collecting both liability and UIM coverage under the same policy would transform UIM insurance into liability insurance and thus create a duplication of liability benefits. *Id.*

{25} This distinction is important to our decision in the present case. In this case, unlike *Martinez,* the injured insured collected liability payments from a third-party tortfeasor, not the driver's Class II coverage. Jones is not attempting to collect both liability and UIM coverage from a Class II insurer, as was the case in *Martinez.* Thus, by declining to allow the contractual offset, there is no danger of turning UIM coverage into a secondary type of liability coverage, as the Court feared in *Martinez.* The policy reasons relied on by the Court in allowing the contractual offset in *Martinez* are simply not present in this case.

{26} *Samora* presented the issue of "whether an injured passenger's Class I coverage is reduced by a liability payment made by a Class II insurer when the same liability payment also reduced the Class II insurer's [UIM] coverage for the same injured passenger." *Samora,* 119 N.M. at 468, 892 P.2d at 601 (internal quotation marks and citation omitted). The parties in *Samora* did not dispute that based on the language of the Class II policy, the amount of liability coverage provided offset the entire amount of UIM coverage. *Id.* at 469, 892 P.2d at 602. Our Supreme Court in *Samora* determined that since the contractual offset in the Class II policy reduced the UIM coverage to zero, there was no Class II coverage to "stack" with Class I coverage. *Id.* at 469–70, 892 P.2d at 602–03. *Samora,* like *Martinez,* involved a situation where the driver of the vehicle was at fault for the accident, and the driver's insurer provided Class II liability coverage for the passenger. The Court allowed the Class II insurer to take a contractual offset based on the policy language, and then allowed the Class I insurer to take the statutory offset for liability payments. *Samora,* 119 N.M. at 470, 892 P.2d at 603. The Court reasoned that the second part of Section 66–5–301(B), which refers to the "insureds" UIM coverage, necessarily refers to the injured party's insurance company, the Class I insurer. Furthermore, the Court reasoned that allowing the contractual offset to the Class II insurer and the statutory offset to the Class I insurer does not result in a "double" offset because the two types of offsets are distinct; the contractual offset affects the recovery of a Class II insured, whereas the mandatory statutory offset applies to the Class I insurer. *Samora,* 119 N.M. at 471, 892 P.2d at 604. The Court noted that no double offset occurred because the insured did not recover an amount less than his UIM coverage under his own Class I policy, and in fact ended up recovering liability coverage in an amount in excess of his UIM coverage. *Id.*

{27} It is with some difficulty that we reconcile the holdings in *Martinez* and *Samora* with the holdings of the earlier cases such as *Morro, Tarango, Schmick, Jimenez,* and *Branchal.* We therefore address the distinguishing factors in these cases in detail. First, *Martinez* and *Samora,* two cases that allow a contractual offset on a Class II policy, do not involve liability payments from third-party tortfeasors. Since *Morro* and *Tarango* involve liability payments from a third-party tortfeasor, as in the present case, there is no danger of UIM coverage by the Class II insurer becoming another type of liability coverage. We believe this is a significant distinguishing feature because the policy reasons for supporting the contractual offset in *Martinez* and *Samora* are not present in *Morro* or *Tarango. Jimenez, Schmick,* and *Morro* all express a public policy to liberally construe the UIM statute to include coverage from one or more policies, specifically stating that coverage, should include all policies purchased by the insured, or by another for the insured's benefit. These cases are consistent with the general policy of UM/UIM coverage,

which is to protect persons injured through no fault of their own. *Martinez* and *Samora* however rely on the different status of Class II insureds to determine that a Class II insured is subject to the terms of the insurance contract, even if that means UIM coverage is entirely offset by policy language. The Court reasons that this does not violate public policy because Class II insured's have no contractual expectation of UIM coverage. *Samora*, 119 N.M. at 470, 892 P.2d at 603; *Martinez*, 115 N.M. at 143, 848 P.2d at 529. This rationale on its face seems contrary to earlier cases holding that coverage should include *all* policies purchased by the insured *or by another for the insured's benefit. See, e.g., Jimenez*, 107 N.M. at 325, 757 P.2d at 795; *Morro*, 106 N.M. at 671, 748 P.2d at 514; *Schmick*, 103 N.M. at 219–20, 704 P.2d at 1095–96. Furthermore, *Martinez* and *Samora* are silent on the effect of primary versus secondary insurer status, which the Supreme Court relied on in the cases of *Branchal* and *Tarango*.

{28} Finally, there is a strong public policy in New Mexico favoring full compensation of injured insureds. *Fickbohm v. St. Paul Ins. Co.*, 2003–NMCA–040, ¶ 21, 133 N.M. 414, 63 P.3d 517. "[O]ther insurance clauses may not be construed to prohibit recovery from more than one policy, at least to the extent of the injured's loss and the second policy's limits[.]" *Morro*, 106 N.M. at 672, 748 P.2d at 515 (internal quotation marks and citation omitted). In *Fickbohm*, we stated that "[w]here application of the offset would result in a limitation of UM/UIM coverage, the offset would not be enforceable." 2003–NMCA–040, ¶ 24, 133 N.M. 414, 63 P.3d 517. We further stated, "[w]henever insureds have UM/UIM coverage less than the amount of their damages, the offset cannot be enforced." *Id.* This Court stated it is "improper to allow an offset against UM/UIM payment which itself did not necessarily represent a full remedy." *Id.* ¶ 17 (citation omitted). We find this reasoning persuasive.

{29} A final reason for not allowing State Farm the contractual offset, and a statutory offset for Twin City, is that to do so would lead to an anomalous result. If we allow State Farm a contractual offset in the amount of liability coverage, $100,000, and allow Twin City the benefit of the statutory offset of $100,000, Jones would be left with a total payment of $500,000, which is less than the amount of UIM purchased for her benefit. Furthermore, allowing the two offsets in this case also leads to the absurd result that Jones would have had a greater recovery if she had been hit by a totally uninsured driver, rather than by an underinsured driver. If she had been hit by an uninsured driver, Jones would receive the entire $100,000 from State Farm in UM coverage because there would be no offset, plus $500,000 from Twin City's UM coverage. We doubt the legislature intended such a result when it enacted the UM statute, and we doubt that our case law interpreting the statute anticipated or would allow such an anomaly. *See Schmick*, 103 N.M. at 221, 704 P.2d at 1097 (striking down an exclusionary clause that would have resulted in the injured insured having a greater recovery if she was hit as a pedestrian, rather than being hit while driving her own insured vehicle.) For the foregoing reasons, we hold that State Farm is not entitled to a contractual offset.

CONCLUSION

{30} We summarize our holding as follows: Where a passenger is injured by a third-party tortfeasor who is entirely at fault, and the damages exceed the amount of available UIM coverage from both the primary Class II insurer and the secondary Class I insurer, the primary insurer is entitled to the benefit of the statutory offset for liability payments received. We further hold that State Farm is not entitled to a contractual offset based on the language of the policy, but, as the primary insurer in this case, is entitled to the statutory offset. Therefore, State Farm's net liability to Jones under its UIM provision is zero. We affirm.

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

WE CONCUR: IRA ROBINSON (concurring in result only) and MICHAEL E. VIGIL, Judges.

2006-NMCA-061
136 P.3d 570

**STATE of New Mexico,
Plaintiff–Appellee,**

v.

Teresa ROBBS, Defendant–Appellant.

No. 25,636.

Court of Appeals of New Mexico.

March 20, 2006.

Certiorari Denied, No. 29,750,
May 25, 2006.

Patricia A. Madrid, Attorney General, James W. Grayson, Assistant Attorney General, Santa Fe, NM, for Appellee.

Gary C. Mitchell, P.C., Gary C. Mitchell, Ruidoso, NM, for Appellant.

OPINION

CASTILLO, Judge.

{1} In this case, we must determine whether a tip provided by a named informant was sufficiently complete and reliable to provide reasonable suspicion for an investigatory stop regarding drugs. We also examine the scope of the resulting detention of the vehicle for thirty-five to forty minutes while officers awaited the arrival of a canine unit. We conclude that the tip was sufficiently reliable to provide reasonable suspicion because the informant was identified, the tip predicted the future movement of Defendant, and other significant facts provided in the tip were corroborated by the officers. We also conclude that detention of the vehicle was reasonable in light of the circumstances. Accordingly, we affirm.

I. BACKGROUND

{2} Detective Dan Aguilar of the Clovis Police Department received a tip from an individual who provided identification but requested that the identification be kept confidential. This informant told Detective Aguilar that Defendant and her husband would be delivering fourteen grams of methamphetamine to an address on Tom Watson Street in Clovis, New Mexico. The informant described their vehicle as a silver and white pickup with a personalized license plate, "GLR." Detective Aguilar contacted officers in the Region V Drug Task Force to report the details of the tip. He identified the informant and notified the officers of the informant's request that his identity remain confidential. Detective Aguilar contacted the officers later in the day to report that he had completed a registration check on the vehicle and that it was located in the 1400 block of Pile Street. When the officers first went to Pile Street, the truck was not there. Later, at about 6:45 p.m., Detective Aguilar again called the officers to report that the vehicle was on the 1400 block of Pile Street.

{3} The officers went to Pile Street for the second time, where they saw the pickup with the personalized license plate, as described in the tip. They saw the vehicle's lights come on; it then proceeded south toward the Tom Watson address. The officers followed the vehicle until it was within two or two and a half blocks from the destination described in the tip. They stopped the vehicle as Defendant was about to turn from a four-lane road

onto a narrow, poorly lit, two-lane road with no shoulder. The officers testified that for safety and investigative reasons, they did not want Defendant to reach the designated destination.

{4} The officers further testified as follows: They stopped Defendant to investigate whether she was in possession of methamphetamine, as reported in the tip; they did not stop Defendant for a traffic violation. Defendant and another woman were the occupants of the pickup. The officers told Defendant that they had been informed that Defendant was "carrying some dope." After Defendant denied that she was in possession of drugs and denied consent to search, the officers requested the assistance of a drug dog. The canine unit arrived approximately thirty-five to forty minutes later, and the dog alerted to the truck. After the dog alerted, the first search warrant was obtained. Although it is unclear as to when Defendant actually left, she conceded that she was free to leave after the initial questioning and, in fact, did so.

{5} The initial search revealed, in Defendant's purse, a crystal substance that field-tested positive for methamphetamine and, in a briefcase, glass pipes used to consume methamphetamine. Chemicals used to produce methamphetamine were found in the bed of the truck, which was covered by a camper shell. For safety reasons, the officers obtained a second search warrant for the bed of the truck so that any chemicals could be immediately destroyed. Subsequently, Defendant was charged with one count of trafficking by manufacturing of methamphetamine, a second-degree felony, NMSA 1978, § 30–31–20(A)(1) (1990), and one count of possession of a controlled substance, methamphetamine, a fourth-degree felony, NMSA 1978, § 30–31–23(A), (D) (2005).

{6} The district court denied Defendant's motion to suppress. Defendant pled no contest to two counts of possession of a controlled substance with intent to distribute, a third-degree felony, NMSA 1978, § 30–31–22(A)(2)(a) (2005), and one count of possession of a controlled substance, methamphetamine, § 30–31–23(A), (D). The plea was conditional and reserved Defendant's right to appeal the denial of her motion to suppress.

{7} Defendant argues that the evidence from the search should have been suppressed (1) because the tip was neither reliable nor sufficient to create reasonable suspicion for the investigatory stop and (2) because the scope of the investigatory stop was unreasonable and resulted in the improper seizure of Defendant's pickup without probable cause. Agreeing with the State, the district court found the tip to be sufficiently reliable to create reasonable suspicion. As to the scope of the stop, the district court determined that the length of detention was not an impermissible delay because the search was contemporaneous with an arrest. The State does not contend that the search was contemporaneous with an arrest; rather, it asserts that the stop did not exceed the permissible scope of the investigation. *See State v. Rector*, 2005–NMCA–014, ¶ 9, 136 N.M. 788, 105 P.3d 341 (stating that this Court "will affirm the trial court if it is right for any reason" (internal quotation marks and citation omitted)). The relevant facts are undisputed.

II. DISCUSSION

A. Standard of Review

{8} Reviewing a motion to suppress concerns mixed questions of fact and law. *State v. Urioste*, 2002–NMSC–023, ¶ 6, 132 N.M. 592, 52 P.3d 964. When substantial evidence exists to support the district court's findings of fact, we ask "whether the law was correctly applied to the facts, viewing them in a manner most favorable to the prevailing party." *State v. Werner*, 117 N.M. 315, 317, 871 P.2d 971, 973 (1994) (internal quotation marks and citation omitted); *see Urioste*, 2002–NMSC–023, ¶ 6, 132 N.M. 592, 52 P.3d 964. When we are asked to determine whether there is reasonable suspicion to detain and question an individual about drugs, we look at the evidence "in the light most favorable to the district court ruling." *State v. Van Dang*, 2005–NMSC–033, ¶ 14, 138 N.M. 408, 120 P.3d 830. "[A]ll reasonable inferences in support of the court's decision will be indulged in, and all inferences or evidence to the contrary will be disregarded." *Werner*,

117 N.M. at 317, 871 P.2d at 973 (internal quotation marks and citation omitted).

{9} Questions of reasonable suspicion are reviewed de novo by looking at the totality of the circumstances to determine whether the detention was justified. *Van Dang*, 2005–NMSC–033, ¶ 14, 138 N.M. 408, 120 P.3d 830; *Urioste*, 2002–NMSC–023, ¶ 6, 132 N.M. 592, 52 P.3d 964. "[A] determination of whether the officer ... made an illegal de facto [seizure], or simply conducted a permissible detention," is a question of reasonableness, an issue of law, which "requires the balancing of legitimate law enforcement interests against a defendant's privacy rights, a policy decision which the trial court is in no better position to make than an appellate court." *Werner*, 117 N.M. at 316–17, 871 P.2d at 972–73.

B. Constitutional Protections

{10} Defendant generally asserts that the investigatory stop was a violation of both the United States Constitution and the New Mexico Constitution. She relies on *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), *abrogated by Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (reaffirming "the totality-of-the-circumstances analysis that traditionally has informed probable-cause determinations"), and the two-pronged test for probable cause in her argument that the New Mexico Constitution was violated. *See State v. Cordova*, 109 N.M. 211, 212, 217, 784 P.2d 30, 31, 36 (1989) (holding that the *Aguilar–Spinelli* test is properly used, under Article II, Section 10, of the New Mexico Constitution, to determine whether probable cause exists to obtain a search warrant that is based on affidavits containing hearsay). Defendant also argues that seizure of the truck was unreasonable because no exception to the warrant requirement was applicable. *See State v. Gomez*, 1997–NMSC–006, ¶¶ 1–2, 122 N.M. 777, 932 P.2d 1 (holding that under Article II, Section 10, of the New Mexico Constitution, the State must show reasonable grounds for the belief that exigent circumstances existed to justify a warrantless search of an automobile). Because we decide that the issue presented is one of reasonable suspicion rather than probable cause, we analyze the circumstances here only under the Fourth Amendment of the United States Constitution. Defendant provides no argument that the New Mexico Constitution provides greater protections for issues involving reasonable suspicion.

{11} By prohibiting unreasonable searches and seizures, the Fourth Amendment protects "[t]he right of the people to be secure in their persons ... and effects." U.S. Const. amend. IV; *State v. Morales*, 2005–NMCA–027, ¶ 9, 137 N.M. 73, 107 P.3d 513. The central inquiry is reasonableness. *Terry v. Ohio*, 392 U.S. 1, 19–20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Attaway*, 117 N.M. 141, 149, 870 P.2d 103, 111 (1994) (stating that the "ultimate question in all cases ... is whether the search and seizure was reasonable"). Determining whether a seizure or search is reasonable involves two questions: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 19–20, 88 S.Ct. 1868.

C. Investigatory Stop

{12} A police officer may make an investigatory stop if, under the totality of the circumstances, he has a reasonable and objective basis for suspecting a particular person has committed or is committing a crime. *Werner*, 117 N.M. at 317, 871 P.2d at 973; *see also Urioste*, 2002–NMSC–023, ¶ 10, 132 N.M. 592, 52 P.3d 964 ("[T]he officer must look at ... the whole picture." (internal quotation marks and citation omitted)). The officer's suspicion must rest on specific, articulable facts, "which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21, 88 S.Ct. 1868 (footnote omitted). "The level of suspicion required for an investigatory stop is considerably less than proof of wrongdoing by a preponderance of the evidence." *Urioste*, 2002–NMSC–023, ¶ 10, 132 N.M. 592, 52 P.3d 964 (internal quotation marks and citation omitted).

{13} Reasonable suspicion depends on the reliability and content of the information possessed by the officers. *State v. Contreras,* 2003–NMCA–129, ¶ 5, 134 N.M. 503, 79 P.3d 1111. In our case, reasonable suspicion for the investigatory stop of Defendant rested on a tip provided by a named source who wanted his identity kept confidential. The reliability of a tip from a named source can be gauged more readily than a tip from an anonymous source because the veracity of the anonymous person is "unknown and unknowable." *Urioste,* 2002–NMSC–023, ¶ 7, 132 N.M. 592, 52 P.3d 964 (internal quotation marks and citations omitted). In *Urioste,* our Supreme Court analyzed the tip as anonymous because the state presented no evidence that the information came from a known source whose reputation could be examined and who could be held responsible if the information was false. *Id.* ¶ 8. Here, however, an officer testified that the informant identified himself to Detective Aguilar and that Detective Aguilar identified the informant to the Clovis police when Detective Aguilar relayed the tip. Thus, we analyze the tip's reliability in light of the fact that the officers knew the identity of the informant at the time the officers stopped Defendant. The informant, because he identified himself to Detective Aguilar, could have been held accountable if the information was false. We conclude that the tip regarding Defendant was more reliable than an anonymous tip.

{14} Moreover, an informant's ability to predict a person's future behavior demonstrates a "special familiarity" with that individual's affairs. *Id.* ¶ 11 (internal quotation marks and citation omitted). This familiarity is an indication that the informant has access to reliable information about a person's illegal activities. *Id.* When significant aspects of the information are verified, an officer can reasonably believe in both the reliability of the information and the informant's veracity. *Id.* Thus, the defendant's movement through time is the most important factor in assessing whether an officer's suspicion based on an informant's tip is reasonable. *Id.* ¶ 14.

> If the tipster can be said to be in on an action that is taken by the suspect in the future, from the point of view of the time the tip is given, then as a matter of law, the asserted illegality can be associated with the prediction so as to increase the reliability of the tip.

Id. Finally, in determining "whether enough facts were corroborated beyond the basic and important future movement factor," we compare the number and type of corroborated facts to those in previous cases in which courts have held that the corroborated facts rose to the level of reasonable suspicion. *Id.* ¶ 15.

{15} The tip in the case here is more reliable than the tip in *Urioste.* In *Urioste,* the police received a tip at approximately 4:30 p.m. *Id.* ¶ 2. The informant described the vehicle, driver, route, and time of the defendant's movement in the future. *Id.* Our Supreme Court concluded that the accurate prediction of the defendant's future movement in time and place, combined with the other facts in the tip that were corroborated by the officer, was sufficient to provide reasonable suspicion. *Id.* ¶¶ 14–15.

{16} Our case is very similar to *Urioste.* The tip correctly predicted Defendant's future movement. The officers corroborated Defendant's future movement when they followed the vehicle that she was driving to within two and a half blocks of the destination provided by informant. The officers also corroborated the description of the vehicle, including the personalized license plate. Defendant argues that the absence of her husband from the vehicle was an indication that the tip was not reliable. However, it was reasonable for the officers to believe that the husband was present in the vehicle prior to the stop because they were following a vehicle that had two occupants. *See Florida v. J.L.,* 529 U.S. 266, 271, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000) ("The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search.").

{17} Defendant argues that the tip in her case is more like the tip found to be insufficient in *J.L.* than the tip found to be sufficient in *Urioste.* *See J.L.* at 268, 120 S.Ct. 1375 (concluding that an anonymous tip, which merely identified the defendant as a

young African–American male who was wearing a plaid shirt, standing at a specific bus stop, and carrying a gun, was insufficient to create reasonable suspicion); *see also Morales,* 2005–NMCA–027, ¶¶ 1–2, 137 N.M. 73, 107 P.3d 513 (holding that an anonymous tip was unreliable when it reported that two individuals, in a blue vehicle at a specific intersection, were acting suspiciously and were possibly armed). We disagree. The tip in *J.L.* merely described a "status quo," and the officers in that case did not observe the defendant moving in accordance with the tip. *Urioste,* 2002–NMSC–023, ¶ 13, 132 N.M. 592, 52 P.3d 964 ("It is much more difficult to form a reasonable suspicion when only a status quo is reported to police and that is all they see."); *see also J.L.,* 529 U.S. at 271–72, 120 S.Ct. 1375. The officers in our case observed the future movements of Defendant in accordance with the tip when they followed the specifically described vehicle to within two and a half blocks of the reported destination.

{18} Defendant also alleges that the tip was inherently unreliable because the informant was an acquaintance of Defendant's and, seeking revenge, set her up. Defendant presents no evidence that the officers were aware of any relationship between the informant and Defendant at the time of the tip and the subsequent investigatory stop. Thus, even if these allegations are true, the reasonableness of the stop and detention is not affected. *See J.L.,* 529 U.S. at 271, 120 S.Ct. 1375.

{19} We conclude that the tip was sufficiently reliable and complete because the identity of the informant was known to the officers and because significant aspects of the tip, including Defendant's future movement, were corroborated by the officers prior to the stop. Under the totality of these circumstances, the tip provided specific articulable facts, corroborated by the officers, that were sufficient to give the officers reasonable suspicion that Defendant was in possession of narcotics. *See State v. 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."); *cf. Contreras,* 2003–NMCA–129, ¶ 5, 134 N.M. 503, 79 P.3d 1111 ("Because the facts surrounding the anonymous tip and investigatory stop are viewed in light of the totality of the circumstances, a deficiency in one consideration can be compensated for by the strength in another consideration or by some indicia of reliability."). Our resolution of the first issue leads us to the second question regarding an investigatory stop: "whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry,* 392 U.S. at 20, 88 S.Ct. 1868.

D. Scope of the Stop

{20} Defendant argues that detaining the vehicle was an unreasonable seizure that required probable cause. Existing law provides no support for Defendant's position. "An officer who makes a valid investigatory stop may briefly detain those he suspects of criminal activity to verify or quell that suspicion." *Werner,* 117 N.M. at 317, 871 P.2d at 973 (using *Terry* and subsequent related cases to examine a de facto arrest). The United States Supreme Court applied the principles of *Terry* to the seizure of property in *United States v. Place,* 462 U.S. 696, 706, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) ("[T]he principles of *Terry* and its progeny . . . permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope."). If the nature and extent of the detention minimally intrude on an individual's Fourth Amendment interests, "opposing law enforcement interests can support a seizure based on less than probable cause." *Id.* at 703, 103 S.Ct. 2637. Only when a detention exceeds the limits of a permissible investigatory stop does the detention require probable cause. *Flores,* 1996–NMCA–059, ¶ 15, 122 N.M. 84, 920 P.2d 1038. We use "common sense and ordinary human experience" to determine whether the detention violates Fourth Amendment protections. *Werner,* 117 N.M. at 317–18, 871 P.2d at 973–74 (internal quotation marks and citation omitted).

{21} There are several factors that must be considered when we determine whether the scope of an investigatory stop is permissible: the government's justification for the detention, the character of the intrusion on the individual, the diligence of the police in conducting the investigation, and the length of the detention. First, in determining whether there is a reasonable justification for the detention, we balance the government's justification for the official intrusion against the character of the intrusion on a person's right to be free from police interference. *Id.* at 318, 871 P.2d at 974; *see also Contreras,* 2003–NMCA–129, ¶ 13, 134 N.M. 503, 79 P.3d 1111 (weighing "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty"). Thus, we balance the government's interest in preventing the use and distribution of methamphetamine against Defendant's right to be free from official investigation through the use of a drug dog. *Cf. Contreras,* 2003–NMCA–129, ¶ 13, 134 N.M. 503, 79 P.3d 1111 (balancing "the possible threat of drunk driving to the safety of the public with [the d]efendant's right to be free from unreasonable seizure").

{22} The government has a significant interest in preventing the use and distribution of an illegal substance, such as methamphetamine. *See Place,* 462 U.S. at 703, 103 S.Ct. 2637 (discussing the government's substantial interest in seizing luggage to investigate a reasonable belief that the luggage contains narcotics). As to the type of intrusion, use of a drug dog to conduct a narcotics investigation is a minimal intrusion. *Id.* at 707, 103 S.Ct. 2637 ("We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure."); *see also Illinois v. Caballes,* 543 U.S. 405, 409, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005) (stating that the use of a drug dog during a lawful stop "generally does not implicate legitimate privacy interests"). Thus, the government's interest in deterring methamphetamine use, coupled with its general interest in effective crime prevention and detection, substantially outweighs the minimal intrusion on Defendant's liberty through the use of a drug dog.

{23} Second, the scope of the search and seizure must be justified by and limited to the circumstances that created reasonable suspicion for the stop. *Terry,* 392 U.S. at 17–19, 88 S.Ct. 1868. "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer,* 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). Relying on *State v. Prince,* 2004–NMCA–127, 136 N.M. 521, 101 P.3d 332, Defendant argues that the scope of the stop was impermissibly expanded because "[o]fficers may not use a lawful stop to fish for evidence of other crimes where there is insufficient reason to detain a defendant beyond the purpose of the initial detention." *See id.* ¶ 19. We emphasize the fact that the officers did not make a traffic stop; rather, they made a stop to investigate their reasonable suspicion with respect to the possession and distribution of methamphetamine. Thus, Defendant's reliance on *Prince* is misplaced because the stop in *Prince* was for a traffic violation. *See id.* ¶ 11. As discussed earlier, the officers in our case had reasonable suspicion to make an investigatory stop regarding Defendant's possession of methamphetamine. Further, the vehicle was detained to effectuate the purpose of the stop—to quickly confirm or dispel the officers' suspicions, regarding methamphetamine, by using a drug dog. *See Carter v. State,* 143 Md.App. 670, 795 A.2d 790, 801 (Ct.Spec.App.2002) ("The *Terry*-stop in this case was from the outset an investigation into a suspected narcotics violation. The use of a drug-sniffing canine was in the direct service of that purpose and was not a gratuitous investigative technique hoping to piggyback on an unrelated traffic stop.").

{24} Defendant further argues that her detention was unlawful, in light of *Flores,* because the investigatory stop must come to an end when the initial suspicion of illegal conduct is dispelled. *See Flores,* 1996–NMCA–059, ¶ 13, 122 N.M. 84, 920 P.2d 1038 ("Once the officers failed to uncover any drugs at the roadside stop, the very rationale for the stop, to verify or quell . . . suspicion, was exhausted." (internal quotation marks

and citation omitted)). *Flores* is distinguishable from the case at hand. There were two seizures in *Flores*. *Id.* ¶ 12. At the initial stop, the roadside search took about an hour. *Id.* ¶ 4. During that time, the defendant consented to a search of his vehicle. *Id.* ¶ 3. In the resulting search, officers failed to find any drugs, and a narcotics dog failed to alert to the presence of any drugs. *Id.* This Court concluded that the initial detention was lawful because "the methods used by the officers at the roadside were designed to verify or dispel their suspicions." *Id.* ¶ 11 (internal quotation marks and citation omitted). After the roadside search, the police moved the vehicles and drivers to a warehouse for an exhaustive search, lasting two to three hours. *Id.* ¶ 12. Because the officers' suspicions had been quelled at the roadside stop, the reasonableness of the investigatory stop ended after the first search. *Id.* ¶ 13.

{25} In the roadside stop in our case, the officers' suspicions were not dispelled after the initial questioning of Defendant; thus, additional articulable facts were not necessary to justify the detention of the vehicle. Defendant was extremely nervous during the initial questioning. After she denied consent to search, the officers requested a drug dog to quickly confirm or dispel their continuing suspicions. Within forty minutes after the officers stopped the vehicle and tried to obtain consent, the canine unit arrived, and the dog alerted to the illegal substances within Defendant's vehicle. It was only after the dog arrived and alerted to the illegal substances that there was any resolution to the officers' suspicions.

{26} Moreover, Defendant asserts that she exhibited no unlawful conduct that would justify detention of the vehicle. This argument also fails. Notwithstanding the fact that reasonable suspicion already existed, based on the tip, we note that reasonable suspicion "can arise from wholly lawful conduct." *Urioste*, 2002–NMSC–023, ¶ 10, 132 N.M. 592, 52 P.3d 964 (internal quotation marks and citations omitted).

{27} Although the State contends that Defendant did not clearly address the temporal scope of the stop, we read her brief to challenge the length of the detention. Because the duration of a stop is a factor in determining reasonableness, we consider Defendant's argument. *See Van Dang*, 2005–NMSC–033, ¶¶ 14–16, 138 N.M. 408, 120 P.3d 830 (reviewing the totality of the circumstances, including duration and scope of questioning, to determine whether the detention was justified). "[T]he brevity of the invasion . . . is an important factor . . ., [and] in assessing the effect of the length of the detention, we take into account whether the police diligently pursue their investigation." *Place*, 462 U.S. at 709, 103 S.Ct. 2637 (concluding that the police "had ample time to arrange for their additional investigation at that location, and thereby could have minimized the intrusion on respondent's Fourth Amendment interests"); *Werner*, 117 N.M. at 319, 871 P.2d at 975 ("Diligence in the investigation is key[.]").

{28} In *Werner*, the scope of the detention violated the defendant's Fourth Amendment rights when, fifteen to twenty minutes after the initial stop, he was moved to the back seat of a locked patrol car, where he remained for more than forty-five minutes. 117 N.M. at 318, 871 P.2d at 974. The officer told the defendant that he could not leave or move his car. *Id.* His freedom of movement was thereby severely limited. *Id.* ("[A] reasonable person in Werner's position would have felt deprived of his freedom in a significant way."). Our Supreme Court concluded that this was a significant intrusion, which outweighed the government's interest in preventing flight and destruction of evidence. *Id.* at 318–19, 871 P.2d at 974–75. Moreover, the Court concluded that the police did not act with diligence because they detained the defendant while "awaiting the development of circumstances off the scene." *Id.* at 319, 871 P.2d at 975 ("If authorities, acting without probable cause, can seize a person, hold him in a locked police car for over forty-five minutes while gathering witnesses, and keep him available for arrest in case probable cause is later developed, the requirement for probable cause for arrest has been turned upside down.")

{29} The investigatory stop in our case is decidedly different from that in *Werner*. First, Defendant's freedom of movement was

not severely restricted. Defendant was told she was free to leave, and she did so. Second, as discussed earlier, the government's substantial interest in preventing the use and distribution of methamphetamine outweighs the minimal intrusion that occurs with the use of a drug dog. Finally, the officers clearly acted with diligence. The record reveals that after Defendant refused consent to search, the officers immediately requested the assistance of a drug dog. The canine unit arrived within thirty-five to forty minutes after the officers stopped the vehicle and tried to obtain consent. A delay of this duration is not unreasonable when the off-duty officer on call with the drug dog lived approximately ten miles, seventeen minutes travel time, from the stop. *See United States v. Bloomfield,* 40 F.3d 910, 917 (8th Cir.1994) ("When police need the assistance of a drug dog in roadside *Terry* stops, it will in general take time to obtain one; local government police forces and the state highway patrol cannot be expected to have drug dogs immediately available to all officers in the field at all times."); *Van Dang,* 2005-NMSC-033, ¶¶ 3, 15, 16, 138 N.M. 408, 120 P.3d 830 (concluding that the duration of the detention was proper because it resulted from the officer's legitimate attempts to contact the rental agency and took no longer than necessary). Finally, the officers' use of a drug dog was a means of investigation that would dispel or confirm their suspicions quickly. *State v. Graves,* 119 N.M. 89, 94, 888 P.2d 971, 976 (Ct.App.1994) ("In examining whether a detention is reasonable under the circumstances, a court must determine . . . whether the officers diligently pursued a means of investigation that would dispel or confirm their suspicions quickly." (internal quotation marks and citation omitted)).

{30} Other jurisdictions have concluded that similar detentions of people or property are reasonable when an off-site drug dog has been summoned to investigate reasonable suspicion of drug crimes. *See United States v. White,* 42 F.3d 457, 460 (8th Cir.1994) (an hour-and-twenty-minute stop); *Bloomfield,* 40 F.3d at 917 (a one-hour stop); *United States v. French,* 974 F.2d 687, 690, 692 (6th Cir.1992) (drug dog called from fifty miles away); *United States v. Mondello,* 927 F.2d 1463, 1471 (9th Cir.1991) (a thirty-minute stop); *United States v. Sterling,* 909 F.2d 1078, 1081 (7th Cir.1990) (an hour-and-fifteen-minute detention of property); *United States v. Hardy,* 855 F.2d 753, 761 (11th Cir.1988) (a fifty-minute stop); *Cresswell v. State,* 564 So.2d 480, 481, 483 (Fla.1990) (a fifty-minute stop); *State v. Brumfield,* 136 Idaho 913, 42 P.3d 706, 710 (Ct.App.2001) (a forty-nine-minute stop); *State v. Gant,* 637 So.2d 396, 397 (La.1994) (per curiam) (a thirty-minute stop); *Carter,* 795 A.2d at 805 (a thirty-five-minute stop).

III. CONCLUSION

{31} Based on the tip provided by a named informant, the officers had reasonable suspicion that Defendant had or was engaged in criminal conduct because the tip accurately predicted the future movement of Defendant and because other significant aspects of the tip were corroborated by the officers. Moreover, detention of the vehicle for thirty-five to forty minutes to await a canine unit was within the permissible scope of the investigatory stop; the officers acted diligently, with minimal intrusion, to verify or dispel their reasonable suspicion that Defendant was in possession of methamphetamine with the intent to distribute. Therefore, we affirm the district court's denial of Defendant's motion to suppress evidence.

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

WE CONCUR: A. JOSEPH ALARID and CYNTHIA A. FRY, Judges.

2006-NMCA-062

136 P.3d 579

STATE of New Mexico,
Plaintiff–Appellee,

v.

Virgil WILLIAMS, Defendant–Appellant.

No. 25,031.

Court of Appeals of New Mexico.

April 10, 2006.

Certiorari Denied, No. 29,785, June 2, 2006.

Patricia A. Madrid, Attorney General, Anita Carlson, Assistant Attorney General, Santa Fe, NM, for Appellee.

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

OPINION

CASTILLO, Judge.

{1} In this case, we must determine if an individual's Fourth Amendment rights are implicated when a law enforcement officer requests a driver's license from the driver of a parked car. Because a reasonable person, in these circumstances, would not feel free to disregard the police officer's request for a driver's license, we conclude that Defendant was detained and that the detention must be justified by individualized reasonable suspi-

cion. We also conclude that before requesting the driver's license, the officer did not have specific, articulable facts to create an individualized reasonable suspicion of criminal activity on the part of Defendant. Accordingly, we reverse the district court's denial of Defendant's motion to suppress.

I. BACKGROUND

{2} Officer Brad Riley, the arresting officer, was the only witness presented at the hearing on the motion to suppress; the following facts derive primarily from his testimony. At about 10 p.m., Officer Riley was driving down Avenue L, in the usual manner of patrol during his shift. As he approached the residence at 402 West Avenue L, he observed the vehicle in which Defendant was sitting, a black Suburban, parked on the side of the street in front of the residence. This residence was the home of Pedro Contreras, an individual who had outstanding felony warrants. Officer Riley, in previous attempts to locate Mr. Contreras, had been to this residence several times before. On this particular evening, Officer Riley observed Defendant's vehicle and saw "someone leaning in from the passenger side into the vehicle." Officer Riley could not see who was driving the vehicle or determine the gender of the individual leaning into the vehicle from the passenger side.

{3} When Officer Riley saw the vehicle, he turned around and pulled in behind it without engaging his overhead emergency lights. The vehicle was not illegally parked. Officer Riley saw no illegal activity. He saw what he considered to be suspicious activity because someone was "leaning into a vehicle in front of the residence" of Mr. Contreras. Officer Riley concluded that this activity, coupled with the hour, about 10 p.m., was suspicious. After he notified the dispatcher, Officer Riley got out of his patrol car and approached the vehicle to see if Mr. Contreras was the driver. Officer Riley knew as soon as he saw Defendant, prior to the request for a driver's license, that Defendant was not Mr. Contreras because Officer Riley knew Mr. Contreras by sight. Nevertheless, Officer Riley "went up and made contact with the driver, asked for his driver's license, some type of identification to identify him." After asking Defendant for his driver's license, Officer Riley recognized the person leaning into the vehicle as Cheryl Montgomery, an individual who, according to Officer Riley, was "a known user of illegal drugs" and was usually in possession of drugs or paraphernalia.

{4} When Defendant was unable to provide Officer Riley with a driver's license, Defendant identified himself verbally by name and date of birth. Officer Riley then used that information to "run a driver's license check to make sure [Defendant] could operate a motor vehicle," since he "was in operation and control of the vehicle and said he had driven there." Officer Riley also ran a warrant check on Defendant and Ms. Montgomery. Defendant overheard the radio dispatcher notifying Officer Riley that a possible warrant existed. At that point, Defendant began to move around in the vehicle, and Officer Riley told him not to reach for anything. Officer Riley then asked Defendant to get out of the vehicle and advised him that he was being detained until it was determined whether the warrant did exist. Officer Riley placed Defendant in handcuffs and seated him in the patrol car. Defendant was placed under arrest when the warrant was confirmed; Officer Riley completed a search incident to arrest and found drugs in the car.

{5} Defendant was charged with violations of NMSA 1978, § 30–31–22 (2005), distribution of a controlled substance, and NMSA 1978, § 30–31–25.1 (2001), possession of drug paraphernalia. At the pretrial conference, Defendant questioned the validity of the stop in an oral motion to suppress. The district court, ruling from the bench, denied the motion:

> In this particular case, I believe that the officer was able to articulate at each juncture the reasoning that was justifiable and constitutionally permitted for his contact with the car. Upon given [sic] his description of the area, the time, the address, his extensive experience both with the occupant, allegedly, of a residence and then with the woman that was there, I think he took proper steps.

> Once he determined that there was no driver's license and these other issues were present, the outstanding warrant, I think he made an appropriate constitutionally permitted search, and the motion to suppress is denied.

Defendant reserved his right to appeal the denial of his motion to suppress when he entered a conditional guilty plea.

II. DISCUSSION

A. Standard of Review

{6} Appellate review of a motion to suppress is a mixed question of fact and law. *State v. Reynolds,* 119 N.M. 383, 384, 890 P.2d 1315, 1316 (1995). We review the facts under a substantial evidence standard, in a manner most favorable to the prevailing party, and we review de novo the application of law to the facts. *Id.; State v. Boeglin,* 100 N.M. 127, 132, 666 P.2d 1274, 1279 (Ct.App. 1983). Since the facts here are undisputed, we review only the district court's application of law to those facts. *State v. Gutierrez,* 2004–NMCA–081, ¶ 4, 136 N.M. 18, 94 P.3d 18. We review de novo whether reasonable suspicion existed to justify Defendant's initial detention. *State v. Lackey,* 2005–NMCA–038, ¶ 6, 137 N.M. 296, 110 P.3d 512.

B. Fourth Amendment Protections

{7} Defendant argues that his rights under the Fourth Amendment of the United States Constitution were violated; he does not argue that the New Mexico Constitution provides greater protection. Thus, we examine the circumstances presented here only under Fourth Amendment standards. *Lackey,* 2005–NMCA–038, ¶ 7, 137 N.M. 296, 110 P.3d 512.

{8} The Fourth Amendment protects an individual from unreasonable seizures and searches. U.S. Const. amend. IV. Reasonableness is determined by balancing the intrusion on an individual's Fourth Amendment rights against the government's legitimate interests. *Delaware v. Prouse,* 440 U.S. 648, 653–54, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *Reynolds,* 119 N.M. at 385, 890 P.2d at 1317. The facts used to justify an intrusion must be measurable by an objective standard because an individual's reasonable expectation of privacy cannot be at the mercy of a field officer's discretion. *Brown v. Texas,* 443 U.S. 47, 51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) (noting that the protection of an individual's Fourth Amendment rights from an officer's "unfettered discretion" is a central concern in balancing the competing interests of government and individual liberty); *Prouse,* 440 U.S. at 654–55, 99 S.Ct. 1391.

{9} Not all police-citizen encounters are seizures subject to the Fourth Amendment. *State v. Javier M.,* 2001–NMSC–030, ¶ 36, 131 N.M. 1, 33 P.3d 1. Consensual encounters, those in which a citizen feels free to leave, generally do not implicate constitutional protections. *Id.; State v. Morales,* 2005–NMCA–027, ¶ 10, 137 N.M. 73, 107 P.3d 513. The State contends that Officer Riley's encounter with Defendant was consensual. We disagree.

C. Consensual Encounter Versus Seizure

{10} Our Court of Appeals, in *State v. Walters,* 1997–NMCA–013, 123 N.M. 88, 934 P.2d 282, discussed consensual encounters:

> The test for determining if a police-citizen encounter is consensual depends on whether, under the totality of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. The test is an objective one based upon a reasonable person standard, not the subjective perceptions of the particular individual. The test presumes an innocent reasonable person. In making this determination, the court should consider the sequence of the officer's actions and how a reasonable person would perceive those actions. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred.

Id. ¶ 12 (internal quotation marks and citations omitted).

{11} When an officer communicates to an individual that he is not free to refuse the officer's request, the encounter is not consensual. *See id.* It becomes a seizure that must be justified by reasonable suspicion. An officer may approach a person to ask questions or request identification, without any basis for suspecting that particular individual, "as long as the police do not convey a message that compliance with their requests is required." *Florida v. Bostick,* 501 U.S. 429, 435, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); *State v. Jason L.,* 2000–NMSC–018, ¶ 14, 129 N.M. 119, 2 P.3d 856.

1. Totality of the Circumstances

{12} Generally, a court examines the officer's actions, in the totality of the circumstances, to ascertain whether the officer used physical restraint or exhibited a show of authority that would prevent a reasonable person from feeling free to leave. *See State v. Baldonado,* 115 N.M. 106, 108, 110, 847 P.2d 751, 753, 755 (Ct.App.1992).

> The determination of a seizure has two discrete parts: (1) what were the circumstances surrounding the stop, including whether the officers used a show of authority; and (2) did the circumstances reach such a level of accosting and restraint that a reasonable person would have believed he or she was not free to leave? The first part is a factual inquiry, which we review for substantial evidence. The second part is a legal inquiry, which we review de novo.

Jason L., 2000–NMSC–018, ¶ 19, 129 N.M. 119, 2 P.3d 856.

{13} In evaluating whether a reasonable person would feel free to leave, we look to three factors: (1) the police conduct, (2) the person of the individual citizen, and (3) the physical surroundings existing at the time of the encounter. *Id.* ¶ 15.

a. The Officer's Conduct

{14} In our case, Officer Riley, while in the course of his regular patrol, observed Defendant's vehicle legally parked on the side of the street. Officer Riley saw "someone leaning in from the passenger side into the vehicle." He did not observe any illegal activity, but he was suspicious because it was late, about 10 p.m., and a person was leaning into a vehicle that was parked in front of a residence belonging to an individual with outstanding warrants. After passing Defendant's vehicle, Officer Riley turned around in the street and pulled up behind the vehicle, without engaging his emergency lights. He notified dispatch that he was going to be out with a vehicle; then he "got out of [his] car, went up and made contact with the driver, [and] asked for [Defendant's] driver's license." There were no preliminary questions; Defendant did not initiate the encounter, and the officer did not begin the encounter "in a conversational manner." *See* 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.4(a), at 426 (4th ed.2004) (internal quotation marks and citation omitted).

b. The Defendant's Person

{15} Defendant is clearly a "driver" under New Mexico law. NMSA 1978, § 66–1–4.4(K) (1999), defines "driver" as "every person who drives or is in actual physical control of a motor vehicle, including a motorcycle, upon a highway, who is exercising control over or steering a vehicle being towed by a motor vehicle or who operates or is in actual physical control of an off-highway motor vehicle." An individual is in actual physical control of a vehicle when he has direct influence over the vehicle. *State v. Johnson,* 2001–NMSC–001, ¶ 19, 130 N.M. 6, 15 P.3d 1233. In other words, a person has actual physical control over the vehicle when he is in a situation in which he can directly begin to operate the vehicle. *Id.* Moreover, a person who is in actual physical control of a moving or nonmoving vehicle is "operating" a motor vehicle. UJI 14–4511 NMRA; *see State v. Laney,* 2003–NMCA–144, ¶ 40, 134 N.M. 648, 81 P.3d 591 (discussing the UJI 14–4511 "operating" instruction, which relies on the definition of "driver" used in Section 66–1–4.4(K)). Further, "[e]very licensee shall have his driver's license in his immediate possession . . . when operating a motor vehicle and shall display the license upon demand of [an] officer." NMSA 1978, § 66–

5–16 (1985). Finally, the definitions of "operating" and "driver" do not distinguish between a moving vehicle and a nonmoving vehicle; the driver of a nonmoving vehicle, one who is in actual physical control, is operating a vehicle and is required to display a license on demand, just as the driver of a moving vehicle is required to produce a license when he has been validly stopped. *See id.;* § 66–1–4.4(K); UJI 14–4511; *see also* NMSA 1978, § 66–1–4.13(E) (1990) (" '[O]perator' means driver, as defined in Section 66–1–4.4[.]"). Thus, Defendant was a driver who was required to produce a driver's license if an officer made such a request.

i. Drivers of Moving Vehicles

{16} New Mexico courts have previously held that the driver of a moving vehicle, detained by a valid stop, is not free to leave when asked to produce a driver's license. *Reynolds,* 119 N.M. at 385, 890 P.2d at 1317 (asking "whether [the officer's] request for identification was justified at its inception" (internal quotation marks and citation omitted)); *see State v. Affsprung,* 2004–NMCA–038, ¶ 15, 135 N.M. 306, 87 P.3d 1088 (holding that a passenger is not free to leave and refuse an officer's request for identification in the context of an ordinary traffic stop because the driver is not free to refuse an officer's request for identification and documentation). Thus, a request for license, registration, and documents of the driver of a moving vehicle is a seizure. *Reynolds,* 119 N.M. at 384–85, 890 P.2d at 1316–17 (using a seizure analysis to determine whether the officer could ask for a driver's license); *Affsprung,* 2004–NMCA–038, ¶ 15, 135 N.M. 306, 87 P.3d 1088 ("[T]he driver is not free to refuse an officer's request for identification and documentation[.]"). Although the circumstances in *Reynolds* and *Affsprung* involve stops of moving vehicles, we believe that these cases provide guidance in the circumstances of our case. Under New Mexico law, Defendant is a driver and is subject to the same laws as a driver of a moving vehicle. We conclude that Defendant in this case, a driver of a nonmoving vehicle, was not free to leave when the officer, without preamble, requested a driver's license because a driver of a vehicle, moving or nonmoving, is required by law to produce a driver's license on demand.

ii. Drivers of Nonmoving Vehicles

{17} Section 66–5–16 does not distinguish between a driver of a moving vehicle and a driver of a nonmoving vehicle. If an individual is in the driver's seat of a vehicle, he is subject to Section 66–5–16; thus, when an officer, without more, requests a driver's license, the driver is not free to leave, and the encounter is not consensual. It would be incongruous for us to hold that the Fourth Amendment provides greater protections for an individual in a moving vehicle than it provides for an individual in a nonmoving vehicle. This would encourage drivers of parked cars to start driving when they see an officer approaching because only then would the officer be required to have reasonable suspicion to request a driver's license. To hold that a driver of a nonmoving vehicle, who must produce a driver's license and registration upon request and await the officer's completion of a check to ensure those documents are valid, is in a consensual encounter would be to take the concept of consensual encounters into the realm of a legal fiction. *See Affsprung,* 2004–NMCA–038, ¶ 17, 135 N.M. 306, 87 P.3d 1088 ("We think it more fiction than fact to call this encounter consensual."). A driver, whether in a moving vehicle or a nonmoving vehicle, is not free to leave when an officer requests a driver's license or a registration certificate in these circumstances.

c. Physical Surroundings of the Encounter

{18} It was around 10 p.m., and Officer Riley did not see any illegal activity. He did not testify about any other persons or vehicles that were present in the area at the time of the initial encounter. Thus, we conclude that there were no other persons or vehicles of interest in the near vicinity.

2. Evaluation of Totality of the Circumstances

{19} Considering the totality of the circumstances—including Officer Riley's con-

duct, Defendant's status as a driver, and the lack of other persons or vehicles of interest in the vicinity at the time—we conclude that an innocent, reasonable person would believe that Officer Riley had stopped to ask for Defendant's driver's license pursuant to Officer Riley's statutory authority. *See Walters,* 1997–NMCA–013, ¶ 12, 123 N.M. 88, 934 P.2d 282. Although the State relies on the fact that Officer Riley did not engage his lights, we do not find this dispositive. *Cf. Baldonado,* 115 N.M. at 109, 847 P.2d at 754 (stating that the use of emergency lights does not preclude a consensual encounter): We believe that the circumstances here fall closer to the seizure side of the spectrum described by this Court in *Baldonado:*

> By way of example, we believe that a trial court should ordinarily find a stop that must be justified by reasonable suspicion whenever officers pull up behind a stopped car, activate their lights, and approach the car in an accusatory manner, asking for license and registration and an account of the occupants' activities. On the other hand, a trial court should ordinarily find no stop whenever officers pull up behind a stopped car, activate their lights, and approach the car in a deferential manner asking first whether the occupants need help.

Id. at 110, 847 P.2d at 755.

{20} In our case, Officer Riley did not engage his lights because he had no need to use them; Defendant was already stopped, and there were no safety concerns reported by Officer Riley. Defendant did not initiate the encounter, and Officer Riley asked no preliminary questions. His first statement to Defendant was a request for a driver's license. Based on the facts of this case, we believe that Officer Riley approached Defendant as if Officer Riley were conducting a traffic stop and asked for his driver's license pursuant to his statutory authority; a reasonable person would not feel free to leave, even though Officer Riley had not engaged his emergency lights. *Cf. id.* at 108, 847 P.2d at 753 ("[A] trial court could find, based on what is on an officer's mind together with surrounding circumstances, that if the officer believes that the defendants are not free to leave it may be more likely that the defendants would feel that they are not free to leave."). Moreover, Section 66–5–16 does not include language that limits the driver's responsibility to produce a driver's license to those incidents in which an officer is using his emergency lights. As a driver, Defendant was not free to terminate the encounter by refusing the officer's request under these circumstances.

{21} The State also argues that Defendant was free to leave because the officer was not holding Defendant's license and that there was no evidence presented that the officer was holding any other documents. *See United States v. Elliott,* 107 F.3d 810, 814 (10th Cir.1997) (concluding that an encounter, which was initially a traffic stop, became consensual after the officer returned the defendant's documents). We disagree. Such a driver would not feel free to leave because the driver is not free to refuse to respond to an inquiry about his driver's license. *Affsprung,* 2004–NMCA–038, ¶ 14, 135 N.M. 306, 87 P.3d 1088 ("The law with respect to ordinary traffic stops and concomitant de minimus [*sic*] investigatory detention is fairly well settled in New Mexico. A driver should not, and, we believe, does not feel free to refuse to respond to an officer's inquiry about license, registration, and insurance."). Moreover, a failure to provide a driver's license in response to the officer's request would result in a statutory violation. *See* § 66–5–16. We now turn to the facts surrounding the incident in order to determine whether there was reasonable suspicion justifying the request for Defendant's driver's license.

D. Reasonable Suspicion

{22} A reasonableness standard governs the exercise of discretion by law enforcement in order to protect an individual's privacy and security against arbitrary invasions. *Prouse,* 440 U.S. at 653–54, 99 S.Ct. 1391. The two-part test in *Terry v. Ohio,* 392 U.S. 1, 19–20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), is used to determine the reasonableness of a traffic stop or an investigatory stop. *State v. Duran,* 2005–NMSC–034, ¶ 23, 138 N.M. 414, 120 P.3d 836; *Mor-*

ales, 2005–NMCA–027, ¶ 14, 137 N.M. 73, 107 P.3d 513. Here, we are concerned with the first question presented by *Terry:* Was the detention justified at its inception? *See Reynolds,* 119 N.M. at 385, 890 P.2d at 1317. To detain a driver for the purpose of checking his license and registration, the officer must have articulable and reasonable suspicion. *Prouse,* 440 U.S. at 663, 99 S.Ct. 1391.

{23} Reasonable suspicion must be based on objective facts that indicate an individual is, or will be in the immediate future, engaged in criminal activity. *State v. Urioste,* 2002–NMSC–023, ¶ 10, 132 N.M. 592, 52 P.3d 964; *State v. Werner,* 117 N.M. 315, 317, 871 P.2d 971, 973 (1994). These facts must be specific, articulable, and particular to the individual who is detained. *Jason L.,* 2000–NMSC–018, ¶ 20, 129 N.M. 119, 2 P.3d 856; *State v. Patterson,* 2006–NMCA–037, ¶¶ 16, 17, 139 N.M. 322, 131 P.3d 1286 (using the term "individualized suspicion" to refer to articulated, particular reasonable suspicion); *Morales,* 2005–NMCA–027, ¶ 14, 137 N.M. 73, 107 P.3d 513. In examining the reasonableness of an officer's suspicion, we objectively consider the totality of the circumstances, including all the information the officer possessed at the time. *Morales,* 2005–NMCA–027, ¶ 14, 137 N.M. 73, 107 P.3d 513.

{24} In our case, the State appears to argue that Officer Riley was reasonably called upon to make contact with Defendant because there were outstanding warrants for Mr. Contreras; because Mr. Contreras could have been driving Defendant's vehicle, since it was parked in front of Mr. Contreras's residence; and because there was an individual who was leaning into the passenger side of Defendant's vehicle and talking with the driver. These specific, articulated facts relied upon by the State are not particular to Defendant and thus cannot support the detention of Defendant that occurred when Officer Riley requested a driver's license.

{25} The State presented no specific, articulable facts that Defendant or an occupant of the vehicle was or was about to be engaging in criminal activity at the time Officer Riley requested Defendant's driver's license. *See Prouse,* 440 U.S. at 663, 99 S.Ct. 1391 (stating that reasonable suspicion of an occupant in violation of a law is sufficient to justify the stop of a vehicle); *Lackey,* 2005–NMCA–038, ¶¶ 3, 9, 137 N.M. 296, 110 P.3d 512 (concluding that a lack of specific, articulable facts regarding the defendant's wrongdoing precluded reasonable suspicion when the officer stopped a truck in which the defendant was a passenger because the truck drove slowly past an accident scene two times). Officer Riley observed no traffic violation. His suspicions concerned Mr. Contreras and not Defendant. Although Officer Riley testified that he recognized the individual talking to Defendant from outside of the passenger window as a known user ordinarily in possession of illegal drugs or paraphernalia, Officer Riley testified that he recognized her *after* asking Defendant for a driver's license. We also note that Officer Riley did not testify to specific, articulable facts regarding Ms. Montgomery's activities that would provide reasonable suspicion to detain her; nor did he testify as to her status as a possible occupant of Defendant's vehicle, which could have justified his detention. *See State v. Prince,* 2004–NMCA–127, ¶ 9, 136 N.M. 521, 101 P.3d 332 ("Generalized suspicions or unparticularized hunches that a person has been or is engaged in criminal activity do not suffice to justify a detention."). Because Officer Riley did not have individualized reasonable suspicion regarding Defendant, the detention was prohibited by the Fourth Amendment.

{26} The State argues that Officer Riley's request for identification from Defendant was constitutionally permissible because Officer Riley was "reasonably called upon to make contact with Defendant" in order to determine whether another individual, Mr. Contreras, was driving the vehicle. *See Reynolds,* 119 N.M. at 388, 890 P.2d at 1320. In making this argument, the State relies on *Reynolds* and *In re Forfeiture of ($28,000.00),* 1998–NMCA–029, 124 N.M. 661, 954 P.2d 93. Both cases are distinguishable. In each case, the Court concluded that the initial stop was valid because the officer, at the time the stop was initiated, had specific, articulable facts that the particular defendant was in violation of a specific law or was

engaged in activity that created a safety concern.

{27} In the case *In re Forfeiture of ($28,000.00),* the officer had specific, articulable facts about the driver's vehicle that justified the initial stop. The vehicle was in violation of state law, which requires vehicle registration to be clearly visible; the vehicle had no license plate and did not appear to have a temporary tag. 1998–NMCA–029, ¶¶ 11, 12, 124 N.M. 661, 954 P.2d 93; *see* NMSA 1978, § 66–3–18(A) (2005); NMSA 1978, § 66–3–6 (1998). Even though the officer could see that the temporary tag was in place after the stop was initiated but before he asked the driver for identification, this Court held that the initial traffic stop was not arbitrary; thus, the officer's request for identification was constitutionally permissible. *In re Forfeiture of ($28,000.00),* 1998–NMCA–029, ¶¶ 12, 13, 124 N.M. 661, 954 P.2d 93. At the time the stop was initiated, the officer possessed information that supported his reasonable suspicion that the defendant was driving in violation of the law. *Id.; see Florida v. J.L.,* 529 U.S. 266, 271, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000) ("The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search.").

{28} Similarly, in *Reynolds,* the officer had specific, articulable facts about the driver's vehicle that justified the initial stop. The vehicle, a small pickup, was traveling at night on the interstate with three occupants who were sitting on an open tailgate, their feet hanging close to the road. *Reynolds,* 119 N.M. at 384, 890 P.2d at 1316. Because the officer stopped the vehicle for these specific safety reasons, the stop was not arbitrary. *Id.* at 384, 386, 890 P.2d at 1316, 1318. Our Supreme Court held that this was a valid stop, one in which the officer was "reasonably called upon to make contact with a driver"; thus, the request for the driver's identification was permissible. *Id.* at 388, 890 P.2d at 1320.

{29} The State urges us to conclude that here, as with the stop in *Reynolds,* the officer was reasonably called upon to make contact with the driver and that the officer was therefore entitled to check Defendant's license and registration. We decline to extend this general language as a justification for Defendant's detention. As discussed earlier, the test for reasonableness requires, at a minimum, individualized reasonable suspicion. *See Prouse,* 440 U.S. at 663, 99 S.Ct. 1391; *Terry,* 392 U.S. at 19–20, 88 S.Ct. 1868.

{30} We believe the circumstances in this case are more like those presented in *Brown v. Texas,* 443 U.S. at 48–49, 99 S.Ct. 2637. We recognize that unlike in our situation, the defendant in *Brown v. Texas* was a pedestrian, *id.* at 48, 99 S.Ct. 2637; however, the specific facts relied on by the officers in *Brown v. Texas* are very similar to those relied on by Officer Riley in our case. In *Brown v. Texas,* the officers observed the defendant and another man a few feet apart, walking away from each other in an alley located in an area with a high incidence of drug traffic. *Id.* at 48–49, 99 S.Ct. 2637. The officers believed the two men had been together or were about to meet when the officers arrived at the scene. *Id.* at 48, 99 S.Ct. 2637. The officers did not suspect the defendant of any specific misconduct. *Id.* at 49, 99 S.Ct. 2637. The United States Supreme Court held that these circumstances did not create reasonable suspicion to believe that the defendant was engaged or had engaged in criminal activity. *Id.* at 53, 99 S.Ct. 2637. Like the defendant in *Brown v. Texas,* Defendant in our case was in an area in which, arguably, criminal activity sometimes occurs. Defendant was communicating with an individual whose identity was unknown by Officer Riley when he requested Defendant's driver's license. Prior to requesting the driver's license, Officer Riley did not suspect Defendant of any specific misconduct. We conclude that these circumstances, like those in *Brown v. Texas,* "simply do not amount to reasonable suspicion" regarding Defendant. *See Lackey,* 2005–NMCA–038, ¶ 9, 137 N.M. 296, 110 P.3d 512; *see also Patterson,* 2006–NMCA–037, ¶ 28, 139 N.M. 322, 131 P.3d 1286 ("The difficulty with the [s]tate's argument is that it does not point to any facts particular to [the defendant] that would lead to individualized suspicion that he was violating a law. The only fact concerning [the

defendant] was that he was present in the car." (citation omitted)).

{31} The State argues that even if Defendant had been detained when he failed to produce a driver's license, Officer Riley was justified in running a check to see whether Defendant had a valid driver's license. This argument fails because reasonable suspicion must exist to justify the stop at its inception and because, as discussed earlier, the detention of Defendant began when Officer Riley asked for his driver's license. *See Terry,* 392 U.S. at 19–20, 88 S.Ct. 1868; *Jason L.,* 2000–NMSC–018, ¶ 20, 129 N.M. 119, 2 P.3d 856 ("The officer cannot rely on facts which arise as a result of the encounter."). The State ignores the distinguishing fact in each case cited to support this proposition—the initial stop in each case was valid. *See United States v. Holt,* 264 F.3d 1215, 1218 (10th Cir.2001) (en banc) (per curiam) ("[The] defendant ... was not wearing a seatbelt."); *United States v. Caro,* 248 F.3d 1240, 1244 (10th Cir.2001) ("[The defendant] has not challenged [the officer's] initial stop ... for a window tint violation."); *Duran,* 2005–NMSC–034, ¶ 24, 138 N.M. 414, 120 P.3d 836 ("Defendant does not challenge that [the officer] was justified in making the initial stop[.]"); *Reynolds,* 119 N.M. at 388, 890 P.2d at 1320 ("The initial stop in this case was lawful[.]"); *Affsprung,* 2004–NMCA–038, ¶ 10, 135 N.M. 306, 87 P.3d 1088 ("Following a valid stop, for a traffic violation, an officer may ... check out license, registration, and insurance."); *State v. Romero,* 2002–NMCA–064, ¶ 9, 132 N.M. 364, 48 P.3d 102 ("Certain points are fixed in the legal landscape. After stopping [the d]efendant for speeding, [the o]fficer ... could lawfully detain [the d]efendant to inspect his license[.]").

III. CONCLUSION

{32} We reverse the denial of Defendant's motion to suppress, and we remand for further proceedings in accordance with this opinion.

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

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

2006-NMSC-017

136 P.3d 999

U.S. XPRESS, INC., a Nevada corporation, M.S. Carriers, Inc., a Tennessee corporation, and Swift Transportation Company, Inc., an Arizona corporation, individually and on behalf of a class of all similarly situated taxpayers, Plaintiffs–Respondents,

v.

STATE of New Mexico, NEW MEXICO TAXATION AND REVENUE DEPARTMENT and Jan Goodwin, Secretary of the New Mexico Taxation and Revenue Department, Defendants–Petitioners.

No. 29,272.

Supreme Court of New Mexico.

April 13, 2006.

C. Joseph Lennihan, Jeffrey W. Loubet, Santa Fe, NM, for Petitioners.

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OPINION

CHÁVEZ, Justice.

{1} This case requires us to decide whether the Tax Administration Act permits the courts to recognize the doctrine of "vicarious" or "virtual" exhaustion of remedies to allow a class action to proceed when only a few members of the proposed class have exhausted their administrative remedies. Because the Tax Administration Act provides the exclusive remedies for tax refunds and requires the taxpayer to individually seek the refund, we decline to adopt vicarious or virtual exhaustion for proceedings under the Tax Administration Act, and reverse the opinion of the Court of Appeals. We affirm the district court's finding that the numerosity requirement of the class action rule is not met in this case because the court lacks subject matter jurisdiction over proposed class members who have not exhausted their administrative remedies.

{2} Plaintiffs–Respondents in this case are three interstate trucking companies. In December of 2002, each company filed claims with the Department of Taxation and Revenue ("Department") for refunds of four road-related taxes and fees paid for the years 1997–2000: the Weight Distance Tax Identification Card ("Cab Card") Fee, the Litter Control and Beautification Act, the Fifty-cent Motor Vehicle Division ("MVD") Administrative Fee, and the Hazardous Material Transportation ("Hazmat") Fee. The claims for refunds were based on Respondents' assertions that the collection of these taxes and fees violated the Commerce Clause of the United States Constitution. The Department granted each trucking company's claim for refunds for the Cab Card fee, the Beautification fee, and the Hazmat fee for the years 1999–2000, but denied the claims for refunds of taxes for the years 1997–1998 based on the statute of limitations in NMSA 1978, Section 7-1-26(D) (2006) of the Tax Administration Act. The Department also denied all of the claims for refunds of the MVD administrative fee for all years. In addition to the refund claims of these three trucking companies, approximately twenty-five additional trucking companies also filed refund claims with the Department. These claims were partial-

ly refunded and partially denied by the Department in exactly the same manner and proportion as the claims of Respondents.

{3} After exhausting their administrative remedies, U.S. Xpress, M.S. Carriers, and Swift Transportation, as named plaintiffs, filed a class action complaint for return of taxes in the First Judicial District Court. The complaint defined the class as "all interstate and intrastate motor carriers authorized to conduct business in New Mexico that have paid and/or that may be required to pay the New Mexico Weight Distance Tax Annual Filing Fee and/or the New Mexico Hazardous Material Transportation Permit Fee" and estimated the number of members of the class as exceeding three thousand companies. The named plaintiffs moved for class certification under Rule 1-023 NMRA, alleging that the class was too numerous for joinder, questions of law or fact were common to the class, the claims or defenses of the named Plaintiffs were typical of the class, and that the named Plaintiffs would adequately represent the class.

{4} Recognizing that the unnamed members of the proposed class had not yet exhausted their administrative remedies by filing refund claims with the Department, Plaintiffs argued that "virtual exhaustion" by the named members obviates the need for each class member to exhaust. The Department opposed the motion for class certification, arguing that only the legislatively crafted, comprehensive statutory tax scheme could address taxpayer refunds. The district court denied class certification on the basis that Plaintiffs were unable to meet the numerosity requirement, "because under Section 7-1-22 NMSA 1978, this court lacks jurisdiction over those members of the proposed class who have not exhausted their administrative remedies by each filing a claim for refund" with the Department. The district court recognized that the question of "vicarious exhaustion" and "virtual representation" in class actions presented "an unsettled and fundamental issue of New Mexico law," and stayed all proceedings pending appeal under Rule 1-023(F). Respondents appealed the order denying class certification to the Court of Appeals.

{5} The Court of Appeals framed the issue on appeal as requiring a determination of "whether the legislature intended the administrative exhaustion requirement to preclude our courts from exercising jurisdiction over the purely legal claims of the absent members of a class who have not exhausted their remedies when exhaustion would be futile." *U.S. Xpress, Inc. v. N.M. Taxation & Revenue Dept.,* 2005-NMCA-091, ¶ 9, 138 N.M. 55, 116 P.3d 846. The Court of Appeals held that because the named plaintiffs in this case had exhausted their own administrative remedies, that exhaustion gave the district court jurisdiction over claims for refunds of the contested taxes for all putative class members, including those who had not themselves exhausted administrative remedies. *Id.* ¶ 23. The Court of Appeals based its decision on the Department's uniform denial of part of each of the requested refunds, determining that further exhaustion of identical claims would be futile. *Id.* ¶ 15. Thus, the Court of Appeals decision allowed a form of representative exhaustion, characterized by the parties as "vicarious" or "virtual exhaustion," when individual exhaustion of administrative remedies for each member of the class would be futile. *Id.* ¶ 22.

{6} The question we consider is whether the Tax Administration Act requires individual exhaustion of remedies before proceeding to challenge the constitutionality of a tax in court, and if so, whether we will recognize a doctrine of "vicarious" exhaustion. "The meaning of language used in a statute is a question of law that we review de novo." *Cooper v. Chevron U.S.A., Inc.,* 2002-NMSC-020, ¶ 16, 132 N.M. 382, 49 P.3d 61 (citation omitted). When this Court interprets the statutes of New Mexico, our "principal objective . . . 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 quotations and citations omitted). The primary indicator of the legislature's intent is the plain language of the statute. *General Motors Acceptance Corp. v. Anaya,* 103 N.M. 72, 76, 703 P.2d 169, 173 (1985).

{7} Applying these principles of statutory construction to the Tax Administration Act, we begin by noting that it provides taxpayers with a choice of two exclusive remedies when the taxpayer disputes liability for a tax. NMSA 1978, § 7-1-23 (2006). Under the administrative hearing remedy, a taxpayer may protest the assessment of the tax without making payment. NMSA 1978, § 7-1-24 (2006). Alternatively, the taxpayer may pay the disputed tax and then request a refund. NMSA 1978, § 7-1-26 (2006). With either choice, Section 7-1-22 requires exhaustion of administrative remedies, stating:

> No court of this state has jurisdiction to entertain any proceeding by a taxpayer in which the taxpayer calls into question the taxpayer's liability for any tax or the application to the taxpayer of any provision of the Tax Administration Act, except as a consequence of the appeal by the taxpayer to the court of appeals from the action and order of the secretary, all as specified in Section 7-1-24 NMSA 1978, or except as consequence of a claim for refund as specified in Section 7-1-26 NMSA 1978.

{8} Section 7-1-22 has been interpreted as requiring taxpayers to follow the procedures in the Tax Administration Act. *Neff v. State Taxation and Revenue Dep't.*, 116 N.M. 240, 244, 861 P.2d 281, 285 (Ct.App. 1993). "Additionally, by using broad language, the Legislature intended, with respect to the Tax Administration Act, to require that challenges to the validity of the Act be first presented either through the protest remedy, Section 7-1-24, or the refund remedy, Section 7-1-26." *Neff, 116 N.M.* at 244, 861 P.2d at 285. The Department argues that Section 7-1-22 requires mandatory exhaustion of administrative remedies by each taxpayer, while the Respondents argue that the Legislature has not clearly required individual taxpayer exhaustion.

{9} Respondents support their argument against requiring individual exhaustion by relying on an Arizona case, *Ariz. Dep't. of Revenue v. Dougherty,* 200 Ariz. 515, 29 P.3d 862 (2001). Respondents' reliance on *Dougherty* was represented as follows: "After carefully analyzing the state's similar refund statutes and applicable authority, the [Arizona] Court found 'no reason why the statutory requirements cannot be satisfied through a single representative claim. . . .' " However, a careful reading of *Dougherty* reveals that the Arizona and New Mexico statutes are materially different and that, had the Arizona statute been similar to New Mexico's, the *Dougherty* court would have decided the case differently. The *Dougherty* court stated: "To begin, we note that nothing in the plain language of [the Arizona exhaustion of remedies statute] requires each *taxpayer* to file a claim for refund. It clearly states that each *claim* must be filed in writing. . . ." *Dougherty,* 29 P.3d at 866 (emphasis in the original). The Arizona claim statute for tax refunds states: "Each claim for refund shall be filed with the department in writing and shall identify the claimant by name, address and tax identification number. Each claim shall provide the amount of the refund requested, the specific tax period involved and the specific grounds on which the claim is founded." A.R.S. § 42-1118(E)(1999). Thus, Arizona's determination that individual exhaustion of remedies was not required was based on the Arizona exhaustion statute, which the court interpreted as not requiring "taxpayers" to exhaust, but instead simply required that each *claim* be exhausted. The plain language of New Mexico's exhaustion of remedies statute requires each *taxpayer* to exhaust administrative remedies by complying with Section 7-1-26. This section applies to "[a]ny person who believes that an amount of tax has been paid by or withheld from that person in excess of that for which the person was liable." NMSA 1978, § 7-1-26 (2006). *Dougherty,* by contrast, supports our conclusion that the references to "a taxpayer" and "the taxpayer" in Section 7-1-22 clearly require individual taxpayer exhaustion of remedies, and an individual refund claim for each taxpayer. Thus, not only is the exhaustion requirement of Section 7-1-22 a precondition to subject matter jurisdiction, as was held in *Neff,* 116 N.M. at 244, 861 P.2d at 285, but it also requires exhaustion by each individual taxpayer.

{10} Respondents urge us to recognize that "vicarious exhaustion" of administrative remedies by the named plaintiffs representing the entire class serves the same purposes

the legislature intended in Section 7–1–22. Respondents' argument is based on their contention that exhaustion should be considered futile here because the Department lacks authority to determine the constitutionality of the taxes at issue. The Court of Appeals agreed with this argument, finding that even with the clear statutory requirement of taxpayer exhaustion, in the context of this case involving the constitutionality of taxes the purpose and intent of the exhaustion requirement would not be served by individual taxpayer exhaustion. *U.S. Xpress,* 2005–NMCA–091, ¶ 11, 138 N.M. 55, 116 P.3d 846.

{11} The Court of Appeals has already addressed the issue of exhaustion and constitutional challenges to a tax, and held that it was mandatory to follow the administrative procedures of Section 7–1–22 before questioning the constitutionality of a tax in court. *Neff,* 116 N.M. at 243, 861 P.2d at 284. In *Neff,* the Court of Appeals followed the reasoning of the U.S. Supreme Court in *Fair Assessment in Real Estate Ass'n. Inc. v. McNary,* 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981), which examined the requirements for a taxpayer's challenge to the administration of a state tax on constitutional grounds. "Such taxpayers must seek protection of their [constitutional] rights by state remedies, provided of course that those remedies are plain, adequate, and complete. . . ." *McNary,* 454 U.S. at 116, 102 S.Ct. 177. Respondents argue that the Tax Administration Act should not require individual taxpayer pursuit of remedies when the dispute is over the constitutionality of the tax, and when the purposes of exhaustion, such as notice to the Department or development of a factual record, would not be served. Although the Court of Appeals in this case found that satisfaction of the "purpose and intent" of the exhaustion requirement was enough, we disagree. We note that Section 7–1–22 does not differentiate between instances when the purposes of exhaustion would be served and when it would not, but instead plainly insists that no court will have jurisdiction except as a consequence of an administrative appeal or a claim for a refund. "[I]f the meaning of a statute is truly clear, it is the responsibility of the judiciary to apply it as written and not second guess the legislature's policy choices." *Derringer v. Turney,* 2001–NMCA–075, ¶ 8, 131 N.M. 40, 33 P.3d 40 (internal quotations and citations omitted). We are bound by the plain meaning rule, which requires a court to give effect to the statute's language and refrain from further interpretation when the language is clear and unambiguous. *Sims v. Sims,* 1996–NMSC–078, ¶ 17, 122 N.M. 618, 930 P.2d 153 (citation omitted). Unless a statute violates the Constitution, "[w]e will not question the wisdom, policy, or justness of legislation enacted by our Legislature." *Madrid v. St. Joseph Hosp.,* 1996–NMSC–064, ¶ 10, 122 N.M. 524, 928 P.2d 250. Therefore we reject the concept of vicarious exhaustion under Section 7–1–22 because the plain meaning of the Tax Administration Act requires individual taxpayer exhaustion of administrative remedies before the constitutionality of a tax may be challenged in court.

{12} Furthermore, in the context of a claim for a tax refund and the exhaustion requirements of Section 7–1–22, we find that the "futility" doctrine advanced by the Court of Appeals has no force. Although it is true that in contexts other than the Tax Administration Act we have stated that exhaustion of statutory remedies was not required when futile, *see, e.g., State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.,* 85 N.M. 521, 529, 514 P.2d 40, 48 (1973) (exhaustion of remedies not required when administrative tribunal clearly lacks jurisdiction or when exhaustion would be vain and futile), we are unable to find any circumstances where we have found futility of exhaustion to be an appropriate excuse for bypassing a clear statutory directive, such as found in this case. *See Neff,* 116 N.M. at 244, 861 P.2d 281 (taxpayer must comply with exhaustion of remedies doctrine); *Chavez v. City of Albuquerque,* 1998–NMCA–004, ¶ 14, 124 N.M. 479, 952 P.2d 474 (exclusive administrative remedy is one which provides for "plain, adequate, and complete means of resolution through the administrative process to the courts"); *Shepard v. Bd. of Educ. of Jemez Springs Mun. Schools,* 81 N.M. 585, 586, 470 P.2d 306, 307 (1970) (mandamus proper remedy only after petitioner exhausted adminis-

trative remedies); *McDowell v. Napolitano*, 119 N.M. 696, 700, 895 P.2d 218, 222 (1995) (exhaustion of administrative remedies is absolute when a claim is first cognizable by administrative agency, and judicial interference is withheld until administrative policy has run its course); *Derringer*, 2001-NMCA-075, ¶ 14, 131 N.M. 40, 33 P.3d 40 (statute requiring post-decision hearing before state engineer comports with principle that a party is required to pursue available administrative remedies before resorting to courts for relief); *Smith v. Southern Union Gas Co.*, 58 N.M. 197, 199, 269 P.2d 745, 747 (1954) (legislature has not taken away jurisdiction from courts, but has postponed jurisdiction until Department has acted on the complaint). We note with approval the Supreme Court of Vermont's treatment of the futility and exhaustion doctrines:

> The term "exhaustion" is used to describe both the judge-made common-law doctrine and a statutory direction that judicial review is available only if specified administrative procedures are first employed. Where the Legislature specifically mandates, exhaustion is required. Where the Legislature has not clearly required exhaustion, sound judicial discretion governs. The futility doctrine has been adopted as part of that discretion to dispense with unnecessary exhaustion of administrative remedies. It has no place, however, in the face of a clear legislative command that exhaustion is required. *See Neff v. State*, 116 N.M. 240, 861 P.2d 281, 285 (Ct.App. 1993)

Stone v. Errecart, 165 Vt. 1, 675 A.2d 1322, 1325 (1996) (internal citations and quotations omitted). Therefore, we hold that the futility doctrine has no force in the context of the Tax Administration Act, in the face of the clear legislative command found in Section 7-1-22.

{13} Respondent also argues that because class actions are not specifically barred in the exhaustion statute, Section 7-1-22 should be construed so as to serve the purposes of the class action rule, Rule 1-023. We disagree with Respondents. Class actions are a procedural device, and the class action procedural rule does not effect any change on the subject matter jurisdiction limitations imposed by the Legislature through the Tax Administration Act. While Section 7-1-22 does not explicitly bar class actions for refund claims after exhaustion, neither does it give any indication that the statutory exhaustion requirement should bow to the Rules of Civil Procedure. *Cf. Romero v. Philip Morris Inc.*, 2005-NMCA-035, ¶ 37, 137 N.M. 229, 109 P.3d 768 (stating "although [the statute] confers standing to New Mexico indirect purchasers to bring a civil action for damages, we see no indication that the Legislature intended [the statute] 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."). Therefore, we reject Respondents' argument that the exhaustion statute and Rule 1-023 are in conflict and that, by enacting the exhaustion statute, the Legislature has encroached on the province of the judiciary. In any matter brought before the court, including a class action, the court must have subject matter jurisdiction before determining if a particular procedure is appropriate. *Gonzales v. Surgidev Corp.*, 120 N.M. 133, 138, 899 P.2d 576, 581 (1995) (citation omitted) (only relevant inquiry in determining subject matter jurisdiction is whether claim falls in scope of authority conferred upon court by constitution or statute). As the district court properly concluded, it does not have subject matter jurisdiction over those class members who have not exhausted their administrative remedies. *El Dorado Utils. Inc. v. Galisteo Domestic Water Users Ass'n.*, 120 N.M. 165, 167, 899 P.2d 608, 610 (Ct.App.1995) (stating "[j]urisdiction of the matters in dispute does not lie in the courts until the statutorily required administrative procedures are fully complied with."). Each member of the class must individually exhaust, and only after individual exhaustion by each class member could the district court have jurisdiction over the class. NMSA 1978, § 7-1-22. The Legislature's limitation on jurisdiction under Section 7-1-22 is a prerequisite, rather than a conflict, to Rule 1-023.

{14} While we appreciate the efforts of the Court of Appeals to avoid unnecessary burdens to the Department, the absent members

of the class, and our courts, we cannot adopt the doctrine of "vicarious representation" in the context of a class action for tax refunds. It is certainly true that each identical claim may initially be denied by the Department, but exhaustion of the statutory remedies is not futile when the procedures of the Tax Administration Act provide a plain, adequate and complete means of determining the constitutionality of the tax with ultimate resolution in the courts. We also note that once the exhaustion requirement is satisfied and a proper appeal taken to the court, a determination by the court as to the constitutionality of the tax which is adverse to the Department will likely have a preclusive effect on the Department. *See Silva v. State,* 106 N.M. 472, 474, 745 P.2d 380, 382 (1987) (describing doctrine of offensive collateral estoppel, used when plaintiff seeks to foreclose defendant from litigating issue defendant has previously litigated unsuccessfully).

{15} It cannot be disputed that a class action might be a more convenient process for recovering tax refunds based on the identical claims in this case. Convenience, however, does not change the clearly expressed intent of the legislature to require that tax refund claims proceed according to the requirements of the Tax Administration Act. "The courts have no authority to alter the statutory scheme, cumbersome as it may be." *In re Application of Angel Fire Corp.,* 96 N.M. 651, 652, 634 P.2d 202, 203 (1981). Therefore, we reverse the Court of Appeals and affirm the holding of 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.

2006-NMCA-059

136 P.3d 1005

STATE of New Mexico, Plaintiff–Appellee,

v.

Calupp HENDERSON, Defendant–Appellant.

No. 24,850.

Court of Appeals of New Mexico.

Feb. 14, 2006.

Certiorari Denied, No. 29,702, May 25, 2006.

Patricia A. Madrid, Attorney General, Margaret McLean, Assistant Attorney General, Santa Fe, NM, for Appellee.

John Bigelow, Chief Public Defender, Sheila Lewis, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

VIGIL, Judge.

{1} This case requires us to determine whether the admission of preliminary hearing testimony of an unavailable witness at Defendant's trial violated the Confrontation Clause of the Sixth Amendment under *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and whether Defendant was entitled to a mistrial when a witness invoked his Fifth Amendment privilege before the jury during his testimony. We hold that Defendant was afforded his Confrontation Clause rights and that no abuse of discretion was committed in denying his motion for a mistrial. The remaining issues raised by Defendant were abandoned. *State v. Aragon,* 109 N.M. 632, 634, 788 P.2d 932, 934 (Ct.App.1990) ("All issues raised in the docketing statement but not argued in the briefs have been abandoned."). We therefore affirm.

BACKGROUND

{2} Officer Donald Jackson and Detective Walter Coburn of the Hobbs Police Department were dispatched to the home of Tarious Ford to investigate a robbery call in which Ford and a guest, Tracy Eagans, were the alleged victims. As a result of their investigation, a criminal complaint was filed in the magistrate court charging Defendant with aggravated burglary, armed robbery, and conspiracy to commit armed robbery. Defendant was arrested and counsel was appointed to represent him. The same attorney continued to represent Defendant throughout the case.

{3} A preliminary hearing was then held in the magistrate court at which Ford and Eagans testified about the incident at Ford's home. Their testimony was under oath and it was tape recorded. Defendant was present during the entire hearing and his attorney cross-examined both witnesses about their testimony without any limitations being

imposed by the magistrate judge on the scope or content of the cross-examination. At the conclusion of the preliminary hearing the magistrate judge made a finding of probable cause and Defendant was bound over for trial in district court on all charges.

{4} At trial the evidence was as follows. Officer Jackson and Detective Coburn were dispatched to a robbery complaint at Ford's home. Eagans, a friend who was visiting Ford, told the officers that a mutual acquaintance of theirs, Fabian Marshall, entered Ford's home without knocking as was his custom. Three other men, Chuck Green, Keylie Martin, and Defendant followed Marshall into Ford's home. Once inside, Martin used a gun and Green a screwdriver to force Eagans and Marshall to remove their clothing. In the meantime, Defendant hit Ford on the shoulder with a gun and forced him to lie down on the floor. The three men then took Ford's pager, at least one of his girlfriend's cellular telephones, an X Box video game player and $547 in cash belonging to Eagans and left. After the police officers arrived, Ford's telephone rang and his caller identification showed that the call originated from his girlfriend's stolen cellular telephone. Ford recognized the caller as Defendant. Ford held the receiver away from his ear to allow Detective Coburn to hear, and Coburn heard the caller inform Ford that he took the items from Ford's home because someone owed him $400. Detective Coburn listened to a second call a few minutes later in the same manner in which the caller said that if Ford gave him $400 he would return the stolen property.

{5} Defendant rested without presenting any evidence on his own behalf. In closing arguments, he asked the jury to disregard Ford's testimony entirely because he was not able to confront him on all the issues. He also argued that the elusiveness and reluctance of the victim witnesses Eagans and Marshall to testify made them unbelievable. Defendant was convicted of all the charges.

DISCUSSION

ADMISSION OF THE PRELIMINARY HEARING TESTIMONY UNDER *CRAWFORD*

{6} Defendant's argument that Ford's preliminary hearing testimony was admitted in violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution under *Crawford* presents a question of law which we review de novo. *State v. Dedman*, 2004–NMSC–037, ¶ 23, 136 N.M. 561, 102 P.3d 628.

{7} Prior to trial the State filed a motion to admit into evidence the tapes of the preliminary hearing testimony of Ford and Eagans pursuant to Rule 11–804(B)(1) NMRA as the testimony of unavailable witnesses. Following two evidentiary hearings in which the State demonstrated its extensive efforts to attempt locating and producing Ford and Eagans to testify at trial, the trial court granted the motion. In doing so, the trial court acknowledged that Defendant could not have cross-examined them at the preliminary hearing on all issues that were relevant to his defense because all the issues were not known at that time. Admission of the testimony was not unqualified. The trial court ruled that Defendant would be able to argue to the jury that these witnesses were not credible because when they could not be located, the charges against the co-defendants Keylie Martin and Chuck Green were dismissed. Nevertheless, Defendant objected, arguing that admitting the preliminary hearing tapes at trial would violate his constitutional right to confront the witnesses against him. Eagans was ultimately located and subpoenaed to testify at the trial, so only Ford's preliminary hearing testimony was admitted.

{8} We first determine whether the preliminary hearing testimony was properly admitted under the Rules of Evidence because if the hearsay testimony was improperly admitted to Defendant's prejudice, we are not required to decide the *Crawford* constitutional issue. The admissibility of evidence as an exception to the hearsay rule is separate from the objection based on confrontation grounds, and its admission is reviewed for an abuse of discretion. *Dedman*, 2004–NMSC–037, ¶ 23, 136 N.M. 561, 102 P.3d 628.

{9} The admissibility of hearsay testimony of an "unavailable" witness who testifies in a

preliminary hearing is governed by Rule 11–804(B)(1). Ford satisfies the definition of an "unavailable" witness because the State was unable to procure his attendance at the trial. *See* Rule 11–804(A)(5) (defining "[u]navailability as a witness" in part to mean "the proponent of a statement has been unable to procure the declarant's attendance ... by process or other reasonable means"). Rule 11–804(B)(1) provides, "[t]estimony given as a witness at another hearing of the same or a different proceeding or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an *opportunity and similar motive* to develop the testimony by direct, cross or redirect examination[,]" is not excluded by the hearsay rule. (Emphasis added.) We must therefore determine whether Defendant had an "opportunity and similar motive" to develop Ford's testimony at the preliminary hearing as contemplated by the Rule.

{10} In *State v. Massengill*, 99 N.M. 283, 657 P.2d 139 (Ct.App.1983), the defendant argued that the preliminary hearing testimony of an unavailable witness was erroneously admitted, contending he did not have the same motive to cross-examine the witness at trial as at the preliminary hearing. *Id.* at 284, 657 P.2d at 140. His argument was rejected on the rationale that the defendant had an opportunity and motive to develop the testimony given by the witness at the preliminary hearing concerning whether a crime had been committed and whether the defendant committed the crime. His motive to develop the testimony at trial was similar—to ask questions concerning the commission of a crime and the defendant's involvement. *Id.* at 285, 657 P.2d at 141. Further, the fact that the defendant chose not to further cross-examine the witness was a matter of tactics, not motive. *Id.* In coming to this conclusion the court emphasized that a defendant has a due process right to be allowed to call whatever witnesses he desires in his own defense at a preliminary hearing, that the Rules of Evidence are applicable in a preliminary hearing, and that witnesses may be cross-examined and their credibility and character tested. *Id.* at 284–85, 657 P.2d at 140–41.

{11} The *Massengill* reasoning was subsequently approved by our Supreme Court in *State v. Gonzales*, 113 N.M. 221, 226, 824 P.2d 1023, 1028 (1992). However, *Gonzales* also recognized that "if the circumstances and facts of a particular case indicate that there was a real difference in motive or other limitation on meaningful cross-examination, the [prior] testimony should not be admitted." *Id.* Examples cited were where defense counsel had no motive to cross-examine a witness at the first trial because of an agreement with the prosecutor that a judgment of not guilty by reason of insanity would be entered, the witness later died, and his recorded testimony was then admitted at a second trial (*State v. Slayton*, 90 N.M. 447, 564 P.2d 1329 (Ct.App.1977)); where defendant was not represented by counsel at the preliminary hearing (*Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)); where objections of the prosecution that were sustained effectively limited the defendant in the scope and nature of his cross-examination (*State v. Magouirk*, 539 So.2d 50 (La.Ct.App.1988), *withdrawn in part*, 561 So.2d 801 (La.Ct.App.1990)); and where the testimony from an earlier trial of a co-defendant was determined not admissible because the motive to develop the testimony as to the defendant did not exist (*State v. Deskins*, 181 W.Va.112, 380 S.E.2d 676 (1989)). *Gonzales*, 113 N.M. at 226–27 & n. 3, 824 P.2d at 1028–29 & n. 3. Another exception that was later recognized was where the State had no reason to challenge a witness' grand jury testimony when medical evidence that contradicted the witness was unknown at the time the witness testified before the grand jury. *See State v. Baca*, 1997–NMSC–045, ¶ 26, 124 N.M. 55, 946 P.2d 1066.

{12} Applying the foregoing authorities, we conclude it was not an abuse of discretion to admit Ford's preliminary hearing testimony at Defendant's trial as an exception to the hearsay rule under Rule 11–804(B)(1). Defendant was freely allowed to cross-examine Ford without any restrictions at the preliminary hearing about whether any crime was committed and whether Defendant was in-

volved. He therefore had an "opportunity and similar motive" to cross-examine Ford at the preliminary hearing as he would have at trial, and there are no circumstances showing a real difference in Defendant's motive to cross-examine Ford differently at the preliminary hearing than at trial. When Ford later became unavailable to testify at the trial, his recorded preliminary hearing testimony became admissible as an exception to the hearsay rule.

{13} In *Crawford*, the United States Supreme Court revised the framework for determining when the admission of hearsay evidence violates the Confrontation Clause of the Sixth Amendment. Under *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the admission of hearsay evidence did not violate the Confrontation Clause where: (1) the prosecutor demonstrated that the declarant whose statements it wished to use against the defendant was unavailable; and (2) after the witness was shown to be unavailable, the trial court found that the statement possessed adequate "indicia of reliability." *Id.* at 65–66, 100 S.Ct. 2531. A hearsay statement was deemed sufficiently reliable to satisfy the Confrontation Clause when it: (1) fell within a "firmly rooted hearsay exception"; or (2) possessed "particularized guarantees of trustworthiness." *Id.* at 66, 100 S.Ct. 2531. Our Supreme Court has concluded that *Crawford* did not change this approach for "nontestimonial" evidence. *Dedman*, 2004–NMSC–037, ¶¶ 32–33, 136 N.M. 561, 102 P.3d 628; *see also Crawford*, 541 U.S. at 68, 124 S.Ct. 1354. However, as to "testimonial" evidence the Confrontation Clause is violated unless: (1) the witness is unavailable; and (2) the defendant had a prior opportunity to cross-examine. Specifically, the Supreme Court held:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a *prior opportunity for cross-examination*. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Crawford, 541 U.S. at 68, 124 S.Ct. 1354. (emphasis added) (footnote omitted).

{14} The evidence that was admitted against Defendant was "prior testimony at a preliminary hearing." It is therefore "testimonial" evidence as defined by the Supreme Court, and subject to the *Crawford* requirements. Defendant does not argue that the State made an insufficient attempt to locate Ford or that he was not unavailable. The question therefore posed in this case is whether Defendant had a sufficient "prior opportunity for cross-examination" of Ford to satisfy *Crawford*. If he did, no Confrontation Clause violation occurred.

{15} Whether admission of the preliminary hearing testimony violates the Confrontation Clause under the standard articulated by *Crawford* is an issue of first impression in New Mexico. However, our courts have decided other cases under *Crawford* that guide our decision in this case. In *State v. Duarte*, 2004–NMCA–117, 136 N.M. 404, 98 P.3d 1054, we construed *Crawford* as holding that an accomplice's testimonial statement was inadmissible under the Confrontation Clause "unless the accomplice was unavailable and the defendant had a prior opportunity to cross-examine the accomplice *concerning the statement*." *Id.* ¶ 10 (emphasis added). *State v. Alvarez–Lopez*, 2004–NMSC–030, 136 N.M. 309, 98 P.3d 699, and *State v. Johnson*, 2004–NMSC–029, 136 N.M. 348, 98 P.3d 998, followed. In both cases our Supreme Court held that the admission of a statement made by an accomplice in a custodial police interview violated *Crawford*. In *Alvarez–Lopez*, the court said that the "[d]efendant had no opportunity to cross-examine [the accomplice] at a preliminary hearing, grand jury proceeding, or otherwise *on these*

testimonial statements." *Alvarez–Lopez,* 2004–NMSC–030, ¶ 24, 136 N.M. 309, 98 P.3d 699 (emphasis added). Similarly, the defendant in *Johnson* did not "at any time have an opportunity to cross-examine [the accomplice] *on his statement.*" *Johnson,* 2004–NMSC–029, ¶ 6, 136 N.M. 348, 98 P.3d 998 (emphasis added). In the same vein, our Supreme Court said that the defendant "was deprived of the opportunity to cross-examine [the accomplice] to *challenge the reliability of his statement.*" *State v. Forbes,* 2005–NMSC–027, ¶ 3, 138 N.M. 264, 119 P.3d 144 (emphasis added). Admission of the statement therefore violated *Crawford. Forbes,* 2005–NMSC–027, ¶ 6, 138 N.M. 264, 119 P.3d 144.

{16} In line with the reasoning of the foregoing cases, we conclude that the admission of a "testimonial" statement given by a witness under oath in a preliminary hearing does not violate the Confrontation Clause under *Crawford* where: (1) the witness is unavailable; and (2) the defendant had a prior *opportunity* to cross-examine *the statement* that is now being offered into evidence against him. We note that our Rules of Evidence conceivably provide greater protection than *Crawford.* While Rule 11–804(B)(1) requires the defendant to have had both an "opportunity and similar motive" to cross-examine the statement for it to be admissible, *Crawford* only requires that the defendant had an "opportunity for cross-examination" of the statement.

{17} Our conclusion is consistent with the result reached in cases from other states. *See State v. Young,* 277 Kan. 588, 87 P.3d 308, 316–17 (2004) (holding that the preliminary hearing testimony of an unavailable witness was admissible at trial under *Crawford* because counsel who represented the defendant at the preliminary hearing had an opportunity to cross-examine the witness); *Primeaux v. State,* 2004 OK CR 16, ¶ 64, 88 P.3d 893, 905 (allowing use of preliminary hearing testimony of unavailable witness at trial, stating that when a defendant is afforded the opportunity to cross-examine the witness and avails himself of that right, *Crawford* is satisfied); *see also State v. Hannon,* 703 N.W.2d 498, 507–08 (Minn.2005) (holding that the admission in a second trial of testimony given by an unavailable witness in the first trial did not violate *Crawford* where counsel had a full opportunity to cross-examine the witness at the first trial, embracing credibility and all other issues, noting that *Crawford* only requires that the defendant had a prior *opportunity* to cross-examine the witness).

{18} Two cases hold that admitting preliminary hearing testimony violated *Crawford: State v. Stuart,* 2005 WI 47, 279 Wis.2d 659, 695 N.W.2d 259, and *People v. Fry,* 92 P.3d 970 (Colo.2004) (en banc). However, those cases are not contrary to our holding here because both relied on the fact that the applicable procedural rules governing preliminary hearings barred the defendant from fully cross-examining the witness, particularly on matters of credibility. *Stuart,* 2005 WI 47, ¶¶ 29–38, 695 N.W.2d at 265–67; *Fry,* 92 P.3d at 977.. These two cases are therefore consistent with the exceptions for admitting prior testimony set forth by our own Supreme Court in *Gonzales* set forth above in ¶ 11.

{19} Defendant argues that because "there was a real difference in motive and ability to cross-examine between the preliminary hearing and the trial" he was "unable to adequately present his theory of the case" at trial. We disagree. At the preliminary hearing and trial, Defendant was charged with the same crimes, he had the same defense counsel, and the same opportunity and motive to cross-examine Ford. Defendant was given an unrestricted right to cross-examine the statements Ford gave at the preliminary hearing which were later admitted at trial. This satisfied *Crawford.* The fact that Defendant might have engaged in additional cross-examination if Ford testified at trial does not require a contrary result.

{20} A comparison of Eagans' live trial testimony with Ford's tape recorded preliminary hearing testimony demonstrates that while Ford's testimony is not word-for-word identical, the testimony interlocks, and the core evidence that supports Defendant's convictions is uncontroverted and consistent. Eagans and Ford both testified that they were at Ford's home on April 20, 2003, when Marshall arrived with three other individuals,

including Defendant. They differed as to whether Marshall had permission to enter the house but both stated that the three men who entered the house after Marshall were not acquaintances who had authorization to enter without knocking. Both witnesses testified that Defendant and another man drew guns once inside while the third brandished a screwdriver. They both testified that Defendant held a gun to Ford's head and hit him on the shoulder with a gun while giving orders to the other two men. Both witnesses identified Defendant's gun as a .09 millimeter "highpoint." They also both testified that two of the men demanded that Eagans and Marshall remove their clothing and sit on the couch while the two men went through their clothes and that Defendant forced Ford to lay on the floor. Both witnesses testified that the three men took an X Box, X Box games, a cell phone, and the cash. Finally, both witnesses testified that the three men attempted to force Ford to go with them when they departed but that Ford refused.

{21} We therefore hold that the admission of Ford's preliminary hearing testimony was consistent with *Crawford* and not in violation of the Confrontation Clause of the Sixth Amendment.

DENIAL OF MOTION FOR MISTRIAL

{22} Defendant argues that he should have been granted a mistrial because Marshall exercised his Fifth Amendment privilege not to testify in the presence of the jury. We review the refusal of the trial court to grant Defendant's motion for a mistrial for an abuse of discretion. *See State v. Gutierrez,* 2005–NMCA–093, ¶ 9, 138 N.M. 147, 117 P.3d 953, *cert. granted,* 2005–NMCERT–007, 138 N.M. 146, 117 P.3d 952. Finding no abuse of discretion by the trial court in this case, we affirm.

{23} Marshall began his testimony by confirming he did not want to testify and acknowledging he was incarcerated and awaiting trial on drug charges. Marshall said he knew Eagans and Ford, having gone to junior college with both of them. He also knew Defendant and identified him. After then confirming that he went to Fords's house on the date in question, he invoked his Fifth Amendment privilege against self-incrimination, whereupon the prosecutor said he had no further questions. When asked if he had any cross-examination, defense counsel requested a bench conference. At the bench conference, defense counsel said Marshall had been in custody and asserted he should have been advised that Marshall was going to invoke his Fifth Amendment privilege. Since Marshall had invoked the privilege in the presence of the jury, defense counsel made a motion for a mistrial.

{24} The prosecutor responded:

> I talked to [Marshall] previously. He told me more than what he said today, and then he said he didn't want to testify and we didn't get any further. Our conversation, he never mentioned invoking a Fifth Amendment privilege to me, and I do not know of any reason that he has a Fifth Amendment privilege, although I can certainly see some scenarios where he might.

Defense counsel then argued that invoking the Fifth Amendment privilege in the presence of the jury had "all kinds of implications" that were prejudicial. The prosecutor responded that Marshall's invocation of the privilege in the jury's presence was more prejudicial to the State than Defendant under the circumstances, and the trial court agreed.

{25} The motion for a mistrial was denied, and defense counsel asked that Marshall's testimony be stricken and the jury was advised to disregard his testimony. At the conclusion of the bench conference, Marshall was excused after defense counsel announced in open court in the presence of the jury he had no questions to ask him. At the conclusion of the case, and without any objection from the State, the trial court instructed the jury, "You will recall that [Marshall] took the benefit of the Fifth Amendment on his testimony and refused to testify. Based on his doing that, you should disregard his testimony entirely."

{26} In *State v. Vega,* 85 N.M. 269, 511 P.2d 755 (Ct.App.1973), the record established that the prosecution knew witnesses it intended to call would invoke the Fifth Amendment. Nevertheless, the prosecutor called the witnesses, and they invoked their

privilege in the presence of the jury. The defendant's motions for mistrial were denied. *Id.* at 270, 511 P.2d at 756. We did not ascribe any particular motive to the prosecutor, but focused our attention on the issue of prejudice to the defendant. *Id.* We have since held that it is not permissible to call witnesses before the jury, knowing that they will invoke the Fifth Amendment privilege before the jury, for the purpose of having them do so. *State v. Crislip,* 110 N.M. 412, 417, 796 P.2d 1108, 1113 (Ct.App.1990), *overruled on other grounds by Santillanes v. State,* 115 N.M. 215–20, 849 P.2d 358–63 (1993). To determine if prejudice occurred in *Vega,* we examined the surrounding circumstances, focusing on two factors, each of which would suggest a distinct ground for finding prejudice: (1) error could be based "upon a concept of prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege"; and (2) error could "rest upon the conclusion that, in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant." *Vega,* 85 N.M. at 271, 511 P.2d at 757 (internal quotation marks omitted) (citing *Namet v. United States,* 373 U.S. 179, 186–87, 83 S.Ct. 1151, 10 L.Ed.2d 278 (1963)). In *Vega,* invocation of the privilege by the witnesses in the presence of the jury created an unfair inference of guilt against the defendant in favor of the State. 85 N.M. at 271–72, 511 P.2d at 757–58. Therefore, we reversed. *Id.*

{27} In *State v. Worley,* 100 N.M. 720, 676 P.2d 247 (1984), the witness was granted immunity but still refused to answer certain questions, asserting he had a right not to answer the questions under the Fifth Amendment in the presence of the jury. *Id.* at 723–24; 676 P.2d at 250–51. Our Supreme Court held that no reversible error occurred because the prosecutor had a right to assume that the witness would testify or that his testimony would be compelled; the prosecutor did not build his case from inferences supplied by the witness' silence; and the presentation of testimony untested by cross-examination did not result when the witness refused to testify. *Id.* at 725, 676 P.2d at 252.

{28} This case does not reflect a conscious case of prosecutorial misconduct in which the prosecutor attempted to build his case out of inferences arising from the use of Marshall's testimonial privilege. The State explained at trial that while Marshall had indicated earlier that he did not want to testify, he did not mention invoking his Fifth Amendment privilege nor did the State know of any reason why Marshall chose to invoke his right. Further, Marshall's invocation of his Fifth Amendment privilege in the jury's presence did not result in the addition of critical weight to the State's case in a form not subject to cross-examination. His testimony encompassed only (1) an acknowledgment that he knew Eagans, Ford, and Defendant, (2) an in-court identification of Defendant, and (3) an admission that he used to go to Ford's house on occasion. This testimony can hardly be deemed to be adding "critical weight" to the State's case given the other evidence in the case. *See State v. Polsky,* 82 N.M. 393, 402, 482 P.2d 257, 266 (Ct.App. 1971) (concluding that under the circumstances, no impermissible inference as to the defendant's guilt was likely to have been drawn by the jury from the refusal of the witness to answer the questions asked of her). Any possible prejudice created by Marshall's invocation of his Fifth Amendment right was remedied by the curative instruction given by the trial court. *See Worley,* 100 N.M. at 724, 676 P.2d at 251 (noting that the trial court instructed the jury not to consider prior statements made by the witness or the fact that the witness refused to answer certain questions).

{29} Finally, we note that the guidelines contained in our Rules of Evidence concerning the claim of a privilege were satisfied. Rule 11–513 NMRA is entitled, "Comment upon or inference from claim of privilege; instruction," and it provides:

> A. Comment or inference not permitted. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of com-

ment by the court or counsel. No inference may be drawn therefrom.

B. Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

C. Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

{30} For the foregoing reasons it was not an abuse of discretion for the trial court to deny Defendant's motion for a mistrial.

CONCLUSION

{31} The judgment and sentence are affirmed.

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Chief Judge, and JAMES J. WECHSLER, Judge.

2006-NMCA-066

136 P.3d 1013

STATE of New Mexico, Plaintiff–Appellee,

v.

Bailon Melvin SALAZAR, Defendant–Appellant.

No. 24,468.

Court of Appeals of New Mexico.

Feb. 15, 2006.

Certiorari Granted, No. 29,745, June 2, 2006.

Patricia A. Madrid, Attorney General, Anita Carlson, Assistant Attorney General, Santa Fe, NM, for Appellee.

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

OPINION

ALARID, Judge.

{1} Defendant appeals his convictions and sentence on two counts of criminal sexual penetration of a minor (CSPM). Defendant makes six allegations of error: (1) improper expert testimony regarding the allegations of molestation; (2) improper denial of access to an expert for Defendant; (3) improper vouching by the prosecutor; (4) improper denial of a continuance; (5) improper instruction of the jury; and (6) improper refusal by the trial court to determine that the Earned Meritorious Deduction Act, NMSA 1978, § 33–2–34 (1999), does not apply to Defendant's convictions. We conclude that no error occurred here and affirm the judgment and sentence, concluding that the earlier version of Section 33–2–34 applies to Defendant. We remand for entry of an amended judgment and sentence, clarifying that neither of Defendant's offenses may be used to deny him the opportunity to earn thirty days per month of good time credit.

BACKGROUND

{2} In 2002, Defendant was charged with ten counts of CSPM of his step-son (the victim). The original information charged the crimes over a period of time from September 11, 1996, to March 11, 2001. The charges were later amended to limit the time period from July 1996 through December 1999. Trial dates were continued several times at the request of both Defendant and the State. After about a year and shortly before trial was scheduled to begin, Defendant retained different counsel. New counsel requested and obtained a continuance of the trial setting. Thereafter, counsel filed a flurry of motions, including one to have Defendant transported to Albuquerque to meet with a psychologist for the purpose of conducting an assessment of Defendant. The trial court denied the motion to transport. Defense counsel renewed the motion in open court. The trial court again denied the motion stating that Defendant would not be transported to Albuquerque at State expense in order to prepare his defense.

{3} A week later, defense counsel again raised the issue in his motion to dismiss or,

in the alternative, for continuance of the trial setting. This motion was addressed prior to the start of the trial. Further continuance of the trial was denied.

{4} At the trial, the victim testified about the molestation. He stated that it happened nine times, eight times in a truck and one time at home. The victim was able to identify the time of only two of the penetrations, the first time, which was shortly after his seventh birthday, and the last time, which occurred at home when he was eleven. The victim identified the locations of other penetrations, but could not state exactly when they occurred. A pediatrician testified to her physical examination of the victim several years after the last penetration occurred. She testified that the exam was normal, but explained that a normal exam was usual in such cases. The victim's grandmother testified about how he had told her of the molestation, and how she had then called the counselor at the boy's school. The counselor testified about how he was made aware of the allegations and how he then reported them to Child Protective Services.

{5} The defense presented evidence trying to establish that the victim was untruthful and that his grandmother had made him make the allegations. Defendant testified on his own behalf. He testified that he did take the victim in his truck, but not to the areas where the boy stated the penetration occurred. Defendant categorically denied ever sexually molesting the victim or any other child.

{6} At the conclusion of the State's case, the trial court directed a verdict of acquittal as to one count of sexual penetration as the victim clearly testified that the molestation occurred nine times. The jury was instructed on nine counts of CSPM. Each of the instructions was identical. There was no distinguishing of the counts by time or place. The jury found Defendant guilty of Counts 1 and 9 and not guilty of the other counts. Defendant moved for a new trial, arguing that a number of errors occurred during the trial and that the jury was improperly instructed. The motion for a new trial was denied.

{7} At the sentencing hearing, the State read a letter from the victim asking for the full sentence to be imposed. Defendant requested mitigation of the sentence. The trial court refused to mitigate, sentencing Defendant to two consecutive eighteen-year terms. Sua sponte, the trial court conducted a second sentencing hearing at which it decided that the two sentences would run concurrently. At that hearing, Defendant raised the issue of which version of the Earned Meritorious Deduction Act would apply to him. The trial court requested briefing on the issue, which Defendant provided. However, the trial court never ruled on the matter.

DISCUSSION

STATE'S EXPERT WITNESS

{8} Defendant contends that the trial court erred in allowing the State's expert, the pediatrician who had physically examined the victim, to present conclusory evidence that the victim was sexually molested. Defendant contends that the expert's testimony was in violation of *State v. Alberico,* 116 N.M. 156, 861 P.2d 192 (1993). In *Alberico,* the Supreme Court ruled that an expert may give testimony regarding symptoms that the victim suffers that are consistent with sexual abuse. Such testimony may not be offered to establish that the victim is telling the truth. *Id.* at 175, 861 P.2d at 211. Nor can the expert testify that the symptoms were in fact caused by sexual abuse. *Id.* at 176, 861 P.2d at 212. Such testimony vouches too much for the credibility of the victim and encroaches on the province of the jury to determine credibility. *Id.*

{9} Initially, we note that the objections raised during the expert's testimony do not relate to the issues briefed by Defendant. We do not address issues that were not raised below. The trial court must be alerted to the problem and given an opportunity to resolve it. *See State v. Varela,* 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280. Additionally, parties cannot change their arguments on appeal. *State v. Henderson,* 116 N.M. 541, 545, 865 P.2d 1185, 1189 (Ct.App.1993), *aff'd,* 116 N.M. 537, 865 P.2d 1181 (1993), *overruled on other grounds, State v. Meadors,* 121 N.M. 38, 908 P.2d 731

(1995). We note that many of the issues argued on appeal are not the issues that were presented to the trial court.

{10} Defendant states that he made timely and repeated objections to the expert testifying to anything but the fact that the physical exam showed nothing. His citation to the record points to pretrial arguments regarding what the expert might testify to. Before trial commenced, the trial court stated that the expert would be allowed to testify to her physical examination of the victim. Later in the hearing, there was discussion regarding the psychology of the delay in reporting abuse. Finally, the trial court reiterated that the expert could testify about her physical exam, but could not state that the victim exhibited traits of someone who had been sexually abused.

{11} During the expert's testimony, Defendant made three objections and was involved in one bench conference. The first objection was during the expert's testimony relaying what the victim had told her about what Defendant did to him. At that time, counsel moved for a mistrial, arguing that under *State v. Fairweather,* 116 N.M. 456, 863 P.2d 1077 (1993), and *Alberico,* 116 N.M. at 175, 861 P.2d at 211, the expert was not allowed to testify and identify who the perpetrator was. The trial court denied the motion for mistrial. A bench conference was held after the expert explained why she needed information about the particulars of the allegations. There was no audible ruling limiting the testimony of the expert. The second objection was made when the expert was asked to explain the reason why nearly 95% of the exams that she does for sexual abuse show normal. Defendant's objection was for relevance and the trial court overruled the objection. The third objection was made when the expert testified about other people's knowledge regarding the healing of rectal tissue. The expert was asked to testify about her own knowledge.

{12} The record does not support Defendant's claim that he made timely and repeated objections to the expert's testimony pursuant to *Alberico.* Only one objection was made that relates to the issues raised in the brief. That was an objection to the expert's identification of Defendant as the perpetrator. However, as is clear from the record, the expert was not identifying Defendant as the perpetrator. Rather, she was relaying how the victim came to her for examination and the information that he relayed to her before the examination. Such information is not the identification of the perpetrator that is prohibited by *Alberico.* What *Alberico* prohibits is the expert testifying to the identity of the alleged perpetrator of the crime as a result of an examination of the victim. 116 N.M. at 175, 861 P.2d at 211. *Alberico* does not prohibit an expert from testifying as to what she was told at the time of her physical examination, so long as she does not improperly comment on the victim's credibility or testify as to her belief that the defendant was the perpetrator. *See id.* at 175–76, 861 P.2d at 211–12; *see also State v. Lucero,* 116 N.M. 450, 455, 863 P.2d 1071, 1076 (1993) (reversing where "[i]n so many words, [the expert] testified that the complainant had in fact been molested. She went a step further and stated that it was the defendant who abused the complainant. She also commented that the complainant's statements were truthful"). Where the expert does not use his or her expertise in testifying about the identity of the perpetrator, and instead is just repeating what the alleged victim related, we analyze the issue under hearsay rules, and not the rules governing the admission of expert testimony. *See In re Esperanza M.,* 1998–NMCA–039, ¶¶ 11–12, 124 N.M. 735, 955 P.2d 204. Defendant does not claim improper admission of hearsay in this case.

{13} Defendant contends that the expert was improperly vouching for the victim by relying on the victim's statement in making her examination. Defendant did not object to the expert's testimony on the basis of vouching. However, even if we were to find that Defendant's general objection citing *Alberico* was sufficient to preserve a claim of vouching, we conclude that the expert's testimony did not comment on the victim's credibility or truthfulness.

{14} Defendant refers to that portion of the expert's testimony where she stated

that the victim was "rare" in the level of his "forthrightness" and "seriousness" when he told her about the abuse. The expert was not vouching for the truthfulness of the victim's report. Rather, reading her words in context, it was clear that she was explaining that it was rare for her to be able to speak intelligently in an adult-like fashion with a patient. Her comments related to the victim's manner in reporting to her, not his honesty or truthfulness.

{15} Finally, Defendant argues that the trial court erred in allowing the expert to testify to rape trauma syndrome. Defendant did not object to the expert's single reference to rape trauma syndrome. Thus, any alleged error in allowing such testimony was not preserved. Moreover, the reference to rape trauma syndrome concerned only the kinds of things the expert generally needs to know in order to conduct a sexual abuse exam. She made no reference to the victim having any symptoms of rape trauma syndrome. Therefore, Defendant's claim is unsupported by the facts in the record.

THE TRIAL COURT'S REFUSAL TO ORDER TRANSPORT AT THE STATE'S EXPENSE

{16} Defendant contends that the trial court erred in refusing to allow him to be transported, at State's expense, to Albuquerque for examination by a psychologist there. Defendant argues in his brief that the trial court erred in ruling that the psychologist's testimony was inadmissible and in excluding the testimony. In fact, Defendant never tendered any expert testimony and the trial court did not ultimately rule that Defendant's psychologist's testimony would be inadmissable. Thus, Defendant's argument as it relates to exclusion of expert testimony is not relevant to this case. We are concerned only with whether the trial court abused its discretion in refusing to order Defendant's transportation at State's expense for evaluations in preparation of his defense.

{17} Defendant argues that it was a per se abuse of discretion for the trial court to infringe on his ability to present a defense. *See State v. Stanley*, 2001–NMSC–037, ¶ 24, 131 N.M. 368, 37 P.3d 85. As we noted earlier, this issue was raised after Defendant obtained the services of new counsel. At that time, counsel presented an ex parte motion to the trial court to transport Defendant to Albuquerque to visit with Dr. Roll. The motion was denied without a hearing as the trial court ruled that it did not consider ex parte motions. Thereafter, a hearing was held on the request to transport. The trial court was concerned about the cost of transporting Defendant to Albuquerque. The State expressed concern about using two deputies for transport and the consequent impairment of the ability to adequately patrol the county. The court asked why Dr. Roll could not come to Farmington and was told that he charged too much and Defendant could not afford it. The trial court suggested using the telephone and Defendant said that could not be done. The trial court then suggested getting an evaluation by someone else in San Juan County. Again, Defendant declined, saying that Dr. Roll had already been retained. Defendant's counsel then suggested that his private investigator, who was a former sheriff, could transport Defendant. The court decided that Defendant needed to bring Dr. Roll to San Juan County. The court determined that Defendant did not have the right to have the State pay for defense costs.

{18} We conclude that the trial court did not abuse its discretion in denying Defendant's request to have Defendant transferred at the State's expense to Albuquerque for examination by his expert.

{19} None of the cases relied on by Defendant support his contention. In those cases, an abuse of discretion was found in the exclusion of expert testimony that purported to be a major part of the defense. *See Stanley*, 2001–NMSC–037, ¶ 24, 131 N.M. 368, 37 P.3d 85. Here, there was no exclusion of Dr. Roll's testimony. In fact, the trial court ruled that if Dr. Roll were to come to Farmington to examine and evaluate Defendant, the court would facilitate such an examination. The trial court did not exclude Dr. Roll as an expert. In fact, Dr. Roll was never presented as an expert because Defen-

dant apparently could not afford to have him come to Farmington for the evaluation. Importantly, Defendant never made a factual showing that he was indigent or otherwise was unable to pay Dr. Roll to come to San Juan County. Defendant appears to have only stated that it would be cost prohibitive because "he probably charges upwards of two hundred and fifty bucks an hour to travel." In addition, Defendant did not make a showing of why Dr. Roll was necessary. When the court asked why Defendant could not get another expert, Defendant's only response was that "the family has already retained Doctor Roll to do this." Finally, because Dr. Roll never examined Defendant, Defendant's assertions of his likely testimony was entirely speculative. A trial court is not required to expend public funds on behalf of defendants who do not make the required showing of necessity for the defense services or inability to pay for them. *See State v. Carrillo,* 88 N.M. 236, 237–38, 539 P.2d 626, 627–28 (Ct.App.1975). Thus, Defendant's argument in his brief that the trial court erred in excluding the testimony of Dr. Roll is not supported by the record in this case.

PROSECUTORIAL MISCONDUCT

{20} Defendant contends that the prosecutor engaged in misconduct by directly vouching for the victim's testimony. We note that there was no objection made by Defendant during either the prosecution's opening or closing argument. We have often stated that a prompt objection and ruling by the trial court goes a long way to curing prosecutorial vouching. *State v. Pennington,* 115 N.M. 372, 382, 851 P.2d 494, 504 (Ct.App. 1993). Defendant's claim of improper vouching by the prosecutor was not preserved. Nor does Defendant argue that it was fundamental error. Therefore, we will not address the merits of the claim.

DENIAL OF CONTINUANCE

{21} "The trial court has broad discretion in granting or denying a motion for a continuance, and absent a demonstrated abuse resulting in prejudice to the defendant, there is no basis for reversal." *State v. Aragon,* 1997–NMCA–087, ¶ 22, 123 N.M. 803, 945 P.2d 1021. Furthermore, a motion for continuance filed at the last minute is not favored. *Id.*

{22} Defendant argues that the trial court erred by ordering that the trial proceed only twenty-one days after new defense counsel had been retained. Defendant appears to be arguing that the trial court would not grant him even one continuance. In fact, the record shows that Defendant had been granted four continuances since he was arrested. The fourth continuance was granted after new counsel was retained and extended the trial date for two and one-half months. Thus, contrary to Defendant's assertion in his brief, his newly retained counsel had about three months to prepare, not three weeks. Trial counsel, in fact, recognized that he had three months to prepare. Defendant's request for a fifth continuance was made eight days before trial was scheduled. In that request, Defendant argued that he needed more time in order to schedule his evaluation by Dr. Roll.

{23} The court is to consider several factors in deciding whether or not to grant a continuance: (1) the length of the requested delay, (2) the likelihood that a delay would accomplish the movant's objectives, (3) the existence of previous continuances in the same matter, (4) the degree of inconvenience to the parties and the court, (5) the legitimacy of the motives in requesting the delay, (6) the fault of the movant in causing a need for the delay, and (7) the prejudice to the movant in denying the motion. *State v. Torres,* 1999–NMSC–010, ¶ 10, 127 N.M. 20, 976 P.2d 20.

{24} Here, the trial had already been delayed more than eight months. Although Defendant contends in his brief that he was asking for only a couple of weeks, his motion requested two months. Moreover, the trial court could reasonably have concluded that additional time beyond the two months would be needed if indeed Defendant did obtain an evaluation by Dr. Roll, as the State would have to be permitted to interview Dr. Roll and perhaps obtain a rebuttal expert.

{25} Defendant stated as the reason for his request for a continuance a need for

additional time in order to have Dr. Roll perform an evaluation. As we have already discussed above, the trial court refused to allow Defendant to be transported to Albuquerque at the State's expense for the evaluations. Defendant, at that time, stated that he could not afford to get Dr. Roll to come to Defendant for the evaluation. In his motion, Defendant did not demonstrate how he was going to get the evaluation done. Defendant failed to show that additional time would accomplish anything.

{26} As we pointed out above, Defendant had already been granted four continuances and the trial had been delayed more than eight months. In considering the degree of inconvenience to the parties and the court, we note that the motion was filed only a week before trial. The State's witnesses had already been subpoenaed for trial and a continuance would have made that a wasted effort. Further, the court recognized that the victim and the State had a right to have the matter tried expeditiously. In addition, the record shows that defense counsel had filed four last-minute motions about a week before trial. Counsel had had a number of weeks prior to trial in which to file these motions. Thus, the trial court could have found a lack of diligence on the part of defense counsel in preparing for trial. Defense counsel filed the motion to transport three days before the appointment with Dr. Roll in Albuquerque. Further, defense counsel insisted on Dr. Roll being the only expert he wanted. Thus, the trial court could have determined that it was defense counsel's fault in causing the claimed need for the delay.

{27} Finally, there was no prejudice in denying the continuance. It appears that Defendant had already been examined by an expert. Further, without a showing that there is a sex offender profile and that Defendant did not fit the profile, it is speculative to conclude that Defendant was prejudiced by the failure of the trial court to allow a continuance so that Defendant could pursue an evaluation by Dr. Roll. *See State v. Perez*, 95 N.M. 262, 264, 620 P.2d 1287, 1289 (1980) (pointing out that the court does not possess the luxury of hindsight and that under facts known to the court at the time, denial of a motion was not an abuse). We conclude that the trial court did not abuse its discretion in denying the motion for a continuance.

{28} Insofar as Defendant claims that counsel was unprepared for trial, the record shows otherwise. *See State v. Brazeal*, 109 N.M. 752, 758, 790 P.2d 1033, 1039 (Ct.App. 1990) (pointing out that where continuance is sought to obtain defense witnesses, in order to show prejudice, there must be a showing that the witness was willing to testify and would have given substantially favorable evidence). Further, the record shows that defense counsel effectively cross-examined the State's witnesses and presented witnesses of his own attacking the credibility of the victim. Defendant has not shown a reasonable probability that the result would have been different but for the court's denial of his motion for a continuance. *Id.*

IDENTICAL JURY INSTRUCTIONS

{29} Defendant contends that the trial court erred in sending the jury nine identical jury instructions on the nine different counts of criminal sexual penetration. The instructions did not distinguish among the charges in any way such as date, location, or acts alleged. Defendant contends that the instructions violated due process and double jeopardy. Defendant's brief asserts that he made numerous objections to the case going to the jury on multiple counts. In fact, Defendant's arguments did not address the multiple counts, but rather requested that the State be required to limit the time frame of the incidents. At the time of settling the jury instructions, there was further argument about the violation of due process. The argument in Defendant's brief, however, does not address the arguments made to the trial court pursuant to *State v. Baldonado*, 1998-NMCA-040, 124 N.M. 745, 955 P.2d 214. Therefore, we deem the *Baldonado* due process arguments to have been waived.

{30} Defendant's brief argues instead, relying on out-of-state authority, that sending multiple, carbon-copy counts of sexual abuse to the jury violates double jeopardy where there were no distinguishing factual bases for the multiple charges. *See Valen-*

tine v. Konteh, 395 F.3d 626, 628 (6th Cir. 2005) (overturning most of the defendant's convictions where prosecution provided no factual basis in indictment or at trial to differentiate between counts, and instead relied on child's statement that abuse had occurred "about 20 times"). Contrary to the cited authority, here the victim linked the different counts to different locations. While most of the charges could not be linked to a particular time, the victim was able to identify five different locations where the abuse occurred. The victim was also able to identify the time periods when some of the incidents took place by identifying which trucking company Defendant was working for at the time. The victim also described differences in the manner in which Defendant penetrated him. Thus, the evidence presented to the jury shows that there were some distinguishing facts for the different counts.

{31} Defendant does not explain how double jeopardy was violated by the conviction on two counts, except to argue that he could have been convicted on separate counts for unitary conduct. However, if there was sufficient evidence from which the jury could have found that each act was in some sense distinct from the other, then the conduct was not unitary. *State v. McClendon,* 2001-NMSC-023, ¶ 5, 130 N.M. 551, 28 P.3d 1092. As we pointed out above, there was sufficient evidence presented to the jury from which it could have found two separate incidents of criminal sexual penetration. The fact that each incident was instructed identically does not change this conclusion. Thus, there was no violation of double jeopardy in the manner in which the jury was instructed. *See State v. Orgain,* 115 N.M. 123, 125, 847 P.2d 1377, 1379 (Ct.App.1993) (finding no prejudice from multiple charges where the jury demonstrated it could apply the evidence to the charges by acquitting on some counts and convicting on others).

SENTENCING AND GOOD TIME

{32} Defendant contends that an amended judgment and sentence needs to be filed, making it clear that he is entitled to good time credit under the old version of Section 33-2-34 rather than the new statute which is effective for those offenses committed on or after July 1, 1999. The Earned Meritorious Deductions Act provides an inmate the opportunity to reduce his actual time spent in the penitentiary. Before July 1, 1999, an inmate could earn thirty days' credit for every month served without incident, thus reducing his or her actual sentence by as much as 50%. NMSA 1978, § 33-2-34(A) (1988). After July 1, 1999, when a defendant is convicted of certain serious violent offenses listed in the statute, the amount of time that he or she can earn is only four days per month. Section 33-2-34(A)(1) (1999). The change in the statute is effective for those offenses that were committed on or after July 1, 1999.

{33} Here, Defendant was charged with nine counts of CSP over a period from June 1996 through December 1999. None of the counts, however, was specifically limited to a particular time. Thus, there is no way to know which counts may have occurred after July 1, 1999. Defendant was convicted of Counts 1 and 9. Although the State argues and the trial court suggested that the conviction on Count 1 was for the first act in 1996 and the conviction on Count 9 was for the last act in 1999, neither the jury instructions nor the verdicts suggest that. When the trial court was requested to make a ruling on the issue, it asked for briefing. Although Defendant briefed the matter, the record does not show a ruling by the trial court.

{34} The State argues that, because there was a general verdict, we should assume that one of the convictions was for acts that occurred after July 1, 1999. The State asserts that we are permitted to make that assumption under the rule that a conviction based on a general verdict of guilt should be upheld so long as one of the alternative bases for conviction is supported by substantial evidence. *See State v. Foster,* 1999-NMSC-007, ¶ 27, 126 N.M. 646, 974 P.2d 140.

{35} We agree with the State's rendition of the above rule, but we find the legal inadequacy doctrine to be more analogous to the present situation. Under that doctrine, a conviction cannot stand where a defendant has been charged under two legal theories, one of which is legally inadequate, and, due to a general verdict, it cannot be determined whether the jury convicted on the permissi-

ble or the impermissible theory. *See State v. Olguin*, 120 N.M. 740, 741, 906 P.2d 731, 732 (1995); *see also Foster*, 1999–NMSC–007, ¶ 27, 126 N.M. 646, 974 P.2d 140 (applying legal inadequacy doctrine where, due to general verdict, it could not be determined whether defendant's double jeopardy rights were violated). We find the situation in this case to be similar to the legal inadequacy doctrine. The verdict here is inadequate to support a conclusion that Defendant committed an act occurring after July 1, 1999.

{36} When young children are involved, we have allowed the State to use charging instruments, such as the one in this case, that cover relatively long periods of time. *See Baldonado*, 1998–NMCA–040, ¶ 1, 124 N.M. 745, 955 P.2d 214. However, where the State is unable to specify a time period for particular acts during the guilt phase, we will not allow it to argue at sentencing that one of the convictions was for acts that occurred at a particular time. We thus decline to presume that one of the jury's convictions was for acts that occurred after July 1, 1999, where the jury was presented with evidence of a number of acts that occurred over two and a half years and was not asked to specify that one act occurred after July 1, 1999.

{37} The State requests that the matter be remanded for resentencing if we conclude that the earlier version of Section 33–2–34 applies. It argues that the trial court sentenced Defendant under the assumption that Count 9 was a serious violent offense for which Defendant would receive only four days per month of good time credit, and that the trial court ran the sentences concurrently for that reason. There is nothing in the record suggesting that. In addition, we do not remand for resentencing when the trial court has entered a lawful sentence after being made aware of potential problems with the sentence. *See State v. Duhon*, 2005–NMCA–120, ¶ 19, 138 N.M. 466, 122 P.3d 50, *cert. granted*, 2005–NMCERT–010, 138 N.M. 494, 122 P.3d 1263. However, we do remand so that the judgment and sentence makes it clear that neither count for which Defendant was convicted may be used to deny him the opportunity to earn thirty days per month of credit.

CONCLUSION

{38} Finding no error on the part of the trial court, we affirm the convictions. Further, we remand to the trial court for entry of an amended judgment and sentence, clarifying that neither of Defendant's offenses may be used to deny him the opportunity to earn thirty days per month of good time credit.

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

WE CONCUR: LYNN PICKARD and IRA ROBINSON, Judges.

2006-NMCA-067

136 P.3d 1022

STATE of New Mexico, Plaintiff–Appellant,

v.

Gregario RUBIO, Defendant–Appellee.

No. 25,310.

Court of Appeals of New Mexico.

March 13, 2006.

Certiorari Denied, No. 29,746, June 9, 2006.

Corrected June 19, 2006.

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

Freedman, Boyd, Daniels, Hollander & Goldberg, P.A., Zachary A. Ives, Albuquerque, NM for Appellee.

OPINION

SUTIN, Judge.

{1} We have withdrawn our opinion filed on February 1, 2006, and we substitute the present opinion in its stead.

{2} In this routine traffic stop case, we address the constitutionality of (1) an officer asking for and obtaining identification from the owner of the vehicle who was a passenger, and (2) the officer running a computer check using the identification obtained. The driver, unable to produce evidence of registration and insurance, indicated that one of his passengers was the owner of the vehicle. The police officer requested the owner-passenger's identification and then ran a "persons" computer check on the owner-passenger. After learning of an outstand-

ing misdemeanor warrant on the owner-passenger and arresting him, the officer searched the vehicle and seized unlawful drugs. The district court suppressed the evidence obtained from the search as the fruit of an unlawful seizure and search. The State contends that the request for identification and computer check were lawful and therefore the search was lawful. We agree. We hold that the officer's request for identification from the owner-passenger and the subsequent computer check based on that identification were lawful; thus, the evidence from the search after the owner-passenger's arrest was not the fruit of an unlawful seizure or search.

BACKGROUND

{3} Officer Dudewicz observed two vehicles traveling alongside each other moving at a speed of approximately ten miles per hour in a thirty-five mile per hour zone and obstructing two lanes of traffic. Defendant Gregario Rubio, who was a front-seat passenger in the vehicle traveling in the left lane, was engaged in conversation with the driver of the vehicle in the right lane. Noticing that the driver of the vehicle in the left lane was not wearing a seatbelt, the officer engaged her emergency equipment and pulled the vehicle over.

{4} The officer asked the driver for his driver's license, registration, and insurance. The driver had a difficult time presenting the paperwork, and when the officer asked if he had insurance for the vehicle, the driver "looked rather confused." The officer then asked the driver who owned the vehicle. The driver pointed to Defendant, who stated that "he owned the vehicle or that it was registered to him." The officer then asked Defendant for his identification. The officer noticed that the passenger in the back seat also was not wearing a seatbelt and asked for his identification too. The officer then "ran a persons check on all three of them." The check on Defendant showed that he was the subject of an outstanding misdemeanor warrant, for which the officer arrested Defendant. The officer made arrangements to tow the vehicle and did an inventory search. The officer's search of Defendant's vehicle produced marijuana and crack cocaine.

{5} At the suppression hearing, the district court asked Officer Dudewicz to explain why she asked for Defendant's identification. The officer stated that the driver indicated that Defendant was the registered owner of the vehicle and the driver did not have the paperwork for the vehicle. The court asked the officer why she ran a warrants check on Defendant's identification and she responded that it was standard that she would usually run a warrants check on any person that she came across. The State asked the officer, "If a driver gives you information and indicates the owner is in the car, do you ask for that—do you investigate that other person, typically?" The officer responded, "To insure that that [person], in fact, is the registered owner, yes."

{6} The district court determined that the initial encounter between the officer and Defendant was consensual and that the officer had a legitimate basis for confirming the ownership of the vehicle. However, the court also determined that the officer needed Defendant's further consent to conduct a warrants check. The court held that there were less intrusive ways to confirm Defendant's ownership. In deciding to suppress the evidence, the court stated from the bench:

> I'm going to grant the motion to suppress the evidence based on the following rationale: The Court finds that, in fact, this was a consensual encounter by the police officer with the defendant and that the officer testified that she had in so many words a legitimate reason for asking the information from the defendant, and that was for the purposes of confirming that he was, in fact, the owner of the vehicle. However, the Court finds that there [were] less intrusive ways to confirm that the defendant, given the information on his ID, was the actual owner of the vehicle by simply checking the ID with the information on the vehicle registration. The officer did not—in order to have continued with her consensual encounter, the Court finds that she should have asked the defendant if, in fact, she could conduct a warrants check, which she did not do.

> By continuing with the warrants check, the Court finds that this encounter went from a consensual encounter to a seizure and the police officer did not in any way articulate any facts indicating a reasonable suspicion that the defendant had been or was involved in criminal activity or that her additional seizure and investigation was warranted for safety concerns.

{7} On appeal, the State argues that Defendant was not seized and consented to the officer's actions. The State also argues that even if obtaining Defendant's identification constituted a detention, the officer was justified in running a computer check to determine whether the driver was entitled to drive the vehicle and to confirm that the vehicle was properly registered and insured.

{8} We first discuss the relevant New Mexico law on routine traffic stops. We then discuss whether, under the circumstances in this case, the officer could lawfully obtain Defendant's identification and proceed to do a computer "persons" or warrants check on Defendant. We conclude that because the officer had a legitimate reason to determine whether Defendant was a registered owner of the vehicle and properly insured the vehicle, the warrants check was also a de minimis continuing detention of Defendant.

DISCUSSION

Standard of Review

{9} Review of a motion to suppress evidence involves mixed questions of law and fact, and this Court applies a substantial evidence standard to a review of the facts and reviews de novo the district court's application of the law to those facts. *State v. Reynolds,* 119 N.M. 383, 384, 890 P.2d 1315, 1316 (1995); *State v. Lowe,* 2004–NMCA–054, ¶ 8, 135 N.M. 520, 90 P.3d 539. Because the facts are undisputed, our review is solely de novo.

Relevant Traffic Stop Law

{10} The Fourth Amendment to the United States Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. Const. amend. IV. The New Mexico Constitution states: "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures[.]" N.M. Const. art. II, § 10.

{11} A traffic stop constitutes a seizure of the vehicle and its occupants. *State v. Duran,* 2005–NMSC–034, ¶ 22, 138 N.M. 414, 120 P.3d 836. In this regard, we disagree with the State's contention that the interaction with Defendant, even after the officer asked for identification, was consensual. *See State v. Affsprung,* 2004–NMCA–038, ¶¶ 16–17, 135 N.M. 306, 87 P.3d 1088 (rejecting the notion that a passenger in a stopped car, particularly after being asked to identify himself, would feel free to leave). Such seizures are analyzed in two parts: first, whether the officer made a valid investigatory stop; and second, whether the officer's actions during the investigatory detention were reasonably related in scope to the circumstances that initially justified the stop. *Duran,* 2005–NMSC–034, ¶ 23, 138 N.M. 414, 120 P.3d 836. As we discuss later in this opinion, circumstances presented here easily pass both parts of this test.

{12} When an officer stops a vehicle for a traffic violation, the officer can lawfully request and inspect the driver's license, vehicle registration, and proof of insurance, in order to verify that the driver is licensed and driving a vehicle that is registered and insured. *Reynolds,* 119 N.M. at 386–88, 890 P.2d at 1318–20; *State v. Romero,* 2002–NMCA–064, ¶ 9, 132 N.M. 364, 48 P.3d 102. The request for these documents is not a "search" because a driver has no expectation of privacy in these documents when requested by a police officer. *Reynolds,* 119 N.M. at 386, 890 P.2d at 1318. When a vehicle is lawfully stopped, the operator of the vehicle must be in immediate possession of a driver's license and must show the license when asked to do so by a peace officer. *See* NMSA 1978, § 66–5–16 (1985); *see also* NMSA 1978, § 66–5–2 (1989) (providing that all drivers must be licensed). In addition, every owner is required to register any motor vehicle that is driven or moved upon a highway and that registration "shall be exhibited upon demand of any police officer."

NMSA 1978, § 66-3-1(A) (2001); NMSA 1978, § 66-3-13 (1978). Finally, all motor vehicles driven on our streets and highways must be insured or the owner of the vehicle must show evidence of financial responsibility; otherwise, the vehicle's operation is prohibited. *See* NMSA 1978, § 66-5-205 (1998).

{13} Although not a search, the request for documents in connection with a traffic stop is nevertheless a seizure or detention that must pass constitutional muster. *Reynolds,* 119 N.M. at 386, 388, 890 P.2d at 1318, 1320. Such a request is constitutionally permissible because "the privacy interest in the documents [is] nonexistent as to a police officer and the detention period [is] de minimis." *Id.* at 388, 890 P.2d at 1320. Thus, continued detention simply to request license, registration, and insurance documents from a driver is not unreasonable and does not violate the Fourth Amendment or Article II, Section 10 of the New Mexico Constitution. *Id.*

{14} After obtaining the documents, the officer may lawfully run a computer check, directly or indirectly by contacting dispatch, in regard to the documents obtained. *Affsprung,* 2004-NMCA-038, ¶¶ 10, 14, 135 N.M. 306, 87 P.3d 1088; *Lowe,* 2004-NMCA-054, ¶ 12, 135 N.M. 520, 90 P.3d 539; *State v. Prince,* 2004-NMCA-127, ¶ 9, 136 N.M. 521, 101 P.3d 332; *State v. Taylor,* 1999-NMCA-022, ¶ 14, 126 N.M. 569, 973 P.2d 246; *see also Reynolds,* 119 N.M. at 385, 388, 890 P.2d at 1317, 1320 (holding that continued detention is reasonable, and approving (1) the request for license, registration, and insurance documents; and (2) a computer check on the vehicle's license plate number). We have stated that this check may include a wants and warrants check. *See Affsprung,* 2004-NMCA-038, ¶ 10, 135 N.M. 306, 87 P.3d 1088; *Lowe,* 2004-NMCA-054, ¶ 12, 135 N.M. 520, 90 P.3d 539; *Prince,* 2004-NMCA-127, ¶ 9, 136 N.M. 521, 101 P.3d 332; *Taylor,* 1999-NMCA-022, ¶ 14, 126 N.M. 569, 973 P.2d 246. In *Reynolds,* 119 N.M. at 385, 387-88, 890 P.2d at 1317, 1319-20, the Supreme Court noted that the officer ran a wants and warrants check on all occupants of the vehicle and ran a computer check on the vehicle's license plate, and the Court quoted with approval an Idaho case upholding a warrants check on the driver's license.

{15} In the present case, Defendant attacked the lawfulness of the warrants check on the ground that it was an unlawful warrantless seizure in that it was not based on reasonable suspicion of criminal activity. We do not equate continued detention for a warrants check, on a person properly detained and identified by the officer, with continued detention to investigate possible contemporaneous criminal activity based on nothing more than generalized suspicion or unparticularized hunches that a motorist is engaged in criminal activity. *See Prince,* 2004-NMCA-127, ¶ 9, 136 N.M. 521, 101 P.3d 332 ("Generalized suspicions or unparticularized hunches that a person has been or is engaged in criminal activity do not suffice to justify a detention."); *Lowe,* 2004-NMCA-054, ¶ 12, 135 N.M. 520, 90 P.3d 539 (stating, in a routine traffic stop circumstance, that "[c]ontinued or contemporaneous detention for purposes related to ... unlawful activity [other than checking out license, registration, and insurance and running a wants and warrants check in regard to the current validity of the documentation] requires reasonable suspicion, proven through specific articulable facts, that the motorist has been or is engaged in criminal activity").

{16} When the target for identification is a passenger rather than the driver, police have limited avenues to expand the interaction. One avenue, not at play here, is if the officer can point to reasonable and articulable suspicion that other criminal activity is afoot. *Duran,* 2005-NMSC-034, ¶¶ 38, 42, 138 N.M. 414, 120 P.3d 836. Or, as in this case, the passenger may be implicated in the investigation related to the initial stop; in such a case there is no expansion of the basic invasion of a routine traffic stop. *See id.* ¶¶ 37-38 (holding that asking driver general questions about travel plans was reasonably related to the scope of the justification for the initial stop and thus no additional reasonable suspicion is required to justify such questions). Here because Defendant was the owner of the vehicle, asking for his identification and the vehicle's registration was reasonably related to the initial stop and run-

ning the wants and warrants check was a de minimis additional intrusion that was justified.

{17} An officer may not request identification from an innocent passenger when the request is based on "nothing more than a generalized concern about officer safety." *Affsprung,* 2004–NMCA–038, ¶¶ 18, 20, 135 N.M. 306, 87 P.3d 1088. In *Affsprung,* the officer stopped the vehicle, in which the defendant was a passenger, for a faulty license plate light. *Id.* ¶ 2. The officer observed no suspicious behavior before asking the defendant for identification. *Id.* ¶¶ 2, 4. The defendant had no identification, but gave the officer his name, date of birth, and social security number. *Id.* ¶ 2. The officer used the information to run a wants and warrants check on the defendant. *Id.* We noted that, although there is potential harm to an officer during a traffic stop, the defendant's "mere presence" in the stopped vehicle, where the officer had "no suspicion whatsoever of criminal activity or danger of harm from weapons[,]" could not justify even a "minimal intrusion to tip the balance in favor of public or officer safety over individual Fourth Amendment privacy." *Id.* ¶ 20. We held that the request for identification and use of that information to conduct a wants and warrants check on the defendant constituted an unlawful detention. *Id.* ¶ 21.

Present Case: The Officer Engaged in Lawful Activities

{18} No issue exists regarding the validity of the stop in this case. The issues relate to asking for identification and documentation, and running a computer warrants check. The particular facts in this case fall between those cases involving a driver who is the owner of a vehicle and required to produce the appropriate documents upon request as in *Reynolds,* and an innocent passenger who is exhibiting no suspicious behavior as in *Affsprung.* The State argues that *Affsprung* was wrongly decided and urges us to reject the holding in that case. We decline to do so. The facts in *Affsprung* are distinguishable from those in this case and it is not necessary to revisit *Affsprung* in order to decide this case. 2004–NMCA–038, ¶ 2, 135 N.M. 306, 87 P.3d 1088. Here, the driver was not the owner and could not produce the required documents for the vehicle. Defendant was not a passenger who was there "solely by virtue of the coincidence he was a passenger in the vehicle." *Id.* ¶ 20. Instead, as the owner of the stopped vehicle, Defendant was responsible for assuring that the vehicle was properly registered and insured, and was also responsible for giving permission to the driver to operate the vehicle.

{19} Thus, it was reasonable for Officer Dudewicz to turn to the owner-passenger for answers. The circumstances are no different here than in *Reynolds,* where the inquiry concerned the driver. Officer Dudewicz needed to ensure that the vehicle was properly registered and insured, and to investigate whether the driver was in lawful possession of the vehicle. The officer was justified in asking for and obtaining the owner-passenger's identification, registration, and insurance documentation, and then running a computer check related to these matters. No different than a minimal detention of an owner-driver for this type of inquiry, the minimal detention of the owner-passenger for these purposes was reasonable and lawful. The officer's activities in asking Defendant, the owner of the vehicle, for identification, registration, and insurance documentation, and in pursuing a computer warrants check based on the identification supplied by Defendant, were therefore constitutionally permissible and did not constitute valid grounds on which to suppress any evidence.

{20} We do not see a reason to limit an officer to a visual cross-check of identification of an owner-passenger with registration and insurance documentation. Under New Mexico law, the officer is not limited to such a cross-check when detaining a driver. Rather, our case law considers the continuing intrusion of a computer check, including a wants and warrants check relating to license or registration, as a de minimis procedure related to the government's and the officer's legitimate interests in making sure that the driver is properly licensed and driving a vehicle that is properly registered and insured. *Reynolds,* 119 N.M. at 386–88, 890 P.2d at

1318–20; *Lowe*, 2004–NMCA–054, ¶ 12, 135 N.M. 520, 90 P.3d 539; *Prince*, 2004–NMCA–127, ¶ 9, 136 N.M. 521, 101 P.3d 332; *Romero*, 2002–NMCA–064, ¶ 9, 132 N.M. 364, 48 P.3d 102; *Taylor*, 1999–NMCA–022, ¶ 14, 126 N.M. 569, 973 P.2d 246.

DEFENDANT'S MOTION FOR REHEARING

{21} In our now withdrawn opinion filed on February 1, 2006, we stated the following:

> As an initial matter, we note that Defendant did not argue that the warrants check was unrelated to license, registration, and insurance. There is nothing in the record indicating what particular information the officer sought in employing the computer check, what information other than outstanding warrants was retrievable and retrieved from the check, or what, if anything, the computer check showed regarding outstanding warrants other than, as in this case, the general revelation that Defendant had an outstanding misdemeanor warrant. Our cases relating to a warrants check seem to assume that the warrants check does relate to license, registration, or insurance. *See Taylor*, 1999–NMCA–022, ¶ 14, 126 N.M. 569, 973 P.2d 246 (noting that the officer "was in the process of performing a permissible wants and warrants inquiry," and stating that the officer "is entitled to verify that the driver is both licensed and driving a car that is registered and insured" (internal quotation marks and citation omitted)); *see also Affsprung*, 2004–NMCA–038, ¶ 10, 135 N.M. 306, 87 P.3d 1088 (stating the officer "is also authorized to run a wants and warrants check in relation to the driver to ensure the continued validity of the documents provided"). Until we are shown in a case before us that a warrants check is unrelated to license, registration, or insurance, we will assume that the check is so related, and under that assumption we hold that a computer warrants check upon obtaining license, vehicle registration, or insurance documentation is a de minimis intrusion supporting strong governmental and police officer interests in knowing whether the driver or owner with whom the officer is dealing has valid driving and vehicle-related documentation and that the vehicle is lawfully registered and insured.

{22} This discussion caused Defendant to file a motion for rehearing asserting that we did not follow the correct standard of review because we did not view the facts about the purpose and function of the wants and warrants check in a light most favorable to Defendant. In his motion for rehearing, Defendant asserted that we viewed the facts in a light most favorable to the State by assuming that the warrants check was related to license, registration, or insurance. Defendant asked us to affirm the district court or, alternatively, remand for an evidentiary hearing relating to the purpose and function of the warrants check. For the following reasons, we are not persuaded to grant the motion.

{23} At no time during the suppression hearing in district court did Defendant seek to invalidate his detention on the specific ground that the warrants check was completely unrelated to license, registration, or insurance, and therefore improper for that reason. In the present case, we have no doubt that the parties and the district court tried the suppression issue either under the assumption that the warrants computer check performed was related to license, registration, or insurance, or without regard to the purpose and function of the particular computer warrants check. Argument by counsel and discussions with the court during the suppression hearing focused on whether the officer needed additional consent from Defendant to continue with the warrants check and whether there were less intrusive ways to confirm Defendant's ownership status.

{24} Further, on appeal Defendant did not argue for affirmance based on the specific ground that the warrants check was completely unrelated to any question of license, registration, or insurance. Rather, the argument implicitly assumed or acknowledged that the warrants check would show related information. Defendant's track on appeal was the same as that of the district court, namely, that the investigative method for checking out ownership and insurance should

not have been by a warrants check because there were less intrusive ways in which registration and insurance information could be checked. No better indication of this is Defendant's argument:

> After the deputy learned that the driver was unable to produce proof of registration and insurance and that [Defendant] owned the vehicle . . ., the least intrusive means of determining whether the vehicle was registered and insured would have been to ask [Defendant] *only* whether he could produce proof of registration and insurance. Instead, the deputy also asked for [Defendant's] driver's license and then used it to conduct a wants and warrants check on him. . . . Accordingly, the deputy's demand for [Defendant's] license and retention of it while running a wants and warrants check were not the least intrusive means of determining whether the car was registered and insured.

{25} At best, Defendant misconstrues the purpose for our discussion in regard to the purpose and function of a computer warrants search. Our purpose was to point out the lack of discussion in our case law about whether computer warrants checks at issue in any particular case actually focuses on, or must focus on license, registration, or insurance. Clarification is needed. Defendant's motion for rehearing presented no ground for us to affirm the district court, nor any basis for a remand to try an issue not raised or addressed in the suppression hearing. Defendant's motion for rehearing presented a sophistical challenge only. We deny the motion.

CONCLUSION

{26} We reverse the order granting Defendant's motion to suppress and remand to the district court for continuation of the proceedings in this case.

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

WE CONCUR: CYNTHIA A. FRY and CELIA FOY CASTILLO, Judges.

2006-NMCA-063

136 P.3d 1029

Nora PIÑA Individually and as Temporary Administratrix of the Estate of Daniel H. Piña, Deceased, and as Next Friend of Santiago Piña, Daniel A. Piña, and Daniel Ray Piña, Plaintiffs,

and

Banta Oilfield Services, Inc., Plaintiff in Intervention–Appellee,

Bituminous Insurance Companies, Plaintiff in Intervention–Appellee,

v.

GRUY PETROLEUM MANAGEMENT COMPANY, Defendant–Appellant,

National Union Fire Insurance Company of Pittsburgh, PA, Intervenor–Appellant.

Nos. 25,219, 24,960.

Court of Appeals of New Mexico.

April 12, 2006.

Beall & Biehler, Larry D. Beall, José R. Blanton, Albuquerque, NM, for Appellee Banta Oilfield Services.

Keleher & McLeod, PA, Robert C. Conklin, Thomas C. Bird, Benjamin F. Feuchter, Albuquerque, NM, for Appellee Bituminous Insurance Companies.

Rodey, Dickason, Sloan, Akin & Robb, PA, Edward Ricco, Albuquerque, NM, Strasburger & Price, LLP, Jack M. Murchison, Houston, TX, Andrews Kurth, LLP, Stuart C. Hollimon, Dallas, TX, for Appellants Gruy Petroleum Management Co. and National Union Fire Ins. Co. of Pittsburgh, PA.

OPINION

ALARID, Judge.

{1} This case turns upon the interpretation of NMSA 1978, § 56–7–2 (1999), commonly known as the Oilfield Anti–Indemnity Statute. We hold that Section 56–7–2, as amended in 1999, is an expression of a "fundamental principle of justice," which is to insure the safety of persons and property at well sites within New Mexico, and that a choice of law provision applying Texas law, by which an indemnitee may be indemnified against its own negligence, is void as violative of the public policy of New Mexico. Recognizing that previously we may have underestimated the force of the public policy expressed by Section 56–7–2, we limit our decision in *Reagan v. McGee Drilling Corp.*, 1997–NMCA–014, 123 N.M. 68, 933 P.2d 867, to the pre–1999 version of Section 56–7–2.

BACKGROUND

{2} Appellant, Gruy Petroleum Management Co. (Gruy), is a Texas Corporation. Appellee, Banta Oilfield Services, Inc. (Banta), is a New Mexico Corporation. Appellee, Bituminous Insurance Companies (Bituminous), is a foreign insurer authorized to conduct business in New Mexico.

{3} In July 2000, Banta and Gruy entered into a Master Service Contract (MSC) under which Banta agreed to perform work at an oil well site operated by Gruy in Lea County, New Mexico. Article 10 of the MSC provided that

> [t]o the fullest extent permitted by law, [Banta] shall indemnify, defend and hold harmless GRUY . . . from and against all claims, damages, losses, liens, causes of action, suits, judgments, fines and expenses, including, but not limited to rea-

sonable attorneys' fees (collectively referred to and defined as "Liabilities"), of any person or entity arising out of, caused by or resulting directly or indirectly from the performance of the work under this Contract, ... regardless of whether the Liabilities are caused in part by the negligence of any Indemnitee.

Article 11 of the MSC required Banta to maintain a $1,000,000 commercial general liability policy adding Gruy as an "additional insured" and to waive any rights of subrogation that Banta and its insurer otherwise would have against Gruy. Article 24 of the MSC provided that it "shall be construed and interpreted in accordance with the laws of the state of Texas." Gruy drafted the MSC and signed it in Texas; Banta signed the MSC in New Mexico.[1]

{4} Banta purchased liability insurance from Bituminous. The policy insured Banta against tort liability assumed by contract and named Gruy as an additional insured.

{5} In March 2003, Nora Piña filed a wrongful death action against Gruy, alleging that her husband, Daniel, suffered fatal burns in 2002 while employed by Banta at a well site located in Lea County, New Mexico, and owned and operated by Gruy. Piña alleged that her husband's injuries were caused by the wrongful conduct of Gruy's agents or employees. Piña sought compensatory and punitive damages.

{6} Banta intervened in the wrongful death action. Banta alleged that Gruy had invoked Article 10 of the MSC, demanding that Banta defend and indemnify Gruy. Banta sought a declaratory judgment invalidating the indemnity provision as violative of Section 56–7–2. Gruy cross-claimed against Banta, seeking enforcement of the indemnity provision and a declaratory judgment validating the provision. Banta and Gruy filed cross-motions for summary judgment. The district court granted Banta's motion and denied Gruy's motion, ruling that the indemnity provision of the MSC was against the public policy of New Mexico as expressed in "[Section] 56–7–2 (*1999*)" (emphasis added) and therefore was "void and unenforceable." Gruy appealed.

{7} Thereafter, Bituminous intervened in the wrongful death action. Citing Section 56–7–2, Bituminous sought a declaratory judgment relieving it on grounds of public policy of any responsibility to defend or indemnify Gruy. Gruy filed a counter-claim seeking a declaratory judgment that Bituminous was required to defend and indemnify Gruy against Piña's claims. Bituminous and Gruy filed cross-motions for summary judgment. The district court granted Bituminous' motion and denied Gruy's motion. Gruy appealed.

{8} We consolidated the two appeals.

DISCUSSION

{9} The Oilfield Anti–Indemnity Statute was enacted in 1971. 1971 N.M. Laws, ch. 205, § 1. In its original form, Section 56–7–2 [then codified as NMSA 1953, § 28–2–2] provided as follows:

A. Any agreement, covenant or promise contained in, collateral to or affecting any agreement pertaining to any well for oil, gas or water ... which purports to indemnify the indemnitee against loss or liability for damages, for:

(1) death or bodily injury to persons; or

(2) injury to property; or

(3) any other loss, damage or expense arising under either Paragraph (1) or (2) or both; or

(4) any combination of these, arising from the sole or concurrent negligence of the indemnitee or the agents or employees of the indemnitee ... is against public policy and is void and unenforceable. This provision shall not affect the validity of any insurance contract or any benefit conferred by the Workmen's Compensation Act....

{10} We construed Section 56–7–2 in *Guitard v. Gulf Oil Co.,* 100 N.M. 358, 670 P.2d 969 (Ct.App.1983). In *Guitard,* we recognized that the public policy underlying Section 56–7–2 is to promote safety. *Guitard, 100 N.M.* at 361, 670 P.2d at 972. We construed Section 56–7–2 to permit indemnity agreements that do not purport to relieve

1. The order in which the parties signed the MSC is not clear from the record.

the indemnitee from liability for its own negligence, since in the case of such agreements, "[b]oth the operator [indemnitee] and the subcontractor [indemnitor] will have incentive to monitor the safety of the operation knowing that they will be responsible for their respective percentage of negligence." *Guitard, 100 N.M.* at 362, 670 P.2d at 973. We upheld the indemnity agreement at issue in *Guitard* because we interpreted it to require the indemnitor to indemnify the indemnitee only for the indemnitor's percentage of negligence.

{11} Our Supreme Court construed Section 56–7–2 in *Amoco Production Co. v. Action Well Service, Inc.,* 107 N.M. 208, 755 P.2d 52 (1988). *Amoco* turned upon the clause "this provision shall not affect the validity of any insurance contract" contained in the final sentence of Section 56–7–2(A)(4). *Amoco Prod. Co.,* 107 N.M. at 210, 755 P.2d at 54 (internal quotation marks and citation omitted). The Supreme Court held that this language allows a party to obtain insurance against its own negligence, but that it does not permit indemnification agreements whereby the indemnitor is required to obtain insurance that insures an indemnitee from liability for the indemnitee's own negligence.

{12} Subsequently, in *Reagan,* we considered Section 56–7–2 in a conflict-of-laws context. In *Reagan,* a Texas drilling contractor sought indemnification from the Texas operator of an oil well located in Lea County, New Mexico, against liability for injuries to a third-party's employee caused by a defective platform belonging to the drilling contractor and under the drilling contractor's sole control and custody. The indemnity agreement at issue in *Reagan* provided that it was "governed and interpreted under the laws of TEXAS." *Reagan,* 1997–NMCA–014, ¶ 4, 123 N.M. 68, 933 P.2d 867. We observed that Texas' anti-indemnity statute allowed indemnity agreements indemnifying a party against its own negligence where the indemnitor's obligation is covered by liability insurance, an arrangement nevertheless unlawful under Section 56–7–2 as interpreted by our Supreme Court in *Amoco. Reagan,* 1997–NMCA–014, ¶ 11, 123 N.M. 68, 933 P.2d 867. We acknowledged that New Mexico policy of not enforcing indemnity agreements was stricter than that of Texas and that under New Mexico law the indemnity agreement would be void and unenforceable. *Id.* ¶ 12.

{13} Examining conflict-of-laws principles, we observed that New Mexico courts may decline to enforce a choice-of-law provision in a contract incorporating foreign law if application of foreign law would offend New Mexico public policy. *Id.* ¶ 8. We immediately qualified this apparently broad public policy exception to freedom of contract:

> It is said that courts should invoke this public policy exception only in "extremely limited" circumstances. Mere differences among state laws should not be enough to invoke the public policy exception. Otherwise, since every law is an expression of a state's public policy, the forum law would always prevail unless the foreign law were identical, and the exception would swallow the rule. The threshold, under Justice Cardozo's classic articulation, is whether giving effect to another state's policies would "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal" of the forum state.

Id. ¶ 9 (citations omitted). We concluded that the diametrically opposed outcomes that would obtain under New Mexico law versus Texas law merely established that the laws of the two states are "different" and that application of Texas law to uphold an indemnity agreement that was unlawful under Section 56–7–2, as construed by our Supreme Court, would not violate "some fundamental public policy of the State of New Mexico." *Reagan,* 1997–NMCA–014, ¶ 14, 123 N.M. 68, 933 P.2d 867. Relying on public policy favoring freedom of contract, and what we perceived as the absence of a serious policy conflict between New Mexico and Texas law, we upheld the parties' choice of Texas law, which validated the indemnification provision:

> In the present case, the indemnity provisions are valid under Texas law, whose public policy is consistent with New Mexico's. Furthermore, the indemnity provisions [in the contract] do not touch upon any rule of public morals. They do not rise to the level of violating "some funda-

mental principle of justice, some prevalent conception of good morals. . . ." The parties negotiated and signed the contract in Texas. Both parties were free to choose Texas law to govern their contract, and under that law the provisions are valid. Our conflict of laws rules require us to recognize that law and enforce the contract.

Id. ¶ 16 (citation omitted).

{14} In 1999, the Legislature substantially revised Section 56–7–2:

A. An agreement, covenant or promise contained in . . . an agreement pertaining to a well for oil . . . that purports to indemnify the indemnitee against loss or liability for damages arising from the circumstances specified in Paragraph[ ](1) . . . is against public policy and is void:

(1) the sole or concurrent negligence of the indemnitee . . .;

. . . .

C. A provision in an insurance contract . . . or any other contract requiring a waiver of rights of subrogation or otherwise having the effect of imposing a duty of indemnification on the primary insured party that would, if it were a direct or collateral agreement [indemnifying a party against its own negligence], be void, is against public policy and void.

1999 N.M. Laws, ch. 162, § 1.

{15} In 2003, the Legislature amended Section 56–7–2, inserting the words "foreign or domestic" and "within New Mexico" in Subsection A:

A. An agreement, covenant or promise, *foreign or domestic,* contained in . . . an agreement pertaining to a well for oil . . . within New Mexico, that purports to indemnify the indemnitee against loss or liability for damages arising from the circumstances specified in Paragraph (1) . . . is against public policy and is void:

(1) the sole or concurrent negligence of the indemnitee . . . [.]

2003 N.M. Laws, ch. 309, § 2 (emphasis added).

{16} Gruy concedes that the 2003 version of Section 56–7–2 would invalidate the indemnification provisions of the MSC. Gruy argues that

[w]hile the district court correctly recognized that the 1999 version of the statute applies to the present case and the 2003 version is not retroactive, the court in essence gave the 2003 amendment retroactive effect by erroneously ascribing to the 1999 statute a legislative intent that was not manifest until 2003.

Gruy argues that the district court's interpretation of the 1999 version of Section 56–7–2 frustrates a legitimate expectation that its indemnity agreement would be enforceable under New Mexico law.

{17} Section 56–7–2 is an example of an extraordinarily limited class of statutes whose very subject is the enforceability of contracts that contravene a specific public policy. In 1971, when the Legislature enacted the original version of Section 56–7–2, it was well settled that freedom of contract is a "paramount" public policy "not to be interfered with lightly." *Tharp v. Allis–Chalmers Mfg. Co.,* 42 N.M. 443, 449, 81 P.2d 703, 706 (1938). In enacting Section 56–7–2, our Legislature directly addressed the conflict between the policies generally favoring freedom of contract and the policy favoring safety at well sites and mines located in New Mexico. The Legislature expressly determined that in this particular context, freedom of contract was to be subordinated to the policies furthered by the Oilfield Anti–Indemnity Statute. Where the Legislature has directly addressed the question of unenforceability on grounds of public policy "the court is bound to carry out the legislative mandate with respect to the enforceability of the term." Restatement (Second) of Contracts § 178(2) cmt. a (1981).

{18} The Legislature's decision to expressly subordinate freedom of contract to well site safety is a persuasive indicator that the Legislature believed promoting safety at well sites to be an especially important public policy. The Legislature, which we presume was familiar with the strong public policy favoring freedom of contract, nevertheless, chose to elevate the public policy favoring safety at well sites over the public policies underlying freedom of contract. In *Reagan,*

we failed to appreciate that a public policy embodied in a statute that expressly overrides freedom of contract is necessarily an unusually important public policy in its statutory context. *See* Restatement (Second) of Conflict of Laws § 187 cmt. g (1971) (discussing public policy exception to parties' ability to contractually designate which state's law will apply to their transaction; observing that "fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal").

{19} In deciding *Reagan*, we also failed to appreciate that safety concerns underlying Section 56–7–2 are not limited to the immediate parties to an indemnity agreement. By requiring an indemnitee to remain responsible for its own negligence, Section 56–7–2 protects third parties whose person or property would be placed at risk by the indemnitee's indifference to safety.[2] Because Section 56–7–2 promotes the safety of third parties, an indemnity agreement prohibited by Section 56–7–2 is not a purely private matter.

{20} In *Reagan*, we assumed that "while a Texas indemnity contract covered by insurance is contrary to the letter of New Mexico law, it does not promote a policy at odds with New Mexico [public] policy." *Reagan*, 1997–NMCA–014, ¶ 13, 123 N.M. 68, 933 P.2d 867. Bituminous points out that the 1999 amendment to Section 56–7–2 directly responded to this observation by expressly providing in Subsection (C) that indemnity agreements covered by insurance are "against public policy and void." Subsequent to the 1999 amendment, it is no longer reasonable to state, as we did in *Reagan*, that enforcement of an indemnity agreement indemnifying the indemnitee against its own negligence supported by insurance "does not promote a policy at odds with New Mexico policy." 1997–NMCA–014, ¶ 13, 123 N.M. 68, 933 P.2d 867. By expressly declaring that prohibited indemnity agreements covered by insurance also are "against public policy," the 1999 amendment severely undercut our analysis in *Reagan*, which proceeded on the assumption that the choice-of-law clause at issue implicated "mere differences" between New Mexico and Texas law.

{21} We hold that the Texas anti-indemnity statute is fundamentally inconsistent with important New Mexico public policy as expressed in Section 56–7–2 *as amended in 1999*. Accordingly, a choice-of-law provision contained in a contract executed subsequent to the effective date of Section 56–7–2 as amended by the 1999 Legislature and that purports to apply Texas' anti-indemnity statute to validate an otherwise prohibited indemnification agreement pertaining to work to be performed at a New Mexico oil well site is itself void as against public policy.

{22} "[W]e presume that the legislature does not intend to enact useless statutes[.]" *City of Albuquerque v. State Mun. Boundary Comm'n*, 2002–NMCA–024, ¶ 11, 131 N.M. 665, 41 P.3d 933. "[T]he legislature can[ ] amend an existing law for clarification purposes just as effectively and certainly as for purposes of change." *State ex rel. Dickson v. Aldridge*, 66 N.M. 390, 396, 348 P.2d 1002, 1005 (1960). The 2003 amendments merely make clearer what was already implicit in the 1999 amendments to Section 56–7–2: indemnification agreements that undermine the indemnitee's incentive to promote safety at New Mexico well sites violate a fundamental public policy of New Mexico and are void and unenforceable; and further, agreements that purport to escape the effect of Section 56–7–2 by invoking foreign law, likewise, are against public policy and are void and unenforceable in New Mexico courts.

{23} We affirm the judgments of the district court.

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Chief Judge and RODERICK T. KENNEDY, Judge.

2. In *Reagan* itself, the injured party was not an employee of either of the parties to the indemnity agreement.

2006-NMCA-064
136 P.3d 1035

Arlo and Joyce MURKEN, on behalf of themselves and all others similarly situated, Plaintiffs–Appellees,

v.

SOLV–EX CORPORATION, John S. Rendall, W. Jack Butler, Defendants,

and

Deutsche Morgan Grenfell, Inc., Defendant–Appellee,

and

Bernard C. Baier (including shares held by Pension and Profit sharing Plan FBO Bernard C. Baier with Suburban Radiology, Patricia A. Baier, Mary Kathleen Baier, and Susan Baier); Harold S. Carpenter (including shares held by Marilyn N. Carpenter, Heartland Systems Company, and Carpenter Investment Company); Lee S. Chapman; Clark A. Colby (including shares held by Thomas Colby, Kimberly Colby, Clark A. Colby, Jr., Melinda Colby, Clark A. Colby III, Vicki Colby, Robert Vogel, Mr. and Mrs. Kenneth Brooke, Lloyd Clarke, Peggy Williams, Stephanie Kempf, Jeff Lamson, Charles I. Colby and Ruth Colby Trust Number One, Ruth Colby Trust 'A', Charles I. Colby and Ruth Colby Nation Development Trust, Charles I. Colby and Ruth Colby Trust, and The Six Incorporated Trust); Keith Denner; Joey Feste; Joe Fielder; William R. and Virginia R. Fielder; Jerry V. Flatt; Samuel A. Francis; Kenneth L. Haack; Armon J. Helvig; Steve Lindell; Edward J. Michael; Toby Michael; Cliff Phelps; Kelly Wentzel; and Don White, Proposed Intervenors–Appellants,

and

Toby Michael, Objector–Appellant,

and

Bernard Baier, Lee Chapman, William Felder, Virginia Felder, Jerry Flatt, Cliff Phelps, Kelly Wentzel, Don White, Joey Feste, Edward J. Michael, Toby Michael, David Rendall, Joe Rock, Mark Richards, John Liporante, Manny Aragon, Dennis Schlegel, Kent Barghols, Norman Anderson, Sajad Janmohammed, Milton E. Davey, Charles Quenneville, Robert Retz, Matthew L.T. Waldor, and Mary Ann Michael, Movants–Appellants.

No. 25,459.

Court of Appeals of New Mexico.

April 25, 2006.

Sanchez, Mowrer & Desiderio, P.C., Robert J. Desiderio, Albuquerque, NM, for Appellants.

Branch Law Firm, Turner W. Branch, Albuquerque, NM, Alexander, Hawes & Audet, LLP, William M. Audet, San Jose, CA, for Appellees Arlo and Joyce Murken.

Modrall, Sperling, Roehl, Harris & Sisk, P.A., John R. Cooney, Charles A. Armgardt, Albuquerque, NM, Milbank, Tweed, Hadley & McCloy, LLP, Jeffrey Barist, New York, NY, Michael D. Nolan, Andrew M. Leblanc, Washington, D.C., for Appellee Deutsche Morgan Grenfell, Inc.

OPINION

PICKARD, Judge.

{1} In this class action appeal, we decide whether the district court was divested of jurisdiction over the merits of the case due to a pending appeal of the denial of a motion to intervene brought by nonnamed class members. We also consider issues contending the district court abused its discretion in certifying a class for purposes of settlement, in deciding that notice to absent class members was adequate, and in approving the settlement, all without conducting an evidentiary hearing. Holding that the district court had jurisdiction to certify the class and did not abuse its discretion in finding that a class action was the superior method of adjudication, and that the other issues are not properly before us, we affirm.

BACKGROUND

{2} This is another appeal involving the demise of the Solv–Ex Corporation. *See Butler v. Deutsche Morgan Grenfell, Inc.*, 2006-NMCA-084, 140 N.M. 111, 140 P.3d 532

(Nos. 25,556, 25,557, 25,558, filed April 25, 2006); *Murken v. Solv-Ex Corp.*, 2005-NMCA-137, 138 N.M. 653, 124 P.3d 1192; *Murken v. Suncor Energy, Inc.*, 2005-NMCA-102, 138 N.M. 179, 117 P.3d 985. The case began when Plaintiffs filed a class action complaint in 1996. Solv-Ex Corporation, John Rendall (founder and CEO of Solv-Ex), W. Jack Butler (president of Solv-Ex), and Deutsche Morgan Grenfell (DMG, an investment firm that had helped to finance Solv-Ex) were all named as defendants. Plaintiffs' complaint alleged that the defendants had engaged in a fraudulent scheme involving the sale of Solv-Ex stock. The complaint alleged violations of state securities laws and asserted common law tort and contract claims. In 2003, Plaintiffs entered into a settlement agreement with DMG whereby the class would receive $1.5 million. The agreement did not involve any of the other defendants. On September 8, 2003, the district court granted preliminary approval of the settlement and directed the parties to the settlement to send notice to class members. The district court's order certifying the class directs that the order will become null and void should the settlement not become effective.

{3} On August 13, 2003, after Plaintiffs and DMG had reached a settlement but before the court's preliminary approval of the settlement, some of the Appellants in this case moved to intervene in the class action. These Appellants claimed to be Solv-Ex stockholders who had suffered injuries similar to those alleged by the class plaintiffs. They disagreed with Plaintiffs' theory of the case. They believed that Butler and Rendall were not responsible for Solv-Ex's failure. Instead, they alleged DMG and its parent company, Deutsche Bank, had acted in concert with third parties to harm Solv-Ex. They also claimed that Plaintiffs were not adequately representing the interests of the class members. The district court denied the motion to intervene as untimely. This Court recently affirmed that decision. *Murken*, 2005-NMCA-137, ¶ 2, 138 N.M. 653, 124 P.3d 1192.

{4} On December 9, 2004, while Appellants' appeal of the intervention denial was pending before this Court, the district court held a hearing on the motion of Plaintiffs and DMG for final approval of the settlement agreement. The court did not allow the presentation of oral testimony at the hearing, but it did allow argument by all parties who asked to be heard, and it considered extensive documentary evidence, affidavits, and pleadings contained in the record. Over Appellants' objection, the district court certified the class for purposes of settlement only and approved the settlement. Appellants filed an application for appeal of this order under Rule 1-023(F) NMRA, which we granted.

{5} Appellants' briefing indicates that the individuals appealing the district court's order fall into three distinct groups: (1) those individuals who unsuccessfully attempted to intervene in the class action; (2) Toby Michael, a class member who filed a timely objection to the settlement; and (3) "movants," a group of Solv-Ex shareholders who objected to the settlement. However, the same arguments are advanced with respect to all three groups, and the briefing does not indicate if or why the groups should be treated differently. Thus, we will not distinguish between the groups, referring to them collectively hereafter as Appellants.

DISCUSSION

{6} As an initial matter, Plaintiffs argue that Appellants lack standing to challenge the district court's order because they are not "parties" to the litigation. However, Plaintiffs acknowledge that one of the appellants was a party, and they do not explain why or argue that he would not have standing. In addition, Plaintiffs have not cited any authority whatsoever in support of their position. We will not address contentions not supported by argument and authority. *See, e.g., Smith v. Village of Ruidoso*, 1999-NMCA-151, ¶ 36, 128 N.M. 470, 994 P.2d 50.

{7} Appellants advance three arguments on appeal: (1) because of the pending appeal of the intervention denial, the district court lacked jurisdiction to certify the class and approve the settlement; (2) the district court abused its discretion in failing to "rigorously analyze" the superiority and notice requirements of Rule 1-023 because it failed to hold an evidentiary hearing, and it abused its

discretion in failing to place the burden on Plaintiffs to show that the rule's requirements were met; and (3) the district court's decisions to certify the class, approve the notice procedures, and approve the settlement are not supported by substantial evidence because the court did not allow the presentation of any evidence. We address these arguments in turn, rejecting each of them.

1. The District Court Had Jurisdiction to Certify the Class and Approve the Settlement

{8} Appellants first argue that the district court lacked jurisdiction to certify the class and approve the settlement due to the pending appeal of the denial of Appellants' motion to intervene. We review the subject matter jurisdiction of the district court de novo. *See Sanchez v. Santa Ana Golf Club, Inc.*, 2005-NMCA-003, ¶ 4, 136 N.M. 682, 104 P.3d 548.

{9} Appellants rely on *Kelly Inn No. 102, Inc. v. Kapnison*, 113 N.M. 231, 824 P.2d 1033 (1992), *limited on other grounds by Trujillo v. Hilton of Santa Fe*, 115 N.M. 397, 851 P.2d 1064 (1993). In *Kelly Inn*, our Supreme Court clarified the well-known rule that the filing of a proper notice of appeal divests the district court of jurisdiction and transfers jurisdiction to the appellate court. *See* 113 N.M. at 241–43, 824 P.2d at 1043–45. The Court noted that the rule is not absolute, as it does not prevent the district court from taking actions to "carry out or enforce the judgment." *Id.* at 241, 824 P.2d at 1043. The Court then listed examples of such permissible actions. *Id.* (determination of amount of costs); *id.* at 242, 824 P.2d at 1044 (motion to enter deficiency judgment; enforcement of declaratory judgment; stay of execution of judgment). However, the Court ultimately reiterated the general rule that when an appeal is pending, the district court retains jurisdiction only to determine "collateral matters not involved in the appeal." *Id.* at 243, 824 P.2d at 1045.

{10} Appellants argue that the district court lacked jurisdiction because certification of the class and approval of the settlement were not "collateral matters" that would not "affect the judgment on appeal." Appellants assert that the judgment on appeal could have been affected by the district court's actions of certifying the class and approving the settlement because if this Court had reversed the district court and allowed Appellants to intervene, there would have been no lawsuit remaining for them to join on remand. We are not persuaded by these arguments.

{11} *Kelly Inn* makes clear that the policy behind the rule is judicial economy—as a practical matter, it would be inefficient to have two courts working on the same substantive matter at the same time. *Id.* at 242, 824 P.2d at 1044 (noting that the rule is "designed to avoid the confusion and waste of time that might flow from putting the same issues before two courts at the same time" (internal quotation marks and citation omitted)). To avoid such waste, when substantive issues have been properly put before the appellate court, the district court may no longer take any action that could change the issues pending in the appellate court. As the United States Supreme Court has written: "The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over *those aspects of the case involved in the appeal.*" *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) (per curiam) (emphasis added), *superseded by rule on other grounds as stated in Hatfield v. Bd. of County Comm'rs*, 52 F.3d 858, 861 (10th Cir.1995). Thus, application of the *Kelly Inn* rule necessarily assumes a final, appealable order on the merits that is under consideration by an appellate court and could be affected by further action of the district court.

{12} Here, the situation is different. The only relevant final order issued by the district court prior to the certification and settlement order was the denial of intervention. Our cases deem such orders "final" so that they can be immediately appealed, not because they conclude the case pursuant to ordinary notions of finality. *See Apodaca v. Town of Tome Land Grant*, 86 N.M. 132, 133, 520 P.2d 552, 553 (1974) (discussing

whether denial of intervention is appealable as of right and concluding that orders denying intervention are final to allow them to be appealable); *Kelly Inn,* 113 N.M. at 236, 824 P.2d at 1038 ("The general rule in New Mexico for determining the finality of a judgment is that '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.' " (internal citation omitted)); *cf.* Rule 1–054(B)(2) NMRA (deeming judgment determining all issues as to one party to be final unless the court otherwise provides). Thus, the order denying intervention can be viewed as interlocutory, although immediately appealable. There was no final order on the merits of the underlying class action. We certainly agree that the *Kelly Inn* rule would have prevented the district court from altering its ruling on the intervention motion, the substantive matter that was pending before this Court. But because no substantive issues involving the certification or settlement were before this Court at the time the district court made its ruling on those issues, the dangers sought to be avoided by the *Kelly Inn* rule were not implicated. Therefore, we hold that the *Kelly Inn* rule was not applicable and the district court retained jurisdiction to certify the class and approve the settlement.

{13} Authority from other jurisdictions also provides support for our decision. We note that Appellants have provided us with no authority that directly supports their position, and we are thus entitled to assume there is none. *In re Adoption of Doe,* 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) ("We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority."). However, our research has revealed a few cases that are on point. Two of those cases reach the same conclusion we do, while the other, with little analysis and no citation to direct authority, reaches the opposite conclusion. *See Van Hoomissen v. Xerox Corp.,* 368 F.Supp. 829, 831 n. 1 (N.D.Cal.1973) (noting that intervenor's interlocutory appeal involving scope of intervention did not deprive court of jurisdiction over "other matters in the case which are not on appeal"), *abrogated on other grounds as noted in Patrick v. Miller,* 953 F.2d 1240, 1250 & n. 5 (10th Cir.1992); *Olson v. Hopkins,* 269 Cal.App.2d 638, 75 Cal.Rptr. 33, 37–38 (Ct.App.1969) (rejecting argument, based on statute similar to *Kelly Inn* rule, that appeal of denial of intervention motion divested district court of jurisdiction to rule on merits); *cf. County of Alameda v. Carleson,* 5 Cal.3d 730, 97 Cal.Rptr. 385, 488 P.2d 953, 958 n. 7 (1971) (en banc) (citing *Olson* for the proposition that district court retained jurisdiction to rule on proposed intervenors' motion to vacate judgment where the denial of their motion to intervene was on appeal). *But see Maine v. Norton,* 148 F.Supp.2d 81, 83 (D.Me.2001) (citing no direct authority but stating that the lower court lacked jurisdiction to proceed on the merits while denial of intervention was pending in court of appeals).

{14} We are also unpersuaded by Appellants' reliance on the *Kelly Inn* Court's statement that the district court is not divested of jurisdiction when the action it takes "will not affect the judgment on appeal." 113 N.M. at 241, 824 P.2d at 1043 (emphasis omitted). Appellants take this phrase out of context. The complete sentence reads as follows: "It is clear, though, that a pending appeal does not divest the trial court of jurisdiction to take further action when the action will not affect the judgment on appeal and when, instead, the further action enables the trial court to carry out or enforce the judgment." *Id.* (emphasis omitted). The complete sentence makes clear that the Court was not attempting to set forth a comprehensive definition of actions that are impermissible. Rather, it was stating what actions are permissible—those actions that are taken to "carry out or enforce the judgment." Thus, this statement does not aid Appellants. *See Fernandez v. Farmers Ins. Co. of Ariz.,* 115 N.M. 622, 627, 857 P.2d 22, 27 (1993) ("[C]ases are not authority for propositions not considered." (internal quotation marks and citations omitted)).

{15} We have also considered the policy arguments raised by Plaintiffs and Defendant DMG. They point out that if we were to rule in Appellants' favor on this question, we

would be creating the possibility that an appeal of any intervention motion, no matter how frivolous, could be used to delay proceedings in the district court indefinitely. We agree that this possibility further counsels against a holding that the district court lacked jurisdiction in this case.

{16} In fact, as we noted above, the order denying intervention is fundamentally interlocutory, although it is deemed final for purposes of allowing it to be immediately appealed. It is precisely to prevent a litigant from depriving a district court of jurisdiction that we have held that an attempted "appeal from a manifestly non-final order cannot divest a court of jurisdiction." *In re Byrnes,* 2002–NMCA–102, ¶ 39, 132 N.M. 718, 54 P.3d 996.

{17} Importantly, too, Appellants did not pursue other options that were potentially available to protect their rights. First, they could have asked the district court to stay its decision on the merits pending resolution of the appeal. *See Belser v. O'Cleireachain,* 2005–NMCA–073, ¶ 3, 137 N.M. 623, 114 P.3d 303 (noting that the district court, in the exercise of its inherent power to manage the cases before it, has discretion to grant and lift stays). If they were dissatisfied with the district court's exercise of discretion, Rule 12–207 NMRA provides general authority for this Court's review of district court decisions dealing with stays.

{18} Second, they could have opted out of the action so as to not be bound by any judgment rendered. *See* Rule 1–023(C)(2)(a) (referencing the ability of class members to timely request exclusion from the class). Appellants also fault the notice procedures used by Plaintiffs, alleging that some class members did not receive actual notice of the action in time to opt out. However, the opt-out deadline was November 3, 2003, and the motion to intervene was filed on August 13, 2003. Thus, at least those Appellants who were party to the motion to intervene had actual notice of the action in time to opt out. Because Appellants declined to protect their rights by requesting a stay or opting out of the class, they ran the risk of the situation in which they now find themselves.

{19} We acknowledge that there appear to be some Movant–Appellants who were not party to the motion to intervene, and thus we cannot tell whether they would have had actual notice in time to opt out. However, while Appellants have made a general allegation that some class members received notice after the opt-out deadline, they have not indicated whether any of the parties to this appeal fall into that category. *See City of Albuquerque v. Westland Dev. Co.,* 121 N.M. 144, 155, 909 P.2d 25, 36 (Ct.App.1995) ("The appellant has the burden to point out clearly and specifically the error it asserts on appeal.").

{20} We reiterate that because there was no final judgment on the merits of the underlying class action, the *Kelly Inn* rule was not applicable and the district court acted within its jurisdiction in certifying the class and approving the settlement.

2. The District Court Adequately Analyzed the Rule 1–023 Factor of Superiority and Did Not Abuse its Discretion in Certifying the Class

{21} We utilize a two-step process in reviewing a district court's class action certification decision. First, we review de novo whether the district court applied the correct law. *See Brooks v. Norwest Corp.,* 2004–NMCA–134, ¶ 7, 136 N.M. 599, 103 P.3d 39. If the district court has applied the correct law, we then review its certification decision to see whether the court abused its discretion in certifying or refusing to certify the class. *Id.*

{22} Appellants first argue that the district court "misappli[ed]" the law in "neglect[ing] to undertake the rigorous analysis required by law of whether Plaintiffs met all the requirements of Rule [1–023]." Appellants' primary argument is that the district court erred in failing to hold an evidentiary hearing prior to certifying the class. This is a threshold question of whether the district court applied the correct law, and we review it de novo. *See Brooks,* 2004–NMCA–134, ¶ 7, 136 N.M. 599, 103 P.3d 39. After making that determination, we review the remainder of Appellants' contentions under the abuse of discretion standard because Appellants do not make any other allegations that the court

failed to apply or misconstrued the requirements of Rule 1–023. We hold that the district court was not required to hold an evidentiary hearing and that the court did not abuse its discretion in certifying the class.

{23} Appellants specifically argue that the district court failed to "rigorously analyze" the requirement of Rule 1–023(B)(3) that a class action must be superior to other methods of adjudication. *See Brooks,* 2004–NMCA–134, ¶ 9, 136 N.M. 599, 103 P.3d 39 (directing district courts to engage in a "rigorous analysis" of the Rule 1–023 requirements in order to ensure that the process is fair to both defendants and absent class members). This requirement mandates that before certifying a Rule 1–023(B)(3) class action, the district court must find that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The rule then directs the court to consider the following four factors in deciding whether a class action is the superior method of adjudication: (1) "the interest of members of the class in individually controlling the prosecution or defense of separate actions," (2) "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class," (3) "the desirability or undesirability of concentrating the litigation of the claims in the particular forum," and (4) "the difficulties likely to be encountered in the management of a class action." Rule 1–023(B)(3).

{24} Appellants argue only that the first of the superiority factors, the interest of individual class members in bringing their own actions, weighs against certification in this case. Appellants correctly point out that one of the primary considerations with regard to this factor is the potential size of individual members' claims, because larger claims are more likely to be worth adjudicating individually instead of in a class action. *See Amchem Prods.,* 521 U.S. at 616, 117 S.Ct. 2231.

{25} Appellants have not demonstrated to us that the district court failed to conduct a rigorous analysis of this factor. As we have stated, Appellants' argument essentially boils down to dissatisfaction with the district court's refusal to hold an evidentiary hearing before certifying the class. Appellants argue that the size of potential individual claims is a question of fact that the court cannot have considered because it refused to allow the presentation of evidence.

{26} Courts around the country have concluded that a district court need not conduct an evidentiary hearing prior to certifying a class. *See, e.g., Grayson v. K Mart Corp.,* 79 F.3d 1086, 1099 (11th Cir.1996) ("A court *may* hold an evidentiary hearing prior to certifying a class. The failure to hold an evidentiary hearing, however, does not require reversal of the class certification unless the parties can show that the hearing, if held, would have affected their rights substantially." (internal citations omitted)); *Hartman v. Duffey,* 19 F.3d 1459, 1473 (D.C.Cir.1994) (remanding for reconsideration of certification decision but stating that "[w]e emphasize that there is no requirement in this circuit that a trial court conduct an evidentiary hearing . . . on the issue of class certification in every case"). *But see Merrill v. S. Methodist Univ.,* 806 F.2d 600, 608 (5th Cir.1986) ("[W]e have stated on numerous occasions that the district court should ordinarily conduct an evidentiary hearing on [the certification] question. Only in cases free from doubt, where clear grounds exist[ ] for denial of class certification may a district court escape this obligation." (internal quotation marks and citations omitted)). We agree with the majority of these courts and hold that a district court is not required to hold an evidentiary hearing prior to making a certification decision, particularly in cases like the present one, where the district court reviewed a mass of documentary evidence and heard argument of counsel, and where Appellants have not specifically shown any prejudice from the failure to hold an evidentiary hearing.

{27} We now examine whether the district court abused its discretion in finding that the superiority requirement was met. We note that despite the district court's refusal to take "evidence," the court was well aware of Appellants' contention that a class action was not the superior method of adjudication due to the allegation of large claims

belonging to individual class members. Counsel for Appellants cogently made this point at the certification hearing, and Mr. Michael (the Appellant who was a class member and timely objected) also submitted an affidavit indicating that he alone owned approximately 600,000 shares of Solv–Ex stock. Appellants have not demonstrated to us that the district court failed to consider their argument. Thus, we presume that the district court properly considered the possibility that individual class members might have large claims that would not be well suited to class action adjudication and nonetheless determined that a class action was the superior method of adjudication. *See State v. Rojo,* 1999–NMSC–001, ¶ 53, 126 N.M. 438, 971 P.2d 829 (noting that where record is unclear, we presume regularity and correctness of the district court's actions).

{28} Further, the district court's determination that a class action was the superior vehicle in this case is supported by the fact that the other three superiority factors weigh in favor of certification. First, there is no other pending litigation brought by Solv–Ex stockholders. *See* Rule 1–023(B)(3)(b) (directing court to consider related pending litigation). Second, New Mexico appears to be a desirable forum because Solv–Ex was a New Mexico corporation and Defendant Rendall is still a New Mexico citizen. *See* Rule 1–023(B)(3)(c) (directing court to consider whether forum is desirable). Finally, manageability issues are not relevant to the superiority determination because this class was certified for purposes of settlement only. *See* Rule 1–023(B)(3)(d) (directing court to consider whether class action will be manageable); *see also Amchem Prods.,* 521 U.S. at 620, 117 S.Ct. 2231 (noting that while other Rule 23 factors should still be analyzed vigilantly, manageability need not be considered if certification is for purposes of settlement only). Because we assume that the district court properly considered Appellants' argument with regard to the size of individual claims, and because the other three Rule 1–023(B)(3) factors weigh in favor of certification, we cannot say that the district court abused its discretion in determining that a class action was the superior method of adjudicating this conflict.

{29} Because we have decided that the district court did not err in finding that a class action was the superior method of adjudication, we also reject Appellants' cursory argument that the district court failed to put the burden of showing that the Rule 1–023 requirements were met on Plaintiffs.

3. Appellants' Other Arguments Are Not Properly Before Us

{30} We now turn to Appellants' contention that the district court erred in approving Plaintiffs' procedures for disseminating notice to the class. Defendant DMG argues that we should not consider Appellants' notice arguments because Appellants brought this appeal under Rule 1–023(F). Rule 1–023(F) allows for discretionary appeal of "an order of a district court granting or denying class action certification." We agree with DMG that notice issues are not properly addressed in a Rule 1–023(F) appeal because notice is a separate issue that is not part of the certification decision. *See* Rule 1–023(A)–(B) (setting forth the requirements for certification); Rule 1–023(C) (setting forth notice requirements). We also note that the federal courts have construed the analogous federal rule narrowly. *See, e.g., McKowan Lowe & Co. v. Jasmine, Ltd.,* 295 F.3d 380, 390 (3d Cir.2002) (noting that circuit courts have been "scrupulous about limiting [Fed. R. Civ. P.] 23(f) inquiries to class certification issues").

{31} In this case, Appellants did not directly appeal from the order approving the settlement. No notice of appeal was ever filed by them, and Appellants did not file or serve their application for interlocutory appeal on the district court clerk, as contemplated by a later-enacted rule governing appeals of class action certification decisions. *See* Rule 12–203A(A) NMRA. It remains the rule that time and place filing requirements for the notice of appeal are mandatory preconditions to this Court's exercise of jurisdiction over an appeal. *See Govich v. N. Am. Sys., Inc.,* 112 N.M. 226, 230, 814 P.2d 94, 98 (1991). Thus, we cannot construe their application as a notice of appeal. Accordingly, we do not address their issues concerning the

procedures for disseminating notice to the class.

{32} Appellants also make a cursory argument that the district court's decision to approve the settlement was not supported by substantial evidence. We will not address this argument for the same reasons we do not address the notice issue—such issues are not properly raised in an interlocutory appeal of a class action certification decision and there was no timely appeal taken from the settlement order.

CONCLUSION

{33} We affirm.

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

WE CONCUR: JAMES J. WECHSLER and RODERICK T. KENNEDY, Judges.

2006-NMCA-065

136 P.3d 1043

Arlo and Joyce MURKEN, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

SOLV-EX CORPORATION, W. Jack Butler, Defendants,

and

John S. Rendall, Defendant-Appellant,

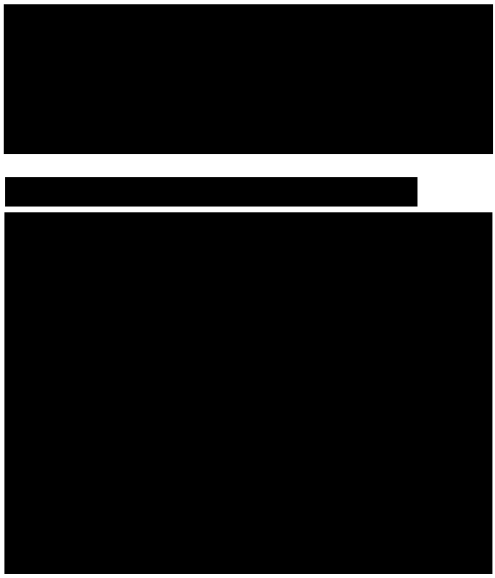
and

Deutsche Morgan Grenfell, Inc., Defendant-Appellee.

No. 25,468.

Court of Appeals of New Mexico.

April 25, 2006.



John S. Rendall, Albuquerque, NM, Pro Se Appellant.

Modrall, Sperling, Roehl, Harris & Sisk, P.A., John R. Cooney, Charles A. Armgardt, Albuquerque, NM, Milbank, Tweed, Hadley & McCloy, LLP, Jeffrey Barist, New York, NY, Milbank, Tweed, Hadley & McCloy, LLP, Michael D. Nolan, Andrew M. Leblanc, Washington, D.C., for Appellee.

OPINION

PICKARD, Judge.

{1} This case requires us to decide whether a non-settling defendant in a class action has standing to object to a court-approved settlement entered into by the class plaintiffs and another defendant. We hold that, while there may be instances in which a non-settling defendant may have such standing, the case at bar is not one of them. We therefore reject all of the non-settling defendant's arguments seeking to nullify the order approving the settlement. We affirm the district court's order approving the settlement.

FACTS AND PROCEEDINGS

{2} This appeal is yet another arising from the demise of the Solv–Ex Corporation. *See Murken v. Solv–Ex Corp.*, 2006–NMCA–064, 139 N.M. 625, 136 P.3d 1035, 2006 WL 1593903 (No. 25,459, filed April 25, 2006); *Butler v. Deutsche Morgan Grenfell, Inc.*, 2006-NMCA-084, 140 N.M. 111, 140 P.3d 532 (Nos. 25,556, 25,557, 25,558 filed April 25, 2006); *Murken v. Solv–Ex Corp.*, 2005–NMCA–137, 138 N.M. 653, 124 P.3d 1192; *Murken v. Suncor Energy, Inc.*, 2005–NMCA–102, 138 N.M. 179, 117 P.3d 985. The basic facts are that Defendant Rendall was the founder and CEO of Solv–Ex. Solv–Ex was a corporation that purported to have technology that could extract oil from tar sands without producing the toxic tailings that conventional methods produce. In the mid–1990s, Solv–Ex's stock was doing well. In 1996, however, the price of it plunged, and the company ultimately went bankrupt in 1997.

{3} According to the class plaintiffs, the problems with Solv–Ex's stock were caused by the fact that the technology was a fraud. In 1996, they sued the company, Rendall, Butler (another officer and large shareholder in the company), and Deutsche Morgan Grenfell (DMG), a financial company that was allegedly involved in financing the company, as well as marketing its shares through misleading reports. According to Rendall, the problems with the stock were caused by Solv–Ex's competitors in the oil extraction business, who conspired with DMG and its parent corporation to pull the financing from Solv–Ex so that Solv–Ex would fail and the competitors would not have to compete with a corporation that could extract oil from tar sands without the severe environmental consequences that were caused by the competitors' processes.

{4} In 2003, the class plaintiffs and DMG settled their differences and the class plaintiffs presented the settlement plan to the district court. On the same day that the motion to preliminarily approve the plan was filed, the district court signed the preliminary approval. Rendall moved to vacate it, but the district court denied his motion on the ground that he lacked standing to object to the settlement. Rendall's basic objections were that (1) the class plaintiffs could not settle with DMG without affording Rendall an opportunity to litigate the issue of who and what caused Solv–Ex's demise and (2) the entry of the preliminary approval without

notice to Rendall or his being involved in a hearing leading to that approval was a denial of his due process rights.

{5} At the time of the final approval of the settlement, Rendall also appeared and objected. At this time, he argued that (1) he was a member of the plaintiff class inasmuch as his shares of Solv–Ex were damaged also, (2) he had an outstanding malicious prosecution counterclaim against the class representatives that disqualified them from representing the class, and (3) he was prejudiced by the settlement because a jury should determine whether he and the other original defendants were responsible for the fall in stock price or whether the international conspiracy among competitors and others was responsible for it. The district court again ruled that Rendall lacked standing to object.

{6} The district court entered a final judgment certifying the class and approving the settlement between the class plaintiffs and DMG. Rendall filed a timely notice of appeal in the district court in which he asked "leave" of this Court to appeal the class certification. DMG then filed a response, opposing Rendall's "application for appeal," and Rendall filed a reply asking this Court to consider his appeal an appeal as of right. This Court assigned the case to its general calendar without granting any application, thereby treating Rendall's appeal as an appeal as of right and permitting him to raise any issues he wished that arose from the final judgment approving the settlement between the class plaintiffs and DMG.

DISCUSSION

{7} Rendall raises seven issues on appeal, which roughly correspond to the objections he made in the district court. It would unduly lengthen this opinion to lay out his arguments on each issue. If the district court was correct that Rendall did not have standing to raise any objection to the settlement, we should affirm. We review de novo the question of whether Rendall had standing to object to a settlement to which he was not a party. *See In re Sch. Asbestos Litig.*, 921 F.2d 1330, 1332 (3d Cir.1990); *Forest Guardians v. Powell*, 2001–NMCA–028, ¶ 5, 130 N.M. 368, 24 P.3d 803.

{8} It is well established that non-settling parties usually have no standing to object to a settlement agreement into which other parties have entered. *See* 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11:55, at 178 (4th ed.2002) [hereinafter *Newberg*]. "[N]on-settling defendants generally have no standing to complain about a settlement, since they are not members of the settling class." *Transamerican Ref. Corp. v. Dravo Corp.*, 952 F.2d 898, 900 (5th Cir.1992). Among the reasons for this rule is the policy favoring settlements, especially in complex class-action cases. *Newberg, supra; In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1102 (10th Cir.2001).

{9} There is a limited exception to this rule, and it applies when a non-settling party can demonstrate prejudice caused by the settlement. *In re Integra Realty Res., Inc.*, 262 F.3d at 1102. However, the type of prejudice must be "plain legal prejudice." *Id.* (internal quotation marks and citation omitted). "Plain legal prejudice" has been defined as including the situation where there is legal interference with a party's right to seek contribution or indemnification or where the settlement "strips the party of a legal claim or cause of action." *Id.* at 1102–03 (quoting *Agretti v. ANR Freight Sys., Inc.*, 982 F.2d 242, 247 (7th Cir.1992)). "Mere allegations by a nonsettling party that prejudice exists because there is a loss of 'resource sharing,' 'broader discovery,' or 'bargaining power,' is insufficient." *Newberg, supra.* A mere allegation of injury is also insufficient. *See In re Integra Realty Res., Inc.*, 262 F.3d at 1103.

{10} Measured by these standards, Rendall's claims of prejudice are insufficient. First, he claims that the class action alleged a conspiracy between him and DMG that would result in joint and several liability. He implies that the settlement agreement cut off his rights to contribution or indemnification. However, as pointed out by DMG, there is nothing in the settlement agreement that bears on any of Rendall's rights. In particular, there is no attempt in the settlement agreement to cut off any rights to contribution or indemnification, nor is there any attempt to enjoin Rendall's actions in

connection with these lawsuits in any way. Thus, *Altman v. Liberty Equities Corp.*, 54 F.R.D. 620 (S.D.N.Y.1972), on which Rendall relies, is wholly inapposite. In that case, the proposed settlement contained a provision barring the non-settling defendants from making any claims against the settling defendants. *Id.* at 622. Because there is no comparable provision in this case, Rendall's argument is without merit. *See Zupnick v. Fogel*, 989 F.2d 93, 98–99 (2d Cir.1993) (upholding settlement agreement because it was not binding on non-settling defendants).

{11} Second, Rendall appears to claim prejudice in that the settlement with DMG leaves him "holding the baby on a claim which I dispute." However, this is the sort of general prejudice that the cases hold is insufficient to confer standing. Instead of general prejudice, Rendall must show plain legal prejudice, which requires some legal right or claim to be cut off. None of Rendall's rights or claims has been cut off by the settlement agreement between the class plaintiffs and DMG.

{12} Third, Rendall alleges prejudice because of his still-pending malicious prosecution claim against the representatives of the plaintiff class. However, this allegation is just another objection to the settlement, not a claim of legal prejudice such as would give Rendall standing. Moreover, instead of showing that such a claim has been cut off by the settlement, Rendall's allegation proves that his claim is still viable, or at least is not cut off by the settlement. Thus, this assertion of prejudice is unavailing to Rendall.

{13} Fourth, Rendall claims that he is in fact a member of the plaintiff class because his stock has been adversely affected. A class member would have standing to object and would not need to show legal prejudice. However, Rendall is not a member of the class. Both the class-action complaint and the settlement agreement expressly excluded the original defendants from the class, and thus Rendall's claim is not supported by the record.

{14} In short, none of Rendall's claims of prejudice rise to the level of legal prejudice such as are required to give him standing to object to the settlement. The policy favoring the voluntary settlement of legal disputes would be undermined were claims such as Rendall's allowed to scuttle a settlement between other parties that does not affect the non-settling party's legal rights.

CONCLUSION

{15} The entry of the final judgment approving the settlement between the class plaintiffs and DMG is affirmed as against Rendall's objections to it.

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

WE CONCUR: JAMES J. WECHSLER and RODERICK T. KENNEDY, Judges.

2006-NMSC-025

137 P.3d 577

Diane G. DEFLON, Plaintiff–Petitioner,

v.

Dan SAWYERS, Steve Lasky, and Jon Vance Hartley, Defendants–Respondents.

No. 28,898.

Supreme Court of New Mexico.

April 24, 2006.

As Corrected June 29, 2006.

Thomas L. Johnson Law Offices, L.C., Thomas L. Johnson, Foster, Johnson, McDonald, Lucero, Koinis, L.L.P., Kerri Lee Peck, Albuquerque, NM, for Petitioner.

Gilkey & Stephenson, P.A., George Christian Kraehe, Barbara G. Stephenson, The Jaffe Law Firm, Mark S. Jaffe, McCary, Wilson & Pryor, P.C., Alan R. Wilson, Kennedy, Moulton & Wells, P.C., Deborah D. Wells, Albuquerque, NM, for Respondents.

OPINION

CHÁVEZ, Justice.

{1} This case explores the res judicata and collateral estoppel effects of the dismissal of a federal lawsuit on subsequent state court proceedings. Plaintiff originally sued her former employer, Danka Corporation, Inc., in the United States District Court for the District of New Mexico for sex discrimination in violation of Title VII, 42 U.S.C. §§ 2000e–2, 2000e–3 (2000), and in violation of the Equal Pay Act, 29 U.S.C. § 206(d) (2000). Plaintiff also brought two state law claims for negligent retention and supervision and intentional infliction of emotional distress in her federal lawsuit. All claims in the federal lawsuit were based primarily on the actions of Danka employees. The federal district court granted Danka's motion for summary judgment, and the Tenth Circuit Court of Appeals affirmed. *Deflon v. Danka Corp.*, 1 Fed.Appx. 807 (10th Cir.2001). Plaintiff then filed suit against Defendants, who were all Danka employees, in state court for intentional infliction of emotional distress, intentional interference with a contract, defamation, prima facie tort, and civil conspiracy. Finding that the doctrines of res judicata and collateral estoppel barred Plaintiff's claims, the district court dismissed Plaintiff's complaint with prejudice. Plaintiff appealed the dismissal of two claims—intentional interference with a contract and civil conspiracy—and the Court of Appeals affirmed that dismissal. *DeFlon v. Sawyers,* No. 23,013, slip op. at 2 (Ct.App. July 28, 2004). Plaintiff now asks this Court to reverse the Court of Appeals and reinstate her claims for intentional interference with a contract and civil conspiracy. We hold that res judicata does not bar Plaintiff's claims because Defendants, who allegedly acted outside the scope of their authority, are not in privity with the defendant in the federal suit. Collateral estoppel does not bar Plaintiff's claims because the Tenth Circuit did not actually and necessarily decide issues which would bar the present claims.

I. RES JUDICATA DOES NOT BAR PLAINTIFF'S CLAIMS BECAUSE DEFENDANTS ARE NOT IN PRIVITY WITH THE DEFENDANT IN THE FEDERAL SUIT

{2} Res judicata prevents a party or its privies from repeatedly suing another for the same cause of action. *See Three Rivers Land Co. v. Maddoux,* 98 N.M. 690, 694, 652 P.2d 240, 244 (1982), *overruled on other grounds by Universal Life Church v. Coxon,* 105 N.M. 57, 58, 728 P.2d 467, 469 (1986). Or, as the Court of Appeals explained, "Res judicata bars relitigation of the same claim between the same parties or their privies when the first litigation resulted in a final judgment on the merits." *DeFlon,* No. 23,013, slip op. at 4 (citing *Ford v. N.M. Dep't of Pub. Safety,* 119 N.M. 405, 407, 891 P.2d 546, 548 (Ct.App.1994)). Because the first final judgment in this case came from

federal court, the Court of Appeals indicated that federal law governs the preclusive effect that the prior federal judgment should have on these state court proceedings. *Id.* at 4 (citing *Ford*, 119 N.M. at 409, 891 P.2d at 548 and *Edwards v. First Fed. Sav. & Loan Ass'n*, 102 N.M. 396, 402–04, 696 P.2d 484, 490–92 (Ct.App.1985)). We agree with the importance of recognizing and granting appropriate deference to federal court judgments but note that "[f]ederal law and New Mexico law are not divergent on claim preclusion doctrine." *Moffat v. Branch*, 2005–NMCA–103, ¶ 11, 138 N.M. 224, 118 P.3d 732. Therefore, we employ both federal and state precedent in analyzing this case.

{3} Because the parties do not dispute the facts in this case, we review the legal issue presented by the district court's application of res judicata de novo. *Anaya v. City of Albuquerque*, 1996–NMCA–092, ¶ 5, 122 N.M. 326, 924 P.2d 735. Res judicata bars a subsequent lawsuit if four elements are met: "1) the parties must be the same or in privity; 2) the subject matter must be identical; 3) the capacity or character of persons for or against whom the claim is made must be the same; and 4) the same cause of action must be involved in both suits." *Myers v. Olson*, 100 N.M. 745, 747, 676 P.2d 822, 824 (1984) (cited authority omitted). The only element at issue in this case is whether Defendants are in privity with Danka, the defendant in the federal litigation. *See DeFlon*, No. 23,013, slip op. at 4–5.

{4} Determining whether parties are in privity for purposes of res judicata requires a case-by-case analysis. In *St. Louis Baptist Temple, Inc. v. FDIC*, the Tenth Circuit provided insight into the flexible definition of privity:

> There is no definition of "privity" which can be automatically applied in all cases involving the doctrines of res judicata and collateral estoppel. Thus, each case must be carefully examined to determine whether the circumstances require its application. This is so, notwithstanding the general assumption that res judicata applies only if the parties in the instant action were the same and identical parties in the prior action resulting in a judgment. Privity requires, at a minimum, a substantial identity between the issues in controversy and showing that the parties in the two actions are really and substantially in interest the same.

605 F.2d 1169, 1174 (10th Cir.1979) (citing *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263 (1940) and *Green v. Bogue*, 158 U.S. 478, 15 S.Ct. 975, 39 L.Ed. 1061 (1895)). *St. Louis Baptist* further explained that parties have been found in privity where they represent the same legal right or where they have a "mutual or successive relationship to the same rights of property." *Id.* at 1175. *Lowell Staats Mining Co. v. Philadelphia Electric Co.*, 878 F.2d 1271 (10th Cir.1989), clarifies and expands the *St. Louis Baptist* discussion. "Privity has been held to exist in the following relationships: concurrent relationship to the same property right (i.e. trustee and beneficiary); successive relationship to the same property or right (i.e. seller or buyer); or representation of the interests of the same person." *Lowell Staats*, 878 F.2d at 1275. Because none of these relationships exist in the present case, we will next consider those cases where privity was found not to exist.

{5} The Tenth Circuit has indicated that privity does not exist where an initial lawsuit is brought against an employer and a second lawsuit is then brought against an employee acting in his or her individual capacity. *Morgan v. City of Rawlins*, 792 F.2d 975, 980 (10th Cir.1986) (stating, "We fail to see how Mr. DeHerrera's employee/employer relationship bars his presence in this suit when he is named for actions for which he allegedly was personally responsible.") (citing *Smith v. Updegraff*, 744 F.2d 1354 (8th Cir.1984)). The case of *Lowell Staats* echos this proposition, finding that the plaintiff's claims against two employee defendants would have survived res judicata if those claims had been brought against the employee defendants in their individual capacities, instead of in their official capacities as corporate officers or agents. 878 F.2d at 1276, 1278. *Lowell Staats* found the fact that the plaintiff had "failed to allege any other basis of common law liability" against one of those two em-

ployee defendants to be of particular importance. *Id.* at 1278.

{6} Plaintiff in the present case asserts the basis of common law liability that was lacking in *Lowell Staats:* intentional interference with a contract. "Parties to a contract cannot bring an action for tortious interference with an existing contract against each other." *Salazar v. Furr's,* 629 F.Supp. 1403, 1410 (D.N.M.1986) (citing *Wells v. Thomas,* 569 F.Supp. 426, 434 (E.D.Pa. 1983)). The appropriate cause of action between parties to the same contract would be breach of contract. Thus, in the present case Plaintiff could not have sued Danka for interfering with her employment contract.

{7} Plaintiff can only bring an intentional interference with a contract claim against the present Defendants *in their individual capacities.* In *Salazar,* the United States District Court for the District of New Mexico held that the president of a corporation was not liable for tortious interference with a contract for firing a pregnant employee before her pension benefits could vest. 629 F.Supp. at 1406, 1410. Although *Salazar* offered little discussion on this issue, its holding was presumably based on the implicit finding that the president was acting as an agent of the corporation, and therefore was not a third party to the contract. *Id.* at 1410. A corporate officer acting outside the scope of authority, however, may be liable for interfering with a corporate contract. *Ettenson v. Burke,* 2001–NMCA–003, ¶¶ 16–17, 130 N.M. 67, 17 P.3d 440.

{8} In *Ettenson,* a former employee sued the defendant, the president and CEO of a magazine company, for civil conspiracy and tortious interference with a contract. The defendant allegedly offered the plaintiff stock in the company and assurances of long-term employment in lieu of salary increases, but then suddenly fired the plaintiff and tried "to squeeze him financially and force him to waive whatever legal claims he had arising out of the termination." *Ettenson,* 2001–NMCA–003, ¶ 7, 130 N.M. 67, 17 P.3d 440. Discussing the tortious interference with a contract claim, the Court of Appeals acknowledged "the theory that a corporate officer is absolutely immune from suit for interfering with the contracts of his own corporation." *Id.* ¶ 16. Under that theory, the corporate agent breaks the contract on behalf of the corporation and does not merely interfere with the contract as a third party. *Id.* (quoting *Said v. Butt,* 3 L.R. 497, 505–06 (K.B. 1920)). Nevertheless, the Court of Appeals found the absolute immunity theory to be a minority view. *Id.* The majority view is "that a corporate officer is privileged to interfere with his corporation's contracts only when he acts in good faith and in the best interests of the corporation, as opposed to his own private interests." *Id.* ¶ 17.

{9} The idea behind the qualified immunity theory is that an officer acting on behalf of a corporation should have the authority to breach a corporation's contract, leaving the corporation to answer for the authorized breach in a breach of contract action. *See id.* ¶ 16. An officer acting outside the scope of his or her employment and in his or her own private interest has no authority to breach the corporation's contract, and that officer should not be able to hide behind a corporate shield for unauthorized conduct. *See id.* ¶ 17. We agree with the Court of Appeals that "[a] qualified privilege is more attune with our case law than a blanket privilege of absolute immunity would be," *id.* ¶ 20, and we adopt the Court of Appeals' analysis. In New Mexico, corporate officers may be liable for interfering with corporate contracts if such interference is in bad faith and against the best interests of the corporation. *Id.* ¶¶ 18, 19.

{10} Determining whether a corporate officer's actions fall outside the scope of authority "requires a court to delve into the motivating forces behind the officer inducing his corporation to breach its contractual obligations." *Id.* ¶ 18. In other words, our trial courts must examine whether the corporate officer "acted to satisfy personal feelings . . . or to serve his own private interest with no benefit to the corporation." *Id.* ¶ 18 (quoting *Ong Hing v. Ariz. Harness Raceway, Inc.,* 10 Ariz.App. 380, 459 P.2d 107, 115 (1969)). Because we interpret Plaintiff's complaint as alleging that Defendants acted outside the scope of their corporate authority, we do not

find Defendants and Danka in privity for purposes of the intentional interference with a contract claim.[1] The district court improperly applied res judicata to dismiss this claim. Because "civil conspiracy by itself is not actionable" and must instead attach to the independent, unlawful acts alleged in Plaintiff's claim for intentional interference with a contract, *Ettenson*, 2001-NMCA-003, ¶ 12, 130 N.M. 67, 17 P.3d 440, Plaintiff's civil conspiracy claim survives, as well.

{11} Defendants argue that, even if Plaintiff could not have sued Danka for tortious interference with a contract in federal court, Plaintiff should have brought the claim against Defendants under the federal court's supplemental jurisdiction, referring to the supplemental jurisdiction statute, codified as 28 U.S.C. § 1367 (1990). The Court of Appeals found Defendants' argument persuasive, noting that because the federal court exercised pendent jurisdiction over Plaintiff's state tort claims, there was no reason to believe that the federal court would have denied supplemental jurisdiction on the intentional interference claim. *DeFlon v. Sawyers*, No. 23,013, slip op. at 9. Instructive on this issue is the case of *Salazar v. Murphy*, 66 N.M. 25, 340 P.2d 1075 (1959). There, Plaintiff sued a trucking company in federal court, and the trucking company filed a third-party complaint against the local owner of the truck. *Id.* at 26–27, 340 P.2d at 1076–77. Plaintiff failed to appear at trial, and the federal court dismissed both the complaint and the third-party complaint with prejudice. *Id.* at 27, 340 P.2d at 1077. Plaintiff then sued the local owner of the truck, as well as the driver, in state court, and the state district court granted the defendants' motion for summary judgment on the grounds of res judicata. *Id.* at 26–27, 340 P.2d at 1076. In reversing the district court and reinstating the plaintiff's state suit, we noted that the plaintiff had not actually sued the defendants in federal court, "and although he could have, he was not required to do so." *Id.* at 30, 340 P.2d at 1079.

{12} In *Salazar*, we declined to make the permissive rules involving third party practice mandatory when they are, by their plain language, permissive. *Id.* at 31, 340 P.2d 1075, 340 P.2d at 1079; *see* Fed.R.Civ.P. 14 and Rule 1-014 NMRA 2006. In this case, Plaintiff could have requested supplemental jurisdiction from the federal court. However, Plaintiff was not required to do so. *See* Fed.R.Civ.P. 19, 20. This remains a case, like *Salazar*, where the current issues between Plaintiff and Defendants have not been litigated. *See Salazar*, 66 N.M. at 30, 340 P.2d at 1079. Therefore, "[t]he rule that a judgment between the same parties or their privies bars a second action as to what was litigated and also as to all matters that might have been litigated clearly has no application in a situation such as the one here present." *Id.* at 30, 340 P.2d at 1079. We hold that res judicata does not bar Plaintiff's claims for intentional interference with a contract and the attendant civil conspiracy.

II. COLLATERAL ESTOPPEL DOES NOT APPLY BECAUSE PLAINTIFF'S INTENTIONAL INTERFERENCE WITH A CONTRACT AND CIVIL CONSPIRACY CLAIMS WERE NOT ACTUALLY AND NECESSARILY DECIDED IN FEDERAL COURT

{13} Like res judicata, collateral estoppel promotes judicial economy and protects parties from endless relitigation. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). Unlike res judicata, collateral estoppel "does not require that both suits be based on the same cause of action." *Adams v. United Steelworkers of Am.*, 97 N.M. 369, 373, 640 P.2d 475, 479 (1982). Instead, collateral estoppel, also called issue preclusion, prevents a party from re-litigating "ultimate facts or *issues* actually and necessarily decided in a prior suit." *Id.* (emphasis added). Because the initial judgment in the present case comes from federal court, we will apply the federal law of collateral estoppel unless doing so conflicts with precedent from this Court.

1. We do not decide whether Plaintiff has met her burden to show that Defendants were acting outside the scope of their authority. This is in part a question of fact which we leave for the district court to determine.

See Edwards, 102 N.M. at 404, 696 P.2d at 492. However, because we find little difference between federal and state law on the collateral estoppel elements important to this case, we rely on both federal and state precedent.

{14} Collateral estoppel traditionally has four elements. The wording of these four elements differs somewhat between New Mexico and the Tenth Circuit. *Compare Shovelin v. Central N.M. Elec. Coop., Inc.,* 115 N.M. 293, 297, 850 P.2d 996, 1000 (1993), *with Lombard v. Axtens,* 739 F.2d 499, 502 (10th Cir.1984). Nevertheless, it is clear that a party attempting to use nonmutual defensive collateral estoppel in either court system must establish that the issue to be estopped has been actually litigated and necessarily determined, or actually and necessarily decided. *Shovelin,* 115 N.M. at 297, 850 P.2d at 1000; *see also Lombard,* 739 F.2d at 502 (stating, "The doctrine of collateral estoppel precludes relitigation of issues actually and necessarily decided in a prior action.") (citing *Parklane,* 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552). The main concern is that a party against whom collateral estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior action. *See Shovelin,* 115 N.M. at 297, 850 P.2d at 1000; *Lombard,* 739 F.2d at 502.

{15} The Court of Appeals concluded that Plaintiff's claims for intentional interference with a contract and civil conspiracy were "actually and necessarily decided" by the federal court and that Plaintiff had a full and fair opportunity to litigate those issues. *DeFlon,* No. 23,013, slip op. at 11. According to the Court of Appeals, because the state suit is grounded on the same set of facts as the federal suit, and because the federal court did not think those facts were sufficient to establish the causes of action that Plaintiff brought in federal court, collateral estoppel bars Plaintiff's state court claims for intentional interference with a contract and civil conspiracy. *Id.* Reviewing this legal issue de novo, *see Anaya,* 1996–NMCA–092, ¶ 5, 122 N.M. 326, 924 P.2d 735, we disagree and reverse the Court of Appeals.

A. CURRENT STATE CLAIMS

{16} In her state complaint, Plaintiff alleged that Defendants "deliberately and intentionally drove Plaintiff away from her employment at Danka by using improper means." In order to prove intentional interference with a contract, a plaintiff must establish that the defendant, "without justification or privilege to do so, induces a third person not to perform a contract with another." *Wolf v. Perry,* 65 N.M. 457, 461, 339 P.2d 679, 681 (1959). In *Ettenson,* the Court of Appeals clarified the elements of intentional interference with a contract. 2001–NMCA–003, ¶ 14, 130 N.M. 67, 17 P.3d 440. To succeed, Plaintiff must prove: (1) Defendants had knowledge of the contract; (2) Plaintiff was unable to fulfill her contract obligations; (3) Defendants played an active and substantial part in causing Plaintiff to lose the benefits of the contract; (4) Plaintiff suffered damages resulting from the breach; and (5) Defendants induced the breach without justification or privilege to do so. *See id.* As will be discussed below, these elements differ considerably from each of the claims Plaintiff raised in federal court and do not require the same findings in order to succeed. Because Plaintiff's claim for civil conspiracy is not actionable by itself and survives only if the underlying claim for intentional interference with a contract survives, *Ettenson,* 2001–NMCA–003, ¶ 12, 130 N.M. 67, 17 P.3d 440, we will only discuss the intentional interference with a contract claim in this collateral estoppel portion of the opinion.

B. FEDERAL TITLE VII CLAIMS

{17} Examination of the sexual discrimination standards applicable to Plaintiff's Title VII claims reveals that her present claim for intentional interference with a contract could not have been actually and necessarily decided in federal court for two reasons: (1) a substantial portion of Plaintiff's evidence was excluded in federal court but would not be excluded in state court, and (2) the threshold showing for Title VII claims is different from what is needed to establish intentional interference with a contract. As to the first reason, the Tenth Circuit found that

the federal district court had properly excluded much of Plaintiff's evidence as falling outside of the Title VII period of limitations. *Deflon,* 1 Fed.Appx. at 812–15.[2] There are exceptions to this limitations period, but the Tenth Circuit found that Plaintiff had not satisfied them here. *Id.* at 813–15. Therefore, the Tenth Circuit did not consider any evidence outside of the 300-day range, including Plaintiff's allegations that Defendant Sawyers called Plaintiff into his office almost every morning for roughly one year "belittling her work performance and threatening to fire her, while pacing in front of Plaintiff and waiving his finger in her face"; that Defendant Lasky demeaned Plaintiff; and that Defendant Hartley made inappropriate comments directed at Plaintiff, shunned Plaintiff by refusing to speak to her or acknowledge her for a period of time, and ignored company policy by denying Plaintiff compensation for commissions that coworkers stole from her. This evidence would not be excluded in Plaintiff's state court action because no similar limitations period applies in intentional interference with contract cases.

{18} The second reason supporting our conclusion that Plaintiff's claim for intentional interference with a contract was not actually and necessarily decided in federal court is the fact that the threshold showing for Title VII claims is different from what is needed to establish intentional interference with an employment contract. The Tenth Circuit approached Plaintiff's allegations of sexual discrimination under Title VII as four separate causes of action: (1) sexual discrimination based on a hostile work environment; (2) sexual discrimination resulting in constructive discharge; (3) sexual discrimination based on disparate compensation; and (4) sexual discrimination based on a failure to promote. *Deflon,* 1 Fed.Appx. at 810. These sexual discrimination claims required Plaintiff to demonstrate either sexually discriminatory conduct or retaliation following a complaint of sexual discrimination, not that Defendants unjustifiably played an active and substantial part in causing Plaintiff to lose the benefits of her employment. *Ettenson,* 2001–NMCA–003, ¶ 14, 130 N.M. 67, 17 P.3d 440. We examine each of Plaintiff's federal sexual discrimination claims in greater detail below.

1. HOSTILE WORK ENVIRONMENT

{19} In order to prove sexual discrimination based on a hostile work environment theory, Plaintiff needed to establish that the alleged conduct "stemmed from a sexual animus" and "was severe or pervasive enough to create a work environment that was objectively and subjectively abusive and hostile." *Deflon,* 1 Fed.Appx. at 816. Considering only conduct tied to gender, the Tenth Circuit concluded that the district court had properly dismissed this claim; Plaintiff failed to " 'show that a rational jury could find that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.' " *Id.* (quoting *Penry v. Fed. Home Loan Bank,* 155 F.3d 1257, 1261 (10th Cir.1998)). While proving sexual discrimination under this standard might suffice to prove interference with an employment contract, we decline to hold that a plaintiff must show sexual discrimination in order to establish intentional interference with a contract. Therefore, the Tenth Circuit did not actually and necessarily decide Plaintiff's current claims by dismissing her federal hostile work environment claim.

2. CONSTRUCTIVE DISCHARGE

{20} To succeed on her constructive discharge claim, Plaintiff needed to show that "the employer by its discriminatory acts has

2. Generally a plaintiff must file a complaint with the Equal Employment Opportunity Commission within 180 days of the unlawful conduct. *Deflon,* 1 Fed.Appx. at 812 (citing 42 U.S.C. § 2000e–5(e)(1)). In a state like New Mexico where a plaintiff first files a complaint with a state or local agency, the limitations period extends to 300 days. *Id.* (citing *Mascheroni v. Bd. of Regents of the Univ. of Cal.,* 28 F.3d 1554, 1557 (10th Cir.1994)). Plaintiff filed an EEOC complaint on May 22, 1997, and resigned from Danka on May 27, 1997. *Id.* at 810. Plaintiff "concede[d] that much of the discriminatory conduct occurred prior to July 26, 1996 (the cut-off date for the limitations period)." *Id.* at 813.

made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign." *Deflon,* 1 Fed.Appx. at 819 (quoting *Derr v. Gulf Oil Corp.,* 796 F.2d 340, 344 (10th Cir.1986)). The Tenth Circuit explained that Plaintiff could establish a prima facie case of constructive discharge in two ways: (1) Plaintiff "was forced to resign from her job due to sex discrimination" or (2) Plaintiff was the object of retaliatory discrimination following a complaint of sexual discrimination. *Id.* at 819.

{21} The Tenth Circuit found that the first of these constructive discharge theories failed because Plaintiff had not demonstrated a sexually hostile work environment, *id.,* which it had previously defined as sexual harassment "severe or pervasive enough to create a work environment that was objectively and subjectively abusive and hostile." *Id.* at 816. We have already indicated that Plaintiff did not have to prove sexual harassment creating an abusive and hostile work environment in order to succeed on her intentional interference with a contract claim. Therefore, the Tenth Circuit's holding on this issue does not preclude Plaintiff's present claims.

{22} Regarding Plaintiff's second theory for constructive discharge, based on retaliatory discrimination, to establish a prima facie case of retaliatory discrimination in federal court, Plaintiff needed to show: "(1) protected opposition to discrimination or participation in a proceeding arising out of discrimination; (2) adverse action by the employer; and (3) a causal connection between the protected activity and the adverse action." *Id.* at 819 (citing *Sauers v. Salt Lake County,* 1 F.3d 1122, 1128 (10th Cir.1993)). Plaintiff was unable to establish the requisite causal connection because the retaliatory conduct she alleged occurred *before* she filed an Equal Employment Opportunity Commission complaint, not after. *Id.* There would be no similar time limitation in the state case, and Plaintiff would not have to show any retaliation. Plaintiff simply needs to show that Defendants unjustifiably interfered with her employment obligations and played an active and substantial part in causing Plaintiff to lose the benefits of her employment. *Ettenson,* 2001–NMCA–003, ¶ 14, 130 N.M. 67, 17 P.3d 440. We conclude that the Tenth Circuit's analysis on constructive discharge did not actually and necessarily decide Plaintiff's intentional interference with a contract claim.

3. DISPARATE PAY AND FAILURE TO PROMOTE

{23} To prove her claims for disparate pay and failure to promote, Plaintiff needed to demonstrate that Danka paid her less than similarly situated male employees and passed her over for promotions in favor of male employees. *Deflon,* 1 Fed.Appx. at 817–18. The Tenth Circuit concluded that Plaintiff failed to show that Danka actually paid her less than similarly situated male co-workers, *id.* at 817, or that Danka denied Plaintiff a promotion. *Id.* at 818. Both of these causes of action focus on the conduct of Plaintiff's corporate employer, not on the issue of whether Defendants unjustifiably caused Plaintiff to lose the benefits of her employment at Danka. *See Ettenson,* 2001–NMCA–003, ¶ 14, 130 N.M. 67, 17 P.3d 440. Thus, the Tenth Circuit's rulings on the disparate pay and failure to promote claims did not actually and necessarily decide Plaintiff's present claims.

C. FEDERAL EQUAL PAY ACT CLAIM

{24} As was the case with the disparate pay claim above, the elements of intentional interference with a contract differ from what is needed to establish an Equal Pay Act violation. To succeed on her Equal Pay Act claim, Plaintiff needed to show that she performed work "substantially equal to that of the male employees" under similar working conditions for less pay. *Deflon,* 1 Fed.Appx. at 820. The Tenth Circuit held that Plaintiff failed to establish that the jobs of the higher paid men with whom she sought to compare herself were "substantially equal" to her job. *Id.* We fail to see how a holding that Plaintiff did not perform the same job as higher paid male co-workers actually and necessarily decided the issue of whether Defendants interfered with her employment.

D. NEGLIGENT SUPERVISION AND RETENTION CLAIM

{25} Analyzing New Mexico law, the Tenth Circuit stated that in order to survive summary judgment on her negligent supervision and retention claim Plaintiff had to show: (1) that a wrongful act committed by a Danka employee injured Plaintiff, and (2) that Danka's supervision and retention of that employee was negligent. *Deflon,* 1 Fed.Appx. at 820. After concluding that Plaintiff's Title VII allegations failed to prove that a wrongful act committed by a Danka employee injured Plaintiff, the Tenth Circuit examined whether Plaintiff's allegations of common law sexual harassment would satisfy this "wrongful act" requirement. *Id.* at 821. Relying on New Mexico case law, the Tenth Circuit held that Plaintiff could not succeed because in New Mexico evidence of "sexual groping, sexual assault and battery or other substantial overt sexual conduct toward a female employee" is required to prove sexual harassment. *Id.* (citing *Coates v. Wal-Mart Stores,* 127 N.M. 47, 51, 976 P.2d 999, 1003 (1999)). We need not examine whether the Tenth Circuit correctly interpreted New Mexico law on sexual harassment. However, we find it important that the Tenth Circuit focused on *sexually* inappropriate conduct. While Plaintiff alleges facts of sexual discrimination in her state claim, Plaintiff need not establish sexual harassment in order to prove that Defendants, without justification or privilege, played an active and substantial part in causing her to lose the benefits of her employment. *Ettenson,* 2001-NMCA-003, ¶ 14, 130 N.M. 67, 17 P.3d 440. Therefore, we conclude that the Tenth Circuit did not actually and necessarily decide the intentional interference with a contract issue in reaching its decision on negligent supervision and retention.

E. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

{26} The Tenth Circuit stated that "the conduct about which [Plaintiff] complains was not sufficiently severe to give rise to a claim of intentional infliction of emotional distress." *Deflon,* 1 Fed.Appx. at 822. In analyzing the issue, the Tenth Circuit stated that Plaintiff needed to show that Danka's "conduct was 'extreme and outrageous under the circumstances, that the tortfeasor acted intentionally or recklessly, and that as a result of the conduct the claimant experienced severe emotional distress.' " *Id.* (quoting *Coates,* 127 N.M. at 57, 976 P.2d at 1009). After examining all of Plaintiff's evidence, the Tenth Circuit concluded that the alleged misconduct was not " 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " *Id.* (quoting *Stieber v. Journal Pub. Co.,* 120 N.M. 270, 274, 901 P.2d 201, 205 (1995)). Therefore, Plaintiff's intentional infliction of emotional distress claim failed. *Id.* Conduct sufficient to establish intentional infliction of emotional distress might also be sufficient to establish intentional interference with a contract. However, while proving intentional interference with a contract is not easy, we decline to hold that Plaintiff must establish "extreme and outrageous" conduct in order to prove that Defendants, without justification or privilege, played an active and substantial part in causing her to lose the benefits of her employment. *Ettenson,* 2001-NMCA-003, ¶ 14, 130 N.M. 67, 17 P.3d 440. Therefore, we conclude that the Tenth Circuit did not actually and necessarily decide Plaintiff's intentional interference with a contract claim.

CONCLUSION

{27} Because privity does not exist between the present Defendants and the defendant in the federal lawsuit, res judicata does not bar Plaintiff's state court lawsuit. We similarly find that collateral estoppel does not apply because Plaintiff's claims for intentional interference with a contract and civil conspiracy were not actually and necessarily decided in federal court. We remand to state district court for proceedings consistent with this opinion.

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

WE CONCUR: RICHARD C. BOSSON, Chief Justice, PAMELA B. MINZNER, PATRICIO M. SERNA, and PETRA JIMENEZ MAES, Justices.

2006-NMSC-026

137 P.3d 587

STATE of New Mexico, Plaintiff–Respondent,

v.

Heather R. NYCE, Defendant–Petitioner.

No. 28,950.

Supreme Court of New Mexico.

May 22, 2006.

As Corrected June 29, 2006.

Gary C. Mitchell, Ruidoso, NM, for Petitioner.

Patricia A. Madrid, Attorney General, M. Anne Kelly, Assistant Attorney General, Albuquerque, NM, for Respondent.

OPINION

BOSSON, Chief Justice.

{1} Two police officers observed Defendant Heather Nyce shopping for tincture of iodine and hydrogen peroxide, merchandise which among other things can be used in the manufacture of methamphetamine. Based on the officers' training and experience, they grew suspicious. They submitted an affidavit to a magistrate judge and obtained a search warrant for the residence where Defendant delivered her purchases. After Defendant was arrested and charged with conspiracy for trafficking methamphetamine by manufacturing, she filed a motion to suppress incriminating evidence obtained inside the residence. The district court denied the motion to suppress, and the Court of Appeals affirmed. We granted certiorari to examine inferences that may fairly be drawn from the lawful, yet suspicious, purchase of common merchandise that is capable of use in the manufacture of methamphetamine. We now reverse, holding that the affidavit did not establish probable cause for the search warrant.

BACKGROUND

{2} The following information is taken from the affidavit for the search warrant. Defendant purchased tincture of iodine and hydrogen peroxide at two stores. Both ingredients are used in the manufacture of methamphetamine. When purchasing the iodine at Wal–Mart with her infant daughter in the shopping cart, Defendant proceeded immediately to the pharmaceutical aisle and bought four 1–ounce bottles, all the iodine that was on the shelf. She placed the iodine in her shopping cart and covered it with a large box that was already in her cart. Defendant first proceeded to an automated, self-pay register with the iodine. When she noticed a line, she went to a register staffed by a cashier. Although hydrogen peroxide was available at Wal–Mart, Defendant then went to an Allsup's and purchased a 1–pint bottle of hydrogen peroxide.

{3} New Mexico State Police Agents Carr and Suggs, the officers who observed Defendant, became suspicious of her purchases for a number of reasons. In the affidavit, Agent Carr noted that in his experience observing purchases of tincture of iodine, most people buy only one bottle. He also stated that it was his experience that persons who shop for methamphetamine ingredients will often buy the items at more than one store to avoid being detected by law enforcement. Agent Carr noted that persons who are buying drug precursors [1] know where in the store the items are located, and spend little time in those aisles to avoid detection. Defendant went immediately to the aisle where the iodine was located, got it off the shelf, and walked quickly toward the registers to make the purchase.

{4} Defendant took the iodine and peroxide to the home of her boyfriend, Peter Cook. The agents suspected that Cook was involved in the manufacturing of methamphetamine because allegedly he had been seen approxi-

1. The affidavit appears to use methamphetamine "ingredients" and methamphetamine "precursors" interchangeably. However, under the Drug Precursor Act, NMSA 1978, §§ 30–31B–1 to –18 (2004), none of the items purchased by Defendant were "precursors." *See* n. 3, *infra*.

mately one year before stealing and purchasing methamphetamine ingredients. Also, about a year before Defendant's purchase, Agent Suggs saw Defendant at the home of an individual who Agent Carr knew had been arrested for involvement in methamphetamine manufacture and whose girlfriend had been convicted of the same crime.

{5} The agents presented their affidavit to a magistrate judge and requested a warrant to search Cook's home. The magistrate determined there was probable cause and issued the warrant. At the Cook house, the agents found ingredients and paraphernalia that are used to make methamphetamine as well as small amounts of the drug. They arrested both Cook and Defendant.

{6} After her arrest, Defendant moved to suppress items seized during the search. She argued that (1) the affidavit was insufficient to establish probable cause, (2) the affidavit contained false statements, (3) there was no nexus between Defendant and the place to be searched, and (4) the affidavit contained stale information that allegedly had occurred a year before. The district court concluded that the paragraphs which Defendant claimed were stale did "not add any information that establishes probable cause," [2] and then held that the affidavit established probable cause to search even without those paragraphs. Following the denial of her motion to suppress, Defendant pleaded no contest to conspiracy for trafficking methamphetamine by manufacturing, but reserved her right to appeal the suppression issue. *See* NMSA 1978, § 30-31-20(A)(1) (1990).

{7} The Court of Appeals affirmed in a memorandum opinion. However, in its review of the sufficiency of the affidavit, the Court considered the stale evidence which the trial court found did not add to the probable cause determination. The Court also limited its decision to Defendant's first issue: whether the affidavit was factually sufficient to establish probable cause. The Court ruled that Defendant abandoned the other three issues by failing to respond to the proposed disposition to affirm. *See State v. Johnson*, 107 N.M. 356, 358, 758 P.2d 306, 308 (Ct.App.1988). The State argues those issues were not preserved at trial. Since our resolution of the first issue mandates reversal, we limit our review as well to the issue of probable cause. However, we review the affidavit as the district court did, without the stale information concerning Cook's prior behavior and Cook and Defendant's former association with alleged methamphetamine manufacturers. *See State v. Gonzales*, 2003-NMCA-008, ¶ 13, 133 N.M. 158, 61 P.3d 867.

DISCUSSION

Standard of Review

{8} We apply a de novo standard of review to a magistrate's determination that an affidavit for a search warrant alleges facts sufficient to constitute probable cause. *Gonzales*, 2003-NMCA-008, ¶ 13, 133 N.M. 158, 61 P.3d 867; *see also State v. Ochoa*, 2004-NMSC-023, ¶ 5, 135 N.M. 781, 93 P.3d 1286. This review is limited to the contents of the affidavit. *State v. Duquette*, 2000-NMCA-006, ¶ 11, 128 N.M. 530, 994 P.2d 776. " 'We review the affidavit by giving it a commonsense reading, considering the affidavit as a whole, to determine whether the issuing judge made an . . . independent determination of probable cause,' " based upon sufficient facts. *State v. Garcia*, 2002-NMCA-050, ¶ 7, 132 N.M. 180, 45 P.3d 900 (quoting *State v. Whitley*, 1999-NMCA-155, ¶ 3, 128 N.M. 403, 993 P.2d 117); *see also* Rule 5-211(E) NMRA 2006 (requiring probable cause to be based on substantial evidence); *State v. Cordova*, 109 N.M. 211, 213, 784 P.2d 30, 32 (1989) (same).

The Probable Cause Requirement

{9} The Fourth Amendment to the United States Constitution and article II, section 10 of the New Mexico Constitution both require probable cause to believe that a

2. The stale information, not considered by the district court, was contained in three paragraphs of the affidavit. These included Cook having been observed stealing and purchasing methamphetamine ingredients, and Defendant having been associated with known methamphetamine manufacturers, both occurring a year or so before Defendant was observed making these purchases.

crime is occurring or seizable evidence exists at a particular location before a search warrant may issue. *See also* Rule 5-211(A). Accordingly, law enforcement officials must present an affidavit to a "neutral and detached magistrate" demonstrating probable cause. *Johnson v. United States,* 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436 (1948); *accord State v. Baca,* 97 N.M. 379, 640 P.2d 485 (1982). A magistrate is required, not because officers cannot make reasonable inferences from evidence, but because the constitutional prohibition against unreasonable searches and seizures prefers an independent review of the evidence, rather than one from police who are "engaged in the often competitive enterprise of ferreting out crime." *Johnson,* 333 U.S. at 14, 68 S.Ct. 367. It follows then, that the magistrate's role is not simply to rubber stamp an officer's conclusion about probable cause. *State v. Hughes,* 20 Or.App. 493, 532 P.2d 818, 822 (1975). Rather, "[t]he constitutionally mandated role of magistrates and judges in the warrant process requires them to make an '*informed and deliberate*' determination whether probable cause exists." *Cordova,* 109 N.M. at 213, 784 P.2d at 32 (quoting *Aguilar v. Texas,* 378 U.S. 108, 110, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964)) (emphasis added).

{10} Probable cause exists when there are reasonable grounds to believe an offense has been or is being committed in the place to be searched. *State v. Snedeker,* 99 N.M. 286, 290, 657 P.2d 613, 617 (1982); *Gonzales,* 2003-NMCA-008, ¶ 11, 133 N.M. 158, 61 P.3d 867. Probable cause is not subject to bright line, hard-and-fast rules, but is a fact-based determination made on a case-by-case basis. *See State v. Aull,* 78 N.M. 607, 612, 435 P.2d 437, 442 (1967) (stating no two cases are precisely alike); *People v. Miller,* 75 P.3d 1108, 1113 (Colo.2003) (en banc) (stating that probable cause analysis "does not lend itself to mathematical certainties or bright line rules"). "The degree of proof necessary to establish probable cause for the issuance of a search warrant 'is more than a suspicion or possibility but less than a certainty of proof.' " *Gonzales,* 2003-NMCA-008, ¶ 12, 133 N.M. 158, 61 P.3d 867 (quoting *State v. Donaldson,* 100 N.M. 111, 116, 666 P.2d 1258, 1263 (Ct.App.1983)). When ruling on probable cause, we deal only in the realm of reasonable probabilities, and look to the totality of the circumstances to determine if probable cause is present. *State v. Garcia,* 79 N.M. 367, 368, 443 P.2d 860, 861 (1968); *see United States v. Basham,* 268 F.3d 1199, 1203 (10th Cir.2001).

{11} Any search pursuant to a warrant that has an affidavit lacking in probable cause is unreasonable. 2 WAYNE R. LAFAVE, CRIMINAL PROCEDURE § 3.3(a), at 83 (2d. ed.1999). Accordingly, while we give deference to a magistrate's decision, and to an officer's observations, experience, and training, their conclusions must be objectively reasonable under all the circumstances. *See State v. Attaway,* 117 N.M. 141, 149, 870 P.2d 103, 111 (1994) ("In New Mexico, the ultimate question in all cases regarding alleged search and seizure violations is whether the search and seizure was reasonable."); *see also State v. Gutierrez,* 116 N.M. 431, 444, 863 P.2d 1052, 1065 (1993) (noting that "Article II, Section 10 [of the New Mexico Constitution] expresses the fundamental notion that every person in this state is entitled to be free from unwarranted governmental intrusions").

{12} The presence of objective reasonableness is especially important when dealing with the search of a home. *See State v. Ryon,* 2005-NMSC-005, ¶ 22, 137 N.M. 174, 108 P.3d 1032 (noting "a search within a home raises unique concerns"); *Snedeker,* 99 N.M. at 288, 657 P.2d at 615 ("The fourth amendment ... is intended to protect the sanctity of a person's home."); *Payton v. New York,* 445 U.S. 573, 589-90, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) (same). The privacy of a home is afforded the highest level of protection by our state and federal constitutions. *State v. Monteleone,* 2005-NMCA-129, ¶ 9, 138 N.M. 544, 123 P.3d 777, *cert. granted,* 2005-NMCERT-011, 138 N.M. 587, 124 P.3d 565. Both the state and federal constitutions ascribe a textual basis for protection of a home. *See* N.M. Const. art. II, § 10 ("The people shall be secure in their ... *homes* ... from unreasonable searches and seizures...." (Emphasis added.)); U.S. Const. amend. IV ("The right of the people

to be secure in their ... *houses* ... against unreasonable searches and seizures, shall not be violated...." (Emphasis added.)). Therefore, we give due weight to the fact that it is a home to be searched and its privacy invaded when we consider the objective reasonableness of a magistrate's warrant based on probable cause.

The Redacted Affidavit Did Not Establish Probable Cause

{13} Without the stale information redacted by the district court, the affidavit alleges that Defendant purchased two products, tincture of iodine and hydrogen peroxide, that are legal yet capable of being used illegally. One of those products, iodine, was purchased in an amount potentially inconsistent with personal use. Both products were purchased in a lawful yet suspicious manner, and were taken to the home in question. While these events appropriately may have been suspicious to an officer trained in the detection and interdiction of clandestine methamphetamine manufacturing, that suspicion does not necessarily equate to probable cause. *See United States v. Drake,* 673 F.2d 15, 18 (1st Cir.1982) ("The purchase in a single order of all the requisite chemicals ... for the manufacture of [methamphetamine] is a 'red flag' fact which arouses suspicion, although not necessarily establishing probable cause."); *cf. Ochoa,* 2004–NMSC–023, ¶ 14, 135 N.M. 781, 93 P.3d 1286; *State v. Flores,* 1996–NMCA–059, ¶ 15, 122 N.M. 84, 920 P.2d 1038.

{14} The key is whether the circumstances surrounding a lawful purchase are significant enough to give rise to probable cause. Our inquiry should be particularly exacting when both the purchase and its manner are equally consistent with legal activity. *See State v. Anderson,* 107 N.M. 165, 169, 754 P.2d 542, 546 (Ct.App.1988) (stating officer's observation of facts consistent with drug courier profile was not enough to establish probable cause when those facts were just as consistent with innocent activity). Mere suspicion about ordinary, non-criminal activities, regardless of an officer's qualifications and experience, does not satisfy probable cause. *See Ochoa,* 2004–NMSC–023, ¶ 14, 135 N.M. 781, 93 P.3d 1286; *Flores,* 1996–NMCA–059, ¶ 15, 122 N.M. 84, 920 P.2d 1038. *But cf. State v. Van Dang,* 2005–NMSC–033, ¶ 16, 138 N.M. 408, 120 P.3d 830 (stating officer's training and experience can assist the evaluation of whether reasonable suspicion exists). However, ordinary, innocent facts alleged in an affidavit may be sufficient if, when viewed together with all the facts and circumstances, they make it reasonably probable that a crime is occurring in the place to be searched. *United States v. Dishman,* 377 F.3d 809, 811 (8th Cir.2004); *see State v. Steinzig,* 1999–NMCA–107, ¶ 39, 127 N.M. 752, 987 P.2d 409; *State v. Jones,* 107 N.M. 503, 504, 760 P.2d 796, 797 (Ct.App. 1988). *But see Anderson,* 107 N.M. at 169, 754 P.2d at 546 (holding drug courier profile, which was consistent with innocent explanation, along with other innocent facts was not sufficient for probable cause); *State v. Brown,* 96 N.M. 10, 13, 626 P.2d 1312, 1315 (Ct.App.1981) ("[A]n aggregate of discrete bits of information, each of which is defective, does not add up to the establishment of probable cause."). When all the suspicious activity observed does not make it reasonably probable that the manufacture of a controlled substance is occurring at a home, further investigation is needed to justify a search warrant.

{15} In considering the inferences that one can reasonably draw from Defendant's purchases, we first note that these products are not currently considered "drug precursors" or "immediate precursors" under the Drug Precursor Act, Sections 30–31B–1 to –18 (2004). *See* §§ 30–31B–2(L), (M), –3; 16 NMAC 19.21.35 (2005).[3] The Act lists sever-

3. The Court of Appeals and the State asserted that tincture of iodine and hydrogen peroxide are drug precursors under the Act. We are not persuaded. There is no mention of hydrogen peroxide anywhere in the Act. Iodine crystals and iodine matrix are listed as precursors, but the State, which has the burden of proof, presented no evidence that tincture of iodine is included in either of these two categories. Further, the affidavit only describes these items as ingredients, not precursors under the Act. It explains that tincture of iodine is used to make iodine crystals, which are a main ingredient to methamphetamine, and hydrogen peroxide is a main ingredient used to crystalize tincture of iodine. Thus, at best, it appears these two items are used to make

al items that are "precursors" in Section 30–31B–3, and defines an "immediate precursor," in part, as "a substance which is a compound commonly used or produced primarily as an immediate chemical intermediary used in the manufacture of a controlled substance." Section 30–31B–2(M). Pursuant to the Act, the New Mexico Board of Pharmacy has listed several items which are "immediate precursors." *See* § 30–31B–4(A); 16 NMAC 19.21.35. For instance, pseudoephedrine (sudafed) is an "immediate precursor" of methamphetamine. 16 NMAC 19.21.35(W); *see Commonwealth v. Hayward*, 49 S.W.3d 674, 676 (Ky.2001) ("*The* precursor, and *main ingredient*, of methamphetamine is ephedrine or pseudoephedrine." (Emphasis added)). However, neither hydrogen peroxide nor tincture of iodine is listed as a "precursor" or "immediate precursor" either in the Act, or in Board of Pharmacy regulations. They are simply ingredients.

{16} The distinction between ingredients and precursors is directly relevant to the probable cause analysis in this case. While a product such as hydrogen peroxide or tincture of iodine can potentially have a limited use in the methamphetamine manufacturing process, a product that is an "immediate precursor" is, according to our Legislature, "a substance ... *commonly* used or produced *primarily* as an immediate chemical intermediary used in the manufacture of a controlled substance." Section 30–31B–2(M) (emphasis added). In the realm of reasonable probabilities, therefore, it is more likely that the purchase of methamphetamine "precursors" or "immediate precursors" would be for an illicit purpose and give rise to an incriminating inference, as compared to the purchase of mere ingredients like iodine and hydrogen peroxide. The Legislature, along with the Board of Pharmacy, appears to have said as much, and we give those official classifications great weight when considering the appropriate inferences to be drawn from the purchase or possession of those products.[4]

{17} In a given case, the purchase of even a legal product may be sufficiently large or otherwise suspicious to rise to the level of probable cause.[5] *See Harper*, 105 P.3d at 889 (stating defendant purchased one gallon of tincture of iodine); *cf. State v. Brenn*, 2005–NMCA–121, ¶ 15, 138 N.M. 451, 121 P.3d 1050 (holding the jury could infer attempt to manufacture methamphetamine from possession of over 5000 pseudoephedrine pills and 7 gallons of iodine because there is no legal purpose to possess such large amounts). The purchase of one single 1–pint bottle of hydrogen peroxide falls far short of the mark.

{18} Admittedly, Defendant's purchase of the iodine casts a darker shadow. Four 1–ounce bottles might appear excessive, and more impressive still, it was all the iodine on the shelf. *But see* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.7(d), at 412 (4th ed.2004) (explaining that a statement in an affidavit that an item can be used to manufacture illegal drugs is only a truism and adds nothing to probable cause). However, the officers' remaining observations—Defendant covering the iodine in her shopping cart, her attempt to use the self-pay register, her hurried pace, and her purchase of hydrogen peroxide at another store—all serve to "highlight the ordinary, rather than the sinister," in terms of what one can observe daily in shopping centers throughout the state. *Anderson*, 107 N.M. at 169, 754 P.2d at 546.

some of the ingredients or precursors of methamphetamine, but are not themselves precursors.

4. For purposes of completeness, we observe that in New Mexico it is legal to purchase even a "precursor" or "immediate precursor." *See* Section 30–31B–12; *cf. State v. Harper*, 197 Or.App. 221, 105 P.3d 883, 889 (2005) (noting because ORS 475.967(1) makes it illegal to possess a precursor with intent to manufacture a drug, probable cause to believe manufacture is occurring can exist if purchase is coupled with intent).

5. The dissent appears to interpret our distinction in this case between mere ingredients and precursors or immediate precursors as dispositive of the probable cause analysis. *See infra*, ¶ 33. This is simply not the case. Probable cause is a fact-based inquiry by nature, and the outcome of each case like this one will vary, not based on whether the items purchased are precursors, but rather all of the surrounding circumstances. We merely conclude in this case that Defendant's purchases, while suspicious, did not give rise to probable cause. The suspicious inference might have been more persuasive had Defendant produced actual precursors.

These remaining observations may be suspicious to the trained eye, but even when considered as a whole they do not give rise to probable cause. Notably, the officers provided no additional relevant information in the affidavit to demonstrate why these two purchases made it reasonably probable that Defendant was manufacturing methamphetamine.

{19} In addition, the officers were seeking a warrant to search not just Defendant, but the house to which she delivered her purchases. When officers believe controlled substances are being manufactured in a residence, there must be a sufficient nexus in the affidavit between the activities observed, and the officers' belief that manufacture is occurring at that home. 2 LAFAVE, *supra*, § 3.7(d). We have already explained why Defendant's purchases did not create probable cause. The mere fact Defendant brought those same items to her home does not make it any more or less probable that she would use those items for an illicit purpose. In other words, it adds nothing to elevate her suspicious purchases from mere suspicion to probable cause, except that the officers needed more information to establish a reasonable belief that methamphetamine was being manufactured at the house. Thus, there was not a sufficient nexus between her purchases and this belief. Absent other probative information, the state and federal constitutions do not permit law enforcement, and especially the reviewing magistrate, to make the leap from suspicious, albeit legal, purchases of items that *may* be used to make methamphetamine to the actual manufacture of that substance at that particular location.

{20} Failure to draw this nexus was fatal to the affidavit in *People v. Kazmierski*, 25 P.3d 1207, 1213 (Colo.2001) (en banc). There, the Colorado Supreme Court considered evidence that two suspects purchased known precursors to methamphetamine over a period of five months, one of the suspects was seen in a car smoking something in a glass pipe similar to those used for methamphetamine, and the two suspects lived together. The Court held the evidence was insufficient to establish probable cause to search their residence. *Id.*

{21} The Colorado Supreme Court's foremost concern was the failure to "recite any other facts that would support probable cause to believe that the defendants were *manufacturing* methamphetamine inside the home." *Id.* at 1212 (emphasis added). The Court noted additional factual allegations that might have sufficed, such as a distinctive odor associated with methamphetamine manufacture emanating from the home. *Id.; see also United States v. Failla*, 343 F.Supp. 831, 835 (W.D.N.Y.1972) (holding no probable cause existed despite suspiciousness of purchase of a chemical commonly used in the manufacture of illegal drugs, because defendant was never observed either making or selling illegal drugs). The mere purchase of precursors without more, the Court found, was insufficient because it failed to establish a nexus between that activity and the alleged manufacturing in the home to be searched. *Kazmierski*, 25 P.3d at 1212–13. "This was not a circumstance in which the crime occurred off site, and the affidavit had merely to establish a reasonable basis for believing that evidence of the crime would be located at the home. Rather, the crime consisted of the manufacture of methamphetamine—a crime requiring a location." *Id.* at 1212. We note that the affidavit in *Kazmierski* contained *more* incriminating information than the affidavit presented to the magistrate in the case before us.

{22} In the main, observed suspicious activity should be the beginning, not the end, of the investigation. In Defendant's case, the officers did not observe anything additional at the residence that would support a conclusion that methamphetamine was being manufactured inside. The officers reported no smells emanating from the house, no presence of equipment, supplies, or other methamphetamine ingredients or precursors other than the two small purchases Defendant brought to the house. The affidavit does not suggest that Defendant or Cook had previous arrests for the manufacture, sale, or possession of controlled substances, and contained nothing *recent* pointing to incriminating activities on their part. No individuals known to have been involved in the manufacture,

sale, or possession of methamphetamine were seen at the household.

{23} The officers did not speak with neighbors to ask if they had observed any suspicious activities. There was no informant's tip [6] or an undercover buy at the house. The officers did not attempt to gain consent to search the residence or perform a "knock and talk" to try and gain information. *See Florida v. Bostick,* 501 U.S. 429, 434–35, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991) (indicating that officers do not need any basis of suspicion to ask general questions of an individual, including asking for consent to search); *United States v. Cormier,* 220 F.3d 1103, 1109 (9th Cir.2000) (opining that the " 'knock and talk' " investigative technique is legal in the absence of suspicion as a "firmly-rooted notion in Fourth Amendment jurisprudence").

{24} These are examples only, not an exhaustive list of what officers commonly do to complete a proper investigation. Absent some additional investigative effort of this kind, we are compelled to conclude that the affidavit did not sufficiently connect Defendant's activities to the manufacture of methamphetamine at this particular residence. The officers acted prematurely in obtaining the warrant.

{25} Most judicial opinions brought to our attention concerning the manufacture of methamphetamine appear to require additional investigative activity, similar to the foregoing suggestions before a warrant will issue. *See State v. Ballweg,* 670 N.W.2d 490, 498 (N.D.2003) (holding affidavit sufficient where defendant purchased ingredients used to manufacture methamphetamine, including pseudoephedrine, *and* purchased supplies used to make and cut methamphetamine, and detached garage at residence had covered windows and a tarp which prevented ability to look inside); *State v. Bowles,* 28 Kan. App.2d 488, 18 P.3d 250 (2001) (noting purchase of precursors and other items used to manufacture methamphetamine, *along with* defendant's prior conviction for possession and sale of same, smell of ether emanating from house, and tip from informant that house was being used for manufacture established probable cause).[7]

{26} We note one case from North Dakota particularly close to the facts before us. In *State v. Lewis,* 527 N.W.2d 658, 662–63 (N.D. 1995), the North Dakota Supreme Court found that an affidavit did not establish prob-

6. The dissent indicates that it would follow the Court of Appeals opinion in *State v. Donaldson,* 100 N.M. 111, 666 P.2d 1258 (Ct.App.1983). *See infra,* ¶ 34. The dissent argues that "law enforcement had just as much if not more incriminating information," than in this case. *Id.* In fact, the affidavit in *Donaldson,* as the dissent notes, was supported by an informant's tip. No such tip existed in this case. Moreover, the suspects in *Donaldson* used fictitious names to board an airplane, purportedly to obtain drugs. The use of fictitious names is highly suspicious activity, and no similar allegations were made in this case. We do not find *Donaldson* persuasive.

7. *See also United States v. Swanger,* No.Crim. A.05–53–JBC., 2005 WL 2002441, at *6 (E.D.Ky. Aug.18, 2005) (stating warrant to search hotel room upheld when defendants were seen purchasing two precursors to manufacture of methamphetamine, drug dog alerted to their vehicle, hotel was known for drug activity, and room was registered to one of defendants); *Dishman,* 377 F.3d at 810–11 (holding an individual's purchase of substance sometimes used in the manufacture of methamphetamine and transporting substance in a truck registered to an individual who was involved in the sale and manufacture of methamphetamine to the defendant's residence, in conjunction with defendant's previous criminal charge involving another methamphetamine precursor, observation of several items that are used in the manufacture of methamphetamine at the residence, and other information established probable cause); *State v. Eshnaur,* 106 S.W.3d 571, 576 (Mo.Ct.App.2003) (stating affidavit was sufficient when it stated that residence had previously been closed due to presence of methamphetamine lab, police observed ingredients and supplies used to make methamphetamine, and defendant was on probation for manufacturing); *Drake,* 673 F.2d at 18 (holding purchase in single order of all chemicals necessary to make methamphetamine, plus purchase of equipment and cutting materials used for the same, in conjunction with viewing of lab equipment inside place to be searched, and defendant's suspicious activity of driving in an evasive manner established probable cause); *United States v. Coppage,* 635 F.2d 683, 686 (8th Cir.1980) (noting probable cause existed where the defendant purchased under a false name a number of different precursors, an odor of one of the precursor chemicals was detected, and the defendant discarded a seal identical to that found on the container of another precursor chemical).

able cause to believe the suspects were growing marijuana in their home. The affidavit indicated that over a seven-month period Lewis had purchased several pieces of equipment commonly used for growing marijuana. Officers then performed surveillance on the Lewis house, an investigative step omitted in the case before us, using a device that showed excessive heat loss from one side of the house, and the officers noticed the windows on that side were covered with insulation. The officers knew that covering windows is a common tactic used by marijuana growers to prevent visual observation and heat loss. Also, heat loss beyond the normal amount for a household suggested an indoor growing operation. Nonetheless, the North Dakota Supreme Court found the information was insufficient to establish probable cause because insulating windows during the winter was common in North Dakota, and the heat loss and growing equipment were equally capable of a benign explanation-the indoor cultivation of other plants. *Id.*

{27} Applying the holding in *Lewis* to the present case strongly suggests that Defendant's purchases and other suspicious activity, without additional investigation, cannot rise to the level of probable cause necessary for a warrant to search a home. *Cf. Ballweg,* 670 N.W.2d at 498 (holding affidavit sufficient where defendant purchased ingredients used to manufacture methamphetamine, *including* pseudoephedrine, *and* purchased supplies used to make and cut methamphetamine, and detached garage at residence had covered windows and a tarp which prevented ability to look inside).

{28} Accordingly, we conclude that Defendant's suspicious activities did not give rise to probable cause to search the Cook residence. Because no other information was presented in the affidavit to confirm the officers' suspicions and establish the crucial link to the residence to be searched, the affidavit was insufficient. The warrant was therefore unconstitutionally defective, and the evidence seized as a result of the search should have been suppressed.[8]

CONCLUSION

{29} We reverse the order of the Court of Appeals affirming the district court's denial of Defendant's motion to suppress.

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

WE CONCUR: PAMELA B. MINZNER, PETRA JIMENEZ MAES, and EDWARD L. CHÁVEZ, Justices.

PATRICIO M. SERNA (dissenting).

SERNA, Justice (dissenting).

{31} I respectfully dissent. I would affirm the district court and the unanimous Court of Appeals panel. As a preliminary matter, I prefer the *State v. Gomez* interstitial analysis in adjudicating overlapping state and federal constitutional claims. 1997–NMSC–006, ¶¶ 19–22, 122 N.M. 777, 932 P.2d 1. "Under the interstitial approach, the court asks first whether the right being asserted is protected under the federal constitution. If it is, then the state constitutional claim is not reached. If it is not, then the state constitution is examined." ¶ 19. Applying independent and adequate state law to a defendant's motion to

8. The dissent argues, "This case does not compel invocation of the exclusionary rule." *See infra,* ¶ 36. For this proposition, the dissent cites to *United States v. Leon,* 468 U.S. 897, 916, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) ("[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates."). *Leon,* of course, is the seminal Supreme Court decision that created the good-faith exception to the exclusionary rule. There, the Court concluded the rule, which is in place solely to deter police misconduct, would not apply when "an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." 468 U.S. at 920, 104 S.Ct. 3405. This Court squarely rejected the application of the good-faith exception to warrants which lack sufficient probable cause under the New Mexico Constitution's counterpart to the Fourth Amendment, article II, section 10. *See State v. Gutierrez,* 116 N.M. 431, 445, 863 P.2d 1052, 1066 (1993). We did so, because we believed the purpose of the exclusionary rule in New Mexico is "not ... deterrence or judicial integrity ... instead, [the] focus is to effectuate in the pending case the constitutional right of the accused to be free from unreasonable search and seizure." *Id.* at 446, 863 P.2d at 1067. In New Mexico, when law enforcement fails to establish probable cause in an affidavit, we do not make any inquiry as to whether the exclusionary rule should be applied because "we will not sanction that conduct by turning the other cheek." *Id.*

suppress could likely create a different outcome than applying federal law (such as the application of the good faith exception to the exclusionary rule), which is why a separate analysis and conclusion regarding these two distinct approaches is important. Even in the context of the majority's combined state-federal analysis and outcome, I ultimately agree with the trial court and the Court of Appeals that the affidavit presented by law enforcement satisfied the probable cause standard and that there was a sufficient nexus between the affidavit's allegations and the house searched.

{32} The first issue is whether the affidavit presented to the magistrate satisfied probable cause for a search. The affidavit detailed how Defendant took all four 1-ounce bottles of iodine available at the store off the shelf and hid it under something else in her cart before purchasing it. Defendant then went to another store to purchase hydrogen peroxide, even though hydrogen peroxide was available at the first store very near the iodine. The majority states that this highlights the ordinary; I cannot agree that this is ordinary behavior, especially given the fact that the law enforcement affiant knew through training and experience that "most people purchasing tincture of iodine generally buy only one bottle" and "persons shopping for methamphetamine precursors often buy the items at more than one store in order to avoid detection by law enforcement."

{33} The Majority Opinion, ¶ 16, states, "[t]he distinction between ingredients and precursors is directly relevant to the probable cause analysis in this case." It is too formalistic to argue that a judge's probable cause determination should be affected by the fact that tincture of iodine and hydrogen peroxide are ingredients to create an immediate precursor, but are not formally listed as immediate precursors. It goes against common sense and the facts presented to the magistrate. *State v. Donaldson,* 100 N.M. 111, 116, 666 P.2d 1258, 1263 (Ct.App.1983). Law enforcement presented the magistrate with the following information:

> Affiant knows through training and experience that tincture of iodine is used to make iodine crystals, which are a main ingredient used in the manufacture of methamphetamine.... Affiant knows through training and experience that hydrogen peroxide is a main ingredient used to crystallize iodine from tincture of iodine. Affiant also knows through training and experience that iodine cannot be used in the tincture form for the manufacturing of methamphetamine, rather it must first be crystallized using hydrogen peroxide.

The affidavit is clear that law enforcement knew that tincture of iodine and hydrogen peroxide are ingredients that easily become iodine crystals, a main ingredient for methamphetamine. Iodine crystals are formally called an immediate precursor in New Mexico's administrative code. 14 NMAC 16.19.21.35. How are we advancing state and federal constitutional protections by concluding that tincture of iodine and hydrogen peroxide, which are combined to create the immediate precursor of iodine crystals, are in a totally different category from the already-formed iodine crystals, and do not give rise to probable cause even when bought on the same day by a suspect? Perhaps the Legislature ought to consider amending the Drug Precursor Act to clarify its intent regarding whether multiple ingredients that combine to become immediate precursors bought by a suspect on the same day should be treated differently than immediate precursors per se.

{34} In addition to the inferences that can be drawn from the affidavit, our courts have previously decided this issue in *Donaldson,* 100 N.M. at 111, 666 P.2d at 1258. The police in *Donaldson* acted on an informant's tip and observed suspicious but legal activities by the defendants, such as paying cash for airplane tickets to Las Vegas, Nevada; boarding the plane under fictitious names; returning home to Albuquerque a few days later; and transferring packages between two cars while outside the residence to be searched. *Id.* at 114, 666 P.2d at 1261. Law enforcement obtained a search warrant and seized drug contraband from the residence. *Id.* The *Donaldson* defendants moved to suppress the evidence on the basis that the affidavit did not support probable cause. The trial court and the Court of Appeals disagreed and found that the affidavit sworn

to by a narcotics agent was sufficiently detailed to support probable cause. *Id.* at 115–16, 666 P.2d at 1262–63. In the pending case, law enforcement observed Defendant's suspicious purchase of known methamphetamine ingredients and delivery of the contraband to the house. Law enforcement had direct evidence so an informant's tip regarding illegal substances was not necessary to complete the inference. Because law enforcement and the judge had just as much if not more incriminating information, I would follow *Donaldson* and also find that the affidavit merited issuance of the search warrant.

{35} The second issue is whether the information in the affidavit created a sufficient nexus to the home to be searched. The Majority Opinion, ¶ 19, states a proposition and uses the term "sufficient nexus" without any citation to case law authority to support the proposition or explain the term so that it can be consistently applied in future cases. The facts are that Defendant delivered the methamphetamine ingredients to the house that was searched on the same day as her purchase.

> The female subject returned to her vehicle and Affiant along with Agent Suggs followed her to a residence located at 18 Sage, Boles Acres, Otero County, New Mexico, as described above. Affiant and Agent Suggs observed the female, believed to be Heather Nyce, along with Peter Cook unload the shopping bags from the vehicle and carry them inside the residence.

Common sense tells me this is sufficient nexus. Common sense is also a controlling consideration in determining if probable cause existed. *Donaldson,* 100 N.M. at 116, 666 P.2d at 1263. Furthermore, in *People v. Kazmierski,* 25 P.3d 1207 (Colo.2001) (en banc), the out-of-state case upon which the majority relies to argue that lack of nexus between the alleged criminal activity and house to be searched is fatal to the probable cause determination, is not applicable. The *Kazmierski* court, in finding a lack of nexus to the house searched, stated "not only did the investigator not see the items transported into the home, but more importantly, the investigator did not recite any other facts. . . ." 25 P.3d at 1212–13. In the pending case, the affidavit details that law enforcement did witness Defendant deliver the methamphetamine ingredients to the house searched, which renders *Kazmierski* unpersuasive for the nexus reasoning.

{36} Defendant has convinced a majority of this Court to apply the exclusionary rule and suppress the evidence against her on the basis that the evidence was illegally obtained. Because I conclude that probable cause existed and Defendant's constitutional rights were not trampled upon, I consider the rationale for the exclusionary rule. A purpose of the exclusionary rule is to deter police misconduct by excluding evidence that law enforcement acquired through unconstitutional means. In discussing the scope of the exclusionary rule, the United States Supreme Court stated "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *United States v. Leon,* 468 U.S. 897, 916, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). *See also Stone v. Powell,* 428 U.S. 465, 486, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); *State v. Gutierrez,* 116 N.M. 431, 447, 863 P.2d 1052, 1068 (1993) ("deterrence of future constitutional violations is a critical state interest that is a by-product of the exclusionary rule"). Defendant has not alleged egregious law enforcement behavior nor alleged that the judge reviewing the affidavit for the warrant did not perform as a detached and neutral judicial officer. In considering the affidavit in light of the motion to suppress, the district court judge even struck certain portions, which would indicate a thoughtful review rather than a rubber stamp. This case does not compel invocation of the exclusionary rule, as the lower courts have previously determined. What more does the judiciary want from law enforcement besides peaceable, constitutionally compliant observation of suspicious behavior, coupled with approval from a detached and neutral judge? The Majority Opinion, ¶ 23, suggests different approaches law enforcement could have taken. Aside from the fact that as a court it is not within our power to advise law enforcement officials as to how they should conduct an investigation, the suggestions are unrealistic given the circumstances. If law enforcement

officers spoke with neighbors or performed a "knock and talk" at the suspected residence to gain information, law enforcement would be just as likely to tip off criminals to the fact that they were being investigated and therefore hinder the interdiction. It is not our role to concoct requirements beyond what the constitutions demand.

{37} Instead, we have an opinion that relies upon non-binding precedent that the parties did not argue to the Court in order to come to a conclusion that will hamper law enforcement's efforts in eradicating methamphetamine from New Mexico's communities. Ironically, we do so in a case in which the Defendant pled no contest to manufacturing methamphetamine, which suggests that law enforcement's suspicions were right on target. It is a pyrrhic victory for the constitutional protections against unreasonable search and seizure and for the exclusionary rule.

2006-NMSC-029

137 P.3d 599

Kimberly J. PAYNE, Plaintiff–Petitioner,

v.

Thomas HALL, M.D., and Curtis W. Boyd, M.D., a professional corporation, Defendants–Respondents.

No. 28,823.

Supreme Court of New Mexico.

June 8, 2006.

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Sanders, Bruin, Coll & Worley, P.A., Clay H. Paulos, Ian D. McKelvy Roswell, NM, for Petitioner.

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Attwood, Malone, Turner & Sabin, P.A., Kay Cargill Jenkins, Carla Ann Neusch Williams, Roswell, NM, for Amicus Curiae, New Mexico Defense Lawyers Association.

McGinn, Carpenter, Campbell, Montoya & Love, Randi McGinn, Michael B. Browde, Albuquerque, NM, for Amicus Curiae, New Mexico Trial Lawyers Association.

OPINION

BOSSON, Chief Justice.

{1} In the course of an elective abortion, Plaintiff Kimberly Payne twice received medical treatment she alleged to be negligent, which ultimately caused her to suffer substantial physical injuries. She was first treated by Dr. Thomas Hall of the Boyd Clinic (hereinafter collectively referred to as "the Clinic"), and subsequently at the University of New Mexico Hospital (hereinafter referred to as the "Hospital"). Plaintiff sued only the Clinic under a theory of successive tortfeasor liability, and sought compensation for alleged injuries incurred both at the Clinic and the Hospital. The jury returned a verdict of negligence but no causation on the part of the Clinic for any injury, either at the Clinic or the Hospital. On appeal, Plaintiff claims error in that, consistent with successive tortfeasor theory, the trial court should have found causation as a matter of law on the part of the Clinic for the entire extent of her injuries, including those incurred successively at the Hospital.

{2} Both the district court and the Court of Appeals held against Plaintiff on her claim of causation as a matter of law, although the appellate court could not agree on an overarching rationale. *Payne v. Hall*, 2004-NMCA-113, 136 N.M. 380, 98 P.3d 1030 (Alarid, J., specially concurring, Bustamante, J., dissenting). We granted certiorari to

help clarify the evolving state of the law regarding successive tortfeasor liability, particularly as it relates to the requirement that the victim prove a distinct injury caused by the negligence of the original tortfeasor, separate and apart from those injuries later caused by the successive tortfeasor. We agree with the Court of Appeals that the trial court did not err when it refused to decide as a matter of law that the Clinic caused any original injury separate from the injuries suffered at the Hospital. Nonetheless we reverse and remand for a new trial because the jury was not properly instructed on the theory of the case. We also attempt to resolve the questions raised in the separate opinions of the Court of Appeals and provide guidance in respect to this confusing area of the law.

BACKGROUND

{3} In the second trimester of her pregnancy, Plaintiff went to the Clinic to obtain an abortion. Because of the advanced state of her pregnancy, the Clinic chose a procedure that requires two days. On the first day the cervix is dilated through the insertion of laminaria. On the second day, the fetus is extracted.

{4} During the laminaria insertion on the first day, Plaintiff was in some degree of pain. Plaintiff wanted to proceed despite the pain, and Dr. Hall completed the insertion. On the second day, Plaintiff's pain grew worse. Dr. Hall and members of his staff attempted to start an IV in Plaintiff's arms to administer pain medication. The attempt was unsuccessful, possibly due to Plaintiff's alleged prior intravenous drug use. The Clinic staff also attempted to obtain an anesthesiologist for the procedure, but could not. Plaintiff's pain caused her to move about on the table, forcing the doctor to stop the procedure several times.

{5} Due to the risk of infection or spontaneous abortion, Dr. Hall was too far along in the procedure to remove the laminaria and allow Plaintiff to go home. Dr. Hall advised Plaintiff that one option was to find a doctor at a hospital who would perform the procedure. Although no hospital in New Mexico takes patients directly for elective abortions, Dr. Hall informed Plaintiff that the University of New Mexico Hospital allows for exceptions, such as referral of patients with complications. Plaintiff opted to continue at the Clinic. Dr. Hall continued for some time using an intramuscular anesthesia for limited pain control, but the doctor ultimately determined he could not complete the procedure. He then contacted Dr. Jamison at the Hospital who agreed to accept Plaintiff's transfer.

{6} Under the supervision of Dr. Jamison, Dr. Maybach, a second-year resident at the Hospital, attempted to complete the abortion, but with disastrous results. Dr. Maybach entered the uterus and unknowingly extracted Plaintiff's right ureter, the tube connecting the kidney to the bladder. Continuing on, Dr. Maybach mistakenly extracted Plaintiff's right ovary. At that point, Dr. Jamison terminated the procedure and began abdominal surgery, during which the doctors realized Plaintiff's uterus had a large perforation forcing them to perform a hysterectomy. Plaintiff's kidney was later removed because of the damage caused by the removed ureter. The parties to this appeal do not dispute that Plaintiff suffered significant personal injury as a result of her treatment at the Hospital.

{7} Electing not to sue the Hospital or its doctors, Plaintiff filed a complaint solely against the Clinic.[1] Specifically, Plaintiff alleged that the Clinic negligently perforated Plaintiff's uterus, among other injuries, which in turn caused Plaintiff to be transferred to the Hospital where she suffered separate, enhanced injuries due to the Hospital's negligence. Alleging successive, divisible injuries, first at the Clinic and then at the Hospital, Plaintiff sued the Clinic under a theory of successive tortfeasor liability. As will be discussed more fully in this opinion, under successive tortfeasor theory the Clinic could be held jointly and severally liable for both: any original injury caused at the Clinic, and the enhancement of those injuries by separate acts of negligence at the Hospital.[2]

1. Plaintiff's counsel stated that the Hospital and its doctors were not sued because Plaintiff felt grateful to the Hospital for saving her life and that suing them would be wrong.

2. Recognizing that Plaintiff was pursuing a theory that would hold the Clinic liable for both the injuries caused by the Clinic and by the Hospital, the Clinic filed a third-party complaint seeking

For its part, the Clinic denied any negligence or that it caused Plaintiff any injury. The Clinic blamed the Hospital for substantially all of Plaintiff's injuries.

{8} At the close of all the evidence, the district court agreed that Plaintiff had presented a case for successive tortfeasor liability. Based on this Court's prior discussion of successive tortfeasor liability in *Lujan v. Healthsouth Rehabilitation Corp.*, 120 N.M. 422, 426, 902 P.2d 1025, 1029 (1995), the jury was instructed that: "When a person causes an injury to another which requires medical treatment, it is foreseeable that the treatment, whether provided properly or negligently, will cause additional harm. Therefore, the person causing the original injury is also liable for the additional injury caused by subsequent medical treatment, if any." At Plaintiff's request, the jury was also instructed on five possible theories of negligence by the Clinic: (1) that the Clinic was not adequately equipped to perform this type of abortion; (2) the Clinic did not obtain an anesthesiologist; (3) the Clinic did not obtain IV access; (4) the Clinic did not stop the procedure when Plaintiff was in pain, and; (5) Dr. Hall did not accurately relay the patient's medical history to the Hospital.

{9} On Plaintiff's request, the jury also received an instruction that Plaintiff had the burden of proving that the Clinic's negligence was a proximate cause of Plaintiff's injuries and damages, as well as an instruction defining proximate cause.[3] At Plaintiff's suggestion, the jury was given a special verdict form asking it to decide whether the Clinic was negligent, and if so, to determine if that negligence was a proximate cause of Plaintiff's injuries and damages. Along with Plaintiff's instructions, the district court permitted the Clinic to submit to the jury its defense theory that Plaintiff's injuries were caused solely by the Hospital and not by anything that occurred at the Clinic.

{10} After being instructed, the jury returned a special verdict finding that the Clinic was negligent but not a proximate cause of Plaintiff's injuries and damages. Plaintiff then filed a motion for judgment as a matter of law (JNOV) and a motion for new trial, asking the district court to find proximate cause as a matter of law. The district court denied Plaintiff's motions, and the Court of Appeals affirmed the district court in a split decision. *Payne*, 2004–NMCA–113, 136 N.M. 380, 98 P.3d 1030 (Alarid, J., specially concurring, Bustamante, J., dissenting). We granted certiorari to address successive tortfeasor liability, a subject that has been called the "most intractable problem created by New Mexico's adoption of several liability." M.E. Occhialino, *Bartlett Revisited: New Mexico Tort Law Twenty Years After the Abolition of Joint and Several Liability–Part One*, 33 N.M. L.Rev. 1, 20 (2003).

DISCUSSION

Successive Tortfeasor Liability Arises from Separate and Causally–Distinct Injuries Caused by the Original Tortfeasor

{11} In New Mexico, when concurrent tortfeasors negligently cause a single, *indivisible* injury, the general rule is that each tortfeasor is severally responsible for its own percentage of comparative fault for that injury. *See* NMSA 1978, § 41–3A–1(A) (1987); *Bartlett v. N.M. Welding Supply, Inc.*, 98 N.M. 152, 158, 646 P.2d 579, 585 (Ct.App.1982), *superseded in part on other grounds by* § 41–3A–1. Under several liability, fault is compared among concurrent tortfeasors, limiting the liability of each to the dollar amount that is "equal to the ratio" of each concurrent tortfeasor's comparative responsibility for the single, indivisible injury.

indemnification from the Hospital. The third-party complaint was dismissed for failure to comply with the two-year statute of limitations that applied to the Hospital under the New Mexico Tort Claims Act. NMSA 1978, § 41–4–15(A) (1977). That issue has not been appealed to this Court.

3. Since the time of trial, the Uniform Jury Instruction on causation has been modified to remove the legal term "proximate cause." UJI 13–305 NMRA 2006. Instead the instruction is now simply titled "causation." The new instruction labels a "cause" as "[a]n act or omission [that] ... if unbroken by an independent intervening cause ... contributes to bringing about the injury." *Id.* This is modified from the prior instruction that read, "[a] proximate cause of an injury is that which in a natural and continuous sequence ... produces the injury, and without which the injury would not have occurred." UJI 13–305 NMRA 2004.

See § 41–3A–1(B). While several liability is the majority rule, however, certain narrow exceptions still allow for joint and several liability. *See* § 41–3A–1(C). Under the theory of joint and several liability, each tortfeasor is liable for the entire injury, regardless of proportional fault, leaving it to the defendants to sort out among themselves individual responsibility based on theories of proportional indemnification or contribution. *See* NMSA 1978, § 41–3–2 (1987) (joint and several liability produces a right of contribution); *In re Consol. Vista Hills Retaining Wall Litig.*, 119 N.M. 542, 552–53, 893 P.2d 438, 448–49 (1995) (adopting proportional indemnification "only when contribution or some other form of proration of fault among tortfeasors is not available").

{12} Whereas comparative fault and several liability apply when concurrent tortfeasors cause a single, indivisible injury, our analysis shifts when successive tortfeasors cause separate *divisible* injuries. Under successive tortfeasor liability, a first injury is caused by an original tortfeasor. That injury then causally leads to a second distinct injury, or a distinct enhancement of the first injury, caused by a successive tortfeasor (hereafter distinguished as the "second injury" or the "enhanced injury"). *See Lujan*, 120 N.M. at 426, 902 P.2d at 1029; Occhialino, *supra*, 20.

{13} As an exception to the general rule of several liability, the successive tortfeasor doctrine imposes joint and several liability on the original tortfeasor for the full extent of both injuries, those caused by both the original tortfeasor and the successive tortfeasor. *Lujan*, 120 N.M. at 426, 902 P.2d at 1029. The original tortfeasor is responsible for both injuries because it is foreseeable as a matter of law that the original injury, such as that suffered from a car accident, may lead to a causally-distinct additional injury, such as when the original injury requires subsequent medical treatment, negligently administered at a hospital. *Id.* The successive tortfeasor is only responsible for the second injury or for the distinct enhancement of the first injury. *See Lewis ex rel. Lewis v. Samson*, 2001–NMSC–035, ¶ 34, 131 N.M. 317, 35 P.3d 972 (*Lewis II*).

{14} Importantly, because successive tortfeasor liability is an exception to the general rule of several liability among concurrent tortfeasors, the doctrine is limited to a "narrow class of cases," in which a plaintiff can show more than one distinct injury successively caused by more than one tortfeasor. *Lewis II*, 2001–NMSC–035, ¶ 32, 131 N.M. 317, 35 P.3d 972; *see also Lujan*, 120 N.M. at 425–26, 902 P.2d at 1028–29. *See generally* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 (2000); RESTATEMENT (SECOND) OF TORTS § 457 (1965). As a condition to obtaining joint and several liability of the original tortfeasor for both injuries, a plaintiff must show that "the original injury and the subsequent enhancement of that injury [are] *separate and causally-distinct injuries.*" *Lujan*, 120 N.M. at 426, 902 P.2d at 1028 (emphasis added). If these elements cannot be shown, then joint and several liability does not obtain.

{15} The limiting requirement of causally-distinct injuries can be traced back to early discussions of successive tortfeasor liability in New Mexico. *See* Occhialino, *supra*, 20–23. Prior to New Mexico's adoption of several liability and comparative fault, our caselaw consistently distinguished between successive and concurrent tortfeasors, noting that successive tortfeasor liability involved negligent acts that are not concurrent, "but one succeeds the other by an appreciable interval." *Id.* at 21 (citing *Lucero v. Harshey*, 50 N.M. 1, 5, 165 P.2d 587, 589 (1946)). This temporal distinction between the negligent acts was later dropped in favor of a distinction based on an original injury followed by a successive, enhanced injury. The key to the distinction is that the original injury is caused by the negligence of the original tortfeasor, which is then followed by a second or enhanced injury caused by the second tortfeasor. *Id.* at 21–25. This Court has consistently held, even after the passage of the Several Liability Act in 1987, that for successive tortfeasor liability to apply, two distinct injuries must exist. *Id.* at 23–28; *Lewis II*, 2001–NMSC–035, ¶ 32, 131 N.M. 317, 35 P.3d 972; *Lujan*, 120 N.M. at 426–27, 902 P.2d at 1029–30. Thus, under the law of

this state only when these elements are found—negligence, causation, and a distinct original injury—may the original tortfeasor be held jointly and severally responsible for the subsequent or enhanced injury as well. *See Lujan*, 120 N.M. at 426, 902 P.2d at 1029; *see also* RESTATEMENT (SECOND) OF TORTS, *supra*, § 457 cmt. a (stating plaintiff must show the original tortfeasor's negligence was the "legal cause of bodily harm for which, even if nothing more were suffered, the other could recover damages").

Successive Tortfeasor Liability does not Apply here as Plaintiff Never Proved a Separate and Distinct Injury Caused by the Negligence of the Clinic

{16} Plaintiff asserted at trial that her claim fit comfortably into a theory of successive tortfeasor liability. She argued that her original injuries at the Clinic included the perforation of her uterus, internal bleeding, and pain and suffering, all distinctly caused by the Clinic's negligence. Plaintiff then argued that a second, distinct injury occurred at the Hospital when Dr. Jamison and Dr. Maybach attempted to complete the abortion, and negligently caused Plaintiff to lose her ureter, undergo a hysterectomy, and eventually lose her kidney. Under a theory of successive tortfeasor liability, we agree that the Clinic, if it were a proximate cause of a causally-distinct original injury, such as a perforated uterus, internal bleeding, or pain and suffering, would then become jointly and severally liable as a matter of law for subsequent injuries suffered at the Hospital.

{17} However, anticipating its potential liability for all of Plaintiff's injuries, the Clinic argued at trial that it was not negligent at all, or in the alternative, that its negligence did not cause a separate, discrete original injury at the Clinic. In other words, the Clinic presented evidence that it caused no separate injury to Plaintiff, but that all injuries resulted at the Hospital, for which the Clinic was not jointly and severally liable because successive tortfeasor liability did not apply.

{18} Thus, we arrive at the heart of our problem. According to Plaintiff, once the trial court determined that this case properly called for successive tortfeasor liability and the jury found the Clinic negligent, then as with *Lujan* the trial court should have found the Clinic's negligence a proximate cause as a matter of law for all the injuries subsequently suffered at the Hospital. Consistent with that theory, Plaintiff urges this Court to find proximate cause as a matter of law and reverse the jury's verdict in the Clinic's favor. Unfortunately for Plaintiff, her argument misapprehends the essence of successive tortfeasor liability.

{19} Plaintiff met part of her burden by proving negligence, but failed to show the Clinic's negligence caused any distinct injury. We cannot agree that proximate cause of the *original* injury (if contested) should be decided as a matter of law by the trial judge. When the claim is brought against the original tortfeasor, it is up to the plaintiff to prove, and the jury to decide, whether the plaintiff suffered a distinct original injury caused by the original tortfeasor's negligence. Causation for the *second injury* is determined as a matter of law, but if, and only if, the plaintiff satisfactorily demonstrates that the original tortfeasor negligently caused a distinct, original injury requiring medical treatment. *See Lujan*, 120 N.M. at 426, 902 P.2d at 1029 ("When a person causes an injury to another which requires medical treatment, it is foreseeable that the treatment, whether provided properly or negligently, will cause additional harm."). This original injury must be distinct from the enhanced injury that occurs subsequently at the hands of the successive tortfeasor. Here the existence of an original injury and causation of that injury were in dispute at trial, and it was for the jury, not the judge, to determine existence and causation of any alleged original injury.

{20} The requirement of an original injury was more apparent in this Court's two prior opinions dealing with successive tortfeasor theory, *Lujan* and *Lewis II*. While both opinions involved actions against the successive tortfeasor, liability of the original tortfeasor was clearer than in the present case, because both existence of, and causation for, the original injury was patent. In *Lujan*, the original tortfeasor collided with a motorcycle driven

by the victim, breaking his leg. 120 N.M. at 423, 902 P.2d at 1026. Then, the leg was refractured during treatment at a rehabilitation center. *Id.* at 424, 902 P.2d at 1027. The negligence of the driver of the car in the original accident caused a distinct original injury, the broken leg, which led to a distinct second injury, the refracture. Successive tortfeasor liability clearly applied, and if the claim had been brought against the original tortfeasor, the negligent driver would have been found jointly and severally liable for all injuries subsequently occurring.

{21} In *Lewis II,* 2001-NMSC-035, ¶ 2, 131 N.M. 317, 35 P.3d 972, the victim was stabbed multiple times by a criminal assailant, the original tortfeasor, and later died at a hospital allegedly due to medical malpractice. The jury found the hospital was not negligent, and thus not a successive tortfeasor, based in part on the hospital's argument that the original tortfeasor, the assailant, was the sole cause of the death; in essence that the victim would have died regardless of what subsequently happened at the hospital. *Id.* ¶¶ 2–4. The victim failed to prove that the successive tortfeasor (the hospital) caused any enhanced injury.

{22} In both *Lewis II* and *Lujan,* unlike the present case with the Clinic, there was no question that the original tortfeasor's negligence caused a distinct original injury. While neither case dealt specifically with the responsibility of the original tortfeasor, in both cases, had an action been brought against the original tortfeasor, he would have been liable jointly and severally for both the original and successive injuries.

{23} Contrary to the original tortfeasors in *Lujan* and *Lewis II,* the facts surrounding any alleged injury at the Clinic were very much in dispute, and it was up to Plaintiff to prove a distinct original injury caused by the Clinic's negligence, separate and apart from the injuries later suffered at the Hospital, before the Clinic could be held jointly and severally liable for all subsequent injuries. Based on the evidence presented at trial, the jury found that Plaintiff did not meet her burden when it found no causation. And the jury's decision had substantial support in the evidentiary record.

{24} During Plaintiff's trial, the evidence was disputed as to whether the Clinic caused any separate injury, and substantial evidence suggested that the entire extent of Plaintiff's injuries was caused by the Hospital alone. The injuries Plaintiff claimed were caused by the Clinic, uterine perforation, internal bleeding, or pain and suffering, did not necessarily occur at the Clinic. Evidence showed that Plaintiff was stable at the time she arrived at the Hospital with normal vital signs, and her initial examination by Hospital staff did not reveal any evidence of acute abdominal problems, uterine perforation or internal bleeding.

{25} Similarly, the evidence at trial was in dispute as to whether Plaintiff's theories of the Clinic's negligence were linked to any distinct injury occurring at the Clinic. For example, evidence suggested that even if the Clinic did cause uterine perforation, such a complication is not uncommon in late-term abortion procedures and not necessarily the result of negligence. Evidence also suggested that these kinds of procedures are inherently painful, and not necessarily the result of any negligence on the part of the treating physician. Plaintiff presented contrary evidence to be sure, but assuming the Clinic's view of the evidence, the jury could reasonably have concluded that the Clinic's negligence, under one of Plaintiff's proffered theories, did not cause any separate injury, distinct from what occurred subsequently at the Hospital.

Negligence Without Injury does not Qualify for Successive Tortfeasor Liability

{26} Plaintiff further argues that even if there is not a distinct injury, a causal chain of events connects the negligence of the Clinic to the successive injury at the Hospital, and thus successive tortfeasor liability applies. Specifically, she argues that the medical complications at the Clinic necessarily caused her to be transferred to the Hospital. We note it is uncontested that the Hospital would not have taken Plaintiff as a patient had she not been referred from the Clinic, because as a matter of policy the Hospital did not accept patients for abortion proce-

dures. Therefore, Plaintiff asserts there is an indisputable causal relationship between what happened at the Clinic and whatever ultimately happened at the Hospital, because without the Clinic there would have been no Hospital. Based on that empirical and logical connection, Plaintiff concludes that the trial court erred in not finding proximate cause as a matter of law.

{27} We agree that had Plaintiff not sought treatment at the Clinic, regardless of whether the Clinic caused a distinct injury, Plaintiff would not have been subjected to medical care at the Hospital. This is not unlike a car accident victim who, although apparently uninjured, goes to the hospital for a precautionary checkup and is injured by a doctor's malpractice. *See Payne*, 2004-NMCA-113, ¶¶ 39-40, 136 N.M. 380, 98 P.3d 1030 (Alarid, J., specially concurring). In such a hypothetical, the negligent driver can be said to be "as much a proximate cause of [the Plaintiff's] exposure to [the negligent doctor] as in the classic *Lujan* scenario." *Id.* ¶ 41. It is suggested that this causal connection is enough to fall under the successive tortfeasor theory, and that plaintiff need not prove the original tortfeasor caused a distinct injury separate, from the injury caused by "the *combined* negligence of D1 and D2." *Id.* (emphasis added).

{28} This brings us to an important point. There are many scenarios in which a defendant's negligence does not cause a separate injury, but may lead the victim to seek medical care, and in that case the defendant's negligence would be a contributing factor to the injury resulting from subsequent medical treatment. However, this argument does not meet the standard for successive tortfeasor liability. While there may be a kind of temporal connection, or a kind of causation in fact, successive tortfeasor liability applies only when an original *injury* causes subsequent medical treatment, because it is that *separate injury* which makes subsequent medical treatment foreseeable as a matter of law. *See id.* ¶¶ 39-40. Without a separate original injury, there is but one injury caused by the combined negligence of two tortfeasors. *Id.* ¶ 41. This would be a classic comparative negligence case arising from concurrent tortfeasors who together produce one, indivisible injury. The victim can always sue the parties severally as concurrent tortfeasors and claim comparative fault for a single, indivisible injury. This is not, however, a situation in which to claim joint and several liability under a theory of successive tortfeasors. To that extent, we respectfully disagree with any contrary view offered in Judge Alarid's thoughtful concurring opinion. *Id.* ¶¶ 35-48.

[13] {29} We reiterate that successive tortfeasor liability is a narrow theory, and must remain so because it allows joint and several liability for all injuries, rather than following the majority rule in New Mexico of several, proportional liability. *See Lewis II*, 2001-NMSC-035, ¶ 32, 131 N.M. 317, 35 P.3d 972; *Lujan*, 120 N.M. at 425-26, 902 P.2d at 1028-29. To ensure that successive tortfeasor liability continues to be applied appropriately, the parties must prove all the elements, including an original injury caused by the original tortfeasor's negligence. Merely alleging a causal connection between two alleged tortfeasors who cause a single, indivisible injury does not meet this requirement.

{30} While we require two causally-distinct injuries to qualify under successive tortfeasor theory, we emphasize that the original injury caused by the original tortfeasor's negligence need not be as obvious as the original injury in *Lujan*, a broken leg, or in *Lewis II*, eight stab wounds. For example, New Mexico law allows damages for pain and suffering. *See* UJI 13-1807 NMRA 2006. Depending on the specific facts and circumstances of a given case, this form of injury might constitute the distinct original injury necessary under successive tortfeasor liability, as long as we can decide it was foreseeable as a matter of law that medical treatment would be sought, consistent with *Lujan*, 120 N.M. at 426, 902 P.2d at 1029.

The Jury Instructions at Trial

{31} While we do not agree with Plaintiff's argument that proximate cause of the *original* injury should have been determined as a matter of law, we must still ascertain if the jury understood, based on the instructions it was given, how to decide the

essential issues of a case involving successive tortfeasor liability and its consequences. Plaintiff argues the jury did not understand, but was hopelessly confused by the instructions. Specifically, Plaintiff asserts that the instructions on negligence and causation were misleading in suggesting that the Clinic and the Hospital's causation for the injuries could be compared, and thus that there could be only one proximate cause for all of Plaintiff's injuries. Plaintiff argues that this forced the jury to choose between, or compare, the Clinic and the Hospital, which of course is directly contrary to successive tortfeasor theory and joint and several liability.

{32} The jury was instructed on successive tortfeasor liability. Instruction 14, using the language of this Court in *Lujan*, stated, "When a person causes an injury to another which requires medical treatment, it is foreseeable that the treatment, whether provided properly or negligently, will cause additional harm. Therefore, the person causing the original injury is also liable for the additional injury caused by the subsequent medical treatment, if any." This instruction properly set forth successive tortfeasor liability. However, it was coupled with other instructions that appeared to contradict the basic tenets of this form of liability. *Cf. Vigil v. Miners Colfax Med. Ctr.*, 117 N.M. 665, 670, 875 P.2d 1096, 1101 (Ct.App.1994) (citing *Kirk Co. v. Ashcraft*, 101 N.M. 462, 466, 684 P.2d 1127, 1131 (1984)) (jury instructions are not sufficient if, when read in their entirety, they do not "fairly present the issues and the applicable law").

{33} As we will explain, the jury was asked about the causation of injuries considered as a whole, but was never asked the critical question about causation of a separate, original injury at the Clinic. Instruction 4, based on the Clinic's theory of the case, advised the jury that, "Dr. Hall also contends that [Plaintiff's] *injuries* were caused by the acts or omissions of employees or agents of the University of New Mexico Hospital, and/or the negligence of [Plaintiff]." (Emphasis added.)[4] Instruction 4 also included language that placed the burden on Plaintiff to show that the Clinic's negligence "was a proximate cause of the *injuries and damages*." (Emphasis added.) Then Instruction 13 defined proximate cause without differentiating between the original injury and the successive injury. UJI 13-305 NMRA 2004; *see supra* note 3.

{34} As emphasized throughout this opinion, the critical question for the jury to decide was whether the Clinic's negligence caused a discrete injury, separate from injuries inflicted at the Hospital. The jury was never asked that question. Instead, based on generic negligence jury instructions, it was asked about causation of Plaintiff's "injuries," possibly all of them considered together, without differentiating between what the Clinic's negligence caused and what the Hospital's negligence caused. *See Const. Contracting & Mgmt., Inc. v. McConnell*, 112 N.M. 371, 374-79, 815 P.2d 1161, 1165-69 (1991) (granting a new trial because the instructions confused the jury on what question it was being asked to determine and what damages it could award).

{35} As in *McConnell*, the jury was given instructions that were particularly likely to confuse the jury. *See also State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134 (in a criminal case "[a] juror may suffer from confusion ... despite the fact that the juror considers the instruction straightforward ... [if the] instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law"). Based on the given instructions, the jury could well have concluded that it had to determine whether the Clinic's negligence caused *all* the injuries, both those occurring

4. Plaintiff argues in part that the requested instruction allowed the Clinic to introduce evidence of comparative fault. Under the law of this state, the alleged original tortfeasor may argue that another tortfeasor caused the original injury; in other words, that the original tortfeasor's negligence did not cause an original distinct injury. *Cf. Lewis II*, 2001-NMSC-035, ¶ 35, 131 N.M. 317, 35 P.3d 972. Such an argument is not comparative fault but a basic proximate cause defense. However, we wish to make clear that the original tortfeasor can never assert that it was not at fault for the successive injury. If the original tortfeasor causes a distinct original injury requiring medical treatment, then it is also the cause, as a matter of law, for the successive injury.

at the Clinic and those occurring at the Hospital. The jury was never asked the critical question: whether the Clinic's negligence caused a separate injury, causally-distinct from those occurring at the hands of the Hospital.

{36} In sum, the jury was asked the wrong question, causation for "injuries" as a whole, and never asked the right question, causation for an "original injury." For that reason, we lack confidence in the jury's verdict, especially when it found negligence but no causation for any of Plaintiff's injuries. While we acknowledge there was sufficient evidence for the jury's outcome, we cannot be sure that the jury was addressing the pivotal and determinative issue of the case.

{37} We are also aware that some of the confusing instructions were offered by Plaintiff, and it is not our practice to grant a new trial if the original error was the fault of the complaining party. *See McConnell,* 112 N.M. at 375 n. 3, 815 P.2d at 1166 n. 3. However, the circumstances of this case present us with a unique challenge. At the time of trial, there were no Uniform Jury Instructions on successive tortfeasor theory, and in fact there was very little caselaw on the subject. *Lujan,* 120 N.M. 422, 902 P.2d 1025; *Lewis I,* 1999–NMCA–145, 128 N.M. 269, 992 P.2d 282. Importantly, none of that caselaw dealt with claims against the original tortfeasor, but rather dealt only with claims against the successive tortfeasor. Also, the law at the time was in flux because *Lewis II* had not yet been decided, leaving *Lewis I* as the applicable law.

{38} These circumstances, along with complicated facts and application of a complex area of law, make this case something of an aberration. We should not penalize any party for not anticipating future developments in the law, including law set forth years later in this opinion. For these reasons we are compelled to remand for a new trial on the merits.

Guidance on Successive Tortfeasor Theory

{39} In an attempt to avoid future mistakes, we take this opportunity to provide our courts with guidance regarding how successive tortfeasor cases should be tried.[5]

{40} Initially, the trial court should attempt to determine whether the case potentially involves successive tortfeasor liability. Here, at the close of the evidence the trial judge concluded that the case did involve successive tortfeasor theory because it looked like there were two causally-distinct injuries. Because the existence of two causally-distinct injuries was in dispute, the judge could not make this determination before presentation of all the evidence. This ruling was based on *Lewis I.*

{41} In *Lewis I,* our Court of Appeals concluded that successive tortfeasor liability could be, but did not have to be, determined as a matter of law prior to or after hearing all the evidence.[6] *Lewis I,* 1999–NMCA–145, ¶¶ 38, 41, 55, 128 N.M. 269, 992 P.2d 282. The Court stated that if the trial court could determine before hearing the evidence that the case involved successive tortfeasor liability, then the parties should be informed not to argue comparative fault. In order to avoid tainting a successive tortfeasor case, the Court of Appeals concluded that even if the judge could not make this determination prior to hearing evidence, the trial judge should inform both sides not to argue comparative fault.

> If the evidence is adduced during trial to permit the trial court to make such a determination one way or the other (concurrent tortfeasor liability versus successive tortfeasor liability) as a matter of law, the trial court should submit the appropriate instructions to the jury on the proper . . . theory founded on the evidence presented and permit counsel to argue the evidence

5. We note that we are not attempting to preempt our Committee on Uniform Jury Instructions–Civil, whose job it is to recommend jury instructions for this Court's review and adoption. Our discussion of jury instructions here is intended as guidance to that Committee.

6. Contrary to our suggestion in *Lewis II,* the Court of Appeals did not hold that the issue *had* to be determined as a matter of law. *See Lewis II,* 2001–NMSC–035, ¶ 31, 131 N.M. 317, 35 P.3d 972.

and applicable liability theory accordingly during closing arguments.

Id. ¶ 55.

{42} We agree with this assessment in part. If the existence of a causally-distinct injury is undisputed, then the trial court can determine, as a matter of law, that successive tortfeasor theory applies. Such may well be the case when a plaintiff brings a claim against only the successive tortfeasor, as in *Lujan* and *Lewis II*. But if the claim is asserted against the original tortfeasor and causation of an original injury is contested, then it would not be appropriate for the trial judge to make this determination in place of the jury.

{43} As was the case here, when the existence of causally-distinct, divisible injuries is not clear, then the question should be given to the jury to decide. Such a situation may add a certain amount of complexity to such cases. During trial, the parties may have to deal with the possibility that, ultimately, successive tortfeasor theory may not apply at all, depending on how the jury answers certain questions regarding injury and causation. Ultimately, the case may be decided on the basis of several liability and comparative fault among concurrent tortfeasors, as opposed to joint and several liability among successive tortfeasors. Or, the jury may be given a choice of theories to apply, depending on how it answers certain interrogatories. When the evidence is unclear, factual questions are best left to the jury, subject to appropriate instruction from the court.

{44} More to the point in a case such as this one, at the close of evidence the jury may have to be presented with alternative sets of jury instructions, one for concurrent tortfeasors causing a single, indivisible injury, and a second for successive tortfeasors causing separate injuries. Which theory applies will depend on the jury's answers to factual interrogatories regarding negligence, injury, and causation of a distinct original injury.

{45} The jury should be asked whether defendant was negligent. *See* UJI 13–1601 NMRA 2006 (general negligence definition); UJI 13–1101 NMRA 2006 (medical negligence definition). If so, the jury should be asked whether the evidence demonstrated causally-distinct injuries, rather than a single, indivisible injury caused by the concurrent actions of two individuals. If the jury finds separate, causally-distinct injuries, it will be instructed to proceed under successive tortfeasor liability. If the jury finds a single, indivisible injury, it will proceed under concurrent tortfeasor liability, based upon principles of comparative fault.

{46} Under successive tortfeasor theory, the jury should then be asked whether the original tortfeasor's negligence caused plaintiff's distinct, original injury. If this question is answered in the negative, then plaintiff's claim will be a nullity. But if answered in the affirmative, the plaintiff has met the burden of a successive tortfeasor liability case. If the claim is against the original tortfeasor, the defendant is then jointly and severally liable for both the original and the successive injury.[7]

{47} The trial court's successive tortfeasor instruction, utilizing the language of this Court in *Lujan*, will then be appropriate: "When a person causes an injury to another which requires medical treatment, it is foreseeable that the treatment, whether provided properly or negligently, will cause additional harm. Therefore, the person causing the original injury is also liable for the additional injury caused by subsequent medical treatment, if any." Similar language may be used in future successive tortfeasor cases. *See also* Judicial Council of California Jury Instruction 3929, 2006 Edition (California successive tortfeasor instructions); Ronald W. Eades, JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS §§ 4.19, 4.20 (2003) (examples of instructions on negligent medical treatment).[8]

7. If the claim is against the successive tortfeasor, after finding the tortfeasor's negligence caused the successive injury, the jury must then determine what the degree of enhancement was by examining the injuries that would have occurred absent the negligence. *Lewis II*, 2001–NMSC–035, ¶ 34, 131 N.M. 317, 35 P.3d 972.

8. The California jury instruction regarding subsequent medical treatments states: "If you decide

Cases Involving Both Successive and Concurrent Theories

{48} The final issue we address is how to instruct and guide the jury in cases, such as this one, where there are both negligence theories: successive tortfeasor liability and comparative fault. Here, one of Plaintiff's negligence theories was that the Clinic did not properly relay Plaintiff's medical history to the Hospital. This theory cannot support a successive tortfeasor claim because it does not indicate a distinct injury at the Clinic followed by a successive injury at the Hospital. Thus, this negligence theory more properly asserts a concurrent liability claim: comparative fault among concurrent tortfeasors causing a single injury at the Hospital.

{49} When the plaintiff is asserting claims that fall under both theories, it will be up to counsel, under review of the trial judge, to divide the claims appropriately and present them to the jury under the proper theory. For example, two of Plaintiff's claims asserted that the Clinic was negligent in not administering an IV and in not responding properly to Plaintiff's pain. Both of these theories should be presented to the jury with the above instructions for determining whether they fall under successive tortfeasor liability. Then separately, Plaintiff can present the claim regarding the Clinic's failure to properly relay the Plaintiff's medical history, followed by instructions on comparative fault and concurrent tortfeasor liability.

{50} The claims should not be grouped together as was done here. Doing so makes it more confusing to a jury that is attempting to determine whether two causally-distinct injuries have been proven. Thus, dividing each claim and presenting it under the correct theory is the appropriate way to approach multiple claim cases.

CONCLUSION

{51} For the foregoing reasons, we reverse the opinion of the Court of Appeals. We remand the case for a new trial consistent with this opinion.

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

WE CONCUR: PATRICIO M. SERNA, PETRA JIMINEZ MAES, EDWARD L. CHÁVEZ, Justices, and JONATHAN B. SUTIN, Judge (sitting by designation).

that [*name of defendant*] is legally responsible for [*name of plaintiffs*]'s harm, [he/she/it] is also responsible for any additional harm resulting from the acts of others in providing aid that [*name of plaintiff*]'s injury reasonably required, even if those acts were negligently performed."

2006-NMSC-028

137 P.3d 611

The ESTATE OF Rudy ROMERO, by Evelyn ROMERO, personal representative, and Evelyn Romero, individually and as guardian and next friend of Robbie R., a minor, Plaintiffs–Respondents,

v.

CITY OF SANTA FE, The City of Santa Fe Police Department, and Jerry Archuleta, Defendants–Petitioners.

No. 28,816.

Supreme Court of New Mexico.

June 8, 2006.

French & Associates, P.C., Stephen G. French, Valerie A. Chang, Albuquerque, NM, Davis, Gay & Jahner, P.C., Michael S. Jahner, Albuquerque, NM, for Petitioners.

Catron, Catron & Pottow, P.A., Richard S. Glassman, Santa Fe, NM, for Respondents.

Montgomery & Andrews, P.A., Sarah M. Singleton, Carolyn A. Wolf, Santa Fe, NM, for Amicus Curiae, New Mexico Association of Counties.

Randall D. Van Vleck, Santa Fe, NM, for Amicus Curiae, New Mexico Municipal League.

OPINION

CHÁVEZ, Justice.

{1} The question in this case is whether documents and other information in an on-going criminal investigation are discoverable in related civil litigation. This litigation arises out of the disappearance of Robbie Romero, who was seven years old when he was last seen near his home in Santa Fe on June 7, 2000. Plaintiffs are the parents of Robbie Romero,[1] who sued the City of Santa Fe, the Santa Fe Police Department (City Defendants), and Jerry Archuleta, a former Santa Fe police lieutenant, for alleged negligence in the handling of the investigation into Robbie's disappearance. This tragic backdrop makes the conflicting interests in this case, between the parents' natural desire to know the fate of their son and a police department's understandable need to protect confidential materials gathered in the course of a criminal investigation, all the more compelling and of substantial public interest.

{2} During litigation Plaintiffs sought to discover the police department's investigation files. Although City Defendants provided Plaintiffs with approximately one thousand three hundred and seventy-seven pages of documents related to their internal investigation, City Defendants objected to producing material related to its on-going criminal investigation. The district court declined to compel production of the entire criminal investigation file, concluding the materials are privileged. A majority of the Court of Appeals reversed the district court, holding that City Defendants cannot claim executive or public interest privilege. Although our rules and constitution do not presently recognize an executive or public interest privilege in the Santa Fe Police Department, we believe portions of the criminal investigation files may still be immune from discovery. Whether the documents are discoverable requires the district court to balance the competing interests between plaintiffs' legitimate discovery requests and law enforcement's need to protect on-going criminal investigations. Accordingly, we remand to the district court for proceedings consistent with this opinion. Because we believe the public interest in New Mexico requires a comprehensive law enforcement privilege which provides some protection against unfettered disclosure of materials obtained by law enforcement during a criminal investigation, we also take this opportunity to refer this matter to our Rules of Evidence Committee to recommend such a privilege.

I. BACKGROUND AND PROCEDURE

{3} During discovery, City Defendants objected to some of Plaintiffs' discovery requests on the grounds that the requested information and materials were part of the on-going criminal investigation into Robbie's disappearance, and disclosure would compromise and prejudice the investigation. Plaintiffs filed a motion to compel disclosure. The district court denied the motion to compel based on executive privilege, public policy, and the factors outlined in *Frankenhauser v. Rizzo,* 59 F.R.D. 339 (E.D.Pa.1973) (describing "executive privilege" and the factors to consider in determining whether a privilege exists for requested materials), *partially superseded by rule* on other grounds as stated in *Crawford v. Dominic,* 469 F.Supp. 260

1. Since the complaint was originally filed, Plaintiff Rudy Romero passed away and his estate, through personal representative Evelyn Romero, was substituted as plaintiff.

(E.D.Pa.1979). Recognizing that its order "involves a controlling question of law for which there are substantial grounds for difference of opinion," the district court certified the matter for interlocutory appeal as provided under NMSA 1978, § 39-3-4 (1971).

{4} The Court of Appeals accepted the interlocutory appeal and in an unpublished opinion, a two-judge majority of the Court of Appeals reversed the denial of the motion to compel, holding that the City Defendants could not invoke executive privilege because the executive department, as defined by the state constitution, did not include municipalities. The Court of Appeals rejected a "public interest" privilege, because although federal courts have recognized the privilege, "our Supreme Court has not recognized such a privilege and we cannot anticipate that they will do so." The dissenting opinion expressed concern that "the trial court was too quick to completely uphold Defendants' assertion of privilege and the majority is too quick to completely reject it."

{5} City Defendants petitioned this Court to reverse the Court of Appeals, advancing two main arguments. First, they urge us to recognize a "common law public interest privilege" that would preclude the production of police investigatory materials during civil litigation. Second, and as an alternative theory, City Defendants contend that public policy demands that the records of an on-going criminal investigation be confidential and subject only to limited disclosure. Plaintiffs argue that no law enforcement privilege exists, and if this Court deems some of the police files to be confidential, a balancing of interests should apply in determining whether the requested materials are discoverable.

II. DISCUSSION

{6} Discovery orders are generally reviewed for abuse of discretion. *Pub. Serv. Co. of N.M. v. Lyons*, 2000-NMCA-077, ¶ 10, 129 N.M. 487, 10 P.3d 166. However, we review the trial court's construction of the law of privileges de novo. *Id.* (citing *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450).

A. OUR CONSTITUTION AND COURT RULES DO NOT RECOGNIZE A LOCAL LAW ENFORCEMENT PRIVILEGE

{7} Generally, a person is required "to disclose any information which he may possess that is relevant to a case pending before a court of justice." *State ex rel. Att'y Gen. v. First Judicial Dist. Court*, 96 N.M. 254, 257, 629 P.2d 330, 333 (1981) (citing *Ammerman v. Hubbard Broad., Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976)). There are exceptions to this general rule, found in the privilege against self-incrimination in the United States and New Mexico constitutions as well as other evidentiary privileges. *State ex rel. Att'y Gen.*, 96 N.M. at 257, 629 P.2d at 333. This court's " 'constitutional power under N.M. Const. art. III, section 1 and art. VI, section 3 of superintending control over all inferior courts carries with it the inherent power to regulate all pleading, practice and procedure affecting the judicial branch of government.' " *Id.* (quoting *State ex rel. Anaya v. McBride*, 88 N.M. 244, 246, 539 P.2d 1006, 1008 (1975)). "Pursuant to the exercise of this power, we have adopted a comprehensive set of rules of evidence which govern proceedings before the courts," including evidentiary privileges. *Id.*

{8} The New Mexico Rules of Evidence generally follow the federal rules of evidence, but "New Mexico's approach to privileges is a special product of our state law jurisprudence." *Lyons*, 2000-NMCA-077, ¶ 12. Federal Rules of Evidence 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or ... statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience.

In contrast, New Mexico Rules of Evidence 11-501 states:

> Except as otherwise required by the constitution, and except as provided in these rules or in other rules adopted by the supreme court, no person has a privilege to:

A. refuse to be a witness; or

B. refuse to disclose any matter; or

C. refuse to produce any object or writing; or

D. prevent another from being a witness or disclosing any matter or producing any object or writing.

Based on the difference between the New Mexico rule and the federal rule, we have held "[t]he fact that New Mexico did not follow the approach of Congress but instead limited the privileges available to those recognized by the Constitution, the Rules of Evidence, or other rules of this Court manifests the abrogation and inapplicability of the common law evidentiary privileges." *State ex rel. Att'y Gen.*, 96 N.M. at 260, 629 P.2d at 337.

{9} In questioning the wisdom of our case law that precludes the adoption of common law privileges, City Defendants suggest we follow the reasoning of the dissent in *State ex rel. Attorney General.* There, two justices concluded that common law privileges are still available to the court when the subject matter is not otherwise covered in the Constitution or court rules. *Id.* at 263, 629 P.2d at 339 (Easley, C.J., and Federici, J., dissenting). City Defendants urge us to agree that we retain the authority to adopt common law privileges, and further, that we should overrule *State ex rel. Attorney General* to the extent it declines to recognize a public interest privilege, which defendants assert is similar to a law enforcement privilege. The reasons supporting their request seem compelling. They assert that the privilege is necessary to protect important public interests such as bringing perpetrators of serious crimes to justice and "to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation." *In re Dep't of Investigation of the City of N.Y.*, 856 F.2d 481, 484 (2d Cir.1988).

{10} With respect to this case, City Defendants claim that disclosure of police investigatory materials would jeopardize Robbie's safe return if he is still alive, as well as jeopardize the Santa Fe Police Department's efforts to solve the case and irreparably jeopardize the eventual prosecution of the perpetrator(s). Jeopardy is likely, they contend, because disclosure of investigatory information could assist the perpetrator(s) to destroy critical evidence and threaten the safety of confidential informants who provided evidence to the Santa Fe Police Department. As an example of information that should be protected, City Defendants presented testimony describing an investigatory report containing identities of confidential informants, confidential investigative methods, information about individuals accused but not charged with a crime, and information only the perpetrator(s) would know.

{11} There is no question that City Defendants have raised an issue of pressing public concern, and that there is great force to their need to protect confidential police investigatory materials in an active criminal investigation from discovery in civil litigation. However, given the clear directive of Rule 11–501, we remain compelled to decline to recognize common law privileges. Until we decide to change the rule to more closely resemble Federal Rule of Evidence 501, we must follow the framework provided in New Mexico's Rule 11–501 to determine whether a public interest or law enforcement privilege exists. *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005–NMSC–032, ¶ 8, 138 N.M. 398, 120 P.3d 820. Unless such privileges are required by the constitution, or provided for in the rules of evidence or other court rules, these privileges do not exist. *State ex rel. Att'y Gen.*, 96 N.M. at 257, 629 P.2d at 333.

{12} The New Mexico Constitution does not expressly describe any privileges other than the right against self-incrimination in Article II, Section 15. A "public interest" or "law enforcement" privilege would have to be implicit from language in the Constitution. *See State ex. rel. Att'y Gen.*, 96 N.M. at 257–58, 629 P.2d at 333–34. In that case we recognized the existence of an executive privilege based on Article III of the New Mexico Constitution, which describes the separation of powers among the three departments of state government. Because "[c]ertain rights

are implied as being inherently necessary to foster and give meaning to the intent of the Constitution," *id.* at 257, 629 P.2d at 333, we concluded that "[i]nherent in the successful functioning of an independent executive is the valid need for protection of communications between its members." *Id.* at 258, 629 P.2d 330. Thus, we characterized executive privilege as "a recognition by one branch of government, the judiciary, that another co-equal branch of government, the executive, has the right not to be unduly subjected to scrutiny in a judicial proceeding where information in its possession is being sought by a litigant." *Id.* In the same case, however, we rejected the concept of a "public interest" privilege that would protect from disclosure communications between government officials and private individuals since we could find no basis for such a privilege in the Constitution or the Rules of Evidence. *Id.* at 260, 629 P.2d at 336.

{13} Similarly, we can find no implied privilege in the Constitution for the protection of local law enforcement investigatory materials. The City Defendants are a municipality and a branch of a municipality, and municipalities were not contemplated in the Constitution as part of the executive branch. *State ex rel. Chapman v. Truder*, 35 N.M. 49, 52, 289 P. 594, 596 (1930) (ruling that the New Mexico constitutional provisions for separation of powers apply only to state offices, not municipalities). Even after New Mexico amended its Constitution in 1970 to provide for "home rule" municipalities having broad legislative powers, we have consistently held that traditional separation-of-powers doctrine does not apply to municipalities. *Bd. of County Comm'rs of Bernalillo v. Padilla*, 111 N.M. 278, 283, 804 P.2d 1097, 1102 (Ct.App. 1990) (stating that the dangers of tyranny when one branch of government assumes the powers of another are diminished for a subordinate level of government, and therefore Article III, Section 1 of New Mexico Constitution does not apply to local governments). Since the theory of separation of powers led to the recognition of the executive privilege, we are not persuaded our Constitution permits us to conclude a similar privilege is inherently necessary to the successful functioning of city law enforcement agencies. Thus, we do not recognize an express or implied law enforcement privilege in the New Mexico Constitution.

{14} With no relevant privilege in the New Mexico Constitution, we examine our Rules of Evidence for a law enforcement privilege. *See Lyons*, 2000-NMCA-077, ¶ 13; *see* Rules 11-502 to 11-514 NMRA. We note that two of the privileges are similar to a "public interest" or "law enforcement" privilege. Rule 11-502 may privilege some of the investigative materials in this case, since it provides a privilege for reports required to be made by law. Rule 11-510 provides a privilege from disclosing the identity of an informant. Rule 11-510 "is a recognition by the judiciary that certain privileges are necessary to aid law enforcement officers and the Legislature in obtaining information through investigations ... without having to be concerned with being subpoenaed into court." *State ex rel. Att'y Gen.*, 96 N.M. at 259, 629 P.2d at 335. However, as City Defendants point out, this rule does not privilege the investigative materials themselves. Thus, while our Rules of Evidence do provide some protection for individual pieces of investigatory materials and information, these rules do not afford complete protection from disclosure of all on-going criminal investigative materials obtained by law enforcement. Since we do not identify an express or implied law enforcement privilege in the Constitution or our court rules, we are unable to recognize the existence of such a privilege.

B. ALTHOUGH NOT PRIVILEGED, ON-GOING CRIMINAL INVESTIGATION MATERIALS MAY BE IMMUNE FROM DISCOVERY

{15} Nevertheless, we do not believe the absence of a law enforcement privilege means confidential police investigatory materials, such as reports containing confidential investigative methods, information about individuals accused but not charged with a crime, and information only the perpetrator(s) would know, are completely unprotected from disclosure under our rules of evidence and civil procedure. Our case law and Rule 1-026 NMRA require courts to take an active role in determining the proper balance

between the conflicting needs of discovery and confidentiality. For example in the case of *In re Motion for a Subpoena Duces Tecum,* 94 N.M. 1, 2, 606 P.2d 539, 540 (1980), we held that where there is a matter of great public concern as expressed by the legislature, we "will not hesitate to exercise [our] power of superintending control to protect the confidentiality of . . . information against unwarranted disclosure." We believe the legislature has expressed a matter of great public concern when it comes to the disclosure of materials pertaining to an on-going criminal investigation. Therefore, exercising our power of superintending control, we proceed to examine means by which our rules may prohibit the disclosure of confidential information developed by law enforcement during an on-going criminal investigation.

{16} In examining the means by which confidential materials have been entitled to protection from disclosure, *Southwest Community Health Services v. Smith* is instructive. 107 N.M. 196, 198–99, 755 P.2d 40, 42 (1988). In *Southwest Community Health Services* we held that a statute making medical peer review organization records immune from discovery did not create an evidentiary privilege and therefore did not conflict with our rules of privilege. *Id.* In addition, we stressed that the confidentiality created by the statute was not intended by the legislature to apply only to the production of evidence for civil litigation. *Id.* at 199, 755 P.2d at 43. We recognized the potential conflict between two separate branches of government and sought a way to accommodate the interests of both branches.

> While the legislative decision to prohibit notoriety of medical peer review proceedings is a constitutional exercise of the essential legislative function to promote the health and welfare of New Mexico's citizens, the Court cannot ignore an overbroad implementation of the confidentiality provision which would impinge upon the right of litigants to have their disputes decided on relevant and material evidence. It is not a matter of the statute being unconstitutional but rather a recognition, when litigation is at issue, that conflicting constitutional powers by two separate and independent branches of government are being exercised.

Id. at 200, 755 P.2d at 44 (emphasis omitted). We clearly stated that had the statute created an evidentiary privilege, it would be invalid. We then exercised our judicial authority to balance the conflicting constitutional interests by describing the process to be used when invoking the statute that immunized evidence from discovery. *Id.*

{17} We believe the approach used in *Southwest Community Health Services* is applicable here. While we have superintending control over procedures used in the courts, the legislature describes the public policies of the state through statutes. Just as we held that the statute at issue in *Southwest Community Health Services* created an immunity from discovery, so too we hold that New Mexico's Inspection of Public Records Act (IPRA), NMSA 1978 § 14–2–1 (2005), creates a similar immunity from discovery. IPRA announces a broad policy statement that "[e]very person has a right to inspect public records of this state," but then lists several specific exceptions. § 14–2–1(A). The exception germane to this case precludes the following from public inspection:

> law enforcement records that reveal confidential sources, methods, information or individuals accused but not charged with a crime. Law enforcement records include evidence in any form received or compiled in connection with a criminal investigation or prosecution by a law enforcement or prosecuting agency, including inactive matters or closed investigations to the extent that they contain the information listed in this paragraph.

§ 14–2–1(A)(4). Within IPRA the legislature has expressed its intent to protect from disclosure police investigatory materials in an on-going criminal investigation.

{18} Clearly, the primary purpose of the IPRA is to provide access to public records rather than "to create an evidentiary shield behind which the government can hide." *In re Marriage of Daniels,* 240 Ill.App.3d 314, 180 Ill.Dec. 742, 607 N.E.2d 1255, 1263 n. 2 (1992). IPRA's exclusion of law enforcement records from public inspection does not purport to create an evidentiary privilege, nor

does it contemplate use of law enforcement records in civil litigation. *State ex rel. Att'y Gen.*, 96 N.M. at 260, 629 P.2d at 336 (stating that the Right To Know statute "did not, nor was it intended to, create a new evidentiary privilege applicable to discovery"). Instead, IPRA is used here to guide the court in appraising public policy concerns based on legislation enacted by the legislature pursuant to its general police powers. Using an analysis similar to the approach we employed in *Southwest Community Health Services*, we conclude that the IPRA exception for law enforcement records in a criminal investigation is illustrative of a vitally important public policy concern, leading to an immunity from discovery for some police investigative materials in civil litigation.

{19} This immunity is not absolute. Although we will recognize limited immunity from discovery we will not "impinge upon the right of litigants to have their disputes decided on relevant and material evidence." *Southwest Cmty. Health Serv.*, 107 N.M. at 200, 755 P.2d at 44. Courts will be required to balance the interests at stake. Under the balancing outlined in *Southwest Community Health Services*, the party seeking to preclude disclosure has the burden of proving the information sought to be protected is confidential under a policy interest which may make the information immune from discovery. *Id.* at 200, 755 P.2d at 44. In this case, City Defendants have the burden of proving the information requested by Plaintiffs is confidential because such information meets the policy interest expressed in Section 14–2–1(A)(4). An *in camera* examination of the materials and an evidentiary hearing to determine whether the requested material is immune, may be necessary. However, even if the material is confidential, the party seeking the evidence may be entitled to the information if they satisfy the trial court that "the information constitutes evidence which is critical to the cause of action or defense." *Id.* at 201, 755 P.2d at 45. Under this latter inquiry, the trial court must determine whether "the success or failure of a litigant's cause of action or defense would likely turn on the evidence adjudged to fall within" the immunity. *Id.* In addition, the trial court should consider whether the evidence is not otherwise available by the exercise of due diligence, as well as whether the public's interest in preserving confidentiality does not outweigh the specific needs of the litigant. *See State ex rel. Att'y Gen.*, 96 N.M. at 258, 629 P.2d at 334 (citing *U.S. v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)).

{20} With respect to assessing whether the public interest outweighs the needs of the litigant, the factors in *Frankenhauser*, 59 F.R.D. at 344, will aid the trial court in its analysis. These factors are:

> (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case.

Although these factors were articulated in the context of a civil rights action against police, we believe the factors will also be helpful to consider in the context of discovery for other civil litigation involving on-going criminal investigations.

{21} The procedure described above is intended to provide general guidelines for the trial court as it reevaluates whether the discovery requested by Plaintiffs should be produced by City Defendants. We note that Rule 11–510 (privileging the identity of confidential informants) and Rule 11–502 (privi-

leging some reports required to be made by law), may apply to some of the materials requested in this case. In addition, "we do not tell the trial court when it is appropriate to issue protective orders under Rule 26 of the New Mexico Rules of Civil Procedure, N.M.S.A.1978 to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense." *State ex rel. Att'y Gen.*, 96 N.M. at 261, 629 P.2d at 337. We note only that the approach described in this case is consistent with the spirit of Rule 1-026(C).

III. CONCLUSION

{22} We anticipate that the balancing guidelines described above address Plaintiffs' legitimate discovery needs and City Defendants' need to protect the most sensitive of police investigation materials in the Robbie Romero case. In addition to remanding the discovery requests by Plaintiffs to the district court for proceedings consistent with this opinion, we also refer this matter to our Rules of Evidence Committee for discussion and review of the possible need for a comprehensive law enforcement privilege. We also note that "the application of this statute as construed today by this Court to the case at bar does no violence to *Marquez v. Wylie*, 78 N.M. 544, 434 P.2d 69 (1967), which held that rules adopted by this Court are not effective to change the procedure in any pending case." *Southwest Cmty. Health Serv.*, 107 N.M. at 201, 755 P.2d at 45. The IPRA statute was in effect prior to the initiation of this lawsuit, and our opinion merely recognizes the limited immunity from discovery created by that statute. *Id.* ("Our opinion today merely construes a pre-existing statute; it does not adopt a change in procedural rules.").

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

WE CONCUR: RICHARD C. BOSSON, Chief Justice, PAMELA B. MINZNER, PATRICIO M. SERNA and PETRA JIMENEZ MAES, Justices.

2006-NMCA-069

137 P.3d 619

NEW MEXICO BOARD OF VETERINARY MEDICINE, Appellee–Petitioner,

v.

Michael H. RIEGGER, D.V.M., Appellant–Respondent.

No. 25,610.

Court of Appeals of New Mexico.

April 20, 2006.

Certiorari Granted, No. 29,790, June 14, 2006.

Patricia A. Madrid, Attorney General, Jerome Marshak, Assistant Attorney General, Santa Fe, NM, for Petitioner.

Bannerman & Williams, P.A., Charlotte Lamont, Albuquerque, NM, for Respondent.

OPINION

KENNEDY, Judge.

{1} We affirm the district court, holding that the Board of Veterinary Medicine (the Board) cannot sanction its licensees for acts of ordinary negligence arising out of a single episode of care under NMSA 1978, § 61–14–13(A)(5) (1999). We reverse the district court's disallowances of the costs of this administrative action. We hold that NMSA 1978, § 61–1–4(G) (2003), which states that licensees must generally bear all costs of the disciplinary proceedings against them, is not limited by the terms of Rule 1–054(D) NMRA and that the legislature did not intend for Rule 1–054(D) to be read into Section 61–1–4(G). Issue (B)(3) is the district court's disallowance of the Board members' per diem and mileage as a cost that may be assessed against a disciplined licensee. On this issue, the panel is divided. The author's opinion on this issue represents a dissenting view. Judge Pickard's opinion, following the main opinion, represents the majority opinion on this issue. We therefore remand to the district court for a hearing to determine the proper measure of the other costs to be assessed in this case.

FACTS AND BACKGROUND

{2} Riegger is a veterinarian. This case concerns the disciplinary proceeding brought against him following his treatment of a horse named Eagle.

{3} Eagle's owner hired Riegger to perform follow-up care after Eagle had at least two surgeries at Colorado State University. After Eagle experienced more problems, Riegger recommended surgery. Riegger performed the surgery on October 1, 1999. Following surgery, Eagle was unable to stand and was suffering. Eagle was euthanized at approximately 8:00 a.m. the following morning.

{4} Eagle's owner complained to the Board that Riegger's treatment of Eagle was malpractice and cruelty. A hearing was held before a hearing officer pursuant to the Uniform Licensing Act (ULA), NMSA 1978, §§ 61–1–1 to –33 (1957, as amended through 2003), and the Veterinary Practice Act (VPA), NMSA 1978, §§ 61–14–1 to –20 (1967, as amended through 2005).

{5} Following the hearing, the Board considered Riegger's case. *See* § 61–1–13(A) ("After a hearing has been completed, the members of the [B]oard shall proceed to consider the case[.]"). It disagreed with the hearing officer's determinations in several respects. The hearing officer had found the Board could not discipline a licensee for acts of ordinary negligence under Section 61–14–13(A)(5) of the VPA. The Board disagreed, determining that it had the statutory authority to discipline Riegger for acts of ordinary negligence.

{6} While agreeing with the hearing officer that Riegger had committed a negligent act during surgery and grossly negligent and cruel acts following surgery, the Board found fault with several of the hearing officer's findings. Contrary to the hearing officer's findings, the Board found that Riegger had committed a number of preoperative negligent acts and that one of those acts was also grossly negligent. The Board also found that one post-operative act was grossly negligent where the hearing officer had found otherwise. In addition to ordering probation and continuing education, the Board ordered Riegger to pay the costs of the disciplinary proceeding in the amount of $22,021.83.

{7} Pursuant to Rule 1–074 NMRA, Riegger appealed to the district court. The court found that the Board was incorrect in interpreting Section 61–14–13(A)(5) of the VPA as authorizing discipline against a licensee for acts of ordinary negligence. It concluded that Riegger should not be sanctioned for acts of ordinary negligence. The district court then remanded for the Board to redetermine sanctions in light of its memorandum opinion, directing the Board to file an itemized cost bill in accordance with LR 2–302 NMRA.

{8} After the Board entered an amended decision with revised sanctions and costs in the amount of $22,021.83, Riegger again appealed to the district court. The district court entered an order allowing costs of only $1,669.11. Following the Board's motion for reconsideration, the district court allowed an additional $253.95 in costs that Riegger had conceded. In all other respects, it denied the Board's motion to reconsider.

{9} In formulating its ruling, the district court found that the term "costs" in Section 61–1–4(G) of the ULA should be construed to mean only the costs anticipated by Rule 1–054(D). It relied upon several out-of-state cases for this position. The district court also articulated additional reasons for rejecting certain costs. It reasoned that assessing the cost of the hearing officer would chill the licensee from defending against the charges. It also found that the Board members' per diem and mileage were provided for in another statute and that assessing the cost of the hearing room was contrary to the accessability and smooth functioning of the judiciary. The district court's final order incorporated its earlier memorandum opinions and allowed costs of $1,923.06. The Board filed a petition for certiorari which this Court granted.

II. DISCUSSION

A. Liability for Ordinary Negligent Acts Committed During a Single Episode of Treatment

{10} The ULA sets out the procedures for a professional board to take action

against a licensee. Section 61–14–13(A)(5) of the VPA authorizes the Board to discipline a licensee upon finding that the licensee "is guilty of dishonesty, incompetence, gross negligence or other malpractice in the practice of veterinary medicine." The Board claims that the definition of "other malpractice" includes Riegger's acts of ordinary negligence. This issue is a question of statutory interpretation that does not implicate agency expertise; our review is de novo. *See Hovet v. Allstate Ins. Co.,* 2004–NMSC–010, ¶ 10, 135 N.M. 397, 89 P.3d 69 (holding that the appellate courts apply a de novo standard of review to issues of statutory interpretation); *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 (stating that our Supreme Court would not defer to an agency's interpretation of a statute because this was a question of law that the Court reviews de novo); *Miss. Potash, Inc. v. Lemon,* 2003–NMCA–014, ¶ 7, 133 N.M. 128, 61 P.3d 837 (observing that "[w]e may substitute our interpretation of the law for that of the agency because it is a court's role to interpret the law"). Section 61–14–13(A)(5), as written, allows sanctioning for "gross negligence." As discussed later in this opinion, we hold that this standard alone defines the applicable standard of negligence upon which the Board can base its discipline of licensees; the phrase "other malpractice" in Section 61–14–13(A)(5) should not be interpreted to include a single episode of ordinary negligence. We specifically decline to address whether repeated acts of ordinary negligence over time may be disciplined as "other malpractice." We limit the scope of this opinion to a veterinarian's acts of ordinary negligence committed during a single episode of treatment.

{11} To interpret the phrase "other malpractice" as meaning a single episode of "negligence" would make the term "gross" mere surplusage. Reading a standard sanctioning a single act of ordinary negligence into the statute would expand the sanctionable behavior to allow discipline for all forms of negligence, *including* "gross negligence." The existing standard of "gross negligence" would thus be superfluous, and we will not interpret the statute in such a manner. *See Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers,* 1998–NMSC–020, ¶ 28, 125 N.M. 401, 962 P.2d 1236 ("Statutes must be construed so that no part of the statute is rendered surplusage or superfluous." (internal quotation marks and citation omitted)); *Slygh v. RMCI, Inc.,* 120 N.M. 358, 359, 901 P.2d 776, 777 (Ct.App.1995) ("A statute must be construed so that no word, clause, sentence, provision or part is rendered surplusage or superfluous."). If the legislature had intended to authorize sanctions for ordinary negligence, it could easily have drafted the statute to specifically include "negligence" without qualifying that term by adding of the word "gross." *Cf.* Colo.Rev.Stat. § 12–64–111(1)(k) (2004) (allowing veterinarians to be disciplined for "[i]ncompetence, negligence, or other malpractice"). Therefore, it would be unreasonable for the legislature to have intended the phrase "other malpractice" to encompass negligent acts committed during a single episode of treatment.

{12} The Board cites to the Medical Malpractice Act, NMSA 1978, §§ 41–5–1 to –29 (1976, as amended through 1997), and *Duncan v. Campbell,* 1997–NMCA–028, 123 N.M. 181, 936 P.2d 863, to support its claim that malpractice of a licensee should be interpreted as ordinary negligence. This argument is unpersuasive. Both the Medical Malpractice Act and this Court's decision in *Duncan* address the issue of when a practitioner may be civilly liable to a patient or client for malpractice and the possible limitations on this liability. *See* §§ 41–5–5, –6 (limiting the recovery available against qualified health care providers in civil malpractice actions); *Duncan,* 1997–NMCA–028, ¶¶ 1, 6, 11, 123 N.M. 181, 936 P.2d 863 (addressing when the plaintiff's legal malpractice claim accrued for purposes of the statute of limitations). *Duncan* does not discuss the meaning of "other malpractice" in the context of a standard for discipline of a licensee. *See Seeds v. Lucero,* 2005–NMCA–067, ¶ 19, 137 N.M. 589, 113 P.3d 859 (noting that a case was not authority for a proposition the case did not consider). *Duncan* instead discussed the civil statute of limitations as applied to a legal malpractice claim. 1997–NMCA–028, ¶ 1, 123 N.M. 181, 936

P.2d 863. *Duncan* has little bearing on the issues involved in the case before us.

{13} The Medical Malpractice Act further highlights the difference between disciplinary actions and tort or contract claims. This act's purposes are centered around the imposition of tort or contract liability as opposed to the discipline of a medical practitioner. *See* § 41–5–3(C) (stating that a malpractice claim "includes any *cause of action* arising in this state against a health care provider for medical treatment, lack of medical treatment or other claimed departure from accepted standards of health care which proximately results in injury to the patient, whether the patient's *claim* or *cause of action* sounds in tort or contract, and includes but is not limited to actions based on battery or wrongful death" (emphasis added)); *Wilschinsky v. Medina*, 108 N.M. 511, 516, 775 P.2d 713, 718 (1989) ("The New Mexico Medical Malpractice Act was enacted by the legislature in order to meet an insurance crisis, to promote health care in New Mexico by providing a framework for tort liability with which the insurance industry could operate."). We decline to apply the meaning of "malpractice" as that term is used in the context of civil tort liability to a case of sanctions imposed on a licensee by an administrative body. An examination of the Medical Malpractice Act convinces us that the inclusion of "negligence" in the matters addressed by the Medical Malpractice Act is consistent with a much different regulatory scheme than exists in the VPA.

{14} Looking in the other direction, the VPA creates and governs the Board and its oversight of veterinary licensing and discipline. *See, e.g.*, §§ 61–14–4, –8, –13. In scope and application, there is a chasm between the VPA and the Medical Malpractice Act. Because the purposes of the Medical Malpractice Act and the VPA are different, we do not believe that the VPA's reference to "other malpractice" in the context of disciplining a licensee can be equated with the word "malpractice" in the context of a civil cause of action under the Medical Malpractice Act. *See, e.g.*, § 41–5–3(C) (stating that malpractice claims include those sounding in tort and contract). In this case, the Board's purview is limited to its relationship to its licensee. The Board cannot provide relief as is available for malpractice as that term is used under the Medical Malpractice Act.

{15} Policy considerations also suggest that the legislature did not intend to authorize sanctions against a licensee for ordinary negligence committed during a single episode of treatment. Review of other statutes addressing the licensing and sanctioning of health care providers indicates that the legislature requires more to warrant discipline. We note that none of the other statutes concerning healthcare provider licensing authorize the discipline of a practitioner/licensee for an act of ordinary negligence. *See, e.g.*, NMSA 1978, § 61–3–28(A)(3) (2003) (providing that nurses may be disciplined if they are unfit or incompetent); NMSA 1978, § 61–4–10(A)(3), (A)(16)(f), (A)(16)(i) (1993) (providing that chiropractors may be disciplined for incompetence, gross negligence, or "repeated similar negligent acts"); NMSA 1978, § 61–5A–21(A)(3) (2003) (providing that dentists may be disciplined for "gross incompetence or gross negligence"); NMSA 1978, § 61–6–15(D)(12), (13), (19) (2005) (providing that medical doctors may be disciplined for gross negligence, manifest incapacity, incompetence, or "repeated similar negligent acts"); NMSA 1978, § 61–7A–13(A)(4) (1989) (providing that dieticians and nutritionists may be disciplined for conduct that is "grossly negligent or incompetent"); NMSA 1978, § 61–8–11(G) (1998) (providing that podiatrists may be disciplined for "gross malpractice or incompetency"); NMSA 1978, § 61–9A–26(A)(7), (9) (2005) (providing that mental health counselors may be disciplined for gross negligence and marked incompetence); NMSA 1978, § 61–10–15(C) (1975) (stating that osteopaths may be disciplined for gross malpractice). *But see* NMSA 1978, § 61–2–13(B) (1973) (stating that optometrists may be disciplined for "malpractice or incompetence"). We are not aware of any policy considerations that would support imposing a higher standard on veterinarians, who treat animals, than what is statutorily imposed on medical professionals treating people.

{16} That neither the hearing officer nor the district court has given effect, nor at-

tempted to assign a meaning, to the term "malpractice" does not require this Court to do so. We disagree with the Board's contention that the only reasonable construction of "other malpractice" is ordinary "negligence." As we have already stated, such an interpretation would render the phrase "gross negligence" superfluous. Even though the phrase "other malpractice" must authorize the Board to sanction a licensee for something in addition to gross negligence and incompetence, this case does not require us to define the entire scope of the behavior this phrase encompasses. Rather, we only decide that "other malpractice" does not include acts of ordinary negligence committed during a single episode of treatment. Perhaps the hearing officer correctly opined that "other malpractice" refers to issues such as the failure to obtain informed consent or inadequate supervision of other employees. It is possible that repeated negligent acts may be disciplined as "other malpractice." Perhaps not. Such questions are not before this Court. *See City of Las Cruces v. El Paso Elec. Co.*, 1998-NMSC-006, ¶ 18, 124 N.M. 640, 954 P.2d 72 ("We avoid rendering advisory opinions.").

{17} In this case, we interpret Section 61-14-13(A)(5) as excluding acts of ordinary negligence in order to avoid the unreasonable result of imposing a higher standard on veterinarians than the standard statutorily imposed upon other health care professionals and to avoid rendering the phrase "gross negligence" surplusage and superfluous. *See Regents of the Univ. of N.M.*, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 962 P.2d 1236; *see also Wilson v. Mass. Mut. Life Ins. Co.*, 2004-NMCA-051, ¶ 27, 135 N.M. 506, 90 P.3d 525 ("We do not blindly assume that statutes are written with the precision that judges may prefer. Rather, we will interpret statutes to avoid unreasonable results." (citation omitted)).

B. Liability for the Costs of the Administrative Proceeding

1. Rule 1-054(D) Does Not Limit Costs Under Section 61-1-4(G)

{18} Like the previous issue, the statutory interpretation of "costs" under Section 61-1-4(G) is a question of law which does not implicate agency expertise, so that our review is de novo. *See Rio Grande Chapter of the Sierra Club*, 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806. The district court reduced the Board's assessment of costs for the administrative proceeding against Riegger from $22,021.83 down to only $1,923.06. It reasoned that the term "costs" in Section 61-1-4(G) meant only the costs allowed by the rules of civil procedure. *See* Rule 1-054(D). The Board claims this reasoning was erroneous, and we agree.

{19} This Court has stated that Rule 1-054(D) "by its own terms does not apply when a statute expressly provides for an award of costs." *Paternoster v. La Cuesta Cabinets, Inc.*, 101 N.M. 773, 782, 689 P.2d 289, 298 (Ct.App.1984), *limited on other grounds by Apex Lines, Inc. v. Lopez*, 112 N.M. 309, 815 P.2d 162 (Ct.App.1991). Rule 1-054(D)(1) states that a prevailing party will be allowed its costs "[e]xcept when express provision therefor is made . . . in a statute." Section 61-1-4(G) is such a statute, expressly providing for costs by stating that a licensee "shall bear *all costs* of disciplinary proceedings." (Emphasis added.) We hold that under the plain language of Rule 1-054(D), this rule does not govern an award of costs in an administrative disciplinary action under the ULA. We reverse the district court on this point.

{20} Unpersuaded that Rule 1-054(D) applies directly to this case, we are equally unpersuaded that this rule applies indirectly. Riegger argues that when the legislature said "costs" in Section 61-1-4(G), it was using this term as shorthand for costs permissible under the rules of civil procedure. However, this language is not in Section 61-1-4(G), and we do not add language to a statute when it makes sense as it is written. *See Santa Fe County Bd. of County Comm'rs v. Town of Edgewood*, 2004-NMCA-111, ¶ 7, 136 N.M. 301, 97 P.3d 633. The legislature, had it wished, could have made the costs subject to the rules of civil procedure, as it did in other sections of the ULA. *See, e.g.*, §§ 61-1-5 (stating that the method of service under the ULA shall be in the same manner as under the rules of civil

procedure), –9(B) (same), –8(C) (stating that depositions taken under the ULA are to be in accordance with the rules of civil procedure), –19 (stating that motions to stay may be filed under the ULA in accordance with the rules of civil procedure). This principle was acknowledged in *Sears v. Romer,* 928 P.2d 745, 750 (Colo.Ct.App.1996), where the Colorado Court of Appeals held that since the "costs [were] imposed in a regulatory matter under an administrative scheme that contains no reference to [the civil costs statute] ... examples of 'costs' recoverable in civil actions" were not determinative of the agency cost assessment under review.

{21} The briefs indicate why the statute, in allowing "all costs" in an administrative disciplinary proceeding of a licensee, makes sense as written. The district courts are not funded in the same way as an administrative board. In district court, the State funds the cost of the judge, support staff, and courthouse. The same costs are incurred in an administrative proceeding but without a state funding mechanism. *See* § 61–14–4(E) (stating that reimbursement for the Board's expenses "and all other expenses involved in carrying out the [VPA] shall be paid exclusively from fees received pursuant to provisions of the [VPA]"). Those disciplined by an administrative board therefore bear the cost of their own discipline since the State does not.

{22} We acknowledge that in some circumstances, Rule 1–054(D) may guide a district court's review of an agency's cost assessment. For example, the Nevada Supreme Court in *Gilman v. Nevada State Board of Veterinary Medical Examiners,* 120 Nev. 263, 89 P.3d 1000, 1006 (2004), described its civil costs statute as "illustrat[ive]." *Gilman* stated that its civil costs statute "provides guidance for the recovery of costs, regardless of whether the parties are in district court or before an administrative board." *Id.* We do not interpret these statements to hold that the civil costs statute directly applied to an administrative agency's cost assessment. Rather, we interpret these statements to mean that, in reviewing an agency's assessment of costs, the district court may look to a civil costs statute for guidance. We see nothing inappropriate in a district court looking to Rule 1–054(D) for guidance in reviewing an agency's cost assessment to determine whether the agency "acted fraudulently, arbitrarily or capriciously," without substantial evidence, or contrary to law. *See N.M. State Bd. of Psychologist Exam'rs v. Land,* 2003–NMCA–034, ¶ 5, 133 N.M. 362, 62 P.3d 1244.

{23} However, we are unpersuaded by the reliance Riegger and the district court placed upon language contained in *In re Wang,* 441 N.W.2d 488 (Minn.1989), and *Devous v. Wyoming State Board of Medical Examiners,* 845 P.2d 408 (Wyo.1993). In *Wang,* the provision at issue stated that the board could require the licensee to pay all of its costs if the licensee had his or her license revoked or suspended. 441 N.W.2d at 496. *Wang* reasoned that, because attorney fees and investigation costs were not specifically authorized by the statute, and because of policy reasons implicating due process concerns, those costs were not recoverable. *Id.* In this case, attorney fees and investigation costs are not at issue, and we are remanding for consideration of the constitutional question. As to the remaining costs, *Wang* then stated that its civil costs statute evinced a legislative intent that the civil costs statute should govern the agency's cost assessment. *Id.* at 497. As explained above, we do not agree with this analysis.

{24} In *Devous,* the provision at issue stated that the board could take a number of punitive actions against a licensee, including assessing all or part of the cost of the proceedings. 845 P.2d at 418–19; *see* Wyo. Stat. Ann. § 33–26–405(a)(viii) (2003). *Devous* reasoned that because of the general rule that parties to litigation bear their own expenses, and because none of its cases had ever held that "costs" included attorney fees and the expenses of the hearing examiner, those expenses were not recoverable. 845 P.2d at 418–19. We find this analysis less than compelling.

{25} In addition to our disagreement with the analysis in these cases, Section 61–1–4(G), unlike the provisions in *Devous* and *Wang,* sets a different tone. Section 61–1–4(G) uses mandatory language: a licensee who does not prevail on the merits "*shall*

bear *all costs* of disciplinary proceedings." (Emphasis added.) The costs must be paid unless the Board excuses the licensee from paying or the licensee prevails *and* no other sanction is given. *Id.* This mandatory language reaffirms our holding that Rule 1–054(D) does not dictate costs under Section 61–1–4(G).

{26} The district court disallowed several costs solely upon its Rule 1–054(D) rationale. First, it excluded the cost of the hearing room, citing Rule 1–054(D) and the dissenting opinion in a Colorado Court of Appeals case. *See Sears,* 928 P.2d at 752–53 (Rothenberg, J., concurring in part, dissenting in part) (disagreeing with the majority that an administrative cost award is not governed by the civil costs statute). We have held that the costs in this case are not governed by Rule 1–054, and we consider the majority opinion in *Sears* the better authority than its dissent. The disallowance of the cost of the hearing room must be reversed.

{27} Next, the district court ruled that the Board could not recover the fees and expenses for one of its expert witnesses, Dr. Martinez. The district court primarily relied upon Rule 1–054(D)(2)(g), which limits expert witness fees as set forth in NMSA 1978, § 38–6–4(B) (1983) (limiting expert witness fees "in any civil case pending in the district court" to one expert for liability and one for damages unless the district court "finds that additional expert testimony was reasonably necessary to the prevailing party and the expert testimony was not cumulative"). The district court thus found that Dr. Martinez's testimony was cumulative. As explained later in this opinion, the question was whether the costs associated with Dr. Martinez were arbitrary and capricious. *See Land,* 2003–NMCA–034, ¶ 5, 133 N.M. 362, 62 P.3d 1244; *see also* NMSA 1978, § 39–3–1.1(D)(1) (1999) ("[T]he district court may set aside . . . the final decision if it determines that . . . the agency acted fraudulently, arbitrarily or capriciously[.]"); Rule 1–074(Q)(1) (same). We have already held that Rule 1–054(D) does not limit the costs permissible under Section 61–1–4(G). We therefore also reverse the disallowance of the costs associated with Dr. Martinez. We remand for the district court to reconsider the cost assessment under the appropriate standard of review. *See Land,* 2003–NMCA–034, ¶ 5, 133 N.M. 362, 62 P.3d 1244 (stating that a court may reverse an agency's action where the agency "acted fraudulently, arbitrarily or capriciously," without substantial evidence, or contrary to law).

{28} Since the district court provided reasons other than Rule 1–054(D) for its disallowance of several other costs, we address each of those costs in turn except for the cost of the hearing officer. As for the cost of the hearing officer, the district court stated that the Board could not assess this cost under Rule 1–054(D). However, the district court also stated that to charge the licensee with this cost would have a chilling effect upon a licensee's right to challenge the charges against him or her while giving the Board an incentive to pass its costs through to the licensee. The district court then stated that it did not "reach this particular constitutional question." We do not address whether this rationale was incorrect because the Board has declined to brief this issue on the belief that the district court did not reach it. While it is true that this Court will affirm the district court's decision if it is right for any reason, we will not do so where this would be unfair to the appellant. *See Meiboom v. Watson,* 2000–NMSC–004, ¶ 20, 128 N.M. 536, 994 P.2d 1154. Considering that the district court posited the chilling effect as a rationale, then stated that it was not reaching this constitutional question, we may in fairness neither address this issue nor use it as a basis to affirm this cost. *See id.* Therefore, the disallowance of this cost of the hearing officer is reversed solely upon the district court's erroneous reliance upon Rule 1–054(D). We remand for the district court to consider the constitutional question in light of *Gilman,* 89 P.3d at 1003–05.

{29} Having explained that the costs a licensee may be assessed under Section 61–1–4(G) are not limited by Rule 1–054(D), we are faced with those limits that Riegger asks us to impose and other limitations the district court placed on the cost award in this case. We address each in turn.

{30} Riegger argues that the legislature did not intend for the "unfettered and un-reviewable" assessment of costs against a licensee. Riegger also argues that the district court properly limited the costs in this case because in addressing attorney discipline cases, our Supreme Court has frequently assessed "costs" that are much lower than those involved here. We agree that there are limits on the costs a disciplinary board can assess against a licensee. These limits are not, however, contained in the rules of civil procedure or other, more specific disciplinary rules. Rather, costs are limited by the district court's review. The district court will reverse an assessment of costs if "it determines that the agency acted fraudulently, arbitrarily or capriciously, if the decision was not supported by substantial evidence, or if the agency did not act in accordance with the law." *See Land*, 2003-NMCA-034, ¶ 5, 133 N.M. 362, 62 P.3d 1244; § 39-3-1.1(D)(1); Rule 1-074(Q)(1). This standard limits the costs available under Section 61-1-4(G), so that a cost assessment is neither "unfettered" nor limited by vague notions that it should be lower. Rather, under this standard, "[t]he district court may not substitute its judgment for that of the agency and must evaluate whether the record supports the result reached, not whether a different result could have been reached." *Land*, 2003-NMCA-034, ¶ 5, 133 N.M. 362, 62 P.3d 1244; *see Gonzales v. N.M. Bd. of Chiropractic Exam'rs*, 1998-NMSC-021, ¶ 12, 125 N.M. 418, 962 P.2d 1253 (stating that, by granting to professional boards the power over licenses and discipline, "[t]he Legislature provided for a certain level of internal self-regulation, subject to limited judicial review").

2. The Board's Decision to Use a Stenographer Instead of a Tape Recorder Was Not Arbitrary and Capricious

{31} The Board sought to assess Riegger $6,909.56 for transcription of his September 2002 hearing on the merits of the disciplinary action. The district court excluded the cost of this transcription because "[t]he Board chose its method (a stenographer, instead of tape recording) and the licensee should not bear the cost of the Board's expensive decision." Our question is whether the mere expense of transcription was arbitrary and capricious. *See Land*, 2003-NMCA-034, ¶ 5, 133 N.M. 362, 62 P.3d 1244. We hold that it was not.

{32} Section 61-1-12 of the ULA requires that a record of the hearing be preserved. Preservation may be "by any stenographic method in use in the district courts of this state, or in the discretion of the [B]oard, by tape recording." The Board was therefore allowed to employ a stenographer at the hearing, which lasted five days. The Board members had to familiarize themselves with the evidence before they could make a decision. *See* § 61-1-13(A). This decision had to be rendered within ninety days of the hearing. *See* § 61-1-13(B). The Board was therefore faced with making a reasoned but expeditious decision based on a very long hearing involving specialized issues. Transcription of the stenographic record was therefore a logical choice. Furthermore, this cost would have been allowable even if the stricter Rule 1-054(D) standards were applicable. *See* Rule 1-054(D)(2)(d). Because employing a stenographer was a permissible and logical choice, assessing the cost was not arbitrary or capricious. *See Colonias Dev. Council v. Rhino Envtl. Servs., Inc.*, 2005-NMSC-024, ¶ 13, 138 N.M. 133, 117 P.3d 939 (stating that a decision of an administrative agency will be held to be arbitrary and capricious if, in light of the whole record, the decision is unreasonable or without a rational basis); *Perkins v. Dep't of Human Servs.*, 106 N.M. 651, 655, 748 P.2d 24, 28 (Ct.App. 1987) ("Where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though another conclusion might have been reached."). Rather, the district court's decision that the cost of the stenographic transcription was just too expensive appears to stray from its required standard of review into fact-finding. *See Land*, 2003-NMCA-034, ¶ 5, 133 N.M. 362, 62 P.3d 1244. We reverse the district court's exclusion of the cost of the stenographic transcription.

3. The Board Members' Per Diem and Mileage Is Not a Permissible Cost

{33} This subsection of the opinion represents the dissenting view of the author.

Judge Pickard's opinion, joined by Judge Sutin, represents the majority opinion on whether the district court properly disallowed the cost of the Board members' per diem and mileage.

{34} "Costs are a creature of statutes and may not be imposed in the absence of clear legislative authorization." *Mathis v. Trailways Lines, Inc.*, 111 N.M. 292, 294, 804 P.2d 1111, 1113 (Ct.App.1990) (internal quotation marks and citations omitted). Our courts demonstrate a reluctance to expand allowable costs beyond what is provided for by statute and precedent. *Key v. Chrysler Motors Co.*, 2000-NMSC-010, ¶ 19, 128 N.M. 739, 998 P.2d 575. Costs are not expenses in general, but only those that are recoverable. Generally, "the term 'costs' refers specifically to those items of expense incurred in litigation that a prevailing party is allowed by rule to tax against the losing party." 20 Am.Jur.2d *Costs* § 1 (2005). I believe that the majority allows an award of per diem costs to the Board by expansively divining the intent of the legislature in the give and take between the VPA and its incorporation of the ULA to include an expense that should not be taxed to Riegger. This primarily stems from what we might now see as an unfortunate bit of drafting that uses both the words "fees" and "costs" in Section 61-1-4(G). While I concede that for the purpose of Section 61-1-4, they mean the same thing, I think conflating them under the word "cost" is more useful, as I consider it improbable that "fee" in that section of the ULA means the same thing as it does in the VPA. The majority's use of the word "fee" makes it too easy to make unwarranted assumptions about "fees" under the ULA when "costs" provides a semantic distinction that becomes essential. Because the VPA specifies per diem is generally paid from license fees and Riegger has presumably paid them, the majority's position should entitle Riegger to a set-off or rebate against assessed costs. On the other side, I see nothing to prohibit the Board from calculating any pro-rata share of "costs" to assess—from light bills to bottled water drunk by Board members at a hearing if the majority have their way. I think the VPA says per diem comes from licensing fees, and is not a proper component of assessed costs.

{35} This is a question of statutory interpretation not involving an agency's expertise that is reviewed de novo. *See Rio Grande Chapter of the Sierra Club*, 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806. The district court rejected the cost of the Board members' per diem and mileage based on Rule 1-054(D) "and because their payment is authorized elsewhere" by Section 61-14-4(E). Section 61-14-4(E) provides for the way the Board members are paid per diem and mileage, and says that they are paid "exclusively from fees received pursuant to provisions of the Veterinary Practice Act." "The purpose of the Per Diem and Mileage Act . . . is to establish rates for reimbursement for travel for public officers and employees." NMSA 1978, § 10-8-2 (1971). Nothing in the Per Diem and Mileage Act specifies the source from which the Board members are to receive compensation for this cost. Section 61-14-4(E) thus designates the *exclusive source* of the funds from which Board members may be paid for per diem and mileage. This language does not explicitly prohibit per diem and mileage from being assessed as "costs" under Section 61-1-4(G), but appears to preclude the Board from drawing on the assessed costs as a source of reimbursement. Section 61-14-4 is a statute that creates the Board of Veterinary Medicine and says how they will go about their work. It allows per diem and mileage for Board members as they exercise their lawful authority. NMSA 1978, § 61-14-5(A) (1999), establishes one of those purposes as determining the qualifications and fitness of veterinarians, and "issue, renew, deny, suspend or revoke licenses." Section 61-14-5(C) empowers the Board to "establish a schedule of license and permit fees based on the board's financial requirements for the ensuing year."

{36} In civil litigation, we have held that litigants are not to bear the "burden of paying per diem and travel expenses incurred by a district judge and his court reporter." *Read v. W. Farm Bureau Mut. Ins. Co.*, 90 N.M. 369, 375, 563 P.2d 1162, 1168 (Ct.App. 1977). *Read* cites to the predecessor of current NMSA 1978, § 34-6-23 (1968), that provides that district judges and district court employees' per diem "shall be paid from the

funds of the district court of the judicial district for which the business is transacted." This conclusion appears to stem from the source of funding for such proceedings. In *In re Nelson,* 207 Ariz. 318, 86 P.3d 374 (2004) (en banc), the Arizona Supreme Court held that per diem, mileage, and lodging for a hearing panel were not assessable costs. *Id.* at 380. *Nelson* pointed out that "[a] disciplinary hearing panel's function is similar to that of a judge conducting a bench trial." *Id.*

{37} The Board's official functions as defined by statute include conducting disciplinary matters. In pursuit of their functions, their per diem is paid by the fees they assess, which are likewise limited by statute to those assessed against licensees in general. According to Section 61–14–5(C), if the Board's expenses increase, they can increase their fees to cover operating expenses, including their per diem to attend disciplinary hearings. Paying per diem by reading "fees" to include costs of disciplinary proceedings exceeds the "fees" allowed the Board under statute. The ULA is incorporated into the VPA, but the VPA is specific about the source of per diem. The VPA deals with the Board, its functions, and its funding specifically. Because the Board's functions are funded by fees defined by statute, turning "costs" into "fees" under the ULA should not control the more specific provisions of VPA Section 61–14–5(C) that authorizes only license and permit fees, and Section 61–14–4(E) that says Board members pursuing their duties are paid per diem from those fees received from all licensees. Disciplinary proceedings are part of the regular, ordinary business of the Board, just as going to court is for judges and court reporters. Travel costs might be expenses, but they should not be costs when otherwise provided for by statute.

{38} Taking the majority's more expansive reading leads to absurd consequences. Since Riegger may have paid his license fee, he is being asked by the Board to pay twice for the per diem expense. Is he now entitled to a rebate on a flat or pro-rata basis? Upon remand, I hope the district court might address the question if it arises. If operating expenses otherwise covered by statute that are incident to ordinary Board business (such as per diem) can be taxed as costs to the disciplined veterinarian, there is nothing to prevent other ordinary expenses also being so taxed. Space rental, telephone bills, water bills, and other components of the overhead required to carry on the business of the Board might be broken out and assessed. When our Supreme Court suggests that trial courts "carefully, cautiously, and sparingly exercise their discretion when considering expenses not authorized by statute or precedent," there is no reason for us to allow an administrative agency more latitude. *See Key,* 2000–NMSC–010, ¶ 19, 128 N.M. 739, 998 P.2d 575 (internal quotation marks and citation omitted). This is particularly so when, as here, a statute stands to demarcate per diem as an expense that should not be taxed here as a cost. The district court's skeptical conservatism in this regard is commendable. The Board is funded only by its members and disciplined licensees, and can increase fees if expenses (like more disciplinary hearings) increase. When the legislature excluded disciplined licensees as a source of reimbursement for per diem and mileage, this exclusion expressed a decision that funds for per diem and mileage were *not* to come from disciplined licensees. I would therefore hold that under Section 61–1–4(G), per diem and mileage are not recoverable costs. I would affirm the district court's disallowance of these expenses. *See Meiboom,* 2000–NMSC–004, ¶ 20, 128 N.M. 536, 994 P.2d 1154. The majority has expressed a different view and this holding is set forth below. For the reasons above, I dissent.

III. CONCLUSION

{39} We affirm the district court's conclusion that Riegger's acts of ordinary negligence were not subject to discipline under Section 61–14–13(A)(5) of the VPA. We reverse the district court's disallowance of the costs of the hearing room, the expert witness, and the hearing officer because Rule 1–054(D) does not limit the costs available under Section 61–1–4(G) of the ULA. We remand for the district court to reevaluate these costs under the appropriate standard of review for agency decisions. We reverse

the disallowance of the cost of the stenographic transcription because this cost was not arbitrary or capricious. We also reverse the district court's exclusion of per diem and mileage, although the author would affirm as explained above. Upon remand, the district court may also consider the constitutional question which it did not reach earlier.

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

LYNN PICKARD and JONATHAN B. SUTIN (concurring in part).

PICKARD, Judge.

{41} We concur in all of Judge Kennedy's opinion with the exception of the discussion of the Board's per diem and mileage. This opinion represents the majority opinion on the issue of the Board members' per diem and mileage. As we understand the dissent's discussion of this issue, it is that the legislature did not intend a recovery of costs to pay Board members' per diem and mileage to attend disciplinary hearings, because their per diem and mileage is intended to be paid from the license fees of all veterinarians regulated by the Board. Opinion, ¶¶ 33–38. We cannot agree, either as a legal matter or a practical matter.

{42} As a legal matter, we agree with the dissent that two of the pertinent, governing statutes are Section 61–14–4(E) of the VPA and Section 61–1–4(G) of the ULA. Section 61–14–4(E) states:

> Members of the board shall receive per diem and mileage as provided in the Per Diem and Mileage Act ... and shall receive no other compensation, perquisite or allowance. *This reimbursement and all other expenses involved in carrying out the Veterinary Practice Act ... shall be paid exclusively from fees received pursuant to provisions of the Veterinary Practice Act.* The board shall deposit all fees received pursuant to provisions of the Veterinary Practice Act with the state treasurer for the exclusive use of the board, and money shall be expended only upon vouchers certified by a majority of the board.

Id. (emphasis added). Section 61–1–4(G) states: "Licensees shall bear all costs of disciplinary proceedings unless they are excused by the board from paying all or part of the *fees* or if they prevail at the hearing...." (Emphasis added.) However, Section 61–14–13(A) of the VPA incorporates the ULA into the VPA when it authorizes disciplinary action to be taken against licensees "[i]n accordance with the procedures contained in the [ULA]."

{43} It can be seen from this statutory framework that among the "fees" received pursuant to the VPA are the "fees" designated as "costs" collected pursuant to the ULA. Because the word "fees" is used both in the ULA and in the VPA, it appears to us that the legislature intended that the costs assessed in disciplinary proceedings may be considered fees received pursuant to the VPA.

{44} As a practical matter, we believe that this result is also well supported. The dissent appears to indicate that the Board members' per diem and mileage, whether for regular Board meetings or the extraordinary meetings concerned with disciplining members, should come from the members' regular fees, and not from the disciplined members' fees that are charged as costs. From a practical standpoint, it appears to us that the Board could well establish its regular schedule of fees pursuant to Section 61–14–5(C) based on its regularly anticipated duties of meeting in the ordinary course, holding examinations, and the like. *See* § 61–14–5 (establishing Board duties). Pursuant to this view, the extra meetings that are the result of unanticipated disciplinary proceedings are more appropriately charged to the disciplined veterinarian.

I CONCUR: JONATHAN B. SUTIN, Judge.

2006-NMCA-075

137 P.3d 631

Tanya ESPINOSA, Tina Espinosa, and Ronnie Espinosa, Jr., Plaintiffs–Appellants,

v.

UNITED OF OMAHA LIFE INSURANCE COMPANY, Defendant–Appellee,

Mutual of Omaha Structured Settlement Company (Mossco–CT), and Mutual of Omaha Companies, Michelle Hope Romero–Espinosa, Individually and as Mother and Next Friend of Stephanie Nichole Romero, Jaqueline Monique Romero, and Elizabeth Rachel Romero, Defendants,

and

Settlement Capital Corporation and Settlement Funding Company, LLC, d.b.a. Peachtree Funding Company, LLC, Intervenors–Appellees,

and

In the Matter of the Estate of Ronnie Gilbert Espinosa, Sr., Deceased.

No. 25,278.

Court of Appeals of New Mexico.

April 24, 2006.

Certiorari Denied, No. 29,800, June 21, 2006.

Clara Ann Bowler, James K. Gilman, Albuquerque, NM, for Appellants.

M. Clea Gutterson, Albuquerque, NM, for Defendant–Appellee United of Omaha Life Insurance Company.

R. Thomas Dawe, Albuquerque, NM, for Intervenor–Appellee Settlement Funding Company, LLC.

OPINION

CASTILLO, Judge.

{1} The issue before us is the enforceability of an anti-assignment clause contained in an annuity purchased pursuant to the terms of a structured settlement agreement between an alleged tortfeasor and its tort victim. Because we hold that in this case, the anti-assignment clause is enforceable, we reverse the trial court's orders and remand for further proceedings, as detailed in the conclusion of this opinion.

I. BACKGROUND

{2} First, we provide a short history of events that occurred before the filing of the complaint in this case. Ronnie Espinosa, Sr., (Mr. Espinosa) was the plaintiff in a medical

malpractice suit. The parties to that lawsuit entered into a structured settlement agreement and release (Structured Settlement Agreement), providing in pertinent part that Mr. Espinosa would receive monthly payments of $1,667.58 "for life with 20 years guaranteed." The Structured Settlement Agreement allowed either the defendants to the tort lawsuit or their insurer through its assignee, Mutual of Omaha, to purchase an annuity from United of Omaha Life Insurance Company (United of Omaha) and further specified that Mutual of Omaha would be the "sole owner of the annuity policy and [would] have all rights of ownership." Pursuant to those terms, Mr. Espinosa and Mutual of Omaha signed a "Qualified Assignment, Release and Pledge Agreement" (Qualified Assignment), which provided for the purchase of an annuity policy from United of Omaha for Mr. Espinosa's benefit. In the Qualified Assignment, Mr. Espinosa agreed that he would have "no right to anticipate, sell, assign, pledge, encumber, or otherwise exercise any right with respect to the Annuity." He also agreed that the annuity policy would contain the following provision:

Notice

> This annuity contract has been delivered to the possession of [Mr.] Espinosa for the sole purpose of perfecting a lien and security interest of such person in this contract. [Mr.] Espinosa is not the owner of, and has no ownership rights [in], this contract and may not anticipate, sell, assign, pledge, encumber, or otherwise use this contract as any form of collateral. Please contact the issuer of this contract for further information.

The annuity policy was issued under Number SU6176399, and the front of the annuity policy was stamped with a modification of the above provision.

{3} The payments to Mr. Espinosa commenced on November 15, 1996. In February 1998, Mr. Espinosa divorced his first wife and subsequently named his children with his first wife as contingent beneficiaries to his annuity policy. These children are Plaintiffs in this case.

{4} In May 1999, Mr. Espinosa married Michelle Hope Romero (Mrs. Espinosa). Mr. Espinosa died on September 1, 2000. After his death, Mrs. Espinosa allegedly sent to United of Omaha a post-dated change of beneficiary form with Mr. Espinosa's purported signature, designating Mrs. Espinosa's children as the new contingent beneficiaries.

{5} Now we come to the facts of this case. As a result of Mrs. Espinosa's actions and in order to establish the proper contingent beneficiaries to the annuity policy, Plaintiffs filed a complaint for declaratory judgment against United of Omaha and against Mrs. Espinosa, individually and as next friend to her three children. Several months after the suit was filed, Settlement Funding Company, LLC, (Settlement Funding), d.b.a. Peachtree Funding Company, LLC, intervened in the action and claimed that Mr. and Mrs. Espinosa had "pledged and collaterally assigned" Mr. Espinosa's rights under the annuity policy to WebBank as security for a loan in the amount of $111,317.00. WebBank later assigned its interest in the loan to Peachtree Funding Company, LLC, a division of Settlement Funding. The loan went into default in October 2000, which prompted Settlement Funding's intervention in the present case.

{6} During the course of the litigation, both Plaintiffs and Settlement Funding filed cross-motions for summary judgment. Relying primarily on contract law and public policy, Plaintiffs argued that according to the terms of the settlement documents, Mr. Espinosa's right to payments under the annuity could not be legally alienated. According to information provided in the affidavits attached to Plaintiffs' motion, (1) the structure of the settlement, which provided for nonassignable annuity payments over a period of time, was entered into for the protection of Mr. Espinosa, who was physically and mentally debilitated as a result of the injuries caused by the alleged malpractice; (2) the value of the annuity policy was $296,829.24 when it was assigned to WebBank, which subsequently assigned its interest to Settlement Funding; and (3) according to the loan documents, Mr. and Mrs. Espinosa borrowed $111,317.00 and granted a security interest in

Mr. Espinosa's right to receive cash payments from the annuity.

{7} In its motion, Settlement Funding contended that Mr. Espinosa's rights under the annuity policy should be considered "payment intangibles," subject to Article 9 of the Uniform Commercial Code (UCC), as amended effective July 1, 2001. NMSA 1978, §§ 55–9–101 to –710 (2001). Arguing that the anti-assignment provision stamped on the face of the annuity policy was unenforceable, Settlement Funding asserted that under the terms of the loan agreement, it was entitled to foreclosure of all the monthly annuity payments owed to Mr. Espinosa. Plaintiffs countered by arguing that the annuity payments retained their identity as a tort settlement and insurance benefits, both of which are excluded from the operation of the UCC. Without making any specific findings with respect to the cross-motions, the trial court granted summary judgment to Settlement Funding and denied summary judgment to Plaintiffs.

{8} Shortly after the summary judgment order was entered, Plaintiffs filed a first amended complaint, alleging a number of tort claims against Settlement Funding and others. Settlement Funding filed a motion for default judgment of foreclosure and a motion to dismiss the tort claims against it. The trial court granted the motion to dismiss all claims against Settlement Funding and entered an order of foreclosure as to the annuity policy in favor of Settlement Funding. This is Plaintiffs' appeal of the final order adjudicating all issues with regard to Settlement Funding. For the reasons discussed in this opinion, we reverse the trial court's summary judgment order and final order, and we remand for further proceedings.

II. DISCUSSION

A. Standard of Review

{9} The basis for the final order was the trial court's summary judgment order. Accordingly, we evaluate the trial court's determination in this regard. Summary judgment is appropriate where there are no genuine issues of material fact and where the party seeking summary judgment is entitled to judgment as a matter of law. Rule 1–056(C) NMRA. We review the grant of summary judgment de novo, and we construe all reasonable inferences in favor of the nonmoving party. *See Katcher v. Johnson Controls World Servs., Inc.*, 2003–NMCA–105, ¶ 10, 134 N.M. 277, 75 P.3d 877.

B. Choice of Law

{10} As discussed above, Mr. Espinosa signed the Structured Settlement Agreement and the Qualified Assignment, both of which related to his tort injuries. The Qualified Assignment contains a provision titled "Governing Law," which states that the Qualified Assignment "shall be governed by and interpreted in accordance with the laws of the State of Nebraska."

{11} Below, Settlement Funding argued that the law of New Mexico, not Nebraska, should apply in this case. Although Plaintiffs mentioned Nebraska law in their pleadings by pointing out that Nebraska has "enacted special legislation enforcing anti-assignment language in structured settlements," Plaintiffs relied on New Mexico's UCC in support of their arguments. On appeal, the parties do not argue that we must apply Nebraska law in this case; instead, they rely exclusively on New Mexico's UCC in making their arguments. Choice of law questions must be adequately raised below, or they are waived. *See Gonzales v. Surgidev Corp.*, 120 N.M. 133, 140, 899 P.2d 576, 583 (1995) (deciding not to consider a choice of law preemption claim because the issue was not properly raised at trial and was therefore waived); *Fredenburgh v. Allied Van Lines, Inc.*, 79 N.M. 593, 595–96, 446 P.2d 868, 870–71 (1968) (restating the rule that an affirmative defense must be pleaded or it is waived and cannot be argued on appeal); *see also Strickland Tower Maint., Inc. v. AT & T Commc'ns, Inc.*, 128 F.3d 1422, 1426 (10th Cir.1997) (determining that where the trial court applied the law of Oklahoma and the parties did not challenge that finding on appeal, the appellate court would accept the trial court's view that the law of Oklahoma applies). In this case, we apply New Mexico law.

C. New Mexico Uniform Commercial Code

1. Applicability of Pre-July 2001 Version of Article 9

{12} In addressing the parties' arguments, we must first determine which version of Article 9 applies. Article 9 was amended effective July 1, 2001. Section 55-9-701. Plaintiffs argue that the 2001 amendments to Article 9 of the UCC are not applicable to this case because the case was commenced in December 2000. *See* § 55-9-702(c) ("This act does not affect an action, case or proceeding commenced before July 1, 2001."). Settlement Funding does not dispute Plaintiffs' argument. Instead, it contends that under either the previous version or the amended version of Article 9, Settlement Funding is entitled to judgment as a matter of law. Because the case was already pending on the effective date of the amendments to Article 9 of the UCC, we hold that the previous version of Article 9, prior to the July 2001 amendment, is applicable to this case. *See, e.g., Cmty. Pub. Serv. Co. v. N.M. Pub. Serv. Comm'n,* 99 N.M. 493, 497, 660 P.2d 583, 587 (1983) (holding that the effective statute is that which was in effect at the time events in the case occurred); *USLife Title Ins. Co. of Dallas v. Romero,* 98 N.M. 699, 703, 652 P.2d 249, 253 (Ct.App.1982) (holding that where a case is pending when an amended statute is enacted, the prior statute applies to the case). Unless specifically noted otherwise, our references to Article 9 will refer to the version of Article 9 before the July 2001 amendment. Because some of the arguments rely on the 2001 version and official comments thereto, we will insert the adoption date of a statute when it appears that there may be confusion. A 2001 adoption date will indicate the 2001 version, while an adoption date earlier than 2001 will indicate the pre-amendment version.

{13} Article 9 of the UCC applies generally to secured transactions. Transactions excluded from Article 9 include the "transfer of an interest in or claim in or under any policy of insurance" and the "transfer in whole or in part of any claim arising out of tort." *See* NMSA 1978, § 55-9-104(g), (k) (1997). Below, Plaintiffs relied on both (g) and (k). On appeal, Plaintiffs continue to maintain that the payments to Mr. Espinosa qualify under both and are therefore not covered by the UCC. In response, Settlement Funding argues that the payments cannot be categorized as either and are therefore governed by the UCC.

{14} Settlement Funding points us to NMSA 1978, § 55-9-318(4) (1985), which contains language that invalidates certain types of anti-assignment clauses. Arguing that the right to receive payments under an annuity is considered a general intangible under NMSA 1978, § 55-9-106 (1997), and that Section 55-9-318(4) applies to the "creation of a security interest in a general intangible for money due or to become due," Settlement Funding maintains that the anti-assignment clause in the annuity is invalid because the transaction at issue here is one in which Settlement Funding took a security interest in a general intangible. Plaintiffs, on the other hand, contend that no part of Article 9 applies to the transaction involved in this case. The official comment to Section 55-9-106 (1997) refers to the definition of a general intangible as a "catchall definition" and notes that it does not apply to types of intangibles that are specifically excluded under Section 55-9-104 (1997). Accordingly, if this transaction is excluded from Article 9 coverage, Settlement Funding's argument fails. Therefore, we first focus our discussion on whether the payments qualify as "arising out of tort," under Section 55-9-104(k), and then on whether the payments are considered a "claim in or under any policy of insurance," as set forth in Section 55-9-104(g).

2. Tort Claim Exception Under Pre-July 2001 Version of Article 9

{15} Initially, we note that Settlement Funding contends that the Structured Settlement Agreement and the Qualified Assignment should be considered separately from the annuity policy because it is from the Structured Settlement Agreement and Qualified Assignment that Mr. Espinosa's rights flow and because he was not a party to the annuity policy. We disagree. "If two or

more writings are part of a single transaction and concern the same subject matter, then they are a single contract." *Crow v. Capitol Bankers Life Ins. Co.,* 119 N.M. 452, 456, 891 P.2d 1206, 1210 (1995). To determine whether two or more writings amount to a single contract, we look at the surrounding circumstances and the intentions of the parties. *Id.* at 456–57, 891 P.2d at 1210–11. "A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together." Restatement (Second) of Contracts § 202(2) (1981); *see also CGU Life Ins. Co. of Am. v. Metro. Mortgage & Sec. Co.,* 131 F.Supp.2d 670, 675 (E.D.Pa.2001) (applying general rules of contract: two or more documents executed at the same time and involving the same transaction are construed as a whole, even when different parties are involved, and two or more agreements made as part of the same transaction, though made at different times, are construed as a whole); *Crow,* 119 N.M. at 457, 891 P.2d at 1211. Here, the parties to the underlying tort action entered into a Structured Settlement Agreement, which included an agreement to make a Qualified Assignment and an agreement to purchase an annuity. The Qualified Assignment, stamped on October 10, 1996, refers to the Structured Settlement Agreement and to the annuity to be purchased. The annuity policy was issued on October 10, 1996, the same date stamped on the Qualified Assignment. It becomes clear that the Qualified Assignment and the annuity policy were intended to be part of the same transaction. Based on the circumstances, the Structured Settlement Agreement, Qualified Assignment, and annuity are all part of the same agreement between Mr. Espinosa and the tortfeasor; thus, they are to be read together. Specifically, Mr. Espinosa's agreement in the Qualified Assignment—that the annuity policy would not be assignable and would contain express non-assignability language—makes the non-assignability provision of the annuity applicable to Mr. Espinosa. We therefore do not agree with Settlement Funding's argument that Mr. Espinosa was not bound by that provision, since he was not a signatory party to the annuity policy. The bottom line is that Mr. Espinosa agreed not to assign his right to receive payments under the annuity, whether or not he was an owner of or a party to the annuity. It is the enforceability of this agreement that is in question in this case.

{16} Plaintiffs' argument is that the payment stream originating from the Structured Settlement constitutes tort compensation and is thus exempted from Article 9 of the UCC. We are aware that courts are split on the question of whether proceeds from a tort settlement qualify as "arising out of tort" under the UCC. *See* § 55–9–104(k); *see, e.g., Owen v. CNA Ins./Cont'l Cas. Co.,* 167 N.J. 450, 771 A.2d 1208, 1211–12 (2001) (discussing the controversy surrounding whether the Article 9 exclusion applies to proceeds of tort claims); *Barclays Bus. Credit, Inc. v. Four Winds Plaza P'ship,* 938 F.Supp. 304, 308–09 (V.I.1996) (listing arguments on both sides of the issue of whether tort proceeds are excluded from Article 9); *see also* Gregory Scott Crespi, *Selling Structured Settlements: The Uncertain Effect of Anti–Assignment Clauses,* 28 Pepp. L.Rev. 787, 792–93 (2001) (explaining those cases in which "courts that have explicitly addressed the Article 9 question have uniformly found it to be inapplicable, although their rationales vary"); John Krahmer, *Anti–Assignment Clauses and Structured Settlements Under Revised Article 9,* 56 Consumer Fin. L.Q. Rep. 25, 31–32 (2002) (discussing the considerable litigation regarding the validity of the sale of the right to future payments under structured settlements with non-assignment clauses); Adam F. Scales, *Against Settlement Factoring? The Market in Tort Claims Has Arrived,* 4 Wis. L.Rev. 858, 939–40 (2002) (reviewing the effect of the exclusions under Article 9 on the controversy about the factoring of proceeds from structured settlements). After reviewing various decisions from other jurisdictions, we are convinced that the better-reasoned view in this case is that under Article 9, the annuity payments flowing from the Structured Settlement Agreement are payments "arising out of tort" and are therefore excluded from Article 9 of the UCC. *See* § 55–9–104(k).

{17} As discussed in *Barclays,* there is no majority rule among other jurisdictions as to whether the exclusion of transfers of tort

claims under Section 55–9–104(k) also excludes tort settlement proceeds. *Barclays,* 938 F.Supp. at 308. The court in *Barclays* cited to numerous authorities that provide some history about the exclusion contained in Section 55–9–104(k), as well as its interpretation, and specifically whether this section of Article 9 also excludes derivative settlement rights from tort claims. *Barclays,* 938 F.Supp. at 308–10. Having reviewed these authorities, we believe that an interpretation that would allow tort settlement proceeds to be assigned under Article 9 seems to cut against the apparent intent of the drafters of Section 55–9–104(k). We also believe that if Section 55–9–104(k), with its accompanying official comment, is interpreted to exclude certain rights derived from a tort cause of action, the UCC's exclusion of "any claim arising out of tort" would become meaningless, due to the ease with which it could be circumvented by assignment of the derivative rights. *See id.* Over the years, this position has evolved, and now the assignability of tort claims and their proceeds is more favored. Under the 2001 amendment to the New Mexico UCC, revised Article 9 now covers commercial tort claims, and they can be assigned. *See* NMSA 1978, § 55–9–109(d)(12) (2001); § 55–9–109 official cmt. 15. And as we explain in paragraphs 18–20, while the revised Article 9 now appears to cover tort claim proceeds, pre-amendment Article 9 does not.

{18} In this case, Mr. Espinosa settled his tort claim and received in exchange a specific sum of money. He did not receive this money directly; rather, an annuity policy was purchased for the purpose of distributing to him the money that he had received for the settlement of his tort claim. Applying the *Barclays* reasoning to this case, we reach the logical conclusion that the money to be distributed to Mr. Espinosa under the annuity arises out of tort. This money constitutes the proceeds from the settlement of his claim. It makes no sense to exempt from Article 9 any "transfer in whole or in part of any claim arising out of tort" while, at the same time, requiring the proceeds from tort claims to be freely assignable under that same Article. *See* § 55–9–104(k); *Barclays,* 938 F.Supp. at 309 (observing that if Article 9 is construed to apply to rights connected to a tort action, such as structured settlement tort proceeds, the specific exclusion for a claim arising out of tort would be rendered meaningless).

{19} We also look to New Mexico law. In *Quality Chiropractic v. Farmers Insurance Co. of Arizona,* 2002–NMCA–080, 132 N.M. 518, 51 P.3d 1172, this Court upheld the common law rule prohibiting the assignment of personal injury claims and also rejected "any distinction between an assignment of the proceeds of a claim and an assignment of the claim itself." *Id.* ¶ 36. While we agree that *Quality Chiropractic* is a variation on the theme, in that it deals with an assignment to future proceeds, we believe that the reasoning supports our determination that the phrase "claim arising out of tort" would also include the proceeds of that tort. *See* § 55–9–104(k). In *Quality Chiropractic,* this Court reviewed the history of the policy underlying the common law prohibition and addressed the several public policy and equitable arguments made by the assignee. 2002–NMCA–080, ¶¶ 13–31, 132 N.M. 518, 51 P.3d 1172. In upholding the prohibition of assignment of personal injury claims and their proceeds, we recognized the competing policy interests and concluded that the legislature is in the best position to address problems that are created by not allowing the assignment. *Id.* ¶ 33.

{20} Although it appears the legislature has not directly addressed the issue regarding assignment of future proceeds of a tort claim, the legislature did clarify the characterization of the proceeds of a structured settlement in the 2001 amendment to Article 9. According to official comment 15 to Section 55–9–109, "once a claim arising in tort has been settled and reduced to a contractual obligation to pay, the right to payment becomes a payment intangible and ceases to be a claim arising in tort." The concept of payment intangible is also a 2001 addition to Article 9. Official comment 2 to NMSA 1978, § 55–9–318 (2001), states that "sales of payment intangibles [are] transactions that were not covered by former [A]rticle 9." These comments support a conclusion that we would likely treat this transaction differently under the 2001 amendments to [A]rticle 9.

This case, however, is decided under the pre-amendment version of Article 9.

{21} As we explained before, Settlement Funding argues that even under the unrevised Article 9, specifically Section 55–9–106, the payments due Espinosa are general intangibles, to which Section 55–9–318(4) (1985) applies, and that Settlement Funding was therefore legally entitled to take a security interest in the contract payment. We disagree with this conclusion. If an intangible is excluded under Section 55–9–104 (1997), it is not considered a general intangible under Section 55–9–106 (1997). *See id.* official cmt. We have determined that the payment is a result of the tort claim and represents the proceeds of the settlement of that claim. As such, the payment is not covered by Article 9.

{22} Furthermore, construing the exclusion in this manner comports with public policy considerations. There is a strong public policy against allowing factoring companies, such as Settlement Funding, to engage in unrestricted transactions whereby injured individuals, such as Mr. Espinosa, assign their rights to a stream of payments in exchange for a discounted lump-sum payment, particularly in cases where a clear anti-assignment clause is included for the protection of the individual in both a structured settlement agreement and an annuity policy. *See Grieve v. Gen. Am. Life Ins. Co.,* 58 F.Supp.2d 319, 324 (D.Vt.1999). In recognition of that policy, a number of states have enacted legislation to evaluate these transactions before assignment can take place, by requiring judicial or administrative approval before structured settlement rights can be transferred. *See, e.g., In re Goins,* No. 00–61087, 2002 Bankr.LEXIS 1736, at **36–37 (Bankr.E.D.Ky. Dec. 19, 2002). Significantly, New Mexico has also indicated its support of the public policy discussed above by enacting its own legislation, effective July 1, 2005, which requires transfers of structured settlement rights to be approved in advance by a "final court," based on specific findings by the court regarding such matters as the best interests of the recipient, professional advice to the recipient, and the effect of any orders or statutes on the transfer. *See* Structured Settlement Protection Act (the Act), NMSA 1978, §§ 39–1A–1 to –7 (2005). We agree with Settlement Funding that the Act does not apply to this case. *See* § 39–1A–7(E) (stating that nothing in the Act shall be used to imply that any transfer entered into before July 1, 2005, is valid or invalid). However, the public policy behind the legislation is not new. The public policy in favor of enhancing the likelihood that accident victims will not use the proceeds from their settlements so quickly that they will be unable to support themselves is found in our workers' compensation statutes. *See, e.g., Jackson v. K & M Constr.,* 2004–NMCA–082, ¶ 10, 136 N.M. 94, 94 P.3d 837 (discussing public policy for evaluation of lump sum distributions to injured workers: balancing "the public policy of this state that . . . compensation shall be made in a certain amount, to secure the injured employee against want, and to avoid his becoming a public charge" and "the economic difficulties faced by workers who cannot pay debts because of injury or disability" (internal quotation marks and citation omitted)). *See generally In re Kaufman,* 2001 OK 88, n. 40, 37 P.3d 845, 853 n. 40.

{23} For the above reasons, we hold that the exclusion for the transfer "in whole or in part of any claim arising out of tort" applies to the situation in this case. *See* § 55–9–104(k). Article 9 of the UCC therefore has no effect on the anti-assignment provision included in the Structured Settlement Agreement and the annuity policy.

{24} Settlement Funding points to official comment 15 under the amended version of Section 55–9–109 as support for the assertion that once the tort claim was settled by Mr. Espinosa, his right to payment ceased "to be a claim arising in tort." *See* § 55–9–109 official cmt. 15. We agree that this comment appears to differentiate between a tort claim that has been settled and reduced to a contractual obligation and the original tort claim itself. But as we explained above, the 2001 amendment to Article 9 post-dates the assignment by Mr. and Mrs. Espinosa to Settlement Funding, and the amended Article 9 is not applicable to this case. We now turn to the exception regarding insurance policies under Section 55–9–104(g).

3. Interest In or Claim In or Under Any Policy of Insurance

{25} As noted above, Plaintiffs also claim that the payments to Mr. Espinosa are a transfer of interest under a policy of insurance and are therefore exempted from Article 9 of the UCC. *See* § 55-9-104(g). Settlement Funding contends that the annuity contract is merely a funding mechanism—a contract between the settlement obligor and the annuity contract issuer—and that Mr. Espinosa is not a party to the annuity contract. We address this issue as further support for reversal of the trial court's decision. Courts from other jurisdictions have applied the insurance-policy exemption to annuities related to structured settlements. *See, e.g., CGU,* 131 F.Supp.2d at 677 (holding that although annuities differ from life insurance policies, the statutes governing insurance include annuity contracts under the authority and jurisdiction of the insurance department); *Grieve,* 58 F.Supp.2d at 323-24 (relying on the fact that annuity contracts are included in the statutes governing and regulating insurance to hold that annuity is exempt under Article 9). As in *CGU* and *Grieve,* annuities are also included under and regulated by our New Mexico Insurance Code. *See generally* NMSA 1978, §§ 59A-20-2, -17 to -24 (1984). Also, under the common law, annuities are considered insurance policies for some purposes. *See Black's Law Dictionary* 99 (8th ed.2004) (defining "annuity policy" as "[a]n insurance policy providing for ... periodic payments ... to begin at a fixed date and continue through the insured's life"). We agree with the courts in *CGU* and *Grieve* and hold that payments made pursuant to annuity policies, such as the one in this case, are exempt from Article 9 of the UCC. Accordingly, Settlement Funding's argument that Article 9 applies in this case is without merit.

D. Contract Law

{26} As explained above, Article 9 does not preclude enforcement of the anti-assignment clauses contained in the Qualified Assignment and the annuity policy. We must therefore determine whether the clauses are enforceable under traditional contract law. The parties do not argue that the documents are ambiguous. When a contract or agreement is unambiguous, we interpret the meaning of the document and the intent of the parties according to the clear language of the document, and we enforce the contract or agreement as written. *See, e.g., Ponder v. State Farm Mut. Auto. Ins. Co.,* 2000-NMSC-033, ¶ 11, 129 N.M. 698, 12 P.3d 960. As discussed above, both the Qualified Assignment and the annuity policy contain the anti-assignment provision agreed upon by the parties involved in the tort settlement.

{27} We are aware that anti-assignment clauses are generally disfavored, but they are enforced in those situations where the language or circumstances indicate a clear intention to prohibit assignment. *See* Restatement (Second) of Contracts § 322(2), at 32 (1981) (disallowing contract terms that prohibit assignment, unless a "different intention is manifested"); *see also* Restatement (Second) of Contracts § 317(2)(c), at 15 (1981) (providing that a contractual right can be assigned, unless the "assignment is validly precluded by contract"). Here, the anti-assignment language that was agreed to and specifically included in both the Qualified Assignment and the annuity policy establishes the clear intention that the payments to Mr. Espinosa were not to be assigned or used as collateral. The language is clear on its face. *Cf. Liberty Life Assurance Co. of Boston v. Stone St. Capital, Inc.,* 93 F.Supp.2d 630, 637 (D.Md.2000) (noting that although the anti-assignment clause did not contain specific language voiding or invalidating any assignment that might be made, the language of the clause clearly denies a party the power to assign the periodic payments); *J.G. Wentworth S.S.C. Ltd. P'ship v. Callahan,* 2002 WI App 183, ¶ 15, 256 Wis.2d 807, 649 N.W.2d 694 (refusing to require " 'magic' words" or a "secret code" to enforce an anti-assignment provision when the language, on its face, showed the parties' clear intention). Based on the clear and unambiguous language in the anti-assignment clause, we hold that the anti-assignment clause is enforceable as written; the assignment to Settlement Funding is therefore void.

E. Equitable Estoppel

{28} Settlement Funding contends that principles of equitable estoppel should apply in this case to prevent the voiding of the assignment by Mr. Espinosa. Equitable estoppel requires "(1) a false representation or concealment of material facts, (2) knowledge of true facts, and (3) an intention or expectation that an innocent party would rely on those facts." *Quality Chiropractic,* 2002–NMCA–080, ¶ 34, 132 N.M. 518, 51 P.3d 1172 (citing *Brown v. Taylor,* 120 N.M. 302, 305–06, 901 P.2d 720, 723–24 (1995)). Here, the elements of equitable estoppel are not met. It is undisputed that there was nothing hidden with regard to the anti-assignment provision stamped on the annuity; thus, Settlement Funding could not have relied to its detriment on the lack of such a provision. The provision clearly and specifically provided that Mr. Espinosa was not the owner of the annuity policy and could not "anticipate, sell, assign, pledge, encumber, or otherwise use [the] contract as any form of collateral." The loan documents prepared by Settlement Funding indicate that Settlement Funding made efforts to circumvent the language of the anti-assignment clause. For example, under the loan documents, Mr. Espinosa was required to acknowledge that under the applicable state law, there may be a problem with the ability to assign the annuity policy, to conduct his affairs in order to prevent the assertion of a claim that the annuity policy was not assignable, and to defend and indemnify Settlement Funding for any claims with respect to the annuity policy. This is not a situation where Settlement Funding, acting as an innocent party and ignorant of the true facts, has relied on the conduct or statements of Mr. Espinosa. Equitable estoppel does not apply.

F. Court Registry

{29} Plaintiffs claim that this Court should "provide some guidance on the proper use of the District Court Registry." Plaintiffs argue that the trial court abused its discretion in ordering its court clerk to "collect and process future payments to Settlement Funding." Because we are reversing the trial court's summary judgment order and, consequently, the court's order of dismissal and order allowing foreclosure, we need not address this issue.

III. CONCLUSION

{30} We reverse the trial court's orders granting summary judgment to Settlement Funding, dismissing Plaintiffs' first amended complaint as to Settlement Funding, and entering judgment of foreclosure in favor of Settlement Funding. We remand to the trial court for entry of summary judgment in favor of Plaintiffs on the issue of the enforceability of the anti-assignment provision in the annuity policy and for further proceedings.

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

WE CONCUR: A. JOSEPH ALARID and LYNN PICKARD, Judges.

2006-NMCA-070

137 P.3d 640

STATE of New Mexico, Plaintiff–Appellee,

v.

John PADILLA, Defendant–Appellant.

State of New Mexico, Plaintiff–Appellee,

v.

John Padilla, Defendant–Appellant.

Nos. 24,990, 24,999.

Court of Appeals of New Mexico.

April 26, 2006.

Certiorari Denied, No. 29,810, June 12, 2006.

Patricia A. Madrid, Attorney General, Santa Fe, NM, Steven S. Suttle, Assistant Attorney General, Albuquerque, NM, for Appellee.

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

OPINION

WECHSLER, Judge.

{1} In this appeal, we address whether a defendant held in prison in another state has a right under the Interstate Agreement on Detainers, NMSA 1978, § 31–5–12 (1971) (IAD), to a final disposition of habitual offender status within 180 days of serving a request contemplated by the IAD. Because the IAD does not apply to sentencing and because a habitual offender proceeding addresses sentence enhancement, we hold that a defendant does not have such a right and affirm.

{2} The IAD is a multistate agreement concerning the cooperation of states that are parties to the agreement to enable disposition of charges pending in one party state against a defendant who is imprisoned in another party state. Section 31–5–12. Article 3(A) of the IAD states the basis for a state to lodge a detainer against a prisoner of another state, establishes the prisoner's right to make a request for a final disposition of proceedings in another state, and sets a time limit of 180 days for trial. Section 31–5–12, art. 3(A). It provides:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged

against the prisoner, he shall be brought to trial within one hundred eighty days after he has caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner and any decisions of the state parole agency relating to the prisoner.

{3} Defendant John Padilla pleaded no contest to four counts of forgery in Chaves County District Court. The State filed a supplemental criminal information, stating that, on the basis of four prior felony convictions, Defendant was a habitual offender justifying an enhancement of his sentence by eight years. Defendant failed to appear for sentencing, and the district court issued a bench warrant for his arrest. He was subsequently arrested and imprisoned in Arizona. Arizona is also a party state to the IAD. Ariz.Rev.Stat. Ann. § 31–481 (2002).

{4} The State placed a detainer on Defendant on August 14, 2002. It concedes that Defendant requested a final disposition with respect to the detainer under the IAD. Although the details of the detainer and the request are not clear from the record before us, in denying Defendant's motion to dismiss, the district court found, and neither party contests, that the State failed to act on the request because it did not have Defendant "transported to New Mexico within 180 days after Arizona notified New Mexico" under the IAD. The State and Defendant reached an agreement concerning sentencing, resulting in the State filing an amended supplemental information stating only two prior felony convictions and Defendant admitting to the convictions. The district court entered its judgment, sentence and commitment, from which Defendant appeals.

{5} On appeal, Defendant focuses his argument on the supplemental information. We focus our analysis, therefore, on the issue of whether the IAD required the State to transport Defendant when his criminal liability had already been determined in the Chaves County proceeding.

{6} Our IAD case law has distinguished pretrial proceedings from sentencing proceedings. *State v. Sparks,* 104 N.M. 62, 716 P.2d 253 (Ct.App.1986). We held in *Sparks* that "a request for the disposition of an outstanding sentencing is not cognizable under the IAD." *Id.* at 64, 716 P.2d at 255. We relied on *Carchman v. Nash,* 473 U.S. 716, 105 S.Ct. 3401, 87 L.Ed.2d 516 (1985), in which the United States Supreme Court held that the IAD does not apply to probation revocation proceedings. *Sparks,* 104 N.M. at 65, 716 P.2d at 256. We reasoned that the plain meaning of the IAD's language requiring its application to an "untried indictment, information or complaint" did not apply to sentencing, but rather referred to "documents initiating criminal prosecution by charging the individual with a crime." *Id.* We also reasoned that the IAD's word "untried" further indicated that the IAD did not apply to sentencing because the defendant had already been tried and convicted for the crimes charged. *Id.* We lastly reasoned that the policy considerations underlying the IAD did not apply to sentencing. *Id.* at 65–66, 716 P.2d at 256–57.

{7} In contending that *Sparks* does not apply to his case, Defendant points out that the State filed a supplemental information, requiring him to answer to "untried" charges of being a habitual offender. We acknowledge this distinction, but it is addressed by *Carchman,* on which we directly relied in *Sparks.* In *Carchman,* the United States Supreme Court held that the IAD did not apply to probation revocation proceedings. *Carchman,* 473 U.S. at 734, 105 S.Ct. 3401. As we noted in *Sparks,* the Supreme Court interpreted "indictment," "information," and "complaint," as used in the IAD, to "refer to

documents charging an individual with having committed a criminal offense." *Carchman,* 473 U.S. at 724, 105 S.Ct. 3401. It interpreted "untried" in the IAD context to "refer to matters that can be brought to [a] full trial." *Id.* Accordingly, it concluded that even though a probation violation proceeding may involve an underlying criminal offense, it did not fall within the IAD requirements because it does not involve the prosecution or trial of that offense. *Id.* at 724–25, 105 S.Ct. 3401.

{8} Based on *Carchman,* the distinction Defendant raises between *Sparks* and this case does not counsel reversal. The supplemental information, like the charging document in *Carchman,* does not charge Defendant with a new crime, but only as a habitual offender based on prior convictions. In addition, although Defendant faces additional factual allegations concerning his identity as the person convicted of the crimes listed in the supplemental information, the resolution of these issues, as with the issues of probation revocation in *Carchman,* does not require a trial of any offense. A habitual offender proceeding determines a defendant's status as a habitual offender, not whether a defendant has committed a crime. *See* NMSA 1978, § 31–18–17 (2003) (providing that a person with prior convictions may be a habitual offender); *State v. Aragon,* 116 N.M. 267, 269, 861 P.2d 948, 950 (1993) (referring to "habitual offender status"). It relates only to the enhancement of a sentence.

{9} Further, the policy considerations of the IAD also support affirmance in this case. The purpose of the IAD is to encourage the prompt disposition of outstanding charges to address uncertainty in treatment and rehabilitation for prisoners subject to a detainer from another jurisdiction. Section 31–5–12, art. 1. As stated in *Carchman* and *Sparks,* the uncertainty and potential adverse effects facing a prisoner who has already been convicted of the underlying crimes are significantly less than if the charges remained untried. *Carchman,* 473 U.S. at 732–33, 105 S.Ct. 3401; *Sparks,* 104 N.M. at 65–66, 716 P.2d at 256–57. While the uncertainty Defendant faces relating to his enhanced sentence may be greater than the uncertainty created by the probation violation in *Carchman,* Defendant nevertheless knows that he has entered a guilty plea to four forgery charges and that he will be sentenced for those crimes. The only real uncertainty is the extent of the sentence, which includes the enhancement. Moreover, because of Defendant's guilty plea, this case does not fall within the identified purpose of the IAD to enable a prisoner to require the charging state to address an unsubstantiated or meritless detainer. *Carchman,* 473 U.S. at 729–30, 105 S.Ct. 3401; *Sparks,* 104 N.M. at 65, 716 P.2d at 256.

{10} We note that the State claims, as a jurisdictional issue, that Defendant did not properly reserve the issue on appeal in the district court. Rule 5–304(A)(2) NMRA allows a defendant to enter a conditional guilty plea, reserving in writing the right to appeal an issue raised in a pretrial motion and adversely decided by the district court. Although Defendant's attorney orally stated when entering Defendant's plea that Defendant intended to appeal the court's decision concerning the applicability of the IAD, Defendant did not enter a written plea agreement reserving the issue. *See State v. Hodge,* 118 N.M. 410, 416, 882 P.2d 1, 7 (1994) (approving the entry of conditional pleas when appellate issues are preserved and specified in a written plea, and when the court and prosecution agree to the entry of the plea). As a result, the State contends that, because Defendant is challenging the jurisdiction of the district court to order his sentence, Defendant's sole avenue for review is Rules 5–801 and 5–802 NMRA, and this Court lacks jurisdiction of this appeal.

{11} In *State v. Shay,* 2004–NMCA–077, 136 N.M. 8, 94 P.3d 8, *cert. granted,* 2004–NMCERT–006, 135 N.M. 788, 93 P.3d 1293, *cert. quashed,* 2005–NMCERT–002, 137 N.M. 266, 110 P.3d 74, this Court addressed a similar issue. The defendant had entered a guilty plea and argued that the district court did not have the statutory authority to enhance his sentence as it did. *Id.* ¶¶ 1, 3. The defendant contended that both the state and the district court knew that he would appeal the enhancement, even though he did not reserve the issue in writing in a plea

agreement. *Id.* ¶¶ 5–6. We held that the rationale of Rule 12–216 NMRA, allowing appellate review of unpreserved jurisdictional issues, and *Hodge,* excepting jurisdictional issues from the ordinary waiver attendant to a voluntary guilty plea, permitted our review of the case. *Shay,* 2004–NMCA–077, ¶ 6, 136 N.M. 8, 94 P.3d 8.

{12} The State argues that *Shay* was incorrect in its holding, but we do not agree. We do agree with the State that Rule 5–304(A)(2) contemplates the consent to a conditional plea by the State and approval by the district court. *See* Rule 5–304(A)(2); *Hodge,* 118 N.M. at 416, 882 P.2d at 7. We also agree that this procedure provides efficiency in the plea and appeal process. *See Hodge,* 118 N.M. at 416, 882 P.2d at 7 (noting that the state's and district court's involvement should ensure efficient appellate review). However, our Supreme Court expressly recognized in *Hodge* that this procedure does not require "rigid adherence." *Id.* at 417, 882 P.2d at 8. In adopting the interpretation of the federal rule counterpart to Rule 5–304(A)(2), our Supreme Court stated:

> [W]ith the prosecution's consent and the court's approval, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

Hodge, 118 N.M. at 415, 882 P.2d at 6 (internal quotation marks and citation omitted). Our Supreme Court continued:

> [A]n appellate court can pardon the informalities of a conditional plea so long as the record demonstrates that the spirit of [the rule] has been fulfilled—that the defendant expressed an intention to preserve a particular pretrial issue for appeal and that neither the [state] nor the district court opposed such a plea.

Id. at 417, 882 P.2d at 8 (internal quotation marks and citation omitted). Similar to *Shay,* the State and the district court in this case were both aware of Defendant's intent to appeal the court's sentencing authority. *Shay,* 2004–NMCA–077, ¶ 5, 136 N.M. 8, 94 P.3d 8. The State did not voice any opposition, and the district court said "Sure" and accepted the plea. Given the jurisdictional nature of the issue and the way Defendant presented it before the district court, our review is proper on direct appeal in both cases. Rules 5–801 and 5–802 addressing habeas corpus relief do not preclude direct review of an illegal sentence in these circumstances.

CONCLUSION

{13} We affirm the district court's judgment, sentence and commitment.

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

I CONCUR: CELIA FOY CASTILLO, Judge.

IRA ROBINSON, Judge (dissenting).

ROBINSON, Judge (dissenting).

{15} A violation of the IAD occurred when the supplemental information, containing the habitual charges, had not been tried during the required 180–day period provided for in the IAD. An habitual criminal information sets out certain charges that the Prosecution must prove and the Defense must defend against. These are issues which the court must decide. Among them: Is Defendant the same person who committed the prior crimes charged? Are the prior crimes ones for which Defendant was convicted during the previous ten years? Are the prior convictions considered felonies in New Mexico? There may also be issues of authentication of documents from other states. Evidence and testimony must be presented and a decision must be made based upon this evidence. Therefore, the matter was untried at the completion of the 180–day period and, under the IAD, the habitual charges should be dismissed.

{16} The Majority views this as simply a sentence enhancement and the IAD does not apply to sentencing. I see a difference between an habitual and a regular sentencing proceeding. In a regular sentencing hearing, neither the Prosecutor nor the Defense has any obligation to present sworn testimony

upon which a judge must base his decision on specific substantive issues. In an habitual proceeding, these issues must be tried to the court.

{17} Another important difference is that when the State seeks a true sentence enhancement based on aggravated circumstances, it does not need to file an information while, in a habitual proceeding, it is necessary to file the habitual allegations as separate charges by a new or supplemental information. Because an habitual proceeding is more a trial than a sentencing, it is covered by the IAD. It is a hearing on the merits, after which sentencing takes place.

{18} Therefore, Defendant has a right, under the IAD, to a final disposition of the habitual offender charges against him within 180 days of serving a request contemplated by the IAD. The State failed in its obligation and the criminal information containing the habitual charges should be dismissed.

{19} The Majority, on page 643 of the opinion, states that "[t]he purpose of the IAD is to encourage the prompt disposition of outstanding charges to address uncertainty in treatment and rehabilitation for prisoners subject to a detainer from another jurisdiction. Section 31–5–12, art. 1." I cannot imagine a defendant having more uncertainty and trepidation than when he is waiting to have a fully contested hearing that will decide whether he will spend a long time, or even the rest of his life, in prison. I would reverse.

{20} I, therefore, respectfully dissent.

2006-NMCA-071

137 P.3d 645

STATE of New Mexico, Plaintiff–Appellee.

v.

Andrew WALTERS, Sr., a/k/a Andy Walters, Sr., Defendant–Appellant,

and

State of New Mexico, Plaintiff–Appellee,

v.

Stephanie Lopez, Defendant–Appellant,

and

State of New Mexico, Plaintiff–Appellee,

v.

Steven Lopez, Defendant–Appellant.

Nos. 24,585, 24,566, 25,110.

Court of Appeals of New Mexico.

April 27, 2006.

Certiorari Granted, No. 24,585, No. 29,806, June 14, 2006.

Certiorari Granted, No. 25,110, No. 29,801, June 14, 2006.

Certiorari Granted, No. 24,556, No. 29,803, June 15, 2006.

As Corrected June 21 and June 29, 2006.

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Liane E. Kerr, Albuquerque, NM, for Appellant Stephanie Lopez.

Law Office of J.B. Jacks, Jack Bennett Jacks, Albuquerque, NM, for Appellant Steven Lopez.

OPINION

VIGIL, Judge.

{1} The dispositive issue in this case is whether Defendants were denied their constitutional rights of confrontation and cross-examination under the Sixth Amendment to the United States Constitution at their joint jury trial when interlocking confessions or statements of each Defendant were admitted into evidence and none of them testified. We determine that *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), were violated and require the convictions to be reversed because the error in admitting the interlocking confessions or statements was not harmless beyond a reasonable doubt. We therefore remand the cases with instructions to grant each Defendant a separate trial.

INTRODUCTION

{2} This case involves the convictions of Stephanie Lopez (Mother), Andrew Walters (Father), and Steven Lopez (Uncle) following a jury trial for the abuse resulting in the death and sexual assault of five-month-old Baby. Mother was convicted of negligently permitting child abuse resulting in death or great bodily harm, and negligently permitting child abuse not resulting in death or great bodily harm. NMSA 1978, § 30–6–1(D) (2005). Father was convicted of intentional child abuse resulting in death or great bodily harm, conspiracy to commit intentional child abuse resulting in death or great bodily harm, criminal sexual penetration of a child under thirteen years of age in the first degree, intentional child abuse not resulting in death or great bodily harm, and negligently permitting child abuse not resulting in death or great bodily harm. Section 30–6–1(D); NMSA 1978, § 30–28–2 (1979); NMSA 1978, § 30–9–11(A), (C) (2003). Uncle was convicted of intentional child abuse resulting in death or great bodily harm, conspiracy to commit intentional child abuse resulting in death or great bodily harm, and criminal sexual penetration of a child under thirteen in the first degree. Section 30–6–1(D); Section 30–28–2; Section 30–9–11(A), (C). Grandmother and a second uncle were also convicted of various offenses, but they did not appeal. Mother, Father, and Uncle appeal.

BACKGROUND

{3} Baby lived in a bedroom with Mother, Father, and her 18–month–old brother in a mobile home owned by Baby's grandmother and grandmother's partner. Some weeks before Baby's death, Mother's twin brother (Uncle) moved into the bedroom. Mother, Father, and Baby's brother shared a futon in the bedroom. When Baby did not sleep in her bounce chair in the room, she also shared the futon. Uncle slept on the floor. Father's brother (second uncle) sometimes visited Baby's family in the room.

{4} On July 19, 2002, Baby was taken to the emergency room where she died. The cause of death was cranial cerebral injuries

due to the fact that she was a battered baby. She had bruising all over her head and ears and human bite marks on her face, neck, and body. A blunt force injury to Baby's head in the last three days or less resulted in a large subdural hematoma on her brain. X-rays revealed Baby's skull was fractured in two places, on two different bones, and that the fractures were 5–7 days old. Old blood was found during brain tissue examination, which meant that Baby had received a separate brain injury in the past. Baby's optical nerves were filled with both fresh and old blood, which meant that she had been violently shaken on at least two occasions. X-rays of Baby's torso revealed two broken ribs that were broken several weeks before her death. Baby also had recent bucket-handle fractures of her thighs and one of her arms. This type of fracture results from the limbs being forcefully twisted or yanked causing the growth plate to be separated from the bone, thus resembling the profile of a bucket handle being lifted from its horizontal position.

{5} In addition, Baby's anus and vagina were both injured. Baby had a significant abrasion on her buttocks which went all the way into the buttocks which was consistent with sexual assault. Immediately after Baby was pronounced dead, a nurse observed that her anus gaped open with no muscle tone. At autopsy, the anal opening was dilated to a full inch. Internal examination showed an injury a half-inch to an inch inside the anal opening and vaginal injuries inside the labia minora, including three small injuries to the hymen.

THE STATEMENTS

{6} On July 19, 2002, around 10 a.m., Mother called 911 and reported that her baby was not breathing as a result of a fall around 3 a.m. The dispatcher overheard conversations between Mother and grandmother when the call was made. Baby was taken to the hospital and was pronounced dead at 11:10 a.m. At the hospital, Mother had conversations with a nurse, a social worker with the Children, Youth, and Families Department, and a Senior Field Medical Investigator for the Office of the Medical Investigator concerning Baby. Father also had conversations concerning Baby at the hospital with the same social worker and investigator. Mother, Father, Uncle, and Baby's second uncle were interviewed later that day at the Doña Ana County Sheriff's Department.

A. Mother's Statements

{7} Investigator Mark Perea of the Doña Ana County Sheriff's Department interviewed Mother. She told him that a few days before July 19, Uncle had thrown Baby up into the air and Baby had come down. Father had also thrown Baby up, and when he did so, Baby hit her head on the ceiling. She also said that Father dropped Baby while throwing her. Mother said she told Father two or three times to stop throwing Baby. Mother told Officer Perea that the night before, she had a few beers before falling asleep. Father and Baby's two uncles stayed up in the room. When she awoke around 9:45 a.m., Baby was bruised, pale, and not breathing. When she asked Father what had happened, he told her that Uncle had thrown Baby up into the air, and that he found Baby on the floor at 7 a.m. and put her back in her bouncy. Mother also said she saw Father throw Baby as well. They took Baby into the living room and Father started CPR while Mother called grandmother. After calling grandmother, Mother called 911. When Officer Perea asked Mother about the bruises on Baby's ears and bite marks on her body, she said the bruises may have been caused by the way Baby slept in her bouncy and that Baby's 18–month–old brother had bitten Baby in the past.

B. Father's Statements

{8} Father was interviewed by Officer Lindell Wright of the Doña Ana County Sheriff's Department, and they were later joined by Sergeant Ed Miranda. Father was transported from the hospital to the police station at 11:49 a.m. An officer drove him because he needed a ride. The interview took place in a room with the door closed because of the noise in the hallway, and Father was not given warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), before the interview started. However, Officer Wright told Father he was

free to stop talking and leave at any time. Father gave no indication he wanted to leave and was very cooperative. The first part of the interview lasted from about 4:25 p.m. until 5:15 p.m. In the first part of the interview, Father recounted his activities from the previous night. He said he got off work at 5 p.m. and arrived home around 6 p.m. Sometime around 8 p.m., he picked up Uncle at work and they purchased a case of beer. They returned to their house and spent the rest of the night in their room with Mother, Baby, and Baby's brother. He said he went to sleep between 12:30 and 1 a.m., and checked Baby around 3 a.m. He then got up, played with Baby, and gave her a baby blanket as the sun was coming up, and changed Baby's diaper around 7 a.m. He and Mother discovered that Baby was not breathing around 10 a.m., and the 911 call was made. In this part of the interview, Father admitted only that Baby had fallen off her bed during the night and that he caused two bite marks on her ribs, after he initially claimed that his 18–month–old son made the bite marks. At 5:15 p.m., Father was given a 30–40 minute break for food and a soda.

{9} After the break, Officer Wright told Father that Baby was dead, and Father broke down. Sergeant Miranda had interviewed the 911 dispatcher and hospital personnel, had taken photographs of Baby, and then joined the interview. Officer Wright decided to give Father *Miranda* warnings at this time because the detectives had gathered evidence that was inconsistent with his statement. Father was told he was still free to go, and no threats or promises were made to Father to induce him to continue the interview. Father carefully read and signed the sheet acknowledging receipt of his *Miranda* warnings before proceeding with the interview.

{10} After receiving the *Miranda* warnings Father admitted to throwing Baby into the air with Baby hitting her head on the ceiling four days before she died. Father admitted bruising Baby. "I didn't mean for it to leave a bruise like that. Like I left her a bruise like that before, just from messing with her. [Mother] gets mad." He subsequently admitted that the night before, he and Uncle were "playing a little rough" with Baby by throwing her into the air, with Baby hitting the ceiling, and being dropped onto the floor when he "missed" her. He identified a particular bruise on a photograph as being caused when Baby hit the ceiling and another when she landed on the floor as well as various bite marks he acknowledged he made. Father said Baby hit the ceiling three times and that he also dropped her "two or three times" on the floor. After Baby was dropped onto the floor, "[t]hen we just continued playing the game and then I was messing with her and everyone went to sleep." Father said Baby cried when she was dropped onto the floor, and when he was asked what he did to calm her down, he answered, "I just kept throwing her in the air."

{11} Father was also shown a photograph of Baby's anus, and Father became very upset and profane, saying they were "not going to find any semen." Father said he cleaned Baby's butt with a baby wipe, wrapped the baby wipe around his left index finger, and put the wrapped finger into Baby's anus up to the second knuckle at the middle of his finger. When he took his finger out, "[t]here was a little bit of blood on there."

C. Uncle's Statements

{12} In the meantime, Investigator Greg Boeglin of the Doña Ana County Sheriff's Department interviewed Baby's Uncle. Uncle at first only said that Mother, Father, and he (together with Baby) were in the room playing video games when Baby's second uncle and a friend came in and joined them for some beers. After watching a movie and drinking beers, he went to bed at 2 a.m. He initially said he drank six beers, then later said it was ten. Nothing was wrong with Baby when he went to bed. When he awoke the next morning, he saw Baby, and did not notice anything. He then repeated he did not see any bite marks or anything wrong with Baby other than a little pink mark on her forehead. Finally, after Investigator Boeglin was informed about other interviews, including the one with Father, he asked Uncle whether he ever threw Baby up into the

air. Uncle answered, "[s]ometimes we would[,]" and he acknowledged that Baby had hit her head while being thrown. Uncle was asked if anyone threw Baby into the air the previous night, and he first answered, "[n]o, I don't think so[,]" then changed to, "I don't remember if I did." On another occasion, Uncle said that he "was throwing her in the air," but answered "I don't think so" when Investigator Boeglin asked him if she was injured.

{13} Sergeant Edward Miranda decided to continue interviewing Uncle himself rather than trying to tell Investigator Boeglin everything he had just learned from Father's interview. Sergeant Miranda asked Father to speak to Uncle before he started Uncle's interview. Father agreed and told Uncle, "[g]o ahead and tell them the truth" and left. Ultimately, Uncle confessed that he joined Father in throwing Baby in the air, hitting her head on the ceiling, and dropping her on the floor. When Sergeant Miranda used the term "physical abuse," Uncle became offended and said, "We didn't physically abuse her. We were just playing with her." Sergeant Miranda said: "Okay. So to make sure, what you're telling me is you and [Father] were playing with [Baby] by throwing her up into the air and allowing her to fall onto the floor?" Uncle answered, "Yes."

{14} Sergeant Miranda then showed Uncle a photograph of Baby's anus. Uncle immediately said, "Oh, no. I didn't do that. I didn't do nothing like that." Uncle asserted that neither Father nor any other males in the house were responsible for sexual abuse towards Baby. Sergeant Miranda therefore asked Uncle what he did with Baby. Uncle was equivocal and said he did not remember. Sergeant Miranda later asked, "Could it have been you?" Uncle answered: "Maybe. I don't know." Uncle asked, "What if I did do it?" and "What can happen to me?" Uncle then talked about how many beers he drank, and told Sergeant Miranda he could not remember starting the sex act but he remembered stopping it because he realized it was wrong. Later, Uncle said he remembered starting the act, and that Baby was awake at the time. Sergeant Miranda then asked point-blank: "Did you have sex with [Baby]?" Uncle answered: "Yes."

D. Second Uncle's Statements

{15} Investigator Boeglin also interviewed Baby's second uncle. He told Investigator Boeglin he came home from work around 8:15 a.m. and heard Baby crying. Mother was making her a bottle. Later, grandmother woke him up and was hysterical. Father was crying and throwing up and Mother was giving Baby CPR. He told Investigator Boeglin that grandmother had recently seen Father throwing Baby up into the air, and grandmother told him, "If you don't cut that shit out I'm going to take [Baby] away from you."

THE MOTIONS FOR SEVERANCE AND TO SUPPRESS

{16} Prior to trial, the State filed a statement for joinder seeking a joint trial of all Defendants. In response, Father filed an opposition to the statement for joinder stating in part, "[e]ach of the Defendants may give statements that would be inadmissible against the other party and therefore a violation of each defendant's right to cross-examine the witnesses against them." Mother filed a motion for severance arguing in part that all defendants had given statements to law enforcement officers and specifically that Father and Uncle had made admissions of their own abusive or negligent conduct which would be inadmissible against Mother in a separate trial. Uncle joined in the motion for severance and he argued in part that "[t]here are statements and confessions which should be limited to the defendant who made them."

{17} The severance question was heard by the trial court at a pretrial hearing. At the hearing, general assertions were made by counsel for Defendants that statements made by the others were accusatory to them and inadmissible hearsay. Defendants contended that admitting these statements into evidence would result in the admission of statements they could not cross-examine and that this would violate their confrontation rights. The trial court denied severance.

{18} Father renewed the motion for severance immediately prior to trial, and all De-

fendants renewed the motion for severance following opening statements. Defendants added at this time that *Bruton* would be violated by admission of their respective statements in a joint trial. Mother suggested that an appropriate alternative to severance would be to redact all the accusations Father made against her from his statements before admitting them into evidence. All motions were again denied, with the trial court stating that each Defendant had preserved the issue. Defendants were granted a continuing objection to the admission of statements made by each other.

{19} Father also filed a motion to suppress the statements he gave to Officer Wright and Sergeant Miranda, asserting the statements were involuntary and that he was entitled to receive *Miranda* warnings before the interview commenced. Since Father did not file the motion until the morning of the pretrial hearing and the trial court had not seen it, a ruling on the motion was deferred until the morning of trial. Following a hearing during the trial, the motion was denied.

{20} In its final instructions, the trial court instructed the jury that before it could consider Father's statement and Uncle's statement for any purpose, it must first determine that each such statement was given voluntarily. The jury was also told that Mother's statement given to investigator Mark Perea could only be considered as evidence against her and not any other Defendant. Similarly, the jury was instructed that second uncle's statement to Investigator Greg Boeglin could only be considered against him and not against any other Defendant.

ANALYSIS

{21} We first address Father's motion to suppress and preservation before beginning our confrontation clause analysis. In determining whether Father's motion to suppress was properly denied, we decide whether the law was properly applied to the facts, viewing the facts in the light most favorable to the State as the prevailing party, indulging all reasonable inferences in support of the trial court's ruling, and disregarding all evidence and inferences to the contrary. *See State v. Jason L.*, 2000–NMSC–018, ¶ 10, 129 N.M. 119, 2 P.3d 856; *State v. Joe*, 2003–NMCA–071, ¶ 6, 133 N.M. 741, 69 P.3d 251. Father argues on appeal that his statement was involuntary and should be suppressed because no *Miranda* warnings were given to him at the beginning of his interview and that subsequently giving him the warnings did not cure the initial failure to advise him of his *Miranda* rights. Applying the foregoing standard of review, we disagree and affirm the trial court.

{22} Further, we conclude that Defendants properly preserved for appeal their argument that their Confrontation Clause rights were violated when they were denied separate trials. *See State v. Martinez*, 1996–NMCA–109, ¶¶ 11–12, 122 N.M. 476, 927 P.2d 31 (holding that Confrontation Clause claim was preserved for appellate review because a decision of the trial court was fairly invoked even though the defendant did not specifically mention the Confrontation Clause or his constitutional right to confront the witnesses at the motions hearing).

A. Right of Confrontation and Cross–Examination

{23} We are thus squarely confronted with the question of whether Defendants' Confrontation Clause rights were violated. This presents an issue of law which we review de novo. *Id.* at ¶ 14.

{24} We begin with cases leading up to *Crawford*. In *Delli Paoli v. United States*, 352 U.S. 232, 233, 77 S.Ct. 294, 1 L.Ed.2d 278 (1957), a joint trial resulted in the conviction of five co-defendants of conspiring to possess and transport alcohol in unstamped containers and evade payment of federal taxes on the alcohol. None of the defendants testified at trial. However, one of the defendants gave a written confession after the conspiracy ended, *id.*, and it was admitted into evidence with repeated instructions that it was to be considered solely in determining the guilt of the confessing defendant and not the guilt of any other defendant. *Id.* at 234. The United States Supreme Court held that no reversible error was committed in admitting the confession at the joint trial. *Id.* at 243, 77 S.Ct. 294. Five Justices assumed that the jury followed the instructions of the trial court that the confession was not to be

considered in determining the guilt or innocence of the non-confessing defendants. Further, the majority observed, the confession merely corroborated what the government otherwise proved independent of the confession. *Id.* at 241–42, 77 S.Ct. 294. Four justices dissented, concluding that the trial court's admonition could not effectively wipe out the confession from the minds of the jurors. *Id.* at 246–47, 77 S.Ct. 294. Giving the limiting instruction was described as a " 'recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's.' " *Id.* at 247, 77 S.Ct. 294 (quoting Judge Learned Hand in *Nash v. United States,* 54 F.2d 1006, 1007 (2d Cir.1932)). In response to the majority's observation that the co-defendants' guilt was otherwise proven by non-hearsay evidence, the dissent emphasized this was the best reason for trying them free from the inevitable unfairness of being affected by evidence which was not admissible against them. *Delli Paoli,* 352 U.S. at 248, 77 S.Ct. 294.

{25} *Delli Paoli* was overruled in *Bruton,* 391 U.S. at 126, 88 S.Ct. 1620. In *Bruton,* two defendants were jointly tried for the armed robbery of a post office. *Id.* at 124, 88 S.Ct. 1620. The co-defendant confessed to a postal inspector that he and Bruton had committed the armed robbery. *Id.* Neither defendant testified, but the confession inculpating Bruton was admitted into evidence with instructions to the jury that it was to disregard the confession in determining Bruton's guilt or innocence. *Id.* The Supreme Court expressly repudiated *Delli Paoli* and held that under the circumstances, Bruton's constitutional right of cross-examination secured by the Confrontation Clause of the Sixth Amendment to the United States Constitution was violated. *Bruton,* 391 U.S. at 126, 88 S.Ct. 1620. The holding was based on the recognition that despite the instructions to the contrary, there was an unacceptable risk that the jury would look to the incriminating extrajudicial confession of the co-defendant in determining Bruton's guilt. *Id.* The co-defendant's confession was properly before the jury during its deliberation in considering his guilt, so there was a likelihood that the jury would believe he made the statements and that not only were the self-incriminating portions true, but those implicating Bruton as well. *Id.* at 127, 88 S.Ct. 1620. Thus, introduction of the co-defendant's confession added weight to the prosecution's case in a form not subject to cross-examination. *Id.* at 127–28, 88 S.Ct. 1620. A jury cannot follow an instruction to consider a confession as it relates to a defendant making the confession but ignore it where it simultaneously inculpates the co-defendant. *Id.* at 129–30, 88 S.Ct. 1620. The Supreme Court agreed that such an instruction " 'is a kind of "judicial lie" [which] undermines a moral relationship between the courts, the jurors, and the public; like any other judicial deception, it damages the decent judicial administration of justice.' " *Id.* at 132–33 n. 8, 88 S.Ct. 1620 (quoting *United States v. Grunewald,* 233 F.2d 556, 574 (2d Cir.1956) (Frank, J., dissenting)).

{26} In *Parker v. Randolph,* 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979), the United States Supreme Court considered, but was unable to decide, an additional element in the *Bruton* matrix: whether *Bruton* applies when the defendant has confessed and his confession interlocks with and supports the co-defendant's confession. *Parker,* 442 U.S. at 64, 99 S.Ct. 2132. This prosecution for murder during the commission of a robbery consisted primarily of "interlocking" confessions of the respondents, none of whom testified. *Parker,* 442 U.S. at 66, 99 S.Ct. 2132. The confessions were admitted through the testimony of several police officers, with instructions to the jury that each confession could be used only against the defendant who gave it and could not be considered as evidence of a co-defendant's guilt. *Id.* at 66–67, 99 S.Ct. 2132. All of the defendants were convicted. *Id.* at 66, 99 S.Ct. 2132. The Tennessee Supreme Court characterized the confessions as "interlocking inculpatory confessions" which "clearly demonstrated the involvement of each, as to crucial facts such as time, location, felonious activity, and awareness of the overall plan or scheme," and concluded no *Bruton* violation occurred. *Parker,* 442 U.S. at 67–68, 99 S.Ct. 2132 (internal quotation marks and citation omitted). The United States District Court for the District of Tennessee disagreed

and granted writs of habeas corpus to the respondents, which the Court of Appeals for the Sixth Circuit affirmed. *Id.* at 68, 99 S.Ct. 2132. Two different views emerged in the Supreme Court on whether *Bruton* was violated.

{27} The first view in *Parker* reasoned that a defendant's own confession constitutes the most "damaging" and "probative" evidence against him. 442 U.S. at 72, 99 S.Ct. 2132 (internal quotation marks and citation omitted). Thus, when a defendant admits his own guilt, the incriminating statements of a co-defendant will seldom, if ever, have a "devastating" effect on the defense. *Id.* at 72–73, 99 S.Ct. 2132 (internal quotation marks and citation omitted). Under this view, the constitutional right of cross-examination "has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence." *Id.* at 73, 99 S.Ct. 2132. The justices subscribing to this view would therefore "hold that admission of interlocking confessions with proper limiting instructions conforms to the requirements of the Sixth and Fourteenth Amendments to the United States Constitution." *Id.* at 75, 99 S.Ct. 2132.

{28} The second view expressed in *Parker* was that just because a defendant made an extrajudicial admission of guilt which was unchallenged before the jury "is not an acceptable reason for depriving him of his constitutional right to confront the witnesses against him." 442 U.S. at 84, 99 S.Ct. 2132 (Stevens, J., dissenting). Creating a *Bruton* exception when there are "interlocking" confessions makes two invalid assumptions. "First, it assumes that the jury's ability to disregard a co[-]defendant's inadmissible and highly prejudicial confession is invariably increased by the existence of a corroborating statement by the defendant." *Parker*, 442 U.S. at 84, 99 S.Ct. 2132. This assumption fails because it remains unrealistic to assume that the jury will follow the judge's instructions to disregard the co-defendant's confession when evaluating each defendant's guilt. *Id.* at 87–88, 99 S.Ct. 2132. Secondly, such an exception to *Bruton* is based on the false assumption "that all unchallenged confessions by a defendant are equally reliable." *Parker*, 442 U.S. at 84, 99 S.Ct. 2132. This assumption is false because of the "infinite variability" of inculpatory statements which defendants and co-defendants can make and their likely effect on juries. *Id.* A plurality decision resulted because Justice Blackmun concluded that any error which resulted from the admission of the confessions in violation of *Bruton* was harmless beyond a reasonable doubt. *Id.* at 77, 99 S.Ct. 2132 (Blackmun, J., concurring in part and concurring in the judgment).

{29} The United States Supreme Court adopted the second *Parker* view when it decided *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987). The question presented was "whether *Bruton* applies where the defendant's own confession, corroborating that of his co[-]defendant, is introduced against him." *Cruz*, 481 U.S. at 188, 107 S.Ct. 1714. The New York Court of Appeals had affirmed the defendant's murder conviction after concluding that "*Bruton* did not require the co[-]defendant's confession to be excluded because [the defendant] had himself confessed and his confession 'interlocked' with [co-defendant's]." *Cruz*, 481 U.S. at 189, 107 S.Ct. 1714. The United States Supreme Court reversed, holding that "where a nontestifying co[-]defendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." *Id.* at 193, 107 S.Ct. 1714 (internal citation omitted). The basis for the holding is the recognition that a nontestifying co-defendant's confession which interlocks with the defendant's corroborates the defendant's own confession, making it even more damaging to the defendant. *Id.* at 192, 107 S.Ct. 1714. Again, the Supreme Court recognized that a jury could not be expected to follow an instruction to ignore the co-defendant's confession whose reliability was now enhanced by the defendant's own confession. *Id.* at 193, 107 S.Ct. 1714. "Having decided *Bruton*, we must face the honest consequences of what it holds." *Id.*

{30} Finally, *Crawford* unequivocally and without exception holds that the admission of "testimonial evidence" to prove the truth of the matter violates the Confrontation Clause of the Sixth Amendment unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford,* 541 U.S. at 68, 124 S.Ct. 1354. Specifically, these are "demands" the Sixth Amendment requires to be satisfied to protect the constitutional right of confrontation where hearsay "testimonial evidence" is admitted into evidence against a criminal defendant. *See id.* *Crawford* therefore assumes that certain statements are admissible under traditional hearsay rules, but if they constitute "testimonial evidence," their admission violates confrontation unless the *Crawford* requirements are satisfied. *Id.* In this case, the statements made by Mother, Father, and Uncle to the police are specifically designated as "testimonial evidence" by *Crawford:* "Whatever else the term [testimonial evidence] covers, it applies at a minimum to . . . police interrogations." *Id.* Furthermore, no Defendant had an opportunity to cross-examine the other's statements. This would seem to end the inquiry about whether *Crawford* was violated. The State argues that the statements were nevertheless admissible for two reasons.

{31} First, the State argues that the statements were admissible under *Crawford* because they were made in furtherance of a conspiracy to cover up the crime. We reject this argument. While *Crawford* notes that statements in furtherance of a conspiracy are not by their nature "testimonial," 541 U.S. at 56, 124 S.Ct. 1354, *Crawford* is also clear and unequivocal in stating that "police interrogations" constitute "testimonial evidence" subject to its requirements. *Id.* at 68, 124 S.Ct. 1354. Therefore, the admission of statements made by a co-conspirator during the course and in furtherance of a conspiracy are governed by Rule 11–801(D)(2)(e) NMRA *unless* the statements are "testimonial." *Cf. State v. Williams,* 131 Wash.App. 488, 128 P.3d 98, ¶¶ 9–11 (2006) (holding that no *Crawford* violation occurred when a co-conspirator's out-of-court statements to various people during the conspiracy were admitted into evidence and the co-conspirator's confession to the police after his arrest in which he implicated the defendant was neither offered nor admitted into evidence). Since all the statements at issue here constitute "testimonial evidence," under *Crawford,* their admissibility is subject to its requirements. Further, admitting the statements into evidence violated Defendant's confrontation rights because *Crawford's* demands for admissibility were not satisfied.

{32} Secondly, the State argues, the statements were not offered for their truth, but to show that Defendants were making up lies to hide the crimes and their consciousness of guilt. *Crawford* specifically acknowledges that, "The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U.S. at 60 n. 9, 124 S.Ct. 1354. The State argues the statements are therefore admissible under *Tennessee v. Street,* 471 U.S. 409, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985), decided before *Crawford,* and *United States v. Holmes,* 406 F.3d 337 (5th Cir.2005), and *People v. Lewis,* 11 A.D.3d 954, 782 N.Y.S.2d 321 (2004), decided after *Crawford.* However, each of these cases is distinguishable.

{33} In *Street,* the prosecutor relied on a detailed statement the defendant gave to police officers in which he admitted to burglary and murder. 471 U.S. at 411, 105 S.Ct. 2078. An accomplice had also given a statement admitting to the crimes. *Id.* At trial the defendant testified he did not commit the burglary or participate in the murder. *Id.* He also maintained that his confession was coerced. *Id.* Specifically, he claimed that an officer read from the accomplice's statement and directed him to say the same thing. *Id.* In rebuttal, the officer testified this did not happen, and the accomplice's statement was introduced into evidence to show it was different from the defendant's, with the jury being instructed that it could not be considered for its truth, but for rebuttal purposes only. *Id.* at 411–12, 105 S.Ct. 2078. In closing arguments the prosecutor referred to the accomplice's statement only to dispute the defendant's claim that he had been forced to repeat the accomplice's statement. *Id.* at

412, 105 S.Ct. 2078. The United States Supreme Court concluded that the Confrontation Clause was not violated because the accomplice's statement was used only for a non-hearsay purpose—to prove what happened when the defendant confessed—and not for a hearsay purpose—to prove what happened at the murder scene. *Id.* at 414, 105 S.Ct. 2078. The Supreme Court expressly stated that if the jury had been asked to infer that the accomplice's statement proved that the defendant participated in the murder, then the evidence would have been hearsay, and Confrontation Clause concerns would have been implicated because the accomplice was not available for cross-examination. *Id.* Our discussion of harmless error which follows demonstrates that the prosecutor argued to the jury that the statements of Mother, Father, and Uncle proved that each was guilty. This fact alone distinguishes *Tennessee* and makes it inapplicable.

{34} In *Holmes,* an attorney was convicted of being in a conspiracy with a court clerk to back-date and file a petition in a medical malpractice case he was handling to make it appear that the petition was filed within the statute of limitations. 406 F.3d at 343–44. Before criminal charges were filed, the clerk gave a deposition in which she supported the defendant's version of what he claimed had occurred. *Id.* at 345, 350. After the indictment was filed, she became physically incapacitated from life-threatening health problems and died while the charges were pending. *Id.* at 346 n. 9. The deposition was admitted into evidence when the defendant did not object to its admission, *id.* at 347, and the defendant then repeatedly argued that the deposition testimony was true. *Id.* at 350. On the other hand, the prosecutor did not offer or use the deposition testimony for its truth, but to prove it was false through independent evidence. *Id.* at 349. Assuming that the deposition was "testimonial" under *Crawford,* the court concluded there was no constitutional error because the prosecutor did not use the deposition testimony to prove the truth of the matter asserted, and this non-hearsay use of the deposition posed no Confrontation Clause concerns. *Holmes,* 406 F.3d at 349. *Holmes* clearly does not assist the State here. All Defendants objected to admitting the others' statements into evidence, and Defendants did not argue or agree that their respective statements were true. The prosecutor in this case argued not only that the statements were true, but that they proved each Defendant guilty.

{35} Finally, in *Lewis,* the defendant was interviewed by police officers in connection with two murders, and he initially denied all involvement. 782 N.Y.S.2d at 322. The officers were permitted to testify that he admitted his culpability after they told him that his co-defendant had implicated him in the crimes and that there were witnesses who identified him at the crime scene. *Id.* Agreeing that the co-defendant's statement to the officers was "testimonial" under *Crawford,* the court concluded that no Confrontation Clause violation occurred because it was not offered for the truth of the facts asserted therein, but to show the circumstances in which the defendant admitted his guilt and "appropriate limiting instructions" were given to the jury. *Lewis,* 782 N.Y.S.2d at 322. Again, the "testimonial" statements in this case were admitted as substantive proof of guilt, and not for the sole purpose of showing the circumstances under which the statements were given.

{36} We must give effect to and apply the ever-increasing restrictions on the use of a co-defendant's out-of-court statements that begin with *Delli Paoli* and end with *Crawford.* In this case, co-Defendants' statements incriminating Defendants were admitted into evidence without an opportunity for cross-examination. *Cruz* is directly applicable because the statements made by Mother, Father, and Uncle to the police are not independently admissible. In this regard, *Crawford* specifically declares that *Cruz* is faithful to the framers' understanding of the Confrontation Clause because it is a decision in which "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford,* 541 U.S. at 59, 124 S.Ct. 1354. Thus, in light of *Crawford,* we must conclude that Defendants' Confrontation Clause rights protected by the

Sixth Amendment were violated when the interlocking confessions or statements were admitted into evidence at their joint trial. *See State v. Johnson,* 2004–NMSC–029, ¶ 7, 136 N.M. 348, 98 P.3d 998 ("[U]nder *Crawford,* because [the d]efendant did not have an opportunity to cross-examine [the accomplice], the admission of [the accomplice's] statement constituted a per se violation of [the d]efendant's Sixth Amendment right of confrontation."); *see also State v. Forbes,* 2005–NMSC–027, ¶ 13, 138 N.M. 264, 119 P.3d 144 ("In *Crawford,* ... the United States Supreme Court confirmed what the New Mexico Supreme Court announced in [*State v. Earnest,* 103 N.M. 95, 99, 703 P.2d 872, 876 (1985)]—that a custodial statement by an alleged accomplice to a police officer is not admissible unless the declarant is unavailable and the defendant had an opportunity to cross-examine the declarant."); *State v. Alvarez–Lopez,* 2004–NMSC–030, ¶ 24, 136 N.M. 309, 98 P.3d 699 ("Seen through the newly shaped lens of *Crawford,* ... [i]t is clear from the facts that [the d]efendant had no opportunity to cross-examine [the accomplice].... Therefore, [the d]efendant's Sixth Amendment right to confrontation was violated by the admission of these statements into evidence at his trial.").

B. Harmless Error

{37} While both *Cruz* and *Crawford* hold that the admission of a non-testifying co-defendant's incriminating statement violates the Confrontation Clause, they both leave open the possibility that the admission of such evidence may nevertheless be harmless. *Cruz,* 481 U.S. at 194, 107 S.Ct. 1714 (noting that the defendant's own confession may be considered on appeal in assessing whether any Confrontation Clause violation was harmless); *Crawford,* 541 U.S. at 42 n. 1, 124 S.Ct. 1354 (expressly declining to express an opinion on whether confrontation violation was harmless).

{38} Our own Supreme Court guides us on how to determine whether the admission of a non-testifying co-defendant's incriminating statement in violation of the Confrontation Clause may be considered as harmless error. These decisions are *Johnson,* 2004–NMSC–029, 136 N.M. 348, 98 P.3d 998 and *Alvarez–Lopez,* 2004–NMSC–030, 136 N.M. 309, 98 P.3d 699. Both decisions inform us that the burden is on the State to establish that the constitutional error was "harmless beyond a reasonable doubt" pursuant to *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (internal quotation marks omitted). *Johnson,* 2004–NMSC–029, ¶ 8, 136 N.M. 348, 98 P.3d 998; *Alvarez–Lopez,* 2004–NMSC–030, ¶ 25, 136 N.M. 309, 98 P.3d 699. Under this inquiry, if there is a "reasonable possibility" that the inadmissible evidence "might have" contributed to a defendant's conviction, the constitutional error is not harmless. *Johnson,* 2004–NMSC–029, ¶ 9, 136 N.M. 348, 98 P.3d 998 (internal quotation marks and citation omitted); *Alvarez–Lopez,* 2004–NMSC–030, ¶ 25, 136 N.M. 309, 98 P.3d 699.

{39} In determining whether the error was harmless, we must be able to conclude beyond a reasonable doubt that the jury verdict would have been the same in the absence of the error by looking to the effect that the constitutional error had upon the guilty verdict in *this particular case.* Constitutional error is not harmless simply because there was substantial evidence to support the conviction. The fact that overwhelming evidence of a defendant's guilt is otherwise present is not determinative because a criminal defendant has a constitutional right to have a jury decide guilt or innocence, not appellate court judges during review on appeal. Therefore, notwithstanding the presence of overwhelming evidence of a defendant's guilt, we still examine whether there is a "reasonable possibility" that the erroneous evidence "might have" affected the jury's verdict. *Johnson,* 2004–NMSC–029, ¶¶ 9–11, 136 N.M. 348, 98 P.3d 998; *Alvarez–Lopez,* 2004–NMSC–030, ¶¶ 26–27, 30, 32, 136 N.M. 309, 98 P.3d 699. Unless the answer to this question is "no" the constitutional error is not harmless beyond a reasonable doubt.

{40} In light of the realities recognized by the United States Supreme Court in *Cruz* that a co-defendant's confession which interlocks with a defendant's statement in material respects is not only extremely damaging to

a defendant, but cannot be ignored by a jury in deciding a defendant's guilt, it will be an exceedingly rare case, if one exists, where the erroneous admission of a co-defendant's confession under these circumstances can be deemed harmless beyond a reasonable doubt. Our own Supreme Court has also expressly recognized these realities. In *Alvarez–Lopez,* our Supreme Court agrees that because a defendant's own confession discloses not only how a crime was committed, but also his motive, its impact on the jury is profound to the extent that we may justifiably doubt a jury's ability to put the confession out of its mind even if it is told to do so. "Like a defendant's own confession, the incriminating statements of an accomplice often have a profound impact on the jury's verdict." *Alvarez–Lopez,* 2004–NMSC–030, ¶ 34, 136 N.M. 309, 98 P.3d 699. Therefore, instructs our Supreme Court, we must exercise "extreme caution" before determining that the erroneous admission of a co-defendant's confession that implicates the defendant is harmless. *Id.* (internal quotation marks and citation omitted).

{41} With these principles in mind, we cannot conclude that the Confrontation Clause violation in this case was harmless beyond a reasonable doubt. First, the statements interlock in material respects. Mother's statement establishes that Father and Uncle had in the past thrown Baby back and forth like a ball, striking her head on the ceiling and dropping her. On the night Baby received her fatal injuries, they were doing the same thing with Baby. Father's statement not only corroborates Mother's, he specifically adds that he and Uncle made Baby hit the ceiling and dropped her onto the floor while they were throwing her and that Mother knew it. Uncle also admits he and Father were throwing Baby, hitting her head on the ceiling, and dropping her. Baby's second uncle said grandmother had recently seen Father throwing Baby into the air. Finally, both Father and Uncle confessed to committing acts constituting criminal sexual penetration upon Baby. Under the circumstances, each statement was corroborated by the other in a form that was immune from cross-examination, and no juror could reasonably be expected to isolate and consider each statement only in connection with the Defendant who made it. On this basis alone, we would be hard pressed to conclude that there is no "reasonable possibility" that the interlocking statements might have contributed to the conviction of each Defendant. *See Johnson,* 2004–NMSC–029, ¶¶ 8–9. Thus, we cannot say that the constitutional error was harmless. *See id.*

{42} Secondly, the closing arguments remove any possibility for us to conclude otherwise. In closing argument, the prosecutor asked the jurors to use each Defendant's statement:

> Remember that you are the judges of the facts. You decide who is telling the truth, who isn't telling the truth, who has a motive for lying, who has a motive for covering up. Even when they give statements to the police. You decide who is telling the truth. If you keep in mind the police took many statements, and maybe you are wondering why. The main reason is they saw this baby girl at the hospital and they had a death, a death by child abuse and no one heard, no one saw, no one knew, and according to everyone in that house, no one is responsible, and the police were determined to find out what happened to this little girl, and that's why once they were able to get a statement from one person that caused them to go to the other person and say, "Wait a minute, you are not telling us the truth, you need to tell us the truth, because [Father] is already telling us that you, too, were throwing it up."
>
> And he will give it up a little bit. They will go to the other one and say, "wait a minute, [Uncle]," and you can see why the police had to go back and forth, because clearly they were not going to be totally honest to the police. They had something to hide. They did not want the police to know. It wasn't going to be a stretch. Someone in the house killed this baby girl. Someone between the hours of 10:00 at night on the 18th and 10:00 in the morning, 9:45 in the morning on the 19th, someone within that household killed that baby girl.

{43} The prosecutor then proceeded to use Father's statement to argue that Mother and Uncle were guilty and Uncle's statement to argue that Father was guilty. Uncle was prompted to make a motion for a mistrial during the prosecutor's closing argument asserting that the prosecutor's closing argument was urging the jury to use statements made by Defendants against each other. The motion was denied.

{44} In his closing argument, Father asserted that the police never listened to Father and what he was saying. Instead, they interrogated, suggested, intimidated, and asked leading questions to coerce Father into admitting what they wanted him to say. Father argued that he was under great stress and thus susceptible to mental coercion and the suggestiveness of the police officer's interrogations. He contended that his stress was a result of waking up and finding Baby not breathing and subsequently being isolated from the rest of his family. Father asserted that his stress was exacerbated by the officers' strategic actions in withholding the news of Baby's death for several hours, consoling him upon informing him of her death, and then presenting him with the photographs taken of Baby after her death. In conclusion, Father argued that his defense was simple—that he did not do these things to Baby and tried to tell the police initially this was the case, but the police would not listen.

{45} Uncle's closing argument focused on reasonable doubt. He pointed out he initially denied to the police officers any involvement in Baby's abuse and emphasized that no forensic evidence established his involvement in Baby's death. Uncle concluded, "What do we have left? Other than the forced and involuntary admissions in the statements that were taken?"

{46} In her closing argument, Mother emphasized that the forensic evidence at trial established that the bruises and bite marks on Baby could not be dated, supporting an inference that she did not know the complete nature and extent of Baby's injuries. Since the bites and bruises could not be dated, and considering all of Baby's injuries as inflicted the night before, all that was left was Mother's denials of abuse given to Detective Perea. Mother argued, "What we are left with, because the investigation went in the direction it went in, there has been a distortion of the character and the motivations of [Mother]."

{47} In rebuttal closing argument, the prosecutor reiterated her theme of how she wanted the jury to consider Defendants' statements. She said:

> Defense counsel for [Father] said that . . . if the police had only listened to the Defendants we might know who actually did this. I really can't tell you how many times the police did statements of all the various people. I think six times for [Uncle], four times for [Father]. I mean, how many opportunities had to be given to these people to tell the truth? So to say "we might know who actually did this if they just listened," well, they were listening, and they were figuring out who was lying to them, because then they'd have to go back, and say, wait a minute, your friend over here said you were there, and you just told me you weren't there. Or, wait a minute, [Father] said that [Uncle], you were throwing the baby up, and you said you weren't. So they were listening, unfortunately, to many lies at the beginning.

{48} The prosecutor specifically urged the jury to consider each Defendant's statements against the other, and the statements corroborated and reinforced each other in ways that positively reinforced the prosecution's case. The jury could not realistically be expected to ignore the interlocking statements in considering the guilt or innocence of the Defendant not making the statement, because each corroborated and reinforced what the Defendant himself or herself said. Furthermore, limiting instructions were only given in relation to the statements given by Mother and Baby's second uncle. No limiting instructions were given in relation to the statements given by Father and Uncle, so the jury was free to consider those statements in considering the guilt of Mother and each other. Finally, none of the statements were subject to cross-examination.

{49} We cannot conclude there is no reasonable possibility that the interlocking statements could have contributed to the guilty verdicts of Mother, Father, or Uncle. Therefore, we hold that the constitutional error committed in these cases was not harmless.

REMAINING ISSUES

{50} Mother and Father both argue that the evidence is insufficient to support their convictions. Specifically, Mother argues that the evidence is insufficient to support a finding beyond a reasonable doubt that she knowingly and negligently and without justifiable cause placed Baby in a situation that endangered Baby's life or health. Father argues that the evidence is insufficient to support a finding that he committed criminal sexual penetration of a child under thirteen years of age. We disagree and conclude that Mother's own statement and the non-hearsay forensic evidence could constitute sufficient evidence to support guilty verdicts of negligent child abuse. We also conclude that Father's own statement and the non-hearsay forensic evidence could constitute sufficient evidence to support a guilty verdict of criminal sexual penetration. *See State v. Reyes,* 2002–NMSC–024, ¶ 43, 132 N.M. 576, 52 P.3d 948 (reiterating that substantial evidence of a direct or circumstantial nature must exist to support verdict of guilt beyond a reasonable doubt as to each essential element of the crime, and that on appeal, we 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); *State v. Motes,* 118 N.M. 727, 729, 885 P.2d 648, 650 (1994) (noting that because intent is subjective, it is rarely proved by direct evidence and is almost always inferred from other facts in the case).

{51} We do not address any of the other issues raised. An advisory opinion resolves a hypothetical situation that may or may not arise, *see Weddington v. Weddington,* 2004–NMCA–034, ¶ 18, 135 N.M. 198, 86 P.3d 623, and those issues may or may not arise in the separate trials of Defendants.

CONCLUSION

{52} Punishment for even the most heinous crime can only be imposed following a trial which complies with due process that is mandated by our constitution.

> There are few subjects ... upon which [the United States Supreme Court] and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

Pointer v. Texas, 380 U.S. 400, 405, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Defendants were unable to exercise their right of confrontation and cross-examination which our constitution says must be present for a criminal trial to be fair.

{53} The convictions are reversed and the cases remanded with instructions to grant each Defendant a separate trial.

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

WE CONCUR: LYNN PICKARD and CELIA FOY CASTILLO, Judges.

2006-NMCA-073

137 P.3d 659

STATE of New Mexico, Plaintiff–Appellee,

v.

Roger STEFANI, Defendant–Appellant.

No. 24,477.

Court of Appeals of New Mexico.

May 2, 2006.

Certiorari Denied, No. 29,809, June 12, 2006.

As Corrected June 29, 2006.

[redacted]

[redacted]

[redacted]

Patricia A. Madrid, Attorney General, Santa Fe, NM, M. Anne Kelly, Assistant Attorney General, Albuquerque, NM, for Appellee.

John Bigelow, Chief Public Defender, Vicki W. Zelle, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

BUSTAMANTE, Chief Judge.

{1} Defendant appeals his convictions for trafficking methamphetamine by manufacture, conspiracy to commit trafficking, and possession of drug paraphernalia. Defendant asserts that the district court erred in denying his request for a continuance, that the jury instructions were flawed, and the convictions were not supported by substantial evidence. We reverse and remand for further proceedings consistent with this opinion.

BACKGROUND

{2} Two police officers and an expert from the New Mexico Department of Public Safety's Southern Crime Laboratory testified to the following facts at trial. Officers Ron Mullins and Casey Mullins received information that there was a methamphetamine (meth) lab in Alfred Caballero's trailer. These two officers, along with other officers, went to Caballero's trailer to conduct a "knock-and-talk." When they arrived, there was a woman and a young boy outside the trailer. The woman, later identified as Defendant's wife, denied the officers permission to enter the trailer, stating that it was not her trailer. Officer Ron Mullins testified that he knocked on the door repeatedly before Caballero answered. The officers explained to Caballero that they received information about a meth lab in his trailer, and for public safety reasons requested permission to enter the trailer to look for a meth lab. After speaking to the officers, Caballero granted consent for two officers to enter the trailer, stating, "If there is a lab in here, it's not mine. I didn't bring anything in here of that nature."

{3} The officers entered the trailer, and found components of a meth lab in the kitchen. These components included a large jar with bi-layered fluids, other glassware, tubing, funnels, solvents, a hot plate, various chemicals, and a fan in the window. The officers also found a handkerchief containing glass pipes and syringes in the kitchen. Additional meth lab components were found in a box in the northern bedroom of the trailer, including muriatic acid, lighter fluid, a baggie containing red phosphorous, flasks, a funnel, and pills containing pseudoephedrine. A .22 caliber pistol was found in the living room, inside a stand-up speaker.

{4} During the search of the trailer, the officers located Defendant hiding in a closet in the southern bedroom. Defendant initially identified himself to the officers as "Justin," but was later correctly identified by one of the officers at the scene. The officers testified that pursuant to various safety regulations, all of the glassware associated with the meth lab was destroyed on site. The only materials that were examined by the laboratory for latent fingerprints were the bullets and the pistol, but no latent prints of value were found. No other items or containers were tested for fingerprints. A small amount of brown residue, scraped off a Pyrex dish, tested positive for methamphetamine. No other containers or supplies tested positive for methamphetamine.

{5} Caballero testified to the following at trial. Defendant's wife and child came to his house early in the morning on March 31, 2003, asking if they could come in and cook breakfast. Caballero was not feeling well, so he let Defendant's wife in, then went back to bed. Caballero woke up several hours later and went to his kitchen. At that time, Caballero saw Defendant and his wife in the kitchen cooking breakfast. Caballero noticed things on the kitchen counter that were not there when he had let Defendant's wife in several hours earlier. He assumed Defendant and his wife brought those things into his kitchen with them. Caballero then went back to bed, and did not wake up again until the police arrived at 7:30 p.m. that evening.

{6} Based on the preceding testimony, Defendant was convicted of trafficking by man-

ufacture, contrary to NMSA 1978, § 30–31–20(A)(1) (1990); conspiracy to commit trafficking by manufacture, contrary to NMSA 1978, § 30–28–2 (1979) and § 30–31–20(A)(1); possession of drug paraphernalia, contrary to NMSA 1978, § 30–31–25.1(A) (2001); and concealing identity, contrary to NMSA 1978, § 30–22–3 (1963). Defendant does not challenge his conviction for concealing his identity.

DISCUSSION

{7} Defendant presents four issues on appeal. Defendant contends that (1) the district court erred in denying his motion for a continuance; (2) the jury instructions were fundamentally flawed by the failure to include an instruction on constructive possession and the inclusion of a general intent instruction; (3) failure of the jury instructions to delineate which items of evidence fell within the trafficking charge and which items fell within the possession of paraphernalia charge resulted in conviction of both crimes, thus offending principles of double jeopardy; and (4) there was insufficient evidence of each charge to support the convictions. We address each in turn.

1. Motion for Continuance

{8} Defendant contends that the district court erred in denying his request for a continuance. First, Defendant argues that the district court failed to exercise any discretion in denying the continuance by blindly following a "no continuances" policy. Second, Defendant argues that the district court's denial of the continuance violated his constitutional rights of confrontation and due process, to effective assistance of counsel, and to present a meaningful defense. Because we conclude that the district court abused its discretion in denying the continuance, we reverse on this ground. We do not reach the constitutional arguments or the ineffective assistance claims raised by Defendant.

{9} "The grant or denial of a . . . continuance [is] within the sound discretion of the [district] court, and the burden of establishing an abuse of discretion rests with the defendant." *State v. Sanchez,* 120 N.M. 247, 253, 901 P.2d 178, 184 (1995). In exercising this discretion, there are a number of factors district courts should consider. *State v. Torres,* 1999–NMSC–010, ¶ 10, 127 N.M. 20, 976 P.2d 20. These factors include the

> length of the requested delay, the likelihood that a delay would accomplish the movant's objectives, the existence of previous continuances in the same matter, the degree of inconvenience to the parties and the court, the legitimacy of the motives in requesting the delay, the fault of the movant in causing [the] need for the delay, and the prejudice to the movant in denying the motion.

Id. (citation omitted). "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason." *State v. Rojo,* 1999–NMSC–001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citation omitted). Furthermore, a defendant must establish not only that there was an abuse of discretion, but also that there was injury to the defendant in denying the continuance. *State v. Nieto,* 78 N.M. 155, 157, 429 P.2d 353, 355 (1967).

{10} Defense counsel raised three arguments in support of the continuance: the newness of the case, the complexity of the case, and the co-defendant's last minute plea agreement with the State on the morning trial was set to begin. The following facts support defense counsel's arguments.

{11} Defendant was indicted on April 24, 2003. Caballero was joined as a co-defendant the same day. Defendant was arraigned and pleaded not guilty on May 12, 2003. The attorney representing Defendant at the arraignment was Dennis Seitz, who on May 23, 2003, filed an Entry of Appearance. Notice of Trial was filed July 1, 2003, scheduling trial for August 20, 2003, with Defendant's case third on a trailing docket. An Order of Appointment filed July 15, 2003, stated that Kent Yalkut, a contract attorney with the Public Defender, shall represent Defendant. However, it appears from the record that Stephen G. Ryan, not Kent Yalkut, actually

assumed representation of Defendant. Defendant's attorney, Ryan, filed a Demand for a Speedy Trial on July 17, 2003.

{12} The day before trial, the defense attorney learned that the case was set for 8:00 a.m. the following day, rather than third on a trailing docket. With the State's concurrence, Defense counsel filed a motion to continue on August 19, 2003, which was denied the same day. Defense counsel orally renewed and argued the motion to continue the next day at trial. Defense counsel argued that although the case had been assigned to the Public Defender thirty-three days before trial, assignment of the case was confirmed after some confusion only twenty-eight days before trial.

{13} Defense counsel also argued that the case was inherently complex. Defense counsel informed the district court that although discovery had been conducted, there were still eleven or twelve witnesses that needed to be interviewed, and the defense still needed to obtain an expert. Defense counsel further informed the court that there was an attempt to set up witness interviews the day before trial, but the interviews did not happen. Defense counsel notified the district court that he was unprepared to proceed to trial, and if forced to go to trial, Defendant would not get adequate representation. Defense counsel apprised the district court of some specifics regarding his lack of preparedness in light of the complexity of the case, including that he had not yet viewed any of the State's video or photographic evidence, and had not interviewed any of the police officers. Furthermore, defense counsel pointed out that possible defenses would be left unexplored if he were forced to go to trial immediately, including a possible search and seizure suppression issue and the State's destruction of all evidence and failure to obtain any fingerprints. Finally, defense counsel argued that because of the co-defendant's last minute plea the morning trial was set to begin and subsequent agreement to testify for the prosecution, defense counsel did not have adequate time to interview this witness.

{14} The State confirmed that defense counsel was on the phone the day before trial with the district attorney "constantly ... trying to make sure they had everything and figure everything out." The State noted that defense counsel "really did make an effort" to prepare for trial. The State did not object to Defendant's request for a continuance and in fact expressed concern about the record made by defense counsel, although the prosecutor stated she did not want to do the trial twice.

{15} In denying the request for a continuance, the district court stated the following:

> Well, that's fine. I appreciate everything that everyone's saying. Yesterday, of course, is the day before the trial.
>
> Well, certainly, you're well prepared for the motion to continue. None of that was in the written motion. The written motion referred to a municipal court hearing and a magistrate court pretrial conference, which don't bump district court trials. Everybody knows that.
>
> Everyone in this district, in the criminal division, including the attorneys I have here, have worked hard to get the docket to the place where a defendant is afforded the right to a trial within six months. That's what this whole batch of hard work, at least on my part, has been about. We're at a place now where we are beginning to try cases within six months, which is what the constitution requires.
>
> [Thirty-three] days ago, counsel, you demanded a speedy trial. And this matter is set for trial. I frankly, Mr. Ryan, feel that you're an attorney who's highly competent and can do the job that's required of him. Whether you spread yourself so thin that's a problem, I don't know. But I consider you a highly competent attorney.
>
> And the whole effort made by this Court for four solid years has been to get this in place and this docket in place for people like [Defendant] to get a trial within six months. And he's demanded a speedy trial.
>
> The discovery has been available to you for [thirty-three] days. There is no reason this case shouldn't proceed to

trial. Now, you've made a good and proper record, absolutely. So you may appeal on that issue. The Court of Appeals will do what they feel is appropriate. But the Court has been charged—and it's no secret this Court has been charged—by the Supreme Court to do something about the docket in this district, and that's what I've done. And at this point, I'm not going to start backing up and undoing it. So we'll go to trial, counsel.

We'll take the plea, and then I'll give you a few minutes to discuss this matter or interview Mr. Caballero, if he elects to be interviewed. That interview is going to have to be done after we pick the jury, but we'll take a long break there anyway. We always allow the parties to do that.

{16} This dialogue indicates that the district court based its decision to deny the continuance on concerns about granting Defendant a speedy trial and maintaining its docket. While these concerns are legitimate concerns of any court, other factors such as those identified in *Torres* must also be considered. *See* 1999-NMSC-010, ¶ 10, 127 N.M. 20, 976 P.2d 20 (listing factors district courts should consider in determining whether to grant a continuance). In this case, Defendant's motion for a continuance was the first continuance requested, and no amount of time for the continuance was specified. In fact, defense counsel was mindful of the district court's emphasis on maintaining its docket, and stated that he had worked hard and carefully to abide by the district court's "no-continuance[s]" policy in the past. Defense counsel also stated, "I don't ever try to get around the Court's policy [of no continuances] for reasons that are not good reasons. But in this case, it's compelling." Furthermore, there was no evidence presented that the delay would cause any other inconvenience to the parties or the court. In fact, the State did not oppose the continuance.

{17} We are unpersuaded by the district court's concern about Defendant's day-before-trial request for a continuance in this case. In *March v. State,* 105 N.M. 453, 455, 734 P.2d 231, 233 (1987), our Supreme Court rejected the notion that unwarranted delay is an overriding concern where there is an eleventh hour request for continuance by a public defender's office which has less than thirty days in which to prepare for trial. Defense counsel represented to the district court that he was unprepared to go to trial, that the case was relatively new to him, and complex, thus requiring additional time for preparation. In addition, on the day of trial, the co-defendant entered a plea agreement with the State and agreed to testify for the State. The fact that counsel was competent and worked hard to follow the court's no continuance policy was not disputed.

> We will not attempt to establish a formula of how many days are required to adequately prepare for the defense of any specific charge. The nature of the offense, the number of witnesses, and the skill of the attorney are all variables to be taken into consideration in each case.

Nieto, 78 N.M. at 157, 429 P.2d at 355. Defense counsel established that failure to allow the continuance would prejudice Defendant by not allowing adequate time to explore or prepare an adequate defense.

[redacted] {18} The district court's concern about trying criminal cases "within six months, which is what the constitution requires" is also misplaced. We take a moment to clarify the constitutional requirements for a speedy trial and the "six month rule." The Sixth Amendment mandates that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." *State v. Hill,* 2005-NMCA-143, ¶ 10, 138 N.M. 693, 125 P.3d 1175 (internal quotation marks and citation omitted). The right to a speedy trial "is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *Id.* ¶ 11 (internal quotation marks and citation omitted). The "six month rule" on the other hand refers to Rule 5-604(B) NMRA which requires, in relevant part, that the trial of a criminal case shall be commenced six months after either the date of

arraignment or waiver of arraignment, whichever occurs later. *See* Rule 5–604(B)(1). "A six-month rule issue is analytically separate from a constitutional speedy trial issue," and the two are distinct in their operation and reach. *State v. Eskridge*, 1997–NMCA–106, ¶ 2, 124 N.M. 227, 947 P.2d 502. In this case, there was no risk of a six month rule violation or a speedy trial violation by defense counsel's request for a continuance. Only three months had elapsed from the time of arraignment to the date of trial. Furthermore, when the constitutional right to a speedy trial is at issue, delays attributed to Defendant weigh against the Defendant in later claims of violation. *Id.* ¶ 15. Defendants are required to make a demand for a speedy trial in order to assert the right at a later time. *See State v. Urban*, 2004–NMSC–007, ¶ 16, 135 N.M. 279, 87 P.3d 1061 (analyzing defendant's demands for a speedy trial as part of a constitutional speedy trial analysis). *Town of Bernalillo v. Garcia*, 118 N.M. 610, 612, 884 P.2d 501, 503 (Ct.App. 1994) (stating that "a defendant cannot take advantage of the right for a speedy trial unless a demand is made" (internal quotation marks and citation omitted)). However, in asserting this right, a defendant should not be forced to proceed to a speedy trial when he is justifiably unprepared to defend himself. We therefore are not persuaded by the district court's concerns, in this case, for possible violations of the six month rule or providing Defendant with a speedy trial.

{19} Taking all these factors into consideration, we hold that the district court, in an effort to follow a "no continuances" policy and maintain its docket, abused its discretion by denying Defendant's request for a continuance. The district court's reasoning in denying the motion for continuance was clearly against the logic and effect of the facts and circumstances of the case. The district court's concern for maintaining its docket was not sufficient in this context to support its decision. Defendant was clearly prejudiced by having to go to trial under the circumstances described by his counsel. Furthermore, we are concerned about the district court's seemingly rigid adherence to a no continuance policy. Strict adherence to such a policy would be an abuse of discretion for lack of exercising any discretion. We therefore reverse and remand for a new trial.

{20} Due to our conclusion that the district court abused its discretion in denying Defendant's request for a continuance, we are not required to address all of the other issues raised by Defendant. *State v. Jojola*, 2005–NMCA–119, ¶ 2, 138 N.M. 459, 122 P.3d 43, *cert. granted*, 2005–NMCERT–010, 138 N.M. 494, 122 P.3d 1263, and *cert. granted*, 2005–NMCERT–010, 138 N.M. 495, 122 P.3d 1264. We address the other issues raised by Defendant on appeal to the extent the issues may arise on remand. Furthermore, since Defendant would be entitled to a dismissal of the charges on remand if the evidence adduced at trial was insufficient to support the convictions, we are required to address Defendant's argument that there was not sufficient evidence to support the convictions. *Id.* We begin by addressing the jury instructions, then evaluate whether double jeopardy protections were violated, and conclude by reviewing the sufficiency of the evidence.

2. Jury Instructions

{21} Defendant argues the district court erred in failing to instruct the jury on constructive possession, when that was the defense's theory of the case, and including a general criminal intent instruction, thus rendering his convictions fundamentally flawed. Defendant argues that his theory of the case was that he did not constructively possess any of the items found in the meth lab because he was a mere visitor in the trailer. Therefore, Defendant argues that possession was at issue in both the trafficking by manufacture charge and the possession of paraphernalia charge. Defendant also argues that inclusion of the general criminal intent instruction was error because it confused the jury. We disagree.

{22} In *State v. Benally*,

The standard of review we apply to jury instructions depends on whether the issue has been preserved. If the error has been preserved we review the instructions for reversible error. If not, we review for fundamental error. Under both standards we seek to determine whether a reason-

able juror would have been confused or misdirected by the jury instruction.

2001–NMSC–033, ¶ 12, 131 N.M. 258, 34 P.3d 1134 (internal quotation marks and citations omitted). Because the errors claimed by Defendant in this case were not preserved, we would normally review for fundamental error. However, since our aim here is simply to provide guidance for the parties on remand, we will review for simple error.

{23} The jury received the following jury instructions for trafficking by manufacture and possession of drug paraphernalia:

For you to find the defendant guilty of "trafficking a controlled substance by manufacturing" as charged in Count 1, the [S]tate must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant manufactured methamphetamine;
2. The defendant knew it was methamphetamine;
3. This happened in New Mexico on or about the 31st day of March, 2003.

"Manufactured" means produced, prepared, compounded, converted or processed.

For you to find the defendant guilty of possession of drug paraphernalia as charged in Count 3, the [S]tate must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The Defendant had in his possession drug paraphernalia;
2. The Defendant intended to use the paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, re-pack, ingest, inhale or otherwise introduce into the human body, a controlled substance.
3. This happened in New Mexico on or about the 31st day of March, 2003.

{24} The instruction given on trafficking by manufacture tracks the language of UJI 14–3112 NMRA. Possession is not an element of trafficking by manufacture and therefore an instruction on possession was not required to be given with the instruction on trafficking by manufacture. However, possession is an element of possession of drug paraphernalia.

{25} Our Supreme Court recently addressed the issue of whether failure to include an instruction on possession amounts to fundamental error when possession is at issue in *State v. Barber*, 2004–NMSC–019, ¶ 13, 135 N.M. 621, 92 P.3d 633. In *Barber*, the defendant was charged with possession of methamphetamine with intent to distribute. Defendant's theory of the case, as in the present case, was that the drugs were not his and that he did not possess the drugs. *Id.* ¶ 6. The Court concluded that possession was an issue in dispute, and an instruction on possession would have been important to defendant's case and helpful to the jury in understanding the legal implications of mere proximity. *Id.* ¶ 12. The Court went on to hold that if the defendant had requested an instruction on possession, it would have been reversible error for the court to deny him. *Id.* The Court ultimately concluded that failure to give the instruction did not rise to the level of fundamental error. *Id.* ¶ 32.

{26} The Court's ruling as to reversible error applies to this case. Under Defendant's theory of the case, it would be error in the new trial not to give an instruction on possession.

{27} Defendant argues that the general criminal intent instruction given to the jury resulted in unnecessary confusion, thus allowing the jury to convict Defendant for acting "purposely" rather than with the required specific intent. Defendant contends that the effect of unnecessarily giving the general intent instruction is that the jury uses it to further define and elucidate the meaning of the word "intent" in the elements instructions, including those for specific intent crimes. Defendant, relying on *State v. Baca*, 1997–NMSC–059, ¶ 51, 124 N.M. 333, 950 P.2d 776, argues that the offenses of conspiracy to commit trafficking and possession of paraphernalia require that the Defendant have the specific intent "to do a further act or achieve a further consequence." (Internal quotation marks and citation omitted.)

Therefore, according to Defendant, any guidance offered by the general intent instruction only served to mislead the jury as to what was required to prove intent. Defendant's argument that including the instruction on general criminal intent serves to mislead or confuse the jury as to what is required to prove "intent" is without merit, and has already been addressed and answered by this Court in *State v. Gee,* 2004–NMCA–042, ¶ 7, 135 N.M. 408, 89 P.3d 80.

{28} The jury received the general criminal intent instruction, consistent with UJI 14–141 NMRA. The instruction given reads:

> In addition to the other elements of trafficking a controlled substance by manufacturing, conspiracy to commit trafficking a controlled substance by manufacturing, possession of drug paraphernalia, and concealing identity the [S]tate must prove to your satisfaction beyond a reasonable doubt that the 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. Whether the defendant acted intentionally may be inferred from all of the surrounding circumstances, such as the manner in which he acts, the means used, and his conduct and any statements made by him.

{29} The Use Note following UJI 14–141, the general intent instruction, states that the "instruction *must* be used with every crime except for the relatively few crimes not requiring criminal intent or those crimes in which the intent is specified in the statute or instruction." *Id.* Use Note (1) (emphasis added). Furthermore, this Court in *Gee* held that it is not fundamental error to give a general intent instruction where the crime charged is a specific intent crime. 2004–NMCA–042, ¶¶ 1, 9. Consistent with UJI 14–141, the Use Note following the instruction, as well as this Court's holding in *Gee,* we hold that there was no error in the use of the general criminal intent instruction. We next turn to Defendant's double jeopardy claim.

3. Double Jeopardy

{30} Defendant argues that the jury instructions were flawed because they did not delineate which items were considered within the trafficking by manufacture charge and which were considered in the possession of drug paraphernalia charge, resulting in conviction for both crimes based on the same evidence, thus violating double jeopardy. Defendant contends that as the instructions were given, possession of paraphernalia was a lesser included offense of the trafficking charge. Defendant contends that under *Swafford v. State,* 112 N.M. 3, 810 P.2d 1223 (1991), double jeopardy was violated by imposing multiple punishments for the unitary conduct of possession of paraphernalia and trafficking by manufacture.[1] Defendant argues that the conduct required to manufacture methamphetamine necessarily includes that the manufacturer possess the paraphernalia necessary to do so. Defendant contends that because the State's theory of the possession of paraphernalia charge was based on the same evidence presented on the trafficking by manufacture charge, double jeopardy is implicated.

{31} The arguments raised by Defendant fall under the category of double-description cases for double jeopardy analysis. *Id.* at 8, 810 P.2d at 1228. *Swafford* adopted a two-part test for determining whether the statutes at issue are the same offense for double jeopardy purposes: (1) "whether the conduct underlying the offenses is unitary;" and if so, (2) "whether the legislature intended to create separately punishable offenses." *Id.* at 13, 810 P.2d at 1233; *State v. Franco,* 2005–NMSC–013, ¶ 5, 137 N.M. 447, 112 P.3d 1104 (internal quotation marks and citation omitted). In *Franco,* our Supreme Court stated that determining whether the conduct is unitary is not necessarily determined by the State's legal theory, but rather depends on the elements of the charged offenses and the facts presented at trial. *Id.* ¶ 7. "The proper analytical framework is whether the facts presented at trial establish that the jury

1. We note that Defendant did not request a "lesser included offense" instruction at trial or raise any objections to the jury instructions below. Furthermore, Defendant did not raise any double jeopardy concerns below.

reasonably could have inferred independent factual bases for the charged offenses." *Id.*

{32} Applying this first part of the *Swafford* test to the present case, we conclude that the jury could reasonably have inferred independent factual bases for trafficking by manufacture and possession of drug paraphernalia. The jury could have found that Defendant produced, prepared, compounded, converted, or processed methamphetamine based on the evidence of the meth lab in Caballero's kitchen, and that Defendant possessed drug paraphernalia with the intent to plant, propagate, ingest, etc. based on the items found in the handkerchief, the pipe and syringes. *See* NMSA 1978, §§ 30–31–2,–20, –25.1. However, contrary to the State's assertion, we cannot discern with certainty that the jury found that Defendant made meth based on the items in the meth lab, and possessed paraphernalia by possessing the pipe and syringes. Defendant's concerns are thus not entirely misplaced. As Defendant points out, any possible double jeopardy concerns would be eliminated if the State had limited the scope of the possession charge to the items found wrapped in the handkerchief, the pipe and syringes, as separate from other items which made up the meth lab. The State may wish to do so on remand to avoid any double jeopardy concerns on retrial.

4. Sufficiency of the Evidence

[redacted] {33} Defendant argues that the State presented insufficient evidence to prove, beyond a reasonable doubt, that he was guilty of trafficking by manufacture, conspiracy, and possession of paraphernalia. We review challenges to the sufficiency of the evidence under a substantial evidence standard of review. *State v. Sutphin,* 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Salgado,* 1999–NMSC–008, ¶ 25, 126 N.M. 691, 974 P.2d 661 (internal quotation marks and citation omitted). We review the evidence in the light most favorable to the verdict, resolving all conflicts and indulging all reasonable inferences in favor of the verdict. *State v. Apodaca,* 118 N.M. 762, 766, 887 P.2d 756, 760 (1994). We then make the determination of "whether the evidence viewed in this manner could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt." *Id.* (internal quotation marks and citation omitted). We begin with the conspiracy charge.

[redacted] {34} Conspiracy is defined as "knowingly combining with another for the purpose of committing a felony within or without this state." NMSA 1978, § 30–28–2(A) (1979). To commit conspiracy, the statute requires 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 (internal quotation marks and citation omitted). There must be an agreement between the parties to commit the felony, either through explicit or a mutually implied understanding. *State v. Mariano R.,* 1997–NMCA–018, ¶ 4, 123 N.M. 121, 934 P.2d 315.

{35} In this case, the evidence falls short of establishing that Defendant conspired to commit trafficking by manufacture. The evidence presented at trial establishes that there was a meth lab in Caballero's kitchen and a box containing additional meth lab equipment in the northern bedroom. The evidence also establishes that Defendant was present, hiding in a closet in the southern bedroom, when the meth lab was discovered. Caballero, the owner of the trailer, was also present. This evidence places both Defendant and Caballero in the trailer where the meth lab was discovered, but does not establish the mental state required for conspiracy.

{36} The only evidence presented at trial regarding any criminal purpose or intent was the testimony of Caballero. Caballero testified that he was sick in bed on the day in question. He got up at 7:30 a.m. and let Defendant's wife and child into his trailer to cook breakfast, then went back to bed. He got up again at 10:30 a.m., and observed Defendant and his wife in the kitchen. At that time, he noticed things in the kitchen that did not belong to him and were not there before. He went back to bed, and did

not wake up again until the police arrived at 7:30 p.m.

{37} Even viewing Caballero's testimony in the light most favorable to the State, at most it gives rise to an inference that Caballero knew about the meth lab and did nothing about it. But this testimony does not lead to an inference that Defendant had an agreement with Caballero. While Defendant had the intent to commit the offense of trafficking, nothing, other than Defendant's presence in Caballero's trailer, suggests that he had the intent to agree with Caballero to commit that offense. *See Trujillo,* 2002-NMSC-005, ¶ 62 (noting that the crime of conspiracy requires proof of both the intent to agree and the intent to commit the object offense).

{38} Viewing the evidence in the light most favorable to the prosecution, we conclude that there was insufficient evidence for the jury to find Defendant guilty of conspiracy beyond a reasonable doubt. We hold that on remand, Defendant may not be tried again on the charge of conspiracy to commit trafficking by manufacture. *See State v. Gallegos,* 2005-NMCA-142, ¶ 34, 138 N.M. 673, 125 P.3d 652 (nothing that "principles of double jeopardy would bar retrial if [a defendant's] convictions are not supported by substantial evidence"). Next, we review Defendant's convictions for trafficking by manufacture and possession of paraphernalia.

{39} The definitions for the charges of trafficking by manufacture and possession of paraphernalia, as well as the evidence presented at trial, are provided above, and we do not repeat them here. The testimony of the officers and the expert established that a meth lab existed in Caballero's trailer. Defendant does not deny the existence of the meth lab. There was also testimony from the officers and Caballero that Defendant was present in the trailer with the meth lab. Defendant does not deny his presence in the trailer. Furthermore, there was evidence that Defendant hid in a closet when the police arrived and concealed his identity from officers. Although Defendant contends this was because of an outstanding warrant in another county, the jury was free to believe or disbelieve this theory. *Rojo,* 1999-NMSC-001, ¶ 19 ("[T]he jury is free to reject Defendant's version of the facts."). Furthermore, the jury was free to draw inferences regarding the facts necessary to support a conviction, and here, the jury could infer that Defendant was engaged in the manufacture of methamphetamine and was in possession of drug paraphernalia. *See State v. Higgins,* 107 N.M. 617, 621, 762 P.2d 904, 908 (Ct.App. 1988) ("[A] material fact necessary to support a verdict may be proved by inferences."). Based on the foregoing evidence, we hold that there was sufficient evidence for the jury to convict Defendant of trafficking by manufacture and possession of drug paraphernalia. Therefore, Defendant may be retried on these charges on remand.

CONCLUSION

{40} For the foregoing reasons, we hold that the district court abused its discretion in denying Defendant's request for a continuance. We reverse the conviction for conspiracy to traffic methamphetamine by manufacture. We remand for retrial on the counts of trafficking by manufacture and possession of drug paraphernalia.

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

WE CONCUR: CYNTHIA A. FRY and IRA ROBINSON, Judges.

2006-NMCA-074

137 P.3d 670

Louie L. LOPEZ, Sr., Plaintiff-Appellant,

v.

LAS CRUCES POLICE DEPARTMENT, Defendant-Appellee.

Margaret Coleman, Plaintiff-Appellee,

v.

City of Las Cruces, Defendant-Appellant.

Nos. 24,883, 25,488.

Court of Appeals of New Mexico.

May 3, 2006.

Certiorari Denied, Nos. 29,822, 29,823, June 15, 2006.

As Corrected June 29, 2006.

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OPINION

PICKARD, Judge.

{1} These cases present us with the opportunity to resolve the issues of whether the New Mexico Tort Claims Act (TCA), NMSA 1978, §§ 41–4–1 to –27 (1976, as amended through 2004), requires a plaintiff to name a specific public employee as a defendant to

recover damages under the TCA and whether the name of the negligent public employee must be identified in evidence at trial. Because these cases raise similar legal issues, we consolidate them for appellate review. In *Lopez,* the district court granted Defendant Las Cruces Police Department's motion to dismiss or for summary judgment for failure to name a negligent employee. In *Coleman,* the district court entered judgment on the jury verdict in favor of Plaintiff Margaret Coleman notwithstanding Coleman's not having named a negligent employee. We hold that the TCA does not require the naming of individual public employees as defendants. We also hold that Coleman was not required to produce evidence at trial of the identity of the public employees whom Coleman claimed had been notified of the problem with the City sidewalk, because the issue was not properly preserved. Accordingly, in *Coleman,* we affirm the judgment in favor of Coleman, and in *Lopez,* we reverse and remand for reinstatement of Lopez's claim.

I. BACKGROUND AND FACTS

{2} The cases come before us in different procedural postures, and we set out the background to each appeal below. Additional factual and procedural details will be developed as necessary in the context of the discussion of each case.

A. *Lopez*

{3} Louie Lopez filed a pro se complaint against the Las Cruces Police Department, alleging assault, battery, and improper arrest. In his complaint, Lopez did not name the police officers who he alleged had assaulted him. The Police Department filed a motion to dismiss or for summary judgment, arguing that under *Abalos v. Bernalillo County District Attorney's Office,* 105 N.M. 554, 734 P.2d 794 (Ct.App.1987), Lopez had failed to state a claim on which relief could be granted because he had not named a specific negligent public employee as a defendant. The district court dismissed Lopez's complaint with prejudice and entered summary judgment for the Police Department. Lopez appealed to this Court, still acting pro se, and this Court summarily affirmed the district court. The New Mexico Trial Lawyers Association (NMTLA) filed a motion for rehearing and leave to file an amicus curiae brief, which this Court granted. The Police Department moved to dismiss the appeal and for sanctions, arguing that Lopez had not filed the transcript in a timely manner and that NMTLA, as an amicus, should not be allowed to function as Lopez's attorney. We denied the motion, but stated that the parties could raise issues relating to proper representation and the role of an amicus in their briefs.

B. *Coleman*

{4} Margaret Coleman's complaint alleged that she was injured when she tripped on a section of sidewalk in Las Cruces, which was in disrepair due to the negligence of the City of Las Cruces. Her complaint alleged that the City breached its duty to maintain the sidewalk in a safe condition. Coleman presented evidence at trial that on three occasions, City employees had been notified of a sunken water meter and an uneven sidewalk. The jury was instructed that the City could only act through its officers and employees, and the jury found that the City was negligent and that its negligence was the proximate cause of Coleman's injuries. After the district court entered judgment on the jury verdict, the City moved for judgment as a matter of law or a new trial, arguing, in part, that identification of a specific negligent City employee was a jurisdictional requirement under the TCA and that Coleman's failure to identify a specific negligent employee resulted in a lack of notice to the City. The district court denied the City's motion, and the City appealed from the judgment.

II. DISCUSSION

{5} Both cases require us to address whether the TCA requires the naming of a specific governmental employee, but each case also raises separate questions. Therefore, we first address the issues raised in *Lopez* and then address those raised in *Coleman.*

A. *Lopez*

1. Procedural Issues

{6} As a preliminary matter, we address the Police Department's arguments concerning preservation and the role of the amicus, NMTLA, in this appeal. The Police Department argues that Lopez, a pro se plaintiff, did not preserve the arguments he now makes through counsel on appeal. Relying on *Bruce v. Lester,* 1999–NMCA–051, ¶ 4, 127 N.M. 301, 980 P.2d 84 (stating that pro se litigants are not entitled to greater rights than those litigants who employ counsel), the Police Department argues that this Court should not apply a less stringent preservation standard to Lopez simply because he was self-represented in the trial court. "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." *Woolwine v. Furr's, Inc.,* 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct.App.1987). Preservation serves the purposes of (1) allowing the trial court an opportunity to correct any errors, thereby avoiding the need for appeal, and (2) creating a record from which the appellate court can make informed decisions. *Diversey Corp. v. Chem–Source Corp.,* 1998–NMCA–112, ¶ 38, 125 N.M. 748, 965 P.2d 332. Our review of the record indicates that the trial court was alerted to the issue of whether *Abalos* requires a plaintiff to name a specific public employee and decided as a matter of law that there was such a requirement. As Lopez points out in his reply brief, he attempted to respond to the Police Department's argument that he should have named individual employees. Because the trial court was made aware of the issue and knew that Lopez opposed dismissal, we consider the issue preserved for purposes of appellate review.

{7} The Police Department also argues that the role of an amicus "is to call the court's attention to facts or situations that may have escaped consideration. [It] is not a party and cannot assume the functions of a party. [It] must accept the case before the court with the issues made by the parties." *State ex rel. Burg v. City of Albuquerque,* 31 N.M. 576, 590–91, 249 P. 242, 248–49 (1926). Instead of acting within this role, the Police Department argues, NMTLA assumed the functions of a party by advocating for Lopez during the proceedings on rehearing and by securing a transcript. Lopez responds that NMTLA acted appropriately in seeking reconsideration, securing a transcript, obtaining counsel to act in a pro bono capacity on behalf of Lopez, and filing an amicus brief.

[5] {8} Although we agree with the Police Department's description of the role of an amicus in the appellate process, under the facts of this case, we cannot say that NMTLA acted inappropriately in seeking reconsideration of our summary decision. NMTLA argued in its motion for reconsideration that the issue of whether Lopez was required to name individual public employees had been incorrectly decided in a manner contrary to standard practice throughout the state and without the benefit of briefing or argument by licensed attorneys. NMTLA also points out that at the time it filed the motion for reconsideration, it had attempted to contact Lopez but had been unable to do so. Under these circumstances, we conclude that NMTLA did not act improperly in filing a motion for reconsideration. It was seeking to preserve this Court's ability to correctly decide an important issue. At the same time, it successfully sought out counsel to represent Lopez in a pro bono capacity. We now have briefing by a properly represented Lopez, as well as amicus briefing by the NMTLA. It would exalt form over substance to dismiss Lopez's appeal at this point in time. "It is the appellate court policy to construe rules liberally so that an appeal may be decided on the merits whenever possible." *Hester v. Hester,* 100 N.M. 773, 775–76, 676 P.2d 1338, 1340–41 (Ct.App.1984). We therefore reconsider Lopez's issue of whether a plaintiff is required to name a specific negligent public employee in a TCA complaint.

2. The Tort Claims Act

{9} Lopez challenges the district court's dismissal of his claim, arguing that the Police Department is the proper defendant and that he is not required by statute or public policy to name an individual public

employee as a defendant in order to state a claim under the TCA. In the alternative, he argues that if he is required to name individual law enforcement officers, he should be permitted to amend his complaint. We hold that a TCA plaintiff is not required to name an individual public employee as a defendant. In light of this holding, we do not address Lopez's additional issue.

{10} Because the court dismissed Lopez's claim on the Police Department's motion to dismiss or for summary judgment, we review de novo the legal issue of whether a TCA plaintiff is required to name an individual public employee. *See Celaya v. Hall*, 2004–NMSC–005, ¶ 7, 135 N.M. 115, 85 P.3d 239 (stating summary judgment is reviewed on appeal de novo); *Envtl. Control, Inc. v. City of Santa Fe*, 2002–NMCA–003, ¶ 6, 131 N.M. 450, 38 P.3d 891 (stating that when reviewing a trial court's grant of a motion to dismiss, we accept as true the facts pleaded in the complaint, and we review de novo the trial court's application of the law to those facts); *Morgan Keegan Mortgage Co. v. Candelaria*, 1998–NMCA–008, ¶ 5, 124 N.M. 405, 951 P.2d 1066 (indicating that legal issues are reviewed de novo).

{11} The purpose of the TCA is to limit governmental liability for torts to those situations for which immunity is specifically waived. Section 41–4–2(A). Because a governmental entity "can act only through its employees, . . . the act of the offending employee is the act of the public entity under traditional tort concepts." *Silva v. State*, 106 N.M. 472, 477, 745 P.2d 380, 385 (1987), *limited on other grounds by Archibeque v. Moya*, 116 N.M. 616, 621, 866 P.2d 344, 349 (1993). Accordingly, the TCA makes "government responsible for the torts of its employees for which immunity is waived to a similar extent as a private employer would be under the doctrine of respondeat superior" and indemnifies "the employee for acts occurring in the scope of the employee's duties." *Medina v. Fuller*, 1999–NMCA–011, ¶ 12, 126 N.M. 460, 971 P.2d 851.

{12} Although the TCA sets forth the circumstances in which governmental entities are liable for the torts of their employees, it does not specify who should be named as a defendant in a lawsuit. We note that a tort action brought under the TCA, unlike a civil rights action brought pursuant to 42 U.S.C. § 1983, does not require a government employee to be sued in his or her individual capacity in order to avoid Eleventh Amendment immunity defenses. *See Ford v. N.M. Dep't of Pub. Safety*, 119 N.M. 405, 410–12, 891 P.2d 546, 551–53 (Ct.App.1994) (discussing the differences in procedure and remedies between TCA claims and civil rights claims and pointing out that sovereign immunity is waived under the TCA for government entities sued under a doctrine of respondeat superior). Thus, litigants err to the extent that they import notions of pleading from federal civil rights cases into state TCA actions. Below, we demonstrate that (1) the statutory structure of the TCA indicates that either the entity or the individual can be the sole named defendant, (2) the Rules of Civil Procedure contemplate the same, and (3) the cases on which the Police Department relies do not support its argument.

{13} Various sections of the TCA indicate that the Legislature contemplated suits or judgments against either a governmental entity or a public employee. Section 41–4–19(A) states that "[i]n any action for damages against a governmental entity or public employee," the liability shall not exceed the stated amounts. Section 41–4–19(B) states that "[i]nterest shall be allowed on judgments against a governmental entity or public employee" at a particular rate. Section 41–4–19(C) states that no judgment "against a governmental entity or public employee" shall include punitive damages or pre-judgment interest. Finally, Section 41–4–17(A) states that the TCA "shall be the exclusive remedy against a governmental entity or public employee for any tort for which immunity has been waived." The fact that these provisions are framed in the disjunctive indicates a legislative intent that either the employee or the relevant governmental entity can be sued.

{14} Case law decided under Rule 1–019 NMRA (joinder of persons needed for just adjudication) also supports this view.

We are not persuaded that public employees are necessary parties to TCA litigation under Rule 1–019. As this Court discussed in *Baer v. Regents of the University of California,* 118 N.M. 685, 690, 884 P.2d 841, 846 (Ct.App. 1994), a lawsuit based on the doctrine of respondeat superior does not require an employee to be named as a defendant. In this case, as in *Baer,* we have been pointed to no authority "for the proposition that, in order to prove agency, the agent must be joined as a party to the action." *Id.* We also find persuasive on this issue Lopez's argument that under Rule 19(a) of the Federal Rules of Civil Procedure, an " 'employee is not a necessary party to a suit against his employer under *respondeat superior.*' " *Hall v. Nat'l Serv. Indus.,* 172 F.R.D. 157, 159 (E.D.Pa.1997) (quoting *Rieser v. District of Columbia,* 563 F.2d 462, 469 n. 39 (D.C.Cir. 1977)). Rule 1–019(A) is essentially identical to its federal counterpart. We may therefore 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 in 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). Because the TCA itself does not require the naming of an individual public employee, and because such individuals do not appear to be necessary parties under Rule 1–019, we conclude that a plaintiff may state a claim under the TCA by naming only a governmental entity.

{15} We are also unpersuaded by the Police Department's argument that New Mexico case law supports its position. The Police Department argues that under *Abalos,* the public employee is a necessary party to the litigation and a plaintiff must name both the relevant state agency and a negligent employee in order to state a claim under the TCA. The Police Department argues that when this Court wrote that a TCA claim requires a negligent public employee and a governmental entity, we were establishing a rule for who should be named as a defendant in a lawsuit. Contrary to the arguments of the Police Department, however, *Abalos* does not set forth a rule requiring an employee to be named in the complaint. In *Abalos,* this Court was specifically asked to address "(1) whether a governmental entity can be a named party defendant; and (2) if the entity can be sued, which entity should be named." 105 N.M. at 558, 734 P.2d at 798. We observed that "New Mexico's law is confusing and inconsistent regarding which entity can be sued and when," and we concluded that "one can sue the public employee and the agency or entity for whom the public employee works." *Id.* at 559, 734 P.2d at 799. We did not say that a plaintiff must sue both the employee and the agency. In explaining when a particular governmental entity can be named as a defendant in a TCA claim, this Court wrote, "To name a particular entity in an action under the Tort Claims Act requires two things: (1) a negligent public employee who meets one of the waiver exceptions under Sections 41–4–5 to –12; and (2) an entity that has immediate supervisory responsibilities over the employee." *Abalos,* 105 N.M. at 559, 734 P.2d at 799.

{16} However, *Abalos* never stated that a specific employee must be named. Rather, our discussion focused on which agency should be named in a TCA suit, and it was in the context of determining which employer was responsible for the negligent conduct that we discussed the employee. We simply pointed out that because an entity can only act through its employees, "it follows that one can sue the public employee and the agency or entity for whom the public employee works." *Id.* Thus, *Abalos* does not require both the employee and the entity to be named; it merely clarifies that both can be sued. *Id.* That is, as our cases illustrate, a plaintiff can sue the employee whose conduct falls within one of the waivers of immunity, and under Section 41–4–4, the governmental entity would pay the award. Alternatively, a plaintiff can sue the governmental entity who has the right to control the employee's conduct under a theory of respondeat superior. We are not persuaded, therefore, that *Abalos* stands for the principle that a negligent employee must be named as a defendant in a TCA case.

{17} Furthermore, we do not read *Silva* as holding that a public employee is a necessary party in a TCA action, as the Police Department contends. In *Silva*, our Supreme Court affirmed the principle that the doctrine of respondeat superior applied to TCA claims, explained that direct supervision was not a requirement under that doctrine, and held that the state as well as an individual agency could be named as a party if it had the right to control the employee's actions. 106 N.M. at 477, 745 P.2d at 385. Thus, the Court determined that the state and the Corrections Department could be named as defendants in a case alleging that negligent failure to provide care to a prisoner resulted in the prisoner's suicide. *Id.* at 477–78, 745 P.2d at 385–86. Nothing in *Silva* indicates that an individual employee must be named.

{18} Just as we are unpersuaded that *Abalos* and *Silva* require a negligent public employee to be named as a defendant, we are not convinced by the Police Department's argument that *Cobos v. Doña Ana County Housing Authority*, 1998–NMSC–049, 126 N.M. 418, 970 P.2d 1143, illustrates the application of that principle. In *Cobos*, the plaintiff, who was a resident of privately owned but government-subsidized housing, brought a wrongful death lawsuit against the Doña Ana County Housing Authority, the Board of County Commissioners, and employees of the Housing Authority after a fire caused by a defective fireplace killed her family. *Id.* ¶¶ 2–4. Our Supreme Court affirmed the district court's dismissal of the action against the Housing Authority and the board on the ground that they had not received notice under the TCA, but reversed the dismissal of the claim against the public employees. *Id.* ¶ 20. Nothing in *Cobos* indicates that the naming of the public employees as defendants was required under the TCA.

{19} We are not persuaded by the Police Department's arguments that *Abalos*, *Silva*, or *Cobos* requires the joinder of the entity and the employee in the caption of the complaint. Moreover, neither this Court nor our Supreme Court has ever required that a negligent public employee be named in the complaint. As NMTLA points out in its amicus brief, both this Court and our Supreme Court have resolved numerous appeals in which no employee was joined. Indeed, our review of dozens of TCA cases reveals that sometimes the governmental entity alone is named, *see, e.g., Leithead v. City of Santa Fe*, 1997–NMCA–041, 123 N.M. 353, 940 P.2d 459; sometimes the employee alone is named, *see, e.g., Celaya*, 2004–NMSC–005, 135 N.M. 115, 85 P.3d 239; and sometimes both the government entity and the employee are named, *see, e.g., Derringer v. State*, 2003–NMCA–073, 133 N.M. 721, 68 P.3d 961. Accordingly, we hold that the TCA does not require a specific negligent employee to be named as a defendant. We therefore reverse the district court's order granting summary judgment for the Police Department.

B. *Coleman*

{20} Unlike Lopez's case, Margaret Coleman's case proceeded to trial, where the jury found the City's negligence was a proximate cause of Coleman's injuries. Following the entry of judgment on the jury verdict, the City moved for judgment as a matter of law or, in the alternative, for a new trial, and the trial court denied the motion. The City now appeals from the judgment on the jury verdict, arguing that Coleman's claim did not satisfy the jurisdictional prerequisites of a TCA claim. Specifically, the City appears to argue that Coleman's claim did not fall within one of the TCA waivers of immunity because Coleman failed to name a negligent public employee in her complaint and did not identify such an employee at trial.

{21} Like the Police Department in *Lopez*, the City argues that failure to name a public employee for whose conduct the City is responsible constitutes a failure to demonstrate that the cause of action fits within a TCA waiver and thus constitutes jurisdictional error. As we wrote in our discussion of *Lopez*, a named public employee is not a necessary party to a TCA claim that is based on the doctrine of respondeat superior. For the reasons given above, therefore, we are not persuaded that failing to name a specific public employee in the complaint is a defect, let alone a jurisdictional defect. *See State ex rel. State Highway & Transp. Dept. v. City of Sunland Park*, 2000–NMCA–044, ¶ 16, 129

N.M. 151, 3 P.3d 128 ("[T]he absence of an indispensable (let alone necessary) party is not considered a jurisdictional defect in New Mexico.").

{22} The City also argues that without an identified employee, it was impossible for the jury to determine if the City was responsible for that employee's conduct. In making this argument, the City relies on the wording of Section 41–4–11(A), which states that immunity is waived for "damage caused by the negligence of public employees while acting within the scope of their duties during the construction, and in subsequent maintenance of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area." Thus, the City argues, the statute must require at least that the evidence identify a negligent public employee who was directly supervised by the City.

{23} Because we have determined that the failure to name a specific employee does not implicate jurisdiction, the City was required to properly and timely preserve its arguments on this point. *See State v. Garcia,* 2005–NMCA–065, ¶ 6, 137 N.M. 583, 113 P.3d 406 (noting that arguments involving subject matter jurisdiction are an exception to the preservation requirement). We do not reach the merits of the City's argument because it was not properly preserved under the circumstances of this case.

{24} As indicated above, the requirement of preservation serves the twin purposes of allowing the trial court an opportunity to correct errors and creating a record for appeal. *See Diversey Corp.,* 1998–NMCA–112, ¶ 38, 125 N.M. 748, 965 P.2d 332. But it also serves the purpose of allowing the opponent of an objection to meet the objection with either evidence or argument. *See State v. Gomez,* 1997–NMSC–006, ¶ 29, 122 N.M. 777, 932 P.2d 1 (indicating that one of the purposes of the preservation rule is to give the opposing party a fair opportunity to respond to the objection).

{25} In this case, by waiting until after the judgment had been entered to complain that a negligent employee had not been identified, the City deprived Coleman of the opportunity to introduce evidence identifying specific employees who might have been negligent. It further deprived Coleman of the opportunity to attempt to try a theory of the case that did not require the identification of a specific negligent employee. For example, in *Cardoza v. Town of Silver City,* 96 N.M. 130, 628 P.2d 1126 (Ct.App.1981), this Court construed Section 41–4–11 to place an affirmative burden on Silver City to maintain its streets so that they are safe for the traveling public. *Id.* at 134–35, 628 P.2d at 1130–31. In *Cardoza,* the driver of a car sued the Town of Silver City after he was injured when he drove his car over an improperly fitted manhole cover that popped out. *Id.* at 131, 628 P.2d at 1127. Silver City argued that it had no notice of the problem, but this Court held that Silver City installed the manhole cover and had a duty to determine "whether over the years, it had worn to the point where it was dangerous to the traveling public, and whether reasonable inspections of this cover had been made and reported." *Id.* at 135, 628 P.2d at 1131. While *Cardoza* might be limited to its specific facts, the important point for purposes of this case is that, by not objecting until after the conclusion of the proceedings below, the City deprived Coleman of the opportunity to show that the facts of her case were similar to those in *Cardoza.*

{26} Moreover, Coleman provided evidence of repeated notice to various City employees of the dangerous conditions on the sidewalk. Under the principles discussed in this opinion, and in the absence of any timely raised argument to the contrary, this was sufficient to establish her prima facie case.

III. CONCLUSION

{27} We reverse the district court's order entering summary judgment for the Police Department in *Lopez,* and we affirm the jury verdict in *Coleman.*

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

WE CONCUR: A. JOSEPH ALARID and JONATHAN B. SUTIN, Judges.

2006-NMCA-076
137 P.3d 679

STATE of New Mexico, Plaintiff–Appellant,

v.

Aaron UPCHURCH, Defendant–Appellee.

No. 26,436.

Court of Appeals of New Mexico.

May 4, 2006.

Certiorari Denied, No. 29,800, June 21, 2006.

Patricia A. Madrid, Attorney General, M. Anne Kelly, Assistant Attorney General, Santa Fe, NM, for Appellant.

John Bigelow, Chief Public Defender, Ruth Wheeler, Assistant Appellant Defender, Aztec, NM, for Appellee.

OPINION

FRY, Judge.

{1} The State seeks to appeal the district court order granting Defendant's motion to dismiss for violation of his speedy trial rights. We issued a notice of proposed disposition proposing to dismiss for an untimely appeal. The State has responded to our notice. Having considered the State's arguments, we are unpersuaded and dismiss.

{2} The State does not dispute that it filed a notice of appeal one day after the time for doing so had expired and that it failed to seek an extension in which to file its appeal. *See* Rule 12–201(A)(2) NMRA. The State recognizes that a timely appeal is a mandatory precondition to the exercise of our appellate jurisdiction and asks us to exercise our discretion to consider the merits of its appeal. *See Trujillo v. Serrano,* 117 N.M. 273, 277, 871 P.2d 369, 373 (1994). As grounds for exercising our discretion to accept the appeal, the State argues that it is an aggrieved party with an absolute right to one appeal, we routinely excuse the untimely appeals of criminal defendants, and the untimeliness

was inadvertent and does not prejudice Defendant. We are not persuaded.

{3} In support of its argument that it is an aggrieved party with an absolute right to one appeal of a disposition contrary to law, the State refers us to *State v. Ahasteen,* 1998–NMCA–158, ¶ 9, 126 N.M. 238, 968 P.2d 328. In *Ahasteen,* we analyzed the State's right to appeal in the context of the practical finality of the order from it sought to appeal, not the timeliness of the State's appeal. *See* 1998–NMCA–158, ¶¶ 10–20, 126 N.M. 238, 968 P.2d 328. In that case, we determined that denying the State the right to appeal a district court order remanding the case to magistrate court, an order that acted as a dismissal, would effectively deny the State the right to appeal a disposition that was contrary to law. *Id.* ¶¶ 17–20. Although the State is an "aggrieved party" from the district court order dismissing its case against Defendant within the meaning of the New Mexico Constitution, an aggrieved party with the right to appeal must exercise that right within the confines of the Rules of Appellate Procedure.

{4} We do, as the State contends, routinely excuse untimely appeals of represented criminal defendants and parents whose parental rights have been terminated, presuming the ineffective assistance of counsel. *See State v. Duran,* 105 N.M. 231, 232, 731 P.2d 374, 375 (Ct.App.1986) (holding that there is a conclusive presumption of ineffective assistance of counsel where notice of appeal is not filed within the time limit required); *see also State ex rel. Children, Youth & Families Dep't v. Ruth Anne E.,* 1999–NMCA–035, ¶ 10, 126 N.M. 670, 974 P.2d 164 (extending the conclusive presumption established in *Duran* to the fundamental liberty interests implicated where parental rights are terminated). *But see State v. Peppers,* 110 N.M. 393, 399, 796 P.2d 614, 620 (Ct.App.1990) (refusing to extend the conclusive presumption adopted in *Duran* to appeals from guilty or no contest pleas). We do not extend the presumption to the State, however, because it does not possess the constitutional right of an accused to the effective assistance of counsel.

{5} Without presuming the ineffective assistance of counsel and in the absence of exceptional circumstances, we rigidly enforce the mandatory time limits for filing the notice of appeal. *See In re Estate of Newalla,* 114 N.M. 290, 296, 837 P.2d 1373, 1379 (Ct.App.1992) (stating that "[o]ne such exceptional circumstance might be reasonable reliance on a precedent indicating that the order not timely appealed was not a final, appealable order"); *Trujillo,* 117 N.M. at 278, 871 P.2d at 374 (holding that exceptional circumstances include those beyond the control of the parties, such as errors on the part of the court). Contrary to the State's argument, we do not consider whether the opposing party was prejudiced by the delay resulting from an untimely appeal. Further, inadvertence on the part of the State's counsel does not constitute exceptional circumstances. Because there is no indication that unusual circumstances justify our discretion to entertain this untimely appeal, we do not overlook this grave procedural defect.

CONCLUSION

{6} For these reasons and those set forth in our notice of proposed disposition, we dismiss the State's appeal.

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Chief Judge and JAMES J. WECHSLER, Judge.

2006-NMCA-068
137 P.3d 1195

STATE of New Mexico, Plaintiff–Appellee,

v.

Cynthia MARTINEZ, a/k/a Cynthia Navarrette, Defendant–Appellant.

No. 24,601.

Court of Appeals of New Mexico.

April 3, 2006.

Certiorari Granted, No. 29,775, June 2, 2006.

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

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

OPINION

ROBINSON, Judge.

{1} Cynthia Martinez (Defendant) appeals her conviction, pursuant to a conditional plea, for felony child abuse, contrary to NMSA 1978, Section 30–6–1(D) (2005). The issue on appeal is whether the State, under current law, can prosecute a mother for child abuse when the mother uses cocaine during her pregnancy. We conclude that Section 30–6–1(D) does not apply to Defendant's conduct and we therefore reverse.

I. BACKGROUND

{2} The stipulated facts indicate that, on January 12, 2003, Defendant's daughter (Child) was born at Lea Regional Hospital in Hobbs, New Mexico. Child was delivered via caesarian section, due to a breech presentation, and Child was thirty-six weeks gestational age at the time of delivery. Doctor Reddy noted in the medical records that Child was borderline small for her gestational age. He further noted that "[i]f the baby continues to have increasing drug withdrawal, to do drug screening on the baby as the mother is a drug addict." Child's urine was tested approximately forty-eight hours after birth and showed a cocaine level greater than 300 ng/ml, which was flagged for a high level of cocaine.

{3} Defendant received prenatal care at the New Mexico Health Department. Defendant stated she was verbally advised and received pamphlets from her doctor, advising her that the use of drugs or alcohol during her pregnancy would be harmful to her unborn baby. On December 9, 2002, Defendant told the Health Department staff that she ingested all the crack cocaine she could get and drank alcohol all day.

{4} On March 10, 2003, Defendant was contacted by Detective Michael Weiss of the Hobbs Police Department. Defendant told him that she used crack cocaine at several locations in Hobbs and had done so two days prior to the birth of Child. The State charged Defendant with felony child abuse for "knowingly, intentionally or negligently, and without justifiable cause, causing or permitting ... [C]hild to be ... placed in a situation that may endanger ... [C]hild's life or health[.]" § 30–6–1(D)(1).

II. DISCUSSION

A. Standard of Review

{5} We must address whether the State, under current New Mexico law, has the authority to charge Defendant with child abuse. Specifically, this Court must determine whether the Legislature intended a viable fetus to be considered a human being in the context of the child abuse statute. Resolution of this issue requires us to interpret and ascertain the Legislature's intent in drafting the child abuse statute. *See* § 30–6–1. Statutory interpretation is a question that this Court reviews de novo. *State v. Fairbanks,* 2004–NMCA–005, ¶ 5, 134 N.M. 783, 82 P.3d 954. In construing a statute, the primary goal of an appellate court is to ascertain the intent of the Legislature by giving effect to the plain meaning of the words of the statute, unless that would lead to an absurd or unreasonable result. "We refrain from further interpretation where the language is clear and unambiguous." *Id.* ¶ 6; *State v. Marshall,* 2004–NMCA–104, ¶ 7, 136 N.M. 240, 96 P.3d 801. However, in applying the plain meaning rule, this Court must exercise caution because "[i]ts 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." *State ex rel. Helman v. Gallegos,* 117 N.M. 346, 353, 871 P.2d 1352, 1359. Furthermore, "[w]hen attempting to unravel a statutory meaning[,] we begin with the presumption that the statutory scheme is comprehensive." *Sims v. Sims,* 1996–NMSC–078, ¶ 21, 122 N.M. 618, 930 P.2d 153. Thus, in considering the statute's function in relation to related statutes passed by the Legislature, "[w]henever possible, ... we must read different legislative enactments as harmonious instead of as contradicting one another." *State v. Muniz,* 2003–NMSC–021, ¶ 14, 134 N.M. 152, 74 P.3d 86 (internal quotation marks and citation omitted).

B. Interpretation of the Child Abuse Statute

{6} Here, the relevant portion of the child abuse statute provides that "[a]buse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be ... placed in a situation that may endanger the child's life or health[.]" § 30–6–1(D). A child is defined as "a person who is less than eighteen years of age." § 30–6–1(A)(1). Review of the criminal code, NMSA 1978, Sections 30–1–1 to 30–28–3 (1963, as amended through 2005) defines a "person" as "any human being or legal entity[.]" § 30–1–12(E).

{7} When the Legislature defined a "person" as a human being or legal entity, it did not include fetuses within the meaning of a "human being." *State v. Willis,* 98 N.M. 771, 773, 652 P.2d 1222, 1224 (Ct.App.1982), illustrates the point. In *Willis,* we held that an unborn viable fetus is not a "human being" within the meaning of the vehicular homicide statute. The Court reasoned that since the Legislature first enacted homicide statutes, in which the killing of a human being and the killing of an unborn infant child were separately addressed, "it does not follow that the Legislature meant to include viable fetus within the definition of human being without specifically making provision therefor." *Id.*

{8} Since *Willis,* the Legislature has enacted statutes that demonstrate its intention to distinguish an unborn viable fetus from "human being." *See* NMSA 1978, § 30–3–7 (2006) (stating that "[i]njury to [a] pregnant woman consists of a person other than the woman injuring a pregnant woman in the commission of a felony causing her to suffer a miscarriage or stillbirth as a result of that injury" (§ 30–3–7(A)), defining "miscarriage" as "the interruption of the normal development of the fetus, other than by a live birth" (§ 30–3–7(B)(1)), and defining "stillbirth" as "the death of a fetus prior to the complete expulsion or extraction from its mother" (§ 30–3–7(B)(2))); *see also* NMSA 1978, § 66–8–101.1 (1985) (injury to pregnant woman by vehicle). These provisions indicate that when the Legislature intends to include fetuses within the protection of a criminal statute, it does so specifically.

{9} This Court may not expand the meaning of "human being" to include an unborn viable fetus because the power to define crimes and to establish criminal penalties is exclusively a legislative function. *Santillanes v. State,* 115 N.M. 215, 849 P.2d 358 (1993); *see State v. Thompson,* 57 N.M. 459, 465, 260 P.2d 370, 374 (1953) (stating that "[b]y the constitution of the [S]tate the [L]egislature is invested with plenary legislative power, and the defining of crime and prescribing punishment therefor are legislative functions"); *see also* N.M. Const. art. III, § 1 (providing for division of powers of government between legislative, judicial, and executive branches).

{10} Other jurisdictions with similar child abuse statutes have concluded that such statutes do not apply to an unborn fetus. *See People v. Morabito,* 151 Misc.2d 259, 580 N.Y.S.2d 843, 846–47 (N.Y.City Ct.1992) (holding that mother could not be charged with criminal endangering the welfare of her child based upon prenatal acts of smoking cocaine); *State v. Gray,* 62 Ohio St.3d 514, 584 N.E.2d 710, 713 (1992) (holding that mother may not be prosecuted criminally for child endangerment for prenatal substance abuse); *Reinesto v. Superior Court of Ariz.,* 182 Ariz. 190, 894 P.2d 733, 737 (Ct.App. 1995) (holding that mother could not be prosecuted under child abuse statute for prenatal use of heroin); *State v. Dunn,* 82 Wash.App. 122, 916 P.2d 952, 956 (1996) (dismissing charge of second-degree criminal mistreatment of a child, holding that a fetus was not a child within the meaning of criminal mistreatment statute where mother continued to ingest cocaine while pregnant); *State v. Deborah J.Z.,* 228 Wis.2d 468, 596 N.W.2d 490, 496 (Ct.App.1999) (holding that fetus was not a human being for purposes of attempted first-degree intentional homicide and first-degree reckless injury statutes).

C. Due Process

{11} Accepting the State's interpretation of Section 30–6–1 to include a fetus would offend Defendant's due process rights. Since we have concluded that the statutory definition of "human being" does not include a fetus, Defendant could not have reasonably known that her conduct was criminal. *See State v. Marchiondo,* 85 N.M. 627, 629, 515 P.2d 146, 148 (Ct.App.1973) (stating that "[a] statute violates due process if it . . . 'is so vague that persons of common intelligence must necessarily guess at its meaning' " (*quoting State v. Orzen,* 83 N.M. 458, 493 P.2d 768 (Ct.App.1972))); *see also State v. Collins,* 80 N.M. 499, 502, 458 P.2d 225, 228 (1969) (stating that "[p]enal statutes are strictly construed and should be of sufficient certainty so that a person will know his act is criminal when he does it"). Additionally, "penal statutes must be strictly construed, and any doubts about their construction must be resolved in favor of lenity." *State v. Leiding,* 112 N.M. 143, 145, 812 P.2d 797, 799 (Ct.App.1991). Other states confronted with similar issues have come to the same conclusion. *See State v. Luster,* 204 Ga.App. 156, 419 S.E.2d 32, 34 (1992) (stating that mother could not have known that use of illegal drugs that affected fetus could subject her to criminal prosecution); *Reinesto,* 894 P.2d at 736 (reasoning that statutory reference to a child does not include a fetus, mother could not reasonably have known that she could be prosecuted for child abuse because of her prenatal conduct); *Morabito,* 580 N.Y.S.2d at 846 (stating that to construe penal statutes strictly because a reasonable person would have to be informed of the nature of the

offense); *Collins v. State,* 890 S.W.2d 893, 898 (Tex.App.1994) (concluding that statute did not give mother sufficient notice of criminal nature of her substance abuse, and thus her prosecution on this basis violated due process).

{12} Applying the ordinary meaning and legislative history of the criminal code leads us to conclude that Section 30–6–1(D) does not refer to Mother's conduct in this particular case. To expand the ordinary meaning of this statute would deny Defendant reasonable notice that her actions were criminal, thereby, violating her due process rights.

CONCLUSION

{13} For the reasons stated, we hold that the Legislature did not intend for a viable fetus to be included within the statutory definition of a child for the purposes of the child abuse statute. We therefore reverse the district court's ruling denying Defendant's motion to dismiss the charge of child abuse, and remand for further proceedings consistent with this opinion.

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Chief Judge, and MICHAEL E. VIGIL, Judge.

2006-NMCA-072

137 P.3d 1198

STATE of New Mexico, Plaintiff–Appellant,

v.

PABLO R., Child–Appellee.

No. 25,179.

Court of Appeals of New Mexico.

April 28, 2006.

Certiorari Denied, No. 29,798, June 12, 2006.

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

John Bigelow, Chief Public Defender, Nancy M. Hewitt, Assistant Appellate Defender, Santa Fe, NM, for Appellee.

OPINION

VIGIL, Judge.

{1} The State appeals the district court's order granting Child's motion to suppress

evidence. Child and his jacket were searched by two campus service aides in the school security office because he was walking down a school hallway without a pass after classes had begun and he appeared nervous and fidgety when he was initially confronted. Following an evidentiary hearing, the district court ruled that the search was not supported by reasonable suspicion. We affirm.

BACKGROUND

{2} At the relevant time, Child was a junior at Rio Grande High School. On December 15, 2003, at approximately 12:35 p.m., Child was walking down the school hallway during class time and Elvis Delaney, a campus service aide, stopped him. Campus service aides are employed by Albuquerque Public Schools to assist school officials in security matters, including patrolling the campus and ensuring that students are in class. Rio Grande High School has a history of problems on campus, including fighting, truancy, graffiti, gang activity, and weapons. When a campus service aide finds a student who is not in class, he first determines whether the student has a pass authorizing him or her to be out of class. If the student has a pass, the campus service aide makes sure the student is headed to the authorized destination. If the student has no pass, he determines why the student is out of class and escorts the student to the school security office to determine whether any disciplinary action is required.

{3} Delaney testified that he had three or four prior contacts with Child, and on those occasions, Child was also either late to class or out of class. On those occasions, he simply instructed Child to get to class. However, on this occasion, for the first time, Child was acting "a little nervous" and fidgety so he directed Child to the security office because he thought "something was wrong" and he had become concerned that Child might have a weapon or marijuana on him. Delaney admitted he did not suspect Child of any criminal activity, did not smell marijuana on him, and had no information concerning any other wrongdoing by Child that day. Furthermore, Delaney's written incident report makes no mention of Child's nervousness, and it only states that Child "was caught wandering campus" and brought to the security office for a pat-down.

{4} Delaney could not recall whether Child offered any explanation about where he was going. Delaney also did not initially recall whether he asked Child any questions before directing him to the security office; however, he subsequently testified that he did ask Child whether he had a pass, and Child did not have a pass or agenda. Delaney explained that, while on campus, students are typically required to carry with them an agenda containing any signed passes authorizing them to be out of class. However, he also acknowledged that sometimes a student may legitimately be out of class without a pass, such as when a teacher instructs the student to obtain a pass from the administration office.

{5} Child testified that after the lunch period, he walked his girlfriend to her class and then went to his class, but was not allowed into the classroom by his teacher because he was late. His teacher instructed him to go to the administration office to obtain a late pass. On his way to the administration office, Child walked by the security office and he was stopped by Delaney who ordered him inside. Before the search, Delaney had asked Child where he was going and Child testified he responded he was going to the administration office to get a pass. When asked whether he was nervous when confronted by Delaney, Child responded that he was not given the chance to be nervous.

{6} In the security office, Delaney instructed Child to take his jacket off, place it on a table, empty his pockets, and stand against the wall, with his hands and legs spread apart, and Child complied. While patting down Child, Delaney found a pipe containing what appeared to be marijuana residue, a black magic marker, and a lighter with the initials "BST" etched on it. "BST" stands for "Bud Smoking Thugs," a known group on campus. Another campus service aide, Vincent Gallegos, assisted in the search because of the policy to have two campus service aides conduct searches: one to search the student's person and the other to search his or her belongings. Thus, while Delaney patted down Child, Gallegos searched the

jacket, finding brass knuckles inside it. On cross-examination, Gallegos acknowledged he had no independent reason for searching Child. Further, he was not concerned about his safety and had no history of trouble with Child.

{7} The district court judge questioned both Delaney and Gallegos about their reasons for searching Child. In response to the judge's questions, Delaney said he initially stopped Child because he was not in class and he did not have a pass authorizing him to be out of class, and that he searched Child because he appeared nervous and was fidgeting. When asked if the school had a policy of searching any student who was out of class without a pass, Delaney said there was no such policy, but that a student could be searched if he or she appeared to be "hiding something." Gallegos, on the other hand, claimed that any student who is caught out of class without a pass is subject to a search for weapons or contraband. He said that students who are out of class without permission are usually doing something they should not be doing. He also said that being out of class without a pass is a violation of the school rules, and the school handbook, which is distributed to every student, authorizes a search when a student violates school rules.

{8} The district court judge asked for a copy of the school handbook, directed the parties to submit briefs in support of their respective positions, and took the matter under advisement. The district court subsequently granted Child's motion to suppress. Although the court did not enter findings of fact in the written order granting the motion, it gave the following oral ruling in open court. First of all, the school handbook provided no basis for searching Child. Furthermore, the district court found, Child was in the hallway without a pass because he was late returning from lunch and he had been directed by his teacher to obtain a pass from the administration office. Thus, the court concluded, there was no reasonable suspicion that Child had violated the law or a school rule, and the search of Child was unlawful. The State appeals.

STANDARD OF REVIEW

{9} A motion to suppress evidence raises issues of fact and issues of law. On appeal, we therefore review a ruling on a motion to suppress under a two-part standard: first, we determine whether the findings of fact made by the district court are supported by substantial evidence; second, we engage in a de novo review of the application of the law to those facts. *State v. Vandenberg,* 2003–NMSC–030, ¶ 17, 134 N.M. 566, 81 P.3d 19. We view the facts as determined by the district court in the light most favorable to its ruling, *In re Josue T.,* 1999–NMCA–115, ¶ 14, 128 N.M. 56, 989 P.2d 431, we indulge all reasonable inferences in support of the district court's ruling, and we disregard all evidence and inferences to the contrary. *State v. Jason L.,* 2000–NMSC–018, ¶ 10, 129 N.M. 119, 2 P.3d 856. "Determining the reasonableness of a search, however, is a matter of law." *In re Josue T.,* 1999–NMCA–115, ¶ 14, 128 N.M. 56, 989 P.2d 431. We therefore apply a de novo review to the district court's determination that the search in this case was unreasonable. *Id.*

APPLICABLE LAW

{10} "It is well established that school officials do not need a search warrant or even probable cause to search a student's belongings for contraband." *State v. Crystal B.,* 2001–NMCA–010, ¶ 14, 130 N.M. 336, 24 P.3d 771. Because school officials have a need to maintain order and discipline on school grounds, searches conducted by school officials in the school setting are subject to a less stringent standard. *Id.* However, students "do not shed their constitutional rights at the schoolhouse gate" and they maintain a legitimate expectation of privacy in their persons and in the personal belongings they bring to school. *State v. Tywayne H.,* 1997–NMCA–015, ¶ 7, 123 N.M. 42, 933 P.2d 251. Therefore, while probable cause is not required, the search of a student must still be reasonable under the circumstances in order to withstand constitutional scrutiny. *Crystal B.,* 2001–NMCA–010, ¶ 14, 130 N.M. 336, 24 P.3d 771.

{11} In *New Jersey v. T.L.O.,* 469 U.S. 325, 341–43, 105 S.Ct. 733, 83 L.Ed.2d

720 (1985), the United States Supreme Court formulated a two-prong test to determine whether the search of a student conducted by public school officials is reasonable. We adhere to this formulation. *State v. Michael G.*, 106 N.M. 644, 646, 748 P.2d 17, 19 (Ct. App.1987); *In re Josue T.*, 1999-NMCA-115, ¶¶ 15-21, 128 N.M. 56, 989 P.2d 431. First, the court must determine whether the search was justified at its inception. *T.L.O.*, 469 U.S. at 341, 105 S.Ct. 733. A search of a student by a school official is justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated, or is violating, either the law or the rules of the school. *Id.* at 341-42, 105 S.Ct. 733. Second, the court must determine whether the search, as conducted, was reasonably related in scope to the circumstances which justified the search in the first place. *Id.* at 341, 105 S.Ct. 733. A search is permissible in its scope when the measures adopted and used are reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the alleged infraction. *Id.* at 342, 105 S.Ct. 733.

ANALYSIS

{12} A school official must have reasonable grounds to suspect that a student has violated the law or a school rule and that a search will uncover evidence of that violation in order for the search to be constitutionally justified at its inception. *T.L.O.*, 469 U.S. at 341-42, 105 S.Ct. 733; *Tywayne H.*, 1997-NMCA-015, ¶ 8, 123 N.M. 42, 933 P.2d 251. Thus, there must be a nexus or a connection between the item searched for and the suspected violation. *T.L.O.*, 469 U.S. at 345, 105 S.Ct. 733. "A correlation between the wrongful behavior of the student and the intended findings of the search is essential for a valid search of the student under the Fourth Amendment." *In re Lisa G.*, 125 Cal.App.4th 801, 23 Cal.Rptr.3d 163, 166 (2005). The essential nexus between Child's infraction and the object of the search is missing in this case.

{13} The California Supreme Court discussed the significance of a connection between the search and the proscribed activity of a child in the case of *In re William G.*, 40 Cal.3d 550, 221 Cal.Rptr. 118, 709 P.2d 1287 (1985) (in bank). There, an assistant principal encountered three students who were late for class. *Id.* 221 Cal.Rptr. 118, 709 P.2d at 1289. When he asked the students where they were heading and why they were late for class, one student, William, made furtive gestures in attempting to hide his calculator case, which had an odd-looking bulge. *Id.* When asked what he had in his hand, William replied, "Nothing." *Id.* He also said "You can't search me," and then, "You need a warrant for this." *Id.* After several unsuccessful efforts to convince William to hand over the case, the assistant principal forcefully took the case and unzipped it, finding evidence of marijuana use and dealing. *Id.* The court concluded that the search was not supported by reasonable suspicion because the assistant principal "articulated no facts to support a reasonable suspicion that William was engaged in a proscribed activity justifying a search." *Id.* 221 Cal.Rptr. 118, 709 P.2d at 1297. The court also noted that the record did not reflect any prior knowledge or information on the part of the assistant principal linking William to the possession, use, or sale of illegal drugs or other contraband. *Id.* Thus, the court concluded, the assistant principal's "suspicion that William was tardy or truant from class provided no reasonable basis for conducting a search of any kind." *Id.*

{14} We find the California court's reasoning in *William G.* pertinent and persuasive. In this case, Child was suspected of a similar type of violation: being out of class without a pass. Delaney admitted he did not suspect Child of engaging in any criminal activity, did not smell marijuana on him, and had no knowledge or information concerning any wrongdoing by Child, other than being out of class without a pass. Gallegos admitted he had no independent reason for searching Child and had no history of trouble with Child. Nonetheless, Child and his belongings were searched for contraband. Because there is no logical connection between the search of Child for contraband and the suspected violation of being out of class without a pass, we conclude that the search in this

case was not justified at its inception. When the only infraction under investigation is being out of class without a pass or late to class (which may be violations of school rules), we conclude that a search of the student's person and belongings is not justified because the search would not likely reveal evidence of the suspected violation. *See also In re Lisa G.*, 23 Cal.Rptr.3d at 166 (determining that student's disruptive behavior in class did not authorize search of student's personal belongings); *State v. B.A.S.*, 103 Wash.App. 549, 13 P.3d 244, 246 (2000) (concluding that search was unjustified where "there was no evidence in the record of a correlation between a student's violation of the closed campus policy and a likelihood he or she is bringing contraband onto campus").

{15} The State argues that *William G.* is distinguishable. Relying on Delaney's testimony that Child was nervous and fidgety, the State argues that the search was justified for safety reasons. However, nervousness alone is not sufficient to justify even a protective frisk for safety reasons. *Vandenberg*, 2003–NMSC–030, ¶ 31, 134 N.M. 566, 81 P.3d 19. Rather, reasonable suspicion to justify a protective frisk depends upon whether the officer is able to articulate specific reasons *why* the nervousness caused the officer to believe his safety was compromised. *Id.* In this case, Delaney did not articulate any specific reasons why he believed Child's nervous demeanor caused him to believe his safety would be compromised, and Gallegos admitted that he was not concerned about his personal safety. Insufficient justification was presented for a protective frisk, let alone the full search that was performed upon Child. The State urges us to rely on several out-of-state authorities which it claims authorize a search when a student is out of class without a pass and the student's conduct raises safety concerns. However, those cases do not apply because the element of officer safety concern is absent.

{16} Delaney testified that because Child appeared nervous and fidgety, he thought "something was wrong" and became concerned that Child "might have a weapon or anything else like marijuana" on him. However, this was nothing more that a hunch and insufficient as a matter of law to provide reasonable suspicion to conduct the search. *See In re Josue T.*, 1999–NMCA–115, ¶ 23, 128 N.M. 56, 989 P.2d 431 ("A suspicion based on an inchoate and unparticularized suspicion or hunch would not be reasonable." (internal quotation marks and citation omitted)). "Reasonable suspicion must be based on specific articulable facts and the rational inferences that may be drawn from those facts." *State v. Flores*, 1996–NMCA–059, ¶ 7, 122 N.M. 84, 920 P.2d 1038. At the suppression hearing, the State did not elicit any specific articulable facts to support a reasonable suspicion that Child was carrying a weapon or marijuana or engaging in any prohibited activity to justify a search. Moreover, reasonable suspicion must exist at the inception of the search; the State cannot rely on facts which arise as a result of the search, such as the discovery of the weapon and drug paraphernalia on Child. *Jason L.*, 2000–NMSC–018, ¶ 20, 129 N.M. 119, 2 P.3d 856. Because the campus service aides had no idea what Child might have had in his possession upon searching him, or why the search might have revealed evidence of a violation of the law or school rules, we conclude that they did not have a reasonable suspicion to justify the search of Child at its inception. *See R.S.M. v. State*, 911 So.2d 283, 284–85 (Fla.Dist.Ct.App.2005).

{17} It is also possible the district court simply rejected Delaney's testimony that Child was acting "nervous" and "fidgety" when stopped. As discussed above, the district court did not enter any findings of fact in its order, and its oral ruling did not include any finding concerning whether Child was nervous during the stop. Our review of the record indicates that there was inconsistent evidence adduced on the issue of Child's nervousness. While Delaney testified that Child was nervous and fidgety when confronted, Child testified that he "was not given a chance to be nervous." Moreover, Delaney admitted on cross-examination that his written report omitted any mention of Child's nervous and fidgety demeanor, even though he normally tries to be as accurate and complete as possible in preparing his reports.

When the evidence is conflicting, we consider the evidence that supports the district court's ruling, and we will draw all inferences and indulge all presumptions in favor of the district court's ruling. *Jason L.*, 2000–NMSC–018, ¶ 11, 129 N.M. 119, 2 P.3d 856. Thus, in this case, we may presume that the district court believed Child's testimony that he was not nervous.

CONCLUSION

{18} For the foregoing reasons, we conclude that the search of Child was unreasonable and therefore affirm the order granting Child's motion to suppress evidence.

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

WE CONCUR: CYNTHIA A. FRY and IRA ROBINSON, Judges.

2006-NMCA-077

137 P.3d 1204

FARMINGTON POLICE OFFICERS ASSOCIATION COMMUNICATION WORKERS OF AMERICA LOCAL 7911, Vince Mitchell and Paul Martinez, Plaintiffs–Appellees,

v.

CITY OF FARMINGTON, Farmington Police Department, Mark McCloskey, and Doug McKim, Defendants–Appellants.

No. 24,972.

Court of Appeals of New Mexico.

May 17, 2006.

William J. Tryon, Albuquerque, NM for Appellees.

Bingham, Hurst, Apodaca & Wile, P.C., Michael W. Wile, Albuquerque, NM for Appellants.

OPINION

ALARID, Judge.

{1} This case presents us with an opportunity to harmonize the procedural standards governing summary judgment with the substantive standards for determining which party's understanding should prevail in a dispute over the meaning of a contractual term. We hold that, in the present case, the Plaintiffs failed to eliminate genuine issues of material fact bearing upon which party's interpretation should control. We therefore reverse the grant of summary judgment in Plaintiffs' favor.

BACKGROUND

{2} Plaintiffs Vince Mitchell and Paul Martinez were at all material times full-time peace officers employed by Defendants Farmington Police Department (the FPD) and City of Farmington (the City), working as agents with the Region II Narcotics Task Force (Task Force). Plaintiff Communication Workers of America Local 7911 (Union) is the collective bargaining representative of the Farmington Police Officers Association. The City and the Union were parties to a collective bargaining agreement (the CBA). The CBA included the following terms:

> ARTICLE 7. MANAGEMENT RIGHTS
>
> Under this article, subject to existing law, management shall have the right to:

A. Hire, promote, reclassify, transfer, assign, lay off and recall employees;

B. Reprimand, suspend, demote, discharge or otherwise discipline employees[.]

ARTICLE 26. EMPLOYEE INVESTIGATIONS AND DISCIPLINE

. . . .

A. The Police Department reserves the right to investigate all allegations of employee misconduct in accordance with NMSA 29–14 et. seq.

. . . .

E. Employees will cooperate in all investigations conducted by the department. Failure to cooperate may be the basis for disciplinary action up to and including termination.

. . . .

H. Disciplinary actions, other than verbal or written reprimands or warnings, may be appealed through the grievance procedure contained in this agreement through the process of arbitration. Written reprimands may be grieved to the level of the City Manager. If the written reprimand stands after the City Manager's response, the employee may attach a written response to the written reprimand being placed in the employee's file.

ARTICLE 27. GRIEVANCE PROCEDURE

A. Purpose

The purpose of this grievance procedure shall be to secure, at the lowest possible administrative level, equitable resolutions to problems which may arise and are subject to review under this procedure. There shall be no other grievance or appeal procedure on any matter for members of the bargaining unit other than that contained in this Article.

B. Definitions

1. A "grievance" shall be defined as a dispute pertaining to a claim which alleges a violation of this collective bargaining agreement, and terminations, suspensions without pay and demotions. Written reprimands cannot be appealed to arbitration.

ARTICLE 32. SPECIALITY POSITION SELECTION

It is the policy of the Farmington Police Department at this time to allow employees to apply for certain assignments/positions within the employee's existing rank. The Department will continue to allow such application in whole or in part so long as the Chief determines that doing so results in the appropriate distribution of Department staff. The fact that an employee has applied and been selected into an assignment /position in no way limits the right of the Department to reassign the employee when the Chief determines that doing so is in the best interest of the Department.

A. The Chief's determination regarding what constitutes "the best interest of the Department" is the exclusive determination of the Chief of Police. The grievance procedure will be followed through and including the City Manager who will be the final step and decision for this process concerning this section.

ARTICLE 34. ANALYSIS FOR ILLEGAL DRUG USE

Statement of Principle: The Employer and the Union jointly recognize that the use of drugs and alcohol, whether on or off the job or for so-called "recreational" purposes or otherwise, constitutes a serious threat to the health and safety of the public, to the safety of officers, and to efficient operation of the department.

{3} On January 17, 2002, Defendant FPD Chief Mark McCloskey sent out an interoffice memorandum ordering all members of the FPD assigned to the Task Force to answer the following two questions:

1. Have you ever consumed alcoholic beverages either on-duty or off and then driven a work vehicle from the location where the alcohol was consumed? If so, describe such events in detail. List those who were with you when this activity occurred.

2. Do you have any knowledge of Region II (Farmington Office) personnel consuming alcoholic beverages on duty or off and then driving a work vehicle? If so, describe such incidents in detail. List those present at such events in your explanation.

Officers to whom the questions were directed were given the following written instructions:

> You are being required to truthfully answer the questions listed below. Your responses to these questions must be placed in a sealed envelope and submitted to Sergeant Ledwitch before the end of your tour of duty on the day you receive this document. **You are not to discuss this topic or your responses in any manner with anyone including other member** [sic] **of this office and including civilians who may have witnessed or participated in the behavior described above.**

{4} As of January 17, 2002, Mitchell and Martinez were assigned to the Task Force as undercover narcotics agents under the supervision of Defendant FPD Lt. Doug McKim. Mitchell and Martinez received Chief McCloskey's memorandum. Seven of the nine officers who received the memorandum responded by answering the two questions. Mitchell and Martinez responded in writing stating that they were willing "to comply with the request and answer all allegations honestly and truthfully." Mitchell and Martinez did not answer the questions, instead choosing to treat the two written questions as an "interrogation" purportedly triggering various procedural rights under the CBA and Section 4 of the Peace Officer's Employer–Employee Relations Act, NMSA 1978, § 29–14–4(C) (1991) (the POEERA). FPD Sgt. Mark Ledwitch informed Mitchell and Martinez that Chief McCloskey had decided to place them on administrative leave for insubordination unless they answered the questions by the end of work on January 18, 2002. On January 18, 2002, Mitchell and Martinez answered the questions under protest, asserting that Chief McCloskey's January 17, 2002, memo constituted an unlawful order in violation of the CBA and the POEERA. In their answers, Mitchell and Martinez admitted consuming alcoholic beverages while on call. From similarities in their responses, it appeared to Chief McCloskey that Mitchell and Martinez had cooperated in preparing their responses.

{5} On January 30, 2002, Chief McCloskey notified Mitchell and Martinez in separate interoffice memoranda that they had been found to have violated FPD policies:

> 1. The questionnaire was very specific in the directions that those answering the questions were not to discuss the topic of the memo with anyone in any manner. These directions were bolded so that they would be adhered to. You chose to disregard this directive and, by your own admission, discussed the questionnaire and your response with others. The directive was issued so that answers would be independent and so that answers would be individual. It was also issued so that answers would not be discussed and compared. Your answers (both of them) were identical to the answers of another agent. It was obvious you both worked together to fashion your responses. For failing to follow a lawful directive, you are deemed to have violated Code of Conduct section 1.04, *Insubordination and Intemperate Behavior* which states you will obey any lawful directive of a supervisor.
>
> 2. You also admit that you have, on occasion, consumed alcoholic beverages while off duty when you were on-call and then driven your assigned vehicle which is a violation of Policy 299–02, *Vehicle Fleet System.* If you were to be called out after consuming alcoholic beverages and had contact with the public with the odor of an alcoholic beverage on your breath it would be considered unprofessional and could not be tolerated. You are compensated for being on-call and therefore have an obligation to maintain yourself in a condition conducive to responding should you be called out.

{6} Chief McCloskey also determined that in an unrelated incident Mitchell and Martinez had acted unprofessionally in the course of serving a search warrant. Chief McCloskey found that Martinez drew his firearm and pointed it at a "racist" drawing; that Mitchell angrily removed the drawing without an investigative purpose in removing the

drawing; that Martinez stepped on the drawing as it lay on the floor; and that Martinez damaged a second drawing by putting his fist through it. Chief McCloskey reached the following conclusions:

> Article 32 of the collective bargaining agreement between the City and CWA which is currently in effect states that I have the right to reassign employees assigned to specialty positions when doing so is determined to be in the best interest of the Department. In this case, it would also be in the best interest of the Region II Narcotics Task Force. Such determination is exclusively mine. Therefore, it [is] my determination that it would be in the best interest of the Department for you to be *reassigned* to the Patrol Division effective February 10, 2002....
>
> In addition to the reassignment, you can consider this memo a *written reprimand* for the violations of the Code of Conduct and Policy as described above.

{7} Mitchell and Martinez pursued grievances from Chief McCloskey's decision to transfer them out of the Task Force. Their grievances were denied by the FPD. The denials were upheld by the City Manager.

{8} Mitchell and Martinez sought arbitration. Bob Hudson, the City Manager, denied the demand for arbitration. According to Hudson, during negotiations between the Union and the City, the Union had proposed making reassignment from a specialty position subject to arbitration under the CBA, while the City had proposed making reassignment from a specialty position non-grievable under any circumstances. In Hudson's view, Article 32 of the CBA, by allowing reassignments to be grievable up to and including the City Manager, reflected a compromise between these two positions, and the CBA clearly and unambiguously provided that an appeal to the City Manager was the final step in grieving reassignments from a specialty position. Hudson advised Plaintiffs' counsel that he had documentation of the bargaining history of Article 32 and urged counsel to contact members of the Union's negotiating committee to confirm the bargaining history of Article 32.

{9} Thereafter, the Union, joined by Mitchell and Martinez, filed a complaint in the district court, naming the City, the FPD, Chief McCloskey, and Lt. McKim as Defendants. Plaintiffs sought an order compelling arbitration. The City filed an answer in which it admitted that the Union is the exclusive bargaining agent for the collective bargaining unit comprised of FPD police officers. Defendants denied any obligation to arbitrate the decision to transfer Mitchell and Martinez out of the Task Force. Defendants asserted a counterclaim for malicious abuse of process.

{10} The parties agreed to file simultaneous cross-motions for summary judgment. In support of their motion, Plaintiffs attached Article 27 of the CBA; portions of Chief McCloskey's deposition in which he conceded that "[i]f I was in their [Mitchell and Martinez's] shoes I would perceive it [the reassignment] as discipline"; and affidavits in which Mitchell and Martinez stated that the reassignments were punitive, resulted in lessened responsibilities and reduced pay, and undermined their career opportunities. Plaintiffs argued that the reassignment from the Task Force was a disciplinary matter subject to arbitration pursuant to Article 27 D. 8 of the CBA. Defendants argued in support of their motion that Mitchell and Martinez had failed to follow procedures mandated by the CBA in bringing their grievance and that under Article 32 of the CBA the reassignment out of the Task Force was not subject to arbitration. Defendants attached the entire CBA as an appendix to their motion. Defendants also attached copies of correspondence between Plaintiffs and Defendants documenting the dispute, beginning with the January 17, 2002, memo from Chief McCloskey, and concluding with an April 24, 2002, letter from Hudson to Plaintiffs' counsel in which Hudson reiterated the City's position that the reassignment from the Task Force back to patrol duties was not arbitrable under the CBA and that this position was supported by the bargaining history of the CBA.

{11} Defendants also filed a response to Plaintiffs' motion for summary judgment. Defendants characterized the central issue

before the district court as "[w]ere the transfers of Mitchell and Martinez from the Region II Task Force to Farmington Police Department patrol duties reassignments from specialty positions under Article 32 of the [CBA], or were they demotions?" Defendants argued that the transfers were not demotions within the meaning of the CBA and that Article 32 gave the Chief of Police "unfettered authority to transfer Mitchell and Martinez out of the Task Force specialty positions."

{12} The district court entered an order granting Plaintiffs' motion and denying Defendants' motion. The district court included findings that the transfer out of the Task Force to patrol duty with the FPD was disciplinary action as defined by the CBA "[a]s a matter of law," that the Plaintiffs timely pursued their grievance, that the Plaintiffs substantially complied with the requirements of the grievance procedure, and that the Plaintiffs are entitled to have their grievance heard by an arbitrator. Defendants filed a motion for reconsideration, which the district court denied. Defendants moved to dismiss their counterclaim pursuant to Rule 1–041(A)(2) NMRA. The district court granted the motion. Defendants then filed a notice of appeal from the order granting Plaintiffs' motion for summary judgment and denying Defendants' motion for summary judgment.

DISCUSSION

{13} An appeal from an order granting a motion for summary judgment presents a question of law subject to de novo review. *Bartlett v. Mirabal,* 2000–NMCA–036, ¶ 4, 128 N.M. 830, 999 P.2d 1062. Under this standard of review, we step into the shoes of the district court, reviewing the motion, the supporting papers, and the nonmovant's response as if we were ruling on the motion in the first instance.

{14} Rule 1–056 NMRA provides as follows:

> A. **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.
>
> . . . .
>
> C. **Grounds for motion.** The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

{15} A party who will bear the burden of persuasion on a claim or affirmative defense at trial must satisfy a stringent burden to justify summary judgment:

> When the *moving* party has the burden of proof at trial, that party must show *affirmatively* the absence of a genuine issue of material fact: it "must support its motion with credible evidence . . . that would entitle it to a directed verdict if not controverted at trial." In other words, the moving party must show that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the nonmoving party.

United States v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir.1991) (applying Fed.R.Civ.P. 56) (internal quotation marks and citations omitted).

{16} A party seeking judicial enforcement of a contract bears the burden of persuasion. *See Camino Real Mobile Home Park P'ship v. Wolfe,* 119 N.M. 436, 442, 891 P.2d 1190, 1196 (1995) (discussing burden of proof in an action for breach of warranty). Although no New Mexico case appears to have addressed the issue, we believe that where the meaning of a material contract term is in dispute a party seeking affirmative relief based upon its interpretation necessarily bears the burden of establishing that its interpretation controls. *See Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp.,* 190 F.Supp. 116, 121 (S.D.N.Y.1960) (ruling that plaintiff-buyer had the burden of proving that parties to sales contract used buyer's definition of "chicken"). This approach is consistent with the general default rule allocating the burden of persuasion in civil cases to the party who invokes the authority of a court to alter the extrajudicial status quo. *E.g., Atlantic & Pac. Ins. Co. v. Barnes,* 666

P.2d 163, 165 (Colo.Ct.App.1983). Transferred to this case, this principle means that Plaintiffs bore the burden of establishing that Mitchell's and Martinez's reassignments from the Task Force back to patrol duty were arbitrable personnel decisions under the CBA.

{17} In determining which issues of fact are material facts for purposes of Rule 1–056(C), we look to the substantive law governing the dispute. *See Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1136 (10th Cir. 2000) (applying Fed.R.Civ.P. 56(c)). The substantive rules governing the interpretation of contracts are summarized in the Restatement (Second) of the Law of Contracts:

> Whose Meaning Prevails
>
> (1) Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.
>
> (2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made
>
> (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or
>
> (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.
>
> (3) Except as stated in this Section, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent.

Restatement (Second) of Contracts § 201 (1981).

{18} Subsection (1) codifies a subjective standard of mutual assent: "[i]f the parties to a contract attach the same meaning to their expression, it should prevail over the meaning which a hypothetical reasonable party would attach." John Edward Murray, Jr., *Murray on Contracts* § 87, at 416 (3d ed.1990). Subsection (2)(a) codifies a rule based on concerns of fairness that prevents a party who knows that the other party has attached a different meaning to a term from taking advantage of the misunderstanding. E. Allan Farnsworth, *Contracts* § 7.9, at 506 (2d ed.1990). Plaintiffs did not come forward with evidence of what the Union and the City actually believed about the scope of arbitration or what the Union or the City knew about each other's understanding of the scope of arbitration when they entered into the CBA, and, accordingly, we cannot sustain the district court's entry of summary judgment under Subsection (1) or Subsection (2)(a), each of which turns upon the subjective states of mind of the City and the Union as of the time the CBA was made.

{19} Subsection 2(b) codifies the objective theory of contractual assent. Under this objective approach "what is operative is the objective manifestations of mutual assent." *See Pope v. The Gap, Inc.*, 1998–NMCA–103, ¶ 13, 125 N.M. 376, 961 P.2d 1283 (discussing role of mutual assent in contract formation; citing and quoting Restatement (Second) of Contracts § 20 (1981)). Application of an objective standard does not require inquiry into the actual understandings of the parties, but, rather, depends upon what hypothetical reasonable contracting parties[1] would have had reason to know under the circumstances. For Plaintiffs to prevail under Subsection 2(b)'s objective standard, Plaintiffs were required to show that the Union had no reason to know that the City understood the CBA to preclude arbitration of reassignments imposed as discipline and that the City had reason to know that the Union understood the CBA to provide for arbitration of reassignments imposed

1. Because Subsection 2(b) applies an objective standard of reasonableness, it can be used to resolve disputes over the meaning of a term when there is no evidence of the parties' subjective understandings of a term. Farnsworth, *supra*, at 510 (observing that "[i]n many disputes arising out of contemporary business transactions ... the parties gave little or no thought to the impact of their words on the case that later arose.... The court will then have no choice but to look solely to a standard of reasonableness. Interpretation cannot turn on meanings that the parties attached if they attached none, but must turn on the meaning that reasonable persons in the positions of the parties would have attached if they had given the matter thought.").

as discipline. Transferred to the context of summary judgment, Plaintiffs were required to demonstrate the absence of genuine issues of material fact as to what the City and the Union had reason to know of the other's understanding of the CBA. Because Plaintiffs did not come forward with any extrinsic evidence of what each party had reason to know at the time of the making of the CBA, summary judgment can be sustained only if the CBA itself is sufficient to eliminate genuine issues of material fact as to what each had reason to know.

{20} Having carefully reviewed the terms of the CBA, we are persuaded that the CBA itself cannot eliminate genuine issues of material fact as to the arbitrability of the present dispute. We hold that a fair-minded reader, considering the language of the CBA in its entirety and without the aid of extrinsic evidence of the parties' intentions, would necessarily conclude that both parties have articulated interpretations to which the CBA is reasonably susceptible.

{21} Article 32 of the CBA appears to be a self-contained treatment of the entire subject-matter of special assignments. Most importantly for the current dispute, Article 32 expressly provides that review by the City Manager is the final step in grievances arising from reassignments from specialty positions. If, for example, Mitchell and Martinez had been reassigned for a purely non-disciplinary reason—e.g., so that other officers would have the opportunity to benefit from the experience of serving on the Task Force—there likely would be little question that Chief McCloskey's decision to reassign was grievable, but not arbitrable, as provided by Article 32. Here, however, the reassignment can be viewed as either a reassignment or a disciplinary action. As previously noted, Chief McCloskey testified that had he been in Mitchell and Martinez's shoes he would have viewed the reassignment as discipline. A question therefore arises as to which procedure should control in the case of a reassignment from a speciality position imposed as discipline: Article 32, which provides that review by the City manager is the final step in grievances relating to reassignments from specialty positions; or Article 26. H, which provides that "[d]isciplinary actions, other than verbal or written reprimands or warnings, may be appealed through the grievance procedure contained in [the CBA] through the process of arbitration."

{22} Plaintiffs' showing, which was limited to the CBA itself, was insufficient to demonstrate entitlement to summary judgment on the arbitrability of reassignments out of specialty positions. At trial, Plaintiffs would bear the burden under Subsection 201(2)(b) of establishing that (1) the Union had no reason to know of the City's understanding, and (2) the City had reason to know of the Union's understanding. Instead of conclusively ruling out the City's interpretation as unreasonable, the record before the district court merely established that either party's interpretation is reasonable when the CBA is viewed from the standpoint of a fair-minded reader. Where each party's interpretation is one to which the contract language is reasonably susceptible, each party has reason to know of the other's interpretation, and neither party can satisfy Subsection 2(b). Farnsworth, *supra,* § 7.9, at 509. In other words, contract language that is ambiguous—i.e., that is reasonably susceptible to either party's interpretation—cannot by itself eliminate genuine issues of material fact as to what each party had reason to know about the other party's understanding. Accordingly, Plaintiffs' showing, which was limited to the CBA, failed to make out a prima facie case of entitlement to summary judgment. The district court should have denied Plaintiffs' motion for summary judgment. *Young v. Thomas,* 93 N.M. 677, 679, 604 P.2d 370, 372 (1979) (determining as a matter of law that the parties' agreement demonstrated an ambiguity; reversing summary judgment and remanding case for consideration of extrinsic evidence to determine the intent of the parties at the time the agreement was made).

{23} On remand, the district court should hear "evidence of the circumstances surrounding the making of the [CBA] and of any relevant usage of trade, course of dealing, and course of performance." *C.R. Anthony Co. v. Loretto Mall Partners,* 112 N.M. 504, 508–09, 817 P.2d 238, 242–43 (1991). If, in the light of this evidence, no reasonable fact-

finder could determine what the Union and the City knew or should have known of the other's understanding "in any way but one," the district court may determine the parties' respective understandings as questions of law, and apply the standards of Restatement (Second) of Contracts § 201 accordingly. *See id.* at 510, 817 P.2d at 244. If, in the light of the extrinsic evidence, reasonable factfinders could disagree as to what the Union and the City knew or should have known of the other's understanding, the district court should treat the parties' respective understandings of the CBA as questions of fact,[2] and apply the standards of Restatement (Second) of Contracts § 201 to the facts so found. The district court should remain alert to the possibility that each party's understanding was reasonable under all the circumstances existing when the Union and the City entered into the CBA and that there was a failure of mutual assent. Restatement (Second) of Contracts § 201(3). We encourage the parties to request, and the district court to enter, findings of fact and conclusions of law consistent with the standards of Restatement (Second) of Contracts § 201.

{24} In the previous paragraph we have assumed that the parties will come forward with extrinsic evidence bearing upon what the Union and the City knew or should have known of the other's understanding.

> [I]n the event the parties do not offer evidence of the facts and circumstances surrounding execution of the agreement and leading to conflicting interpretations as to its meaning, the court may resolve any ambiguity as a matter of law by interpreting the contract using accepted canons of contract construction and traditional rules of grammar and punctuation.

Mark V, Inc. v. Mellekas, 114 N.M. 778, 782, 845 P.2d 1232, 1236 (1993). We emphasize that traditional canons of contract construction are merely "guides in the process of interpretation," Restatement (Second) of Contracts § 202 cmt. a (1981), and even when a court is construing a contract as a matter of law, it should remain alert to the possibility that a lack of clarity is an indication of a failure of mutual assent that cannot, and should not, be cured through strained or outcome-determinative application of judicial maxims.

{25} We offer the following remarks in response to Judge Pickard's dissent.

{26} We agree with the dissent that under *Barncastle* we arguably have the authority to go ahead and rule on the City's cross-motion. But to the extent the City's cross-motion asks us to declare that its proffered meaning controls, the City assumes the burden of persuasion, and therefore faces exactly the same problem that faced the Union: "contract language that is ambiguous—i.e., that is reasonably susceptible to either party's interpretation—cannot by itself eliminate genuine issues of material fact as to what each party had reason to know about the other party's understanding."

{27} We do not consider Hudson's references to the bargaining history as actual evidence of the bargaining history. Instead, we view Hudson's references merely as suggesting that such extrinsic evidence probably exists. Moreover, even if we accepted Hudson's references as evidence of the actual bargaining history, the bargaining history as described by Hudson does not squarely address the problem presented by a reassignment that also constitutes a disciplinary action. Thus, this is a case in which the court was asked to decide cross-motions for summary judgment based solely upon consideration of a record that of itself did not eliminate genuine issues of material fact as to what each party knew or should have known of the other's understanding.

{28} There is a means of breaking this apparent interpretative stalemate, but neither the district court nor the City relied on it. The key is the risk of non-persuasion. Plaintiffs are the parties seeking affirmative relief, and their right to relief depends upon their establishing that their proffered interpretation of the CBA controls. If Plaintiffs are unable to establish that their interpretation controls, their claim fails, and the extrajudicial status quo continues unaltered. As the party that does not bear the risk of non-persuasion, the City can win merely by demonstrating that Plaintiffs cannot meet their burden of persuasion on the record before the court. There is no need to take the

2. Neither party requested a jury trial.

additional step of deciding whether the City's interpretation should control in order to dispose of this case. Although we think that this is a relatively obvious point once it has been made, no prior case of which we are aware has expressly recognized the importance of allocating the risk of non-persuasion in ruling on cross-motions for summary judgment in a contract interpretation case. We are reluctant to grant summary judgment for the City without giving Plaintiffs and the district court an opportunity to address the consequences of our newly-clarified emphasis on the risk of non-persuasion in contract interpretation cases.

{29} For the reasons set forth above, we reverse the summary judgment in favor of Plaintiffs and remand for further proceedings consistent with this opinion.

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

I CONCUR: CYNTHIA A. FRY, Judge.

LYNN PICKARD, Judge (specially concurring in part and dissenting in part).

PICKARD, Judge (specially concurring in part and dissenting in part).

{31} I agree with the majority's determination that the trial court erred in granting summary judgment for Plaintiffs. Although I do not disagree with the majority's adoption in New Mexico of the Restatement (Second) of Contracts § 201 and the various out-of-state cases cited in the majority opinion, I have concerns about whether they apply to this case. I also disagree that this case should be remanded for further factual development. I would therefore remand with instructions to enter judgment for Defendants.

{32} With regard to the issue of whether the authorities relied on by the majority should be applied in this case, we do not ordinarily reach out to "decide [a] case on a theory not explored or argued by the parties on appeal." *Joslin v. Gregory,* 2003–NMCA–133, ¶ 8, 134 N.M. 527, 80 P.3d 464. Here, the parties did not cite or rely on any of these authorities, instead presenting the case as a simple one that could be decided with reference to New Mexico authorities. Each party contended that its reading of the contract should prevail as a matter of law based on the undisputed facts and the extrinsic evidence presented to the trial court as attachments to the summary judgment motions and responses. As stated by our Supreme Court, "[c]ourts 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 re Doe,* 98 N.M. 540, 541, 650 P.2d 824, 825 (1982) (alteration in original) (internal quotation marks and citation omitted). Although this statement might not apply to the simple citing of different or more pertinent authority than that cited by the parties, it does apply to "ignor[ing] the arguments presented and search[ing] for an alternative ground for decision." *Id.* In this case, no party raised the relative burdens of proof in the context of summary judgment, and no party employed the analysis suggested by the Restatement or any similar analysis.

{33} Both parties moved for summary judgment, and both parties appeared to be of the belief that further extrinsic evidence would not be forthcoming and that the case could be decided, one way or the other, on the basis of the CBA, the bargaining history resulting in the compromise regarding specialty position personnel decisions, and the undisputed facts surrounding the events at issue. Plaintiffs claim that those events constituted a "demotion," while Defendants claim the events were "discipline" in the form of a "written reprimand" under Article 26(H) and a "reassignment" under Article 32, neither of which is arbitrable. In fact, Plaintiffs have never sought a trial at which they could present further extrinsic evidence, leading me to believe that such evidence does not likely exist. We have held that where the parties agree to have the trial court decide a case on cross-motions for summary judgment and where neither party claims that disputed facts exist, this Court will review the case as presented by the parties and decide it one way or the other. *See, e.g., Barncastle v. Am. Nat'l Prop. & Cas. Cos.,* 2000–NMCA–095, ¶ 5, 129 N.M. 672, 11 P.3d 1234. Here, both parties appear to have asked the trial court to interpret the CBA as a matter of law in view of the undisputed facts and uncontroverted evidence. Accordingly, we should decide the case on its merits, rather than remanding for additional factual development.

{34} Applying the majority's law to the facts developed during the proceedings on cross-motions for summary judgment, it is apparent that Plaintiffs have failed in their burden of opposing Defendants' motion for summary judgment. Plaintiffs, as the party seeking to alter the extrajudicial status quo, were required to show a reason for favoring their interpretation of the contract over Defendants' interpretation. At best, Plaintiffs showed only that the CBA was reasonably susceptible of more than one interpretation. Such a showing is insufficient to allow the party bearing the burden of persuasion to prevail. *See* Maj. Op. ¶ 16 (citing cases and stating, "where the meaning of a material contract term is in dispute a party seeking affirmative relief based upon its interpretation necessarily bears the burden of establishing that its interpretation controls").

{35} Because both parties indicated by filing for summary judgment that further factual development was not required, and because Plaintiffs failed to meet their burden, I would reverse the summary judgment in favor of Plaintiffs and remand with directions to enter summary judgment in favor of Defendants.

2006-NMCA-078

137 P.3d 1215

AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO, and John Does 1–6, Plaintiffs–Appellees,

v.

CITY OF ALBUQUERQUE, Defendant–Appellant.

American Civil Liberties Union of New Mexico, and John Does 1–5, Plaintiffs–Appellants,

v.

City of Albuquerque, Defendant–Appellee.

Nos. 24,320, 24,805.

Court of Appeals of New Mexico.

May 18, 2006.

George Bach, ACLU of New Mexico, Justin Lesky, Law Office of Justin Lesky, Reber Boult, Co–Legal Director, ACLU of New Mexico, Kari Morrissey, D. Eric Hannum,

Cooperating Attorneys for New Mexico Civil Liberties Foundation, Albuquerque, NM, Melissa Hill, Corrales, NM, for American Civil Liberties Union of New Mexico.

Robert M. White, City Attorney, Gregory S. Wheeler, Michael I. Garcia, Assistant City Attorneys, Albuquerque, NM for City of Albuquerque.

OPINION

BUSTAMANTE, Chief Judge.

{1} We consolidate the appeals of two cases brought by the American Civil Liberties Union (ACLU) and John Does, challenging the City of Albuquerque's sex offender ordinances on the grounds that the ordinances violate the New Mexico and Federal Constitutions. We decline to address the issues raised in the older of the cases involving the City's Sex Offender Alert Program (SOAP) because they are moot following the passage of a new state law. In the second case, we affirm the district court's decision finding various provisions of the Albuquerque Sex Offender Registration and Notification Act (ASORNA) unconstitutional and upholding the remainder of the ordinance. We hold additional registration provisions not specifically addressed by the district court to be unconstitutional.

BACKGROUND

{2} The City of Albuquerque drafted SOAP in response to a directive by the Mayor to draft an ordinance designed to close asserted loopholes in the statewide Sex Offender Registration and Notification Act, NMSA 1978, §§ 29–11A–1 to –8 (2000) (amended 2005) (SORNA). The City Council responded with the adoption of SOAP, Council Bill No. O–03–92. SOAP contained both registration and notification provisions that were broader in scope than the provisions of SORNA. SOAP also contained additional provisions that prohibited offenders from residing within a certain distance of a school, or being alone with children other than their own. The ACLU challenged SOAP, alleging violations of the New Mexico Constitution and seeking a permanent injunction. The district court found that SOAP's notification provisions, and its limitations on where an offender may live, violated procedural due process. The district court further held that the invalid provisions could not be severed without rendering SOAP incapable of accomplishing its legislative purpose, and therefore enjoined SOAP in its entirety. The City appealed.

{3} The City subsequently repealed SOAP and enacted a revised sex offender registration and notification ordinance, ASORNA, while the SOAP appeal was pending before this Court. ASORNA attempted to remedy the problems that rendered SOAP unconstitutional. Following the adoption of ASORNA, the ACLU challenged the new ordinance, on grounds similar to its prior challenge, and further argued that state law preempts ASORNA. The district court held that ASORNA is not preempted by state law. In addressing the ACLU's constitutional challenges to ASORNA, the district court held that the registration requirements for non-New Mexico residents, and the "Alone With a Child" provision, violate equal protection, and the "sex offender location" limitations violate due process. The district court severed these provisions from ASORNA, denied the ACLU's request for a stay while this appeal was pending, and allowed the ordinance to go into effect. The ACLU appealed.

{4} While this second appeal was pending before this Court, the State Legislature adopted House Bill 165,[1] which contained amendments to SORNA. HB 165 provided that the revisions to SORNA were prospectively applicable as of the effective date of the statute, July 1, 2005. HB 165 contains a State Preemption and Savings Clause, Section 29–11A–9, which preempts the field of sex offender registration and notification, but allows existing ordinances that do not conflict with SORNA to remain in effect until they are repealed. This Court permitted supplemental briefing by the parties to address the

1. We note that HB 165 has now been codified into law, NMSA 1978, §§ 29–11A–1 to 10 (1995, as amended through 2005).

effects of HB 165 on the pending ASORNA litigation.

{5} After a review of the records in both the SOAP and ASORNA litigation, we consolidated the appeals and hold as follows. We decline to address the issues raised in the SOAP litigation because the Preemption and Savings Clause of HB 165 prohibits the re-enactment of SOAP, and therefore the issues became moot when SOAP was repealed by the City Council. With respect to ASORNA, we hold that state law does not preempt ASORNA. In regards to the constitutional challenges to ASORNA, we affirm the district court's ruling that (1) the registration provisions for non-residents violate equal protection; (2) the "sex offender location" limitations as modified by the district court, also challenged on due process grounds, are constitutional; (3) the Alone With a Child provision violates equal protection. We also hold that the notification provisions, challenged on due process grounds, are constitutional; ASORNA is not punitive, and therefore does not violate ex post facto, double jeopardy, or cruel and unusual punishment protections. The registration requirements for the offenses of kidnaping and false imprisonment, without any indication of sexual motive, violate substantive due process. Furthermore, we hold that the registration requirements allowing the Albuquerque Police Department (APD) to collect DNA samples and dental imprinting violate search and seizure protections. We begin with a brief discussion of our holding that the appeal in SOAP is moot. We then turn to ASORNA.

SOAP

{6} We decline to address the issues raised on appeal in regards to SOAP because HB 165 effectively prohibited the reenactment of SOAP once it was repealed. HB 165 prohibits the enactment of sex offender ordinances not in effect on January 18, 2005. The bill provides:

> A. The state preempts the field of sex offender registration and notification. Cities, counties, home rule municipalities and other political subdivisions of the state are prohibited from adopting or continuing in effect any ordinance, rule, regulation, resolution or statute on sex offender registration and notification.
>
> B. After January 18, 2005, cities, counties, home rule municipalities and other political subdivisions of the state are prohibited from adopting or amending an ordinance, rule, regulation or resolution on sex offender registration and notification. An ordinance in effect on January 18, 2005 shall continue in force and effect until repealed; provided that the ordinance shall only continue in force and effect with regard to sex offenders who are required to register pursuant to the provisions of the ordinance, but who are not required to register pursuant to the provisions of the Sex Offender Registration and Notification Act. All other sex offenders shall register pursuant to the provisions of the Sex Offender Registration and Notification Act.

{7} The repeal of SOAP, followed by the enactment of HB 165 renders SOAP moot. The doctrine of mootness "is a limitation upon jurisdiction or decrees in cases where no actual controversy exists." *Mowrer v. Rusk*, 95 N.M. 48, 51, 618 P.2d 886, 889 (1980). "[A]n action will be dismissed if the issues ... become moot." *Id.* "We must review the judgment of the [d]istrict [c]ourt in light of [the] law as it now stands, not as it stood when the judgment below was entered." *Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414, 92 S.Ct. 574, 30 L.Ed.2d 567 (1972) (per curiam); *see also Kremens v. Bartley*, 431 U.S. 119, 126–27, 97 S.Ct. 1709, 52 L.Ed.2d 184 (1977) (holding that enactment of a new statute repealing provisions declared unconstitutional in the court below renders claims on appeal moot).

{8} There is no current controversy as to SOAP because it has been repealed and the City may not now revive it. To comment on SOAP would be to pass upon a law not in effect and, unless state law is changed, that cannot be reenacted. Thus, not only are we without a current controversy, it appears that there cannot be a controversy regarding SOAP in the foreseeable future. We note, however, that to the extent any provisions of SOAP are duplicated in ASORNA, those issues will be addressed in our analysis of

ASORNA. We now turn our attention to ASORNA.

ASORNA

{9} The City enacted ASORNA in an effort to cure the constitutional infirmities in SOAP. The district court found certain provisions of ASORNA unconstitutional and severed those provisions from the ordinance, leaving the remaining ordinance intact. The ACLU appealed, arguing that ASORNA is preempted by state law; suffers from vagueness and over breadth, and violates due process and equal protection; violates offenders' rights to be free from unreasonable searches and seizures; and violates state and federal protections against double jeopardy, ex post facto laws, and cruel and unusual punishment. Addressing the ACLU's challenges to ASORNA, we provide more detail on the specific provisions of ASORNA in the discussion below.

STANDARD OF REVIEW

{10} We review constitutional challenges de novo. *State v. Druktenis,* 2004–NMCA–032, ¶ 14, 135 N.M. 223, 86 P.3d 1050. In reviewing constitutional attacks, "there exists a presumption of constitutionality, and the party attacking the constitutionality of the statute has the burden of proving the statute is unconstitutional beyond all reasonable doubt." *Id.* ¶ 15. *See also City of Albuquerque v. One (1) 1984 White Chevy,* 2002–NMSC–014, ¶ 5, 132 N.M. 187, 46 P.3d 94 ("A strong presumption of constitutionality surrounds a statute.") (internal quotation marks and citation omitted). We also review issues of statutory construction de novo. *Brenneman v. Bd. of Regents of the Univ. of N.M.*, 2004–NMCA–003, ¶ 4, 135 N.M. 68, 84 P.3d 685.

PREEMPTION OF ASORNA

{11} Prior to the adoption of HB 165, the district court held that SORNA did not preempt ASORNA. We agree, and further hold that ASORNA was not preempted by the adoption of HB 165. HB 165 preempts the field of sex offender registration and notification into the future, but allows local sex offender ordinances in effect on January 18, 2005, to continue in effect. ASORNA became effective November 5, 2003, and therefore is not preempted based on the plain language of HB 165. However, our analysis does not end there. The ACLU argues that ASORNA is preempted because it conflicts with state law.

{12} A municipality may adopt ordinances "not inconsistent" with the laws of the state for the purpose of "providing for the safety, preserving the health, promoting the prosperity and improving the morals, order, comfort and convenience of the municipality and its inhabitants." NMSA 1978, § 3–17–1(B) (1993). An ordinance can be more restrictive than a state law, as long as it supplements, complements, or duplicates the state statute but does not conflict with it. *Gould v. Santa Fe County,* 2001–NMCA–107, ¶ 18, 131 N.M. 405, 37 P.3d 122, *overruled on other grounds by Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n,* 2003–NMSC–005, ¶ 16 & n. 10, 133 N.M. 97, 61 P.3d 806. In deciding whether ASORNA is invalid, we must determine if "the stricter requirements of the ordinance conflict with state law, and whether the ordinance permits an act the general law prohibits, or prohibits an act the general law permits." *Id.* (internal quotation marks and citation omitted). The ACLU contends that ASORNA is directly inconsistent with SORNA, §§ 29–11A–1 to –10; the DNA Identification Act, NMSA 1978, §§ 29–16–1 to –13 (1997, as amended through 2005); and the Omnibus Bill, now codified in various sections, including NMSA 1978, § 9–3–13 (2005), and is therefore preempted. We are not persuaded.

{13} The compilation of state laws cited by the ACLU, taken together, provide a statewide scheme for sex offender registration, notification, DNA testing, and oversight. However, they do not conflict with ASORNA, and as already noted, HB 165 expressly allows ASORNA to remain in effect. We presume the Legislature was aware of the existence of ASORNA when it enacted HB 165. *Cf. In re Kira M.,* 118 N.M. 563, 569, 883 P.2d 149, 155 (1994). Furthermore, we also presume that when enacting a statute, the Legislature "did not intend to enact a law inconsistent with existing law[s]." *Pub. Serv. Co. of N.M. v. N.M.*

Pub. Util. Comm'n, 1999–NMSC–040, ¶ 25, 128 N.M. 309, 992 P.2d 860 (internal quotation marks and citation omitted). The Legislature, being aware of the existence of ASORNA, was free to preempt the ordinance, and chose not to, despite the stricter requirements under ASORNA.

{14} Nor does ASORNA otherwise conflict with state law. Some requirements of ASORNA are undisputably stricter than the equivalent provisions of SORNA. For example, ASORNA's requirement for registration, reaching back to convictions in 1970, captures a broader class of offenders, but does not conflict with SORNA. Offenders required to register under the state law are not required to register under ASORNA. As a result, there will never be a direct conflict in the provisions. There is no conflict in the City requiring offenders to provide more detailed information upon registration, or broader notification provisions. Cities are free to adopt ordinances that are more restrictive than state law, which is exactly what ASORNA does. *See Gould,* 2001–NMCA–107, ¶ 18, 131 N.M. 405, 37 P.3d 122.

{15} In sum, we are not persuaded by the ACLU's arguments that through the enactment of a state sex offender law, and other related laws, the Legislature expressed a clear intent to occupy the entire field of sex offender registration and notification, thereby preempting ASORNA. On the contrary, the Legislature declared an express intent to *not* preempt the City ordinance. The language of the preemption and savings clause provides that "[a]n ordinance in effect on January 18, 2005 shall continue in force and effect until repealed." ASORNA is such an ordinance. We perceive no legislative intent implicit in SORNA, the DNA Identification Act, the Omnibus Bill, or other related laws sufficient to override this explicit language. We now turn to the ACLU's constitutional claims.

DUE PROCESS AND EQUAL PROTECTION (VAGUENESS AND OVER BREADTH)

{16} The ACLU argues that "ASORNA suffers from a multiplicity of constitutional infirmities that violate state and federal due process and equal protection guarantees." The due process clause of article II, section 18 of the New Mexico Constitution guarantees that "[n]o person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws." N.M. Const. art. II, § 18. The Fourteenth Amendment contains an analogous provision. Due process is implicated "when state conduct alters a right or status previously recognized by state law." *Doe v. Sturdivant,* No. 05–70869, 2005 WL 2769000 at *5 (E.D.Mich. Oct.25, 2005) (internal quotation marks and citation omitted). Substantive due process protects fundamental rights that are so "implicit in the concept of ordered liberty" that "neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg,* 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (internal quotation marks and citation omitted); *Doe v. Moore,* 410 F.3d 1337, 1342 (11th Cir.2005) (internal quotation marks and citation omitted), *cert. denied,* 126 S.Ct. 624 (2005). Substantive due process "focuses on the validity of legislation as it equally burdens all persons in the exercise of a specific right," while equal protection "focuses on the validity of legislation that permits some individuals to exercise a specific right while denying it to others." *Marrujo v. N.M. State Highway Transp. Dep't,* 118 N.M. 753, 757, 887 P.2d 747, 751 (1994).

{17} We address only the substantive due process and equal protection arguments raised by the ACLU because its procedural due process arguments have been foreclosed by the holdings in *Connecticut Department of Public Safety v. Doe,* 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003), and *Druktenis,* 2004–NMCA–032, 135 N.M. 223, 86 P.3d 1050. We address the substantive due process and equal protection claims together because the "substantive due process attack implicitly and necessarily includes an equal protection attack." *Druktenis,* 2004–NMCA–032, ¶ 53, 135 N.M. 223, 86 P.3d 1050.

{18} The ACLU originally challenged ASORNA under the New Mexico Constitution, urging the district court to rely

on independent state constitutional grounds for finding ASORNA unconstitutional. The district court, however, found that the ACLU failed to make the required showing for a divergence from federal precedent, and therefore declined to decide the issues on independent state constitutional grounds. *See State v. Gomez,* 1997–NMSC–006, ¶ 19, 122 N.M. 777, 932 P.2d 1 (stating that a state court may rely on the state constitution, diverging from federal precedent, if it is shown that there is "a flawed federal analysis, structural differences between [the] state and federal government, or distinctive state characteristics"). The burden is on the party seeking relief under the state constitution to provide reasons for interpreting the state provisions differently from the federal provisions when there is no established precedent. *Druktenis,* 2004–NMCA–032, ¶ 38, 135 N.M. 223, 86 P.3d 1050. Despite the possibility of an independent state constitutional ground for finding an ordinance such as ASORNA unconstitutional, we agree with the district court that the ACLU has failed to meet the required showing. We therefore limit our due process and equal protection analysis to the federal constitution, unpersuaded that the state constitution affords any greater protections.

{19} When an ordinance is challenged on due process or equal protection grounds, one of three levels of review is applied, depending on either the rights affected by the ordinance, or the status or group of people it affects. *Breen v. Carlsbad Mun. Schs.,* 2005–NMSC–028, ¶ 8, 138 N.M. 331, 120 P.3d 413. "Strict scrutiny applies when the violated interest is a fundamental personal right or civil liberty" guaranteed by the constitution. *Marrujo,* 118 N.M. at 757, 887 P.2d at 751. Under strict scrutiny, the government bears the burden to demonstrate a compelling state interest supporting the challenged scheme, and to show that the statute accomplishes its purpose by the least restrictive means. *Id.* at 757, 887 P.2d at 751. Intermediate scrutiny applies when legislative classifications infringe on important but not fundamental rights, or involve sensitive but not suspect classes.[2] *Trujillo v. City of Albuquerque,* 1998–NMSC–031, ¶ 15, 125 N.M. 721, 965 P.2d 305. Under intermediate scrutiny, the party supporting the statute must prove the scheme is substantially related to an important governmental interest. *Breen,* 2005–NMSC–028, ¶ 13, 138 N.M. 331, 120 P.3d 413. If the ordinance "does not affect a fundamental right or create a suspect classification, nor impinge upon an important individual interest," rational basis review applies. *Mieras v. Dyncorp,* 1996–NMCA–095, ¶ 27, 122 N.M. 401, 925 P.2d 518. Under rational basis, the challenger has the burden to demonstrate that the ordinance is not rationally related to a legitimate state interest, defined by our Courts as the absence of a "firm legal rationale or evidence in the record to support the . . . classification." *Breen,* 2005–NMSC–028, ¶ 16, 138 N.M. 331, 120 P.3d 413 (internal quotation marks and citations omitted). We begin by looking at the nature of the interests at stake.

{20} This Court conducted a thorough analysis of the nature of the interests affected by SORNA in *Druktenis,* and concluded that the registration and notification scheme did not infringe on any fundamental rights and, therefore, rational basis was the appropriate review. *See* 2004–NMCA–032, ¶¶ 91–94, 100–01, 135 N.M. 223, 86 P.3d 1050 (stating that fundamental rights emanated from natural law, and "for the liberty interest to be a fundamental one, the interest must be one traditionally protected by our society, or rooted in history and tradition") (internal quotation marks and citation omitted). Other jurisdictions that have addressed the issues posed by sex offender registration and notification statutes have similarly held that no fundamental rights are implicated and applied a rational basis review. *See, e.g., Moore,* 410 F.3d at 1343 (stating that the Supreme Court recognized fundamental rights in regard to some special liberty interests, but has not created a broad category of rights where any alleged infringement on privacy and liberty will be subject to due

2. We clarify that intermediate scrutiny requires either an important right *or* a sensitive class, not an important right *and* a sensitive class as stated in *Druktenis,* 2004–NMCA–032, ¶¶ 97–100, 135 N.M. 223, 86 P.3d 1050.

process protections); *Doe v. Tandeske,* 361 F.3d 594, 597 (9th Cir.2004) (holding that persons convicted of serious sex offenses had no fundamental right to be free from registration and notification provisions of the Alaska sex offender statute), *cert. denied,* 543 U.S. 817, 125 S.Ct. 56, 160 L.Ed.2d 25 (2004).

{21} We agree with the reasoning set forth in *Druktenis* and other jurisdictions, and conclude that no fundamental rights are implicated by the application of ASORNA. We therefore apply a rational basis standard of review. The burden is then on the ACLU to show that the ordinance is not rationally related to a legitimate governmental interest, or the absence of a "firm legal rationale" for the challenged provisions. *Druktenis,* 2004–NMCA–032, ¶ 111, 135 N.M. 223, 86 P.3d 1050. As we review the challenged provisions, we are mindful that liberty is a rational continuum which "includes a freedom from all substantial arbitrary impositions and purposeless restraints[;]" and that "[d]ue process has not been reduced to any formula." *Poe v. Ullman,* 367 U.S. 497, 542–43, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting). Although we separate the provisions of ASORNA for purposes of discussion, we are aware that taken as a whole, the ordinance imposes a substantial burden on individuals subject to it. We are also aware that looking at each provision in isolation tends to artificially dilute the overall impact of the ordinance. With this in mind, we now turn to the challenged provisions.

REGISTRATION UNDER ASORNA

{22} ASORNA requires sex offenders who were convicted of "sex offenses" after January 1, 1970, to register with APD. A sex offense is defined as having "the same meaning the term has under [Section 29–11A–3(E),] except that ASORNA includes only offenses against [c]hildren and not offenses against [a]dults." The offenses subject to registration under Section 29–11A–3(E)(1)–(12) include criminal sexual penetration in the first, second, third, or fourth degree; criminal sexual contact in the fourth degree; criminal sexual contact of a minor in the second third or fourth degree; sexual exploitation of children; sexual exploitation of children by prostitution; kidnaping when the victim is less than eighteen years of age and the offender is not a parent of the victim; false imprisonment when the victim is less than eighteen years of age and the offender is not a parent of the victim; solicitation to commit criminal sexual contact of a minor in the second, third or fourth degree; and attempt to commit any of these sex offenses. Upon registration, a sex offender must provide the APD with a variety of information, including the offender's names, aliases, date of birth, social security number, current address, the address of any residences or real property owned by the offender, place of employment including the name and telephone number of a contact person who knows the offender's location at any and all times during employment hours, drivers license number, and a list of all sex offense violations. Furthermore, when a sex offender registers under ASORNA, APD takes and retains their photographs and sets of fingerprints, and may record and retain an offender's shoe size, a DNA sample, dental imprints, and a description of tattoos, scars, and other identifying features.

{23} The district court held that the registration requirements for residents of the City contained in Section 4 of ASORNA were constitutional. The district court, relying on *Smith v. Doe,* 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003), and *Connecticut Department of Public Safety,* 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98, noted that the United States Supreme Court has examined and approved sex offender registration schemes, including those that apply to people convicted before the enactment of the registration requirement, those allowing for widespread dissemination of sex offender information, and those that apply to a broader category of offenders than ASORNA. On the basis of *Smith* and *Connecticut Department of Public Safety,* we agree with the district court ruling that the registration requirements for New Mexico residents are constitutional with two exceptions. The registration requirements for convictions of kidnaping and false imprisonment are not rationally related to the City's interest in protecting citizens from sex offenders.

Furthermore, the registration provisions allowing for DNA sampling and dental imprints violate search and seizure protections. We discuss the kidnaping and false imprisonment requirements next, and address the DNA sampling under the search and seizure analysis below.

REGISTRATION REQUIREMENTS FOR KIDNAPING AND FALSE IMPRISONMENT

{24} The ACLU argues that ASORNA is both vague and over broad in its registration requirements. The ACLU contends that ASORNA requires registration of an overly broad class of individuals, for example, those who have never committed crimes with a sexual motivation. Other jurisdictions faced with similar constitutional challenges have found it significant that the statute at issue applies only to crimes with a sexual motive, and have held unconstitutional statutes that are over-inclusive in their registration requirements. *See, e.g., State v. Small,* 162 Ohio App.3d 375, 833 N.E.2d 774, 782–83 (2005) (holding that "absent evidence that defendant committed the kidnaping of the minor victim with sexual motivation," denominating defendant a "sexually oriented offender lacked a rational basis under substantive due process" (internal quotation marks omitted)); *Moore,* 410 F.3d at 1340 n. 1 ("When a person is convicted of kidnaping, false imprisonment, or luring or enticing a child into a dwelling or conveyance, there must be a sexual component shown in addition to the predicate offense before designating that person as a sex offender."); *Raines v. State,* 805 So.2d 999, 1003 (Fla.Dist.Ct. App.2001) (holding that inclusion of a person convicted of false imprisonment, with no concomitant sexual component, in the definition of a sex offender violated equal protection because it was over-inclusive), *review dismissed,* 888 So.2d 623 (Fla.2004). We agree with the reasoning of this line of cases.

{25} The inclusion of kidnaping and false imprisonment as convictions requiring registration as a sex offender is not rationally related to the legitimate interest of the City in protecting victims or potential victims of sex offenders. There is no "firm legal rationale" for including offenses with no sexual motivation as "sex offenses." In *Druktenis,* this Court found it significant that the criminal statutes triggering notification under SORNA all proscribed sexual conduct involving children. 2004–NMCA–032, ¶ 62, 135 N.M. 223, 86 P.3d 1050. The same is not true of ASORNA. Furthermore, we note that the hardship imposed on an offender convicted of kidnaping or false imprisonment to be labeled a sex offender, absent any evidence of a sexual motivation for the crime, is great. The City's stated purpose of ASORNA, which is the "protection of the victims and potential victims of *sex offenders*" is not furthered by the inclusion of crimes that are not sexually motivated. (Emphasis added.) We hold that the registration provision of ASORNA that requires registration for offenders with convictions of kidnaping, NMSA 1978, § 30–4–1 (2003), or false imprisonment, NMSA 1978, § 30–4–3 (1963), without any sexual component, violates due process and is therefore unconstitutional.

REGISTRATION REQUIREMENTS FOR NON–RESIDENTS

{26} The district court held that the registration requirements for out-of-state offenders, Section 5 of ASORNA, contained a loophole rendering those provisions unconstitutional as a violation of equal protection guarantees. We provide a brief overview of the resident registration requirements and the non-resident registration requirements to clarify our discussion. ASORNA requires sex offenders to register with APD. A sex offender is defined as an adult who:

> (1) is a resident of the City who is convicted of a Sex Offense against a Child in New Mexico or, (2) changes his residence to the City after that person has been convicted of a Sex Offense against a Child . . . Outside New Mexico, (3) is a resident of the City who is convicted of a Sex Offense against a Child . . . Outside New Mexico or (4) is a Sex Offender who is convicted of a Sex Offense against a Child . . . Outside New Mexico and is temporarily in the City for more than three consecutive days at any time or an aggregate of ten or more days in a registration year.

{27} Under Section 5, registration for non-resident sex offenders temporarily in the City is required for

> non–New Mexico resident[s] who ha[ve] been convicted of a Sex Offense against a Child ... Outside New Mexico and [are]: (a) employed full-time or part-time or performing duties under a contract in New Mexico for a period of time exceeding three days or for an aggregate period of time exceeding twenty days during any calendar year or (b) attend[ing] or ... enrolled on a full-time or part-time basis in a private or public school in New Mexico including but not limited to secondary schools, trade schools, professional institutions or institutions of higher education.

{28} These provisions result in differing treatment for resident and non-resident sex offenders that is not rationally related to the City's interest in protecting citizens from sex offenders. The district court illustrated the problem as follows:

> (1) A person with a 1993 Maine conviction, who resides in Maine, and is in Albuquerque for three consecutive days in one year, is required to register under Section 4 [(which regulates residents)], but not Section 5 (which regulates non-residents);
>
> (2) A person with a 1993 New Mexico conviction who lives one block outside the Albuquerque city limits and works in Albuquerque every day is **not** required to register under Section 4 or Section 5;
>
> (3) A person with a 1993 New Mexico conviction, who resides in Maine, and is in Albuquerque 300 days in one year, is **not** required to register under Section 4 or Section 5.

{29} In other words, the language in Section 5 does not require registration of those convicted sex offenders who are most likely to have the means and opportunity to reoffend in the City. Yet those offenders who were convicted of sex offenses outside of New Mexico, who reside outside the state, and are in the City only a limited number of days, must register. We agree with the district court that this violates equal protection guarantees. *See Breen*, 2005–NMSC–028, ¶ 10, 138 N.M. 331, 120 P.3d 413 (stating that the threshold question in equal protection challenges is "whether the legislation creates a class of similarly situated individuals who are treated dissimilarly"). We affirm the holding of the district court regarding the registration requirements for out-of-state offenders.

{30} To summarize our holdings regarding the registration provisions of ASORNA, we hold that the inclusion of kidnaping and false imprisonment, without a sexual motivation, in offenses requiring registration, is not rationally related to a legitimate state interest, is over-inclusive, and therefore violates due process. We affirm the district court's holding that the registration requirements for out-of-state offenders violates equal protection guarantees and is unconstitutional. We now turn to the notification provisions of ASORNA, and determine whether they violate due process or equal protection guarantees.

NOTIFICATION PROVISIONS

{31} We start with an overview of the notification provisions. The notification provisions require the City to make available and disseminate sex offender registration on the City of Albuquerque's website. The ordinance provides that inclusion of a sex offender in the City's database and on the website is based solely on the fact of a prior conviction and is not based on any assessment of current dangerousness. Like the statute at issue in *Connecticut Department of Public Safety*, the ordinance in this case requires a disclaimer on the website stating that the decision to post offender information on the website is based on conviction, and the City has not assessed the specific risk posed by any particular offender or the degree of dangerousness of any offender. 538 U.S. at 5, 123 S.Ct. 1160. Furthermore, the disclaimer notes that the purpose of providing the data on the internet "is to make the information more easily available and accessible, not to warn about any specific individual."

{32} The district court did not find any constitutional violations in the notification provisions. We agree. In large part, ASORNA simply makes available, the City's website, information that is already publicly available. *See Smith*, 538 U.S. at 98, 123

S.Ct. 1140 (noting that Alaska's Megan's Law provides for "dissemination of accurate information about a criminal record, most of which is already public"). As the Court reasoned in *Smith*, "[a]lthough the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." *Id.* at 101, 123 S.Ct. 1140. SORNA already provides for public dissemination of sex offender information on the State website, and ASORNA simply provides information on a broader class of offenders. The City contends that providing sex offender information on the City's website is rationally related to the City's interest in allowing the public and authorities to identify sex offenders accurately and "to know their whereabouts even if they decide to move and reestablish residences." We agree, and hold that the notification provisions are constitutional, as they are rationally related to the City's interest in allowing the public and authorities to identify sex offenders accurately, and to know their whereabouts.

SEX OFFENDER LOCATION

{33} The "sex offender location" provision states that sex offenders "shall not acquire, mortgage or newly occupy any real property, occupy or acquire any real property by lease or otherwise or establish a place of lodging within 1000 feet of a[s]chool." The district court held that language in this provision, which may be read to require offenders currently owning property within 1000 feet of a school to have to relocate, was constitutionally infirm. The intent of the provision was to prohibit sex offenders from newly acquiring property within 1000 feet of a school, but the language did more than that. The district court found that the language could prohibit a second mortgage on an existing home, and failed to provide an exclusion of existing owners.

{34} The district court severed the constitutionally defective language from the "sex offender location" provision, and left the remaining portions intact. Following the district court's ruling, the provision now reads, "Sex Offenders shall not acquire, or newly occupy any real property, acquire any real property by lease or otherwise or establish a place of lodging within 1000 feet of a School." As modified, the provision serves its intended purpose, to prevent sex offenders from *newly* occupying a residence within 1000 feet of a school, and is constitutional. The provision is rationally related to the City's interest in protecting children from sex offenders by preventing them from living within 1000 feet of places where children congregate.

{35} We note that other jurisdictions that have considered similar provisions have upheld "sex offender location" provisions as constitutional. *See Doe v. Miller*, 405 F.3d 700, 705, 710–16 (8th Cir.2005) (holding that Iowa statute prohibiting sex offenders from residing within 2000 feet of a school or daycare does not infringe on liberty interests sufficiently to require heightened scrutiny and was rationally related to a legitimate state interest); *People v. Leroy*, 357 Ill. App.3d 530, 293 Ill.Dec. 459, 828 N.E.2d 769, 775 (2005) (concluding that prohibiting sex offenders from living within 500 feet of a playground or a facility providing programs or services for children bears a reasonable relationship to the goal of protecting children from known sex offenders); *Lee v. State*, 895 So.2d 1038, 1041–44 (Ala.Crim.App.2004) (in an ex post facto challenge, noting that there is nothing indicating that the regulatory scheme prohibiting sex offenders from living within 2000 feet of a school "is anything other than reasonable in light of the nonpunitive objective of keeping children safe from convicted sex offenders.") We find the reasoning in these cases persuasive. Prohibiting sex offenders from newly residing within 1000 feet of a school is rationally related to the City's objective to protect children from sex offenders. We affirm the district court's holding in regards to the "sex offender location" provision, and hold that as modified by the district court, the provision is constitutional. We now turn to the alone with a child provision.

ALONE WITH A CHILD

{36} ASORNA prohibits sex offenders from being alone with a child unless a

responsible adult is present. "Alone with a child" is defined as being "present in the same room or in a vehicle with a Child other than [the offender's w]ard, their own biological or legally adopted Child or their own biological grandchild[, or,] if [they are] outdoors, within a 30 yard radius of [such] a Child." A "responsible adult" is "an adult who is not a sex offender."

{37} The district court found the "alone with a child" provision to be constitutionally infirm because it violates equal protection guarantees. The district court illustrated the problem with the following example: "While a grandfather who sexually abused his granddaughter is permitted to be alone with that child, a twenty year old sister of a child convicted of touching the genital area of a fully clothed sixteen year old boy, could not be alone with her sister." The district court reasoned that excluding stepparents, siblings, or other persons similarly situated to grandparents equates to treating similarly situated people dissimilarly, thus violating equal protection. *See Breen*, 2005–NMSC–028, ¶ 10, 138 N.M. 331, 120 P.3d 413 (stating that the threshold inquiry of an equal protection analysis is whether similarly situated persons are treated dissimilarly). The City conceded that there was no rational basis for the distinction. In fact, the district court pointedly asked the City at trial if there was a rational basis for the categorization allowing a grandparent sex offender to be alone with a grandchild, while prohibiting a stepfather, brother, or sister. The City answered "no," there was not a rational basis for the dissimilar treatment. Absent any reason to support the dissimilar treatment that results from the alone with a child provision, we agree with the district court. We therefore affirm the district court's ruling that the alone with a child provision is not rationally related to a legitimate governmental interest, violates equal protection guarantees, and therefore is unconstitutional.

SEARCH AND SEIZURE

{38} The ACLU next argues that ASORNA violates both the Fourth Amendment and article II, section 10 of the New Mexico Constitution, which protect against unreasonable searches and seizures. The ACLU contends that the violation stems from forcing sex offenders to submit to compulsory DNA testing and dental imprinting after they have served their entire sentence. According to the ACLU, this amounts to a search and seizure of evidence without requiring any showing that registrants have committed, or are likely to commit, a new crime. The challenged provision states:

> When a Sex Offender registers under ASORNA, APD shall take and retain their photograph and a set of fingerprints. Additionally, APD may record and retain the person's shoe size, *a DNA sample, dental imprints* and a description of tattoos, scars and other identifying features that would assist in identifying the Sex Offender.

(Emphasis added.)

The ACLU argues that while compulsory DNA testing or blood sampling from offenders who are currently incarcerated, or on probation or parole, has been upheld as constitutional, requiring submission of DNA sampling or dental imprinting by persons convicted of offenses who are no longer in custody or subject to some type of supervisory release is a violation of the Fourth Amendment. We agree.

{39} The Fourth Amendment and article II, section 10 of the New Mexico Constitution both protect citizens against unreasonable searches and seizures. Reasonableness is the touchstone of our Fourth Amendment analysis in all circumstances of a governmental invasion of a citizen's personal security. *Terry v. Ohio*, 392 U.S. 1, 19, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Attaway*, 117 N.M. 141, 149, 870 P.2d 103, 111 (1994). The ACLU expressly argues that the New Mexico Constitution affords greater protections than the Fourth Amendment, citing *State v. Cardenas–Alvarez*, 2001–NMSC–017, ¶ 12, 130 N.M. 386, 25 P.3d 225 (stating that article II, section 10 of the New Mexico Constitution has been interpreted more broadly than its federal counterpart), and *Gomez*, 1997–NMSC–006, ¶¶ 22–23, 122 N.M. 777, 932 P.2d 1 (discussing requirements for preserving state constitutional claims for appellate review). We agree that broader protections may be available under the state constitution, and that

the ACLU has preserved the issue for review. However, since we hold that the challenged provisions violate the Fourth Amendment, we need not reach the possibly broader protections afforded under the state constitution.

{40} The compulsory administration of a blood test "plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment." *Schmerber v. Cal.,* 384 U.S. 757, 767, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). Furthermore, "[s]uch testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of that Amendment." *Id.* "Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned." *Id.* at 770, 86 S.Ct. 1826.

{41} Individuals who are incarcerated, or subject to some form of conditional release, traditionally enjoy fewer privacy rights than other citizens, and therefore may be subject to compulsory DNA testing. *United States v. Kimler,* 335 F.3d 1132, 1146–47 & n. 14 (10th Cir.2003) (holding that DNA sample extraction, "while implicating the Fourth Amendment, is a reasonable search and seizure under the special needs exception to the . . . warrant requirement" as applied to conditions of a convicted felon's supervised release from incarceration); *Shaffer v. Saffle,* 148 F.3d 1180, 1181 (10th Cir. 1998) (holding that "while obtaining DNA samples implicates Fourth Amendment concerns, it is reasonable in light of an inmate's diminished privacy rights"). The same is not true for citizens who are not incarcerated, or who have completed their conditions of probation or parole.

{42} Following the enactment of HB 165, the effect of ASORNA is to require registrants who are not incarcerated, and who have completed the terms of their probation or parole prior to July 1, 1995, to submit to bodily intrusions for DNA testing or dental imprinting at the request of APD. The City offers no authority for its proposition that "[t]aking DNA is not a search and seizure," other than a reference to *Connecticut Department of Public Safety,* 538 U.S. at 4, 123 S.Ct. 1160.

{43} However, *Connecticut Department of Public Safety* did not address the issue of retroactive DNA collection from offenders that are no longer incarcerated or under any type of supervised release. *Id.* The City argues that the registration scheme at issue in *Connecticut Department of Public Safety* contemplated DNA testing, and the Court made no determination that it was unconstitutional. This argument is not persuasive. The Supreme Court simply was not presented with a challenge to the DNA testing requirement, and therefore it was not addressed. *Id.* Furthermore, the DNA testing requirements in the *Connecticut Department of Public Safety* scheme, unlike those in ASORNA, did not apply retroactively. 538 U.S. at 4–5, 123 S.Ct. 1160.

{44} The City asserts that by raising the search and seizure issue, the ACLU is implicitly challenging the DNA Identification Act and, at the same time, arguing that the Act preempts ASORNA. The City appears to misunderstand the provisions of the DNA Identification Act. The Act only allows collection of DNA samples from covered offenders under limited circumstances, including:

> (1) a covered offender convicted on or after July 1, 1997 shall provide a sample immediately upon request of the corrections department so long as the request is made before release from any correctional facility or, if the covered offender is not sentenced to incarceration, before the end of any period of probation or other supervised release;
>
> (2) a covered offender incarcerated on or after July 1, 1997 shall provide a sample immediately upon request of the corrections department so long as the request is made before release from any correctional facility.

Section 29–16–6(A)(1)–(2). The provisions for DNA testing under the Act are not retroactive, and allow for compulsory testing only of those individuals that are currently incarcerated, on probation, or parole, or some

type of supervised release.[3] The ACLU does not challenge the constitutionality of DNA testing for those groups, and in fact acknowledges that prisoners, probationers, and parolees traditionally enjoy fewer privacy rights than other citizens.

{45} For the foregoing reasons, and because the City has offered no authority to the contrary, we hold that the provisions of ASORNA allowing APD to collect DNA samples and dental imprints from registrants, is an unreasonable governmental invasion into the individual's personal security or privacy, thus violating the Fourth Amendment.

EX POST FACTO LAWS, DOUBLE JEOPARDY, AND CRUEL AND UNUSUAL PUNISHMENT

{46} The ACLU argues that ASORNA violates state and federal prohibitions on double jeopardy, ex post facto laws, and cruel and unusual punishment. The Ex Post Facto Clause of Article I, Section 10 of the United States Constitution and article II, section 19 of the New Mexico Constitution prohibit the application of any law passed "after the fact" and "applies only to penal statutes which disadvantage the offender affected by them." *State v. Nunez*, 2000-NMSC-013, ¶ 112, 129 N.M. 63, 2 P.3d 264 (internal quotation marks omitted). Double jeopardy protects against a second prosecution for the same offense after acquittal, 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). Constitutional protections against cruel and unusual punishment imply "a limitation upon the form and character of punishment that may be prescribed." *State v. Peters*, 78 N.M. 224, 227, 430 P.2d 382, 385 (1967). Central to each of these constitutional claims is the issue of punishment. If ASORNA is not punitive, none of these constitutional protections are violated.

{47} We deal with these arguments summarily because "[v]irtually all federal circuits and state jurisdictions considering this issue have rejected the argument that retroactive application of sex offender statute registration and notification requirements violates constitutional ex post facto prohibitions." *Druktenis*, 2004-NMCA-032, ¶ 36, 135 N.M. 223, 86 P.3d 1050. *See, e.g., Smith*, 538 U.S. at 105-06, 123 S.Ct. 1140 (holding that the retroactive application of Alaska's sex offender law did not violate the Ex Post Facto Clause because the statute was not so punitive either in purpose or effect as to negate the intention to deem it civil); *Cutshall v. Sundquist*, 193 F.3d 466, 476-77 (6th Cir. 1999) (holding sex offender scheme is not punitive, and therefore does not violate ex post facto prohibitions); *Druktenis*, 2004-NMCA-032, ¶ 32, 135 N.M. 223, 86 P.3d 1050 (holding that the "Legislature's intent in enacting SORNA was to enact a civil, remedial, regulatory, nonpunitive law," and the effects of the law were not punitive); and *State v. Moore*, 2004-NMCA-035, ¶ 24, 135 N.M. 210, 86 P.3d 635 (holding that although the provisions of SORNA "are immediate and automatic, they do not constitute punishment for a crime," and furthermore, that SORNA is "remedial in purpose and effect").

{48} The stated intent of ASORNA is to provide "a more comprehensive local counterpart" to SORNA, to address the unique, local concerns of Albuquerque. Although the requirements of ASORNA may have adverse consequences on offenders as do those in SORNA, they do not rise to the level of punishment. Therefore, since ASORNA is a regulatory scheme that is not punitive in intent or effect, the retroactive application of the ordinance does not violate the Ex Post Facto Clause, double jeopardy, or cruel and unusual punishment prohibitions.

{49} The ACLU raised additional equal protection concerns in their supplemental brief-in-chief, following enactment of HB 165, which we briefly address here. Subsequent to the passage of HB 165, sex offenders in Albuquerque are required to comply with one of three registration and notification schemes. The amendments in

3. SB 216, passed by the 2006 Legislature, provides for DNA collection of certain felony arrestees, on or after January 1, 2007. We express no opinion about the constitutionality of SB 216, and it does not enter into our analysis.

HB 165 apply only prospectively to offenses committed on or after July 1, 2005, or to those offenders still incarcerated or on probation or parole for a sex offense as of July 1, 2005. For those individuals, SORNA, plus the HB 165 amendments, apply. For offenders convicted on or after July 1, 1995, but before July 1, 2005, the provisions of SORNA prior to the enactment of HB 165 apply. For offenders who committed offenses after January 1, 1970, but before July 1, 1995, the provisions of ASORNA apply. No offender is required to register under the provisions of more than one law. The result of this classification is that offenders subject to the more stringent requirements of ASORNA are those who have not committed an offense or been on probation or parole since July 1, 1995, whereas the more recent offenders are subject to the less stringent requirements of SORNA.

{50} Although we recognize the concerns this scheme raises, we find no equal protection violation. Both the City and the State have valid interests in protecting the public from sex offenders. As we discussed in the preemption analysis, the City may enact an ordinance that is more restrictive than state law. That is what occurred with ASORNA. While we appreciate the ACLU's concerns about the different schemes and requirements that result following the enactment of HB 165, the different requirements do not create an equal protection violation.

CONCLUSION

{51} We conclude with a brief summary of our holdings. We decline to address the issues raised in the SOAP litigation because they are moot. We affirm the district court's decision finding various provisions of ASORNA unconstitutional and severing those provisions from the ordinance. In addition, we hold that the inclusion of kidnaping and false imprisonment absent a sexual motivation for the crimes is over broad and violates due process. We also hold that the registration provision which allows APD to collect DNA samples and dental imprints is unconstitutional. We also hold that ASORNA does not violate ex post facto, double jeopardy, or cruel and unusual punishment protections.

{52} As a final note, we are well aware of the public concern over "sex offenders." However, as this Court stated in *Mieras*, 1996–NMCA–095, ¶ 53, 122 N.M. 401, 925 P.2d 518 (Hartz, J., specially concurring), "[t]o affirm [or reverse] the constitutionality of a statute is not to approve it on policy grounds. Unfortunately, or fortunately, judges are not ex officio members of the legislature. We should refrain from imposing our views of policy under the banner of constitutional principles." Thus, we may not, and do not, express any view on the wisdom of the provisions found to be constitutionally valid or infirm.

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

I CONCUR: JAMES J. WECHSLER, Judge.

IRA ROBINSON, Judge, specially concurring.

ROBINSON, Judge (specially concurring).

{54} The City of Albuquerque has chosen to exercise its right to make its sex offender registration ordinance, ASORNA, so much more stringent than that of the State of New Mexico, SORNA, and any other municipality in New Mexico. Albuquerque has a right to do so. I have no sympathy for convicted sex offenders and, as far as I am concerned, that is all well and good. But what effect will ASORNA have? It will hopefully keep sex offenders away from schools where children play. It will make the identities and whereabouts of sex offenders more widely known and discoverable to the average citizen and certainly to the average parent who, in this dangerous society, worries constantly about the safety of his or her child every time the child is out of sight.

{55} So, if the heat is on these sex offenders in Albuquerque, what will they do? They will leave Albuquerque and go to another city or town in New Mexico, which has no ordinance of its own and their life will be governed by the less restrictive and less stringent provisions of the State's sex offender registration law, SORNA. My concern is that we will drive them out of Albuquerque and into smaller cities and towns in New Mexico where the police forces and local authorities do not have the resources to han-

dle the burden of keeping track of these sex offenders and making sure that they do not violate SORNA.

{56} One way that the smaller communities could alleviate this ominous problem is to pass their own ordinances duplicating the stringent provisions of Albuquerque's sex offender law so that the sex offender would find no advantage in moving to a smaller town or city. But, alas, the State has preempted the field and after January 18, 2005, no new sex offender registration ordinance may be enacted by cities, counties, and local governments. Albuquerque's ordinance predates the cut-off, so it may remain in force. *See* Opinion at page 4, line 20.

{57} Thus, SORNA could be viewed as being in direct conflict with NMSA 1978, § 3–17–1(B) (1993), which states that communities may adopt ordinances "not inconsistent" with the laws of the state for the purpose of "providing for the safety, preserving the health, promoting the prosperity and improving the morals, order, comfort and convenience of the municipality and its inhabitants." *Id.*

{58} With these additions, I specially concur in this Opinion.