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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-012

Filing Date: April 8, 2013

Docket No. 33,375

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

FERNANDA COBRERA,

Defendant-Respondent.

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Santa Fe, NM

for Petitioner

Bennett J. Baur, Acting Chief Public Defender
Allison H. Jaramillo, Assistant Appellate Defender
Santa Fe, NM

for Respondent

OPINION

CHÁVEZ, Justice.

Fernanda Cobrera (Cobrera) was charged with criminal damage to property having a value greater than $1,000, resulting from her alleged destruction of household goods located in the home of her estranged husband. The question in this case is whether the prosecution must present evidence of the property's age and condition in order to satisfy its burden of proving the monetary value of the property. We hold that in cases where common household items have been irreparably damaged, it is sufficient for the State to introduce evidence of the items' purchase price.

BACKGROUND

On October 14, 2003, Cobrera broke into the house where her estranged husband, Jose Cobrera (Jose), was living with his new girlfriend, Sandra Hernandez (Hernandez). Once inside, Cobrera slashed upholstered couches and chairs with a knife and smashed the following items with a baseball bat: three glass side tables and a coffee table; several framed pictures, including family photos and purchased "home interiors" pictures; two mirrors; a stereo; all of the cups and glasses in

the kitchen, as well as a matched set of plates and cups for twelve; a flower vase; a coffee maker; two televisions and a VCR; and a collection of porcelain angels belonging to one of Hernandez's daughters. Jose testified that all of the items other than the couches and upholstered chairs were unusable after the incident. Hernandez was able to repair the couches. They replaced the damaged chairs.

Hernandez testified about the value of the items when she initially purchased them, although she did not state how old they were. She testified that her living room set, including the sofas and glass tables, cost about $1,900; the framed pictures (excluding the family photographs) cost approximately $1,400; the stereo cost $40; the upholstered chairs that they replaced cost "550, 424 [dollars], something like that"; the angel figurines cost around $500; a mirror cost $10; and one of the televisions cost about $100.

Hernandez did not recall how much she had paid for the photographs, which were scratched during the incident, or their frames; the plates, glasses, cups, or coffee maker; the VCR; or the second television. She did not know the value of the vase.

Jose testified that the couches were not torn when he left for work that morning and the tables and pictures were undamaged. Hernandez testified that nothing was damaged before she left the house on the day of the incident. There was no other testimony about the condition of the items prior to when Cobrera destroyed them.

Cobrera was convicted of criminal damage to property in excess of $1,000, contrary to NMSA 1978, Section 30-15-1 (1963). She appealed her conviction, and the Court of Appeals reversed, holding that the State presented insufficient evidence of the value of the property. *State v. Cobrera*, No. 29,591, slip op. at 2 (N.M. Ct. App. Dec. 8, 2011) (unpublished). In particular, the Court of Appeals expressed concern that the State had told the jury "nothing about the age or condition of the goods prior to the crime, the possible cost of repair, or how much it would cost to purchase an equivalent replacement for the goods." *Id.* at 4. The Court of Appeals noted that although there had been testimony about the purchase price of the items, "we have consistently held that, to establish value of the goods just prior to the damage, the State must produce evidence of something more than the original cost of the goods." *Id.* at 3. The State appealed to this Court, and we granted certiorari. *State v. Cobrera*, 2012-NMCERT-002, 291 P.3d 1291.

DISCUSSION

"In reviewing the sufficiency of evidence used to support a conviction, we resolve all disputed facts in favor of the State, indulge all reasonable inferences in support of the verdict, and disregard all evidence and inferences to the contrary." *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. "It is our duty to determine whether any rational jury could have found the essential facts to establish each element of the crime beyond a reasonable doubt." *State v. Dowling*, 2011-NMSC-016, ¶ 20, 150 N.M. 110, 257 P.3d 930.

Section 30-15-1 does not specify how to determine the dollar value of the property damage. However, the jury in this case was instructed on how to measure the damage:

> "Amount of damage" means the difference between the price at which the property could ordinarily be

> bought or sold prior to the damage and the price at which the property could be bought or sold after the damage. If the cost of repair of the damaged property exceeds the replacement cost of the property, the value of the damaged property is the replacement cost.

UJI 14-1510 NMRA. *State v. Barreras*, 2007-NMCA-067, ¶¶ 5-6, 141 N.M. 653, 159 P.3d 1138, confirms that the two sentences of the instruction provide two separate methods for evaluating property damage. The first method is the diminution in the value of the property due to the damage, or the "before and after value." *Id.* ¶ 5. The second method is the cost of repair or replacement, whichever is less. *Id.* ¶ 6. Under the second method, the State does not need to demonstrate the value of the property immediately prior to the damage. *Id.* ¶ 11 (holding that when the state relies on cost-of-repair evidence, "the amount of damage can be assessed without determining the before and after value of the property"). Instead, the State could introduce other evidence of the cost of repair or replacement such as receipts, price quotes for repair services, or advertisements that state the cost of similar items.

In holding that a conviction under Section 30-15-1 requires "evidence of something more than the original cost of the goods," *Cobrera*, No. 29,591, slip op. at 3, the Court of Appeals relied on *State v. Hughes*, 108 N.M. 143, 767 P.2d 382 (Ct. App. 1988), and *State v. Barr*, 1999-NMCA-081, 127 N.M. 504, 984 P.2d 185. In *Hughes*, the Court of Appeals upheld a conviction for receiving stolen property, holding that there was sufficient evidence for the jury to find that stolen laboratory equipment had a value of at least $100. 108 N.M. at 145-46, 767 P.2d at 384-85. An employee of the laboratory testified about the condition of the equipment, its resale value in its current condition, and its value when it was new. *Id.* at 145, 767 P.2d at 384. The Court of Appeals found his testimony sufficient to establish the value of the equipment, noting that "[i]t is clear that an owner of personal property may testify concerning the value of the property and that such testimony is sufficient to support a jury's determination of value." *Id.* at 145-46, 767 P.2d at 384-85. The *Hughes* Court noted that an owner knows "the age, the condition[,] . . . the original cost, and the amount that he, as an informed buyer, would pay for each item in its condition at trial." *Id.* at 146, 767 P.2d at 385.

In *Barr*, the Court of Appeals again upheld a conviction, this time for larceny, finding that the victim's testimony about the purchase price, the age, and the condition of the items, as well as the victim's belief about their replacement cost and garage sale value, was sufficient to establish their value. 1999-NMCA-081, ¶¶ 29-30. The *Barr* Court stated that "testimony of the purchase price of consumer goods, *when coupled with information about the age and condition of the goods*, is sufficient by itself to allow a jury to draw reasonable inferences about the present market value of the items." *Id.* ¶ 30 (emphasis added). The Court of Appeals in *Cobrera* inferred from this language that evidence of purchase price alone is insufficient to establish value. No. 29,591, slip op. at 3-4.

However, we note that the Court of Appeals affirmed the convictions in the cases of *Barr* and *Hughes*. In each case, the Court held that the evidence of value that had been presented was sufficient to establish guilt. Neither case indicated that any less evidence would have been insufficient. In addition,

neither *Barr* nor *Hughes* involved criminal damage to property or the cost-of-repair-or-replacement method of calculating damage as described in *Barreras*, 2007-NMCA-067, ¶ 6.

When the Court of Appeals did analyze the issue of property value in a property damage case, it concluded that evidence of purchase price alone can establish the cost of replacing an item. In *State v. Haar*, 110 N.M. 517, 519, 797 P.2d 306, 308 (Ct. App. 1990), the Court of Appeals upheld the defendant's conviction for criminal damage to property of more than $1,000. The victim testified that she had sustained total damages of $1,009.54, an amount barely over the statutory minimum. *Id.* at 520, 797 P.2d at 309. The damages included $110 for the victim's dishwasher.[1] *Id.* The victim testified that she had purchased the dishwasher for $110 and that it was unusable since the defendant had damaged it. *Id.* The defendant challenged the valuation of the dishwasher as "speculative," and the Court of Appeals rejected his challenge. *Id.* at 520-21, 797 P.2d at 309-10. The *Haar* Court held that because the victim specifically stated the purchase price of the dishwasher, the jury could accept that amount as evidence of valuation without making "an inference based on conjecture or speculation." *Id.* at 520, 797 P.2d at 309. Although the *Haar* Court cited *Hughes* for the proposition that the owner of property knows its quality, cost, and condition, *Haar*, 110 N.M. at 521, 797 P.2d at 310, there is no indication in the opinion that the victim testified about her dishwasher's condition. Instead, she testified that (1) she had purchased the dishwasher for $110 and (2) the dishwasher was unusable, and the Court of Appeals allowed the jury to infer that replacing the dishwasher would cost $110. *Id.* at 520-21, 797 P.2d at 309-10.

Under Uniform Jury Instruction 14-1510 and *Barreras*, 2007-NMCA-067, ¶¶ 5-6, the State may prove the amount of damage by introducing evidence of replacement cost. *Haar* stands for the proposition that the jury may infer that the replacement cost is equal to the purchase price. *See* 110 N.M. at 520, 797 P.2d at 309 (indicating that the victim, who testified to purchase price of dishwasher, "specifically stated *the value* of the dishwasher" (emphasis added)). It is reasonable to infer that the jury in *Cobrera* did exactly that.

In this case there are unresolved questions about the degree of damage to certain items (for example, the couches, which were not totally destroyed), but it is not necessary for this Court to resolve them. Hernandez testified that the framed pictures alone had a purchase price of $1,400. Photographs presented at trial showed the framed pictures smashed to pieces, and there was testimony that all of the items other than the furniture were unusable after the damage. In other words, the State introduced evidence of the purchase price of items that could not be repaired; under *Haar*, that was sufficient to convict.

[1] *Haar* initially states that the cost of replacing the dishwasher was $100, but this figure appears to be a typographical error. 110 N.M. at 520, 797 P.2d at 309. The opinion states that the damages were "car interior, $368.37; car exterior including gas tank, $465.84; wall repairs, $65.33; and dishwasher replacement, $100, for total damages of $1,009.54." *Id.* However, the listed figures add up to $999.54, not $1,009.54. In the same paragraph and elsewhere in the opinion, the court states that the dishwasher cost $110. *Id.* ("[S]he had purchased [the dishwasher] from a private party for $110," but the "defendant contends [the victim's] testimony with respect to the dishwasher damage was speculative and thus did not support an inference that it amounted to $110."). Therefore, we assume that the trial court valued the replacement cost of the dishwasher at $110.

Furthermore, the jury was able to draw on something more than the testimony about the items' purchase price. The evidence included twenty-seven photographs of the damaged property. The items that were damaged were common household items such as furniture, dishes, and electronics. When weighing the testimony of Hernandez and Jose, the jury could have drawn on its own knowledge and life experience to conclude that many of the items were damaged beyond repair and the cost of repairing all of the damaged items and replacing those that were irreparable would be greater than $1,000. *See Barreras*, 2007-NMCA-067, ¶ 9 (permitting jury to infer that the replacement cost of a year-old Cadillac Escalade in good condition would be greater than the cost of repair, which was $5,100).

CONCLUSION

Because the State introduced evidence that the purchase price of irreparably damaged items was greater than $1,000, the jury had sufficient evidence to conclude that the replacement cost of the items was also greater than $1,000. Under established New Mexico law, replacement cost of irreparable items is an appropriate measure of the value of the items. Therefore, we reverse the Court of Appeals and reinstate Cobrera's conviction. We remand to the Court of Appeals for consideration of Cobrera's remaining claims.

IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

RICHARD C. BOSSON, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-013

Filing Date: April 11, 2013

Docket No. 33, 372

CHERYL SCHULTZ for KEVIN SCHULTZ (deceased),

Worker-Petitioner,

v.

POJOAQUE TRIBAL POLICE DEPARTMENT, and NEW MEXICO MUTUAL CASUALTY COMPANY,

Employer-Insurer-Respondents.

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for Respondents

OPINION

BOSSON, Justice.

On August 17, 2002, Pojoaque Tribal Police Officer Kevin Schultz drowned while rescuing a twelve-year-old boy from the Rio Grande near Pilar, New Mexico. On the day of the accident, Schultz had taken the day off from work to chaperone a group of children from his church on a recreational outing. This case arose when Schultz's widow, Cheryl, filed a claim for workers' compensation benefits resulting from her husband's death, but only *after* the statute of limitations had expired.

Notwithstanding the late filing, Mrs. Schultz contends that the conduct of the Pojoaque Tribal Police Department (police department or employer) caused her to file after the deadline and, thus, we should consider her complaint timely filed pursuant to NMSA 1978, Section 52-1-36 (1937) (as amended through 1989) of the Workers' Compensation Act (the Act), entitled "Effect of failure of worker to file claim by reason of conduct of employer." This particular statute goes to the heart of Mrs. Schultz's appeal.

Both the Workers' Compensation Judge (WCJ) and the Court of Appeals decided that Mrs. Schultz's complaint was not timely filed. For the reasons that follow, we reverse and remand to the Court of Appeals for further proceedings consistent with this opinion.

BACKGROUND

The Act provides a one-year statutory period within which to file a claim for workers' compensation benefits following the death of a worker. NMSA 1978, § 52-1-31(B) (1987). When the filing delay is caused, "in whole or in part," by the employer's conduct, then the delay "shall not deprive such person of the right to compensation" under the Act. *See* § 52-1-36. The statute provides:

> The failure of any person entitled to compensation under the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] to give any notice or file any claim within the time fixed by the Workers' Compensation Act *shall not deprive such person of the right to compensation where the failure was caused in whole or in part by the conduct of the employer or insurer which reasonably led the person entitled to compensation to believe the compensation would be paid.*

Section 52-1-36 (emphasis added).

Following Schultz's death, members of the police department assured Mrs. Schultz that they would take care of everything for her. Within two months of Schultz's death, the employer filed the necessary paperwork for federal death benefits. However, it was not until a meeting on July 28, 2003, between Mrs. Schultz, her financial advisor, and John Garcia, Chief of the Pojoaque Tribal Police Department, that it became clear that Mrs. Schultz might be entitled to workers' compensation benefits. At this meeting, Chief Garcia told Mrs. Schultz that he would "take care of getting the workers' compensation paperwork done." To be clear, Chief Garcia testified that he did not remember telling Mrs. Schultz this, but acknowledged that "if she said that, it must be correct." Thus, we accept this representation by the Chief of Police as unrebutted for purposes of this opinion.

Despite this representation, the employer did not file a workers' compensation claim on Mrs. Schultz's behalf. Once Mrs. Schultz realized that the employer was not going to file her claim, she filed a pro se complaint that same day, October 1, 2003—some forty-five days after the one-year statute of limitations had run. Although it was filed late, Mrs. Schultz's complaint proceeded to an informal mediation at the Workers' Compensation Administration (the WCA). *See* NMSA 1978, § 52-5-5(C) (1993) (describing that "every claim shall be evaluated by the director [of the WCA] or his designee, who shall then contact all parties and attempt to informally resolve the dispute").

The mediator issued a recommended resolution on December 19, 2003, recommending that the complaint be dismissed without prejudice so that Mrs. Schultz could retain legal counsel to assist her during settlement negotiations. According to the mediator, Mrs. Schultz could "immediately file an amended complaint with the accompanying documents required by this Administration." Neither party filed an acceptance nor a rejection of this resolution. The WCA generated a Notice of Completion on February 13, 2004.

After retaining legal counsel, Mrs. Schultz filed a second complaint with the WCA on June 18, 2004, which specifically requested modification of the first recommended resolution because she had retained an attorney. A second mediation occurred, after which the employer rejected the mediator's recommended resolution of settlement with Mrs. Schultz for a cash sum. After extensive discovery, the case proceeded to trial in 2007 before a WCJ.

Following three days of trial, the WCJ entered findings of fact, conclusions of law, and a compensation order. The WCJ decided that Mrs. Schultz was not entitled to workers' compensation benefits on two grounds. The WCJ determined (1) that the statute of limitations barred Mrs. Schultz's claim, and (2) that even if the statute of limitations were not a bar, her husband was not acting within the course and scope of his employment when he died.

Mrs. Schultz appealed. The Court of Appeals initially dismissed her appeal as untimely. *See Schultz v. Pojoaque Tribal Police Dep't*, No. 28,508, slip op. at 2 (N.M. Ct. App. Sept. 23, 2008). We reversed and remanded for the Court of Appeals to decide the merits of her appeal. *Schultz ex rel. Schultz v. Pojoaque Tribal Police Dep't*, 2010-NMSC-034, ¶ 1, 148 N.M. 692, 242 P.3d 259.

On remand, the Court of Appeals

affirmed the WCJ's decision, holding that the statute of limitations barred Mrs. Schultz's claim. *Schultz ex rel. Schultz v. Pojoaque Tribal Police Dep't*, 2012-NMCA-015, ¶ 33, 269 P.3d 14. Finding this issue dispositive, the Court of Appeals did not address whether her husband died within the course and scope of employment. *Id.* ¶ 7. We granted certiorari, *Schultz v. Pojoaque Tribal Police Dep't*, 2012-NMCERT-001, 291 P.3d 599, to determine how Section 52-1-36 impacts a workers' compensation claim once the statute of limitations has expired.

STANDARD OF REVIEW

This Court has previously held that "[i]n reviewing a WCJ's interpretation of statutory requirements, we apply a de novo standard of review." *DeWitt v. Rent-A-Center, Inc.*, 2009-NMSC-032, ¶ 14, 146 N.M. 453, 212 P.3d 341.

DISCUSSION

Application of Statutory Tolling

The Court of Appeals assumed without deciding that the employer's conduct caused Mrs. Schultz to file an untimely claim, thereby implicating Section 52-1-36. *Schultz*, 2012-NMCA-015, ¶ 25. The Court then proceeded to analyze the effect of Section 52-1-36 on this case, concluding that the statute was of no help to Mrs. Schultz. *Schultz*, 2012-NMCA-015, ¶ 26. For purposes of our own analysis, we track the issues as stated by the Court of Appeals. We look first to the effect of Section 52-1-36 on this case, assuming it applies, and then we will examine the record to see whether the failure to timely file "was caused in whole or in part by the conduct of the employer." *Id.*

In examining the effect of Section 52-1-36, the Court of Appeals regarded it as a tolling statute, relying on prior opinions of our two courts. *See Schultz*, 2012-NMCA-015, ¶¶ 25-26 ("Section 52-1-36 permits tolling when an employer's conduct reasonably leads the worker to believe that compensation will be paid."). Whether Section 52-1-36 is, in fact, a tolling statute is significant, because as the Court of Appeals described in *Schultz*, 2012-NMCA-015, ¶¶ 25-26, tolling extends a statute of limitations for only a limited period of time.

> Tolling [is] [a]n interruption in the time a limitations period runs. Tolling interrupts the time of a period for the limitations of action under a statute of limitations, effectively adding on time to commence an action after the moment when the statute would otherwise have barred an action. . . . Tolling persists as long as the cause of the tolling persists, and when that cause ends, the calculation of time under the statute commences again.

1 *The Wolters Kluwer, Bouvier Law Dictionary* 1645 (Desk Ed. 2012). This Court has previously stated that "a statute of limitations may be tolled for a period of time, and then recommence in such a way that the remainder of the period remaining under the statute is extended by the period tolled." *State v. Sanchez*, 109 N.M. 313, 316, 785 P.2d 224, 227 (1989); *see also State v. Hill*, 2008-NMCA-117, ¶ 9, 144 N.M. 775, 192 P.3d 770 (defining a "tolling statute" as "a law that interrupts the running of a statute of limitations in certain situations" (quoting *Black's Law Dictionary* 1525 (8th ed. 2004) (internal quotation marks and alteration omitted))).

An example may clarify the analysis. Assume that an employee is misled sixty days before the statute of limitations is to run. Tolling would suspend the effect of the limitations statute until the employee learns or should learn the truth. If that were to occur one month after the statute had run, the limitations period would be tolled until that time, and the employee would have sixty days thereafter in which to file, the time left in the limitations period when the misrepresentation occurred, but not a day longer.

Because it interpreted Section 52-1-36 to function as a tolling statute, the Court of Appeals applied a strict tolling analysis to Mrs. Schultz's late filing. *Schultz*, 2012-NMCA-015, ¶ 26. The Court focused on the fateful meeting with Chief Garcia on July 28, 2003, twenty-one days before the statute of limitations was to expire. *Id.* The Court of Appeals assumed without deciding that on this date, the employer's conduct could reasonably have led Mrs. Schultz to believe that her claim would be filed, thereby giving her a "false sense of security." *Id.* ¶¶ 25-26.

It is this conduct that implicates Section 52-1-36. If the statute functions as a tolling statute, then from July 28, 2003 onwards, Mrs. Schultz was operating under the assumption that the employer was going to file her claim. On October 1, 2003, she realized that the employer had *not* filed a claim. During this period, from July 28, 2003 until October 1, 2003, just over two months, the limitations period would be tolled. On October 1, 2003, the cause of the tolling—the employer's conduct reasonably leading Mrs. Schultz to believe that the workers' compensation claim would be filed—ceased to exist. At this point, under a strict tolling analysis, the limitations statute began running again, giving her the originally tolled twenty-one days to file the workers' compensation claim on her own.

Of course, in this case Mrs. Schultz did not need the full twenty-one days; she filed her first workers' compensation complaint the same day she realized the employer had not filed, October 1, 2003. As a result, the statute of limitations stopped running when the complaint was filed. *See Bracken v. Yates Petroleum Corp.*, 107 N.M. 463, 466, 760 P.2d 155, 158 (1988) (describing how the statute of limitations is tolled during the pendency of an action). Following the statutorily required mediation, the mediator recommended dismissal without prejudice on December 19, 2003, stating in part:

> It is the [m]ediator's evaluation, however, that under the circumstances of this case, [Mrs. Schultz's] attorney should be present during settlement negotiations for her consultation. Therefore, the [m]ediator recommends that the complaint filed on October 22, 2003,[1] be *dismissed without prejudice*. [Mrs. Schultz] may immediately file an amended complaint with the accompanying documents required by this Administration.

(Emphasis added.)

The dismissal without prejudice

[1] The record indicates that there was another complaint filed on October 22, 2003. It is not clear why this second complaint was filed. This complaint is the same as the one filed on October 1, 2003. For purposes of this appeal, all parties have treated October 1, 2003, as the date Mrs. Schultz first filed her workers' compensation complaint.

complicated the analysis for both the WCJ and the Court of Appeals. Because Mrs. Schultz did not file a rejection of the first recommended resolution nor raise the effect of the dismissal without prejudice of the first complaint, the WCJ found that "[w]hen a Complaint is filed and dismissed without prejudice, and the filing date is not preserved in the document doing the dismissal, it's as if the Complaint has never been filed at all." *Schultz*, 2012-NMCA-015, ¶¶ 15-16.

According to the Court of Appeals, the statute of limitations started running again once the mediator dismissed the case without prejudice, or at the latest, when the WCA finally closed the file on February 13, 2004. *Id.* At that point, under the Court of Appeals' view of tolling, Mrs. Schultz had no more than twenty-one days—the original tolling period—to file another complaint with the WCA. *Id.* Her second complaint, filed on June 18, 2004, fell well outside this time frame. *See id.* ¶ 8. Thus, the Court of Appeals regarded the second complaint as untimely, notwithstanding Section 52-1-36. *Schultz*, 2012-NMCA-015, ¶ 26.

Estoppel

Mrs. Schultz asks us to construe Section 52-1-36, not as a strict tolling statute, but as an estoppel statute. Equitable estoppel "applies where, as a result of the conduct of a party upon which another person has in good faith relied to his or her detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights that might have otherwise existed." 28 Am. Jur. 2d *Estoppel and Waiver* § 27 (2011).

Mrs. Schultz argues that *Molinar v. City of Carlsbad*, 105 N.M. 628, 735 P.2d 1134 (1987), supports her position that Section 52-1-36 "is actually a codification of the principle of equitable estoppel." In *Molinar*, which concerns retirement benefits rather than workers' compensation, we determined that a city was estopped from raising the statute of limitations as a defense when the actions of its former attorney assured city employees that their case would be settled satisfactorily without the need for litigation. *Id.* at 631, 735 P.2d at 1137. We cited Section 52-1-36 as an example of a statute which codifies that "the conduct of a party may estop it from raising the statute of limitations as a defense." *Molinar*, 105 N.M. at 631, 735 P.2d at 1137.

Unlike tolling, equitable estoppel does not appear to confine its relief to a carefully crafted number of days. It is more a matter of what is fair under the circumstances, which is why Mrs. Schultz prefers that doctrine in this case. *See Anderson v. Cox*, 977 F. Supp. 413, 416 (W.D. Va. 1997) ("The concept of equitable estoppel is based on principles of fairness."); *see also* 28 Am. Jur. 2d, *supra* § 31 ("[T]he doctrine of equitable estoppel may . . . be invoked to prevent a defendant from relying on the statute of limitations."). However, we do not see the dicta in *Molinar* as deciding the question one way or another. Clearly, that case did not determine whether Section 52-1-36 is a tolling statute or one based on equitable estoppel; the statute was cited only as an illustration. For the following reasons, based on its history and evolution, we conclude that Section 52-1-36 established its own special relief, untethered to either doctrine.

Section 52-1-36

Section 52-1-36 has a long history in our jurisprudence. Our Legislature first enacted the statute's predecessor in 1937 in

response to a 1931 decision of this Court, *Taylor v. American Employers' Insurance Co. of Boston, Massachusetts.* 35 N.M. 544, 3 P.2d 76 (1931), *superseded by statute as stated in Lucero v. White Auto Stores, Inc.*, 60 N.M. 266, 268, 291 P.2d 308, 309 (1955) (recognizing that the Legislature enacted this statute following the *Taylor* decision); *see also* 1937 N.M. Laws, ch. 92, § 13.

In *Taylor*, this Court took a strict view of the statute of limitations within the Act as it existed at the time. *See* 35 N.M. at 550, 3 P.2d at 78. In that case, an injured worker asserted that the employer's insurer led him to believe that workers' compensation would be paid. *Id.* at 545, 3 P.2d at 76. The worker relied on these representations and failed to file a workers' compensation complaint within the applicable limitations period. *Id.* This Court strictly applied the statute of limitations, finding that waiver and estoppel could not save the worker's claim, because the statute at issue was not a mere limitation on the remedy, but was a "limitation upon the right of action" that is "conditioned upon its enforcement within a prescribed period." *Id.* at 549-50, 3 P.2d at 78 (internal quotation marks and citation omitted); *see also Lucero,* 60 N.M. at 268, 291 P.2d at 309 (describing the holding of *Taylor*).

Six years later, in response to our holding in *Taylor*, the Legislature enacted what is codified today as Section 52-1-36. *See Knippel v. N. Commc'ns, Inc.*, 97 N.M. 401, 405, 640 P.2d 507, 511 (Ct. App. 1982) (noting that "[p]rior to the enactment of [Section] 52-1-36, early decisions in New Mexico declined to recognize assertions of equitable estoppel or waiver as a basis for tolling the time constraints imposed by [Section] 52-1-31," and citing *Taylor*). Except for several very minor amendments, the language enacted in 1937 remains in force today. *Compare* 1937 N.M. Laws, ch. 92, § 13 (enacting what is now Section 52-1-36), *with* § 52-1-36 (containing substantively identical language).

Over the years, courts have described Section 52-1-36 as a tolling statute. *See Silva v. Sandia Corp.*, 246 F.2d 758, 760 (10th Cir. 1957) (considering employee's argument that employer's conduct tolled the statute of limitations under previous codification of Section 52-1-36); *Stasey v. Stasey*, 77 N.M. 436, 439-40, 423 P.2d 869, 871-72 (1967) (recognizing that "[t]his section of our statutes provides the only reason or excuse for tolling or extending the time within which suit must be filed" under the Act); *Lucero*, 60 N.M. at 269, 291 P.2d at 310 (determining whether what is now codified as Section 52-1-36 tolled the one-year limitations period in which to file a workers' compensation complaint); *Hutcherson v. Dawn Trucking* Co., 107 N.M. 358, 360, 758 P.2d 308, 310 (Ct. App. 1988) (recognizing that Section 52-1-36 functions as a tolling statute); *Howie v. Stevens*, 102 N.M. 300, 305, 694 P.2d 1365, 1370 (Ct. App. 1984) (citing Section 52-1-36 and stating that "[m]isrepresentation that the employee will receive benefits remains the only reason the workmen's compensation limitation period is tolled"); *Ryan v. Bruenger M. Trucking*, 100 N.M. 15, 17, 665 P.2d 277, 279 (Ct. App. 1983) (describing Section 52-1-36 as containing a tolling provision); *Saenz v. McCormick Constr. Co.*, 95 N.M. 609, 610, 624 P.2d 551, 552 (Ct. App. 1981) (describing Section 52-1-36 as a "tolling provision"), *holding modified on other grounds by Ryan*, 100 N.M. at 17, 665 P.2d at 279; *Owens v. Eddie Lu's Fine Apparel*, 95 N.M. 176, 178, 619 P.2d 852, 854 (Ct. App. 1980) (stating that "52-1-36 . . . is a tolling

provision"), *abrogation recognized on other grounds in Schultz*, 2012-NMCA-015, ¶ 26.

Although our courts have used the term "tolling" to describe Section 52-1-36, this Court's seminal opinion interpreted Section 52-1-36 differently—without the limitations of tolling. In 1943, in *Elsea v. Broome Furniture Co.*, this Court construed NMSA 1941, Section 57-914, the exact language that was codified in 1937. 47 N.M. 356, 366-67, 143 P.2d 572, 578 (1943); *compare* NMSA 1941, § 57-914, *with* 1937 N.M. Laws, ch. 92, § 13 (containing identical language).

In that case, a worker was injured on three separate occasions, from February to June 1940. *Id.* at 362-63, 143 P.2d at 575-76. Following his third injury, the worker attempted to obtain workers' compensation benefits in August of 1940. *Id.* at 363, 143 P.2d at 576. After speaking with an insurance adjuster, the worker learned that he had a "legitimate claim" for workers' compensation and "it was only a matter of time until it would be paid." *Id.* at 364, 143 P.2d at 576. In the intervening months, the worker contacted the insurance company to inquire about his claim and at no time was he told that his claim would not be paid. *Id.* at 364, 143 P.2d at 576. However, on October 27, 1941, the insurance company formally rejected the worker's claim. *Id.* at 364, 143 P.2d at 576-77. Seven months later, almost two years after his initial efforts at collection, the worker filed suit. *Id.* at 364, 143 P.2d at 577.

The worker argued under the precursor to Section 52-1-36 that his failure to file a timely lawsuit "was caused in whole or in part by the conduct of the employer or insurer which would reasonably lead the person entitled to compensation to believe the compensation would be paid." *Elsea*, 47 N.M. at 366-67, 143 P.2d at 578 (internal quotation marks, alteration and citation omitted). The *Elsea* court refused to disturb the jury verdict in the worker's favor, which found that the worker had been "misled 'in whole or in part' by the conduct of the employer or insurer." *Id.* at 368, 143 P.2d at 579. In reaching this conclusion, the *Elsea* court reasoned that "[t]he statute provides that it is only necessary to connect claimant's delay 'in whole or in part' with the conduct of the employer to excuse a failure *to file claim or a suit* within the time prescribed." *Id.* (emphasis added). This Court further stated, "The statute does not go so far as to require actual waiver by agreement or conduct which would meet the technical rules supporting estoppel. It only requires proof of such conduct as would 'in whole or in part' reasonably lead claimant to believe compensation would be paid." *Id.* at 368-69, 143 P.2d at 579.

Aside from avoiding "technical rules" in assessing the impact of employer's conduct upon the employee, the *Elsea* court also declined to impose a rigid time limit within which the employee must file suit. In holding that the worker's suit was timely filed, the *Elsea* court was "not disposed to fix any particular time short of one year after [denial of the claim] within which the action must have been filed." *Id.* at 369, 143 P.2d at 580.

In *Elsea,* this Court noted that various authorities had different approaches to determining how much time was appropriate for the worker to re-file a claim once the insurance company denied it. *Id.* at 369-70, 143 P.2d at 580. Specifically, the *Elsea* court noted that "the extended period under such circumstances should be only a reasonable time rather than a whole new statutory

period." *Id.* at 370, 143 P.2d at 580 (internal quotation marks and citation omitted). Elaborating on what a reasonable time could mean, the *Elsea* court stated that "the adoption a reasonable time [approach] . . . does not mean that the statutory period of limitations might not itself be treated as a reasonable time," and in contrast, that "[m]any cases hold that the time to be allowed is to be defined as a 'reasonable time', [sic] but which should not exceed that of the original limitation period." *Id.* The *Elsea* court did not decide which approach—an entirely new statutory period or only a reasonable amount of time not exceeding the original limitations period—was the better way to proceed. *Id.*

In the present appeal, our Court of Appeals addressed *Elsea* only in the context of when the one-year limitations began to run. *Schultz*, 2012-NMCA-015, ¶¶ 11-12. Apparently Mrs. Schultz argued to the Court of Appeals that *Elsea* supported her contention that the statute of limitations began to run on October 1, 2003, the day she filed her complaint, not the day Schultz died. *Schultz*, 2012-NMCA-015, ¶ 11. The Court of Appeals correctly stated that it saw "nothing in *Elsea* suggesting that the limitations period begins to run at a time other than the date of the worker's death in a case involving an alleged work-related death." *Schultz*, 2012-NMCA-015, ¶ 13. Mrs. Schultz does not make that argument to this Court, but asserts instead that the Court of Appeals misunderstood her *Elsea* argument. Regardless, we view the holding in *Elsea* more broadly than did our Court of Appeals, and it informs our interpretation of Section 52-1-36.

We find the plain language of Section 52-1-36 to be clear. *Elsea,* though admittedly somewhat cryptic, supports a charitable, non-parsimonious reading of that statute in favor of deciding a worker's claim on its merits. We observe that Section 52-1-36 has changed very little over time, despite the Act's major evolution in other ways. *Compare* NMSA 1978, § 52-1-47 (1990) (amended nine times), *with* § 52-1-36 (amended three times). Whatever the Legislature meant in drafting what is now Section 52-1-36, *Elsea*'s interpretation of it has been good law for close to seventy years, and in that time, the Legislature has never modified the statute to mandate a stricter approach to calculating the limitations period. Nothing in Section 52-1-36 of the Act specifies that strict tolling is the only way to apply this section to an untimely workers' compensation complaint. In fact, Section 52-1-36 never uses the word "tolling."

Significantly, when the Legislature wanted to make clear elsewhere in the Act that tolling was the appropriate remedy, it stated so in express language. For example, NMSA 1978, Section 52-1-31(A) (1987), provides that the worker has a duty to file a claim within one year for any workers' compensation payment or installment that an employer or insurer fails or refuses to pay. Section 52-1-31(A), however, allows the statutory period to be tolled if the worker remains employed where the injury occurred. *Id.* ("[The] one-year period of limitations shall be *tolled* during the time a worker remains employed by the employer by whom he was employed at the time of such accidental injury, not to exceed a period of one year." (emphasis added)).

We have previously said that "when the Legislature includes a particular word in one portion of a statute and omits it from another portion of that statute, such omission is presumed to be intentional." *State v. Jade G.*, 2007-NMSC-010, ¶ 28, 141 N.M. 284,

154 P.3d 659. Without necessarily applying that principle of statutory construction to this specific instance, its reasoning cautions circumspection; it affords us additional guidance as we consider whether Section 52-1-36 should be confined by the limits of tolling or by any other "technical rule." *See Elsea*, 47 N.M. at 368-69, 143 P.2d at 579.

Admittedly, our prior case law has leaned in a different direction, guiding the Court of Appeals in this case to apply Section 52-1-36 as a tolling statute. But the fact that prior opinions have somehow overlooked or misconstrued *Elsea*'s meaning does not mean that we should compound the error. Therefore, we hold that Section 52-1-36 should no longer be confined by the limits of tolling.[2]

Accordingly, consistent with *Elsea* and the language of Section 52-1-36, if an employee entitled to workers' compensation benefits fails to file a complaint or a claim within the limitation period because the conduct of the employer or insurer reasonably led the employee to believe compensation would be paid, then the employee has a reasonable time thereafter within which to file. As we stated in *Elsea*, we are not disposed to fix any particular time within which the worker must file, as long as the failure to file is caused in whole or in part by the conduct of the employer or the insurer. *See Elsea*, 47 N.M. at 369, 143 P.2d at 570 (refusing to set a rigid deadline for filing a complaint).

Having settled on the proper application of Section 52-1-36, we now determine (1) whether the conduct on the part of this particular employer, in whole or in part, reasonably led Mrs. Schultz to believe that workers' compensation benefits would be paid, and if so, (2) whether Mrs. Schultz's workers' compensation complaint was filed within a reasonable time thereafter.

The Employer's Conduct Reasonably Led Mrs. Schultz to Believe Workers' Compensation Claim Would be Filed and Benefits Would be Paid

The Court of Appeals assumed without deciding that the conduct of the employer following the July 28, 2003, meeting with the Chief of Police reasonably led Mrs. Schultz to believe compensation would be paid. *See Schultz*, 2012-NMCA-015, ¶ 26. In order to demonstrate that the conduct on the part of the employer caused a failure to file a workers' compensation complaint, the worker must show, by reasonable inference, that he believed compensation would be paid, the belief was reasonable, and the belief was based, in whole or in part, on the conduct of the employer. *See Hutcherson*, 107 N.M. at 360, 758 P.2d at 310 (listing elements in the context of summary judgment).

From the night Schultz died, his employer assured his widow that it would "take care of everything for her." At this early

[2] We expressly overrule the portions of those cases which describe or apply Section 52-1-36 as a tolling statute. *See Stasey v. Stasey*, 77 N.M. 436, 423 P.2d 869 (1967); *Lucero v. White Auto Stores, Inc.*, 60 N.M. 266, 268, 291 P.2d 308, 309 (1955); *Hutcherson v. Dawn Trucking* Co., 107 N.M. 358, 360, 758 P.2d 308, 310 (Ct. App. 1988); *Howie v. Stevens*, 102 N.M. 300, 305, 694 P.2d 1365, 1370 (Ct. App. 1984); *Ryan v. Bruenger M. Trucking*, 100 N.M. 15, 17, 665 P.2d 277, 279 (Ct. App. 1983); *Knippel v. N. Commc'ns, Inc.*, 97 N.M. 401, 405, 640 P.2d 507, 511 (Ct. App. 1982); *Saenz v. McCormick Constr. Co.*, 95 N.M. 609, 610, 624 P.2d 551, 552 (Ct. App. 1981), *holding modified on other grounds by Ryan*, 100 N.M. at 17, 665 P.2d at 279; *Owens v. Eddie Lu's Fine Apparel*, 95 N.M. 176, 178, 619 P.2d 852, 854 (Ct. App. 1980), *abrogation recognized on other grounds in Schultz*, 2012-NMCA-015, ¶ 26.

stage, the employer did not state specifically that it would file a workers' compensation claim, and perhaps, as the employer stated, no one was contemplating workers' compensation benefits at that early point in time.

Two months after Schultz's death, the employer submitted the paperwork necessary to make Mrs. Schultz eligible for federal death benefits, which she did in fact receive. On July 17, 2003, Mrs. Schultz was notified of her benefits under the federal Public Safety Officers' Death Benefits statute, 42 U.S.C. § 3796 (2006), which, as the award letter indicated, recognizes "the selfless dedication of federal, state and local public safety officers killed in the line of duty."

These events provide context for the July 28, 2003, meeting with Chief Garcia. At this meeting, all participants became aware that Mrs. Schultz might be entitled to workers' compensation benefits. The Chief testified about his surprise at hearing this, because it had never occurred to him that Mrs. Schultz might be entitled to workers' compensation. Nevertheless, Chief Garcia promised to prepare the necessary paperwork for filing a worker's compensation claim.

Both Mrs. Schultz and her financial advisor testified, without contradiction, that they left this meeting believing that the employer would be filing the necessary papers. Shortly after this meeting, Mrs. Schultz visited Chief Garcia to inquire about the status of her worker's compensation complaint, and he told her to be patient because "these things take time." Consistent with this conduct, the employer wrote a letter to Mrs. Schultz on October 21, 2003, stating that "[y]our husband, Kevin Schultz, died in the line of duty. The Pueblo of Pojoaque will do anything necessary for you to receive survivor's benefits, workmen's compensation or any other benefits available to you and your grieving family."

These representations, fully documented in the record below, support Mrs. Schultz's belief that her husband's compensation would be paid, or at the very least, that she could rely on the employer to process her claim and file the necessary paperwork toward that same end. We recognize that Section 52-1-36 speaks in terms of causing the employee to believe that benefits would be *paid*. Under the circumstances of this case, we conclude the employer's promises were the functional equivalent of saying that it would do everything within its power to see that benefits were paid. Mrs. Schultz could reasonably rely on those representations within the meaning of Section 52-1-36.

The employer's conduct, therefore, implicates the relief called for in Section 52-1-36, and allowed Mrs. Schultz a reasonable period of time within which to file on her own. We now turn to the reasonableness of Mrs. Schultz's conduct.

Mrs. Schultz Acted Within a Reasonable Period of Time and Her Filing Was Timely

Mrs. Schultz filed her pro se workers' compensation complaint on October 1, 2003. The statute of limitations on her claim expired on August 17, 2003. Although both the Court of Appeals and the WCJ focused on the prejudicial effect of the first mediator's dismissal without prejudice, that focus was misplaced. Mrs. Schultz's first complaint, filed on October 1, 2003, was clearly within a reasonable time after the statute of limitations expired—even under the now-discredited tolling approach. The WCA

treated this complaint as timely and proceeded to mediation.

The WCA mediator's first recommended resolution made no mention of the statute of limitations. In fact, it appears that the dismissal without prejudice of the first recommended resolution was intended to assist Mrs. Schultz; it was intended to provide her time to consult with an attorney before entering settlement negotiations. *See Schultz*, 2012-NMCA-015, ¶ 48 (Sutin, J., specially concurring) ("Interestingly, the mediator presumably did not think that Mrs. Schultz's October 1, 2003, complaint was untimely filed, given that he did not recommend dismissal based on the timeliness of the complaint (which dismissal would have been a dismissal with prejudice.)").

Additionally, when Mrs. Schultz filed her second worker's compensation complaint on June 18, 2004, the WCA gave the complaint the same case number as the October 1, 2003, complaint and labeled it with a 'Reopened' date stamp. When a second mediator considered the issue of the statute of limitations later in 2004, he specifically stated that "[i]t is the [m]ediator's evaluation that if this case proceeds to trial, a Workers' Compensation Judge will probably decide this complaint is not barred by the statute of limitations pursuant to § 52-1-36." Therefore, it is fair to conclude that the WCA considered the second complaint as a continuation or a mere reopening of the first complaint, and not as an entirely new case. Importantly, there is no dispute that the first complaint, filed on October 1, 2003, was timely.

The Court of Appeals placed great reliance on the mediator's words, "dismissal without prejudice," concluding that Mrs. Schultz had to start all over within the constraints of the old limitation period. We conclude that the Court of Appeals misread what occurred below. We question whether a dismissal without prejudice from a mediator, following an informal mediation process conducted at the WCA, was intended to have the harsh consequences the Court of Appeals gave to this case. Legally, "[t]he words 'without prejudice' when used in an order or decree generally indicate that there has been no resolution of the controversy on its merits and leave the issues in litigation open to another suit as if no action had ever been brought." *Bralley v. City of Albuquerque*, 102 N.M. 715, 719, 699 P.2d 646, 650 (Ct. App. 1985).

Yet, mediations at the WCA are "informal meetings with no transcript of the proceedings" where "[n]o motions practice shall be allowed." 11.4.4.10(C)(7)(c) NMAC (12/31/12). The mediator's duties include "mak[ing] recommendations on all issues remaining in dispute" and issuing a recommended resolution. 11.4.4.10(C)(6)(b) & (d) NMAC. Unlike a court, it does not appear that a mediator has the authority to dismiss a case without prejudice, as a judge could. *See* 11.4.4.10(C)(6)(a) & (c) NMAC (describing the purposes of the mediation conference and duties of the mediator, stating that the parties shall come together, "attempt to settle disputed issues by discussing the facts . . . and by suggesting compromises or settlements," and also that the mediator could "state an opinion of the strength of any argument or position, and the possible results if the complaint is tried by a judge").

No one at the WCA entered a formal order dismissing the case without prejudice, although the recommended resolution did become binding on the parties after thirty days when neither party formally rejected or

accepted the resolution. *See* 11.4.4.10(D)(5)(a) NMAC ("Failure to timely accept or reject the recommended resolution shall conclusively bind the parties to the recommended resolution."). It appears that the use of the term "dismissal without prejudice" had consequences beyond what the mediator intended. As previously stated, the mediator was trying to assist Mrs. Schultz, who came to the first mediation with only her pastor, not her attorney. *See Schultz*, 2012-NMCA-015, ¶ 49 (Sutin, J., specially concurring) (recognizing the harsh result of the dismissal without prejudice in this case and wondering "why the workers' compensation process could not . . . have accommodated [Mrs. Schultz] by, instead of a dismissal without prejudice and apparently without any explanation as to the effect of the dismissal, setting a definitive date for the continuation of the mediation"). Considering all the circumstances, we conclude that neither the WCA nor the mediator intended an outright dismissal or that a second complaint would have to begin anew to satisfy the limitation period.

Moreover, even if we were to consider the second complaint as completely independent of the first, we are satisfied that it was filed within a reasonable period of time as Section 52-1-36 envisions. In *Elsea,* the worker took an additional seven months to file his complaint. We fail to see why a similar period of time would be unreasonable in this case. 47 N.M. at 364, 143 P.2d at 576-77.

CONCLUSION

We reverse and remand to the Court of Appeals to determine whether Schultz died within the course and scope of his employment.

IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-014

Filing Date: April 15, 2013

Docket No. 33,395

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

DONOVAN KING,

Defendant-Appellee.

Gary K. King, Attorney General
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for Appellant

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Sergio J. Viscoli, Assistant Appellate Defender
Albuquerque, NM

for Appellee

OPINION

CHÁVEZ, Justice.

Donovan King, suspected of aggravated battery, sat slumped over in a chair located in an interrogation room at the Farmington Police Department. His interrogator, Detective Paul Martinez, advised King of his rights consistent with *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966), and asked if he understood his rights. King replied, "Yeah." Detective Martinez next asked him, "Do you wish to answer any questions?" King answered, "Not at the moment. Kind of intoxicated." After telling King that intoxication was not a reason that King could not talk to him, Detective Martinez placed a waiver of rights form in front of King, tossed a pen in King's direction, and said, "Sign this for me if you wish to answer questions," indicating where King should sign. King responded, "If I wish to answer questions? Like I said[,] not at the moment." Undeterred, Detective Martinez repeated that intoxication was not a reason for not giving a statement, persisted in questioning King, and eventually elicited an incriminating statement from him.

The district court granted King's motion to suppress the statement because King had twice unambiguously invoked his Fifth Amendment right to remain silent when he told Detective Martinez that he did not want to answer questions at the moment. Because King was ultimately charged with an open count of first degree murder, the State appealed the district court's ruling to this Court. *See* NMSA 1978, § 39-3-3(B)(2) (1972) (permitting appeal by the state to the Supreme Court of decisions and orders suppressing evidence); *State v. Smallwood*, 2007-NMSC-005, ¶ 11, 141 N.M. 178, 152 P.3d 821 (holding that this Court has jurisdiction over interlocutory appeals in cases in which a criminal defendant may be sentenced to life imprisonment). We affirm the district court.

KING UNEQUIVOCALLY INVOKED HIS RIGHT TO REMAIN SILENT

In *Miranda*, the United States Supreme Court articulated a warning that law enforcement must give to a suspect before the suspect can be subjected to a custodial interrogation without compromising the suspect's privilege against self-incrimination. 384 U.S. at 478-79. The Court explained:

> [The suspect] must be warned prior to any questioning that he has the right to remain silent, that anything

> he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479. "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Id.* at 473-74.

It is uncontested in this case that King was a suspect who was being subjected to a custodial interrogation and that he was advised of his *Miranda* rights. The dispositive issue is whether King's statements that he did not want to answer questions "at the moment" were sufficient to invoke his constitutional right to remain silent, mandating that the interrogation cease. In addressing this issue, we defer to the district court's findings as long as the findings are supported by substantial evidence, and we review de novo the district court's application of the law to those facts. *State v. Hubble*, 2009-NMSC-014, ¶ 5, 146 N.M. 70, 206 P.3d 579.

A hearing was held on King's motion to suppress on December 8, 2011. Detective Martinez testified at the hearing, and the video recording and transcript of Detective Martinez's interrogation of King were admitted as State's Exhibits A and B, respectively. The district court made detailed and comprehensive findings of fact and conclusions of law. It entered an order on December 27, 2011, granting the motion to suppress. The district court made the following relevant findings:

> 1. At the time of the interview that is the subject of the motion, the Defendant was in custody for *Miranda* purposes and was under interrogation by the Detective.
>
> 2. At the outset of the interrogation when the Detective explained the Defendant's *Miranda* rights, the Defendant appears on the DVD to be physically affected by the alcohol and marijuana he testified to having consumed during the hours prior to the custodial interrogation. However, it is clear that the Defendant's mentation was rational and lucid. He was able to readily recite his date of birth, age, post office box and physical address. His remarks and questions were logical and appropriate to the situation.
>
> 3. The DVD and Appendix A, pg. 2[,] statements 7 through 14, reveal the following exchange.
>
> > Detective: All right. [King], listen to me. You have the right to remain silent. Listen to me—look at me bro! You have the right to remain silent. Anything you say may be used against you. You have a right to a lawyer. If you cannot afford a lawyer one will be provided free. Do you understand your rights?
> >
> > [King]: Yeah[.]
> >
> > Detective: Do you wish to answer any questions?
> >
> > [King]: Not at the moment. Kind of intoxicated.

Detective: Well[,] intoxication isn't one of the reasons you can't talk to us. It's uh . . .

[King]: It's what?

Detective: Three o'clock. Sign this for me if you wish to answer questions. Right there.

[King]: If I wish to answer questions? Like I said[,] not at the moment.

4. As the Detective said "sign this for me," he placed the waiver of rights form across the table in front of [King], tossed a pen and marked the signature line. [King] did not sign.

. . .

7. In one form or another, the Detective told [King] to sign the form six times before [King] actually signed the waiver of rights form.

Based on these findings, the district court concluded that (1) King had unambiguously invoked his right to remain silent; (2) King did not have to supply a reason for invoking his right to remain silent; and (3) the detective did not scrupulously honor King's right to remain silent and terminate the interrogation. The transcript and the video recording of the interrogation adequately support the district court's findings of fact. We next determine whether the district court correctly applied the facts to the law.

The legal analysis begins with the following passage from *Miranda*:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

384 U.S. at 473-74 (footnote omitted).

However, the broad statement, "[i]f the individual indicates in any manner," *id.* at 473, has been clarified to mean that a suspect must make an unambiguous statement invoking the right to remain silent. *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010). The moment that the unambiguous statement is made, the interrogator must "scrupulously honor" the suspect's or person's right by ceasing the interrogation. *See Michigan v. Mosley*, 423 U.S. 96, 104 (1975) (internal quotation marks and citation omitted). The interrogator is not at liberty to refuse to discontinue the interrogation or to persist in repeated efforts to wear down the suspect so as to cause the suspect to change his or her mind. *Id.* at 105-06.

The State contends that King's statement that he did not want to answer questions "at the moment" was equivocal and implied that King would answer questions at some point later in time, perhaps when he no longer felt

intoxicated. King contends that his refusal to answer questions "at the moment" required the police to stop the interrogation. We agree with King.

King clearly invoked his right to remain silent. There is nothing ambiguous about his statement, which made it clear that he did not want to speak with the police. The adverb "not" is unequivocally a negative expression. In addition to this plain statement, King also refused to sign the waiver of rights form. It is obvious that Detective Martinez himself understood that King did not want to answer questions. Detective Martinez acknowledged as much when he told King that intoxication was not a reason that King could not talk to him. The State argues that "Detective Martinez did not lie to [King] when he told him that 'intoxication was not a reason for not speaking.'" However, the State does not cite any authority for the proposition that a person subjected to a custodial interrogation must state a reason for his or her choice to invoke their constitutional rights, and we have found none. Thus, we presume that no such authority exists. *State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031; *McNeill v. Rice Eng'g & Operating, Inc.*, 2010-NMSC-015, ¶ 11, 148 N.M. 16, 229 P.3d 489 ("Where [a party has] failed to cite any contrary authority from this or any other jurisdiction, this Court will presume that no such authority exists."). The district court was correct in concluding that a person who invokes the right to remain silent does not have to offer a reason for invoking the right. All that is required is an unambiguous statement invoking the right to remain silent so that the interrogator is not left to guess whether the right was invoked. *Berghuis*, 560 U.S. at 382. We are left with the inescapable conclusion that Detective Martinez did not have to guess what King meant, and the detective knew that King did not want to answer questions, as further evidenced by the detective's efforts to get King to change his mind and sign the form waiving his rights.

Although King's statement suggested that he might want to talk at a later time, there was absolutely no respite from the interrogation in this case. After King declined to sign the waiver of rights form and repeated that he did not want to talk "at the moment," Detective Martinez immediately launched into a lecture about how intoxication is not one of the reasons for refusing to talk to the police. Detective Martinez reprimanded King, telling him that the interrogation was "pretty important," King could not possibly think that the detectives were messing around, and King should be "scared sober." This lecture was followed by more questioning and several requests for King to sign the waiver of rights form.

This is a case in which the interrogator failed to honor a decision by a person in custody to cut off questioning, by both refusing to discontinue the interrogation and by persisting in repeated efforts to wear the suspect down and cause him to change his mind. This, the Fifth Amendment does not tolerate. "The requirement that law enforcement authorities must respect a person's exercise of [the right to remain silent] counteracts the coercive pressures of the custodial setting." *Mosley*, 423 U.S. at 104. Detective Martinez's failure to scrupulously honor King's exercise of his right to remain silent is inconsistent with any notion of a voluntary relinquishment of the right to remain silent. Detective Martinez's actions are conclusive evidence that King's subsequent relinquishment of his right to remain silent was forced upon him by the continued

interrogation, and therefore it was not a voluntary relinquishment.

CONCLUSION

The district court's grant of King's motion to suppress is affirmed because King unambiguously invoked his right to remain silent and law enforcement did not scrupulously honor his right to remain silent by immediately ceasing the interrogation.

IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

RICHARD C. BOSSON, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

Certiorari Denied, April 3, 2013, No. 34,054

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-054

Filing Date: December 26, 2012

Docket No. 30,296

ROCHELLE WEISS, as Personal Representative for the Wrongful Death Beneficiaries of Florence Zuckerman, deceased,

Plaintiff-Appellee,

v.

THI of NEW MEXICO AT VALLE NORTE, LLC; THI of NEW MEXICO, LLC; THI of BALTIMORE, INC.; FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC; FUNDAMENTAL CLINICAL CONSULTING, LLC; and JIMMY D. MELTON, administrator,

Defendants-Appellants.

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Dusti D. Harvey
Jennifer J. Foote
Albuquerque, NM

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R. Daniel Sorey
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Lori D. Proctor
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for Appellants

OPINION

CASTILLO, Chief Judge.

A nursing home and its affiliates and administrator (Defendants) appeal from a district court decision denying their motion to compel arbitration and stay proceedings. The court based its denial on its conclusion that Defendants waived their right to arbitrate and that the arbitration agreement is unconscionable. Defendants also appeal the imposition of $25,000 in sanctions against them. The parties have resolved the underlying issues of waiver and unconscionability, so we do not address them. We affirm the imposition of sanctions.

I. BACKGROUND

Because our sole issue on appeal relates to the imposition of sanctions, we provide only a short background of the events leading up to the hearing at which the sanctions were imposed. Rochelle Weiss (Plaintiff), the personal representative for Florence Zuckerman, sued Defendants over alleged injuries and harm to Mrs. Zuckerman, who died in February 2008 at the THI of New Mexico Valle Norte nursing home. Shortly after filing her complaint, Plaintiff in early March 2009 began serving discovery requests on Defendants. Over the next few months, Plaintiff granted several extensions to Defendants to respond to interrogatories and requests for production, but Defendants produced only a small percentage of the documents requested. In mid-August 2009, Plaintiffs filed a motion to compel discovery.

Between the filing of the motion and the motion hearing, on September 1, 2009, a scheduling conference was held, during which the district court established a time line for trial preparation activities, including deadlines for discovery, and it set a date for a ten-day jury trial beginning in August 2010. Several days later, the parties held a teleconference regarding the production of discovery requested, but no agreement was reached. In early October 2009, the court heard Plaintiff's motion to compel, granted the motion orally, and gave Defendants two weeks, until October 21, to produce the documents. The district court issued a written order requiring the production of discovery by October 21, although the written order was not filed until October 22.

About this time, Defendants discovered the admission agreement signed by Mrs. Zuckerman and also noticed that it contained an arbitration clause. Based on this information, Defendants, on October 29, 2009, filed a motion to compel arbitration and to stay the proceedings under the Federal Arbitration Act (FAA), 9 U.S.C. § 3 (2011). Defendants did provide some discovery on

November 2 but thereafter refused to engage in discovery because their position was that the proceedings were automatically stayed upon the filing of their motion to compel arbitration.

Plaintiff filed a motion for discovery sanctions on November 12, 2009. On January 28, 2010, the district court heard Plaintiff's motion for sanctions together with Defendants' motion to compel arbitration and stay the proceedings. Defendants provided some discovery documents the day before and the day of that hearing.

The court denied Defendants' motion to compel, granted Plaintiff's motions for sanctions, imposed a $25,000 fine on Defendants, and ordered Defendants to produce all remaining discovery items within five days. Defendants appealed the district court's order. At oral argument before this Court, the parties explained that they had settled the case except for the matter of the imposition of sanctions. Accordingly, we limit our opinion to the issue of sanctions.

II. DISCUSSION

Defendants make two arguments. First, they argue that sanctions were inappropriate because the sanctions were based in part on litigation activities that occurred after Defendants had filed their motion to compel arbitration. According to Defendants, the filing of the motion should have automatically stayed the proceedings, and they thus were "substantially justified" in resisting discovery and were in compliance with discovery rules because they reasonably believed that the proceedings had been stayed. *See* Rule 1-037(B)(2) NMRA. In their second point, Defendants contend that the court provided no basis for the amount of the sanctions at $25,000 and did not base it on any evidence or representation of fees incurred by Plaintiff. We address each argument in turn.

A. Stay of the Proceedings

In their memorandum in support of their motion to compel arbitration, Defendants cited the FAA for their contention that proceedings should be stayed upon such an application. *See* 9 U.S.C. § 3. Defendants reiterated that contention in their response to Plaintiff's motion for sanctions by citing to New Mexico's Uniform Arbitration Act (the Act), NMSA 1978, §§ 44-7A-1 to -32 (2001). *See* § 44-7A-8(f). Defendants contend that the district court must automatically stay the proceedings upon receiving a motion to compel arbitration. We disagree with Defendants' reading of the statutes.

Because this involves a matter of statutory interpretation, we are faced with a question of law, and our review is de novo. *See Cooper v. Chevron U.S.A., Inc.*, 2002-NMSC-020, ¶ 16, 132 N.M. 382, 49 P.3d 61. We follow the plain meaning rule, requiring a court to give effect to a statute's language and refrain from further interpretation when the language is clear and unambiguous. *See Sims v. Sims*, 1996-NMSC-078, ¶ 17, 122 N.M. 618, 930 P.2d 153.

We first address the federal law. The FAA states that "the court . . . , upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had." 9 U.S.C. § 3. Rather than occurring automatically upon a motion to compel arbitration, a stay in the proceedings under the FAA occurs only when the court is satisfied that the issue is referable

to arbitration. *See United Nuclear Corp. v. Gen. Atomic Co.* (*United Nuclear I*), 93 N.M. 105, 123, 597 P.2d 290, 308 (1979) ("Section 3 of the [FAA] provides for a stay of pending court action on application of one of the parties when the [district] court is satisfied that the issue involved is referable to arbitration and that the applicant for the stay of court proceedings is not in default in proceeding with such arbitration."). That language invokes the discretion of the court and requires either a hearing or a ruling by the court informed by an analysis of the viability of a request for arbitration.

We now turn to the New Mexico statute. The Act states: "If a party makes a motion to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section." Section 44-7A-8(f). Here, too, the stay is not triggered automatically but requires the court, "on just terms," to assess whether the claim is subject to arbitration. The New Mexico Supreme Court has spoken only once on the meaning of the phrase "just terms" and has concluded that it translates roughly to "reasonable terms." *See Pankey v. Hot Springs Nat'l Bank*, 42 N.M. 674, 683, 84 P.2d 649, 654 (1938) (stating that the phrase, in the context of bringing in another party as an appellee, means "such reasonable terms as will save the adverse party harmless in the premises" (internal quotation marks and citation omitted)). In the context of the Act, we conclude that, before staying the proceedings, a district court must utilize its reasonable discretion to determine whether a case is arbitrable.

Adoption of Defendants' assertion that a stay of the proceedings is mandatory and is automatically triggered by a filing of a motion to compel would subvert the court's jurisdiction and lead to the absurd result of giving either party the unilateral power to halt litigation. Defendants overreach in trying to find analogous cases from other jurisdictions to support their theory. For instance, they point to *Citibank (South Dakota) NA v. Reikowski*, 760 N.W.2d 97 (N.D. 2009), for the proposition that a mere motion to compel arbitration automatically triggers a stay in the proceedings. However, that court relied on a South Dakota law with wording that is significantly different from the New Mexico statute. *See* S.D. Codified Laws § 21-25A-7 (2004) ("Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration *or an application therefor* has been made . . . ." (emphasis added)). Other state jurisdictions are equally unhelpful to Defendants' argument. And federal case law offers numerous examples of providing discretion to lower courts to determine the merits of a motion for arbitration before requiring a stay of the proceedings. *See, e.g.*, *In re Gandy*, 299 F.3d 489, 494 (5th Cir. 2002) ("A court must stay its proceedings if it is satisfied that an issue before it is arbitrable under the agreement."); *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 249 (4th Cir. 2001) ("[A] party may demand a stay of federal judicial proceedings pending exercise of a contractual right to have the subject matter of the federal action decided by arbitration, unless the party seeking arbitration is 'in default' of that right." (internal quotation marks and citation omitted)); *Houlihan v. Offerman & Co.*, 31 F.3d 692, 695 (8th Cir. 1994) ("A federal court must stay court proceedings and compel arbitration once it determines that the dispute falls within the scope of a valid arbitration agreement."); *Jones v. Gen. Motors Corp.*, 640 F. Supp. 2d 1124, 1128-29 (D. Ariz. 2009) ("If a district

court decides that an arbitration agreement is valid and enforceable, then it should either stay or dismiss the claims subject to arbitration."); *Lorntzen v. Swift Transp., Inc.*, 316 F. Supp. 2d 1093, 1095 (D. Kan. 2004) (stating that the FAA requires a district court to stay the proceedings in favor of an arbitration agreement except when the agreement is invalid as matter of law).

We conclude that because the issue was found to be not "referable to arbitration" the court could not "on just terms" order an immediate stay of the proceedings without addressing the merits of the right to arbitrate the issue at hand. 9 U.S.C. § 3; § 44-7A-8(f). Therefore, the district court had the discretion to stay or not stay the proceedings depending on the viability of the right to arbitrate, and Defendants' argument that they were justified in withholding discovery fails. Further, because the parties settled the issue of arbitrability, we need not analyze the court's justifications for denying the motion to compel arbitration and to stay the proceedings.

B. The Sanctions

We now turn to the merits of the district court's decision to impose sanctions against Defendants. At the close of the hearing on the parties' motions, the district court imposed the sanction of $25,000 based on several findings. The court found that "Defendants clearly had no intention of following" the court's October 2009 order to compel discovery and instead "unilaterally decided that all matters would be stayed." Additionally, the court described the response to Plaintiff's discovery requests as dilatory, even when considering the documents presented on the day before and day of the January 2010 hearing on sanctions. The court also found that Defendants' counsel "misrepresented several pertinent facts" during the January hearing, characterizing the attorney's statements as "careless and sloppy at best and intentional[ly] unethical at worst." We observe that the district court imposed sanctions based not only on its statutory authority to manage the discovery process but also on the court's inherent powers to control the proceedings. *See State ex rel. N.M. State Highway & Transp. Dep't v. Baca* (*Baca*), 120 N.M. 1, 4, 896 P.2d 1148, 1151 (1995) (concluding that courts have "inherent power to impose . . . sanctions on both litigants and attorneys . . . to regulate their docket, promote judicial efficiency, and deter frivolous filings" (internal quotation marks and citation omitted)); *Seipert v. Johnson*, 2003-NMCA-119, ¶ 9, 134 N.M. 394, 77 P.3d 298 (stating that a "district court could properly sanction under its inherent power to control the litigation and the conduct of the parties before it").

1. Standard of Review

"We review a [district] court's decision to impose discovery sanctions under Rule 1-037(B)(2) for an abuse of discretion." *Lewis ex rel. Lewis v. Samson*, 2001-NMSC-035, ¶ 13, 131 N.M. 317, 35 P.3d 972. Under this standard, "we will disturb the [district] court's ruling only when the [district] court's decision is clearly untenable or contrary to logic and reason." *Id.* (internal quotation marks and citation omitted). "In conducting our review[,] we must be mindful of the nature of the conduct and level of culpability found by the [district] court and whether the [district] court's sanction appears more stern than necessary in light of the conduct prompting the sanction." *Enriquez v. Cochran*, 1998-NMCA-157, ¶ 20, 126 N.M. 196, 967 P.2d 1136. "[I]mplicit in the standard of review is the question of

whether the court's findings and decision are supported by substantial evidence." *Id.*

The abuse of discretion standard is also used for review of the imposition of Rule 1-011 NMRA sanctions, *see Rangel v. Save Mart, Inc.*, 2006-NMCA-120, ¶ 12, 140 N.M. 395, 142 P.3d 983, and for bad faith participation in a settlement conference or mediation. *See Carlsbad Hotel Assocs. v. Patterson-UTI Drilling Co.*, 2009-NMCA-005, ¶ 20, 145 N.M. 385, 199 P.3d 288. We conclude that this same standard can be used in evaluating sanctions imposed based on the inherent power of a court to control its proceedings.

2. The Basis for Sanctions

Discovery sanctions "may only be imposed when the failure to comply is due to the willfulness, bad faith or fault of the disobedient party." *United Nuclear Corp. v. Gen. Atomic Co.* (*United Nuclear II*), 96 N.M. 155, 202, 629 P.2d 231, 278 (1980). Sanctions are intended to "preserve the integrity of the judicial process and the due process rights of the other litigants." *Sanchez v. Borrego*, 2004-NMCA-033, ¶ 19, 135 N.M. 192, 86 P.3d 617 (internal quotation marks and citation omitted). New Mexico's rules of civil procedure state that if a district court grants a motion to compel discovery

> the court shall . . . require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney[] fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

Rule 1-037(A)(4). The court gave its order to compel discovery orally from the bench on October 7, 2009, giving Defendants two weeks to produce all documents requested. We have previously noted that our "Supreme Court has held that a district court's oral ruling may justify sanctions under Rule 1-037." *Allred ex rel. Allred v. Bd. of Regents of the Univ. of N.M.*, 1997-NMCA-070, ¶ 19, 123 N.M. 545, 943 P.2d 579. Here, the district court followed up with a written order on October 22, listing the deadline as October 21.

Rather than comply with the order to compel discovery, Defendants responded a week later, on October 29, by filing their motion to compel arbitration and to stay the proceedings. Defendants did not comply with the court's order of October 7 because they claimed that they needed 120 days to do so, not the fourteen days provided by the court's oral and written orders or the thirty days offered by Plaintiff's counsel. At no point did Defendants file a motion for a protective order or claim a privilege with respect to the documents sought by Plaintiff. *See* Rule 1-037(D) ("The failure to act . . . may not be excused on the grounds that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 1-026 NMRA."); Rule 1-026(B)(7)(a) ("When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection . . ., the party shall make the claim expressly[.]").

Defendants' dilatory responses to discovery requests "were not merely accidental or inadvertent." *Enriquez*, 1998-

NMCA-157, ¶ 33. Instead, Defendants' actions "show a sustained and deliberate disobedience of the court orders concerning discovery." *Miller v. City of Albuquerque*, 88 N.M. 324, 331, 540 P.2d 254, 261 (Ct. App. 1975) ("Under these circumstances[,] we cannot say that the award of attorney fees . . . was unfair, arbitrary, manifest error, or not justified by reason."). We conclude that substantial evidence existed below for the district court to impose sanctions on Defendants for their discovery violations and misrepresentations to the court.

3. The Amount of Sanctions

Defendants further argue that the judge provided no reasoning behind the $25,000 amount of the sanction and did not base it on any evidence or representation of fees incurred by Plaintiff.

Discovery sanctions short of dismissal are commonly based on the moving party's costs and attorney fees that result from the dilatory party's failure to comply with discovery requests and orders. *See, e.g.*, *In re Chavez*, 2000-NMSC-015, ¶¶ 32-33, 129 N.M. 35, 1 P.3d 417; *Gonzales v. Surgidev Corp.*, 120 N.M. 151, 155, 899 P.2d 594, 598 (1995). The New Mexico Supreme Court has stated that a district court "must award reasonable expenses to the affected party when the other party has failed to comply with a discovery order." *Marchman v. NCNB Tex. Nat'l Bank*, 120 N.M. 74, 91, 898 P.2d 709, 726 (1995). "In determining the nature of the sanctions to be imposed, the [district] court must balance the nature of the offense, the potential prejudice to the parties, the effectiveness of the sanction, and the imperative that the integrity of the court's orders and the judicial process must be protected." *Enriquez*, 1998-NMCA-157, ¶ 48. It is appropriate that the "sanctions imposed [be] proportional to the offenses." *Gonzales v. N.M. Dep't of Health*, 2000-NMSC-029, ¶ 16, 129 N.M. 586, 11 P.3d 550.

In the case before us, Defendants' actions went beyond mere violations of discovery rules to include material misrepresentations to the court. We have long held that a court's power is broader than merely the statutory authority to impose sanctions to cover a prejudiced party's costs when the offending party has violated a rule or statute. *See Miller*, 88 N.M. at 329, 540 P.2d at 259 ("[C]ourts have inherent power to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."). Further, our Supreme Court has concluded that "an award of attorney fees without a basis in a statute, contractual provision, or court rule may be justified as an exercise of a court's inherent powers when litigants, their attorneys, or both have engaged in bad faith conduct before the court or in direct defiance of the court's authority." *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 16, 127 N.M. 654, 986 P.2d 450 (internal quotation marks and citations omitted). Our Supreme Court has thus recognized that "a court's inherent authority extends to all conduct before that court and encompasses orders intended and reasonably designed to regulate the court's docket, promote judicial efficiency, and deter frivolous filings." *Baca*, 120 N.M. at 8, 896 P.2d at1155; *see Martinez v. Martinez*, 1997-NMCA-096, ¶ 23, 123 N.M. 816, 945 P.2d 1034 (reiterating that "courts have inherent power to impose sanctions on both litigants and attorneys in order to regulate their docket, promote judicial efficiency, and deter frivolous claims"). In that vein, "a court must be able to command the obedience of litigants and their attorneys if it is to perform its

judicial functions." *Baca*, 120 N.M. at 4, 896 P.2d at 1151. In these circumstances, a court is permitted to "vindicate its judicial authority" and impose sanctions. *Id.* at 5, 896 P.2d at 1152; *accord Landess v. Gardner Turf Grass, Inc.*, 2008-NMCA-159, ¶ 19, 145 N.M. 372, 198 P.3d 871; *In re Jade G.*, 2001-NMCA-058, ¶ 28, 130 N.M. 687, 30 P.3d 376 ("Under its inherent authority, a court may sanction parties and attorneys to ensure compliance with the proceedings of the court."). In the case before us, the district court had the authority to exercise its inherent authority to impose sanctions in order to regulate its docket and preserve the integrity of the judicial process.

In penalizing Defendants $25,000, the court chose to impose a sanction less severe than dismissal of the case or the striking of an affirmative defense. In *Allred*, we deemed the more severe sanction of dismissal appropriate after the district court found "that [the p]laintiffs' conduct in failing to comply with reasonable discovery requests and [the p]laintiffs' misrepresentations to the court constituted a pattern of disregard for the discovery rules and the rulings of the court." 1997-NMCA-070, ¶ 26. Here, under similar circumstances, the district court imposed a less severe monetary sanction that is permitted when exercising its inherent powers. *See Avlin Inc. v. Manis*, 1998-NMCA-011, ¶ 12, 124 N.M. 544, 953 P.2d 309. It is true that the court did so without evidence presented by Plaintiff itemizing her discovery costs that resulted from Defendants' dilatory discovery conduct. At the hearing on sanctions, however, Plaintiff did inform the court that Defendants had claimed that it would cost them $50,000 to comply with the October discovery order. The court could have reasonably halved that figure to come up with the $25,000 sanction. *Cf. MHC Inv. Co. v. Racom Corp.*, 323 F.3d 620, 628 n.13 (8th Cir. 2003) (considering $25,000 the "minimum amount a [c]ourt can award in order to deter" a law firm's improper behavior); *In re White*, 18 Cal. Rptr. 3d 444, 471 (Ct. App. 2004) (considering $25,000 "a reasonable and responsible monetary sanction to compensate this court in part for the cost of processing, reviewing, and deciding" frivolously filed writ petitions); *Barnhill v. Iowa Dist. Ct. for Polk Cnty.*, 765 N.W.2d 267, 277 (Iowa 2009) (affirming a $25,000 sanction without a specific accounting because "it balanced the twin purposes of compensation and deterrence set forth in our case law"); *Multifeeder Tech., Inc. v. British Confectionery Co.*, 2012 WL 4135848, *10 (D. Minn. 2012) (mem. & order) (ordering a sanction of $25,000 "for the abuse of the [c]ourt's processes"); *Zurich Reinsurance (UK) Ltd. v. Canadian Pacific, Ltd.*, 613 N.W.2d 760, 766 (Minn. Ct. App. 2000) (concluding that the district court did not abuse its discretion in awarding $25,000 to insured as sanction for indemnity insurer's refusal to admit that insured could enter into a reasonable settlement of claims without insurer's authorization or consent); *Skepnek v. Mynatt*, 8 S.W.3d 377, 380-81 (Tex. App. 1999) (upholding a $25,000 sanction to be paid into registry of court for filing a false affidavit).

In addition, an award of sanctions need not be tied to the prejudice to the opposing party but may be linked to the affront to the court and the judicial process. *See Sanchez*, 2004-NMCA-033, ¶ 19 (stating that "whether prejudice to [the d]efendant resulted is not the issue; the issue is counsel's abuse of the discovery process"); *Reed v. Furr's Supermarkets, Inc.*, 2000-NMCA-091, ¶ 29, 129 N.M. 639, 11 P.3d 603 (stating that "the overriding concern is abuse of the

discovery process"). "[A]n abuse of the discovery process affects more than private litigants. It also affects the integrity of the court and, when left unchecked, would encourage future abuses." *Gonzales*, 120 N.M. at 157, 899 P.2d at 600.

Here, the district court found not only that "Defendants clearly had no intention of following" the court's order to compel discovery but also that their counsel "misrepresented several pertinent facts to the [c]ourt" at the January 2010 hearing. The court also noted that Defendants' counsel failed to read the briefs and a key Plaintiff's affidavit. Thus, Defendants' misconduct went beyond the discovery violations; the court also warned Defendants' counsel not to come before the judge again with misrepresentations because they had not read the briefs or because they had not done the work. The court's award of sanctions encompassed both discovery violations covered by the rules and misbehavior before the court that fell under the court's inherent powers to "command the obedience of litigants" and "vindicate its judicial authority." *Baca*, 120 N.M. at 4, 5, 896 P.2d at 1151, 1152. We cannot say in this instance that the imposition of $25,000 in sanctions was not supported by substantial evidence or that they were not proportional to the offenses committed, *see Gonzales*, 2000-NMSC-029, ¶ 16, or that the sanctions were "more stern than reasonably necessary." *United Nuclear II*, 96 N.M. at 241, 629 P.2d at 317 (internal quotation marks and citation omitted); *see Seipert*, 2003-NMCA-119, ¶ 20 (stating that "an affront to the court . . . warrants the imposition of sanctions severe enough to put a stop to the practice"); *Pizza Hut of Santa Fe, Inc. v. Branch*, 89 N.M. 325, 328, 552 P.2d 227, 230 (Ct. App. 1976) (noting that "[s]anctions may be light or drastic dependent on the facts and circumstances of each case" and affirming a sanction that the district court "conscientiously believed . . . was reasonable and proper"). "It is not our responsibility as a reviewing court to say whether we would have chosen a more moderate sanction." *United Nuclear II*, 96 N.M. at 239, 629 P.2d at 315 (internal quotation marks and citation omitted).

We conclude that the district court did not abuse its discretion in deciding to award sanctions based on Defendants' failure to comply with the discovery order and their counsel's misrepresentations and unpreparedness in court.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's granting of Plaintiff's motion for discovery sanctions.

IT IS SO ORDERED.

CELIA FOY CASTILLO, Chief Judge

I CONCUR:

CYNTHIA A. FRY, Judge

TIMOTHY L. GARCIA, Judge (dissenting)

GARCIA, Judge (dissenting).

I respectfully dissent in this case. I agree with the majority that the district court did not abuse its discretion when it determined that Defendants' dilatory response to discovery requests warranted the imposition of a monetary sanction under Rule 1-037(A)(4). Plaintiff was entitled to recover the reasonable expenses incurred in obtaining the production of the documents requested, including attorney fees. Majority Opinion, ¶¶ 17-19. When this

monetary sanction was imposed, however, it is undisputed that Plaintiff had not been given the opportunity to present any evidence to establish the actual amount of its reasonable expenses and attorney fees incurred due to Defendants' dilatory acts in withholding discovery. Majority Opinion, ¶ 23. Effectively, no evidence was presented, substantial or otherwise, regarding the reasonable expenses and attorney fees incurred in obtaining the production of the documents requested. *See Gonzales*, 2000-NMSC-029, ¶ 15 (recognizing that discovery sanctions are fact-based and must be supported by substantial evidence).

Although the majority presents a reasonable premise that the district court can also use its inherent authority to control the proceedings in its courtroom and impose a sanction, there is no indication in the record that the district court actually exercised its inherent authority in this case. Majority Opinion, ¶¶ 16, 22-25. Despite the fact that substantial monetary sanctions may well be warranted under Rule 1-037(A)(4) for the dilatory tactics practiced by Defendants in order to deny the discovery ordered by the district court, based upon the record before us, it is impossible to determine whether the $25,000 sanction imposed by the court was clearly untenable or contrary to logic or reason. Without some means of measurement, we have no justifiable way to determine whether the district court acted properly and did not abuse its discretion. *See Baca*, 120 N.M. at 8, 896 P.2d at 1155 ([G]eneralized conclusions, without more, do not justify a finding of bad faith sufficient to support an attorney's fee award."). The actual evidence may support a different result. It is impossible to make such a determination at this time.

I recognize and understand the district court's frustration with Defendants and how this may have led to a hasty decision regarding the award of sanctions. Not only had Defendants already stonewalled the discovery process, but they also appeared at the January 2010 hearing unprepared and made misrepresentations that were "careless and sloppy at best and intentionally unethical at worst." Despite this conduct, I cannot agree with the majority that the sanction imposed by the district court at the January 2010 hearing was based upon its inherent authority. Plaintiff should have been awarded the reasonable expenses and attorney fees that they incurred under Rule 1-037(A)(4) due to Defendants' conduct, including the time and expense incurred at the January 2010 hearing. This matter should be remanded to the district court to hold an evidentiary hearing in order to determine the amount of expenses and attorney fees Plaintiff actually incurred and is now entitled to receive as a sanction imposed against Defendants under Rule 1-037(A)(4).

TIMOTHY L. GARCIA, Judge

Certiorari Denied, April 3, 2013, No. 34,045

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-055

Filing Date: January 31, 2013

Docket No. 31,581

FRANK MILLAR,

Petitioner-Appellee,

v.

NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS and WESTERN REFINING SOUTHWEST, INC.,

Respondents-Appellants.

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New Mexico Department of Workforce Solutions
Marshall J. Ray
Elizabeth A. Garcia
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for Appellant

OPINION

VANZI, Judge.

The New Mexico Department of Workforce Solutions (DWS) appeals from a district court order reversing a decision of the DWS's Appeals Tribunal (Tribunal). The Tribunal determined that claimant Frank Millar was required to repay an overpayment of unemployment compensation benefits in the amount of $4,931. The district court held that the Tribunal's hearing, conducted five months after Millar started receiving benefits, violated the timeliness requirements for processing appeal claims under state and federal law. In the alternative, the district court found that the doctrine of equitable estoppel barred DWS from claiming and collecting an overpayment from Millar. We disagree with the district court's decision and reverse.

BACKGROUND

Factual Background

Millar was discharged from his employment with Western Refining Southwest, Inc. (Western Refining) on November 20, 2009. He filed for unemployment benefits on December 6, 2009. After preliminary fact finding, the DWS claims examiner issued a notice of claims determination (NCD) in favor of Millar granting him benefits of $269 per week. The NCD stated that the determination was final "unless an appeal is filed within fifteen calendar days from[] 01/07/2010." In addition, the NCD stated, "If your employer challenges a decision allowing benefits to you and the appeal decision is against you, you will be required to repay those benefits." On January 21, 2010, Western Refining appealed the claims examiner's decision.

It is undisputed that DWS did not immediately inform Millar that it had received the January 21, 2010 notice of appeal from Western Refining. The parties further agree that Millar did not learn of the appeal until the Tribunal sent out a notice of hearing on June 4, 2010, setting the hearing for June 16, 2010. However, he continued to receive benefits until April 17, 2010. At the June 16, 2010 hearing, the Tribunal found Millar to be disqualified from benefits due to misconduct connected with his employment. Millar subsequently received an overpayment notice for the unemployment payments that he had received from December 19, 2009, until his benefits were exhausted at the end of April 2010.

Although he did not appeal the misconduct issue, Millar timely appealed the overpayment determination through the DWS's administrative process. The Tribunal affirmed the claims examiner's decision that Millar had been overpaid benefits in the amount of $4,931 and that the benefits must be refunded to DWS. In turn, the DWS's cabinet secretary (secretary) upheld the January 7, 2011 determination of the Tribunal. The secretary's affirmation was the final administrative decision in the matter. Having exhausted his administrative remedies, Millar appealed to the district court under Rule 1-077 NMRA and NMSA 1978, Section 51-1-8(M), (N) (2004). The district court granted Millar's writ of certiorari and, after a hearing, reversed the decision of the secretary, affirming the Tribunal. Specifically, the court found that DWS was out of compliance with federal and state timeliness standards for processing appeals and that the long delay in scheduling an appeal hearing "unfairly resulted in an onerous overpayment claim." In the alternative, the district court ruled that DWS was equitably estopped from pursuing overpayments against Millar. This appeal timely followed.

DISCUSSION

DWS raises two issues on appeal: (1) whether the district court exceeded its authority in holding that the Tribunal violated the timeliness requirements of 20 C.F.R. §§ 650.1 to 650.4 (2006, as amended through 2013) and Section 51-1-8(D); and (2) whether the district court erred in ruling that the doctrine of equitable estoppel barred DWS from recovering the overpayments to Millar. We begin with the standard of review and an overview of the law relating to the payment of unemployment benefits and the recovery of overpayments. We then turn to the issues raised by DWS.

Standard of Review

Generally, we apply the same standard of review as the district court, and we review an administrative order to determine whether DWS acted fraudulently, arbitrarily, or capriciously, or whether, based on the whole record, the decision is not supported by substantial evidence. *See* Rule 1-077(J); *San Pedro Neighborhood Ass'n v. Bd. of Cnty. Comm'rs of Santa Fe Cnty.*, 2009-NMCA-045, ¶¶ 10-11, 146 N.M. 106, 206 P.3d 1011. "This Court . . . will conduct the same [standard of] review of an administrative order as the district court sitting in its appellate capacity[.]" *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 16, 133 N.M. 97, 61 P.3d 806. Under the whole record standard of review, "we look not only at the evidence that is favorable, but also evidence that is unfavorable to the agency's determination." *Fitzhugh v. N.M. Dep't of Labor*, 1996-NMSC-044, ¶ 23, 122 N.M. 173, 922

P.2d 555. Questions of substantial compliance with a statute depend on statutory construction, and we review those questions de novo. *See Stennis v. City of Santa Fe*, 2008-NMSC-008, ¶ 13, 143 N.M. 320, 176 P.3d 309 ("Interpretation of . . . statutes is a question of law that we review de novo.").

Administrative Procedures in the Payment of Unemployment Benefits and the Recovery of Overpayments

In order to frame the factual setting and legal issues raised in this appeal, we summarize the relevant statutes and administrative proceedings relating to the payment of unemployment benefits in New Mexico and the recovery of over-payments. Unemployment compensation is an insurance program "to be used for the benefit of persons unemployed through no fault of their own" and is designed to "lighten [the] burden which now so often falls with crushing force upon the unemployed worker and his family." NMSA 1978, § 51-1-3 (1953). Benefits run for twenty-six weeks, NMSA 1978, § 51-1-4(E) (2011), but may be continued for an additional twenty-six weeks during times of high employment. NMSA 1978, § 51-1-48(E) (2011). An unemployed worker is not eligible for benefits if he has left work without good cause or has been discharged for misconduct connected with the employment. NMSA 1978, § 51-1-7(A)(1), (2) (2011).

The initial determination of whether a claimant is eligible for unemployment benefits is made by a claims examiner who conducts preliminary fact finding, including obtaining statements from the claimant and employer. *See* 11.3.300.308(A) NMAC (11/15/2012). Once the claim has been evaluated, the claims examiner issues a NCD. 11.3.300.308(C) NMAC. A party dissatisfied with the determination of the claims examiner may appeal the initial determination. If an initial determination is made in favor of the claimant and payment of benefits is begun, payments shall not be stopped without prior notice and an opportunity to be heard. 11.3.300.308(E) NMAC. This provision necessarily results in some payments being made upon an initial determination of eligibility that are subsequently overturned. As a result, the NCD advises the claimant that if the appeal decision is against him, he will be required to repay the benefits received. Following a hearing before an Administrative Law Judge (ALJ) within DWS's appeals tribunal at which parties may be represented by counsel and may present testimonial and documentary evidence, the ALJ issues a decision of the appeals tribunal. *See* 11.3.500.10 NMAC (11/15/2012). The parties may further appeal the decision of the ALJ first to the secretary, who may enter a decision, refer the decision to the board of review directly, or if the secretary does not take action within fifteen days, the decision will be automatically scheduled to be heard before the board. 11.3.500.12(B), (C) NMAC (11/15/2012). Once the secretary or board of review issues a decision, the appellant has exhausted administrative review. 11.3.500.13 NMAC (11/15/2012). Finally, an aggrieved party may appeal that decision as of right to the district court. Rule 1-077(A).

DWS's authority to recover overpayments of unemployment benefits is governed by Section 51-1-8(J) and NMSA 1978, Section 51-1-38(F) (1993). In "double affirmation" cases—those in which a decision in favor of the claimant is then affirmed by either the tribunal, board of review, or judicial action only to be ultimately reversed—Section 51-1-8(J) provides that the claimant is not liable for overpayments. This case, however, involves "single affirmation" in which the Tribunal and

secretary disagreed with the decision of the claims examiner. In such cases, the overpayments are not "unemployment compensation," and the monies are not being used for the administration of unemployment compensation laws and must be recouped. Section 51-1-38(F) states that a claimant

> who has received benefits as a result of a determination or decision of the department . . . that he was eligible and not disqualified for such benefits and such determination or decision is subsequently modified or reversed by a final decision . . . irrespective of whether such overpayment of benefits was due to any fault of the person claiming benefits, *shall,* as determined by the secretary or his authorized delegate, either be liable to have such sum deducted from any future benefits payable to him . . . or be liable to repay to the department . . . a sum equal to the amount of benefits received by him for which he was not eligible or for which he was disqualified or that was otherwise overpaid to him[.]

(Emphasis added.) Thus, DWS is required by law to issue a demand for a refund of improperly paid benefits whenever a determination of overpayment is made. It is against this backdrop that we proceed to analyze the decision of the district court.

The Regulation's Timeliness Guidelines

As we have said, Millar's disqualification for receipt of unemployment compensation benefits in the amount of $4,931 is not at issue in this case. We address only whether DWS may seek recoupment of those benefits in full. In its order, the district court held that the "Tribunal hearing conducted more than five months after [Millar] was awarded benefits was untimely, in that it violated the requirements of state and federal law, found at [Section] 51-1-8[(D)] and 20 C.F.R. [§] 650.1 [to] 20 C.F.R. [§] 650.4." DWS first contends that the district court exceeded the scope of its authority in reviewing the federal time-lapse standards, including a timeliness quality report showing New Mexico's thirty-day and forty-day compliance rates at 2.8% and 5%, respectively, because such evidence was not properly presented in the administrative hearing. DWS then argues that the district court misapplied federal law in holding that the Tribunal violated state and federal regulations.

We disagree with DWS that evidence regarding compliance with the federal time-lapse standards was not part of the administrative record and that, therefore, Millar failed to properly preserve the issue for review by the district court. Rule 1-077(J) states that the "district court shall determine the appeal upon the evidence introduced at the hearing before the board of review or secretary of the [DWS]." Although preservation of an issue is a prerequisite to its review on appeal, "the preservation requirement should be applied with its purposes in mind, and not in an unduly technical manner." *Gracia v. Bittner*, 120 N.M. 191, 195, 900 P.2d 351, 355 (Ct. App. 1995).

As an initial matter, the Codes of Federal Regulation are federal law and, if relevant, may properly be considered by the district court. More importantly, in his motion for relief from claim of overpayment filed in the Tribunal, Millar specifically argued that the overpayment claim against him was

unlawful because the hearing violated the time-lapse standards of state and federal law. In support of his argument, Millar attached copies of the relevant state and federal law, as well as a timeliness and quality report, to his motion. Further, during the hearing, counsel for Millar directed the ALJ to the exhibits, and the ALJ acknowledged that he was looking at them. In its reply brief, DWS does not dispute Millar's assertion that he presented the evidence in his motion and at the administrative hearing. We conclude that the documents were sufficiently made part of the record before the Tribunal and that, therefore, the district court did not violate Rule 1-077(J). We now turn to DWS's contention that the district court misapplied federal law in holding that the untimely appeal hearing before the Tribunal violated state and federal time-lapse standards and that, therefore, Millar did not have to repay the overpayment.

New Mexico's unemployment compensation program is jointly operated by the federal and state governments. While New Mexico administers the program pursuant to its own laws, it must nevertheless adhere to federal guidelines in doing so. *See* 42 U.S.C. § 502(a) (2004) (requiring that all federal monies received are used for the proper and efficient administration of unemployment compensation laws). Further, 42 U.S.C. § 503(a)(1), (3) (2012) provides that state laws regarding unemployment compensation must include provisions for methods of administration that are "reasonably calculated to insure full payment of unemployment compensation when due" and an opportunity for a fair hearing for all individuals whose claims for unemployment compensation have been denied. The secretary of labor has interpreted the above to require that hearings be commenced and appeals decided "with the greatest promptness that is administratively feasible." 20 C.F.R. § 650.3(a)(2). Further, the secretary of labor has construed 42 U.S.C. § 503(b)(2) as requiring states to substantially comply with the required provisions of state law. 20 C.F.R. § 650.3(b). Accordingly, 20 C.F.R. § 650.4(b) states:

> A State will be deemed to comply substantially with the State law requirements set forth in § 650.3(a) with respect to first level appeals, the State has issued at least 60 percent of all first level benefit appeal decisions within 30 days of the date of appeal, and at least 80 percent of all first level benefit appeal decisions within 45 days.

Section 51-1-8(D) incorporates 20 C.F.R. §§ 650.1 through 650.4 by reference.

DWS argues that the standards set forth in 20 C.F.R. § 650.4(b) only offer guidelines in processing unemployment appeals and do not set absolute deadlines for processing an individual first level appeal. We agree and see nothing in the broad language of the regulation requiring otherwise. We conclude that the plain language of 20 C.F.R. § 650.4(b) does not establish any mandatory statutory time limit that would require Millar to be notified of the pending appeal or within which the hearing had to be held. More compelling, however, is DWS's assertion that the timeliness rules set forth above do not eliminate a disqualified claimant's liability for overpayments.

As we have stated and discuss in further detail below, the timeliness regulations are primarily concerned with ensuring that unemployment benefits are promptly provided to eligible claimants. There is no dispute that Millar began receiving benefits as soon as the

claims examiner issued the NCD in his favor, and he continued to receive those benefits for the full twenty-six weeks. On the other hand, Section 51-1-38(F) unequivocally imposes a statutory duty upon DWS to recover funds issued to claimants who are later found to be ineligible or disqualified from receiving benefits. We are concerned that DWS did not notify Millar that Western Refining had filed an appeal yet continued to pay him benefits for several months after the appeal was filed. There is nothing humane about a delay of some months in not informing an unemployed person that his employer is contesting the award of benefits and that he may lose them. Nevertheless, nothing in the above regulations allows a claimant who is subsequently disqualified from receiving benefits to challenge the DWS's mandatory obligation to recover overpayments. The refund demand was timely, and Millar is liable to repay the unemployment benefits he collected.

Millar does not point to any case in which a claimant has challenged—let alone successfully—an overpayment obligation based on DWS's failure to adhere to the suggested timelines for processing unemployment appeal decisions, and we have found none. He does, however, cite to *Dunn v. New York State Department of Labor*, 474 F. Supp. 269 (S.D.N.Y. 1979), in support of his assertion that an individual claimant may bring a cause of action based on the same time-lapse standards at issue in this case. In *Dunn*, the plaintiffs, on behalf of themselves and a class of similarly situated claimants, brought an action pursuant to 42 U.S.C. § 1983 (1996) seeking declaratory and injunctive relief against the state department of labor and its industrial commissioner. *Dunn*, 474 F. Supp. at 271-72. The plaintiffs alleged that New York's failure to provide prompt hearings of unemployment compensation appeals deprived them of their Fourteenth Amendment due process rights to receive prompt payment of unemployment compensation under the "when due" provision of 20 C.F.R. § 503(a)(1). *Dunn*, 474 F. Supp. at 272. The federal district court agreed, noting the United States Supreme Court's recognition of the importance of promptly providing unemployment insurance benefits to eligible claimants. *Id.* at 273 (citing *Cal. Dep't of Human Res. v. Java*, 402 U.S. 121 (1971)). Moreover, the court said, "promptness in the adjudicatory process is essential to prompt payment." *Dunn*, 474 F. Supp. at 273. It entered judgment for the plaintiffs and required the defendants to submit copies of their monthly appeals promptness reports to the court for a period of one year. *Dunn*, 474 F. Supp. at 276. Unlike *Dunn*, this case does not involve a claim of a constitutional deprivation but instead seeks a waiver of money owed for benefits to which a claimant was disqualified and to which he has no vested right. We conclude that neither the regulations nor *Dunn* support Millar's position that he has a right to unemployment compensation benefits to which he was not entitled and which DWS has a statutory obligation to recover.

Although prompt payment is not the only consideration of procedural fairness to a claimant, prompt notice of benefits being in jeopardy must be as well. However, the district court's interpretation of 20 C.F.R. § 650.4(b) cannot be reconciled with DWS's statutory obligation to recover overpayments from an initial favorable eligibility ruling that is subsequently overturned on appeal. We conclude that the district court misapplied the federal and state time-lapse standards to the facts of this case. Accordingly, we reverse its decision that the Tribunal acted arbitrarily and

capriciously in ordering Millar to repay the overpayment.

The Application of Equitable Estoppel

As an alternative ruling, the district court found that the doctrine of equitable estoppel barred DWS from claiming and collecting the overpayment from Millar. Specifically, the district court relied on the New Mexico Supreme Court's decision in *Waters-Haskins v. New Mexico Human Services Department*, 2009-NMSC-031, 146 N.M. 391, 210 P.3d 817, in reaching its decision. For the reasons that follow, we conclude that the district court erred in applying the doctrine of equitable estoppel to the facts of this case.

The parties agree that estoppel cannot be applied contrary to statutory requirements and can only be applied against the state in exceptional circumstances where there is a shocking degree of aggravated and overreaching conduct or where right and justice demand it. *Envtl. Control, Inc. v. City of Santa Fe*, 2002-NMCA-003, ¶ 22, 131 N.M. 450, 38 P.3d 891. "With respect to New Mexico state agencies in particular, the doctrine only is available to bar those rights or actions over which an agency has discretionary authority." *Waters-Haskins*, 2009-NMSC-031, ¶ 17. Thus, "[e]quitable relief is not available when the grant thereof would violate the express provision of a statute." *Coppler & Mannick, P.C. v. Wakeland*, 2005-NMSC-022, ¶ 8, 138 N.M. 108, 117 P.3d 914 (internal quotation marks and citation omitted). Even in those circumstances, the party raising estoppel must show the result of estoppel would not be contrary to statutory requirements and must establish the six essential elements of estoppel. *Waters-Haskins*, 2009-NMSC-031, ¶¶ 16-17 (estopping the state only after first determining whether the state was acting in its discretionary authority, the basic elements of estoppel were met, and right and justice demanded it). We begin by first deciding whether the provisions of Section 51-1-38(F) are mandatory or discretionary.

As we have set forth above, DWS has a statutory duty to recover benefits paid to claimants later found to be ineligible or disqualified. Section 51-1-38(F) states that any overpayment of benefits, regardless of the fault of the person claiming the benefits, "shall" be repaid either from any future benefits payable to him or in "a sum equal to the amount of benefits received by him for which he was not eligible or for which he was disqualified or that was otherwise overpaid to him[.]" The use of the word "shall" imposes a mandatory, not discretionary, requirement. *See* NMSA 1978, § 12-2A-4(A) (1997) (explaining that " '[s]hall' and 'must' express a duty, obligation, requirement or condition precedent"). Accordingly, although DWS has the discretion to deduct overpayments from a claimant's future benefits or seek repayment, given the mandatory language of Section 51-1-38(F), it does not have any discretion to forego overpayments altogether.

Millar concedes that Section 51-1-38(F) "appears to be mandatory and without exception." Nevertheless, he argues that DWS in fact has discretion regarding overpayments. We are not persuaded. First, Millar contends that because the Federal Emergency Unemployment Compensation Act, Pub. L. 110-252, § 4005(b), 122 Stat. 2323 (2008), and the Trade Act of 1974, 19 U.S.C. § 2315(a)(1) (2011), provide some discretion to waive overpayments, at least with respect to federal extended unemployment benefits, DWS must have such discretion as

well. However, the federal discretionary authority has no bearing in this case, particularly where Millar was paid state unemployment insurance benefits, not federal extended benefits. Further, we reiterate that unlike the federal discretionary authority over repayment of extended benefits, the New Mexico Legislature has unambiguously mandated that DWS shall not have any discretion to waive claims of overpayment. *See* § 51-1-38(F).

We also reject the district court's and Millar's reliance on *Waters-Haskins* as inapplicable to the facts of this case. In *Waters-Haskins*, the New Mexico Human Services Department (HSD) sought repayment of food stamps erroneously issued to the appellant for just under the period of a year. 2009-NMSC-031, ¶ 1. HSD argued that federal regulations mandated that it pursue collection of overpayment of food stamps and, as a result, HSD had no discretion in its policies for establishing overpayment claims. *Id.* ¶ 18. Our Supreme Court disagreed and found that the food stamp regulations expressly allowed the HSD to compromise or waive overpayment claims. *Id.* ¶ 20 (noting that the United States Department of Agriculture, when creating the food stamps program, gave state agencies "broad authority to establish and collect overpayments claims, and the creation of the policies to meet those ends are a discretionary exercise within the scope of that authority"). In contrast to the food stamp regulatory scheme discussed in *Waters-Haskins*, the unemployment compensation laws at issue here do not permit DWS to "compromise or waive" overpayment liability.

We are also not persuaded by Millar's argument that because DWS "elsewhere lays claim to broad discretion in the collection of overpayments of state unemployment benefits," equitable estoppel is a valid option for the district court to apply here. Specifically, Millar points to regulations that permit DWS, at its discretion, not to pursue collection of overpayments which are more than ten years old or less than $50 and more than seven years old, or are otherwise uncollectible. *See* 11.3.300.324 NMAC (01/01/2003) (amended 11/15/2012). We note that nowhere do these regulations authorize DWS discretion for a complete waiver of overpayments, and doing so would necessarily conflict with the statutory obligation imposed upon DWS by Section 51-1-38(F), thus thwarting the legislative objectives of recovering taxpayer funds to which an ineligible claimant is not entitled. At the very least, the regulations do not grant the type of "broad authority to establish and collect overpayment[s]" that our Supreme Court found existed in *Waters-Haskins*. 2009-NMSC-031, ¶ 20. Because DWS has no discretionary authority in pursuing collection of any overpayment, the doctrine of equitable estoppel is not a valid defense to Millar's claim that he should be excused from repaying the unemployment benefits to which he was not entitled to receive.

Having concluded that DWS has no discretion to forego recovery of overpayments, we need not conduct any further analysis regarding the doctrine of equitable estoppel based on the facts of this case. We acknowledge that any resulting hardship to Millar to repay the benefits is unfortunate, but recoupment is crucial to the preservation of the ongoing integrity of the unemployment compensation system, and our Legislature recognized as much when it enacted Section 51-1-38(F). The affirmative obligation imposed on DWS to recover full repayment of benefits from Millar forecloses the application

of equitable estoppel against it. The decision of the district court is reversed.

CONCLUSION

For the reasons set forth above, we reverse the decision of the district court.

IT IS SO ORDERED.

LINDA M. VANZI, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

J. MILES HANISEE, Judge

Certiorari Denied, April 3, 2013, No. 34,053

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-056

Filing Date: February 18, 2013

Docket No. 30,370

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

BRIAN HICKS,

Defendant-Appellee.

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OPINION

WECHSLER, Judge.

This case presents the question of whether an officer's knowledge that the registered owner of a vehicle has a revoked license provides reasonable suspicion to stop the vehicle when the officer makes no effort to determine, prior to the stop, whether the driver of the vehicle is the registered owner. The State appeals from the district court's grant of

Defendant Brian Hicks's motion to suppress. *See* NMSA 1978, § 39-3-3(B)(2) (1972) (permitting the state to take an interlocutory appeal from an order granting a defendant's motion to suppress). The State contends that the district court erred in concluding that the stop of Defendant's vehicle was not supported by reasonable suspicion and thus violated the New Mexico Constitution. In *State v. Candelaria*, which was decided after the district court's decision in this case, we held that a stop effected on the basis of similar information did not violate the United States Constitution because it was supported by reasonable suspicion. 2011-NMCA-001, ¶ 15, 149 N.M. 125, 245 P.3d 69. We now hold that the same result is warranted under the New Mexico Constitution. Accordingly, we reverse.

BACKGROUND

Defendant was charged by criminal information with driving while under the influence of intoxicating liquor (DWI), a fourth or subsequent offense, and driving with a suspended or revoked license. Defendant filed a motion to suppress, arguing *inter alia* that the stop of his vehicle was not supported by reasonable suspicion because the arresting officer did not confirm, prior to the stop, that Defendant was the registered owner of the vehicle. The parties stipulated to the following facts at the suppression hearing:

1. . . . Defendant's motor vehicle was being driven in San Juan County, New Mexico.

2. Officer [Matt] Costen observed the motor vehicle and "ran" the license plate of the vehicle through the New Mexico Motor Vehicle Department ("MVD").

3. The information from the MVD came back with the fact that the driving privileges of the registered owner of the motor vehicle had been revoked.

4. Officer Costen made no effort to visually observe the driver prior to the stop.

5. Based on the revocation information from the MVD, Officer Costen stopped the motor vehicle.

6. Upon contacting the driver, Officer Costen discovered that . . . Defendant was driving the vehicle, that . . . Defendant was the owner of the vehicle who had a revoked license[,] and that . . . Defendant appeared intoxicated.

The district court orally granted Defendant's motion to suppress. The State filed a motion to reconsider. The State noted that there did not appear to be any New Mexico case law on point, but cited numerous cases from other jurisdictions supporting its position that the stop of Defendant's vehicle was supported by reasonable suspicion and thus did not violate the United States or New Mexico Constitutions. In response, Defendant argued the stop violated the New Mexico Constitution because New Mexico affords greater protection than the United States Constitution against unreasonable searches and seizures involving automobiles.

The district court denied the State's motion. In a written order, dated March 25, 2010, the district court acknowledged that "[c]ase law from other [s]tates could be

construed to mean that Officer Costen had . . . reasonable suspicion to stop Defendant's vehicle." However, the district court held that the stop violated the New Mexico Constitution. The district court quoted *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 15, 130 N.M. 386, 25 P.3d 225, for the proposition that the New Mexico Constitution affords an "extra layer of protection from unreasonable searches and seizures involving automobiles." The district court noted it might have upheld the stop if the officer had observed the driver before stopping the vehicle to determine whether he matched the basic description of the registered owner.

MOTION TO SUPPRESS

In reviewing a motion to suppress, "[w]e review factual determinations by the [district] court under a substantial evidence standard and legal questions de novo." *State v. Brusuelas*, 2009-NMCA-111, ¶ 5, 147 N.M. 233, 219 P.3d 1 (internal quotation marks and citation omitted). The question on appeal is whether the officer had reasonable suspicion to stop Defendant's vehicle solely on the basis of information that the registered owner of the vehicle had a revoked license. Because this is a legal question, our review is de novo. *See id.*

The State contends that *Candelaria* is controlling. In *Candelaria*, we considered whether a traffic stop violated the Fourth Amendment of the United States Constitution when, at the time they effected the stop, the police officers "knew only that the [vehicle] was registered to [a person], whose license had been suspended." 2011-NMCA-001, ¶¶ 9, 11. We recognized this question as one of first impression in New Mexico and elected to follow "an overwhelming majority of jurisdictions" in holding the stop was supported by reasonable suspicion and thus did not violate the Fourth Amendment. *Id.* ¶¶ 11, 13. Defendant contends that *Candelaria* is not controlling because, in addition to knowing that the registered owner's license had been suspended, the police officers in *Candelaria* observed the vehicle under suspicious circumstances prior to the stop.

It is true that, in *Candelaria*, the police officers observed the vehicle in which the defendant was driving "under suspicious circumstances." *Id.* ¶ 1. Specifically, the police observed that, after they pulled into a parking lot, the vehicle "sped away." *Id.* ¶ 2. A careful reading of *Candelaria* reveals this distinction is one without a difference, however, as we did not consider the "suspicious circumstances" in concluding the officers had reasonable suspicion to effect the stop. We explained:

> When police observe a vehicle registered to an owner whose license has been suspended, it is reasonable to conclude that the driver is the registrant—that is, until officers become aware of facts to contradict their assumption. The concept of reasonable suspicion has always embraced a certain degree of uncertainty. In the case before us, because [the officers] were aware of no facts to contradict their inference that [the person] was driving the car for which he was the registered owner, we follow the approach of the majority of jurisdictions and hold that police possessed reasonable suspicion to [e]ffect a traffic stop.

Id. ¶ 15. We noted that "[o]ur holding should come as no surprise" because "New Mexico's civil law has long recognized a presumption

that, in the absence of evidence to the contrary, the registered owner of a vehicle is that vehicle's driver." *Id.*

In deciding Defendant's motion to suppress, the district court did not have the benefit of our decision in *Candelaria*. Without any clear authority from either this Court or our Supreme Court, the district court declined to follow the out-of-state cases cited by the State and held that suppression was warranted under the New Mexico Constitution. On appeal, Defendant focuses entirely on distinguishing *Candelaria*, which is premised on a federal constitutional analysis. Defendant does not argue the district court's decision should be upheld under the New Mexico Constitution. We nonetheless consider the issue because it was the express basis for the district court's ruling. We do not normally consider arguments that are not developed on appeal. *See State v. Fuentes*, 2010-NMCA-027, ¶ 29, 147 N.M. 761, 228 P.3d 1181 (explaining that this Court does not review unclear or undeveloped arguments); *see, e.g.*, *State v. Dickert*, 2012-NMCA-004, ¶ 46, 268 P.3d 515 (declining to address argument inadequately developed by the defendant), *cert. denied*, 2011-NMCERT-012, 291 P.3d 158. However, because the order being appealed from is based on a state constitutional analysis, we will review the issue under the New Mexico Constitution.

The United States and New Mexico Constitutions "provide overlapping protections against unreasonable searches and seizures[.]" *State v. Rowell*, 2008-NMSC-041, ¶ 12, 144 N.M. 371, 188 P.3d 95; *see* U.S. Const. amend. IV (guaranteeing "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"); N.M. Const. art. II, § 10 ("The people shall be secure . . . from unreasonable searches and seizures[.]"). Our Supreme Court has adopted an interstitial approach for reviewing constitutional questions under federal and state law. *See State v. Gomez*, 1997-NMSC-006, ¶ 21, 122 N.M. 777, 932 P.2d 1. Under this approach, we first ask "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." *Id.* ¶ 19.

We have already determined that, under *Candelaria*, Defendant's rights are not protected under the United States Constitution. We now examine Defendant's rights under the New Mexico Constitution. *Gomez* instructs that we may "diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics." 1997-NMSC-006, ¶ 19. We find no flaws in the federal analysis undertaken in *Candelaria*; nor do we perceive any structural differences between state and federal government relevant to the question presented. If we were to reach a different result, it would be because of distinctive state characteristics.

"It is well-established that Article II, Section 10 provides more protection against unreasonable searches and seizures than the Fourth Amendment." *State v. Leyva*, 2011-NMSC-009, ¶ 51, 149 N.M. 435, 250 P.3d 861. Our Supreme Court has specifically recognized that "[t]he extra layer of protection from unreasonable searches and seizures involving automobiles is a distinct characteristic of New Mexico constitutional law." *Cardenas-Alvarez*, 2001-NMSC-017, ¶ 15.

In *Cardenas-Alvarez*, the case relied

upon by the district court in the present case, our Supreme Court held that a federal agent violated the New Mexico Constitution by referring the defendant to a secondary inspection area after a traffic stop at a permanent border checkpoint in the absence of reasonable suspicion. *Id.* ¶¶ 3, 21. Our Supreme Court held that the agent's actions did not violate the United States Constitution because "[u]nder federal law, [the d]efendant's detention constituted a routine border checkpoint stop and therefore need not have been supported by suspicious circumstances." *Id.* ¶ 7. Importantly, our Supreme Court did not hold that reasonable suspicion was present under federal law and lacking under state law; instead, it held that reasonable suspicion was required under state law and not required under federal law. *See id.* ¶ 49 (Baca, J., concurring in the result).

In *State v. Ochoa*, we refused to follow the lead of the United States Supreme Court in upholding pretextual traffic stops. 2009-NMCA-002, ¶ 1, 146 N.M. 32, 206 P.3d 143. We "depart[ed] from federal constitutional law . . . because we [found] the federal analysis unpersuasive and incompatible with our state's distinctively protective standards for searches and seizures of automobiles." *Id.* ¶ 12. We were especially concerned about the mechanical nature of the federal rule because our Constitution requires "that searches and seizures be reasonable based on the particular facts of each case." *Id.* ¶ 26. We noted that at least two other states, Washington and Delaware, had interpreted their state constitutions to provide greater protection than the federal constitution in the context of pretextual traffic stops. *See id.* ¶¶ 27-28.

"The fact that we have departed from the analysis used to determine whether a violation of the Fourth Amendment occurred in certain contexts, however, does not require us to do so in all contexts." *Leyva*, 2011-NMSC-009, ¶ 51. We must conduct a "de novo review of the law[.]" *Id.* In the context of a non-pretextual traffic stop, we require that, to satisfy Article II, Section 10, a police officer must have "reasonable suspicion of criminal activity or probable cause that the traffic code has been violated." *Ochoa*, 2009-NMCA-002, ¶ 25. Driving with a revoked license is a criminal offense. *See* NMSA 1978, § 66-5-39(A) (1993) ("Any person who drives a motor vehicle on any public highway of this state at a time when his privilege to do so is suspended or revoked and who knows or should have known that his license was suspended or revoked is guilty of a misdemeanor [.]"). Thus, the standard in this case is reasonable suspicion.

"In determining whether reasonable suspicion exists, we examine the totality of the circumstances." *Cardenas-Alvarez*, 2001-NMSC-017, ¶ 21. "Reasonable suspicion must be based on specific articulable facts and the rational inferences that may be drawn from those facts." *Id.* (internal quotation marks and citation omitted). "Unsupported intuition and inarticulate hunches are not sufficient." *State v. Garcia*, 2009-NMSC-046, ¶ 43, 147 N.M. 134, 217 P.3d 1032 (internal quotation marks and citation omitted). "The purpose of requiring objectively reasonable suspicion based on the circumstances is to prevent and invalidate police conduct based on hunches, which are, by definition, subjective." *Ochoa*, 2009-NMCA-002, ¶ 25 (internal quotation marks and citation omitted).

In this case, the officer stopped Defendant's vehicle after learning that the license of the registered owner of the vehicle had been revoked. The officer did not have a

subjective hunch that Defendant was breaking the law; rather, he had a particularized suspicion that Defendant was breaking the law by driving with a revoked license. The officer could have been incorrect; he could have discovered that Defendant was not the registered owner and was not otherwise breaking the law. But, as we noted in *Candelaria*, and we believe equally applicable under a state constitutional analysis, "[t]he concept of reasonable suspicion has always embraced a certain degree of uncertainty." 2011-NMCA-001, ¶ 15.

In *Gomez*, our Supreme Court determined that the New Mexico Constitution provides broader protection for warrantless searches of automobiles, holding that they required a showing of exigent circumstances. 1997-NMSC-006, ¶¶ 39-40. In *Ochoa*, we said that the *Gomez* Court "determined that where there is no reasonable basis to believe that the delay in obtaining a search warrant will jeopardize legitimate law enforcement interests, there is no justification for an exception to the warrant requirement." *Ochoa*, 2009-NMCA-002, ¶ 22 (citing *Gomez*, 1997-NMSC-006, ¶¶ 41-43). In this case, we believe that it would potentially jeopardize legitimate law enforcement interests to require police officers to determine, prior to effecting a traffic stop, whether the driver of a vehicle matches the basic description of the registered owner. In upholding a stop similar to the stop at issue here, the Indiana Supreme Court explained:

> We agree with the [s]tate that requiring the officer to verify the driver of the vehicle strikes against basic principles of safety because it puts the onus on the officer to maneuver himself into a position to clearly observe the driver in the midst of traffic. In addition, we acknowledge the difficulty that the driver verification requirement would impose on officers during late night hours and in situations where car windows are darkly tinted[.]

Armfield v. State, 918 N.E.2d 316, 322 (Ind. 2009) (alteration, internal quotation marks, and citation omitted); *see also State v. Vance*, 790 N.W.2d 775, 782 (Iowa 2010) ("[T]o forbid the police from relying on such an inference [that the driver of a vehicle is the registered owner] would seriously limit an officer's ability to investigate suspension violations because there are few, if any, additional steps the officer can utilize to establish the driver of a vehicle is its registered owner."). *Armfield* and *Vance* were based on the United States Constitution, but we believe the policy considerations underlying these decisions are relevant to this case. Requiring police officers to do more than what the officer did here could potentially jeopardize the legitimate law enforcement interest of removing drivers with revoked or suspended licenses from our roadways.

We agree with the State that the best and least intrusive way for the officer to confirm or dispel his suspicion that the driver of the vehicle he observed had a revoked license was through an investigatory traffic stop. *See State v. Affsprung*, 115 N.M. 546, 550, 854 P.2d 873, 877 (Ct. App. 1993) ("While it is true that reasonable suspicion does not provide carte blanche, it does allow detention sufficient to verify or dispel the circumstances giving rise to the suspicion."). In holding that the officer had reasonable suspicion to stop Defendant's vehicle, we are not adopting a bright-line rule of the type we criticized in *Ochoa*. 2009-NMCA-002, ¶ 26.

Instead, consistent with our precedent, we base our conclusion on the totality of the circumstances presented in this case. Notably, and unlike in *Ochoa*, we have not located any case in which a state court has concluded that, under its constitution, an officer lacks reasonable suspicion to stop a vehicle on the basis of the same limited information the officer here possessed. In *Candelaria*, we explained that we found only one case "that still bears the force of law" supporting the argument that reasonable suspicion is lacking on these facts. 2011-NMCA-001, ¶ 12. That case, *State v. Cerino*, 117 P.3d 876, 878 (Idaho Ct. App. 2005), was premised on a federal constitutional analysis.

We conclude that, in this circumstance, the result under the New Mexico Constitution is the same as under the United States Constitution. Like the officers in *Candelaria*, the officer here "possessed reasonable suspicion to believe that [Defendant's] vehicle, as well as its occupant . . . were subject to seizure." 2011-NMCA-001, ¶ 16. Accordingly, the stop of Defendant's vehicle did not violate the New Mexico Constitution.

CONCLUSION

We reverse the district court's grant of Defendant's motion to suppress and remand for further proceedings consistent with this opinion.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

MICHAEL E. VIGIL, Judge

Certiorari Denied, April 8, 2013, No. 33,943

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-057

Filing Date: September 26, 2012

Docket No. 31,324 (consolidated with Docket No. 31,374)

STATE OF NEW MEXICO ex rel. CHILDREN, YOUTH AND FAMILIES DEPARTMENT,

Petitioner-Appellee,

v.

LAURA J.,

Respondent-Appellant,

and

In the Matter of ELIJAH J., a child,

and concerning

COLIN D., REBECCA LYNN F., and DIANA C.,

Intervenors.

consolidated with Docket No. 31,374

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Intervenors.

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OPINION

SUTIN, Judge.

Laura J.'s (Mother's) and Child's cousin, Colin D., and Mother separately appeal the termination of Mother's parental rights to Elijah J. (Child). We have consolidated the two appeals and consider in this Opinion the issues presented by Mother and by Colin. In addition to the propriety of the termination of Mother's parental rights, this appeal raises questions of Colin's standing and whether the Children, Youth and Families Department's (the Department) failure to consider Colin for placement of Child requires this Court to remand for further permanency hearings.

We hold that clear and convincing evidence supported the termination of Mother's parental rights and that Mother was afforded due process in regard to the termination proceedings and determination. We affirm the judgment terminating Mother's parental rights. In addition, to the extent Mother may have a legal interest recognized under due process with respect to placement of Child with relatives, we determine that our remand of the placement issue satisfies any due process concerns. Last, we also hold that Colin has standing to appeal and that the Department was obligated but failed to consider Colin as a potential placement for Child requiring the Department on remand to consider forthwith whether Colin is an appropriate relative with whom to place Child. Our remand of the placement issue does not require reversal of the termination of Mother's parental rights.

BACKGROUND

On December 9, 2008, the Department received a referral alleging that Mother was abusing drugs and physically neglecting Child; the referral included allegations of inadequate food and lack of supervision. Two days later, on December 11, Delfina Medina, an investigator with the Department, went to Mother's home. According to Ms. Medina, Mother stated that she had a history of domestic violence, dating back five months, with a former boyfriend. Mother also reportedly admitted using crack about one month prior to Ms. Medina's visit and using marijuana about one week prior to the visit. Before concluding the home visit, Ms. Medina requested that Mother visit the Department's office "first thing the next morning" for the purposes of continuing the investigation and submitting to a urinalysis. The next day, December 12, 2008, a snowstorm occurred, and Mother "called in and stated that she would not make it to the Department that day and would reschedule the appointment by phoning [Ms.] Medina another day, due to her not having a phone that she could be reached at." On January 5, 2009, through Mother's mother, Ms. Medina requested that Mother visit the Department on January 7, 2009, but Mother cancelled the appointment because Child was sick. Mother agreed to allow Ms. Medina to drive her to SED Labs for a urinalysis. When Ms. Medina arrived at Mother's home, Mother was not there. Later that day, Ms. Medina, along with a detective from the Santa Fe Police Department, did an unannounced home visit, due to Ms. Medina's concerns about Mother's slurred speech earlier that day. The detective, who arrived before Ms. Medina, reportedly told Ms. Medina that it seemed that "they" (Mother and her two guests) were smoking marijuana in the apartment. The detective removed drug paraphernalia from the home and granted the Department a forty-eight-hour hold on Child, who was taken to the Department's office by Child Protective Services supervisor Gabrielle

James. Child was approximately nine and one-half months old at that time.

The Department workers noticed that Child's hands and face were dirty, that he had scratches and abrasions on his hands and shins, and a rash on his buttocks. He also had what appeared to be a bump on the back of his head, a mark on his back, and an older rash on his lower back. He had only one shoe and no socks. He was dressed in a shirt that was too big. Due to concerns regarding Child's physical condition and concerns that he was unable to sit up, unable to hold his head up, and "was not very responsive[,]" Child was taken to the hospital. At the hospital, a drug screen revealed that Child tested positive for opiates. Child also had impetigo, and he was "very hungry[.]"

Child was discharged from the hospital the same day he was taken there. Once discharged from the hospital, Child was placed in foster care. On January 8, a social worker from the hospital contacted the Department and reportedly stated that, due to his having tested positive for opiates, Child should not have been discharged from the hospital and that if Child showed any signs of withdrawal, he needed to be taken back to the hospital immediately. Also on January 8, 2009, the foster parent reported that Child was very limp and would not hold his head up. On January 9, 2009, the foster parent took Child to a follow-up medical appointment, at which the physician determined that the markings on Child's body were from bed bugs.

Pursuant to the foregoing facts, presented as part of the Department's affidavit for ex parte custody order, the district court found probable cause to believe that Child was abused or neglected as defined in NMSA 1978, Section 32A-4-2 (1999) (amended 2009). Accordingly, the court signed an ex parte custody order on January 9, 2009, in which it ordered Child to remain in the Department's custody until further order of the court.

On January 20, 2009, the district court held a temporary custody hearing at which the court ordered continued departmental custody of Child and adopted the Department's initial assessment plan. Among other things, the initial assessment plan noted that Child had been placed with a foster family in San Miguel County while relative placement was being explored, and it called for Mother to provide a list of relatives to be considered for relative placement. Additionally, it called for Mother to participate in a psychological evaluation, as well as in a parenting assessment, and undergo random urinalyses.

On January 23, 2009, the case was transferred from the Department's Santa Fe office to its Las Vegas, New Mexico office because Child's alleged father was related to an employee of the Santa Fe office. On January 30, Mother participated in an intake with Crossroads, a women's residential recovery center in Carlsbad, New Mexico. Crossroads accepted Mother into its program and indicated that she could be admitted in March 2009.

On March 3, 2009, the district court held an adjudicatory and dispositional hearing at which Mother pleaded no contest to allegations of neglect. The court found that the Department had made and continued to make reasonable efforts to reunify Child with Mother. The court adopted the Department's family treatment plan and added additional requirements of Mother, including that (1) she attend the Crossroads program and participate in services and, upon release, follow aftercare

recommendations; (2) after attending the Crossroads program, she be assessed for work skills and be referred to appropriate job training; (3) she get her GED; and (4) she participate in individual counseling.

On March 16, 2009, Mother was admitted to Crossroads, and Child was placed there with her. At the time of her admittance to Crossroads, Mother was one month pregnant with her second child. At Crossroads, Mother underwent a psychological evaluation and a comprehensive clinical and psychosocial assessment. She participated in parenting classes, substance abuse therapy, and individual therapy. She also interacted with Child to learn to address Child's developmental delays.

Mother was scheduled to graduate from the Crossroads program on July 15, 2009; however, she was unsuccessfully discharged from the program on June 8, 2009, "due to her manipulative and detrimental behaviors to the group." In its discharge summary, Crossroads noted, among other things, that Mother had a very difficult time focusing on her addiction and the need for changes in her life; that "[s]he focused most of her time on external factors and manipulated the staff and her group members constantly"; and that she "did work on her behaviors but would relapse and continue to repeat the same negative behaviors." Having been discharged from Crossroads, Mother returned to Santa Fe, where she resumed working on a treatment plan through the Department. Child was placed with foster parents, Rebecca Lynn F. and Diana C. (Foster Parents) in Las Vegas on or about June 10, 2009.

On August 11, 2009, the district court held an interim review. The court ordered the implementation of a modified treatment plan. With an overarching goal of reunification, the treatment plan included interim goals of Mother obtaining and maintaining a safe and stable home environment, becoming employed or otherwise demonstrating an ability to provide for Child, attending individual therapy, demonstrating and maintaining sobriety, and learning and demonstrating effective parenting skills. Additionally, the treatment plan listed the assessment of relative placement as an "individual child plan item" and it stated, as a "step" toward this goal, that the Department would "seek and explore relative placement."

Child's alleged father having been dismissed from the case, the Department transferred the case back to its Santa Fe office, and on August 13, 2009, it assigned the case to senior permanency planning worker, Emily Martin. Among other services, Ms. Martin referred Mother to the Community Infant Program to provide in-home, one-on-one, parenting services to Mother. According to Ms. Martin and her supervisor Delphine Trujillo, for the first month or two after the case was transferred back to Santa Fe, Mother made efforts to comply with her treatment plan. In mid-September 2009 and continuing through December, Mother's compliance with the treatment plan "turned downhill."

Mother's therapist, Carolyn Burns, testified that, after mid-September, she was no longer convinced that Mother was sober. In mid-September, when Mother's boyfriend got out of jail, Mother, who had been attending weekly individual therapy sessions and making progress, according to her therapist became "more erratic[.]" Ms. Burns explained that although Mother would regularly contact her to schedule therapy, Mother was typically a "no show" for the appointments.

[redacted]

[redacted] In October 2009, because Mother was "very far into her pregnancy[,]" the Department arranged for Mother to have individual therapy by phone, offered her transportation when she needed it, and decreased the number of required weekly Narcotics Anonymous meetings. Later in October 2009, Mother's second child, Francisco, was born. On October 27, 2009, the district court held a first permanency hearing. The court adopted, as partial findings of fact, the Department's permanency hearing report and additionally found that Mother believed that since the birth of Francisco she would be able to make increased efforts on her treatment plan. The Department explained that it was not filing for termination of parental rights at the October hearing, because it chose instead to request "an extension of time to work with [Mother] on . . . reunification."

[redacted] Among other facts in the October permanency report, the Department noted that Mother had made "minimal progress toward[] alleviating the causes of [Child's] removal and placement in [the Department's] custody[.]" The Department noted that Mother had "just begun to address her substance abuse in outpatient therapy and by attending [Narcotics Anonymous] meetings"; and that Mother had "made a notable effort in obtaining her sobriety and consistently tested negative for substances during the month of September" 2009. It also noted, however, that Mother's progress in addressing her substance abuse had been slow, and she had "only begun to attend the services designed to help her maintain her recently [attained] sobriety." The Department further noted that Mother had "not been able to provide a safe and stable living environment for herself or" for Child. The Department also explained that Mother "seem[ed] to be doing the bare minimum in all recommended services[,]" that her lack of progress toward the desired outcomes listed on her treatment plan were "largely due to her lack of commitment to [Child] and her failure to follow through with treatment recommendations on a consistent basis[,]" as well as to Mother's relationship with her boyfriend, which continued to be her priority. The Department further noted that Mother minimized her boyfriend's drug use, criminal history, and domestic violence history.

[redacted] According to Ms. Martin, after the first permanency hearing in October 2009, "everything turned south." Mother was not making it to all of her visitations, she would call to schedule urinalyses and then fail to take them, she was missing therapy appointments, and she was missing her parenting appointments by failing to be at home when she was scheduled to meet with the Community Infant Program workers. In early December 2009, during a scheduled home visit with Mother, Ms. Martin became concerned for Francisco's safety, and she determined that it was necessary to file a report. The cause of Ms. Martin's concern was her observation of pills lying outside of an open bottle on the counter and ashtrays containing either tobacco or marijuana roaches; also Mother's urinalysis taken on the day of the home visit revealed a very high level of THC. *Cf. Buffett v. Vargas*, 1996-NMSC-012, ¶ 3, 121 N.M. 507, 914 P.2d 1004 (recognizing that THC is the active ingredient in marijuana).

[redacted] On January 8, 2010, the Department held a family centered meeting regarding Francisco. Colin attended the meeting, as did Child's maternal grandmother. According to the Department's notes, following the meeting Colin "said he would definitely be considered as placement or support to [maternal

grandmother] to help care for Francisco." Later in January 2010, Colin became a kinship guardian to Francisco, and in April 2010, Colin was licensed as a foster parent with the Department.

On April 19, 2010, the district court held a second permanency hearing related to Child. The court found, among other things, that Mother had not attended therapy for several months, that after having stayed sober for a few months prior to the first permanency hearing, the few drug tests that she had taken in 2010 had reflected very high levels of THC, and that she had not provided the Department with proof of her attendance of substance abuse group meetings. The court ordered Child's permanency plan to be changed from reunification to adoption. It also ordered the Department to continue to provide services to Mother to assist her in adjusting the conditions that rendered her unable to properly care for Child and ordered Mother to continue to participate in the treatment plan. Additionally, the court found that

> the Department identified the maternal grandmother as a relative and . . . considered placement with her, but that placement was not feasible . . . . There was no evidence concerning whether other relatives have been located or considered for placement. If [Mother] has concerns regarding other relatives, a hearing should be requested within sixty days.

The court's order, hereinafter referred to as "the second permanency order," was not filed until November 29, 2010.

Four months before the second permanency order was filed, on July 27, 2010, Colin filed a pro se motion to intervene for the purpose of adopting Child. On August 17, 2010, the Department filed a motion to terminate Mother's parental rights to Child. In addition to detailing Mother's history of non-compliance with the treatment plan and with Department-arranged services, the Department listed as grounds for termination that Mother had "recently revealed that domestic violence [was] a problem between her and [her boyfriend]." The Department's motion also stated that because Mother's boyfriend was a household member, the Department requested that he participate in services but, as of the date of the motion, he had yet to comply with that request. He had, however, submitted to a urinalysis which revealed "an extremely high level of THC."

On September 10, 2010, the court filed a stipulated order granting Colin status as an intervenor. The details of this order are discussed later in this Opinion. Beginning on October 25, 2010, and for nine non-consecutive days ending on February 17, 2011, the court held a hearing on the Department's motion to terminate Mother's parental rights. Among the parties who attended the hearing were Colin and Mother, both represented by their counsel.

Following the termination hearing, in his closing argument, Colin argued that the Department failed to follow legal mandates to locate, notify, and consider family members, other than Child's grandmother, as potential placement for Child. He also argued that the Department "knew that relative search was an integral part of family reunification as a matter of law and public policy" and that despite having been trained on the law, the Department chose not to follow it. And he argued that the Department "failed utterly in making reasonable efforts, or any efforts, to

reunify [Child] with his family[.]" These and other of Colin's arguments were related to and made in support of his request that the district court order the Department to arrange for Child to be placed with a relative, Colin himself being a viable option for such placement.

Mother's closing argument focused mainly on her theory that the Department had failed to make reasonable efforts to assist her in meeting the treatment plan goals. Specifically, Mother pointed to the difficulties created by the Department's decision to place Child in a Las Vegas foster home. Mother also argued that the Department failed to understand her psychological and cognitive difficulties and, consequently, it failed to provide her with an adequate treatment plan. Additionally, "as [a] separate and novel attack on reasonable efforts and placement specifically at both the permanency stage of the case and [at the termination stage,]" Mother incorporated all of the argument, theory, and issues that had been raised by Colin.

On April 8, 2011, the court filed a decision that reflected its findings of fact and conclusions of law that provided a basis for termination of Mother's parental rights. The court concluded that there existed clear and convincing evidence that the causes and conditions of the neglect and abuse were unlikely to change in the foreseeable future despite the Department's reasonable efforts and that it was in Child's best interest to terminate Mother's parental rights. Additionally, the court concluded that "[t]he failure of the Department to investigate and place . . . [C]hild in a relative placement [was] not relevant on the issue of whether . . . [Mother's] parental rights . . . should be terminated." The court's decision was followed, on April 21, 2011, by the issuance of its final judgment terminating Mother's parental rights.

Colin and Mother separately appeal from the judgment terminating Mother's parental rights. Mother's appeal is based on three contentions of error: (1) the Department failed in its duty to make reasonable efforts to place Child with a relative, (2) the Department failed to make reasonable efforts to assist Mother to adjust the causes and conditions that led to Child's custody with the Department, and (3) her constitutional right to due process was violated.

Colin's appeal is based on his contention that the district court erred in ordering a change in Child's permanency plan from reunification to adoption when the Department had failed to make reasonable efforts to identify and locate relatives who could potentially have served as placement for Child. Colin maintains that without the court first having made the requisite finding that the Department had made such reasonable efforts with respect to placement of Child with him, the case should not have progressed to the termination stage. As indicated in our discussion that follows, we agree, in part, with Colin.

DISCUSSION

Because our analysis of the issues presented by Mother and Colin requires interpretation of the Abuse and Neglect Act (the Act), NMSA 1978, §§ 32A-4-1 to -34 (1993, as amended through 2009), we begin our discussion with an overview of the relevant provisions of the Act, as well as relevant provisions of the New Mexico Administrative Code. "The express purpose of the . . . Act is to: (1) make the best

interest[s] of the child paramount; (2) preserve the unity of family, to the maximum extent possible; and (3) to assure that the parties receive a fair hearing and their constitutional and other legal rights are recognized and enforced." *State ex rel. Children, Youth & Families Dep't v. Maria C.*, 2004-NMCA-083, ¶ 23, 136 N.M. 53, 94 P.3d 796 (alteration, internal quotation marks, and citation omitted). The provisions of the Act should be interpreted in such a manner as to effectuate its stated purposes, including, when possible, preservation of family unity. *See State ex rel. Children, Youth & Families Dep't v. Benjamin O.*, 2007-NMCA-070, ¶ 34, 141 N.M. 692, 160 P.3d 601 (discussing interpretation of the Children's Code).

When a child is taken into custody by the Department and a court has found that the child was abused or neglected, the Department determines the placement of the child. 8.10.8.13(A)(1), (C) NMAC (11/15/05). At the outset, and applying to all subsequent changes in placement, there exists a preference for placement with qualified relatives of the child. 8.10.8.13(C)(4) NMAC; 8.10.8.11(C)(5) NMAC (8/15/07). A "relative," as defined by Regulation 8.10.8.7(II) NMAC (11/15/05), "is someone connected to another person by blood or marriage within the fifth degree of consanguinity." *See also* 8.10.8.7(Q) NMAC (providing that "'[f]ifth degree of consanguinity' includes brother, sister, grandparents, aunt, uncle, niece, nephew, first cousin, mother-in-law, father-in-law, sister-in-law, and brother-in-law, as well as documented godparents").

If, at the dispositional stage, the court finds that a child is abused or neglected, the court will order the Department to implement a court-approved treatment plan, with which the child's parent is ordered to cooperate. Section 32A-4-22(C). Following an initial review of the disposition, the court will hold a permanency hearing at which the court shall order one of five permanency plans for the child. Sections 32A-4-25(A), -25.1(A), (B). The enumerated permanency plan options are:

> (1) reunification;
>
> (2) placement for adoption after the parents' rights have been relinquished or terminated or after a motion has been filed to terminate parental rights;
>
> (3) placement with a person who will be the child's permanent guardian;
>
> (4) placement in the legal custody of the [D]epartment with the child placed in the home of a fit and willing relative; or
>
> (5) placement in the legal custody of the [D]epartment under a planned permanent living arrangement, provided that there is substantial evidence that none of the above plans is appropriate for the child.

Section 32A-4-25.1(B). "The court shall hold permanency hearings every twelve months when a child is in the legal custody of the [D]epartment." Section 32A-4-25.1(G).

> If the court adopts a permanency plan other than reunification, the court shall determine whether the [D]epartment has made reasonable efforts to identify and locate all grandparents

> and other relatives. The court shall also determine whether the [D]epartment has made reasonable efforts to conduct home studies on any appropriate relative expressing an interest in providing permanency for the child. The court must ensure the consideration has been given to the child's familial identity and connections. If the court finds that reasonable efforts have not been made to identify or locate grandparents and other relatives or to conduct home studies on appropriate and willing relatives, the court shall schedule a permanency review within sixty days to determine whether an appropriate relative placement has been made. If a relative placement is made, the subsequent hearing may be vacated.

Section 32A-4-25.1(D). The required findings provided in Section 32A-4-25.1(D) are related to certain regulatory provisions that govern the actions of the Department. Particularly, Subsection (F) of Regulation 8.10.3.16 of the Administrative Code, which mandates that the Department "shall make every effort to identify, locate[,] and notify fit and willing relatives for consideration of placement of a child in custody who requires out of home placement." 8.10.3.16(F) NMAC (3/31/10) (amended 4/29/11 and 2/29/12); *see also* 8.10.3.7(CC) NMAC (3/31/10) (amended 4/29/11 and 2/29/12) (explaining that the term "protective services division" a term that is used in 8.10.3.16(F) NMAC, "refers to the protective services division of the . . . [D]epartment, and is the state's designated child welfare agency"). Additionally, we note Regulation 8.10.7.17 NMAC (3/31/10), entitled "notifying relatives[,]" reads as follows:

> A. [The Department] shall exercise due diligence to identify and notify adult relatives of a child's removal within thirty . . . days of the removal. The notice shall inform relatives of their option to become a placement resource for the child.
>
> B. If the parent is unable or unwilling to provide the [Department] worker with names and contact information of relatives, the children's court attorney shall inform the court and ask the court to question the parents about relatives. The children's court attorney shall include in the court order that the parents will provide names of relatives, for possible relative placement, to [the Department] and attorneys of record five . . . days from the date of the hearing.
>
> C. At the permanency hearing, when the court adopts a plan other than reunification, the children's court attorney shall request that the court determine whether . . . the [D]epartment has made reasonable efforts to identify and locate, and conduct home studies of any appropriate relative expressing an interest in providing permanency for the child.

When abuse and neglect proceedings reach the second permanency hearing stage, "the presumption is that adoption or other permanent placement is in the child's best interest." *Benjamin O.*, 2007-NMCA-070, ¶ 29 (internal quotation marks and citation omitted). Once the court has ordered a plan of

adoption, "the course is set for termination[.]" *Maria C.*, 2004-NMCA-083, ¶ 30. When a termination hearing is held, a parent's parental rights will be terminated if the court finds by clear and convincing evidence that, despite reasonable efforts by the Department "to assist the parent in adjusting the conditions that render the parent unable to properly care for the child[,]" the conditions and causes of the neglect or abuse are unlikely to change in the foreseeable future. Sections 32A-4-28(B)(2), -29(I). "Clear and convincing evidence is defined as evidence that instantly tilts 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." *State ex rel. Children, Youth & Families Dep't v. Lance K.*, 2009-NMCA-054, ¶ 16, 146 N.M. 286, 209 P.3d 778 (alteration, internal quotation marks, and citation omitted).

When a parent appeals from an order terminating her parental rights, we will affirm the district court if its findings are supported by clear and convincing evidence, and we will resolve all conflicts in the evidence in favor of the Department. *See In re Termination of Parental Rights of Reuben & Elizabeth O.*, 104 N.M. 644, 648, 725 P.2d 844, 848 (Ct. App. 1986); *see also State ex rel. Dep't of Human Servs. v. Williams*, 108 N.M. 332, 335, 772 P.2d 366, 369 (Ct. App. 1989) ("Even in a case involving issues that must be established by clear and convincing evidence, it is for the finder of fact, and not for reviewing courts, to weigh conflicting evidence and decide where the truth lies.").

I. The Termination of Mother's Parental Rights Was Proper

Mother contends that there was insufficient evidence to support the district court's conclusions that the Department made reasonable efforts to assist her to adjust the conditions and causes that led to Child's custody with the Department. Mother argues that by placing Child in Las Vegas when Mother lived in Santa Fe, the Department created a "near-insurmountable obstacle in Mother's path" because Las Vegas was not close enough to Mother's residence to facilitate visitation. Mother also argues that the Department failed to create a treatment plan that accommodated her learning disorder and cognitive limitations. According to Mother, "the district court failed to take into consideration the deleterious results of the Department's lack of efforts."

Mother conceded at the termination hearing, and she likewise concedes in her briefing to this Court, that owing to a lack of financial and other resources, she was not, and is not, ready to parent Child. Although we agree with Mother that her having admitted that she was incapable of parenting Child may not, alone, provide a sufficient basis upon which to affirm the termination, there existed otherwise sufficient evidence to support the court's order. Having provided an overview of the case in the background section of this Opinion, we narrow our discussion, in this section, to the evidence that bears upon Mother's two particularized insufficiency of the evidence claims.

A. The Proximity of Child's Placement in Las Vegas to Mother's Residence in Santa Fe Did Not Affect the Outcome in This Case

The district court found that:

> [] [w]hile the case was being managed out of Las Vegas, the Department transported [Child] to

> Santa Fe twice a week for supervised visits . . . . [Mother's] mother provided transportation for additional visits. . . .
>
> [] Upon transfer of the . . . case to the Santa Fe office in August of 2009, [Mother] was set up with two weekly supervised visits for an hour and a half at either the Department's Santa Fe or Las Vegas offices. Transportation was provided by [the Department], [Mother's] mother[,] and the [F]oster [P]arents. [Mother] was not prejudiced by . . . [C]hild remaining in Las Vegas after she left Crossroads and moved to Santa Fe. The results of the case would have been the same.

The court's finding was supported by the testimony of Nadine Flores, the Las Vegas permanency plan worker who was assigned to Mother's case. Ms. Flores explained at the termination hearing that, although the distance between Child's placement and Mother's residence "wasn't ideal," the Department "went out of [its] way to ensure that [Mother] would have the visits with [Child]." Ms. Flores explained that she, personally, or another Department employee would transport Child twice a week to Santa Fe because Mother did not have transportation and that other times, Mother would receive transportation to Las Vegas to visit with Child there.

Also, Ms. Martin testified that when she was the acting permanency worker on Mother's case, hour-and-a-half-long visits were scheduled twice each week and were held either in Santa Fe or Las Vegas. Mother's apartment at that time was less than one mile from the Department's Santa Fe office, so Mother was able to walk to the visits held there. Child was transported by the Department or the Foster Parents for the Santa Fe visits. And, if Mother needed transportation, the Department provided it; however, Mother's mother also provided transportation.

Based on the testimony regarding visitation and transportation by both the Las Vegas and Santa Fe permanency workers, we reject Mother's argument that the lack of proximity between her residence and Child's placement created an insurmountable obstacle for Mother. The foregoing testimony was sufficient to "instantly tilt[] the scales" in the court's mind that the results would have been the same regardless of Child's placement in Las Vegas. *Lance K.*, 2009-NMCA-054, ¶ 16 (defining clear and convincing evidence). We will not reweigh the evidence. *See In re R.W.*, 108 N.M. at 335, 772 P.2d at 369. We affirm the court's findings relevant to this issue.

B. The Department Made Reasonable Efforts to Assess and Accommodate Mother's Cognitive and Emotional Limitations

The district court found that:

> [Ms.] Burns, M.A., of Integrative Therapies, provided individual therapy to [Mother]. Ms. Burns used dialectical behavior therapy, the treatment of choice for personality disorders. They worked on emotional literacy and mindfulness training. . . . She was aware of [Mother's] history of ADHD and special education, and that her treatment approach would not have been different if she had had access

to a more thorough psychological evaluation.

The court's finding was directly supported by Ms. Burns' testimony, which included statements to the same effect.

Additionally, the court found that Mother "entered . . . Crossroads, a residential treatment center . . . . [where she] completed the first phase of the program[, but] . . . was discharged unsuccessfully . . . on June 8, 2009." The record reflects that while Mother was at Crossroads, she underwent a psychiatric evaluation and a psychosocial assessment. When Mother was discharged from Crossroads, Ms. Flores contacted its staff to learn why. Ms. Flores specifically raised the issue of whether Mother's "mental disabilities" made it difficult for Mother to complete the program. Crossroads staff reportedly told Ms. Flores the work is modified to accommodate the disabilities of the residents and that Mother was capable of doing the work, but she was lying and using her learning disabilities as an excuse to not complete the program.

Based on the foregoing evidence, the district court could conclude, by clear and convincing evidence, that the Department had made reasonable efforts to accommodate Mother's cognitive and emotional limitations by providing referrals to services that were tailored to her particular needs. That Mother did not fully participate in or cooperate with the services does not render the Department's efforts unreasonable. *See State ex rel. Children, Youth & Families Dep't v. Patricia H.*, 2002-NMCA-061, ¶ 23, 132 N.M. 299, 47 P.3d 859 (explaining that "[w]hat constitutes reasonable efforts may vary with a number of factors, such as the level of cooperation demonstrated by the parent"); *see also In re Termination of Parental Rights of Eventyr J.*, 120 N.M. 463, 471, 902 P.2d 1066, 1074 (Ct. App. 1995) (stating that when the Department has made reasonable efforts, further efforts are not required). Mother's argument that the Department failed to accommodate her limitations provides no basis for reversal.

II. Mother's Due Process Contentions

"Parental rights cannot be terminated without due process of law." *State ex rel. Children, Youth & Families Dep't v. Browind C.*, 2007-NMCA-023, ¶ 20, 141 N.M. 166, 152 P.3d 153. Mother argues that her right to procedural due process was denied by the Department's alleged failure to make reasonable efforts to assist her. Mother also argues that she was deprived of procedural and substantive due process by the Department's failure to place Child with relatives. We review Mother's due process claims de novo. *State ex rel. Children, Youth & Families Dep't v. Lorena R.*, 1999-NMCA-035, ¶ 22, 126 N.M. 670, 974 P.2d 164.

Mother contends that application of the due process balancing test described in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), supports a holding in her favor. *See Browind C.*, 2007-NMCA-023, ¶ 31 (applying the *Mathews* test in the context of a termination of parental rights case). *Mathews* provides three factors to be employed in resolving the issue whether constitutional due process dictates were sufficiently upheld. 424 U.S. at 334-35. The first factor requires identification of "the private interest that will be affected by the official action[.]" *Id.* at 335. Next, we are to consider "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards[.]" *Id.* Finally, we consider the

state's interest, including, among other considerations, "the function involved[.]" *Id.*

We first examine Mother's argument that she was denied due process by the Department's failure to make reasonable efforts to assist her. Mother correctly argues that she has a fundamental right to parent Child. *See State ex rel. Children, Youth & Families Dep't v. Amanda M.*, 2006-NMCA-133, ¶ 22, 140 N.M. 578, 144 P.3d 137 (noting that parents have a fundamental right in the care, custody, and management of their children). "The [Department] has an equally significant interest in protecting the welfare of children." *State ex rel. Children, Youth & Families Dep't v. Brandy S.*, 2007-NMCA-135, ¶ 23, 142 N.M. 705, 168 P.3d 1129 (alteration, internal quotation marks, and citation omitted). Therefore, our decision rests upon our conclusion under the second *Mathews* factor. *Brandy S.*, 2007-NMCA-135, ¶ 23. In terms of the Department's efforts to assist her to overcome the causes and conditions that rendered her unable to parent Child, Mother does not make any argument related to the second *Mathews* factor. And, as indicated in the previous section, we agree with the district court's determination that the Department's efforts in this regard were reasonable. The second *Mathews* factor therefore weighs in favor of affirming the court's judgment. Accordingly, we conclude that Mother was not deprived of due process because the Department's efforts were reasonable.

We turn now to Mother's argument that she was denied due process by the Department's failure to place Child with relatives. Mother contends that by failing to make reasonable efforts to place Child with a relative, the Department interfered with her pursuit of a familial relationship with Child. In Mother's view, had Child been "placed with a family member, he could have grown up with his brother, and Mother could have remained connected to both of her sons[,]" and Child could have been "raised as a member of her extended family."

As discussed later in this Opinion, we remand this case with instructions to the Department to consider placing Child with Colin. Because Mother's due process argument as to the Department's failure to abide by Section 32A-4-25.1 is grounded in the potential relationship between herself and Child that would arise from his being placed with Colin, any alleged deprivation of that potential should be remedied by the proceedings on remand. Accordingly, we decline to address the merits of this aspect of Mother's due process claim.

III. Colin Has Standing to Raise the Issue on Appeal Whether the Department's Failure Requires This Matter to be Returned to the Department to Engage in Consideration of Colin

Before we reach the merits of Colin's argument, we address the Department's contention that he does not have standing on appeal[1] to challenge the court's orders. We apply de novo review to the legal question of whether a party has standing. *Rio Grande Kennel Club v. City of Albuquerque*, 2008-

[1] Although the Department's argument regarding Colin's lack of standing is ambiguous in terms of whether its view is that Colin lacked standing to raise challenges in the district court or whether he lacks standing to appeal, owing to its particular stipulation to Colin's standing in the district court, we interpret its argument to be that Colin lacks standing to challenge the court's orders *on appeal*.

NMCA-093, ¶ 7, 144 N.M. 636, 190 P.3d 1131. We likewise apply de novo review to the interpretation of statutes and their application to facts. *Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶ 16, 137 N.M. 26, 106 P.3d 1273.

Colin relies, for standing, on his status as a party to the underlying action. He cites NMSA 1978, Section 39-3-7 (1966), which provides that "any party aggrieved may appeal" from "any final order after entry of judgment which affects substantial rights, in any special statutory proceeding in the district court[.]" And he cites *St. Sauver v. New Mexico Peterbilt, Inc.*, 101 N.M. 84, 85-86, 678 P.2d 712, 713-14 (Ct. App. 1984), for the proposition that "[t]o be aggrieved, a party must have a personal . . . interest . . . adversely affected by the judgment." Colin contends that he has standing to appeal as "a party aggrieved by the departmental and judicial disregard of Section 32A-4-25.1(D) embodied in the district court's judgment." (Internal quotation marks omitted.)

Colin's status as a party in this case arose from a stipulated order, filed in September 2010, granting him status as an intervenor. *See* Rule 1-024(B)(2) NMRA (governing permissive intervention and stating in pertinent part that "anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common"); *see also* § 32A-4-27(A)(4) (stating that "[a]t any stage of an abuse or neglect proceeding, a person [who wishes to become the child's permanent guardian] may be permitted to intervene as a party"). In pertinent part, the order contained the following stipulations by the Department, among other parties:

> b. [Colin] is a person within the fifth degree of consanguinity . . . with whom . . . [C]hild might arguably have resided if [Colin's] existence and interests had been ascertained during the course of the search requirements of Sec[tion] 32A-4-25.1[;]
>
> . . .
>
> d. [Colin] wishe[d] to adopt . . . [C]hild . . . and reserve[d] his interest in becoming . . . [C]hild's permanent guardian;
>
> . . .
>
> f. [Colin] has standing pursuant to Rule 1-024 . . . [because his] claim or defense and the main action . . . have a question of law or fact in common[;]
>
> g. [Colin] wishe[d] to pursue his rights under the above described laws in [f]urtherance of preserving family connections[.]

Because the stipulation referred to Colin's "rights" under the laws cited within the stipulation, including Section 32A-4-25.1, the stipulation reflected an understanding and an agreement among all parties that Colin had legal rights pursuant to that section, among other laws. *Cf. Snyders v. Hale*, 89 N.M. 734, 736, 557 P.2d 583, 585 (Ct. App. 1976) (stating with regard to stipulations that "[i]n all cases of doubt, that construction should be adopted which is favorable to the party in whose favor [the stipulation] is made" (emphasis, internal quotation marks, and citation omitted)).

We conclude that Colin has standing to appeal. As reflected in the order granting

Colin status as an intervenor, the Department in effect stipulated that Colin had a sufficient legal interest under Section 32A-4-25.1 to seek consideration as a viable placement for Child so as to preserve family connections. The invasion of this stipulated, legally protected interest constitutes an injury in fact supportive of his standing in this matter. *See State ex rel. Children, Youth & Families Dep't v. John R.*, 2009-NMCA-025, ¶¶ 16-17, 145 N.M. 636, 203 P.3d 167 (stating that, in the standing context, the invasion of a legally protected interest constitutes an injury in fact). At the least, given the stipulation, Colin was aggrieved by the departmental disregard of Section 32A-4-25.1(D).

Under the circumstances here, with its having stipulated to Colin's intervention in the district court, we reject consideration of the Department's stated concern that "[i]f [Section] 32A-4-25.1 confers rights on Colin . . . simply because he is the . . . cousin of a child in the Department's custody, the statute would confer the same rights on grandparents and all 'other relatives.' " We need "not determine abstract questions of law which do not rest upon existing facts[.]" *Henriquez v. Schall*, 68 N.M. 86, 89, 358 P.2d 1001, 1003 (1961). Colin's stipulated intervention in this case was predicated on his timely efforts to identify and seek stipulation to his right to preserve his family connections and to assert and protect his interest as a relative who should have been considered and may well have been selected as an appropriate placement for Child. We leave for another day whether, in other circumstances or showing of authority, a relative such as Colin may not have standing to raise challenges, either in the district court or on appeal, pursuant to Section 32A-4-25.1(D).

IV. The Evidence Shows That the Department Did Not Comply With the Statute

Section 32A-4-25.1(D) indicates that the Department has a duty to make reasonable efforts to identify, locate, and conduct home studies on willing and appropriate relatives who could potentially serve as placement for a child. What constitutes "reasonable efforts" varies with the factors and circumstances of each case. *Cf. State ex rel. Children, Youth & Families Dep't v. Hector C.*, 2008-NMCA-079, ¶ 24, 144 N.M. 222, 185 P.3d 1072 (discussing the reasonable efforts standard in terms of the Department's duty to assist parents in adjusting the conditions that rendered them unable to care for the child). Although we do not endeavor to define the parameters of the efforts that will, in future cases, be considered "reasonable" under Section 32A-4-25.1(D), it is evident that in this case the Department's efforts fell far below any standard of reasonableness in regard to identifying relatives who may have served as an appropriate placement for Child.

The Department was aware of Colin as early as January 2010 when he attended a meeting at the Department and expressed an interest in providing care for Child's half brother. Colin testified at the termination hearing that, starting around the beginning of January, Colin began pursuing information about Child by contacting the Department, through Ms. Martin, which he did numerous times, and although Ms. Martin reportedly told Colin that she would "get back" to him, she failed to do so. By April 2010, Colin was a Department-licensed foster parent and was the guardian of Child's half brother. Thus, for at least three months before Child's permanency plan changed from reunification to adoption (January to April 2010), the

Department knew about Colin, knew that Colin was interested in Child and, sometime in April 2010, knew that Colin had met Department standards for becoming a foster parent. The Department's failure to consider placing Child with Colin and to alert the court at the second permanency review to Colin's interest in Child, represents a failure by the Department to comply with the statutory requirement of making reasonable efforts to place Child with willing and appropriate relatives.

V. Notwithstanding the Failures of the Department, We Affirm the Second Permanency Order, and We Affirm the Termination of Mother's Parental Rights

We are mindful that the permanency hearing represents a critical stage in abuse and neglect proceedings. *Maria C.*, 2004-NMCA-083, ¶29. Permanency hearings determine the direction of the proceedings and, once an adoption plan is ordered, "the course is set for termination[.]" *Id.* ¶¶30, 32. In Colin's view, the Department's failure to locate and identify relatives with whom to place Child requires restoration of the case to the point at which the process failed, namely, the permanency stage.

The permanency stage represented a significant point of the proceedings in terms of Colin's interest and Child's interest because, had Colin been considered as a potential placement, Child may well have been placed with him as the case progressed toward termination of Mother's parental rights. In theory, such placement would have afforded Colin and Child an opportunity to form a bond and, theoretically, the placement would have increased Colin's chances of becoming Child's adoptive parent. *See* NMSA 1978, § 32A-5-36(F)(7) (2003) (providing that, in adoption proceedings, the court shall grant a decree of adoption if it finds, among other factors, that the best interests of the adoptee are served by the adoption). Furthermore, as Mother suggests, had Child been placed with Colin, he could have grown up with his brother, and Mother could have remained connected to both of her sons.

As it was, however, Child remained with Foster Parents, and by the time of the termination hearing, Child had been with Foster Parents for "twenty plus months[,]" he appeared to "have developed a psychological parent-child relationship with [them,]" and he had formed "a strong positive attachment" to them. Because the court also found that "when possible, infants and toddlers should not be moved from a placement that can be permanent and . . . which clearly benefit the child's well-being" and that Foster Parents were willing to adopt Child, the prospect of the court finding in future adoptive proceedings that Colin, rather than Foster Parents, would be the best prospective adoptive parent appears unlikely.

We agree with Colin that the Department failed to make reasonable efforts to locate and identify relatives for placement. Nevertheless, because the court's second permanency order did nothing more than change the permanency plan from reunification to adoption, we do not see that it is necessary to reverse or set aside the permanency order, as Colin suggests. Rather, as discussed in the next section of this Opinion, the Department's failure in regard to Colin shall be remedied by the Department doing now what it failed to do at the permanency stage.

Moreover, the Department's failure to consider Colin as a relative placement does

not provide a basis for overturning the termination of Mother's parental rights. In its decision to terminate Mother's parental rights, the district court acknowledged the Department's failure to consider relative placement by stating that "[p]rior to the [p]ermanency [h]earing in April 2010, the Department had not reviewed the case for relatives or [otherwise] identified any[.]" Nevertheless, the district court concluded that "[t]he failure of the Department to investigate and place . . . [C]hild in a relative placement [was] not relevant on the issue of whether . . . [Mother's] parental rights . . . should be terminated."

As indicated in our earlier discussion, the termination of Mother's parental rights was supported by clear and convincing evidence. We are not persuaded that the facts that bore upon the court's decision to terminate Mother's parental rights would have been any different had Child been placed with Colin at the permanency stage. Neither Mother nor Colin have presented any persuasive argument or authority to show that the Department's failures, at the permanency stage, to consider placement with Colin require reversal of the order terminating Mother's parental rights. We agree with the district court's determination that those failures were not relevant to the decision to terminate Mother's parental rights. Accordingly, we affirm the termination of Mother's parental rights.

VI. The Circumstances Require This Matter to be Returned to the Department to Engage in Consideration of Colin

Although we reject Mother's and Colin's argument that the Department's failure to consider Colin requires reversal of the termination order, nevertheless, we do not believe that the Department's lack of regard for the law should go unremedied. As Colin argues, the Department's failure to identify relatives with whom to place Child was not only a violation of Section 32A-4-25.1(D) and related regulations, but it was also an affront to the policy behind their implementation; namely the promotion of family unity. Colin urges this Court to consider "in more human terms" the implications of the Department's failure to make reasonable efforts to place Child with relatives.

As Colin reasons, "[n]ot only the child, but the family as a unit, benefits when a child is not lost to his or her kin as a result of parental abuse and neglect." According to Colin, owing to the Department's lack of reasonable efforts to search for relatives, he was deprived the opportunity to be considered as a potential placement for Child such that, had Child been placed with him, Colin would have been placed in a more advantageous position for adoption, and Child was deprived of the chance to be raised with his half-brother. Moreover, as mentioned earlier, the Department's failures may have interfered with Mother's potential to remain connected to both of her sons as part of her extended family. Such considerations cannot and should not be minimized. As one commentator explained:

> Aside from the parent-child relationship, the sibling relationship is the most important relationship in a child's development. The emotional bonds between siblings are irreplaceable. If nurtured and maintained, these relationships can provide emotional security, affect the intellectual, social, emotional, and moral development of one another,

> and offer lifetime companionship. . . . Siblings with a relationship have a better chance of forming lasting friendships with each other and with outside peers. These are just a few of the benefits commentators have ascribed to sibling relationships. They make no mandate that one be alive prior to the other's adoption– a biological bond necessitates at least an attempt to *cultivate* a sibling relationship even where none has existed before.

Christopher D. Vanderbeek, *Oh, Brother! A California Appeals Court Reaffirms the Denial of Necessary Access for Separated Children to Build and Maintain Sibling Relationships*, 13 U.C. Davis J. Juv. L. & Pol'y 349, 378-79 (2009) (alteration, internal quotation marks, and citation footnotes omitted). Thus, the Department's failures had a range of consequences that defy qualitative assessment and that demand remedial action.

Colin should have had and should now have an opportunity to be considered as a willing and appropriate relative to provide permanency for Child. Accordingly, we remand for the Department to complete a home study on Colin and otherwise consider the viability of placing Child with him. After the Department has met those obligations, the district court shall hold a hearing to determine the best interests of Child. *See* § 32A-4-25.1(D) (requiring the court to hold a "permanency review" if, when a child's permanency plan is changed from reunification, the Department has failed to make reasonable efforts to identify or locate relatives or to conduct home studies on willing and appropriate relatives with whom to place the child). The Department's evaluation and the court hearing are to be expedited and meaningful. If Child's best interests would be served by being placed with Colin, the court should, accordingly, oversee a transition plan. *Cf. Lance K.*, 2009-NMCA-054, ¶¶ 2, 44 (ordering the court and the Department to oversee a transition plan to return a child to the father after an erroneous termination of his parental rights).

On a final note, we emphasize that Section 32A-4-25.1(D) imposes a duty upon the district court to make a serious inquiry into whether the Department has complied with its mandate to locate, identify, and consider relatives with whom to place children in its custody. *See Benjamin O.*, 2007-NMCA-070, ¶ 34 (recognizing that the preservation of family unity is one of the legislative purposes of the Children's Code). In future cases, such inquiry will not be satisfied by a pro forma ratification of the Department's assertions that such efforts have been made. Nor will the court's or the child's guardian ad litem's duty of inquiry be satisfied by leaving the full burden of locating and identifying relatives to the parents of children in departmental custody who may, for any number of reasons, be unable or unwilling to provide information about relatives. Rather, in order to comply with the relatives search requirement of Section 32A-4-25.1(D), the court must conclude that the Department, through all of its available resources, has met its affirmative duty to "identify and locate . . . [and] conduct home studies on any appropriate relative expressing an interest in providing permanency for the child." Section 32A-4-25.1(D).

CONCLUSION

We affirm the termination of Mother's parental rights. We remand to the district court with instructions to the

Department to complete a home study on Colin and to look into whether he would serve as an appropriate placement for Child. Afterward, the district court shall conduct a subsequent hearing on whether placement with Colin would be in Child's best interest. The proceedings should occur on an expedited basis.

IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

CYNTHIA A. FRY, Judge

Certiorari Granted, May 10, 2013, No. 34,085

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-058

Filing Date: February 7, 2013

Docket No. 31,162

KENNETH BADILLA,

Plaintiff-Appellant,

v.

WAL-MART STORES EAST, INC., d/b/a WAL-MART #850, WAL-MART STORES EAST, LP, and MEL DISSASSA,

Defendants-Appellees.

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for Appellees

OPINION

KENNEDY, Chief Judge.

This case requires us to determine whether a complaint based solely on the

Uniform Commercial Code's (UCC) provisions for breach of warranty, but seeking personal injury damages, is a claim under the UCC or a tort claim for personal injury. The determination affects which statute of limitation applies and, thus, whether the claim was properly dismissed as barred under the three-year limit on personal injury actions. We hold that the three-year personal injury statute of limitation applies because the essence of the claim is for personal injury, even though it is presented as a breach of warranty. Such a determination is in keeping with New Mexico's historical distinction between tort and contract claims based on the nature of the claimant's injury and the primacy of our tort statute of limitation in the absence of a more specific statute. Because the statute of limitation issue is dispositive, we need not address the merits of the claim under contract law. We affirm the district court's dismissal of the case as time barred.

I. BACKGROUND

Plaintiff Kenneth Badilla worked as a tree trimmer. He bought a pair of work boots at Wal-Mart on October 19, 2003. The boots' label stated "IRON TOUGH[, r]ugged [l]eather [b]oots" that "[m]eets or exceeds ASTM F 2413-05 standards," which provides for specification for performance requirements for foot protection.[1] Badilla wore the boots between eight and twelve hours per day, six days a week, for the next nine months, between 1871 and 2805 hours. He stated that as "the boots wear down[,] the yellow rubber piece tends to unglue itself and roll up as you are walking, making it very dangerous when working." Badilla neither attempted to return the boots nor obtain a refund. He also stated that he was unaware of any defect in the boots that made them unsafe.

On July 28, 2004, Badilla tripped while lifting a large log. He could not get out of bed the following morning. He was driven to the hospital and was told that "he had two ruptured or bulging discs." Badilla eventually had surgery. He pursued a workers' compensation case and received a stipulated compensation order.

Badilla filed a complaint against Wal-Mart on September 20, 2007, alleging breach of express and implied warranties of the boots. Wal-Mart moved for summary judgment, claiming that Badilla's lawsuit was barred by the statute of limitation for personal injury claims. The district court granted the motion, despite Badilla's assertion that his claims should be governed by the four-year statute of limitation under the UCC's warranty provisions. Badilla appealed the dismissal of his complaint.

II. DISCUSSION

The sole issue we face is whether a breach of warranty lawsuit that only seeks damages for personal injury should be governed by the tort statute of limitation or that governing the sale of goods. We must determine whether to apply the limitation governing the named cause of action or the one based upon the essence of the claim.

[1] 29 C.F.R. § 1910.136 (2009) (outlining what footwear employers must ensure employees use under the Occupational Safety and Health Administration, which requires protection against falling or rolling objects, objects piercing the sole, and when an employee's feet are exposed to electrical wires).

We review grants of summary judgment under a de novo standard of review. *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582 (stating that "[s]ummary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law"); *City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*, 2009-NMCA-081, ¶ 7, 146 N.M. 717, 213 P.3d 1146 (holding that "if no material issues of fact are in dispute and an appeal presents only a question of law, we apply de novo review").

The UCC provides that "[a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued" and that "[a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." NMSA 1978, § 55-2-725 (1), (2) (1961). In contrast, NMSA 1978, Section 37-1-8 (1976) provides generally that "[a]ctions must be brought . . . for an injury to the person or reputation of any person, within three years."

Badilla's injuries were personal, rather than related to any failure of the purchase of the boots. He stated that his "objective was not to recoup the cost of the boots but to recover damages." His amended complaint stated that the loose sole of the boots led to his personal injury, by causing "[Badilla] to fall backwards with extensive force causing [him] to suffer damages, including severe, painful[,] and permanent mental and physical injury, loss of earnings[,] and medical expenses." In seeking redress for his injury, however, he couched his claim under contract law, suing Wal-Mart on three counts: breach of express warranty, breach of implied warranty of merchantability, and breach of implied warranty of fitness for a particular purpose. These causes of action are found in New Mexico's adoption of the UCC, NMSA 1978, §§ 55-2-313 to -315 (1961).

Although other jurisdictions have addressed the issue of whether personal injury or UCC time limits apply to such cases with disparate results, New Mexico lacks a definitive rule. Some courts, in facing claims for personal injury under breach of warranty theories, have applied the UCC statute of limitation period regardless of what type of remedy is sought. *See, e.g.*, *Wieser v. Firestone Tire & Rubber Co.*, 596 F. Supp. 1473, 1475 (D. Colo. 1984) (stating that applying the UCC limitations period is the majority rule); *Sille v. McCann Contsr. Specialties Co.*, 638 N.E.2d 676 (Ill. App. Ct. 1994); *Daugherty v. Farmers Coop. Ass'n*, 689 P.2d 947 (Okla. 1984); *Garcia v. Texas Instrument, Inc.*, 610 S.W.2d 456 (Tex. 1980).

However, other jurisdictions have applied the tort limitations period, reasoning that the essence of the claim determines the applicable statute of limitation. *See, e.g.*, *Follette v. Wal-Mart Stores, Inc.*, 41 F.3d 1234 (8th Cir. Ark. 1994); *Abate v. Barkers of Wallingford, Inc.*, 229 A.2d 366 (Conn. C.P. 1967); *Waldron v. Armstrong Rubber Co.*, 236 N.W.2d 722 (Mich. Ct. App. 1975). These courts reasoned that, "[w]here the injury is personal, the statute relating to personal injury actions applies." *Kinney v. Goodyear Tire & Rubber Co.*, 367 A.2d 677, 681 (Vt. 1976). This rationale is consistent with our practice in New Mexico to "look to the nature of the right sued upon, and not the form of action or relief demanded, to determine the applicability of the statute of limitations to a cause of action." *Martinez v. Cornejo*, 2009-NMCA-011, ¶ 29, 146 N.M.

223, 208 P.3d 443 (alterations, internal quotation marks, and citation omitted).

New Mexico has historically distinguished claims for personal injuries from contractual claims, thereby aligning New Mexico more closely with this second line of cases. *Chavez v. Kitsch*, 70 N.M. 439, 374 P.2d 497 (1962); *Kilkenny v. Kenney*, 68 N.M. 266, 361 P.2d 149 (1961); *Mantz v. Follingstad*, 84 N.M. 473, 505 P.2d 68 (Ct. App. 1972). In *Chavez*, our Supreme Court determined that when a couple sued a plumber for breach of express and implied warranty for faulty work resulting in injury caused by accumulation of carbon monoxide in their home, the "[a]ppellants' cause of action is basically one for injuries to the person of appellant" and, therefore, "the statute of limitations for injuries to the person applies, even though the cause of action stated is ex contractu in its nature." 70 N.M. at 444, 374 P.2d at 500. The court in *Chavez* cited to *Kilkenny*, which determined that a pre-UCC statute of limitation for damages to property did not apply to the suit by the decedent's husband for medical expenses and loss of consortium while his wife was in a diabetic coma. *Kilkenny*, 68 N.M. at 270, 361 P.2d at 151. The *Kilkenny* court reasoned that the suit was based on "injury to the person," which was covered by a three-year statute of limitation. *Id.* (internal quotation marks and citation omitted). The court in both cases looked to the gravamen of the claim, rather than the plaintiff's terminology.

We agree that when a personal injury is the basis for a breach of warranty suit, the essence of the injury should govern which statute of limitation applies. In contrast, the UCC applies to cases involving the sale of goods. NMSA 1978, § 55-2-102 (1961). In this case, Badilla fails to show that his claim is rooted in a breach of warranty based on the sale of goods.[2] Badilla's claims, which he described as undisputedly for personal injury, rather than loss based on the commercial value of the boots, must remain subject to the three-year personal injury statute of limitation.

Badilla argues that the four-year statute of limitation for breach of warranty under the UCC should apply to his claims. Section 55-2-725. He states that the UCC should apply because it is narrower and applies to sales transactions, rather than the general statute for personal injuries. Badilla relies on our limited holding in *Fernandez v. Char-Li-Jon, Inc.*, 119 N.M. 25, 888 P.2d 471 (Ct. App. 1994), *abrogated on other grounds by Romero v. Bachicha*, 2001-NMCA-048, ¶ 16, 130 N.M. 610, 28 P.3d 1151, to support his position that the UCC limitation should apply. In *Fernandez*, this Court determined that the plaintiff's claims under breach of warranty for injury from glass shards in a drink were controlled by the UCC's four-year statute of limitation. 119 N.M. at 29, 888 P.2d at 475. However, we declined "to enunciate a universal rule," *id.* at 28, 888 P.2d at 474, and based our ruling on the UCC's use of language specific to the sale of a "drink to be consumed on the premises" to cover this instance. *Id.*

We reasoned in *Fernandez* that the general tort statute of limitation applies "except when otherwise specially provided" and that the UCC provision at issue was just such a special provision. *Id.* at 28-29, 888 P.2d at 474-75 (internal quotation marks and

[2] The fact that Badilla never attempted to provide the required notice of the alleged warranty's failure reinforces our determination of the essence of the claim as one for personal injury.

citation omitted). This is in accordance with *Chavez*, in which our Supreme Court stated that "exceptions contained in statutes of limitation are to be strictly construed." 70 N.M. at 443, 374 P.2d at 500 (referring specifically to the personal injury statute of limitation). We note that, in the case at hand, there is no such applicable special provision, and we do not consider the broad warranty provisions of the UCC to be comparable to the food-and-drink provision, which we relied on in *Fernandez*. Because the tort statute establishes its own general primacy over other statutes of limitation, we are not persuaded by Badilla's argument.

Badilla also relies on the Committee Commentary to Uniform Jury Instruction 13-1430 NMRA, which states that both strict liability in tort and breach of warranty in contract may provide theories under which a plaintiff may pursue product liability claims. He uses the UJI to support his point that contract and tort theories co-exist for breach of warranty cases. However, the Committee Commentary "suggests use of the tort standard in personal injury cases and use of the merchantability standard in commercial cases." *Id.* The tort standard referred to in the UJI is the strict liability standard in the Restatement (Second) of Torts, § 402(A) (2012). The UJI, while it addresses the overlap between tort and contract law, does not contribute to our analysis of the applicable statute of limitation.

Because the issue of the statute of limitation is dispositive, we need not address the merits of Badilla's claim under contract law. "Application of a statute of limitations merely bars the remedy on a stale claim without determining the underlying validity of that claim or modifying it in any way." *Britton v. Britton*, 100 N.M. 424, 428, 671 P.2d 1135, 1139 (1983). "Even if we presume without deciding [the merits of the case are valid], our conclusion concerning the district court's application of the statute of limitations is dispositive and requires affirmance." *Vill. of Angel Fire v. Bd. of Cnty. Comm'rs of Colfax Cnty.*, 2010-NMCA-038, ¶ 13, 148 N.M. 804, 242 P.3d 371.

III. CONCLUSION

We hold that the three-year personal injury statute applies when the gravamen of a claim is in tort, although the claim is presented as one for breach of warranty under the UCC. As Badilla's injury occurred more than three years before he filed his complaint, his claim is barred. We affirm.

IT IS SO ORDERED.

RODERICK T. KENNEDY, Chief Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

J. MILES HANISEE, Judge

Certiorari Granted, May 10, 2013, No. 34,083

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-059

Filing Date: February 26, 2013

Docket No. 31,165

AMETHYST LAND CO., INC.,
a New Mexico corporation,

Plaintiff-Appellant,

v.

JAMES F. TERHUNE and
ELIZABETH R. TERHUNE,

Defendants-Appellees.

O'Friel and Levy, P.C.
Aimee S. Bevan
Santa Fe, NM

for Appellant

Clifford C. Gramer, Jr.
Albuquerque, NM

for Appellees

OPINION

VANZI, Judge.

Appellant Amethyst Land Co., Inc. (Amethyst) and Appellees James F. Terhune and Elizabeth R. Terhune (the Terhunes) are adjoining property owners in Santa Fe County, New Mexico. For several years, access to the property now owned by Amethyst was provided by a 40-foot, non-exclusive roadway and utility easement located on the land now owned by the Terhunes. In 2001, when the Terhunes purchased their property, a predecessor in interest to Amethyst and the Terhunes signed an Extinguishment Agreement to terminate this easement. However, before the Extinguishment Agreement was recorded in the county clerk's office, the predecessor sold its property to Desert Sunrise, LLC (Desert Sunrise), who was unaware of the Extinguishment Agreement and who later sold the property to Amethyst.

In 2006, Amethyst filed suit against the Terhunes in district court, claiming that the easement had not been terminated by the Extinguishment Agreement and that a second easement on the Terhunes' land also benefitted its property. The district court entered judgment in favor of the Terhunes, and Amethyst appeals. We reverse the district court's ruling that the easement providing ingress/egress to Amethyst's property has been extinguished, and we affirm the district court's ruling as to the second easement.

BACKGROUND

Amethyst holds title to a 22-acre parcel of

land located in Santa Fe County, New Mexico, which is referred to as "the 22-acre parcel" throughout this Opinion. The Terhunes own a 5-acre parcel adjacent to Amethyst's property, which is referred to as "Tract 3." The subject of the parties' dispute are two easements that run across Tract 3, which Amethyst claims benefit the 22-acre parcel. The first easement is a 40-foot, non-exclusive roadway and utility easement (the 40-foot easement) providing access to Tract 3 as well as across Tract 3 to the 22-acre parcel. Since at least 1979, access to both properties has been provided by a road known as Coyote Mountain Road located on the 40-foot easement from Old Santa Fe Trail. The second easement at issue in this case is an express easement created in 1981 (the 1981 easement). We set forth the relevant history of each of these easements followed by the procedural history of this case.

The 1981 easement was created by an express written conveyance that described the 1981 easement as "an access-egress-underground utility easement along and across certain real estate described as Tracts 2 and . . . 3."

The 40-foot easement was created by John W. Turner and Marion T. Turner in 1979 in the Turners' warranty deed for sixty acres to Peter Pineda and Lewis Greer. The warranty deed reserved the easement for the benefit of the 22-acre parcel, which was also owned by the Turners at the time. In 1983, the Turners conveyed the 22-acre parcel to MacDuffee, including the 40-foot easement, by warranty deed. Also in 1983, Ocia Peters, Alice Peters, and Caroline Schindler conveyed Tract 3 to Keith MacDuffee via warranty deed. That warranty deed likewise included the existing 40-foot easement providing access to Tract 3, as well as across Tract 3 to the 22-acre parcel. Accordingly, in 1983, MacDuffee owned both Tract 3 and the 22-acre parcel.

On or about February 16, 2001, MacDuffee and his wife signed a warranty deed conveying Tract 3 to the Terhunes. The warranty deed was signed on February 16, 2001, notarized on February 29, 2001, and recorded on March 7, 2001. The Terhunes' warranty deed specifically stated that Tract 3 remained burdened by the 40-foot easement. Thus, at the time it was acquired by the Terhunes, Tract 3 continued to be expressly burdened by the 40-foot easement that provided access to the 22-acre parcel.

The parties agree that the Terhunes required that the MacDuffees sign an "Extinguishment Agreement" to extinguish access across Tract 3 to the 22-acre parcel as a precondition to their purchase of Tract 3. The Terhunes' attorney prepared the Extinguishment Agreement, which was signed by the MacDuffees on March 5, 2001,[1] and by the Terhunes on April 12, 2001. The MacDuffees delivered the Extinguishment Agreement to the Terhunes prior to the March 7, 2001 closing. However, the Terhunes did not record the Extinguishment Agreement when they recorded the warranty deed and boundary survey for Tract 3 on March 7, 2001.

On March 20, 2001, the MacDuffees gave a special warranty deed for the 22-acre parcel

[1] We acknowledge that the parties dispute whether the MacDuffees signed the Extinguishment Agreement on March 5, 2000, the date that was acknowledged by a notary on the document, or on March 5, 2001, which coincided with the closing and sale of Tract 3 to the Terhunes. Although it appears that the year "2000" was a mistake based on trial testimony, the date is not central to our holding.

to Desert Sunrise, LLC (Desert Sunrise), which was recorded by Desert Sunrise on April 25, 2001. Five days later, on April 30, 2001, the Terhunes recorded the Extinguishment Agreement. On the date that the Extinguishment Agreement was recorded, the MacDuffees no longer owned the 22-acre parcel, having already sold that parcel to Desert Sunrise.

Approximately two years after it acquired the 22-acre parcel, Desert Sunrise sold the parcel to Amethyst by a quitclaim deed that was recorded on April 30, 2003. Following the purchase of the property, Amethyst's attorney performed and completed a records search and subsequently prepared corrected deeds that contained the information he located in the records concerning the easements. Amethyst's attorney then prepared corrected deeds for the transfer of the 22-acre parcel from the MacDuffees to Desert Sunrise, as well as for the subsequent transfer from Desert Sunrise to Amethyst. Thus, the MacDuffees signed a special warranty deed corrected as to Desert Sunrise, which was recorded on September 8, 2003. Desert Sunrise next signed a newly conforming and correcting quitclaim deed to Amethyst, which was recorded on September 22, 2003. One of the documents Amethyst's attorney found in his record review, and subsequently referenced in both of the corrected deeds, was the Extinguishment Agreement.

Procedural History

In 2006, Amethyst filed a declaratory action against the Terhunes in district court, claiming that the 40-foot easement and the 1981 easement both provided access to and benefitted the 22-acre parcel. Amethyst specifically claimed that the Extinguishment Agreement was of no force and effect. The district court ruled on summary judgment that the 1981 easement does not benefit the 22-acre parcel. A bench trial took place on all remaining issues shortly thereafter, and the district court entered judgment in favor of the Terhunes on the 40-foot easement, determining that the 40-foot easement had been extinguished across Tract 3. Specifically, the district court found that the Extinguishment Agreement was valid and effective; that the Extinguishment Agreement was in the public record at the time Amethyst acquired the 22-acre parcel; that Desert Sunrise and Amethyst, by their corrected deeds, acquiesced to the vacation of the easement across Tract 3; and that Amethyst was equitably estopped by its prior actions from denying the extinguishment of the 40-foot easement on Tract 3. This appeal timely followed.

DISCUSSION

Amethyst appeals the district court's determination that (1) the 40-foot easement had been extinguished across Tract 3 and (2) that the 1981 easement does not benefit the 22-acre parcel. We address Amethyst's specific arguments with respect to each easement in turn.

A. The 40-Foot Easement

Amethyst contends that the district court improperly entered judgment that the 40-foot easement had been extinguished across Tract 3. Because the relevant facts concerning the 40-foot easement are undisputed and our review is of the district court's legal conclusions, we apply de novo review. *See Johnson v. Yates Petroleum Corp.*, 1999-NMCA-066, ¶ 3, 127 N.M. 355, 981 P.2d 288 (stating that when the relevant facts are undisputed, the legal interpretation of those

facts is subject to de novo review on appeal); *see also Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶ 7, 129 N.M. 698, 12 P.3d 960 ("We review de novo the trial court's application of the law to the facts in arriving at its legal conclusions."). However, to the extent that the district court granted equitable relief in its decision regarding the 40-foot easement, we review under an abuse of discretion standard. *See D'Antonio v. Crowder*, 2011-NMCA-017, ¶ 38, 149 N.M. 426, 249 P.3d 1249.

In addressing Amethyst's arguments regarding the 40-foot easement, we undertake two interrelated inquiries. First, we examine whether the district court erred in determining that the Extinguishment Agreement was valid and effective in terminating the 40-foot easement. Second, we address whether the district court's application of equitable principles in this case was erroneous, and more specifically, whether the court improperly determined that Desert Sunrise and Amethyst, by executing corrected deeds that referenced the Extinguishment Agreement, had "acquiesced" to the vacation of the 40-foot easement across Tract 3.

1. The Extinguishment Agreement

Before addressing whether the Extinguishment Agreement resulted in the termination of the 40-foot easement, we provide some pertinent details regarding its terms and execution by the parties. The parties to the Extinguishment Agreement were the MacDuffees, who were identified therein as the owners of the 22-acre parcel, and the Terhunes, who were named as the owners of Tract 3. The Extinguishment Agreement stated that these two parties "desire[d] to extinguish an easement that burdens the Terhune [p]roperty and benefits the MacDuffee [p]roperty." The easement described in the Extinguishment Agreement was the 40-foot easement. It further stated that "for good and valuable consideration, . . . [t]he parties hereby extinguish th[e 40-foot] easement . . . on . . . Tract 3[,]" and that the Extinguishment Agreement "shall run with the land and shall be binding upon and inure to the benefit of the land, and any person or entity vested in title to the tracts of land described herein." Based on the foregoing language, we consider the Extinguishment Agreement in this case to constitute a release, which is typically defined as a formal agreement between parties to terminate an easement, and we thus apply the law governing extinguishment of easements by release to this case. *See* Restatement (Third) of Property: Servitudes § 7.1 cmt. a (2000) (defining "releases" as "formal documents used to terminate servitudes by conveyance from the benefi[t]ted to the burdened parties"); *id.* § 7.3 (describing extinguishment of easements by release); *see also Sedillo Title Guar., Inc. v. Wagner*, 80 N.M. 429, 432, 457 P.2d 361, 364 (1969) (stating that "[a]n easement may be extinguished by an express written release of the servient estate" and that "[i]n order to be effectual, a release must be executed with the same formalities as are generally required in making transfers of interest in land").

The Extinguishment Agreement further provided that it was to be "effective upon recordation in the records of Santa Fe County, New Mexico." But even if no such provision had been included, we would nonetheless conclude that the Extinguishment Agreement, as a written instrument affecting the title to real estate, was subject to the general recording provisions of NMSA 1978, Sections 14-9-1 to -3 (1886-87, as amended through 1991). *See* § 14-9-1 (providing that

"[a]ll . . . writings affecting the title to real estate shall be recorded in the office of the county clerk of the county or counties in which the real estate affected thereby is situated"). Our Supreme Court recently applied New Mexico's recording provisions to extinguish an unrecorded easement where a good faith purchaser acquired real estate without notice of the easement. *See City of Rio Rancho v. Amrep Sw., Inc.*, 2011-NMSC-037, ¶¶ 42-43, 150 N.M. 428, 260 P.3d 414 (reasoning that the "benefits produced by subjecting easements to extinguishment under the recording act will outweigh the social costs because prospective purchasers will be able to rely on the property records" (alteration, internal quotation marks, and citation omitted)). Although the case before us involves a real estate transaction at the other end of the spectrum—that is, an agreement attempting to terminate, rather than create, an easement—we see no reason to exclude written releases from New Mexico's recording provisions. We thus agree with the Restatement (Third) of Property that releases "should be recorded to protect the servient owner against the possibility that a subsequent bona fide purchaser of the dominant estate will take free of the release." Restatement (Third) of Property: Servitudes § 7.3 cmt. a; *see id.* § 7.15 cmt. a (stating that in order "[t]o protect themselves against revival of a servitude that has been modified or terminated, the parties should record the release or modification agreement").

Turning now to the relevant facts concerning the execution and recording of the Extinguishment Agreement, we observe that the Extinguishment Agreement was signed by the MacDuffees on March 5, 2001, and nearly six weeks later by the Terhunes on April 12, 2001. During this gap in execution, the MacDuffees sold the 22-acre parcel to Desert Sunrise, Amethyst's predecessor, and Desert Sunrise recorded its special warranty deed for the purchase of the 22-acre parcel on April 25, 2001. Five days later, the Terhunes recorded the Extinguishment Agreement. Thus, on the date that the Extinguishment Agreement was recorded, the MacDuffees were no longer the owners of the 22-acre parcel. We must therefore determine whether the Extinguishment Agreement was effective in terminating the 40-foot easement even though it was recorded after Desert Sunrise purchased the 22-acre parcel and recorded its deed.

The district court ruled that since the Extinguishment Agreement was in the public record when Amethyst acquired the 22-acre parcel from Desert Sunrise, Amethyst took title to the 22-acre parcel "with notice of, and subject to, the Extinguishment Agreement." On appeal, Amethyst contends that the district court erred in its application of New Mexico's recording provisions, Sections 14-9-1 to -3, to the facts of this case. Amethyst specifically argues that its predecessor in interest, Desert Sunrise, was a bona fide purchaser who acquired the 22-acre parcel without notice of the Extinguishment Agreement and, consequently, the Extinguishment Agreement was ineffective in terminating the 40-foot easement, such that Desert Sunrise essentially acquired the 22-acre parcel with the 40-foot easement still in place. Having acquired the 22-acre parcel from Desert Sunrise, Amethyst contends that it, too, acquired the 22-acre parcel with the benefit of the 40-foot easement. In addition, Amethyst argues that the Extinguishment Agreement was ineffective in terminating the 40-foot easement because the MacDuffees no longer owned the 22-acre parcel on the date that the Extinguishment Agreement was recorded.

We agree with Amethyst that the

district court erred in its application of New Mexico's recording provisions to the facts of this case. "Section 14-9-3 provides that unrecorded instruments asserting interests in real estate shall not affect the title or rights of purchasers to real estate if the purchaser did not have knowledge of the existence of such unrecorded instruments." *Amrep Sw.*, 2011-NMSC-037, ¶ 40. In this case, Desert Sunrise did not have notice of the Extinguishment Agreement. The original special warranty deed[2] from the MacDuffees to Desert Sunrise did not mention the 40-foot easement or the Extinguishment Agreement. And although the deed corresponding to MacDuffee's sale of Tract 3 to the Terhunes was already recorded at the time Desert Sunrise acquired title to the 22-acre parcel, that deed stated only that Tract 3 was still burdened by the 40-foot easement and did not mention the Extinguishment Agreement. Thus, even if Desert Sunrise had come across the Terhunes' deed for Tract 3 during the course of its record search, the deed would not have alerted Desert Sunrise to the existence of the Extinguishment Agreement. In addition to the lack of record notice, the parties do not dispute that Desert Sunrise did not have actual or inquiry notice of the Extinguishment Agreement at the time that it acquired the 22-acre parcel.

Accordingly, because Desert Sunrise was a bona fide purchaser without notice of the Extinguishment Agreement, it acquired title to the 22-acre parcel free of the Extinguishment Agreement, and the 22-acre parcel continued to be benefitted by the 40-foot easement. *See* Restatement (Third) of Property: Servitudes § 7.15 (providing that "[a]n unrecorded modification or termination of a recorded servitude is not effective against a subsequent taker of an interest in property burdened or benefi[t]ted by the servitude who is otherwise entitled to the protection of the recording act"). Stated differently, the release in this case—the Extinguishment Agreement—was extinguished under Section 14-9-3 by Desert Sunrise's good faith purchaser status. *See* § 14-9-3 (providing that an unrecorded instrument shall not affect the rights or title to property of a purchaser without knowledge of the unrecorded instrument). We find the following example from the Restatement particularly instructive:

> Dawn purchased Lot 2 relying on the record title which showed that Lot 2 was benefi[t]ted by a covenant requiring that any structure built on Lot 1 be located so as not to interfere with the view of the ocean from Lot 2. Prior to Dawn's purchase of Lot 2, the owners of Lots 1 and 2 had entered into a written agreement by which the owner of Lot 2 released the covenant. The release was not recorded until after the conveyance of Lot 2 to Dawn, who had no notice. In the absence of other facts or circumstances, *Dawn takes free of the release; Lot 2 continues to be entitled to the benefit of the covenant.*

Restatement (Third) of Property: Servitudes, § 7.15 cmt. a, illus. 4 (emphasis added). Although the Terhunes later recorded the Extinguishment Agreement, this recording did not revive the Extinguishment Agreement, and it thus remained ineffective against Desert Sunrise. Tract 3 remained burdened by the

[2]Although this warranty deed was later "corrected" by Amethyst's attorney, our discussion here concerns the original special warranty deed that was recorded by Desert Sunrise. We address the impact of the corrected deeds filed by Amethyst's attorney on our ultimate holding later on in this Opinion. *See* Op. ¶¶ 24-27.

40-foot easement during the time period that Desert Sunrise owned the 22-acre parcel.

The Terhunes resolutely ignore Desert Sunrise's bona fide purchaser status in their answer brief and instead focus on the fact that the Extinguishment Agreement was recorded prior to Amethyst's purchase of the 22-acre parcel from Desert Sunrise. Relying on *Angle v. Slayton*, 102 N.M. 521, 697 P.2d 940 (1985), the Terhunes argue that "even though the Extinguishment Agreement was recorded out-of-sequence with [Desert Sunrise's] record title to the 22-acre[parcel]," Amethyst took title subsequent to the recording and therefore had constructive notice of and was subject to the Extinguishment Agreement. We are not persuaded by this argument because the facts of this case bear little resemblance to those found in *Angle*. *Angle* involved an individual who recorded her partial interest in an oil and gas lease several years after having received it and after her grantor had divested itself of all title to the lease. *Id.* at 522, 697 P.2d at 941. However, because she recorded her interest prior to a third party's acquisition of the lease by quitclaim deed, our Supreme Court concluded that the third party had constructive notice of the recorded interest and could not seek the protection of the recording laws. *Id.* at 523-24, 697 P.2d at 942-43. The Court essentially applied the general rule that in order to "prevail over a subsequent purchaser under [New Mexico's notice recording] statute, an owner of an interest in real property must record before the acquisition of a conflicting interest in the same property by the subsequent purchaser." *Id.* at 523, 697 P.2d at 942.

Whereas *Angle* involved a timely recorded instrument, the Terhunes failed to record the Extinguishment Agreement until after Desert Sunrise recorded its deed for the 22-acre parcel. *Angle* is therefore distinguishable and does not support the Terhunes' argument that the Extinguishment Agreement, once recorded, continued to be effective even though Desert Sunrise acquired the 22-acre parcel prior to the recording and without any notice of the Extinguishment Agreement. To permit such a result would circumvent the purpose of our state recording provisions, which is "to protect [good faith] purchasers against loss" and protect their property rights. *See Amrep Sw.*, 2011-NMSC-037, ¶ 39 (alteration in original) (internal quotation marks and citation omitted). We conclude that Amethyst acquired the property interests and rights that Desert Sunrise had at that time in the 22-acre parcel, which included the benefit of the 40-foot easement. That is, the Extinguishment Agreement was ineffective against Amethyst, even though Amethyst's attorney came across the recorded Extinguishment Agreement during the title search prior to purchasing the 22-acre parcel. *See* 14 Richard R. Powell, *Powell on Real Property* § 82.03[2][b], at 82-76 & n.24 (Michael Allan Wolf ed., Matthew Bender 2008) (stating in the context of a hypothetical example, that where a bona fide purchaser later resells his property to a third party, "the bona fide purchaser status would descend to [the third party], even if [the third party] knows of [the unrecorded or late-recorded conflicting] interest. This is necessary, not to protect [the third party], but rather to protect [the bona fide purchaser]. Without this protection, [the bona fide purchaser] might be secure in his own possession, but he would be unable to convey it to anyone else. Such a result would not adequately protect [the bona fide purchaser's] property rights in the real estate."); *see also Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 524 (Minn. 1990) (stating that a bona fide purchaser "may pass

title free of [an] unrecorded interest to a subsequent purchaser who otherwise would not qualify as a bona fide purchaser under the recording act" because otherwise, a "bona fide purchaser would be deprived of the full benefit of the purchase—the right to transfer good title to a subsequent purchaser"); *Hicks v. Loveless*, 714 S.W.2d 30, 32 (Tex. Ct. App. 1986) (stating that if a purchaser acquired a lot without notice of deed restrictions, "the restrictions would not burden his title" and the purchaser could transfer the lot free of the restrictions to a third party, even if the third party "had notice of the restrictions").

Furthermore, Amethyst correctly points out that on the date the Extinguishment Agreement was recorded, the MacDuffees no longer owned the 22-acre parcel and had no authority to extinguish easements benefitting that property. We agree. In *Pollock v. Ramirez*, 117 N.M. 187, 188, 870 P.2d 149, 150 (Ct. App. 1994), the owners of a subdivision attempted to impose restrictive covenants on the subdivision. We held that two attempts by the owners to file and record the restrictive covenants were unsuccessful because the first filing did not comply with the acknowledgment requirements of our recording act, *id.* at 189-90, 870 P.2d at 151-52, and the second filing and recording occurred after the owners no longer owned the property, having already conveyed it to a third party prior to recording. *Id.* at 190, 870 P.2d at 152. Of specific relevance here, we held that the second attempt was invalid in imposing restrictive covenants on the subdivision because the grantors could not place restrictions on land they did not own. *Id.* As in *Pollock*, the Extinguishment Agreement that was recorded by the Terhunes was invalid in terminating the 40-foot easement because the MacDuffees no longer owned the 22-acre parcel on the recording date and consequently had no legal authority to release an easement on property that they no longer owned.

Based on the foregoing, we conclude that the district court erred in determining that the Extinguishment Agreement was valid and effective. However, the district court went on to conclude that by filing corrected deeds that referred to the Extinguishment Agreement, Amethyst was equitably estopped from denying the extinguishment of the 40-foot easement. We therefore consider whether the district court erred in determining that Desert Sunrise and Amethyst, by filing corrected deeds, acquiesced to the extinguishment of the 40-foot easement.

2. The District Court's Grant of Equitable Relief Based on the Corrected Deeds

The parties' dispute in this case was unnecessarily complicated by the actions of Amethyst's attorney following Amethyst's purchase of the 22-acre parcel. By drafting and recording "corrected" deeds for the MacDuffee-Desert Sunrise and Desert Sunrise-Amethyst transfers of the 22-acre parcel, Amethyst's attorney muddied what, otherwise, would have been a relatively straightforward application of the recording provisions to the Extinguishment Agreement by the district court. Both corrected deeds that were signed by all parties to the deeds and recorded by Amethyst described the 22-acre parcel as including:

> Together with a non-exclusive easement . . . (40) feet in width for utilities and right of way . . . said easement . . . *partially vacated in Book 1895, Pages 602-604*, all in the

records of the Clerk of Santa Fe County, New Mexico.

(Emphasis added.) The italicized language above was the recorded Extinguishment Agreement, which we have determined above was invalid and ineffective in terminating the 40-foot easement. The district court, however, determined that the reference to the Extinguishment Agreement in the corrected deeds rendered it effective against Amethyst. The court granted equitable relief to the Terhunes, finding that Amethyst had "acquiesced to the vacation of the easement" and was "equitably estopped" from denying the extinguishment of the 40-foot easement.

While we do not take lightly the actions of Amethyst's attorney, we ultimately conclude that the corrected deeds did not revive the Extinguishment Agreement or otherwise terminate the 40-foot easement. We are not persuaded that the reference in the corrected deeds to the Extinguishment Agreement was adequate to establish an intent of the parties to the corrected deeds to revive the Extinguishment Agreement and terminate the 40-foot easement. *See, e.g.*, *Breliant v. Preferred Equities Corp.*, 918 P.2d 314, 319 (Nev. 1996) ("[T]he mere reference to an extinguished easement in a deed is insufficient, as a matter of law, to revive the easement."); *Capital Candy Co. v. Savard*, 369 A.2d 1363, 1365 (Vt. 1976) (holding that a reference in a deed to an earlier right-of-way that was extinguished by law did not constitute a re-creation of the right-of-way). The use of the term "partially vacated" in the corrected deeds further confirms that the parties to the corrected deeds did not believe that the 40-foot easement was completely extinguished.

Moreover, the district court's application of equitable estoppel in this case was erroneous and, therefore, constituted an abuse of discretion. *See State v. Elinski*, 1997-NMCA-117, ¶ 8, 124 N.M. 261, 948 P.2d 1209 (providing that a misapprehension of the law constitutes an abuse of discretion), *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110. "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy." *Gonzales v. Gonzales*, 116 N.M. 838, 846, 867 P.2d 1220, 1228 (Ct. App. 1993) (internal quotation marks and citation omitted). "[T]he following elements must be shown as to the party claiming estoppel: (1) [l]ack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially." *Mem'l Med. Ctr., Inc. v. Tatsch Constr., Inc.*, 2000-NMSC-030, ¶ 9, 129 N.M. 677, 12 P.3d 431 (internal quotation marks and citation omitted). In this case, the district court entered no findings or conclusions on any of these elements. Our review of the record also does not show any indication that the Terhunes were deceived or misled by Amethyst's conduct or that they relied upon the language of the corrected deeds into believing that the 40-foot easement had been extinguished. Accordingly, there was no factual basis upon which the district court could apply equitable estoppel.

We note that the Terhunes appear to

concede that the district court's application of equitable estoppel was erroneous, and they argue instead that the court "considered and applied estoppel by deed in this case." The district court nowhere in its findings and conclusions stated that it was applying estoppel by deed. Based on the foregoing, we conclude that the district court erred in determining that the 40-foot easement had been extinguished. We hold that the 40-foot easement continues to burden Tract 3.

B. The 1981 Easement

Amethyst also appeals the district court's ruling on summary judgment that the 1981 easement does not provide access to the 22-acre parcel. We review de novo an order granting or denying summary judgment. *See Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280. As noted earlier, the 1981 easement was created by an express written conveyance to the MacDuffees. Amethyst contends on appeal that the language of the 1981 easement, as well as a subsequent easement for encroachment granted by MacDuffee in 1987, indicate that the 1981 easement was intended to benefit the 22-acre parcel. In order to ascertain whether the district court erred in its interpretation of these easements, we examine the language of both of these express easements.

"[A]n easement should be construed according to the intent of the parties." *Amrep Sw.*, 2011-NMSC-037, ¶ 35 (internal quotation marks and citation omitted). In discerning that intent, "we place heavy emphasis . . . on the written expressions of the parties' intent." *Id.* ¶ 37 (omission in original) (internal quotation marks and citation omitted). "[T]he language in a granting instrument should be interpreted to accord with the meaning an ordinary purchaser would ascribe to it in the context of the parcels of land involved." *Id.* (internal quotation marks and citation omitted); *see Sanders v. Lutz*, 109 N.M. 193, 194, 784 P.2d 12, 13 (1989) (providing that an "easement should be construed according to its express and specific terms as a manifestation of the intent of the parties").

Viewing the language of the 1981 easement in light of the foregoing principles, we conclude that the district court correctly determined that this easement was not meant to benefit the 22-acre parcel. The 1981 easement was described in the written conveyance as "an access-egress-underground utility easement *along and across certain real estate described as Tracts 2 and . . . 3*." (Emphasis added.) The 22-acre parcel was not mentioned either in the description of the easement or elsewhere in the written instrument. More significantly, the written instrument included a limitation on the estates that could be served by the 1981 easement—expressly requiring the MacDuffees, as grantees, to "agree, covenant and contract with [the] grantors" that they "will never allow the easement . . . to be extended so as to serve any other lot, tract[,] or property except . . . Tract 1." We view this language as an express manifestation of the parties' intent that the easement was not to serve any lots other than Tracts 2 and 3 (on which the easement ran) and Tract 1. We therefore conclude that the district court did not err in its interpretation of the terms of the 1981 easement.

In addition, the easement for encroachment granted six years later by MacDuffee does not support Amethyst's position that the 1981 easement was intended to provide access to and benefit the 22-acre

parcel. Aspects of the easement for encroachment undercut its validity. The written instrument creating the easement for encroachment named MacDuffee as both the grantor and grantee of the easement. And as Amethyst acknowledges in its briefing, the easement was granted at a time when MacDuffee was the owner of both the 22-acre parcel as well as Tract 3. It is well established that a landowner "cannot have an easement in his own land, as all the uses of an easement are fully comprehended and embraced in his general right of ownership." *Michelet v. Cole*, 20 N.M. 357, 363, 149 P. 310, 311 (1915). As a result, it does not appear that the easement for encroachment is valid and effective, and we therefore do not consider this easement further. *See* Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land* § 3.11, at 3-34 to -35 (2012) (confirming that a landowner cannot obtain an easement in his/her own property and that, generally, "[i]f a landowner attempts to create an express easement in favor of [himself], the purported interest is a nullity"). We affirm the district court's determination that the 1981 easement does not benefit the 22-acre parcel.

CONCLUSION

Based on the foregoing, we reverse in part and affirm in part the judgment of the district court. We reverse the district court's ruling as to the 40-foot easement and conclude that the 40-foot easement has not been extinguished and continues to benefit the 22-acre parcel. We affirm the district court's determination that the 1981 easement does not benefit the 22-acre parcel.

IT IS SO ORDERED.

LINDA M. VANZI, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

J. MILES HANISEE, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-015

Filing Date: March 25, 2013

Docket No. 32,915

STATE OF NEW MEXICO,

Plaintiff-Petitioner and Cross-Respondent

v.

GREG COLLIER,

Defendant-Respondent and Cross-Petitioner.

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OPINION

MAES, Chief Justice.

Greg Collier (Defendant) was indicted in August 2006 for extreme cruelty to animals, a fourth-degree felony, after a horse that Defendant had been training died shortly after a training session. A jury acquitted Defendant of felony extreme cruelty to animals but was unable to reach a unanimous verdict on the lesser included offense of misdemeanor cruelty to animals, on which the district court, at the State's request, instructed the jury without objection from Defendant. The issue on appeal is whether the State can retry Defendant for the lesser offense, which was not explicitly charged in the indictment, without running afoul of the double jeopardy clause of the Fifth Amendment to the United States Constitution. We hold that the State can retry Defendant for the lesser included offense because retrial after a mistrial caused by jury deadlock does not violate the constitutional prohibition on double jeopardy.

In the cross-appeal, we consider whether retrial on the lesser included offense is barred by the period set by the two-year statute of limitations for that crime. The State indicted Defendant for felony extreme cruelty to animals less than seven months after the horse's death, but the district court did not instruct the jury on misdemeanor cruelty to animals until after the statute of limitations period for that offense had run. We hold that the statute of limitations was satisfied because our statutes of limitations prescribe time limits within which the State must commence a prosecution by filing the initial charging document in a case, not time limits within which a defendant must be brought to trial. The statute of limitations does not bar retrial on the lesser included offense.

Additionally, Defendant asks this Court to consider the merits of his speedy trial claim, on which the district court has not ruled. We

decline to consider Defendant's speedy trial claim in the first instance and remand Defendant's case to the district court.

BACKGROUND

The State alleges that on February 13, 2006, Defendant injured a horse he was training, causing the horse's death. On August 31, 2006, a grand jury returned an indictment charging Defendant with one count of extreme cruelty to animals, a fourth degree felony, under NMSA 1978, Section 30-18-1(E) (2001) (amended 2007).

The State has tried Defendant twice under the indictment. The records of Defendant's previous trials are not in the appellate record before this Court. At Defendant's first trial, held in March 2008, the jury failed to reach a verdict on the felony offense, and thus the district court declared a mistrial based on manifest necessity due to jury deadlock.

At the second trial in January 2009, the State again tried Defendant on the felony extreme cruelty charge but this time requested a jury instruction on the lesser included offense of cruelty to animals. *See* § 30-18-1(B)(1) & (D). Defendant did not object to the lesser included offense instruction, and the district court instructed the jury on both offenses. The district court gave the jury the following standard step-down instruction: "If you should have a reasonable doubt as to whether the defendant committed the crime of extreme cruelty to animals, you must proceed to determine whether the defendant committed the included offense of cruelty to animals." UJI 14-6002 NMRA. The jury found Defendant not guilty of the felony charge but failed to reach a unanimous decision on the misdemeanor offense. The district court entered a judgment of acquittal on the felony charge and declared a mistrial based on manifest necessity due to jury deadlock on the misdemeanor charge.

Following the second trial, the district court set Defendant's case for retrial under the original indictment on the lesser included misdemeanor offense of cruelty to animals. One week prior to commencement of the third trial, which was scheduled to begin July 22, 2009, Defendant moved the district court to dismiss his case. Defendant argued that any one of three grounds warranted dismissal: (1) the double jeopardy clause of the Fifth Amendment to the United States Constitution, (2) New Mexico's two-year statute of limitations for the misdemeanor cruelty to animals offense, or (3) Defendant's right to speedy trial. The district court granted Defendant's motion to dismiss because the State did not explicitly charge Defendant with misdemeanor cruelty to animals within the two-year statute of limitations period for that crime.

The State appealed to the Court of Appeals. *See State v. Collier*, No. 29,805, mem. op. (N.M. Ct. App. Jan. 10, 2011). The Court of Appeals held "that cruelty to animals is a lesser included offense of extreme cruelty to animals and that the statute of limitations did not bar trial on the misdemeanor charge." *Id.* at 2. But the Court of Appeals affirmed the district court's dismissal of the case because "subsequent prosecution of the Defendant on the misdemeanor charge following his acquittal on the felony charge would violate the constitutional guarantee against double jeopardy." *Id.*

The State filed a petition for writ of certiorari, arguing that principles of double jeopardy do not preclude the State from retrying Defendant on the lesser included

offense because the jury hung on that charge, causing the district court to declare a mistrial. Defendant filed a cross-petition for writ of certiorari, arguing that a third trial on the misdemeanor charge would violate both the statute of limitations and his right to a speedy trial. We granted certiorari on both petitions.

DISCUSSION

The State may retry Defendant for the misdemeanor offense without violating Defendant's double jeopardy rights

Defendant asks us to uphold the Court of Appeals' conclusion that retrial on the lesser included offense would violate Defendant's double jeopardy rights. Defendant relies only on the double jeopardy clause in the federal constitution and does not argue that the New Mexico Constitution affords him greater protection. *See* N.M. Const. art. II, § 15. Accordingly, we limit our discussion to the federal constitution and review Defendant's double jeopardy claim de novo. *See State v. Gallegos*, 2011-NMSC-027, ¶ 51, 149 N.M. 704, 254 P.3d 655 (providing that double jeopardy claims present questions of constitutional law that we review de novo).

The Fifth Amendment to the United States Constitution guarantees that no person shall be "twice put in jeopardy" for the same offense. U.S. Const. amend. V. The "Double Jeopardy Clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment." *Benton v. Maryland*, 395 U.S. 784, 787 (1969). The double jeopardy clause protects a criminal defendant against (1) "a second prosecution for the same offense after acquittal," (2) "a second prosecution for the same offense after conviction," and (3) "multiple punishments for the same offense." *Gallegos*, 2011-NMSC-027, ¶ 30 (explaining that both the state and federal constitutions provide these three levels of protection).

Defendant asserts that retrial in this case would constitute a second prosecution for the same offense after acquittal. In response, the State relies on *State v. Desnoyers*, arguing that "double jeopardy principles are not implicated" when the State retries a defendant "following a mistrial in which the jury could not reach a verdict on a particular count." 2002-NMSC-031, ¶ 33, 132 N.M. 756, 55 P.3d 968 (internal quotation marks and citation omitted), *abrogated on other grounds as noted by State v. Forbes*, 2005-NMSC-027, ¶ 6, 138 N.M. 264, 119 P.3d 144; *see also State v. O'Kelley*, 113 N.M. 25, 27, 822 P.2d 122, 124 (Ct. App. 1991) (citing New Mexico case law that relies on federal precedent and stating that it "is well established under New Mexico case law that a retrial after a mistrial caused by a hung jury does not violate the constitutional prohibition on double jeopardy"). We agree that the State may retry Defendant for misdemeanor cruelty to animals without implicating Defendant's double jeopardy rights.

A criminal defendant's double jeopardy right to be free from a second prosecution for an offense does not arise until jeopardy has attached and then terminates for that offense. *See Richardson v. United States*, 468 U.S. 317, 325 (1984). In other words, two prerequisites for a meritorious successive-prosecution double jeopardy claim are (1) the attachment of jeopardy and (2) the termination of jeopardy. In a jury trial, jeopardy attaches "when the jury is sworn" to try the case. *State v. Saavedra*, 108 N.M. 38, 41, 766 P.2d 298, 301 (1998). Jeopardy is terminated by the entry of a final judgment, usually a conviction or an acquittal. *See Richardson*, 468 U.S. at

325 (explaining that the protection against double jeopardy "applies only if there has been some event, such as an acquittal, which terminates the original jeopardy"); *see also Illinois v. Somerville*, 410 U.S. 458, 467 (1973) (explaining that "the conclusion that jeopardy has attached begins, rather than ends," the double jeopardy inquiry).

Unlike a conviction or an acquittal, "a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which [the defendant] was subjected." *Richardson*, 468 U.S. at 326. Rather, retrial following a hung jury "is considered a continuation of the first [trial], and the defendant is thus placed in jeopardy only once." *Desnoyers*, 2002-NMSC-031, ¶ 33 (internal quotation marks and citation omitted). The United States Supreme Court has followed this rule for over one hundred and eighty years. *See United States v. Perez*, 22 U.S. 579, 579-80 (1824) (holding that if the jury is unable to agree on a verdict and the trial court discharges the jury for "manifest necessity," double jeopardy does not bar retrial of the defendant for the "same offence"). Likewise, New Mexico courts have long held that a retrial following a mistrial declared for manifest necessity does not implicate the double jeopardy clause. *See State v. Martinez*, 120 N.M. 677, 678, 822 P.2d 715, 716 (1995); *see also O'Kelley*, 113 N.M. at 27-28, 822 P.2d at 124-25 (citing cases). "This rule accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *O'Kelley*, 113 N.M. at 28, 822 P.2d at 125 (internal quotation marks and citation omitted).

Applying these principles to this case, we conclude that jeopardy attached to the felony offense, extreme cruelty to animals, at Defendant's first trial. Jeopardy on the felony offense did not terminate at the end of the first trial because the district court declared a mistrial for manifest necessity due to jury deadlock. Thus, jeopardy continued on the felony offense during Defendant's second trial, when it also attached to the lesser included misdemeanor offense via the jury instruction on that offense. The district court's final judgment of acquittal on the felony offense at the end of the second trial terminated jeopardy for the felony offense. But Defendant remains in continuing jeopardy for the misdemeanor offense because the jury was unable to reach a verdict on that offense. Accordingly, we conclude that the State may retry Defendant for the lesser included offense of misdemeanor cruelty to animals without violating Defendant's double jeopardy rights.

Defendant's arguments to the contrary do not change our conclusion. Defendant acknowledges the rule of continuing jeopardy discussed above but insists that principles of continuing jeopardy should not apply in this case because (1) retrial is barred under *Brown v. Ohio*, 432 U.S. 161 (1997); (2) Defendant has been acquitted of the only offense explicitly charged in the indictment, and the State seeks to retry Defendant for the same alleged conduct; (3) the issue preclusion aspect of double jeopardy bars retrial; and (4) it would be unfair to allow retrial under the circumstances of this case.

Relying on *Brown*, 432 U.S. 161, Defendant argues that the State cannot retry him for misdemeanor cruelty to animals because he has been acquitted of—what is for double jeopardy purposes—the "same offense." In *Brown*, the United States Supreme Court addressed whether the Fifth Amendment precluded Ohio from prosecuting

the defendant for automobile theft after the defendant already had been prosecuted and punished—based on the same conduct—for the lesser included offense of joyriding. *Id.* at 162-63. The Supreme Court concluded that automobile theft and joyriding were the same offense under Ohio law for double jeopardy purposes and held that the defendant could not be subject to prosecution for the greater offense after he had been convicted of and punished for the lesser included offense. *Id.* at 167-69.

Defendant argues that misdemeanor cruelty to animals is a lesser included offense of felony extreme cruelty to animals and that, as in *Brown*, the State is precluded from bringing successive prosecutions for the greater and lesser included offenses because they constitute the same offense for purposes of our double jeopardy analysis. But unlike *Brown*, where the defendant's initial misdemeanor charge resulted in a conviction prior to the second prosecution, the jury in this case never reached a verdict on the misdemeanor charge, and thus no multiple indictments or successive prosecutions ever occurred. *See id.* at 165 n.5 (noting that the Supreme Court was "not concerned . . . with the double jeopardy questions that may arise when a defendant is retried on the same charge after a mistrial"). Principles of double jeopardy do not prohibit the State from trying a defendant for greater and lesser included offenses in a single prosecution, as occurred in this case. *See Martinez*, 120 N.M. at 678, 905 P.2d at 716 (explaining that *Brown* does not apply where multiple charges are prosecuted simultaneously). Thus, *Brown* is inapplicable.

Defendant also contends that the State cannot retry him for the uncharged, lesser included misdemeanor offense because a jury acquitted him of the sole offense explicitly charged in the indictment. Defendant's position fails to recognize the significance of Rule 5-611(D) NMRA, which provides that "[i]f so instructed, the jury may find the defendant guilty of an offense necessarily included in the offense charged," i.e., a lesser included offense. *Id.*; *see State v. Meadors*, 121 N.M. 38, 41 n.2, 908 P.2d 731, 734 n.2 (1995) (noting that the terms "lesser-included" and "necessarily-included" are interchangeable in the context of Rule 5-611(D)). The principle embodied in Rule 5-611, "that a defendant, charged with a greater offense, can be convicted of an uncharged lesser included offense, has been adopted by virtually every jurisdiction in the United States which has passed upon the issue." *Hagans v. State*, 559 A.2d 792, 800-01 & nn.5-6 (Md. 1989) (citing numerous authorities, including judicial decisions, statutes from twenty-nine jurisdictions, and procedural rules from six jurisdictions).

For example, in *United States v. Gooday*, 714 F.2d 80 (9th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984), the Ninth Circuit Court of Appeals rejected the defendant's argument that retrial on an uncharged, lesser included offense would violate the defendant's double jeopardy rights. The defendant in *Gooday* "was tried under a one-count indictment for first-degree murder." *Id.* at 81. At the defendant's request, the trial court instructed the jury "on the lesser included offenses of second-degree murder, voluntary manslaughter, and involuntary manslaughter." *Id.* The jury acquitted the defendant of first-degree murder, the only offense expressly charged in the indictment, but failed to reach a verdict on the three lesser included offenses. *Id.* On appeal, the defendant argued that retrial on the lesser included offenses would violate his double jeopardy rights because the jury had acquitted

him of the sole count in the indictment. *Id.* at 81-82.

The Ninth Circuit rejected the defendant's argument, relying in part on the Federal Rules of Criminal Procedure under which a "defendant may be found guilty of any lesser offense necessarily included in the offense charged." *Id.* at 82 (citing Fed. R. Crim. P. 31(c)(1)). In light of this rule, the Ninth Circuit concluded that in cases where the trial court has instructed the jury on lesser included offenses, the "lesser included offenses should be treated as if they had been specified in separate counts of the indictment." *Id.* at 83. Alternatively, if the trial court has not instructed the jury on any lesser included offenses, "the jury's verdict [must be] limited to whether the defendant committed the crime explicitly charged in the indictment. In such cases, an acquittal on the crime explicitly charged necessarily implies an acquittal on all lesser offenses included within that charge." *Id.* at 82 (citing *In re Nielsen*, 131 U.S. 176, 189-90 (1889)). The Ninth Circuit held that the "acquittal on the indictment's first-degree murder count [did] not preclude retrial on the three lesser included offenses on which the jury was instructed." *Id.* at 83.

Like the Federal Rules of Criminal Procedure, our Rule 5-611(D) provides a mechanism through which a defendant can be retried for an uncharged, lesser included offense following a hung jury on that offense without violating double jeopardy. If a district court properly instructs a jury on a lesser included offense, then that offense should be treated as if the State had explicitly included it in the charging document. In this case, the district court instructed the jury on both the charged felony offense, extreme cruelty to animals, and the lesser included misdemeanor offense, cruelty to animals, without any objection from Defendant. Accordingly, we treat the misdemeanor offense as if it had explicitly been included in the indictment, and we conclude that acquittal on the felony offense does not raise a double jeopardy bar to retrial on the misdemeanor offense following a hung jury.

Defendant also argues that double jeopardy bars his retrial as a matter of issue preclusion because the jury already determined an issue of ultimate fact—that he did not cruelly abuse an animal—by acquitting Defendant of the felony charge. We disagree.

Issue preclusion in the double jeopardy context "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970) (applied by this Court in *Rodriguez*, 2005-NMSC-091, ¶ 15, 138 N.M. 21, 116 P.3d 92). Thus, we must determine whether Defendant's acquittal of felony extreme cruelty to animals necessarily decided all of the issues of ultimate fact that the State would have to prove in a retrial on the misdemeanor offense.

With regard to the felony offense, the district court instructed the jury that in order "to find the defendant guilty of extreme cruelty to animals, the state must prove . . . beyond a reasonable doubt" that the "defendant intentionally or maliciously tortured, mutilated or injured a horse." We recognize that by acquitting Defendant of the felony offense the jury likely concluded that the State failed to prove one or more elements of the crime beyond a reasonable doubt. On the record before us, however, we cannot determine with any degree of certainty which

issues of ultimate fact the jury actually determined. For example, the jury may have concluded that the prosecution failed to prove that Defendant acted with the mens rea required for the felony offense, "intentionally or maliciously." Section 30-18-1(E). But whether Defendant acted maliciously or intentionally would be irrelevant in a third trial for misdemeanor cruelty to animals, in which the State would have to prove that Defendant acted with a different mens rea, criminal negligence. *See* § 30-18-1(B)(1) (defining cruelty to animals as "negligently mistreating, injuring, killing without lawful justification or tormenting an animal"); *see also Santillanes v. State*, 115 N.M. 215, 222, 849 P.2d 358, 365 (1993) (presuming that the word "negligence" in a criminal statute means criminal as opposed to civil negligence, absent a contrary indication from the Legislature); UJI 14-133 NMRA (defining criminal negligence). We conclude that the issue preclusion aspect of double jeopardy does not impede the State from retrying Defendant for misdemeanor cruelty to animals.

Finally, Defendant argues that, as a matter of fairness in its review of his double jeopardy claim, this Court should consider federal due process considerations, even though Defendant concedes he makes this argument without support. The State contends that this Court should not address Defendant's due process argument because, as an argument not raised in either the State's petition or Defendant's cross-petition for writ of certiorari, it is not properly before this Court. We agree with the State that "it is improper for this Court to consider any questions except those set forth in the petition[s] for certiorari." *Fikes v. Furst*, 2003-NMSC-033, ¶ 8, 134 N.M. 602, 81 P.3d 545 (citing Rule 12-502(C)(2) NMRA). Moreover, Defendant does not appear to have preserved his due process argument. *See* Rule 12-216(A) NMRA ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked[.]"). We conclude that Defendant's due process argument is not properly before the Court, and we decline to address it.

Finding none of Defendant's arguments persuasive, we hold that the State may retry Defendant for misdemeanor cruelty to animals without violating the double jeopardy clause of the Fifth Amendment to the United States Constitution.

The State indicted Defendant within the statute of limitations period for misdemeanor cruelty to animals

The district court dismissed Defendant's case because the State did not charge Defendant with misdemeanor cruelty to animals within the statute of limitations period for that offense. In his cross-petition for writ of certiorari, Defendant asks this Court to uphold the district court's ruling.

The parties do not dispute the facts relevant to the statute of limitations in this case. "When facts relevant to a statute of limitations issue are not in dispute," the Court reviews de novo "whether the district court correctly applied the law to the undisputed facts." *State v. Kerby*, 2007-NMSC-014, ¶ 11, 141 N.M. 413, 156 P.3d 704 (internal quotation marks and citation omitted).

The parties agree that the Legislature established the relevant statute of limitations in NMSA 1978, Section 30-1-8 (2005) (amended 2009). Under Section 30-1-8(C), the State cannot prosecute a person for a misdemeanor offense, such as misdemeanor cruelty to animals, "unless the indictment is

found or information or complaint is filed . . . within two years from the time the crime was committed." For a fourth degree felony, such as extreme cruelty to animals, the State cannot prosecute a person "unless the indictment is found or information or complaint is filed . . . within five years from the time the crime was committed." Section 30-1-8(B).

The State argues that it filed the indictment within the limitations period for both felony extreme cruelty to animals and misdemeanor cruelty to animals, satisfying the requirements of Section 30-1-8 for both offenses. We agree. Section 30-1-8 specifies the time period within which the State must commence a prosecution by filing the initial charging document in a case, either a complaint, an information, or an indictment. *See id.*; *see also* Rule 5-201(A) NMRA. In this case, the State alleges that Defendant's conduct caused the horse's death on or about February 13, 2006. A grand jury returned the indictment on August 31, 2006, charging Defendant with extreme cruelty to animals in violation of Section 30-18-1(E). We conclude that the State commenced the prosecution within seven months of the alleged crime, well before the statute of limitations period ran for either felony extreme cruelty to animals or misdemeanor cruelty to animals.

Despite this straightforward application of Section 30-1-8 to the undisputed facts, Defendant asks us to affirm the district court's dismissal of his case because the State did not request a lesser included offense instruction until his second trial in January 2009, well after the two-year statute of limitations periods had run for the misdemeanor offense. In Defendant's view, if an indictment includes an uncharged lesser included offense, a conviction for that lesser included offense is time barred unless the trial court *instructs the jury* on that lesser included offense within the limitations period for that offense.

Adopting Defendant's approach would ignore the purpose of a criminal statute of limitations, which is to ensure the timely *initiation of a prosecution*. *See* § 30-1-8; *cf. Kerby*, 2007-NMSC-014, ¶ 13 (explaining that the purpose of a criminal statute of limitations "is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions" (internal quotation marks and citations omitted)). In addressing Defendant's statute of limitations argument, our inquiry is limited to the timeliness of the charging document itself, not the timeliness of trial.

Defendant's argument conflates the statute of limitations issue with the separate issue of whether the district court erred by instructing the jury on misdemeanor cruelty to animals as a lesser included offense. *See Meadors*, 121 N.M. at 41-44, 908 P.2d at 734-37 (explaining the "cognate approach" that a district court should use in determining whether to grant the State's request for a lesser included offense instruction). Defendant did not object at trial to the district court's jury instruction on misdemeanor cruelty to animals, and Defendant does not challenge the jury instructions on appeal. *Cf. State v. Boeglin*, 105 N.M. 247, 250, 731 P.2d 943, 946 (1987) (explaining that where a defendant fails to preserve an objection to jury instructions at trial, the Court may still grant relief in cases of fundamental error). Because Defendant does not challenge the jury instructions that the district court gave the jury, we assume without deciding that the district court did not err by instructing the jury on misdemeanor cruelty to animals as a lesser included offense of felony

extreme cruelty to animals. *See* Rule 5-611(D).

Defendant also contends he lacked notice that he would be required to mount a defense to misdemeanor cruelty to animals because he was not originally charged with the lesser included offense. We agree that "[p]rocedural due process under the Fourteenth Amendment to the United States Constitution requires the State to provide reasonable notice of charges against a person and a fair opportunity to defend." *State v. Dominguez*, 2008-NMCA-029, ¶ 5, 143 N.M. 549, 178 P.3d 834 (internal quotation marks and citation omitted). But we disagree that Defendant was entitled to any additional notice. This Court has long recognized that notice of a criminal charge necessarily includes notice of any lesser included offenses. *See Meadors*, 121 N.M. at 44-45, 908 P.2d at 737-38 (explaining that the "instrument" charging a defendant with a greater offense gives the defendant adequate notice of potential lesser included offenses even though lesser included offense instructions are not given until the district court has seen the "the evidence adduced at trial"); Rule 5-611(D) (providing that a defendant may be convicted of a lesser included offense and differentiating between "the offense charged" and "an offense necessarily included"); *see also Gooday*, 714 F.2d at 82 (explaining that an indictment gives the defendant notice of the charges against which the defendant may have to defend, including the explicit charges and any offenses necessarily included in those charges).

Finally, in support of his statute of limitations argument Defendant cites a law review article and several cases from other jurisdictions addressing how a court should handle lesser included offenses when the government has filed the initial charging document within the limitations period for the explicitly charged offense but after the period has run on lesser included offenses. *See Spaziano v. Florida*, 468 U.S. 447, 450 (1984); *Cowan v. Superior Court*, 926 P.2d 438, 439 (Cal. 1996); *Tucker v. State*, 417 So. 2d 1006, 1009 (Fla. Dist. Ct. App. 1982); *State v. Delisle*, 648 A.2d 632, 634 (Vt. 1994); *State v. Muentner*, 406 N.W.2d 415, 417 (Wis. 1987); Alan L. Adlestein, *Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial*, 37 Wm. & Mary L. Rev. 199, 200-03 (1995). We conclude that such authorities are not relevant here because in this case the State filed an indictment on the felony, which necessarily included the lesser included misdemeanor offense, within the limitations period for both the charged felony offense and the lesser included misdemeanor offense.

A timely filed charging document stops the statute of limitations clock from running on any explicitly charged offenses and any lesser included offenses upon which the district court properly instructs the jury at trial. We hold that the statute of limitations does not bar a third trial on misdemeanor cruelty to animals because the State commenced the prosecution by timely filing the indictment within the two-year statute of limitations period for that offense.

The Court will not consider Defendant's speedy trial claim because the district court has not ruled on that claim

Defendant argues that, even if we reject his double jeopardy and statute of limitations claims, we should affirm the district court's dismissal of his case because the State violated his constitutional right to speedy trial. *See* U.S. Const. amend. VI

(guaranteeing criminal defendants "the right to a speedy and public trial, by an impartial jury"); N.M. Const. art. II, § 14 ("In all criminal prosecutions, the accused shall have the right to . . . a speedy public trial by an impartial jury.").

New Mexico courts evaluate speedy trial claims using the framework of *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972), to balance "the following four factors: (1) the length of the delay, (2) the reasons given for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) prejudice to the defendant." *State v. Urban*, 2004-NMSC-007, ¶ 11, 135 N.M. 279, 87 P.3d 1061. In order to rule on a speedy trial motion the district court must first "make certain factual determinations and legal conclusions." *State v. Spearman*, 2012-NMSC-023, ¶ 19, 283 P.3d 272 (internal quotation marks and citation omitted). On appeal, "we give deference to the [district] court's factual findings, but we review the weighing and the balancing [of] the *Barker* factors de novo." *Id.* (alterations in original) (internal quotation marks and citations omitted).

The State contends that it would be inappropriate for this Court to consider the merits of Defendant's speedy trial claim in the absence of any factual findings from the district court. Defendant filed two speedy trial motions in the district court, one on January 15, 2009, and one on July 15, 2009. But the parties do not cite, and this Court has not found, any portion of the record demonstrating that the district court ever held an evidentiary hearing or ruled on the motions. Instead, the parties agree on appeal that the district court never issued a ruling on either of Defendant's speedy trial motions. Nonetheless, Defendant asserts that this Court is in as good a position as the district court to analyze whether a third trial would violate Defendant's right to a speedy trial because this Court reviews speedy trial issues de novo.

We disagree with Defendant and decline to consider his speedy trial claim absent a ruling by the district court. Ruling on a speedy trial motion requires a court to weigh factually based factors, and "[f]act-finding is a function of the district court." *State v. Rojo*, 1999-NMSC-001, ¶ 52, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citation omitted). If a defendant does not raise a constitutional speedy trial issue before the district court, there is nothing for an appellate court to review. *Id.* ¶ 51 (citing *State v. Valdez*, 109 N.M. 759, 763, 790 P.2d 1040, 1044 (Ct. App. 1990)); *see also State v. Lopez*, 2008-NMCA-002, ¶ 25, 143 N.M. 274, 175 P.3d 942 ("It is well-settled law that in order to preserve a speedy trial argument, Defendant must properly raise it in the lower court and invoke a ruling."). If Defendant reasserts his speedy trial claim on remand, the district court should evaluate that claim under the four *Barker* factors. *See Barker*, 407 U.S. at 530-32.

CONCLUSION

We conclude that the district court erred by dismissing Defendant's case and hold that retrial on misdemeanor cruelty to animals is not barred by the two-year period set by the statute of limitations for that offense. We reverse the Court of Appeals and hold that the State can retry Defendant for misdemeanor cruelty to animals without violating the double jeopardy clause of the Fifth Amendment to the United States Constitution. We remand to the district court for further proceedings consistent with this Opinion.

IT IS SO ORDERED.

PETRA JIMENEZ MAES, Chief Justice

WE CONCUR:

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-016

Filing Date: March 28, 2013

Docket No. 33,077

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

ALICIA VICTORIA GONZALES,

Defendant-Respondent.

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for Respondent

OPINION

BOSSON, Justice.

After an evening of heavy drinking, Alicia Gonzales (Defendant) got into her car and began to drive to the Albuquerque International Sunport to pick up her husband. On I-25 near the Avenida Cesar Chavez exit, Defendant, drunk and driving recklessly, sideswiped one vehicle and plowed into the back of another in which two children, Manuel Delfino and Deandre Fortune, were riding. While the adults in the front seats were uninjured, the children were not so fortunate. The crash killed Manuel and resulted in minor injuries to Deandre.

Defendant was later indicted on multiple charges stemming from the crash. She was charged with one count of intentional child abuse resulting in death (or negligent in the alternative), *see* NMSA 1978, § 30-6-1(F & H) (2005) (amended 2009), one count of intentional child abuse *not* resulting in death or great bodily harm (or negligent in the alternative), *see* NMSA 1978, § 30-6-1(E) (2005) (amended 2009), one count of aggravated DWI, *see* NMSA 1978, § 66-8-102 (2005) (amended 2010), and one count of leaving the scene of an accident, *see* NMSA 1978, §§ 66-7-202 (1978), -203 (1989). Curiously, the State did not charge Defendant with vehicular homicide. *See* NMSA 1978, § 66-8-101 (2004).

At trial, Defendant was convicted of negligent child abuse, but that charge was later reversed by the Court of Appeals for lack of substantial evidence. She was also convicted of DWI and leaving the scene of an accident which are not relevant to this appeal. The State, barred by double jeopardy from retrying Defendant for child abuse, then sought to prosecute Defendant for vehicular homicide, a charge the State could have brought initially but chose not to. Once again, the Court of Appeals ruled against the State based on principles of double jeopardy. On certiorari, we review only that portion of the Court of Appeals opinion denying the State a new trial for vehicular homicide. We affirm the Court of Appeals but on somewhat different grounds.

BACKGROUND

Trial Court Proceedings

Child abuse is defined by statute to include: "knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be: (1) placed in a situation that may endanger the child's life or health . . . ." Section 30-6-1(D). Before trial, Defendant moved to dismiss the child abuse charges, arguing that to be charged with child abuse, she must have been aware that her actions endangered a known, *particular* child. For example, if the children had been passengers in her own vehicle, then her conduct would have fit the statutory profile of child abuse. *State v. Castañeda*, 2001-NMCA-052, ¶ 11, 130 N.M. 679, 30 P.3d 368. Since these children were not her passengers, however, she was not even aware of their presence when she caused their injuries, and thus, her conduct necessarily did not fall within the meaning of child endangerment.

Responding to the motion to dismiss, the State disagreed with Defendant's characterization of the law. Specifically, the State argued that it "is not required to show that the [D]efendant had the specific intent of harming a particular child. Rather, the State must only show the [D]efendant acted with reckless disregard." The State also argued, in the alternative, that if it were required to show that Defendant was aware of the children in the other vehicle, the State was prepared to do so with testimony from other motorists on the road that night who allegedly saw the children in the back seat of their car.

The district court held a hearing on the motion. Significantly, the court asked the prosecutor why the State had not charged Defendant with vehicular homicide in the alternative. Initially, the prosecutor could not answer the question, adding only that she "wish[ed] they had charged the alternative vehicular homicide just to be safe." The State later characterized it as a discretionary

decision on the part of the district attorney's office.

Following argument, the district court ruled in favor of the State. The court explained that "the current statute as it stands under child abuse does not necessitate or need an awareness factor." The court further concluded "that all that's required as far as knowledge is that the [D]efendant knows or should have known that the defendant's conduct created the substantial or foreseeable risk" without actually being aware of the danger to an identifiable child.

During trial, at the close of the State's case, Defendant raised the same issue in the form of a motion for directed verdict on the child abuse charges. Defendant was again denied.

Ultimately, the jury found Defendant guilty of one count of child abuse resulting in death, negligently caused, one count of child abuse not resulting in death or great bodily harm, negligently caused, aggravated DWI, and leaving the scene of an accident. The jury was unable to agree on a verdict for intentional child abuse. The State never requested an instruction on vehicular homicide, and the jury was never asked to consider that crime. The district court sentenced Defendant to 15 years, 364 days, partially suspended, for a total of 12 years in prison. Defendant appealed, continuing to argue that the crime of child abuse based on child endangerment required some knowledge of an identifiable child present and at risk.

The Court of Appeals

Before the Court of Appeals, Defendant again emphasized that "she was unaware that her conduct posed a particular and foreseeable risk of likely injury to the children" and importantly, that there was no evidence to the contrary. *State v. Gonzales*, 2011-NMCA-081, ¶ 2, 150 N.M. 494, 263 P.3d 271. The Court of Appeals agreed with Defendant. *Id.*

The Court concluded that to be convicted of child abuse a "defendant's conduct must create a substantial and foreseeable risk of harm to an identified or identifiable child within the zone of danger." *Id.* ¶ 21. Further, "[t]he child victim cannot become identified simply by being injured by Defendant: identification of the child and the risk to that child must precede the injury." *Id.* In addition, "[t]he defendant must do more than act in a way that endangers the public as a whole." *Id.* ¶ 24. This Court did *not* grant certiorari to review the Court of Appeals opinion in this respect.

Defendant also argued to the Court of Appeals that if her child abuse convictions were overturned, double jeopardy would also preclude a new charge of vehicular homicide, a charge that could have been brought initially but was not. *Id.* ¶ 3. Again, the Court of Appeals agreed. *Id.* Relying on *State v. Meadors*, 121 N.M. 38, 908 P.2d 731 (1995), the Court concluded that the offense of vehicular homicide, under the facts of this case, was a lesser included offense of child abuse. *Gonzales*, 2011-NMCA-081, ¶ 36. Accordingly, double jeopardy barred "any subsequent prosecution for vehicular homicide." *Id.* ¶ 38. We granted certiorari on the issue of subsequent prosecution and now proceed to that analysis.

DISCUSSION

Standard of Review

"A double jeopardy challenge is a constitutional question of law which we review de novo." *State v. Swick*, 2012-NMSC-018, ¶ 10, 279 P.3d 747.

Double Jeopardy

The Fifth Amendment of the United States Constitution states, among other things, that no person "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The New Mexico Constitution contains a similar provision. N.M. Const. art. II, § 15.

The Double Jeopardy Clause "protects against successive prosecutions for the same offense after acquittal or conviction and against multiple criminal punishments for the same offense." *Monge v. California*, 524 U.S. 721, 727-28 (1998). The United States Supreme Court has stated "that the prohibition against multiple trials is the controlling constitutional principle." *United States v. DiFrancesco*, 449 U.S. 117, 132 (1980) (internal quotation marks and citation omitted). "This prohibition stops the State, with all its resources and power, from mounting abusive, harassing reprosecutions, which subject a defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent." *Blueford v. Arkansas*, 132 S. Ct. 2044, 2053-54 (2012) (internal quotation marks and citations omitted).

The State makes various arguments as to why double jeopardy should not preclude a trial for vehicular homicide, starting with the fact that Defendant was never charged with that particular offense. The State maintains that "[i]f vehicular homicide is a[n] [uncharged] lesser[]included offense, retrial is not barred." The State also argues that "[t]he finding of insufficient evidence on the greater charge [of child abuse] does not preclude a retrial on the lesser charge especially when the jury was not instructed on the lesser charge . . . . This second prosecution does not violate the double jeopardy prohibition against successive prosecutions." For the following reasons, we are not persuaded.

It is settled law that if a conviction is overturned for insufficient evidence, the reversal is treated as an acquittal for double jeopardy purposes. As the United States Supreme Court has stated,

> Since we necessarily afford absolute finality to a jury's *verdict* of acquittal-no matter how erroneous its decision-it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

Burks v. United States, 437 U.S. 1, 16 (1978). Thus, "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient . . . ." *Id.* at 18. The State does not get a second chance to amass additional evidence of guilt.

In addition, an acquittal of a greater offense prevents retrial of lesser included offenses that could have been, but were not submitted to the jury. According to the Ninth Circuit,

> If no instructions are given on lesser included offenses, the jury's

> verdict is limited to whether the defendant committed the crime explicitly charged in the indictment. In such cases, an acquittal on the crime explicitly charged necessarily implies an acquittal on all lesser offenses included within that charge. *In re Nielsen*, 131 U.S. 176, 189-190, 9 S.Ct. 672, 676-677, 33 L.Ed. 118 (1889). An acquittal on the explicit charge therefore bars subsequent indictment on the implicit lesser included offenses. *Id.*

United States v. Gooday, 714 F.2d 80, 82 (9th Cir. 1983).

In this case, the Court of Appeals clearly overturned Defendant's child abuse convictions for insufficient evidence, stating that "double jeopardy applies where Defendant challenges her convictions for sufficiency of the evidence and *she has successfully done so* with regard to negligent child abuse here . . . ." *Gonzales*, 2011-NMCA-081, ¶ 33 (emphasis added). We acknowledge that the Court overturned these convictions based on a new interpretation of the child abuse statute, one that required additional evidence from the prosecution. *Id.* ¶ 1 (describing the issue presented as "an issue of first impression"). The State had to prove that Defendant, while driving recklessly, was aware or should have been aware of the children in the other car and the risk of harm her conduct posed to them. The State failed to produce such evidence. "The State failed to prove that Defendant's behavior endangered a particular child that was foreseeable at the time of the accident." *Id.* ¶ 32. Applying the principle of *Gooday*, therefore, reversal of the greater offense, child abuse, for insufficient evidence would also appear to "bar[] [a] subsequent indictment on the implicit lesser included offenses" that were never presented to the jury. 714 F.2d at 82.

The State failed to attack directly the sufficiency of the evidence determination, and for good reason. Such a ruling is not without precedent in New Mexico law. *See, e.g.*, *State v. Kirby*, 2007-NMSC-034, 141 N.M. 838, 161 P.3d 883 (providing a new interpretation of a criminal statute and concluding that, under the new interpretation, the evidence was sufficient to support the conviction); *State v. Valino*, 2012-NMCA-105, 287 P.3d 372 (interpreting the battery on a health care worker statute to include knowledge as a required element and concluding that the evidence was sufficient to support the conviction). Accordingly, if vehicular homicide is a lesser included offense of negligent child abuse in the context of this case, then double jeopardy bars a new trial on that charge.

Rather than attack the sufficiency of the evidence determination, the State argues that *Montana v. Hall*, 481 U.S. 400 (1987), governs the double jeopardy analysis and does not bar retrial. In that case, Hall was charged with felony sexual assault of his stepdaughter. *Id.* at 401. On the eve of trial, Hall filed a motion to dismiss, claiming that he could only be prosecuted for the more specific crime of incest. *Id.* The motion was granted and the state promptly filed a new information charging Hall with incest, for which he was duly convicted. *Id.*

On appeal, Hall reversed fields, arguing that he could not be convicted of incest, but only sexual assault, because the legislature had amended the incest statute to include stepchildren only *after* he had

assaulted his stepdaughter. *Id.* at 401-02. The Montana Supreme Court agreed with Hall and after declaring the incest conviction void, barred retrial for sexual assault on double jeopardy grounds. *Id.* at 402. The United States Supreme Court reversed, concluding that the "case falls squarely within the rule that retrial is permissible after a conviction is reversed on appeal." *Id.* at 404.

We find the State's reliance on *Hall* misplaced. Most importantly the *Hall* Court reiterated the "venerable principl[e] of double jeopardy jurisprudence that [t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, poses no bar to further prosecution on the same charge." *Id.* at 402 (internal quotation marks and citations omitted). The reversal in *Hall* was based on grounds *other than insufficient evidence*, which enabled the Court to conclude that the "case falls squarely within the rule" that reversal does not bar retrial. *Id.* at 404. The Court stated that Hall's conviction was reversed "on grounds unrelated to guilt or innocence," and because "[t]here is no suggestion that the evidence introduced at trial was insufficient to convict respondent," the Court did not preclude a subsequent retrial. *Id.* at 403. Thus, the holding of *Hall* simply does not apply to a case such as this, in which the Court of Appeals specifically determined that the child abuse convictions were unsupported by substantial evidence.

Disposing of *Hall*, we return to the Court of Appeals' conclusion that, under the facts of this case, vehicular homicide was a lesser included offense of negligent child abuse resulting in death, and as a result, double jeopardy barred a new trial. *Gonzales*, 2011-NMCA-081, ¶ 36. We have previously stated that "[t]he Double Jeopardy Clause prohibits successive prosecutions for two offenses arising out of the same conduct if either one is a lesser[]included offense within the other." *State v. Meadors*, 121 N.M. 38, 41, 908 P.2d 731, 734, (1995). For the reasons that follow, however, we do not find it necessary to decide whether vehicular homicide is such a lesser included offense. Instead, we come to a similar conclusion based on the related principle of joinder.

Compulsory Joinder

Our rules of criminal procedure require that similar offenses be joined in one prosecution and not be brought piecemeal by way of sequential trials. Rule 5-203(A) NMRA states:

> Two or more offenses *shall* be joined in one complaint, indictment or information with each offense stated in a separate count, if the offenses, whether felonies or misdemeanors or both:
>
> (1) are of the same or similar character, even if not part of a single scheme or plan; or
>
> (2) are based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan.

(Emphasis added.) The rule is mandatory; it "is not a discretionary or permissive rule; it demands that the State join certain charges." *State v. Gallegos*, 2007-NMSC-007, ¶ 10, 141

N.M. 185, 152 P.3d 828; *accord State v. Paiz*, 2011-NMSC-008, ¶ 10, 149 N.M. 412, 249 P.3d 1235. Under the facts of this case, vehicular homicide and child abuse, two crimes "based on the same conduct"—Defendant's intoxicated driving resulting in death to the victim—satisfy the criteria of the Rule. The State had no choice but to join these two offenses "in one complaint, indictment or information," if it wanted to pursue them both.

We acknowledge that we raise this issue sua sponte. Neither the State nor Defendant specifically claimed that retrial was barred by Rule 5-203(A). In terms of barring successive prosecutions, however, compulsory joinder and double jeopardy are closely related—two sides of the same coin. Joinder "is designed to protect a defendant's double-jeopardy interests where the [state] initially declines to prosecute him for the present offense, electing to proceed on different charges stemming from the same criminal episode." *Commonwealth v. Laird*, 988 A.2d 618, 628 (Pa. 2010). By raising double jeopardy concerns, then, Defendant necessarily implicated this Court's joinder rule. We agree with the following statement of the Supreme Court of Pennsylvania,

> The purpose of [a] compulsory joinder statute, viewed as a whole, is twofold: (1) to protect a defendant from the governmental harassment of being subjected to successive trials for offenses stemming from the same criminal episode; and (2) to ensure finality without unduly burdening the judicial process by repetitious litigation.

Commonwealth v. Fithian, 961 A.2d 66, 75-76 (2008) (internal quotations marks and citation omitted).

The State can claim no unfair surprise. Six years ago, we made it clear in *Gallegos*, 2007-NMSC-007, ¶ 14, that the compulsory joinder rule means what it says. There, we applied the rule to require joinder of offenses "of the same or similar character," even when arising from two different victims. *Id.* ¶ 15. Here, we have offenses "based on the same conduct" against the *same* victim. In *Gallegos,* we took the time to discuss the evolution of the joinder rule, from permissive to mandatory, and the reasons for it.

Years ago, even before adopting a compulsory joinder rule, this Court expressed its "distaste for piecemeal prosecutions." *Id.* ¶ 14 (internal quotation marks and citation omitted). We stated in *State v. Tijerina*, that this Court does not

> approve [of] piecemeal prosecution. Such disorderly criminal procedures involve a myriad of problems which threaten the existence of our judicial system. The risk of prejudice to the accused, and the waste of time inherent in multiple trials, both perpetuate delays in the judicial process and unconscionable expenditures of public funds, all of which could be avoided by prosecutors getting their facts straight, their theories clearly in mind and trying all charges together.

86 N.M. 31, 36, 519 P.2d 127, 132 (1973). As we later clarified in *State v. Tanton*, "[b]y 'piecemeal prosecutions' in *Tijerina* we referred to multiple prosecutions to which the double jeopardy clause did not apply. Thus, we intended a statement of judicial policy

rather than a rule of law. We adhere to the stated policy." 88 N.M. 333, 336, 540 P.2d 813, 816 (1975).[1]

Some four years later we went further, transmuting this "judicial policy" into a court rule, when this Court made it mandatory to join offenses arising out of the same occurrence or transaction. *See* Rule 5-203 Committee Commentary (providing that a 1979 Supreme Court order made joinder mandatory). In short, after reading our comprehensive opinion in *Gallegos,* the State should have had no doubt about the consequences of its decision not to join vehicular homicide with the other charges.

Until today, we have not considered the proper remedy when the prosecution fails to join charges under Rule 5-203(A). While the rule does not specify a remedy, we clearly intended that the rule have force. It would make little sense to have a mandatory rule with no method of enforcement; we would render it merely permissive. A bar against a subsequent prosecution on charges that should have been joined under Rule 5-203(A) is the only effective remedy to enforce the mandatory nature of the rule.

We also observe that in other jurisdictions a bar against retrial is the usual remedy for failing to join offenses under a mandatory joinder rule. Whether joinder is required by court rule, *see* Ark. R.Cr. P. 21.3 (c), statute, *see* Colo. Rev. Stat. Ann. § 18-1-408(2) (West 2000), or judicial interpretation, *see Kellet v. Super. Ct. of Sacramento Cnty.*, 409 P.2d 206, 210 (Cal. 1966), the remedy is the same. Violation of the requirement bars subsequent prosecution. Thus, we hold that a failure to join offenses under Rule 5-203(A) bars piecemeal prosecution in a subsequent trial.

This is not a case in which the charge the State now seeks to bring, vehicular homicide, was unknown at the time Defendant was indicted. The State had at least three different opportunities to join these offenses. The first was in the original indictment, but it chose to ask the grand jury to indict only on charges of child abuse. The second was at the hearing on the motion to dismiss. The State was made fully aware that the charge was available and admitted at that hearing that it knew it was taking a risk when it decided on this particular trial strategy. Finally, under *Meadors*, 121 N.M. at 45, 908 P.2d at 738, the State could have asked for a vehicular homicide instruction notwithstanding its omission from the indictment, but again the State elected not to do so.

New Jersey courts have noted "the coercive effect" that such all-or-nothing prosecution strategies potentially "exert[] on jury deliberations." *State v. Christener*, 362 A.2d 1153, 1162 (1976), *overruled on other grounds by State v. Wilder*, 939 A.2d 781, 792 (2008). The State continues to argue that "[t]he decision to prosecute child abuse and not vehicular homicide was within the discretion of the State." We agree. But decisions have consequences. As we stated in *State v. Villa*, in which the State also pursued an all-or-nothing trial strategy,

[1]We observe that this judicial policy against piecemeal prosecutions finds expression in other states. Tennessee, for instance, changed its rule of joinder from permissive to mandatory to specifically stop the practice of "saving back" charges for future prosecution. *State v. Johnson*, 342 S.W.3d 468, 473 (Tenn. 2011); Tenn. R. Crim. P. 8, Advisory Comm'n Cmts. (describing the purpose of the joinder rule as "the prevention of a deliberate and willful 'saving back' of known charges for future prosecution").

> [o]n appeal, we do not second-guess the tactical decisions of the litigants. Were we to adopt the State's position, the [S]tate would have all of the benefits and none of the risks of its trial strategy, while the accused would have all the risks and none of the protections. We believe that both parties are entitled to the benefits and should be liable for the risks of their respective trial strategies.

2004-NMSC-031, ¶ 14, 136 N.M. 367, 98 P.3d 1017 (internal quotation marks and citations omitted).

CONCLUSION

For the reasons expressed in this opinion, we affirm the essential holding of the Court of Appeals barring a subsequent prosecution of Defendant for the crime of vehicular homicide.

IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-017

Filing Date: April 18, 2013

Docket No. 32,968

SUNNYLAND FARMS, INC.,

Plaintiff-Petitioner,

v.

CENTRAL NEW MEXICO ELECTRIC COOPERATIVE, INC.,

Defendant-Respondent.

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OPINION

CHÁVEZ, Justice.

This case comes before us because of a fire that destroyed a hydroponic tomato facility belonging to a new business, Sunnyland Farms, Inc. (Sunnyland). The day before the fire, Sunnyland's electricity had been shut off by its local utility, the Central New Mexico Electrical Cooperative (CNMEC), for nonpayment. Sunnyland's water pumps were powered by electricity, and without power, Sunnyland's facility had no water. Sunnyland sued CNMEC, alleging both that CNMEC had wrongfully suspended service, and if its electrical service had been in place, firefighters and Sunnyland employees would have been able to stop the fire from consuming the facility.

After a bench trial, the trial court found CNMEC liable for negligence and breach of contract. The trial court awarded damages, including lost profits, of over $21 million in contract and tort, but reduced the tort damages by 80% for Sunnyland's comparative fault. It also awarded $100,000 in punitive damages. The parties cross-appealed to the Court of Appeals, which (1) reversed the contract judgment, (2) vacated the punitive damages, (3) held that the lost profit damages were not supported by sufficient evidence, (4) affirmed the trial court's offset of damages based on CNMEC's purchase of a subrogation lien, and (5) affirmed the trial court's rulings on pre- and post-judgment interest. *Sunnyland Farms, Inc. v. Cent. N.M. Elec. Coop., Inc.*, 2011-NMCA-049, ¶¶ 2, 101, 119, 149 N.M. 746, 255 P.3d 324.

Sunnyland appealed, and we granted certiorari. *Sunnyland Farms v. Cent. N.M.*, 2011-NMCERT-005, 150 N.M. 667, 265 P.3d 718. We affirm the Court of Appeals regarding the contract judgment, punitive damages, and interest, and reverse on the lost profit damages and the offset. We also take this opportunity to re-examine the standard for consequential contract damages in New Mexico.

BACKGROUND

Sunnyland purchased its electricity from CNMEC. On September 8, 2003, CNMEC

shut off electrical service to Sunnyland. Prior to disconnecting electricity for nonpayment, CNMEC ordinarily gives its customers notice that they have fifteen days to pay their overdue bills before service is suspended. It did not give Sunnyland this fifteen-day notice. The trial court record indicates a confusing array of possible billing irregularities, but it is not necessary to address them here because CNMEC does not contest the trial court's findings that it was negligent and that it breached its duty to Sunnyland.

On the morning of September 9, 2003, before electrical service was restored, several Sunnyland employees engaged in arc welding near flammable materials, including cardboard boxes. In doing so, they started a fire that ultimately consumed Sunnyland Farms' packhouse and operations building. When Sunnyland's employees initially discovered the fire, they attempted to put it out using ordinary hoses, but without electricity, the Sunnyland facility had no running water, and the fire grew. Sunnyland does not contest that its employees were negligent both in starting the fire and in reacting to it, for example, by failing to use a fire extinguisher.

Someone living on Sunnyland's property called the fire department. Fire trucks arrived, but they were unable to access well water for firefighting because there was no electricity to power the pumps. Sunnyland had also failed to make alternative arrangements for emergency water in the event that power failed. Firefighters attempted to contact CNMEC to restore electricity to the water sources, but CNMEC employees expressed reservations to the emergency dispatcher, and the firefighters interpreted their statements as a threat that the fire department would have to assume liability. Firefighters attempted to use reservoir water and to preserve water by using foam and smaller hoses, but the buildings were nonetheless destroyed.

Sunnyland sued CNMEC in contract and tort, among other causes of action, for damages resulting from the fire, alleging that if CNMEC had taken adequate care prior to disconnecting Sunnyland's electrical service, firefighters and Sunnyland employees would have had access to water and the fire could have been contained. The trial court found CNMEC liable both in contract and in tort. It calculated total consequential damages of over $21 million, of which $13.7 million was the net value of lost crops that the facility would have been able to grow in the absence of the fire. The trial court reduced the damages in tort by 80% to account for Sunnyland's comparative fault; however, in contract, the trial court awarded the entire almost $21.4 million. The trial court allowed plaintiffs to elect a remedy in contract or tort after the resolution of their appeals.

The trial court also awarded $100,000 in punitive damages based on CNMEC's failure to restore energy when requested to do so by firefighters. The trial court granted CNMEC an offset of approximately $3.2 million for subrogation rights that it had obtained in a settlement with Sunnyland's insurer. Finally, the trial court awarded post-judgment interest on the contract damages at a rate of 8.75%, awarded post-judgment interest on damages awarded under tort at 15%, and declined to award any prejudgment interest.

CNMEC and Sunnyland cross-appealed to the Court of Appeals, which affirmed on all issues raised by Sunnyland and reversed on several issues raised by CNMEC. *See Sunnyland Farms*, 2011-NMCA-049, ¶ 119. The Court of Appeals held that in New Mexico, awards of consequential damages in

contract are governed by a "tacit agreement" test, which the trial court had failed to apply. *Id.* ¶¶ 28, 54-55, 60, 66. It therefore reversed the award of damages in contract. *Id.* ¶ 66. It vacated the trial court's calculation of future lost profits, finding that the trial court's calculations of crop yields lacked sufficient evidence and did not rise to the level of "reasonable certainty," *id.* ¶ 99, and then substituted a calculation that it found more reasonable. *Id.* ¶ 100. The Court of Appeals vacated the award of punitive damages due to the trial court's failure to find the facts necessary to establish corporate liability. *Id.* ¶ 84. Finally, it affirmed the trial court's rulings on pre- and post-judgment interest and on CNMEC's offset of the damages. *Id.* ¶¶ 107, 110, 118.

Sunnyland appealed all of the Court of Appeals' holdings to this Court. We address each issue in turn.

DISCUSSION

A. CONTRACT DAMAGES

1. *Hadley v. Baxendale* and Restatement (Second) of Contracts state the proper test for consequential damages in New Mexico

This Court has previously stated that in an action for breach of contract, the breaching party "is justly responsible for all damages flowing naturally from the breach." *Camino Real Mobile Home Park P'ship v. Wolfe*, 119 N.M. 436, 443, 891 P.2d 1190, 1197 (1995). Damages "that arise naturally and necessarily as the result of the breach" are "general damages," which give the plaintiff whatever value he or she would have obtained from the breached contract. *Id.* In some circumstances, the plaintiff can also recover for "consequential damages" or "special damages," which "are not based on the capital or present value of the promised performance but upon benefits it can produce or losses that may be caused by its absence." *Id.* (quoting 3 Dan B. Dobbs, *Dobbs Law of Remedies* § 12.2(3), at 41 (2d ed. 1993)) (internal quotation marks omitted).

The classic test for whether a plaintiff may recover consequential damages comes from *Hadley v. Baxendale*, 156 Eng. Rep. 145, 9 Ex. 341 (1854). In that case, a mill was temporarily shut down due to a broken crankshaft. *Id.* at 147, 9 Ex. at 344. The defendants were common carriers who were supposed to ship the broken crankshaft to an engineering company to have a new one built, but the defendants "wholly neglected and refused so to do for the space of seven days," and the mill was shut down for five days longer than should have been necessary. *Id.* at 146, 9 Ex. at 342-43. The jury awarded the mill damages for the profits it lost due to the delay. *Id.* at 147, 9 Ex. at 344-45. The appellate court reversed, holding that in an action for breach of contract, recovery was permitted for consequential damages only "such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." *Id.* at 151, 9 Ex. at 354.

The *Hadley* standard has been interpreted as an objective foreseeability test: A defendant is liable for losses that were foreseeable at the time of contracting, regardless of whether the defendant actually contemplated or foresaw the loss. Restatement (Second) of Contracts § 351 cmt. a (1981); *see also id.* Illustr. 1 (illustrating that the Restatement standard

comes from *Hadley*). This foreseeability standard is more stringent than "proximate cause" in tort law; the loss must have been foreseeable as the *probable* result of breach, not merely as a possibility. *Hadley*, 156 Eng. Rep. at 151, 9 Ex. at 354; Restatement (Second) of Contracts § 351(1), § 351 cmt. a. The Restatement asks whether there were "special circumstances, beyond the ordinary course of events, that the party in breach had reason to know." *Id.* § 351(2)(b); *see also* U.C.C. § 2-715(2)(a) (2010) (allowing buyers consequential damages for "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise"). In the absence of such circumstances, the breaching party is liable only for general damages. Restatement (Second) of Contracts § 351 cmt. b ("If loss results other than in the ordinary course of events, there can be no recovery for it unless it was foreseeable by the party in breach because of special circumstances that he had reason to know when he made the contract.").

This Court has cited the *Hadley* standard approvingly and described it as the appropriate rule of analysis in New Mexico cases dealing with consequential damages. *See Camino Real*, 119 N.M. at 446, 891 P.2d at 1200 (describing consequential damages standard as "essentially the rule expressed in the seminal case of *Hadley v. Baxendale*"). However, we have also stated that "the foreseeability . . . rule anticipates an explicit or tacit agreement by the defendant" that he or she will assume particular damages if he or she breaches. *Camino Real*, 119 N.M. at 446, 891 P.2d at 1200; *see also Wall v. Pate*, 104 N.M. 1, 2, 715 P.2d 449, 450 (1986) (suggesting that the conditions required for an award of special damages must include a "tacit agreement" (citing *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 543-44 (1903))).

Engaging in an exhaustive analysis of *Camino Real*, *Wall*, and other cases in his well-written opinion, Judge Sutin synthesized a "New Mexico rule" of consequential damages. *Sunnyland Farms*, 2011-NMCA-049, ¶ 33. This rule is similar to the test in Restatement (Second) of Contracts, but it incorporates the requirement that "the non-performing party must explicitly or tacitly agree to respond in damages for the particular damages understood to be likely in the event of a breach." *Sunnyland Farms*, 2011-NMCA-049, ¶ 33. This makes the "New Mexico rule . . . more limited and restrictive than the notion of foreseeability in . . . the Restatement or the UCC." *Id.* ¶ 34; *see also* 11 Joseph M. Perillo, *Corbin on Contracts* § 56.3, at 90 (rev. ed. 2005) (describing tacit agreement test as "a stricter rule than that announced in *Hadley*" (emphasis added)).

We now abandon the "tacit agreement" test. While we suspect that there may not, in fact, be much space between a "tacit agreement" and the special circumstances required to render a defendant liable for consequential damages, our previous emphasis on the tacit agreement test from *Globe Refining* is confusing and antiquated. We hold that the proper test for consequential damages in New Mexico is the *Hadley* standard as interpreted in Restatement (Second) of Contracts Section 351. In a contract action, a defendant is liable only for those consequential damages that were objectively foreseeable as a probable result of his or her breach when the contract was made. To the extent our earlier cases suggest a different standard, they are overruled.

2. There were no special circumstances in this case warranting consequential damages

We review the trial court's application of the law to the facts de novo. *Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶ 7, 129 N.M. 698, 12 P.3d 960. The trial court in this case issued very limited conclusions of law regarding the issue of foreseeability and consequential damages. The trial court made one finding of fact stating that "the damages suffered by Plaintiff were foreseeable and a proximate cause [sic—should probably be "result"] of Defendant's Breach of Contract, negligence and negligence per se." However, in its findings, the trial court did not distinguish between the proximate cause required for tort liability and the more stringent foreseeability required for consequential damages in contract. *See* Restatement (Second) of Contracts § 351 cmt. a ("[F]oreseeability is a more severe limitation of liability than is the requirement of substantial or 'proximate' cause in . . . tort."); 11 Perillo § 56.3 at 91 ("Courts have been willing to include in tort actions more remote and less easily foreseeable elements of injury than is the case in contract actions."). The trial transcript reveals that the trial court did consider the *Hadley* standard for special damages in contract:

> [T]he case law generally addresses consequential damages is [sic] that it has to be a contracted damage, generally speaking. It has to be within the contemplation of the parties, best evidence of that is a contractual agreement. In this case, however, since the contract was with one party being the Co-op and the other party being a general body and being no written—well, written agreement but not being any—not being one-to-one and having a third party PRC, you know, you go back to *Baxter v. Hadendale* [sic], that's a contractual [sic]. And I'm worried about the torts [sic] definition of consequential damages.
>
> I've been toying with this, because, like I said, there is no rule in a New Mexico case that would be on all fours with this. And it would seem to me that—and I'm going to rule that the Co-op, in providing electricity and being the expert party to the contract should have been aware of the consequential damages of providing electricity and if electricity—failing to provide electricity if there was a breach of contract, that there would be consequential damages.

However, despite this sign that the trial court contemplated the appropriate standard, we cannot say that the trial court actually applied the foreseeability standard correctly. To support the conclusion that Sunnyland's damages were foreseeable to CNMEC at the time of contracting, we would expect the trial court to find "special circumstances, beyond the ordinary course of events." Restatement (Second) of Contracts § 351(2)(b). Despite the voluminous findings of fact by the trial court, there were no findings that special circumstances of this type existed.

Sunnyland suggests that it was sufficient that CNMEC knew that Sunnyland was a for-profit enterprise and it depended on electricity. Both of these factual statements are supported by the trial court's findings of fact and by the evidence presented at trial.

The trial court found that "CNMEC [e]mployees . . . testified that it was well known within the community that [the Sunnyland] facility was a hydroponic tomato facility." Furthermore, the trial court found that prior to disconnecting electricity, a CNMEC employee allowed a Sunnyland employee to open the windows in the greenhouse to allow venting, which suggests that CNMEC might have known that cutting off electricity could harm Sunnyland's tomato crop.

Taking these findings of fact to indicate the presence of special circumstances is problematic for three reasons. First, although this Court indulges reasonable inferences in favor of the trial court's judgment, *see Tapia v. Panhandle Steel Erectors Co.*, 78 N.M. 86, 89, 428 P.2d 625, 628 (1967), this is simply too speculative. This Court does not speculate about what the fact-finder might have meant to say but did not. *See Econ. Gas Co. v. Bradley*, 472 S.W.2d 878, 880 (Mo. Ct. App. 1971) ("[C]onsider[ing] the evidence in the light most favorable to [the prevailing party] . . . does not require or authorize the court to supply missing evidence, or to give him [or her] the benefit of forced, speculative or unreasonable inferences.").

Second, Sunnyland's injury was not directly caused by the lack of electricity. The actual harm was more attenuated: the lack of electricity interrupted Sunnyland's water supply, which, in conjunction with Sunnyland's lack of backup firefighting options, made it difficult for Sunnyland to respond to the fire its employees negligently started. There were no findings that CNMEC should have known that Sunnyland was likely to start fires or was depending on electricity in order to fight any fires that occurred. Even if some damage to the tomato crop was foreseeable from the disconnection of electricity, the particular damage that occurred was not, and consequential damages are only permissible if the particular damage that actually occurred was foreseeable. "The mere circumstance that some loss was foreseeable, or even that some loss of the same general kind was foreseeable, will not suffice if the loss that actually occurred was not foreseeable." Restatement (Second) of Contracts § 351 cmt. (a).

Third, even if CNMEC had reason to know that Sunnyland depended on its electricity to power water in the event of a fire, CNMEC would still not be liable without the presence of additional special circumstances. *Hadley* provides a good example of what does and does not qualify as "special circumstances." 156 Eng. Rep. at 151, 9 Ex. at 355. In *Hadley*, the defendant knew that the crankshaft it was carrying was a broken part of a for-profit mill. *Id.* However, the plaintiff never told the defendant exactly what was at stake, i.e., that there was no backup shaft or other alternative plan to keep the mill running.[1] *Id.* at 151, 9 Ex. at 355-56.

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[1]There is some tension between the opinion of the court and the reporter's description of the facts. The *Hadley* court found that "the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill." 156 Eng. Rep. at 151, 9 Ex. at 355. The court went on to observe that the defendants could not have been expected to know that a shipping delay would shut down the mill. *Id.* at 151, 9 Ex. at 355-56. The reporter's statement of the facts in the same decision says that "[t]he plaintiffs' servant told the clerk that the mill was stopped, and that the shaft must be sent immediately." *Id.* at 147, 9 Ex. at 344. We treat the opinion of the court, rather than the reporter's summary, as the authoritative statement of the *Hadley* case. *Corbin on Contracts* observes that "if the reporter's headnote

Similarly, in this case, CNMEC would have needed to know not only that Sunnyland depended on its electricity for access to water, but that there was no backup power source, or that there was a particularized need for uninterrupted water or power. There is no evidence that CNMEC had reason to know any of this. In particular, CNMEC could not have been expected to know that Sunnyland did not have a separate power source, independent of the power for the main building, for the well that was to be used in the event of a fire. A firefighter's trial testimony agreed that "if it's going to be an approved firefighting source of water, it has to have two separate sources of electricity . . . [a]nd one of them cannot come through the building that's being . . . protected by the pump," and the trial court found that "Sunnyland Farms was negligent in having only one source of power which ran through the support building to energize the exterior well pump." CNMEC cannot have been expected to anticipate Sunnyland's negligence in this regard.

Langley v. Pacific Gas & Electric Co., 262 P.2d 846 (Cal. 1953) (in bank), provides an instructive example of what a utility company would need to know to render it liable for consequential damages in the event of a power shutoff. The plaintiff ran a trout hatchery that required electricity to oxygenate the water and keep the trout alive. *Id.* at 847. If power was shut off, the fish could survive for only three and a half hours. *Id.* at 847-48. The plaintiff purchased electricity from the utility and explained his situation to its employees, asking whether the utility had 24-hour monitoring and would always be able to tell him before power was shut off. *Id.* at 848. The plaintiff told the utility that if it was not able to make this guarantee, he would put in a backup pump. *Id.* The utility's employees assured the plaintiff that he would be notified any time the power was shut off. *Id.* Several years later, power to the fish hatchery was shut off for several hours, and the utility failed to warn or inform the plaintiff. *Id.* Nearly all of the plaintiff's fish died. *Id.* at 849. The plaintiff sued the utility for breach of contract, *id.* at 847, 849, and the California Supreme Court upheld a jury verdict in his favor, apparently including full consequential damages. *Id.* at 847; *see id.* at 850 (stating that the measure of the damages was identical under tort and breach of contract theories). The court found that the utility "knew that a continuous supply of electric current to plaintiff was imperative," and the utility had an obligation either to provide it or to give the plaintiff notice so that he could make alternative arrangements. *Id.* at 850.

The facts in *Langley* are starkly different from the facts in the present case. In *Langley*, the plaintiff had an unusual and pressing need for uninterrupted service, and he took steps to notify the utility of that need. *Id.* at 848. He also relied on the utility's assurances by choosing not to install backup power, and the utility knew of that fact as well. *Id.* Unlike in *Hadley* and the present case, the utility in *Langley* understood the particular consequences that would result from a breach, and it accepted the contract anyway.

There were no findings in this case that CNMEC should have known of a particular vulnerability to fire on Sunnyland's part, or that Sunnyland had no backup source of power or water. With neither findings nor evidence of special circumstances, we cannot uphold a judgment for consequential damages.

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were correct, the decision would have gone the other way." 11 Perillo § 56.2 at 84 n.4.

Accordingly, we affirm the Court of Appeals' reversal of the trial court's award of contract damages to Sunnyland.

B. THE TRIAL COURT'S DETERMINATION OF LOST PROFITS WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

Sunnyland also appeals the Court of Appeals' reversal of the trial court's calculation of damages. Although contract damages are no longer at issue, the calculations are still relevant to the tort judgment in favor of Sunnyland. The trial court awarded damages to compensate Sunnyland for profits that were lost due to the fire. The Court of Appeals held that lost profits must be proved with "reasonable certainty." *Sunnyland Farms*, 2011-NMCA-049, ¶ 96. The Court concluded that Sunnyland had not met this burden, and as a result there was insufficient evidence to support the award of lost profits. *Id.* ¶ 99. The Court also suggested a crop yield level that it felt had been established with reasonable certainty. *Id.* ¶ 100.

The Court of Appeals noted the difficulty involved in proving future lost profits of a new or unestablished business. *Sunnyland Farms*, 2011-NMCA-049, ¶ 97. In particular, it cited an opinion of this Court, *C. W. Kettering Mercantile Co. v. Sheppard*, 19 N.M. 330, 334, 142 P. 1128, 1129 (1914), which held that "anticipated or expected profits from a business prior to its establishment is an improper element in the measure of damages, because it cannot be proved that they would have been realized." However, this Court seemingly retired the *Kettering* per se rule in *Deaton, Inc. v. Aeroglide Corp.*, 99 N.M. 253, 258, 657 P.2d 109, 114 (1982), in which we stated that "[t]here is no established rule in New Mexico as to whether lost profits [of a new business] may be recovered . . . . The trend elsewhere is to allow lost profits even when the business is new if the loss can be proved with reasonable certainty."

Kettering reflects the traditional "new business rule," which is a minority approach. *Alphamed Pharm. Corp. v. Arriva Pharm., Inc.*, 432 F. Supp. 2d 1319, 1339-40 (S.D. Fla. 2006). As economic forecasting models have become more sophisticated, courts have become more willing to accept predictions that a plaintiff's new business would have been successful. 1 Robert L. Dunn, *Recovery of Damages for Lost Profits* § 4.3, at 391 (6th ed. 2005). The majority of jurisdictions allow unestablished business plaintiffs to collect lost profit damages if they can prove with reasonable certainty the fact of lost profits. *Id.* at 378. The dollar amount of lost profit damages, however, does not require the same level of proof. *Id.* § 1.8 at 25 ("[T]he [reasonable certainty] rule applies only to the *fact* of damages, not to the *amount* of damages."); *id.* § 5.1 at 414 ("[L]ess certainty (or none at all) is required to prove the amount of damages."); *see also Deaton*, 99 N.M. at 258, 657 P.2d at 114 ("Lost profits need not be proved with mathematical certainty."). To remove any doubt as to whether the century-old *Kettering* rule is still good law, we expressly overrule our opinion in *Kettering*.

However, the issue in this case is not whether Sunnyland proved with reasonable certainty the fact that it lost profits. Instead, the issue raised by CNMEC is whether the lost profits are supported by substantial evidence. Therefore, we address only the matter of whether there was sufficient evidence to support the calculation of lost profit damages.

New Mexico courts will not "set aside [an award of damages] as excessive unless the award is not supported by substantial evidence . . . or [the fact-finder] employed an incorrect measure of damages. . . . A damage award which is reasonably certain, supported by substantial evidence, and not based on speculation, will be upheld on appeal." *Ranchers Exploration & Dev. Corp. v. Miles*, 102 N.M. 387, 390, 696 P.2d 475, 478 (1985). In this case, the trial court appears to have based its calculation of lost profits due to crop loss directly on the testimony of Sunnyland's expert witness. The Court of Appeals has refused to find a damage award excessive when the award precisely matched the estimate given by a testifying expert. *Diversey Corp. v. Chem-Source Corp.*, 1998-NMCA-112, ¶ 35, 125 N.M. 748, 965 P.2d 332. The Court noted that " '[a]n expert's opinion is not impermissibly speculative or lacking as to a factual basis where the expert gives a satisfactory explanation as to how he arrived at his opinion.' " *Id.* ¶ 32 (quoting *Sanchez v. Molycorp, Inc.*, 103 N.M. 148, 152, 703 P.2d 925, 929 (Ct. App. 1985) (alteration in original)). Therefore, we examine the record to determine whether the expert testimony was impermissibly lacking as to factual basis.

The crop loss estimate was based on the testimony of Sunnyland's expert witness, Dr. William Bauerle. Bauerle testified that he had a doctorate in "vegetable crop physiology, nutrition, and pathology" from Cornell University and he had previously worked as a researcher for Ohio State University, although he was retired at the time of his testimony. He testified that he mostly did work for insurance companies, but he also consulted for one hydroponic tomato operation in Ontario. He also testified that he had done over one hundred crop loss estimates.

Prior to testifying, Bauerle had visited the site of Sunnyland's Estancia facility, and he estimated Sunnyland's probable output based on "the characteristics of the greenhouse, the characteristics of the climate, the archived data[,] . . . what the potential is for the crop, and what the varieties of . . . the crop are for [the] period." He testified that the Sunnyland greenhouse was "state of the art," with such positive features as (1) "excellent" water quality, as indicated by good condition of the bedding plants being currently grown, as well as the lack of sediment and sodium chloride; (2) water in sufficient volume to support hydroponics; (3) a computer-controlled environment; (4) supplemental carbon dioxide; (5) "excellent light intensit[y]"; and (6) sufficient height to allow for plant growth. Bauerle also noted that Sunnyland had grafted plants onto improved rootstock to improve their water intake, and Sunnyland planned to intercrop, which would allow the facility to produce plants 365 days per year.

Bauerle said that Sunnyland planned to grow Dundee and Geronimo beefsteak tomatoes. According to the company that sold the tomato seeds, both tomatoes have an average size of over eight ounces. Bauerle said that each cluster of tomatoes would consist of roughly four tomatoes and have a total weight of about thirty-two ounces or two pounds, although he said that clusters could range in weight from two to three-and-a-half pounds. Bauerle estimated that a cluster would grow to maturity in nine days (he stated that this estimate was on the high end of the possible range, due to the good light intensity in the area), and he divided 365 days by 9 to get 40 clusters per plant per year. If each cluster weighed approximately two pounds, that would be 80 pounds per plant per year. Bauerle testified that he reduced his estimate

to 75 pounds per plant per year to give "a conservative estimate."

Bauerle testified that the facility was a 20-acre site with 220,000 plants in it. He also consulted USDA pricing for tomatoes. Based on Bauerle's testimony and the testimony of a forensic accountant, the trial court found a net crop loss value of $13,704,828. The only dispute seems to be over Bauerle's estimate of the tomato crop yield that the Sunnyland facility would have produced. *See Sunnyland Farms*, 2011-NMCA-049, ¶¶ 85-86, 99 (discussing CNMEC's claim that Bauerle's estimates were speculative, and therefore that the lost profits award was supported by insufficient evidence).

On cross-examination, CNMEC challenged Bauerle's projections as overly optimistic. CNMEC's attorney read Bauerle a quotation from a scientist who stated that producing the volume of tomatoes in Bauerle's estimate was "biologically and technologically impossible," but this expert did not testify at trial, and the statement did not qualify as evidence. It is uncontested that Bauerle's estimates were not based on any actual history of production in the facility, which Bauerle said could be skewed by a catastrophic event in any given year. Bauerle admitted that he had never previously testified in the United States, although apparently he had done so in Canada, and that his work in the Southwest United States had been very limited.

CNMEC called its own expert witness, Kenneth Gerhart, a tomato grower and consultant. Much of Gerhart's testimony was devoted to rebutting Bauerle's earlier testimony. He testified that Bauerle had failed to take into account factors such as "[d]isease, virus, insects, the grower . . . , [problems with] interplanting, [and] equipment failure." He testified that there was a learning curve for tomato growers, who rarely achieved the highest possible yields in their first year of production. Gerhart thought that light was more of a problem than Bauerle had realized. Gerhart also testified that intercropping was not feasible year-round because of the possibility of disease, and he testified that the average fruit size published by seed companies is not accurate over the life of a crop.

Gerhart characterized Bauerle's estimates as unrealistic. Bauerle's estimate was equivalent to 95 kilograms of tomatoes per square meter per year; Gerhart said that the highest yield he had ever heard of for beefsteak tomatoes was 70 kilograms per square meter per year. He testified that his "reasonable production projection" for the destroyed facility was 58 kilograms per square meter per year. Gerhart based this opinion on his own average yield over eight years in a facility in Las Vegas, Nevada, where his average was 58.5 kilograms per square meter per year. In essence, Gerhart testified that there was no way to run a profitable greenhouse on the Sunnyland site.

On this record, we cannot say that the damage award was overly speculative or unsupported by substantial evidence. Bauerle explained his reasoning and calculations, giving "a satisfactory explanation as to how he arrived at his opinion." *Diversey Corp.*, 1998-NMCA-112, ¶ 32 (internal quotation marks and citation omitted). The trial court evidently credited Bauerle's estimates over Gerhart's. "[W]hen there is a conflict in the testimony, we defer to the trier of fact." *Buckingham v. Ryan*, 1998-NMCA-012, ¶ 10, 124 N.M. 498, 953 P.2d 33.

Moreover, it was not wholly irrational for the trial court to credit Bauerle's testimony. Bauerle was an academic with a doctoral degree who had previously done more than one hundred crop loss estimates. Gerhart was an experienced tomato farmer, but he was not an academic; he testified that he did not have a college degree, and in his testimony he did not specifically take issue with Bauerle's model or calculations, instead choosing to explain the factors that he thought Bauerle had improperly omitted. Gerhart testified that he had never previously done a crop loss assessment, and his estimate was based solely on the average yields achieved by his own greenhouse.

It is not error for a trial court to credit one expert's testimony over another's. *See In re Yalkut*, 2008-NMSC-009, ¶ 18, 143 N.M. 387, 176 P.3d 1119 ("[When the trial court's] 'findings of fact are supported by substantial evidence . . . refusal to make contrary findings is not error.'" (quoting *Griffin v. Guadalupe Med. Ctr., Inc.*, 1997-NMCA-012, ¶ 22, 123 N.M. 60, 933 P.2d 859)). Therefore, we reverse the Court of Appeals on this issue and reinstate the trial court's calculation of the negligence damages.

C. THE TRIAL COURT'S AWARD OF PUNITIVE DAMAGES WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The trial court awarded Sunnyland $100,000 in punitive damages because CNMEC "imped[ed] the firefighters with the threat of liability if the electricity was energized." The trial court found that

> the conduct of [CNMEC] was wilful, reckless, wanton and in bad faith . . . when it threatened [firefighter] Wayne Granger with 'liability' twice before turning on the power to the facility after Wayne Granger requested the assistance of [CNMEC] to reenergize the facility to allow the firefighters access to more water to fight the fire.

The Court of Appeals reversed the award of punitive damages, holding, inter alia, that the trial court had not found any of the factors required to subject a corporation to punitive damages. *Sunnyland Farms*, 2011-NMCA-049, ¶¶ 83-84. To find a corporation in New Mexico liable for punitive damages based on the misconduct of its employees, at least one of three factors must be present: "(1) corporate employees possessing managerial capacity engage in conduct warranting punitive damages; (2) the corporation authorizes, ratifies, or participates in conduct that warrants punitive damages; or (3) under certain circumstances, the cumulative effects of the conduct of corporate employees demonstrate a culpable mental state warranting punitive damages." *Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, ¶ 21, 140 N.M. 478, 143 P.3d 717. The trial court did not explicitly find any of the three factors; Sunnyland argues that the trial court was not required to do so and that the third factor applies.

We review the factual findings underpinning an award of punitive damages for substantial evidence. *Helena Chem. Co. v. Uribe*, 2013-NMCA-017, ¶ 35, 293 P.3d 888. Interpreting the trial court's findings generously, we will assume that the court implicitly found the presence of the third *Chavarria* factor when it found that CNMEC's conduct was "wilful, reckless, wanton and in bad faith." The trial court

evidently based its finding that CNMEC employees "threatened [firefighters] with 'liability' twice," on the testimony of Wayne Granger, the firefighter in charge at the scene. Granger testified that he called the dispatcher to see if CNMEC would re-connect power so that the firefighters could use the well:

> I asked [the dispatcher] if we could have the Co-op turn on the power to the well. . . . They called me back and said the Co-op cannot turn the power on unless you assume the liability. And I asked the dispatcher . . . what is the liability that I would accept or take responsibility of? She said, I don't know. I said, well, find out. What are they telling me that I would assume liability? So she called me back and she said, they won't turn it on, but you'd have to assume the liability. And I said, well, I don't know what the hell they're talking about, so I'm going to go on with my other Plan B, if they can't turn on the power and give me water.

Granger's testimony, taken alone, would tend to support the finding of fact that forms the basis of the punitive damages award. However, the trial court also heard both the testimony of CNMEC employees and the tape of CNMEC employees talking to dispatch, and neither of those sources mentions liability. Paul Chavez, a CNMEC employee, actually said to dispatch, "[T]here is a heck of a fire and I don't know what it is going to do when I send these jacks in but I will not be held responsible. . . . I just don't want to be responsible if something happens." Chavez clarified in his testimony that he was concerned that a firefighter would be hurt or killed if he re-energized the facility.

The evidence presented at trial supports Chavez's concern. Witnesses were split about how much danger electricity would have posed to the firefighters. Two firefighters testified that they could safely fight fires in the presence of electricity, supporting the trial court's analysis. However, two other witnesses testified that they were concerned about the safety ramifications of introducing electricity or they would not have turned the power on if asked.

Additionally, Wayne Granger seriously qualified his statements during his trial testimony. During his testimony, Granger stated that he would have wanted to speak with CNMEC employees and did not want them to re-energize the site without talking to him first. Granger also testified that he assumed that there was a power source to the well that could be turned on without energizing the burning building, thereby reducing the risks to the firefighters on the scene. This was incorrect; Sunnyland had only one power source at the site, and turning it on would have energized the burning support building as well as the well pump.

"Substantial evidence is that which a reasonable mind accepts as adequate to support a conclusion." *Chavarria*, 2006-NMSC-046, ¶ 12 (internal quotation marks and citation omitted). Granger's testimony was the only evidence presented at trial to support the finding that CNMEC "threatened [him] with liability," and the conclusion that there were threats is directly contradicted by the recording of CNMEC employees' conversation with dispatch. Furthermore, the evidence indicates that there was real danger in energizing the scene—perhaps more than Granger realized at the time, given Sunnyland's electrical setup—and CNMEC employees' caution about re-energizing the

scene was warranted. Given the overwhelming weight of evidence suggesting that CNMEC employees did not, in fact, threaten firefighters with liability, combined with the evidence strongly suggesting that CNMEC employees were acting in the interest of the firefighters' safety, we cannot find that there was substantial evidence supporting the third *Chavarria* factor. *See Fraser v. State Sav. Bank*, 18 N.M. 340, 352, 137 P. 592, 594 (1913) ("[T]his Court will not review the evidence further than to determine whether or not the findings are supported by substantial evidence, *in the absence of such an overwhelming weight of evidence against such findings* as would clearly show that the trial Court erred in its conclusions drawn therefrom." (emphasis added)). We affirm the Court of Appeals and vacate the award of punitive damages.

D. THE TRIAL COURT'S OFFSET OF DAMAGES WAS CONTRARY TO NEW MEXICO'S PUBLIC POLICY

Sunnyland Farms was insured by West American Insurance Co., which paid it approximately $3.2 million. West American and its parent company, Ohio Casualty Insurance Co., were plaintiffs in this action against CNMEC. However, CNMEC settled with them prior to the start of trial. Under the terms of the settlement, CNMEC paid West American $1.3 million and acquired its subrogation lien against Sunnyland. After CNMEC was found liable, it moved to offset the damages against it based on its purchase of West American's subrogation interest. The trial court granted the motion and offset CNMEC's liability by the full subrogation lien of just over $3.2 million. The Court of Appeals upheld this setoff. *Sunnyland Farms*, 2011-NMCA-049, ¶ 118. Sunnyland appeals the setoff, arguing that it violates the collateral source rule and the public policy of the State of New Mexico. We agree with Sunnyland, and we reverse.

"[S]ubrogation is an equitable remedy." *State Farm Mut. Auto. Ins. Co. v. Found. Reserve Ins. Co.*, 78 N.M. 359, 363, 431 P.2d 737, 741 (1967). Ordinarily, we review a trial court's exercise of its equitable powers for abuse of discretion. *United Props. Ltd. Co. v. Walgreen Props., Inc.*, 2003-NMCA-140, ¶ 6, 134 N.M. 725, 82 P.3d 535. However, "[t]he question of whether . . . the district court is *permitted* to exercise its equitable powers is a question of law," *id.* ¶ 7 (emphasis added), which is reviewed de novo. *Id.* ¶ 6. In this case, the question is whether the law permitted the trial court to award an offset to the defendant, CNMEC. Sunnyland has not argued that if the offset was actually within the trial court's discretion, it constituted an abuse of that discretion. Therefore, since the question presented concerns the bounds of the trial court's equitable powers rather than their use, we review de novo whether the trial court was able to grant the offset. *Id.* ¶¶ 6-7.

This question implicates a number of policy considerations, including New Mexico's policy against allowing "double recovery" for plaintiffs. In general, plaintiffs may not collect more than the damages awarded to them, or, put another way, they may not receive compensation twice for the same injury. *Hale v. Basin Motor Co.*, 110 N.M. 314, 320, 795 P.2d 1006, 1012 (1990) ("New Mexico does not allow duplication of damages or double recovery for injuries received."); *see also* NMSA 1978, § 41-3-4 (1947) (specifying that if a plaintiff settles with a tortfeasor, the plaintiff's claim against any remaining joint tortfeasors is reduced by the amount of the settlement).

[redacted]

[redacted] However, the collateral source rule is an exception to the rule against double recovery. *McConal Aviation, Inc. v. Commercial Aviation Ins. Co.*, 110 N.M. 697, 700, 799 P.2d 133, 136 (1990), *limitation of holding on other grounds recognized by Summit Props., Inc. v. Pub. Serv. Co. of N.M.*, 2005-NMCA-010, ¶ 45, 138 N.M. 208, 118 P.3d 716. The classic statement of the collateral source rule is that "[c]ompensation received from a collateral source does not operate to reduce damages recoverable from a wrongdoer." *Trujillo v. Chavez*, 76 N.M. 703, 708, 417 P.2d 893, 897 (1966). In other words, if a plaintiff is compensated for his or her injuries by any source unaffiliated with the defendant, the defendant must *still* pay damages, even if this means that the plaintiff recovers twice.

[redacted] There are several justifications for the collateral source rule. If the plaintiff can recover his or her full damages from the defendant, the plaintiff has the means to reimburse the collateral source. *See Sw. Steel Coil, Inc. v. Redwood Fire & Cas. Ins. Co.*, 2006-NMCA-151, ¶ 20, 140 N.M. 720, 148 P.3d 806 (suggesting that the protection of subrogation rights justifies the collateral source rule). This allows the ultimate burden of compensating the plaintiff to fall on the defendant, rather than on blameless but generous parties. "The right of redress for wrong is fundamental. Charity cannot be made a substitute for such right, nor can benevolence be made a set-off against the acts of a tort-feasor." *Mobley v. Garcia*, 54 N.M. 175, 177, 217 P.2d 256, 257 (1950); *see also Martinez v. Knowlton*, 88 N.M. 42, 44, 536 P.2d 1098, 1100 (Ct. App. 1975) ("[A] tort-feasor should not get the benefit of the contract between the [victim and a third party]."). Additionally, knowing that they have some ikelihood of being reimbursed may make third parties more likely to help victims during the time before they are able to collect from the defendant.

[redacted] If the third party or collateral source does *not* seek compensation, its contribution could benefit either the defendant, by reducing the damages that the defendant must pay, or the plaintiff, by allowing the plaintiff to recover twice. In New Mexico, the collateral source rule dictates that the contribution of a collateral source must operate to benefit the plaintiff rather than the defendant. " 'Whether [the collateral contribution] is a gift or the product of a contract of employment or of insurance, the purposes of the parties to it are obviously better served and the interests of society are likely to be better served if the injured person is benefitted than if the wrongdoer is benefitted.' " *McConal Aviation*, 110 N.M. at 700, 799 P.2d at 136 (quoting *Hudson v. Lazarus*, 217 F.2d 344, 346 (D.C. Cir. 1954)); *see also McConal Aviation*, 110 N.M. at 703, 799 P.2d at 139 (" 'If there must be a windfall certainly it is more just that the injured person shall profit therefrom, rather than the wrongdoer shall be relieved of his full responsibility for his wrongdoing.' ") (Montgomery, J., specially concurring) (quoting *Grayson v. Williams*, 256 F.2d 61, 65 (10th Cir. 1958)). Lastly, a plaintiff's "double recovery" is likely to be more egregious in theory than in practice; in reality, plaintiffs rarely receive their full damages, since they must pay attorney fees out of their damages. *McConal Aviation*, 110 N.M. at 703, 799 P.2d at 139 (Montgomery, J., specially concurring). Allocating the collateral contribution to their benefit, rather than to the benefit of the defendant, makes it more likely that the plaintiff will be fully compensated. *Id.*

[redacted] In the present case, part of the

question is whether a collateral source, i.e. Sunnyland's insurer, remains "collateral" to the defendant after settling with it and transfering its subrogation rights to it. If CNMEC's settlement payment to West American transforms the insurance payments into a non-collateral contribution, then CNMEC can offset the damages it must pay to Sunnyland by the amount of the insurance payments. We note that in general, New Mexico has a policy of encouraging settlements, *id.* at 700, 799 P.2d at 136, which would suggest that we should allow such an offset. CNMEC accurately observes that several other states permit offsets where a defendant has settled with the plaintiff's insurer. *See, e.g., Ferrellgas, Inc. v. Yeiser*, 247 P.3d 1022, 1027 (Colo. 2011) (en banc) (allowing defendant to offset damages by entire amount paid by the insurer to the plaintiff); *Hayes Sight & Sound, Inc. v. ONEOK, Inc.*, 136 P.3d 428, 442 (Kan. 2006) (allowing setoff but limiting it to amount that the defendant paid to the insurer). Sunnyland counters that allowing this offset would undermine New Mexico's collateral source rule and allow an insurer to subrogate against its own insured, contrary to *State ex rel. Regents of N.M. State Univ. v. Siplast, Inc.*, 117 N.M. 738, 741-42, 877 P.2d 38, 41-42 (1994).

We disagree with Sunnyland that allowing the offset would violate the rule stated in *Siplast*. In *Siplast*, we were concerned that allowing an insurer to subrogate against its own insured would increase litigation and create conflicts of interest. *Id.* at 742-43, 877 P.2d at 42-43. Neither of those considerations would be implicated by allowing defendants to step into the shoes of insurers and assume their right of subrogation.

However, we have one concern here that was not at issue in *Siplast*: subrogation is not truly a right, but an equitable remedy. "Subrogation, whether created by contract or by operation of law, is an equitable remedy and equitable principles control its application." *Farmers Ins. Grp. of Cos. v. Martinez*, 107 N.M. 82, 83, 752 P.2d 797, 798 (Ct. App. 1988). "The remedy is for the benefit of one secondarily liable who has paid the debt of another and to whom *in equity and good conscience* should be assigned the rights and remedies of the original creditor." *Found. Res.*, 78 N.M. at 363, 431 P.2d at 741 (emphasis added). The question is whether the principles of equity permit a defendant to assert a right of subrogation that it acquires from the plaintiff's insurer.

We hold that they do not. We recognize that "[t]he person asserting the right to subrogation must be without fault." *Hocker v. N.H. Ins. Co.*, 922 F.2d 1476, 1486 (10th Cir. 1991). While there was no malice proven on the part of the defendant in this case, CNMEC does not contest the trial court's findings that it was negligent and breached its contract with Sunnyland. We have stated that "the right [of subrogation] flows from principles of justice and equity." *Fid. & Deposit Co. of Md. v. Atherton*, 47 N.M. 443, 449, 144 P.2d 157, 161 (1943). When the party exercising the right is an innocent third party who compensated the plaintiff, justice and equity dictate that the party should have the right to recover from the plaintiff, regardless of whether the compensation originated in generosity or contractual obligation. A defendant is not similarly situated to such a party. A defendant who has been found liable is ordinarily expected to pay the plaintiff's full damages, and requiring him or her to do so does not offend principles of justice or equity. It does not matter that the

defendant has attempted to step into the shoes of the collateral source by contract. Equity concerns itself with the substance of a matter, not with its form. *Skaggs Drug Ctr. v. Gen. Elec. Co.*, 63 N.M. 215, 226, 315 P.2d 967, 974 (1957).

Our holding does not prevent a defendant from settling with the plaintiff's insurance company, but it does mean that the defendant will not be able to exercise any subrogation lien that it acquires as part of that settlement. The defendant should settle with the plaintiff's insurers with the full knowledge that neither the insurers' previous payments to the plaintiff, nor the defendant's payments to the insurers at the time of settlement, will offset the damages that the defendant must pay to the plaintiff. This holding also does not limit the right of insurers to sell or transfer their subrogation liens, so long as they do not transfer the liens to the defendant.

E. THE POST-JUDGMENT INTEREST ON THE TORT JUDGMENT WAS CORRECTLY CALCULATED, AND THE INTEREST ON THE CONTRACT JUDGMENT IS NO LONGER AN ISSUE

Ordinarily, interest on judgments is calculated at 8.75% from the date of entry. NMSA 1978, § 56-8-4(A) (1993). Sunnyland requested post-judgment interest of 15% on its contract claim, arguing that the judgment was based on CNMEC's "tortious conduct, bad faith or intentional or willful acts," which warrants a higher interest rate under Section 56-8-4(A)(2). The trial court denied Sunnyland's motion and awarded interest on the contract damages at the ordinary rate of 8.75%. The Court of Appeals affirmed the trial court. *Sunnyland Farms*, 2011-NMCA-049, ¶ 107.

The litigation regarding post-judgment interest appears to involve only the contract award. Because we have already determined that the contract award was contrary to New Mexico law, there is no reason to delve into the interest rate that would have applied to the now-vacated contract damages.

To avoid confusion, we note briefly that the tort judgment remains intact, and post-judgment interest on it should be calculated at 15%, as originally determined by the trial court. This is the appropriate rate for a "judgment [that] is based on tortious conduct." Section 56-8-4(A)(2); *see also Pub. Serv. Co. of N.M. v. Diamond D Constr. Co.*, 2001-NMCA-082, ¶ 55, 131 N.M. 100, 33 P.3d 651 ("When a judgment is based on tortious conduct, bad faith, or a finding that the defendant acted intentionally or willfully, a court must award interest at the higher rate of 15 percent."). "[T]ortious conduct" includes negligence. *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 78, 146 N.M. 853, 215 P.3d 791; *Diamond D Constr.*, 2001-NMCA-082, ¶ 58.

F. THE TRIAL COURT'S DENIAL OF PREJUDGMENT INTEREST WAS NOT AN ABUSE OF DISCRETION

Sunnyland also sought prejudgment interest from the trial court under Section 56-8-4(B), which states:

> [T]he court in its discretion may allow interest of up to ten percent from the date the complaint is served upon the defendant after considering, among other things:
>
> (1) if the plaintiff was the cause of unreasonable delay in the

adjudication of the plaintiff's claims; and

(2) if the defendant had previously made a reasonable and timely offer of settlement to the plaintiff.

The trial court refused to award prejudgment interest. The Court of Appeals affirmed the denial. *Sunnyland Farms*, 2011-NMCA-049, ¶ 110. We also affirm.

The decision whether or not to award prejudgment interest is within the discretion of the trial court, and we review only for abuse of that discretion. *See* Section 56-8-4(B); *Martinez v. Pojoaque Gaming, Inc.*, 2011-NMCA-103, ¶ 20, 150 N.M. 629, 264 P.3d 725. Sunnyland argues that the trial court abused its discretion by failing to award interest, given that CNMEC rejected Sunnyland's pre-trial settlement proposals and made a counter-offer that was allegedly so inadequate as to be "not in good faith." CNMEC counters that its settlement offer was reasonable given the difficult legal issues in the case, the high degree of comparative fault, and the disputed damages calculations.

The trial court is not required to make specific factual findings when denying prejudgment interest under Section 56-8-4(B). "The court's reasons for denying prejudgment interest need only be ascertainable from the record and not contrary to logic and reason." *Gonzales v. Surgidev Corp.*, 120 N.M. 133, 150, 899 P.2d 576, 593 (1995). The trial court may also consider equitable considerations not stated in Section 56-8-4(B) if they further the statute's goals of "foster[ing] settlement and prevent[ing] delay." *Gonzales*, 120 N.M. at 150, 899 P.2d at 593 (emphasis omitted) (internal quotation marks and citation omitted).

In this case, it was not an abuse of discretion for the trial court to deny prejudgment interest. Difficult legal issues can contribute to legitimate delays in settlement, *Bird v. State Farm Mut. Auto. Ins. Co.*, 2007-NMCA-088, ¶ 35, 142 N.M. 346, 165 P.3d 343, and there is no denying the complexity of this case, which raised thorny issues of causation, comparative fault, and estimation of lost profits. In addition, while CNMEC's pre-trial settlement offer of just over half a million dollars was far less than the trial court awarded, the record indicates that Sunnyland's lowest settlement offer was $12 million, which is much more than Sunnyland will receive without the damages from the erroneous contract award. We do not bring up this issue to fault either CNMEC or Sunnyland for their refusal to settle, but simply to indicate that the parties appear to have had genuine differences of opinion on the strength of Sunnyland's case. Such differences in opinion could easily arise from the complexity of the issues in this case. Therefore, it was not an abuse of discretion for the trial court to deny prejudgment interest to Sunnyland.

CONCLUSION

We affirm the Court of Appeals' reversal of the consequential damages in contract and the punitive damages. We reverse the Court of Appeals' reversal of lost profit damages in tort. We also affirm the denial of prejudgment interest. The post-judgment interest is no longer in dispute. We remand for further proceedings consistent with this opinion.

IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

RICHARD C. BOSSON, Justice

BARBARA J. VIGIL, Justice

CLAY CAMPBELL, Judge
Sitting by designation

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-018

Filing Date: May 9, 2013

Docket No. 33,182

MOONGATE WATER COMPANY, INC., a New Mexico Public Utility,

Plaintiff-Petitioner,

v.

CITY OF LAS CRUCES,

Defendant-Respondent.

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OPINION

CHÁVEZ, Justice.

The Public Regulation Commission (PRC) issued Moongate Water Company (Moongate) a certificate of public convenience

and necessity (CCN) authorizing Moongate, as a public utility, to provide water to an area located outside the city limits of Las Cruces, New Mexico, which we shall label the "certificated area." Las Cruces later annexed three undeveloped tracts of land within Moongate's certificated area, and Las Cruces committed itself to provide water to this area despite Moongate's CCN. We address two questions in this appeal. First, does Moongate have a right to provide water within the certificated area to the exclusion of Las Cruces? Second, did Las Cruces engage in an unlawful taking of Moongate's property entitling Moongate to just compensation when Las Cruces chose to provide water within the certificated area? We answer the first question in the negative because Las Cruces is not subject to the Public Utilities Act (the PUA), NMSA 1978, Sections 62-1-1 to -6-28 (1884, as amended through 2003) and NMSA 1978, Sections 62-8-1 to -13-15 (1941, as amended through 2003).[1] We also answer the second question in the negative because on the record before us, Moongate has not proven that it had established infrastructure and was already serving customers in the annexed area. Absent such proof of a tangible loss, a public utility is not entitled to just compensation when a municipality lawfully exercises its right to serve in the public utility's certificated area. We therefore affirm the Court of Appeals and reverse the district court.

BACKGROUND

In 1983 the PRC issued Moongate, as a public utility, a CCN that was extended in 1984, authorizing Moongate to provide water services in an area which at the time was outside the Las Cruces city limits. Las Cruces, a home-rule municipality, subsequently annexed three undeveloped tracts of land within Moongate's certificated area, subdivided the land, and committed itself to provide the subdivisions with municipal water service. Moongate filed a complaint against Las Cruces seeking (1) an injunction and declaratory judgment stating that Moongate was exclusively authorized to serve the three subdivisions, (2) compensation for inverse condemnation of its allegedly exclusive right to serve the subdivisions, and (3) compensation for a regulatory taking of its alleged exclusive right to serve.

Las Cruces filed a motion for summary judgment on all counts of the complaint, and Moongate filed a memorandum in opposition and cross-motion for summary judgment on the second and third counts (inverse condemnation and regulatory takings issues). The district court granted Moongate's motion on the second and third counts, and concluded that because Moongate's rights under the CCN were exclusive, Las Cruces was liable for damages as a result of the taking or inverse condemnation to the extent that damages could be proven. The district court held a trial on the issue of damages and ultimately concluded that Moongate had failed to prove damages; therefore, none were awarded.

Moongate appealed to the Court of Appeals on the issue of damages. Las Cruces appealed the district court's determination that Moongate's rights were exclusive and that there had been a taking. The Court of Appeals reversed the district court's determination that the CCN guaranteed Moongate exclusive service rights. *Moongate Water Co. v. City of Las Cruces*, 2012-NMCA-003, ¶ 2, 269 P.3d 1. The Court also concluded that the district court erred in granting summary judgment in

[1]*See* NMSA 1978, § 62-13-1 (1993) (defining the PUA).

Moongate's favor because the grant was based on the district court's finding that Moongate had exclusive service rights under its CCN. *Id.* ¶ 27. Moongate appealed to this Court, and we granted certiorari. *Moongate Water Co. v. Las Cruces*, 2012-NMCERT-001, 291 P.3d 599.

Moongate argues that (1) its CCN is a "valuable property right[]" and gives it the exclusive right to provide water in the certificated area, and although the PRC cannot regulate municipalities operating outside of the PUA such as Las Cruces, those municipalities cannot override the rights granted to public utilities by the PRC; (2) the only way that an unregulated municipality may take over or invade a certificated area is to either submit to PRC regulation or effectuate a taking via the power of eminent domain; and (3) by invading Moongate's certificated area, Las Cruces has "damaged" Moongate's property, thereby effectuating a taking that requires just compensation.

DISCUSSION

This case hinges on the interpretation of various statutes. Statutory interpretation is an issue of law that we review de novo. *Pub. Serv. Co. of N.M. v. N.M. Pub. Util. Comm'n*, 1999-NMSC-040, ¶ 14, 128 N.M. 309, 992 P.2d 860. When this Court construes statutes, "our charge is to determine and give effect to the Legislature's intent." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135. In doing so, we employ canons of statutory construction, and look first to the plain meaning of the statute. *Id.* We give words their ordinary meaning, and if the statute is clear and unambiguous, we "refrain from further statutory interpretation." *Id.* (internal quotation marks and citation omitted).

A. MOONGATE'S CCN DOES NOT PREVENT LAS CRUCES FROM COMPETING WITH MOONGATE IN ITS CERTIFICATED AREA

The PUA is "a comprehensive regulatory scheme granting the PRC the policy-making authority to plan and coordinate the activities of New Mexico public utilities." *Doña Ana Mut. Domestic Water Consumers Ass'n v. N.M. Pub. Regulation Comm'n*, 2006-NMSC-032, ¶ 16, 140 N.M. 6, 139 P.3d 166. The PRC has the authority and responsibility to issue CCNs, which must be obtained by public utilities prior to any construction, operation, or extension of any public utility plant or system. Section 62-9-1(A).

However, with two exceptions, municipalities are not subject to the PUA. *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 120 N.M. 579, 588, 904 P.2d 28, 37 (1995). The first exception that would bring a municipality under the PRC's authority is set forth in NMSA 1978, Section 62-6-5 (1993). It allows municipalities to "elect to come within the provisions of [the PUA] and to have the utilities owned and operated by it, either directly or through a municipally owned corporation, regulated and supervised under the provisions of [the PUA]." Las Cruces has not elected to become subject to the PUA, and therefore this exception is inapplicable to this case. The second exception brings municipalities with a population of more than 200,000 within the provisions of the PUA in certain circumstances. NMSA 1978, § 62-9-1.1(A), (C) (1991); *Morningstar*, 120 N.M. at 588, 904 P.2d at 37. Las Cruces does not have a population of more than 200,000, and

therefore Las Cruces is not subject to the PUA.

Instead, municipalities are regulated under the provisions of NMSA 1978, Sections 3-23-1 to -10 (1953, as amended through 2001), and NMSA 1978, Sections 3-27-1 to -9 (1953, as amended through 1994). Therefore, while the PRC has exclusive jurisdiction to regulate public utilities, it has no authority over utilities owned and operated by most municipalities. NMSA 1978, § 62-6-4(A) (2003) ("The [PRC] shall have general and exclusive power and jurisdiction to regulate and supervise every public utility . . . . Nothing in this section, however, shall be deemed to confer upon the commission power or jurisdiction to regulate or supervise the rates or service of any utility owned and operated by any municipal corporation . . . .").

If Las Cruces were subject to the PUA, the outcome would be clear. Section 62-9-1.1(A) describes the situation at hand and requires a specific remedy:

> Notwithstanding any other provision of the [PUA], or any provision of the Municipal Code, or any privilege granted under either act, if any municipality that has not elected to come within the terms of the [PUA] . . . constructs or extends or proposes to construct or extend its water or sewer line or system or water pumping station or reservoir into a geographical area described in a [CCN] granted by the [PRC] to a public utility rendering the same type of service, the [PRC], on complaint of the public utility claiming to be injuriously affected thereby, shall, after giving notice to the municipality and affording the municipality an opportunity for a hearing with respect to the issue of whether its water or sewer line, plant or system actually intrudes or will intrude into the area certificated to the public utility, determine whether such intrusion has occurred or will occur. If the [PRC] determines such an intrusion has occurred or will occur, the municipality owning or operating the water or sewer utility shall cease and desist from making such construction or extension in the absence of written consent of the public utility involved and approval of the [PRC].

This language clearly describes resolution of disputes between public utilities and municipalities not otherwise subject to the PUA when a municipality invades a certificated area. However, this section still does not resolve the problem in the present case, since Subsection C provides that "[f]or purposes of this section, 'municipality' means any municipality that has a population of more than two hundred thousand." Section 62-9-1.1(C). Thus, this section does not apply to Las Cruces. The Legislature expressed its clear intention to exclude smaller municipalities from the limits placed on larger municipalities that invade a certificated area.

Moongate argues that despite the plain meaning of Section 62-9-1.1(C), the expression of policy set forth in NMSA 1978, Section 62-3-2.1 (1991), requires this Court to hold that Las Cruces cannot invade Moongate's certificated area. Section 62-3-2.1(C) explains:

> A rational basis exists to prohibit intrusion of municipal water or sewer facilities or service into areas in

> which a public utility furnishes regulated services until that municipality elects to come within the terms of the [PUA], in which event both systems will be brought into parity of treatment with respect to the [PRC]'s independent jurisdiction and power to prevent unreasonable interference between competing plants, lines and systems. Without such controls as provided by Section 62-9-1.1 NMSA 1978, the declared policy of the [PUA], the provision of reasonable and proper utility services at fair, just and reasonable rates and the general welfare, business and industry of the state may be frustrated.

We agree with the Court of Appeals' discussion of this particular statutory language. *See Moongate*, 2012-NMCA-003, ¶¶ 18, 20-21. The Legislature expressed a desire to prohibit unreasonable municipal intrusion into territory that is already being served by public utilities, but it failed to enact any operative language, other than Section 62-9-1.1, to accomplish that goal. Because Section 62-9-1.1(C) explicitly excludes municipalities with a population of less than 200,000, we cannot construe either it or Section 62-3-2.1 as prohibiting Las Cruces from competing with Moongate in the certificated area at issue. Indeed, nothing in either the PUA or the statutory sections that regulate municipalities stops Las Cruces from providing service in the certificated area. Here, the area at issue was annexed by Las Cruces, which extended the corporate boundaries of the city, and it is therefore clear that Las Cruces may provide water in the certificated area. In fact, pursuant to Section 3-27-8(A), municipalities that operate a water system are authorized to furnish water even outside their corporate boundaries. Thus, contrary to Moongate's assertions, Las Cruces may provide utility service in the certificated area, even though the city has not elected to come under the provisions of the PUA.

We addressed an analogous situation in *Morningstar*, 120 N.M. at 581, 904 P.2d at 30, when a municipality extended its water services into territory that had previously been exclusively served by a water users' association. The water users' association argued that the municipality was encroaching on its service area and sought protection under the PUA by filing a complaint with the PRC. *Id.* at 582, 904 P.2d at 31. We held that the water users' association could not invoke the protections set forth in Section 62-9-1.1(A) because the municipality was not subject to the PUA under either exception. *Morningstar*, 120 N.M. at 588, 904 P.2d at 37. Similarly, in this case, Las Cruces is not subject to the PUA, which means that Moongate cannot invoke any protections set forth in the provisions in the PUA, including those contained in Section 62-9-1.1. *Morningstar*, 120 N.M. at 588, 904 P.2d at 37. While the Legislature is clearly concerned about possible encroachment by municipalities into public utilities' service areas, it also made clear that the protections contained in the PUA do not cover municipalities except under very limited circumstances.

Moongate has called our attention to the Court of Appeals' opinion in *Fleming v. Town of Silver City*, 1999-NMCA-149, ¶ 6, 128 N.M. 295, 992 P.2d 308, which states in dicta that

> a municipal water system does not fall within the purview of the PUA except that the regulation of the PUA extends to prohibit a municipality

> from operating within the service area of a regulated public utility until the municipality exercises its option to subject itself to regulation under the PUA so that both it and the existing utility may be regulated to avoid unreasonable and unnecessary duplication of plant and resources.

The Court cites Section 62-3-2.1(C) in support of this statement of the law. However, the PUA is clear and unambiguous to the extent that it excludes municipalities from being subject to its provisions. Section 62-3-3(E). Because the plain meaning of the statute is clear, we cannot engage in further interpretation. As we explained previously, Section 62-3-2.1 is a statement of policy. The operative language is found in Section 62-9-1.1, and it does not apply to Las Cruces. When and if the Legislature chooses to bring smaller municipalities into the scope of Section 62-9-1.1, it will amend the statute to do so.

In short, Moongate's CCN grants it exclusive service rights only against utilities that are subject to the PRC's authority. Nothing in the PUA suggests that issuing a CCN should allow the PRC to restrict the actions of a municipal utility that would otherwise fall outside of its jurisdiction. We conclude that the PRC's authority extends only as far as its ability to regulate, and because it has no ability to regulate Las Cruces, a CCN issued by the PRC has no limiting effect on the city. *See S. Union Gas Co. v. N.M. Pub. Util. Comm'n*, 1997-NMSC-056, ¶ 7, 124 N.M. 176, 947 P.2d 133 ("[T]he [PRC] cannot legitimately exercise jurisdiction over [a party] unless [that party] properly falls within the [PRC]'s statutorily defined jurisdiction."). The Court of Appeals' dicta in *Fleming* is incorrect insofar as it suggests otherwise. Moongate's CCN does not prevent a municipality with a population of less than 200,000 from competing with Moongate in its certificated area. We therefore affirm the Court of Appeals to the extent that it concluded that "Moongate's CCN did not grant [it] exclusive service rights against [Las Cruces'] water utility." *Moongate*, 2012-NMCA-003, ¶ 24.

B. LOSS OF AN ABSTRACT RIGHT TO SERVE IS NOT A COMPENSABLE TAKING

We now address Moongate's regulatory taking claim. Even though Moongate's CCN does not prevent Las Cruces from providing service in the certificated area, this does not necessarily preclude the possibility that Las Cruces effectuated a taking in doing so. The district court granted summary judgment in favor of Moongate on the basis that its CCN gave it exclusive service rights as against Las Cruces. We disagree with the district court's conclusion and hold that a taking can occur, even in the absence of a public utility's exclusive right to furnish water under a CCN, if the CCN holder can prove that it had established infrastructure and was already serving customers in the area interfered with by the municipality.

Article II, Section 20 of the New Mexico Constitution and the Fifth Amendment to the United States Constitution forbid the taking of private property for public use without just compensation. *See, e.g.*, *Bd. of Educ. v. Thunder Mountain Water Co.*, 2007-NMSC-031, ¶ 8, 141 N.M. 824, 161 P.3d 869 (explaining the takings protections set forth in the federal and state constitutions); *State ex rel. State Highway Comm'n v. Chavez*, 77 N.M. 104, 106, 419 P.2d 759, 760 (1966) (explaining that the right of access is a

property right that cannot be taken or damaged without just compensation). In evaluating takings claims under the New Mexico Constitution, "we turn to [both] federal [and state] cases for guidance, since '[o]ur state Constitution provides similar protection' to the Takings Clause in Amendment V of the United States Constitution." *Primetime Hospitality, Inc. v. City of Albuquerque*, 2009-NMSC-011, ¶ 19 n.1, 146 N.M. 1, 206 P.3d 112 (quoting *Thunder Mountain*, 2007-NMSC-031, ¶ 8 (third alteration in original)).

A regulatory taking, which Moongate asserts occurred here, occurs when the government regulates the use of land, but does not condemn it, i.e., take title to the property. *Manning v. Mining & Minerals Div.*, 2006-NMSC-027, ¶ 22, 140 N.M. 528, 144 P.3d 87. "The general rule is that a regulation which imposes a reasonable restriction on the use of private property will not constitute a 'taking' of that property if the regulation is (1) reasonably related to a proper purpose and (2) does not unreasonably deprive the property owner of all, or substantially all, of the beneficial use of his [or her] property." *Temple Baptist Church, Inc. v. City of Albuquerque*, 98 N.M. 138, 144-45, 646 P.2d 565, 571-72 (1982). If a regulatory taking has occurred, an action lies for inverse condemnation. *See Townsend v. State ex rel. State Highway Dep't*, 117 N.M. 302, 304, 871 P.2d 958, 960 (1994) (action in inverse condemnation is the exclusive remedy when property is taken or damaged for public use by a governmental entity that has failed to pay just compensation or initiate condemnation proceedings).

Municipalities have "the authority to condemn privately operated water . . . facilities for public use." *United Water N.M., Inc. v. N.M. Pub. Util. Comm'n*, 1996-NMSC-007, ¶ 23, 121 N.M. 272, 910 P.2d 906; Section 3-27-2(A), (G). We have required condemning authorities to pay just compensation to public utilities when taking tangible property, such as a water line extension and associated property. *Thunder Mountain*, 2007-NMSC-031, ¶¶ 3, 5. In this case, Moongate frames its takings claim as whether Las Cruces "could take Moongate's exclusive service rights" without just compensation. At oral argument, we asked Moongate's counsel what property was being taken that required compensation. Moongate reiterated that the property requiring just compensation was its exclusive right to serve. Essentially, Moongate asks us to require compensation for the fair market value of the lost potential opportunity to serve.

The district court found that in at least some of the certificated area, "[a]t most, Moongate lost only a few potential residential water customers as a result of the City's annexation . . . and agreement to provide water . . . utility service." Additionally, the district court found that "Moongate had no infrastructure on any of the three tracts of land and no customers on any of the properties," and it "had no ownership interest in any of the land[]." The district court also found that "Moongate had no physical assets in the areas in issue, and that no physical asset of any kind was taken by the City from Moongate." Further, the district court found that "[i]t was undisputed that, absent significant infrastructure improvements, Moongate could not serve . . . the Dos Suenos subdivision," and the developer had requested that Las Cruces provide utility services to the area. The district court also found that "Moongate has not incurred, and will not incur, any costs to serve the subject subdivisions." Essentially, the district court found that any lost profits

were speculative because they were based on a hypothetical future income stream.

Since there can be no taking of exclusive service rights if the rights are not exclusive as to the party that has allegedly taken them, and the district court's findings of fact indicate that Moongate had no tangible assets on the certificated area, the City has not engaged in a taking. If Moongate had proved that it had invested in production capacity to serve the area, built a plant or other infrastructure, and Las Cruces then took over service or began competing in the certificated area, this would be an entirely different issue, which might justify compensation under a stranded assets theory. Indeed, at oral argument, counsel for Las Cruces conceded that there would have been a taking if that had been the situation.

We have defined stranded assets or stranded costs "as those costs that . . . utilities currently are permitted to recover through their rates but whose recovery may be impeded or prevented by the advent of competition in the industry." *State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 7, 127 N.M. 272, 980 P.2d 55 (internal quotation marks and citation omitted); *see also City of Corpus Christi v. Pub. Util. Comm'n of Tex.*, 51 S.W.3d 231, 238 (Tex. 2001) ("[S]tranded costs are investments in or the cost of tangible assets" that it is in the public interest for utilities to recover). For example, if Moongate had proven that Las Cruces' actions rendered tangible assets worthless, Moongate could have legitimately argued that its investment in those assets was compromised, and therefore it was entitled to compensation under a stranded assets theory. However, Moongate did not make that argument, and the district court's findings of fact and conclusions of law make it clear that Moongate failed to demonstrate any loss at all. Significantly, Moongate itself identifies the alleged "exclusive service rights" as the property that requires just compensation—it does not point to any tangible asset that has been affected by Las Cruces' actions. Therefore, we cannot conclude that Las Cruces has engaged in a taking, and we hold that in the absence of any proof of tangible loss—i.e., physical taking or stranded costs—a public utility is not entitled to just compensation when a municipality lawfully exercises its right to serve in the public utility's certificated area.

Moongate cites case law from other jurisdictions to support the proposition that a municipality that invades a public utility's certificated area has taken property which requires just compensation. Although the authorities relied upon by Moongate are distinguishable, the reasoning and analyses in these cases were useful to this Court in reaching its conclusion. For example, in *City of Jackson v. Creston Hills, Inc.*, 172 So. 2d 215, 217-18, 220 (Miss. 1965), the court held that the city of Jackson had engaged in a taking when it invaded certificated territory where a public utility had established infrastructure ("two deep wells, two submersible pumps, two pressure tanks, water mains, service lines and other sundry property"), *id.* at 217-18, and was already providing service to customers in the area. Notably, the court found error in the district court's decision to value the CCN separately for calculation of damages. *Id.* at 221-22. Another example is *Delmarva Power & Light Co. v. City of Seaford*, 575 A.2d 1089, 1102-03 (Del. 1990), in which the Supreme Court of Delaware held that the city of Seaford could not take customer accounts from a public utility unless just compensation was paid. The municipality began to provide service to two

commercial customers which the public utility had served up to that point. *Id.* at 1091. Like *City of Jackson*, *Delmarva* supports the proposition that a municipality engages in a taking when actual (rather than potential) customers or infrastructure is involved. *See Delmarva*, 575 A.2d at 1103; *City of Jackson*, 172 So. 2d at 218. These cases, however, do not support that a taking has occurred when a right to serve has been compromised and no infrastructure or customers were involved.

CONCLUSION

The district court erred in granting summary judgment in favor of Moongate. Therefore, we affirm the Court of Appeals to the extent that it determined that Moongate's CCN does not guarantee exclusive service rights against Las Cruces. We also conclude that the loss of an abstract right to serve, without tangible loss, is not compensable as a taking. We remand to the district court to enter judgment for Las Cruces.

IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

RICHARD C. BOSSON, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-019

Filing Date: May 13, 2013

Docket No. 33,811

CLIFTON SKIDGEL,

Petitioner,

v.

TIMOTHY B. HATCH, Warden,

Respondent.

Clifton Skidgel, Pro Se
Santa Fe, NM

for Petitioner

Gary K. King, Attorney General
Margaret E. McLean, Assistant Attorney General
Santa Fe, NM

for Respondent

OPINION

DANIELS, Justice.

For more than thirty years, Petitioner Clifton Skidgel has been trying to get the attention of our state courts to correct his parole eligibility for the life sentences imposed on him after he pleaded guilty to four counts of first-degree murder on April 2, 1980. He now seeks a writ of certiorari from this Court to review the district court's summary dismissal of his most recent petition for writ of habeas corpus. We grant certiorari on the issue of the district court's order that Petitioner must serve thirty instead of ten years before consideration for parole, which the court ordered in reliance on our opinion in *Quintana v. New Mexico Department of Corrections*, 100 N.M. 224, 668 P.2d 1101 (1983); and we deny certiorari on all remaining issues. We expressly overrule *Quintana* to the extent that it is inconsistent with *Devine v. New Mexico Department of Corrections*, 866 F.2d 339 (10th Cir. 1989), reverse the district court on Petitioner's parole eligibility, and order the district court to issue a writ of habeas corpus providing that Petitioner shall become eligible for parole consideration upon the completion of ten years of imprisonment on the life sentence he is now serving.

BACKGROUND

Petitioner is serving the second of two consecutive life sentences for the first-degree murders of his wife and three of his stepchildren. According to documents in the record, Petitioner shot his wife and four stepchildren in their home on September 17, 1979. One of his stepchildren survived the shooting. The State charged Petitioner with four counts of first- degree murder and one count of attempted murder. In exchange for his plea of guilty to the four murder charges, the State dismissed the attempted murder charge. The district court sentenced Petitioner on May 14, 1980, to four life sentences, ordering that three of the sentences would run concurrent with each other and consecutive to the fourth, for an effective sentence of two consecutive life terms.

Fifteen months after Petitioner was sentenced, he filed his first motion for postconviction relief to correct what he argued was an illegal sentence. He claimed that his attorney had advised him that he would be eligible for parole after serving ten years on each of his two consecutive life sentences. Once incarcerated, however, Petitioner received a "time slip" informing him that he would not be eligible for parole until he served thirty years on each life sentence. The effect was to extend what Petitioner understood to be the minimum length of his incarceration from twenty years to sixty. He claimed that the discrepancy rendered his plea bargain "involuntary" and that his attorney's incorrect advice amounted to ineffective

assistance of counsel. The district court denied that motion in 1981.

Over the course of the next eight years, Petitioner raised this discrepancy issue with the district court three more times without success. His first effort was in 1983, when he requested relief on the basis of "new evidence," which consisted of postsentencing correspondence with his attorney advising him and his family that he would be eligible for parole in twenty years. For reasons that are unclear from the record, Petitioner abandoned the 1983 attempt shortly before he was to appear for an evidentiary hearing.

He tried again in 1985 with a petition for a writ of habeas corpus. The district court granted Petitioner an evidentiary hearing at which his attorney testified that she had advised him during the course of his plea negotiations, based on her understanding of the law at that time, that a person sentenced to life in prison would be eligible for parole after ten years. The district court denied the petition, concluding that Petitioner did not rely on his attorney's advice when he pleaded guilty to four counts of first-degree murder. The district court further concluded that "[t]he parole eligibility date for [Petitioner's] two consecutive life sentences is sixty years."

The last in this series of attempts was in 1989, when he again petitioned for a writ of habeas corpus and raised the incongruity of his counsel's advice and his ultimate parole eligibility. The district court summarily dismissed the 1989 petition on a technicality, citing Petitioner's failure to name the proper respondent.

Petitioner made two additional postconviction challenges, in 1991 and 1995, on grounds related to his competency, and the district court denied both. This Court denied certiorari review of those denials, and Petitioner fared no better on these issues in federal court. *See Skidgel v. Williams*, 172 F.3d 63, at *1 (10th Cir. 1999) (unpublished) (denying federal habeas corpus relief).

This brings us to the present petition—filed over thirty years after his initial incarceration—in which Petitioner again challenges the timing of his eligibility for parole. This is the first time Petitioner has presented this Court with the issue of his parole eligibility, and we agree that he is entitled to relief on that ground.

ANALYSIS

Legislative History

This Court previously has encountered confusion about the appropriate length of a life sentence for someone convicted of committing a capital crime that occurred in the latter half of 1979. In *Quintana*, we addressed the claim of a defendant sentenced to a life term for a crime he committed during that same period. 100 N.M. at 225, 668 P.2d at 1102. We explained that the confusion for capital offenders arose from a series of conflicting laws passed by the Legislature that affected the period of incarceration such an individual must serve before becoming eligible for parole. *Id.* at 226-27, 668 P.2d at 1103-04.

Prior to 1977, NMSA 1953, Section 41-17-24 (1955) provided that a person sentenced to life imprisonment became eligible for parole consideration after serving ten years. *See Quintana*, 100 N.M. at 226, 668 P.2d at 1103. But in 1977, the Legislature passed two bills—both on the same day—with conflicting provisions

governing parole eligibility for a life sentence. The first 1977 bill repealed Section 41-17-24 and established a new, thirty-year minimum term of imprisonment for a life sentence; that law had a postponed effective date of July 1, 1979. *See Quintana*, 100 N.M. at 226, 668 P.2d at 1103 (citing 1977 N.M. Laws, ch. 216). The second 1977 bill amended Section 41-17-24 in various other ways but left the ten-year period in Section 41-17-24 intact; this second law would have had an effective date of June 21, 1977, ninety days after the March 19, 1977, adjournment of the 1977 Legislative session, by the terms of Article IV, Section 23 of the New Mexico Constitution. *See Quintana*, 100 N.M. at 226, 668 P.2d at 1103 (citing 1977 N.M. Laws, ch. 217).

Compounding the confusion, the 1978 recompilation of the New Mexico Statutes codified only the second bill at NMSA 1978, Section 31-21-10 (1977), and simply referred to the first bill in the compiler's annotations without including its text. *See Devine*, 866 F.2d at 340-41. Thus, Subsection D(4) of the statute that appeared in the official compilation continued to provide that a person sentenced to life in prison was eligible for parole after serving ten years.

Such was the status until February 22, 1980, when the Legislature repealed the newly recodified Section 31-21-10 in its entirety and replaced it with a new statute that prescribed a thirty-year period of imprisonment for a life sentence before eligibility for parole. *See Quintana*, 100 N.M. at 226, 668 P.2d at 1103. The Legislature made the 1980 statute effective immediately and purported to make it apply retroactively to all crimes committed on or after July 1, 1979. *See id.*

These dates are critical in this case because Petitioner's crimes were committed on September 17, 1979, and he was sentenced on May 14, 1980. Thus, Petitioner was sentenced just after the 1980 law went into effect for crimes that he committed after the retroactive date of July 1, 1979.

Conflicting State and Federal Holdings

In *Quintana*, we held that Andrew James Devine, a defendant serving a life sentence under circumstances substantially identical to Petitioner's, would not be eligible for parole until he had served thirty years, rather than ten years as provided by prior law. 100 N.M. at 227, 668 P.2d at 1104. We reasoned that, because the first bill *repealed* the prior sentencing statute and replaced it with a new thirty-year term of imprisonment, the second bill that *amended* the prior statute was ineffective; in essence, there was nothing for the second bill to amend. *See id.* at 226-27, 668 P.2d at 1103-04. Our opinion is not entirely clear about the fate of the second bill—the law published in the 1978 recompilation of our statutes—but it seems that we concluded that it was never effective. *See Quintana*, 100 N.M. at 226, 668 P.2d at 1103. Instead, we held that the law regarding parole eligibility remained unchanged until the law the Legislature passed first became effective on July 1, 1979, as the Legislature originally provided. *See* 100 N.M. at 227, 668 P.2d at 1104 (holding that parole eligibility for an "inmate . . . sentenced for committing a crime after July 1, 1979, [and] serving . . . a capital life sentence . . . is thirty years").

Some years later, the United States Court of Appeals for the Tenth Circuit granted a federal writ of habeas corpus to Andrew James Devine. *See Devine*, 866 F.2d at 339. The Tenth Circuit held that our reasoning and holding in *Quintana* were "unforeseeable and

retroactively enhanced Devine's punishment," in violation of ex post facto principles, and therefore violated Devine's federal due process rights. *Id.* at 347. The Tenth Circuit ordered Devine released unless he was provided a parole hearing after serving ten years in prison. *Id.* Thus, *Devine* effectively overruled our retroactive interpretation of New Mexico's parole eligibility laws in *Quintana* as a matter of federal constitutional law. *Cf. State v. Ordunez*, 2012-NMSC-024, ¶¶ 1-2, 19, 283 P.3d 282 (reviewing ex post facto considerations in parole and probation eligibility cases and holding that retroactive application of a statute reducing sentence credit for time served on probation constitutes ex post facto punishment).

We have acknowledged previously that *Devine* undid our holding in *Quintana*, *see State v. Smith*, 2004-NMSC-032, ¶ 29, 136 N.M. 372, 98 P.3d 1022, although the most widely used legal research services fail to warn users that *Quintana* retains little, if any, precedential value. To avoid any further confusion, we hereby expressly overrule *Quintana* to the extent it is inconsistent with *Devine*, in recognition of the supremacy of the federal court ruling. *See* U.S. Const. art. VI, clause 2.

Disposition of This Petition

The State's responsive filing in this Court agrees with Petitioner that the district court erroneously relied on *Quintana* and requests that we "grant the Petition and . . . such other and further relief this Court deems just and proper." We agree with the State's candid concession. The rule of law that requires Petitioner be held accountable for his crimes also requires that the executive and judicial branches of the state comply with the rule of law in administering his punishment.

The only remaining question concerns the scope of the remedy that this Court should grant to Petitioner. The State suggests that the relief required by *Devine* is based on the parole procedure under the statute that was in effect at the time of Petitioner's crimes. We agree. We therefore reverse the district court's denial of the petition for writ of habeas corpus and remand with instructions to issue a writ clarifying that Petitioner shall be eligible for parole for his second life sentence upon the completion of ten years of that sentence. It appears from the record that Petitioner was granted parole on his first three concurrent life sentences on September 24, 2003, and that he accepted the conditions of his parole on September 30, 2003, effective when service of his final life sentence commenced. If our calculation is correct, it appears that Petitioner will become eligible for a parole hearing on his current and final sentence on September 30, 2013.

Whether to grant parole to Petitioner at that time is not for this Court to decide. We note that the circumstances under which Petitioner was granted parole on his first life sentence are not clear from the record and briefing before us. It appears that he was paroled after serving approximately twenty-four years of that sentence, a possible result of the Tenth Circuit's holding in *Devine*. *See Skidgel*, 172 F.3d 63 at *2 n.5 ("Skidgel's filings in the district court suggest that New Mexico revised its policy following our decision in *Devine* so that Skidgel's current parole eligibility is set at 10 years for each of the consecutive life sentences." (internal citation omitted)). Rather than rely on speculation, we write to ensure that neither the district court's order in this case nor our holding in *Quintana* can be resurrected to further affect Petitioner or any other person similarly situated.

CONCLUSION

We grant the petition for certiorari on the issue of the district court's reliance on *Quintana*, reverse the district court's summary dismissal on that issue, and remand with instructions to issue a writ of habeas corpus ordering that Petitioner's eligibility for a parole hearing accrue upon the completion of ten years of service on his current life sentence.

IT IS SO ORDERED.

CHARLES W. DANIELS, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

BARBARA J. VIGIL, Justice

Certiorari Granted, May 24, 2013, No. 34,120

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-060

Filing Date: March 25, 2013

Docket No. 31,442

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ABRAHAM BACA,

Defendant-Appellant.

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Santa Fe, NM

for Appellee

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for Appellant

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for Amicus Curiae ACLU of N.M.

OPINION

VIGIL, Judge.

This case commenced as a criminal prosecution in the magistrate court. The question presented is whether double jeopardy bars a trial de novo in the district court when the arresting officer completed his testimony on direct examination, and the magistrate court suppressed the arresting officer's testimony and dismissed the case with prejudice. We conclude that the magistrate court judge's ruling constituted an acquittal and that a trial de novo in the district court would violate Defendant's constitutional right to be free from double jeopardy. The district court having ruled otherwise, we reverse.

I. BACKGROUND

Sergeant Martin Trujillo arrested Defendant and filed a criminal complaint in the magistrate court charging Defendant with aggravated driving while under the influence of intoxicating liquor (DWI) and illegally driving left of center on a roadway. NMSA 1978, §§ 66-8-102 (2010) and -7-313 (1978). Magistrate Judge Naranjo dismissed the criminal complaint without prejudice after the prosecutor failed to attend a pretrial conference.

The prosecutor subsequently filed a second criminal complaint in the magistrate court charging the same offenses, but failed to comply with the requirements of Rule 6-506A(C) NMRA for a refiled criminal complaint.[1] A non-jury trial commenced before Judge Naranjo, and the State called Sergeant Trujillo as its first witness. While he was testifying on direct examination, Defendant attempted to conduct a voir dire about the criminal complaint he filed and the second criminal complaint filed by the prosecutor. Judge Naranjo halted the inquiry, explaining that he wanted to hear the direct testimony without interruption and that the voir dire would be heard and considered during cross-examination. Judge Naranjo further stated that he would reserve ruling on the admissibility and weight of the testimony until after the cross-examination of Sergeant Trujillo was completed.

During Sergeant Trujillo's cross-examination, Defendant demonstrated that the second criminal complaint filed by the prosecutor did not comply with the requirements for a refiled criminal complaint mandated by Rule 6-506A. Defendant therefore moved for a finding that the State had violated Rule 6-506A(C) and for a sanction to suppress Sergeant Trujillo's testimony. Judge Naranjo granted the motions, and he filed a final order dismissing

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[1]Rule 6-506A(C) directs:
"If a citation or complaint is dismissed without prejudice and the charges are later refiled, the refiled complaint shall be clearly captioned 'Refiled Complaint' and shall include the following:
(1) the court in which the original charges were filed;
(2) the case file number of the dismissed charges;
(3) the name of the assigned judge at the time the charges were dismissed; and
(4) the reason the charges were dismissed."

the charges with prejudice. The order recites that upon Defendant's motion, the officer's testimony was suppressed, and the "case dismissed with prejudice of the following charge(s): aggravated driving while under the influence of intoxicating liquor or drugs and driving left of center of road ways."

The State appealed to the district court. *See* Rule 5-826(A) NMRA (stating that a party who is aggrieved by the judgment or final order in a criminal action in magistrate court "may appeal, as permitted by law, to the district court"). After the State's notice of appeal was filed, Judge Naranjo filed an amended final order on criminal complaint nunc pro tunc in the magistrate court. In pertinent part, this order states:

> A motion was made by [Defendant] to suppress the testimony of Sergeant Martin Trujillo for violation of [Rule] 6-506-A(C)[,](D). Sergeant Martin Trujillo was the arresting [o]fficer. A second motion was made by [Defendant] for a directed verdict of not guilty due to insufficient evidence to proceed. Motion to suppress and directed verdict of not guilty were granted.
>
> THE DEFENDANT IS THEREFORE ACQUITTED.

The State's appeal triggered a trial de novo to be held in the district court. *See* Rule 5-826(J) ("Trials upon appeals from the magistrate or municipal court to the district court shall be de novo."). Contending that a trial de novo in the district court would violate his constitutional right to be free from double jeopardy, Defendant filed a motion to dismiss the State's appeal. *See* U.S. Const. amend. V (stating that no person shall "for the same offense to be twice put in jeopardy"); N.M. Const. art. II, § 15 (stating that no person shall "be twice put in jeopardy for the same offense"). The State responded, and the motion was set for an evidentiary hearing. The State also objected to the amended final order, and the district court ruled that the amended final order was not valid and would not be considered in ruling on Defendant's motion to dismiss.

Judge Naranjo was subpoenaed to testify at the evidentiary hearing in district court. Judge Naranjo testified that after Sergeant Trujillo completed his direct testimony in the trial in magistrate court, Defendant asserted that the second criminal complaint did not comply with Rule 6-506A, and, for a sanction, asked that Sergeant Trujillo's testimony be suppressed. After taking a recess, Judge Naranjo was in the process of announcing his decision when the prosecutor interrupted and said the State was going to dismiss the charges. Judge Naranjo said he responded that "I didn't need to listen to her dismissing the case, that I would be dismissing the case." Judge Naranjo said that after he announced that Sergeant Trujillo's testimony would be suppressed, defense counsel made a motion for a directed verdict, and he granted that motion as well. Judge Naranjo explained that he was reminded by defense counsel that instead of dismissing the case, he should find Defendant not guilty. Agreeing, Judge Naranjo announced that Defendant was not guilty of the charges. He granted the motion for a directed verdict because after Sergeant Trujillo finished testifying, he determined that Defendant "was not guilty of the charges, and, consequently, I dismissed the charges against him."

Referring to the original order dismissing

the case with prejudice, Judge Naranjo testified that it did not correctly reflect what had happened because he did not dismiss the case, he granted Defendant's motion for a directed verdict, and he found Defendant not guilty. Judge Naranjo said that the errors were likely made by his clerk in preparing the order, and when the errors were discovered, they were corrected in the amended order, which accurately reflects what actually occurred.

In cross-examination, Judge Naranjo acknowledged that other witnesses for the State were in the hallway when he dismissed the case and that the State had not finished presenting all of its evidence. Furthermore, he had no information on what evidence the other witnesses would have offered. Pressed how he could grant an acquittal without hearing these witnesses, Judge Naranjo answered:

> [T]he evidence that had been presented was being presented by the chief or the main witness for the State, in this case, Sergeant Martin Trujillo.
>
> . . . .
>
> [I]f the evidence was going to be suppressed where nothing could be heard from him, my opinion was that we should finish the case, terminate it.

He subsequently added that the most important evidence pertaining to the case "had and should have been given by Sergeant Trujillo," and when Judge Naranjo granted the defense motion to suppress Sergeant Trujillo's testimony, "that, to me, as far as I was concerned, would stop the case from going further."

Sergeant Trujillo also testified at the evidentiary hearing. In order to avoid him repeating what his testimony was at the magistrate court trial, and to save time, the parties stipulated that Sergeant Trujillo was the investigating and arresting officer and that he gave testimony that was relevant to proving a DWI charge in the magistrate court. Sergeant Trujillo then testified that after he completed giving his testimony at the trial, Defendant made an argument that the second criminal complaint filed by the prosecutor was missing information and that after taking a recess of about five minutes, Judge Naranjo ruled he would suppress Sergeant Trujillo's testimony, and he dismissed the case with prejudice. In addition, Sergeant Trujillo also remembered that the term "directed verdict" was also used, although he was not sure exactly when.

The district court denied Defendant's motion to dismiss, reasoning that the sanction imposed in the magistrate court for a violation of Rule 6-506A(C) "was not an evidentiary ruling but was based on a procedural issue." Therefore, the district court concluded that double jeopardy was not a bar to a trial de novo in the district court under *State v. Montoya*, 2008-NMSC-043, ¶ 11, 144 N.M. 458, 188 P.3d 1209 ("[A]n order of dismissal on procedural grounds or in a manner that does not amount to an acquittal is an appealable final order."), and *State v. Lizzol*, 2007-NMSC-024, ¶ 12, 141 N.M. 705, 160 P.3d 886 (stating that a legal judgment that a defendant may not be prosecuted for reasons unrelated to factual guilt or innocence is not an acquittal). Defendant appeals. We have jurisdiction pursuant to *State v. Apodaca*, 1997-NMCA-051, ¶ 17, 123 N.M. 372, 940 P.2d 478 (allowing an immediate appeal from an order denying a motion to dismiss on grounds of double jeopardy).

II. ANALYSIS

Defendant contends the district court erroneously denied his motion to dismiss on double jeopardy grounds. We generally apply a de novo standard of review to whether double jeopardy applies to a given set of facts. *State v. Andazola*, 2003-NMCA-146, ¶ 14, 134 N.M. 710, 82 P.3d 77.

We begin our analysis with *County of Los Alamos v. Tapia*, 109 N.M. 736, 790 P.2d 1017 (1990). In *Tapia*, a police officer observed the defendant running a stop sign and driving with an inoperable tail light near the Los Alamos-Santa Fe County boundary. The police officer pursued the defendant into Santa Fe County, where he arrested the defendant for DWI. *Id.* at 737-38, 790 P.2d at 1018-19. Following his conviction in the Los Alamos County municipal court, the defendant appealed to the district court for a trial de novo. *Id.* at 738, 790 P.2d at 1019; *see* NMSA 1978, § 35-15-10 (1959) ("All trials upon appeals by a defendant from the municipal court to the district court for violations of municipal ordinances shall be de novo and shall be tried before the court without a jury."). The first witness was the arresting officer who testified about his observations, the defendant's field sobriety tests, and a breath test. *Tapia*, 109 N.M. at 738, 790 P.2d at 1019. During the officer's testimony, the defendant made a motion to suppress all evidence resulting from the arrest on grounds that the arrest in Santa Fe County violated the Fresh Pursuit Act, NMSA 1978, §§ 31-2-1 to -8 (1937, as amended through 1981). *Tapia*, 109 N.M. at 738, 790 P.2d at 1019. The district court judge agreed with the defendant and granted the motion to suppress. *Id.* The district court also dismissed the charges because the defendant's arrest was "illegal" and all evidence in support of the charges had been suppressed. *Id.*

Our Supreme Court concluded that the district court ruling did not constitute a determination of the facts in the case, rather "it was purely and simply a ruling on the legality of [the] defendant's arrest and the consequent admissibility *vel non* of the prosecution's evidence." *Id.* at 739, 790 P.2d at 1020. As such, our Supreme Court held that double jeopardy did not prohibit the retrial, even though the dismissal was ordered after jeopardy had attached. *Id.* at 744, 790 P.2d at 1025; *see Lizzol*, 2007-NMSC-024, ¶ 21 (modifying *Tapia*'s holding "that the defendant was not acquitted in the trial court because the court's ruling was based on an interpretation of a statute and was unrelated to a factual finding of guilt or innocence").

On the other hand, our Supreme Court concluded that retrial was barred by double jeopardy in *Lizzol*, because the trial judge did make a factual determination concerning the defendant's guilt. *Id.* ¶ 24. In *Lizzol*, the defendant was charged with DWI, and trial was before the metropolitan court judge. *Id.* ¶¶ 2-3. The arresting officer testified about the defendant's driving behavior, the defendant's performance on field sobriety tests, the defendant's admission that he had consumed alcohol, and a breath alcohol test (BAT) he gave to the defendant. *Id.* When the state attempted to introduce the BAT card into evidence with the test result, the defendant objected on grounds that the arresting officer's testimony was insufficient to establish a foundation for its admission into evidence. *Id.* ¶¶ 3-4. The metropolitan court judge was concerned about whether case law required testimony from someone who was more familiar than the arresting officer about the certification process of the breath alcohol machine in order for its results to be

admissible into evidence.[2] *Id.* ¶ 4.

The prosecutor requested a final order be entered that the arresting officer was not qualified to verify the machine's certification, stating that the state would then appeal. *Id.* The metropolitan court judge responded:

> Yeah, because I'd sure like to find the answer to that. And I'm not saying I necessarily believe it one way or another. I'm just saying right now, it's too close to call. And if it's going to be that way, I'm going to find reasonable doubt in all of this stuff.
>
> So I'll go ahead and find that—that the officer in this case was not the proper person to be appropriately—the appropriately qualified witness by certification. And as such, I'll suppress the breath test.

Id. (internal quotation marks omitted). The metropolitan court judge added: "I'll get a final order out. As such, I'm going to find that I had reasonable doubt in the case." *Id.* (internal quotation marks omitted). After ensuring that the state was resting its case, the metropolitan court judge continued: "So I find that I have reasonable doubt based on that. And as such, would find the [d]efendant not guilty at this point, and then we'll just leave it as such."[3] *Id.* (internal quotation marks and citation omitted). The written order subsequently entered stated:

> BY THE ORDER OF THIS COURT: The breath card is suppressed because the officer is found not to be "A qualified individual" to testify to the certification of the breath machine under [case law], the case is therefore dismissed.

Id. The state appealed to the district court.[4] *Id.* ¶ 5. The district court concluded that the metropolitan court judge erred in not admitting the BAT card and remanded the case to the metropolitan court for trial. *Id.*

The defendant then appealed to this Court, asserting that double jeopardy prohibited the state's appeal to the district court. *Id.* Concluding that *Tapia* allowed the state to appeal a trial court's exclusion of

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[2]In *State v. Martinez*, 2007-NMSC-025, 141 N.M. 713, 160 P.3d 894, filed the same day as *Lizzol*, our Supreme Court held that before a BAT card is admitted into evidence, the state must make a threshold showing that the machine was certified by the Scientific Laboratory Division (SLD) and that the SLD certification was current at the time the test was taken. *Id.* ¶ 12. The trial court must be satisfied that this foundation requirement was met by a preponderence of the evidence, and in making its decision, the trial court is not bound by the rules of evidence except those concerning privileges. *Id.* ¶ 21.

[3]Unlike the magistrate court, the metropolitan court is a court of record in actions involving DWI and domestic violence. NMSA 1978, § 34-8A-6(C) (1993) ("The metropolitan court is a court of record for criminal actions involving driving while under the influence of intoxicating liquors or drugs or involving domestic violence."). Thus, the actions taken by the metropolitan court judge and the reasons were contained in the record on appeal before the district court and the Supreme Court.

[4]The appeal was pursuant to Section 34-8A-6(C), which provides in pertinent part, "Any party aggrieved by a judgment rendered by the metropolitan court in a criminal action involving driving while under the influence of intoxicating liquors or drugs or involving domestic violence may appeal to the district court of the county in which the metropolitan court is located[.]"

evidence, a panel of this Court held that double jeopardy did not bar the state's appeal to the district court. *Id.* On certiorari, our Supreme Court reversed. *Id.* ¶ 6.

Consistent with the established precedent, our Supreme Court said that determining whether the metropolitan court ruling constituted an acquittal did not hinge on the written or oral words used by the metropolitan court judge. *Id.* ¶ 7. "Instead, whether a defendant was acquitted depends on whether the trial court's ruling, however labeled, correctly or incorrectly resolved some or all of the factual elements of the crime." *Id.* Looking to the metropolitan court judge's oral ruling, our Supreme Court concluded:

> When the [metropolitan court] judge decided that the [s]tate lacked foundation to admit the BAT card into evidence, he exercised his discretion and made an evidentiary ruling. Absent the BAT card, the [metropolitan court] judge concluded that the [s]tate lacked evidence sufficient to convict [the defendant]. Regardless of whether the evidentiary ruling was correct, the [metropolitan court] judge, based on that ruling, made a factual finding that the [s]tate could not prove its case. Even if the final written order can be construed as something other than a judgment of acquittal, and notwithstanding the [metropolitan court] judge's clear indication that he wished the issue to be appealed, [the defendant] was acquitted for purposes of double jeopardy.

Id. ¶ 24 (internal quotation marks omitted). Thus, our Supreme Court concluded, the state's appeal to the district court was barred by double jeopardy. *Id.* ¶ 29.

Marquez provides us with additional guidance. In *Marquez*, the defendant was convicted of careless driving and DWI in the municipal court, and he appealed to the district court for a trial de novo. 2012-NMSC-031, ¶ 4. In the district court, the arresting officer testified about the defendant's driving, his slurry speech, the odor of intoxicating liquor emanating from his breath, his red and bloodshot eyes, his performance on field sobriety tests, and the results of a blood test. *Id.* ¶¶ 5-7. After a three-month continuance, defense counsel commenced cross-examination, but stopped his questioning after the officer said he was not feeling well and could not remember his prior direct testimony. *Id.* ¶ 8. Without calling any other witnesses, the city rested. *Id.*

The defendant then asked the district court judge to review a video recording of the entire stop and arrest made by a video camera in the officer's patrol car that had been admitted into evidence during the arresting officer's direct testimony. *Id.* ¶ 9. After the district court judge did so, the defendant moved for a directed verdict on the DWI charge on grounds that he was unable to cross-examine the arresting officer and that the video contradicted the arresting officer's testimony about the defendant's driving, speech, and behavior. *Id.* The district court judge reviewed the video and concluded it contradicted the arresting officer's testimony in several material ways, and that based on the video, the arresting officer lacked reasonable suspicion to expand the traffic stop into a DWI investigation. *Id.* ¶ 10. Thus, the district court judge sua sponte ruled that he would suppress all evidence from the DWI investigation and enter an order dismissing the DWI charge, while upholding the careless

driving charge. *Id.* ¶ 11. The written order stated that having heard testimony, and taken evidence, the court had determined that the arresting officer did not have reasonable suspicion to expand the scope of the traffic stop into a DWI investigation, and on that basis all evidence of DWI developed as a result of the investigation following the traffic stop was suppressed, "and the charge of DWI is . . . dismissed with prejudice." *Id.* (alteration and internal quotation marks omitted). The written order did not explicitly rule on, or make reference to, the defendant's motion for a directed verdict. *Id.*

The city appealed the district court order to our Supreme Court. *Id.* ¶ 1. NMSA 1978, § 35-15-11 (1959) (stating that a municipality may appeal to the Supreme Court from any final decision of the district court on appeal from the municipal court). Our Supreme Court concluded that under *Lizzol*, the district court action constituted an acquittal. *Marquez*, 2012-NMSC-031, ¶¶ 12-18. Specifically, our Supreme Court determined that "the district court's evidentiary ruling here, although not styled as an order of acquittal, nonetheless functioned as an acquittal" just as the order in *Lizzol* did, because "by making the suppression ruling after the [c]ity rested its case and simultaneously dismissing the DWI charge, the district court effectively determined that the [c]ity lacked sufficient evidence to meet its burden of proof." *Id.* ¶ 16. Further, our Supreme Court specifically held that *Tapia* did not apply:

> Like the factual finding in *Lizzol* and unlike the jurisdictional determination in *Tapia*, the district court in the present appeal based its order of dismissal on an evidentiary ruling that directly related to [the defendant's] guilt or innocence. That is because in suppressing the evidence resulting from the DWI investigation after the [c]ity had rested its case and dismissing the DWI charge, the district court here implicitly held the evidence to be insufficient to support [the defendant's] conviction on the DWI charge.

Id. ¶ 18. Therefore, double jeopardy prohibited the city from retrying the defendant on the DWI charge, and the city's appeal was dismissed. *Id.* ¶ 12.

The facts of this case are undisputed and uncontradicted, and they bring us to the inescapable conclusion that Judge Naranjo resolved factual issues on elements of the crimes in Defendant's favor. Sergeant Trujillo was the State's first witness at the magistrate court trial, and with the commencement of his testimony, jeopardy attached. *State v. Nunez*, 2000-NMSC-013, ¶ 28, 129 N.M. 63, 2 P.3d 264 (stating that in a bench trial, "jeopardy attaches when the court begins to hear at least some evidence on behalf of the state"). After Sergeant Trujillo completed his testimony, Defendant asserted that the second criminal complaint did not comply with Rule 6-506A(C), and for a sanction, asked that Sergeant Trujillo's testimony be suppressed. Judge Naranjo granted the motion. Once Sergeant Trujillo's testimony was suppressed, Defendant made a motion for a directed verdict. A motion for a directed verdict challenges the sufficiency of the State's evidence to prove the crime charged. *See generally State v. Armijo*, 1997-NMCA-080, ¶ 16, 123 N.M. 690, 944 P.2d 919 ("A motion for a directed verdict challenges the sufficiency of the evidence[.]"); *State v. Dominguez*, 115 N.M. 445, 455, 853 P.2d

147, 157 (Ct. App. 1993) ("The question presented by a directed verdict motion is whether there was substantial evidence to support the charge."). With Sergeant Trujillo's testimony suppressed, Judge Naranjo determined that the evidence was insufficient to prove either charge against Defendant, and he dismissed the case with prejudice. While additional witnesses were waiting to testify, the State failed to advise Judge Naranjo what evidence they were prepared to offer. In addition, since the State failed to make an offer of proof on the record, we would have to speculate what their testimony would have been.

We have discussed *Tapia*, *Lizzol*, and *Marquez* in great detail. Our purpose was to make it clear that *Tapia* is not applicable and that under *Lizzol* and *Marquez*, Defendant was acquitted in the magistrate court. We hold that the magistrate court's dismissal constituted an acquittal and, therefore, the State was barred from appealing to the district court on the basis that the magistrate court's suppression order was erroneous. Because there was an acquittal, we may not address whether or not Judge Naranjo's ruling suppressing Sergeant Trujillo's testimony was erroneous. *Marquez*, 2012-NMSC-031, ¶ 15 (stating that when there is an acquittal, the state may not appeal from the evidentiary ruling on which the acquittal is based); *Lizzol*, 2007-NMSC-024, ¶ 7 (stating that a verdict of acquittal cannot be reviewed "even if it was based on an 'egregiously erroneous foundation' " (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam))); *Tapia*, 109 N.M. at 741, 790 P.2d at 1022 (stating that once a defendant is acquitted, whether there has been trial error or another defect in the process leading to the acquittal is not subject to review). The efficacy of an acquittal rendered by the fact finder in a criminal case is inviolable.

III. CONCLUSION

The order of the district court denying Defendant's motion to dismiss is reversed, and the case is remanded to the district court for entry of an order dismissing the State's appeal.

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

MICHAEL E. VIGIL, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

JONATHAN B. SUTIN, Judge

Certiorari Granted, May 24, 2013, No. 34,127

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-061

Filing Date: March 26, 2013

Docket No. 31,869

STATE OF NEW MEXICO ex rel. CHILDREN, YOUTH AND FAMILIES DEPARTMENT,

Petitioner-Appellee,

v.

RAQUEL M.,

Respondent-Appellant,

IN THE MATTER OF ANGEL N., n/k/a CISCO N.,

Child.

Children, Youth & Families Department
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for Appellee

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Guardian ad Litem

OPINION

SUTIN, Judge.

Raquel M. (Mother) appeals the district court's judgment terminating her parental rights to Angel N., now known as Cisco N. (Child). Based upon its finding that Child had been subjected to aggravated circumstances—specifically, that Mother's parental rights to Child's sibling had previously been terminated—the district court relieved the Department of its obligation to make further reasonable efforts to reunify the family. Mother contends that because the prior termination was the subject of a pending appeal in this Court, her right to due process was violated by the aggravated circumstances finding. We conclude that Mother's due process rights were not violated, and we affirm.

LEGAL BACKGROUND

When a child is found to be neglected or abused, the district court must order the Children, Youth and Families Department (the Department) to design and implement a treatment plan that reflects "reasonable efforts" on behalf of the Department to preserve and reunify the family. NMSA 1978, § 32A-4-22(C) (2009); *see also State ex rel. Children, Youth & Families Dep't v. Amy B.*, 2003-NMCA-017, ¶ 2, 133 N.M. 136, 61 P.3d 845 (explaining that the treatment plan shall outline the Department's reasonable efforts to reunify the family). Subject to court approval of the treatment plan, the child's parent is ordered to cooperate with its dictates. Section 32A-4-22(C). In some circumstances,

however, the court may relieve the Department of its obligation to employ reasonable efforts at reunification, including its obligation to implement a treatment plan. *Id.* One such circumstance is a finding, by the court, that the parent has subjected the child to aggravated circumstances. Section 32A-4-22(C)(2). By definition, "aggravated circumstances" includes those circumstances in which the parent has had parental rights over a sibling of the child terminated involuntarily. NMSA 1978, § 32A-4-2(C)(4) (2009).

A finding of aggravated circumstances also plays a role in the termination of parental rights. "The Children's Code gives the [district] court the authority to terminate the parental rights of an abusive or neglectful parent." *State ex rel. Children, Youth & Families Dep't v. Mafin M.*, 2003-NMSC-015, ¶ 18, 133 N.M. 827, 70 P.3d 1266. Ordinarily, the court may not terminate parental rights unless the court determines "that the conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future *despite reasonable efforts by the [D]epartment* . . . to assist the parent in adjusting the conditions that render the parent unable to properly care for the child." NMSA 1978, § 32A-4-28(B)(2) (2005) (emphasis added). In cases where the parent has subjected the child to aggravated circumstances, however, the district court may find that efforts by the Department are unnecessary. Section 32A-4-28(B)(2)(b). Under those circumstances, where the Department is excused of its reasonable-efforts obligation, in order to succeed on a motion to terminate parental rights, the Department must still prove that the conditions and causes of the abuse and neglect would not change in the foreseeable future. *Amy B.*, 2003-NMCA-017, ¶ 18.

FACTS

On December 16, 2010, the district court entered a judgment terminating Mother's parental rights to a sibling of Child. Mother appealed the December 16 judgment to this Court. *See In re Isiah M.*, No. 31,057, slip op. (N.M. Ct. App. March 27, 2012). On February 4, 2011, while Mother's appeal to this Court was pending, the Department filed an abuse and neglect petition alleging that Mother had abused and/or neglected Child.[1]

The abuse and neglect petition alleged the following facts in support of its request that the district court find that Child was neglected and/or abused. On January 31, 2011, the Department responded to an emergency law enforcement referral alleging physical neglect of Child. Law enforcement had entered a residence due to outstanding warrants for the adult residents. When they entered the residence, the officers "observed what they believed to be adults trying to place [Child, who was less than three months old at the time] into a hole in the floor." There was drug paraphernalia throughout the residence. Mother was arrested pursuant to outstanding warrants. Child was taken into the custody of the Department. As of the filing date of the petition, Mother was incarcerated. Based on a mouth swab, Child tested positive for methamphetamine, indicating that Child had been exposed to the drug within thirty-six hours prior to being tested.

The petition also alleged that Mother had subjected Child to aggravated circumstances based on the December 16, 2010, judgment that terminated her parental rights to Child's

[1] The abuse and neglect petition also pertained to Child's father who is not a party to this appeal.

sibling, Isiah. Owing to the aggravated circumstance of the December 16, 2010, termination of Mother's parental rights to Isiah, the Department requested to be relieved of its obligation to make reasonable efforts to preserve and reunify the family as to Child, pursuant to Section 32A-4-22(C)(2).

Also on February 4, 2011, the Department filed its affidavit in support of an ex parte custody order. In greater detail and with additional facts, the affidavit essentially expanded upon the facts presented in the abuse and neglect petition. Among other facts, the affidavit alleged that there was a bottle, a blanket, and a cell phone in one of two holes in the floor. Further, law enforcement officers were said to have observed a marijuana pipe and two methamphetamine pipes in the living room, as well as a purse containing foil and plastic baggies, which the officers suspected to be related to drugs. Mother had approximately fifteen warrants for her arrest.

On February 7, 2011, the district court filed an ex parte custody order, mandating that Child remain in the Department's custody "until further order of the [c]ourt." On March 8 and April 19, 2011, the district court held an adjudicatory hearing on the Department's abuse and neglect petition. In its disposition order, the court found by clear and convincing evidence that Mother's parental rights to a sibling of Child's had been involuntarily terminated on December 16, 2010. Based on that prior termination of parental rights, the district court found aggravated circumstances as to Mother. The court also found that "further treatment efforts by [the Department] would be futile"; accordingly, the court relieved the Department of making further efforts to work a treatment plan with Mother.

On May 17, 2011, the district court held an initial permanency hearing. The court noted that owing to its April 19 finding of aggravated circumstances, it had relieved the Department of making reasonable efforts and implementing a treatment plan. The court found that "[t]he permanency plan proposed by the Department is adoption[,]" which plan the court found appropriate. The court ordered that Child's permanency plan would be adoption.

On July 11, 2011, the Department moved to terminate Mother's parental rights to Child. In its motion, the Department stated that the "facts and circumstances supporting . . . termination" were that Child was subjected to aggravated circumstances in that the parental rights to a sibling had been terminated involuntarily and that termination of parental rights would promote the physical, mental, and emotional welfare needs of Child.

A hearing on the Department's motion to terminate Mother's parental rights was held on September 23, 2011. On October 20, 2011, the district court entered its decision to terminate Mother's parental rights. On appeal, Mother does not challenge the district court's factual findings. In pertinent part, those findings included that Mother has a chronic illegal drug abuse problem; Mother's parental rights were involuntarily terminated in regard to Isiah; when Child was taken into Department custody, "he had a high level of methamphetamine in his system"; and Mother had been "in and out of jail since the beginning of this case." Specifically, the court found that Mother was incarcerated from January 31, 2011, through early May 2011; and on September 13, 2011, Mother was arrested again for allegedly violating the conditions of her probation.

The court found that after Mother was released from jail in early May 2011, she requested visitation with Child, and while she was incarcerated, she had some limited visitation, but none after May 17, 2011, and beyond her initial request for visitation, Mother made no further contact with the Department. The court also found that Mother took advantage of services that were available to her during her January to May 2011 incarceration, but after her release she did nothing to eliminate the causes and conditions that brought Child into custody. In the court's view, those causes and conditions included:

A. Mother has never had a home.

B. Mother has never had employment.

C. Mother continues to use illegal drugs (the alleged probation violation is for the use of illegal drugs).

D. Mother has never entered, let alone completed, any drug treatment plan.

E. Mother did not follow up on working on her GED.

In addition, the court found that "[t]he only progress Mother has ever made has been when she has been incarcerated[,]" and it is unknown when Mother will be released from incarceration. Based on the foregoing facts, the court concluded that "[t]he conditions and causes of the neglect and abuse that brought Child [into] custody are unlikely to change in the foreseeable future."

The court also entered findings of fact and conclusions of law in regard to Child's interests. The court found that Child had been in the care of foster parents since Child was taken into the Department's custody, and the foster parents wished to adopt Child. The court found that Child had bonded with the foster parents in a parent/child relationship. And the court concluded that it was in the best interest of Child to have Mother's parental rights terminated and Child made available for adoption.

In accordance with its findings of fact and conclusions of law, the court concluded that Mother's rights would be terminated pursuant to Section 32A-4-28(B)(2). On November 22, 2011, the court, referencing its October 20 decision, entered its judgment terminating Mother's parental rights. On March 27, 2012, this Court entered a Decision affirming the termination of Mother's parental rights to Child's sibling. *See In re Isiah M.*

Mother appeals from the district court's judgment terminating her parental rights to Child. On Appeal, Mother argues that she was deprived of due process when the district court found aggravated circumstances based upon the earlier termination of her parental rights, when that case had yet to be resolved on appeal. She also argues that the Legislature did not intend to authorize termination of parental rights based on aggravated circumstances when the prior termination of parental rights judgment is pending on appeal.

We conclude that the statutory procedures employed in the district court provided protection against the risk of an erroneous deprivation of parental rights, even with a finding of aggravated circumstances, and even when there existed a possibility the foundational judgment supporting that finding

could be reversed on appeal. And we do not believe that additional or substitute procedural safeguards are required. Also, we reject Mother's legislative intent argument. We affirm.

DISCUSSION

Mootness

As an initial matter, we reject the argument made both by the Department and the Guardian ad Litem that Mother's appeal is moot because the earlier termination was ultimately affirmed by this Court. A case is moot when there exists no actual controversy and the appellate court cannot grant actual relief. *Gunaji v. Macias*, 2001-NMSC-028, ¶ 9, 130 N.M. 734, 31 P.3d 1008. Here, Mother's due process claim amounts to the contention that, in Mother's words, "the district court's premature decision irreparably harmed Mother's chances of reuniting with Child." This constitutes an actual controversy for which we could grant the "actual relief" of remanding the case with instructions to the Department to make reasonable efforts to assist Mother to reunify with Child. Accordingly, we conclude that Mother's appeal is not moot. We turn now to a consideration of the merits of Mother's appeal.

Standard of Review

"[T]he right to raise one's child is a fundamental right protected by the Fourteenth Amendment to the United States Constitution[.]" *Mafin M.*, 2003-NMSC-015, ¶ 18. Termination proceedings must therefore be conducted in a constitutional manner that affords the parent due process of law. *Id.* "Due process of law requires that termination proceedings be conducted with scrupulous fairness to the parent." *Id.* (internal quotation marks and citation omitted). We review de novo the question whether Mother's due process rights were violated when the district court terminated her parental rights. *Id.* ¶ 17.

To determine whether due process was satisfied in a termination proceeding, we employ the three-part balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *Mafin M.*, 2003-NMSC-015, ¶ 19. That test requires the weighing of (1) Mother's interest; (2) the risk to Mother of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest. *Id.* Our Supreme Court has recognized an equal balance between a parent's fundamental interest in regaining a parent-child relationship and the state's interest in protecting the welfare of children. *Id.* ¶ 20. In light of that balance, our Supreme Court has stated that "the decisive issue centers on the second factor of the *Mathews* test." *Mafin M.*, 2003-NMSC-015, ¶ 20.

Mother's Due Process Argument

Mother argues that finding aggravated circumstances on the basis of a prior termination of parental rights that "may well be reversed" on appeal creates a significant risk of an erroneous deprivation of her parental rights in regard to Child. In Mother's view, had she been afforded the time and opportunity to work a treatment plan, with the Department's assistance, the result of the proceedings in regard to Child may well have been different.

Mother's argument rests upon the premise that the propriety of the prior

termination was placed "in doubt" while her appeal of the prior termination of her parental rights was unresolved in this Court. Mother reasons that the risk of an erroneous deprivation stemmed from the possibility that, had the earlier judgment terminating her parental rights been reversed by this Court, the aggravated circumstances finding, the corresponding deprivation of a treatment plan and lack of Department support, and lack of time to achieve treatment goals, would have been based upon a prior erroneous termination. According to Mother, had she received a treatment plan, Department support, and time to achieve treatment goals, she may have been able to reunify with Child. Mother contends that because of the court's premature determination of aggravated circumstances, termination of her parental rights to Child was a "virtual certainty[.]" That virtually certain termination of her rights to Child would thus have been based upon an erroneous assumption regarding her ability to remedy the conditions that rendered her unable to properly care for Child's sibling. *See* § 32A-4-28(B)(2) (stating the basis upon which a court may terminate a parent's rights to his or her child).

Mother argues that the risk of an erroneous decision arising out of the procedure employed here is "unacceptably high" when measured against the importance of the right at stake—that is, her fundamental right to parent Child. She further argues that highly effective substitute procedures are readily available and that their implementation would "far better [ensure] a fair and accurate decision, [and would] cause little delay in finality for [Child]." More specifically, Mother argues that an appropriate "alternative to rushing to find aggravated circumstances before a judgment [has been disposed of] on appeal is to delay [the aggravated circumstances] determination and to require [the Department] to both put in place a treatment plan and [to] offer the parent assistance in working that plan." In Mother's view, delaying an aggravated circumstances finding during the pendency of an appeal from the earlier termination decision is a viable alternative that would conform with the routine functioning of the Department and the district court. *See, e.g.*, § 32A-4-22(C); NMSA 1978, § 32A-4-25 (2009); NMSA 1978, § 32A-4-25.1 (2009).

Mother's Due Process Argument Is Unpersuasive

Under the facts in this case, we are not persuaded that the district court's aggravated circumstances finding, while a prior termination was pending on appeal, engendered a risk of an erroneous deprivation of Mother's parental rights. The aggravated circumstances finding did not condemn her to failure or lay the ground work for the inevitable termination of her parental rights to Child. Mother was free, on her own behalf, to engage in efforts toward reunification, yet she failed to do so. *See Amy B.*, 2003-NMCA-017, ¶ 5 (recognizing that, notwithstanding a finding of aggravated circumstances, the mother was not "precluded . . . from making efforts on her own behalf in an attempt to alleviate the conditions that led to the abuse and neglect"). For example, among other things, Mother continued to use drugs throughout the pendency of this case, and she remained unemployed and without a home.

Additionally, the district court may not terminate parental rights to a child absent a finding "that the conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future[.]" Section 32A-4-28(B)(2). This finding is required regardless

of aggravated circumstances. *Amy B.*, 2003-NMCA-017, ¶ 18. And it must be supported by clear and convincing evidence. *See Mafin M.*, 2003-NMSC-015, ¶ 25 (recognizing that the Department is required to present clear and convincing evidence to support termination of a parent's parental rights). Thus, the risk of an erroneous deprivation was minimal because had Mother exhibited a sincere, active, and productive effort to reunify with Child, and had she acted to dispel the concerns that gave rise to statutory exception to the treatment plan and Department efforts requirements, she may well have prevailed in overcoming the Department's contention that the conditions and causes of the neglect and abuse were unlikely to change in the foreseeable future. As it stands, however, Mother does not dispute the "clear and convincing" nature of the evidence that supported the district court's decision to terminate her parental rights in this case.

We next consider the probable value of additional or substitute procedural safeguards that might have been employed in this case. Mother suggests only one such procedural safeguard—that is, to have required the district court to delay an aggravated circumstances finding until the earlier judgment was resolved on appeal and, in the interim, to have provided her with a treatment plan aimed at reunification. Under the facts of this case, Mother's argument is unavailing. As indicated in the earlier paragraphs, we do not view the risk of erroneous deprivation under the circumstances to have been more than minimal. That view is fortified by the fact that this Court affirmed the termination of Mother's parental rights to Isiah four months after the termination of Mother's parental rights to Child. Had the circumstances in this case including the timing of the events been substantially different, Mother may have had a stronger position, however, under these facts, Mother's argument provides no basis for reversing the termination of parental rights and requiring the district court to order the Department to engage in reasonable efforts toward reunification of Mother and Child.

We do not foreclose the possibility that in some cases where a prior termination of parental rights is pending appeal, the facts or circumstances of the case may call for delaying an aggravated circumstances determination pending the outcome of the appeal. Whether the court should make an aggravated circumstances determination and the timing of such a determination is properly left to the sound discretion of the district court. *See* § 32A-4-22(C); *Amy B.*, 2003-NMCA-017, ¶ 14 (recognizing the court's discretion to find aggravated circumstances). Despite Mother's desire that we do so, we will not attempt either to suggest guidelines or to impose a set of bright-line factors to guide the court's discretionary determination in that regard.

In sum, we disagree with Mother's due process arguments relating to the district court's aggravated circumstances finding and the timing of that finding. Under the second *Mathews* factor, we conclude that the risk to Mother of an erroneous deprivation under these circumstances was minimal and that no additional or substitute procedural safeguards were required. *See Mafin M.*, 2003-NMSC-015, ¶ 19. Therefore, we reject Mother's due process claim.

Mother's Legislative Intent Argument

Side-by-side with her due process argument, Mother argues that the district

court's use of her prior termination of parental rights that was pending appeal constituted reasonable reversible error because it was contrary to legislative intent. Mother argues that such a procedure is inconsistent with two purposes of the Children's Code, specifically, (1) the preservation of the unity of the family whenever possible, and (2) the provision of judicial and other procedures in which the parties are assured a fair hearing and their constitutional and other legal rights are recognized and enforced. *See* NMSA 1978, § 32A-1-3(A), (B) (2009). Mother also argues that the Legislature's use of the past tense in providing the definition of aggravated circumstances in Section 32A-4-2(C)(4) indicates that the Legislature intended the prior termination of parental rights to provide the basis of an aggravated circumstances only where the "prior termination of parental rights was absolutely final." We reject Mother's arguments.

First, to the extent that Mother is arguing that because state law incorporates notions of due process, the proceedings violated state law, having already rejected Mother's due process claim, we likewise reject her contention. Second, Mother overlooks the fact that the preservation of family unity "whenever possible" is a secondary consideration, with the primary consideration being "the care, protection[,] and wholesome mental and physical development of children[.]" Section 32A-1-3(A) (stating that the legislative purposes of the Children's Code include "first to provide for the care, protection[,] and wholesome mental and physical development of children . . . *and then* to preserve the unity of the family whenever possible" and explaining that the health and safety of children are the "paramount concern" (emphasis added)). To that end, the district court has been given discretion to alleviate the Department's burden to engage in reasonable efforts at reunification under specific circumstances, including the prior termination of parental rights to a child's sibling. *See* §§ 32A-4-2(C)(4), -22(C)(2).

The enactment of the aggravated circumstances provisions was a response to the federally recognized problem in abuse and neglect cases of a tendency to "err on the side of protecting the rights of parents. . . . [The result of which was that] too many children are subjected to long spells of foster care or are returned to families that reabuse them." *Amy B.*, 2003-NMCA-017, ¶ 7 (internal quotation marks and citation omitted). As recognized in *Amy B.*, the aggravated circumstances provisions tend to serve the best interest of the child because "[e]xperience has shown that with certain parents, as is the case here, the risk of recidivism is a very real concern. Therefore, when another child of that same person is adjudged a dependent child, it is not unreasonable to assume [that] reunification efforts will be unsuccessful." *Id.* ¶ 16 (internal quotation marks and citation omitted).

Finally, Mother argues that the termination of parental rights is not "absolutely final" when it is the subject of a pending appeal. *Cf. State ex rel. Children, Youth & Families Dep't v. Brandy S.*, 2007-NMCA-135, ¶ 15, 142 N.M. 705, 168 P.3d 1129 (recognizing that a judgment terminating parental rights constitutes a final judgment). She bases this argument on a perceived legislative intent that the aggravated circumstances finding is to be delayed pending appeal of an earlier termination. We are not persuaded. The Legislature could have limited the definition of aggravated circumstances to those situations in which an

appellant has exhausted her rights to appeal, but it did not. *See State v. Office of Pub. Defender ex rel. Muqqddin*, 2012-NMSC-029, ¶ 47, 285 P.3d 622 (recognizing that the Legislature is free to define statutory elements as it wishes). Moreover, considering that the primary consideration of the Children's Code is the best interest of the child, *see* § 32A-1-3(A), and that children's interests are served by "timely and permanent placement[,]" *State ex rel. Children, Youth & Families Dep't v. Maria C.*, 2004-NMCA-083, ¶ 45, 136 N.M. 53, 94 P.3d 796, we are not persuaded that the Legislature would choose to limit the district court's discretion with a mandate requiring the court to delay a finding of aggravated circumstances in all cases coming within the definition of Section 32A-4-2(C)(4) until an appeal of the prior termination was finally resolved in the appellate process. *See id.* (defining aggravated circumstances as those circumstances in which the parent has had parental rights over a sibling terminated involuntarily).

The Dissent

Respectfully, the Dissent's approach is problematic.

To interpret "terminated" in Section 32A-4-2(C)(4) to mean that the issue has been resolved by the highest court to which the parent might seek relief eviscerates legislative intent. That intent is to avoid, where reasonable and appropriate, holding a child in Department-custody limbo where, with respect to the child's sibling, a parent has or parents have already been proven not amenable to Department reunification efforts or otherwise so unfit to parent as to inspire little hope that they will be able to provide appropriate care for the child at issue. *See* §§ 32A-4-2(C)(4), -4-22(C)(2); *Amy B.*, 2003-NMCA-017, ¶¶ 7, 16.

The interpretation results in an unintended mandate that, regardless of the circumstances, where the earlier termination adjudication is on appeal, the parent is guaranteed another go-round with Department reunification efforts for a period that could linger on over a span of a year or more while the child remains in limbo. Considering the high value of timely and permanent placement for children, *see Maria C.*, 2004-NMCA-083, ¶ 45, this interpretation runs afoul of the purpose of the Children's Code and does not have support in legislative intent. In addition, the Dissent's reliance on one dictionary definition of "terminate" leaves open unintended and perhaps unwarranted interpretations or consequences with respect not only to the meaning of "termination" throughout the Children's Code, but also with respect to the concept of "finality" in the appellate process.

The Dissent's view of the issue at hand as being whether "Mother should have been provided services," Dissent ¶ 44, evades focus on the real issue—whether Mother's due process right was violated. An aggravated circumstances finding does not inevitably lead to deprivation of reasonable reunification efforts. The finding has the limited effect of permitting the district court to exercise its discretion whether to alleviate the Department's burden to make such efforts. *See* § 32A-4-22(C)(2). In considering the circumstances, the court can require the Department to engage in reasonable reunification efforts. The due process risk that Mother associates with an aggravated circumstances finding that is based on a potentially reversible prior termination is minimized by the court's discretionary function.

Finally, the Dissent indicates that,

under the majority's opinion here, in all cases in which reversal on appeal of an earlier termination relating to the sibling occurs, this Court will be forced to "unring the 'aggravated circumstances' bell" with adverse consequences. Dissent ¶ 45. While we acknowledge that reversal of an earlier termination will result in further proceedings in the case involving the sibling as well as the case in which an aggravated circumstances finding was made, we do not agree that these possible circumstances dictate a ruling in this case that adopts Mother's position or the Dissent's view. That position and view are based on an assumption that is, in our view, unsupportable—that in every aggravated circumstances case, the district court will relieve the Department of its reasonable efforts obligation. Moreover, as we have expressed, we do not think that Mother's position and the Dissent's view comports with plain language used by the Legislature, with legislative intent, or with the goals of the Children's Code. If we are mistaken, we respectfully invite the Legislature to set the matter right.

CONCLUSION

We affirm.

IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

I CONCUR:

RODERICK T. KENNEDY, Chief Judge

TIMOTHY L. GARCIA, Judge, dissenting.

GARCIA, Judge (dissenting).

I respectfully dissent in this case. I would agree with Mother that the Legislature did not intend for aggravated circumstances under Section 32A-4-2(C)(4) to be applied in proceedings where the termination of parental rights over a sibling remained unresolved on appeal. As a result, it is not necessary to address the related due process issue raised in this appeal. Mother was entitled to assistance from the Department to remedy the causes and conditions that rendered Mother unable to properly care for Child and originally caused Child to come into the Department's custody.

Section 32A-4-2(C)(4) defines the particular element of aggravated circumstances applied by the district court in this case as: "*had* parental rights over a sibling of the child *terminated* involuntarily[.]" (Emphasis added.) Mother argued that this definition requires completion and finality in the involuntary termination proceedings pending for Child's sibling, including any appeals. It is not disputed that the termination proceedings for Child's sibling were on appeal and remained unresolved throughout Child's district court proceedings in the present case. Because of the district court's decision to apply aggravated circumstances in this case, the Department did not provide Mother with assistance under Section 32A-4-22(C) to attempt reunification and to remedy the causes and conditions that rendered Mother unable to properly care for Child.

This Court reviews issues of statutory interpretation and construction de novo. *State ex rel. Children, Youth & Families Dep't v. Andree G.*, 2007-NMCA-156, ¶ 17, 143 N.M. 195, 174 P.3d 531. The primary goal in statutory construction is "to ascertain and give effect to the intent of the Legislature." *Lobato v. N.M. Env't Dep't.*, 2012-NMSC-002, ¶ 6, 267 P.3d 65 (internal quotation marks and

citation omitted). Both parties recognize that when construing a statutory section in reference to the statute as a whole, this Court will consider the several sections together so that all parts are given proper effect and placed in the appropriate context. *Reule Sun Corp. v. Valles*, 2010-NMSC-004, ¶ 15, 147 N.M. 512, 226 P.3d 611. "The appellate courts examine the overall structure of the statute and its function in the comprehensive legislative scheme." *State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022. "[W]hen a statute is ambiguous, we may consider the clear policy implications of its various constructions." *Id.* The parties recognize that the statutory construction for the language in Section 32A-4-2(C)(4) has not been previously interpreted by this Court.

Initially, the appellate courts start this review "by examining the words chosen by the Legislature and the plain meaning of those words." *Reule Sun Corp.*, 2010-NMSC-004, ¶ 15. Webster's Dictionary provides several primary and secondary definitions for the word "terminate." *Webster's Third New Int'l Dictionary* 2359 (1966). Primary definition includes: "a: to bring to an ending or cessation in time sequence, or continuity : CLOSE . . . (benediction *terminated* the service)." *Id.* A third primary definition states: "c: to end formally and definitely . . . (his employment with the company was *terminated*)." *Id.* One of the secondary definitions states "2: to set a limit to in space : serve as an ending, boundary, limit, dividing line." *Id.* Each of these definitions have a common principle to apply, they recognize a definitive ending or finality to an event or proceeding. As such, an unresolved proceeding, one that is not final and has not reached a definitive end, does not meet the accepted general definition of "terminate" or its past-tense equivalent "terminated." In this case, the generally accepted definition of "terminated" would appear to support Mother's position—where a termination proceeding remains unresolved on appeal and has not yet ended formally or definitely, parental rights to a sibling have not been terminated under Section 32A-4-2(C)(4). However, our Supreme Court has recognized that the application of the plain meaning rule does not end an analysis. *See State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939 (recognizing that the appellate courts will not rely upon the literal meaning of a statute when such a construction would be absurd, unreasonable, or otherwise inappropriate).

We should be looking at the overall legislative scheme regarding the termination of parental rights and address whether the plain meaning of the word "terminated" in Section 32A-4-2(C)(4) contradicts the scheme established by the Legislature under the Abuse and Neglect Act (the Act), NMSA 1978, §§ 32A-4-1 to -34 (1993, as amended through 2009). The majority views this analysis in light of the previous federally recognized problem—that abuse and neglect proceedings were subjecting children to long spells in foster care or returning them to abusive parents. Majority Opinion ¶ 30. This analysis does not explain why the plain meaning interpretation of "terminated" under Section 32A-4-2(C)(4) would subject children to long spells in foster care or return them to abusive parents. In fact, there is no statutory basis under the Act to support the majority's premise that such an undesirable result would occur.

At issue is whether Mother should have been provided services from the Department to attempt reunification and remedy the causes and conditions that

rendered Mother unable to properly care for Child. These are the same services and plans designed into the Act for all parents who have been adjudicated as abusive or neglectful that otherwise do not meet one of the two narrow statutory exceptions for expediting the process. *See* § 32A-4-22(C). Neither the Department nor the majority challenge the general statutory scheme under the Act. This general scheme attempts to efficiently reunify a child with its natural parents and remedy the causes and conditions that rendered a parent unable to properly care for a child in the first place. The Act was enacted in 1993, presumably to help remedy the historic problem where children spent long spells in foster care or were regularly returned to abusive parents. Mother's interpretation of "terminated" under Section 32A-4-2(C)(4) would not impose any new obligations or procedures upon the Department that are not presently in place. Implementing the standard reunification procedures in this case would not have subjected Child to some indefinite period of limbo or an extraordinary wait for final adjudication. Similar to any normal case, termination proceedings would timely ensue if Mother failed to comply with the Department's reasonable efforts to effectuate reunification.

Mother's proposed statutory interpretation is far better than the alternative proposed by the majority. Under the majority's analysis, this Court would be forced to unring the "aggravated circumstances" bell each time a district court erred in its determination that the parental rights to a sibling were terminated but remained unresolved on appeal. Reversal by this Court of a prior termination would not only send the sibling's proceedings back for reconsideration, it would also send the "aggravated circumstances" case for the subsequent sibling back for consideration by the district court for further Department efforts. When considering the best interests of a child and the potential length of time a child could be subjected to further custodial limbo and Department supervision, the majority's decision neither comports with the plain language used by the Legislature in Section 32A-4-2(C)(4) nor efficiently carries out the Act's comprehensive legislative scheme to avoid long periods of potential supervision and foster care.

In conclusion, I do not concur with the result reached by the majority in this case. As a result, I would reverse the district court's previous determination of aggravated circumstances under Section 32A-4-22(C)(2) and remand for further proceedings in an attempt to reunify the family in compliance with the Act.

TIMOTHY L. GARCIA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-062

Filing Date: April 9, 2013

Docket No. 31,784

STATE OF NEW MEXICO, ex rel., CHILDREN, YOUTH and FAMILIES DEPARTMENT,

Petitioner-Appellee,

v.

MARSALEE P.,

Respondent-Defendant,

and

STANLEY P.,

Respondent,

and

IN THE MATTER OF DA'VONDRE P., WHITLEY P., and JORDAN P.,

Children.

New Mexico Children, Youth and Families Department
Charles E. Neelley, Chief Children's Court Attorney
Rebecca J. Liggett, Children's Court Attorney
Santa Fe, NM

for Appellee

Caren I. Friedman
Santa Fe, NM

for Appellant

Richard J. Austin
Farmington, NM

Guardian ad litem

OPINION

WECHSLER, Judge.

We examine in this appeal of a parental termination order circumstances that require the district court and Petitioner Children, Youth and Families Department (the Department) to fulfill obligations under the Abuse and Neglect Act, NMSA 1978, Sections 32A-4-1 to -34 (1993, as amended through 2009). We hold that the district court erred by terminating Mother's parental rights without ensuring that the Department had complied with Section 32A-4-22(I) of the Abuse and Neglect Act, which mandates that the Department "shall pursue the enrollment" on behalf of children eligible for enrollment in an Indian tribe. Accordingly, we reverse the termination of Mother's parental rights and remand to the district court.

BACKGROUND PRIOR TO PARENTAL TERMINATION TRIAL

The Department filed a neglect/abuse petition in August 2010 against Mother regarding three of her children, Da'Vondre P., Whitley P., and Jordan P. (collectively, the children). The Department took custody of the children on August 9, 2010 because of

unsanitary living conditions and illegal drug use by Mother and the children's father.

The district court held a custody hearing on August 23, 2010 and filed a custody order on August 24, 2010. The Department stipulated that the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901 to 1963 (1978), applied because the children were eligible for enrollment in the Navajo Nation. The order states that "[t]he children are eligible for enrollment with the Navajo Nation and are therefore subject to [ICWA]." In the predispositional study, the Department acknowledged that two of the children were eligible for enrollment into the Navajo Nation "if . . . [M]other . . . chooses to enroll." Additionally, the report states that all three children are "eligible for enrollment in the Navajo [Nation]. [Mother] is not enrolled in the [Navajo Nation]."

The district court held an adjudicatory hearing on October 4, 2010. After the hearing, the district court entered a judgment adjudicating the children as abused and providing the Department custody of the children. In the judgment, the district court stated that the children were not subject to ICWA. Likewise, the initial judicial review order entered in January 2011 contained a statement that the children were not subject to ICWA. The district court reached an identical conclusion in its status review and change of plan hearing order filed on April 5, 2011. Despite its previous stipulation to the contrary, the Department subsequently filed a motion to terminate parental rights in which it contended that the children were not subject to ICWA.

REQUEST FOR CONTINUANCE AND TRIAL

At the beginning of the termination of parental rights trial, Mother's counsel requested a continuance so that the provisions of ICWA could be followed. Before Mother arrived at trial, Mother's counsel stated that he believed that Mother and the children were now enrolled in the Navajo Nation, or at the very least, Mother was trying to get herself and the children enrolled in the Navajo Nation. As a result, Mother's counsel argued that the case was subject to the provisions of ICWA. The Department argued that, at the beginning of the case, neither Mother nor children were enrolled in the Navajo Nation and therefore ICWA did not apply.

The district court agreed that if Mother arrived at the hearing and had a certificate of Indian blood (CIB) issued by the Bureau of Indian Affairs (BIA), ICWA would apply, and the trial would need to be continued. The district court expressly stated that it perceived that Mother's effort to enroll in the Navajo Nation was a "last minute tactic." Mother's counsel then pointed out that the custody hearing order contained the stipulation that the children were subject to ICWA. The Department responded that it had received a letter from the Navajo Nation stating that the children were not eligible for enrollment and that, as a result, the October 2010 adjudicatory order changed the initial determination that ICWA applied.

Once Mother arrived at the trial, the district court inquired as to whether Mother had completed enrollment. Mother disclosed that she did not have a CIB and that she had not completed enrollment but that she was pursuing enrollment for herself and the children. Mother's counsel then read into the record a letter from the Navajo Nation's tribal enrollment services that stated that Mother came to its offices to enroll herself and her six children and that Mother was eligible to

enroll. The letter continued that the tribal enrollment office is waiting for additional documentation in order to process the application. Mother, who was adopted, explained that her application for enrollment had to proceed through a review board to trace her lineage to determine whether she is the child of the woman she identifies to be her biological mother and that the process takes about six weeks.

The district court stated that it had known since the custody hearing that Mother was eligible to enroll and was still not enrolled and that the trial would go forward without application of ICWA. The district court stated that the ICWA issue was in the same position as it was on "day one," which was that Mother knew she was eligible but knew there were things she had to do in order to get enrolled. Therefore, because Mother was not enrolled at the date of the trial, the district court proceeded with the trial.

During the trial, Mother testified that she began the enrollment process into the Navajo Nation once she received paperwork from the state of California regarding her adoption, several months before the trial. She stated that it took six years to get the paperwork because it was a closed adoption. Mother testified that her birth certificate listed her adoptive mother as her mother and that she needed a birth certificate that listed her biological mother in order to enroll. She stated that her mother was full Navajo, that Mother was one-half Navajo, and that the children were therefore one-quarter Navajo. She further testified that she still needed her marriage license, divorce decree from her first marriage, and two of the children's birth certificates in order to complete the enrollment process.

At the conclusion of trial, the district court announced its ruling from the bench. Specifically regarding ICWA, the district court held that there was no evidence that Mother was enrolled with any tribe and that therefore ICWA did not apply. The district court advised Mother to continue the process of enrolling the children and that if she is successful, ICWA's placement preferences would apply. The district court then found by clear and convincing evidence that Mother had not alleviated the conditions and causes that brought the children into the Department's custody. The district court terminated Mother's parental rights.

ARGUMENTS ON APPEAL

Mother filed a timely appeal and focuses her arguments on whether the district court erred in failing to apply the protections of ICWA. Particularly, Mother argues that (1) the district court erred by determining that the children were not Indian children as defined by ICWA and therefore erred by refusing to apply the substantive requirements of ICWA, including (a) making necessary findings pursuant to 25 U.S.C. § 1912(d), (e); (b) giving preferential foster care placement of the children to the children's extended family, pursuant to 25 U.S.C. § 1915; and (c) applying the higher standard of proof required by 25 U.S.C. § 1912(f) than in non-ICWA termination proceedings; (2) the Department failed in its obligation to pursue enrollment on behalf of the children pursuant to Section 32A-4-22(I) of the Abuse and Neglect Act; and (3) the district court erred in conducting the trial and terminating Mother's parental rights despite the Department's failure to comply with ICWA's notice requirement in 25 U.S.C. § 1912(a).

"The interpretation of ICWA and its relationship to [the Abuse and Neglect Act]

present questions of law that we review de novo." *State ex rel. Children, Youth & Families Dep't v. Marlene C.*, 2011-NMSC-005, ¶ 14, 149 N.M. 315, 248 P.3d 863. Additionally, we review interpretations of the Abuse and Neglect Act de novo. *See State ex rel. Children, Youth & Families Dep't v. Benjamin O.*, 2007-NMCA-070, ¶ 24, 141 N.M. 692, 160 P.3d 601. "ICWA is a remedial statute in that it was enacted to stem the alarmingly high percentage of Indian families being separated by removal of children through custody proceedings[,]" and we therefore construe it liberally in order to effectuate its purpose. *Marlene C.*, 2011-NMSC-005, ¶ 17 (internal quotation marks and citation omitted).

ICWA AND THE ABUSE AND NEGLECT ACT

Generally

We begin by briefly discussing ICWA and its relationship to the New Mexico Abuse and Neglect Act, which underlies the issues in this appeal. Congress enacted ICWA in 1978 to govern proceedings for the termination of parental rights, adoptions, and foster care placement involving Indian children. *See* 25 U.S.C. §§ 1901 to 1963. In enacting ICWA, Congress determined "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe[.]" 25 U.S.C. § 1901(3). Additionally, Congress found "that the [s]tates, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). As a result, ICWA is intended to "promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." 25 U.S.C. § 1902.

When ICWA applies to a termination proceeding, it provides several minimum substantive and procedural protections that must be used as opposed to the standards used under state law. For example, before terminating a parent's parental rights to an Indian child, ICWA requires the state court to make a determination, on the record, that beyond a reasonable doubt, termination is required to prevent serious emotional or physical damage to the Indian child. 25 U.S.C. § 1912(f). When the proceedings involve foster placement, ICWA requires the state court to give preference to placement of the child with a member of the child's extended family, with the tribe, or with another Indian family. 25 U.S.C. § 1915(a). In determining whether good cause exists for placement outside of the Indian community, the state court is directed to examine the reasons given in light of "the prevailing social and cultural standards of the Indian community." 25 U.S.C. § 1915(d). Additionally, ICWA requires that notice of the proceeding be given to the Indian parent and the Indian tribe and that the tribe be given the opportunity to intervene in the proceedings. 25 U.S.C. §§ 1911(c), 1912(a).

The New Mexico Abuse and Neglect

Act contains several provisions designed to effectuate ICWA. For example, when the Department takes custody of a child, the Department "shall make reasonable efforts to determine whether the child is an Indian child." Section 32A-4-6(C). If the Department determines that the child is an Indian child, the Abuse and Neglect Act requires that the Department give notice of the proceedings to the Indian tribe in accordance with ICWA. Section 32A-4-6(D). Section 32A-4-9 contains placement preferences for foster care and pre-adoptive placement of an Indian child that mirror ICWA's placement preferences. Section 32A-4-21(B)(9) requires the Department to provide information in the predispositional report to the district court addressing whether the child is an Indian child, and if so, whether ICWA's placement preferences were followed and whether the child's treatment plan provides for maintaining the child's cultural ties. The district court is then required to make factual findings regarding these issues in its dispositional judgment. Section 32A-4-22(A)(11).

The Abuse and Neglect Act also contains the procedures for terminating the parental rights of an Indian child. When the Department files a motion for terminating the parental rights of an Indian child, the Department must include in its motion whether the child "is subject to" ICWA, and if so, it must state (1) the tribal affiliations of the parents; (2) the specific actions taken by the Department to notify the Indian tribes, including supporting documentation; and (3) the specific actions taken to comply with the placement preferences of ICWA. Section 32A-4-29(B)(7). Before terminating the parental rights of a child subject to ICWA, the district court must ensure that the termination complied with ICWA. Section 32A-4-28(E).

Application

We first address Mother's argument that the district court erred by holding the trial without applying the substantive and procedural provisions of ICWA and the accompanying provisions in the Abuse and Neglect Act, including (a) making necessary findings pursuant to 25 U.S.C. § 1912(d), (e); (b) giving preferential foster care placement of the children to the children's extended family pursuant to 25 U.S.C. § 1915; and (c) applying the higher standard of proof required by 25 U.S.C. § 1912(f) than in non-ICWA termination proceedings. Mother argues that the children are "Indian child[ren]" as defined by ICWA and the Abuse and Neglect Act, and, therefore, the district court should have applied ICWA at the trial.

ICWA and the Abuse and Neglect Act define "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]" 25 U.S.C. § 1903(4); *see also* NMSA 1978, § 32A-1-4(K) (2009). By its express terms, the children are "Indian child[ren]" as defined by ICWA if (1) the children are "member[s]" of the Navajo Nation, or (2) the children are "eligible for membership" *and* Mother is a "member" of the Navajo Nation. 25 U.S.C. § 1903(4). It is undisputed by both Mother and the Department that both Mother and the children are eligible to enroll in the Navajo Nation but are not formally enrolled. The parties do dispute, however, whether the eligibility for enrollment of Mother and the children in the Navajo Nation is sufficient to make either Mother or the children "member[s]" for purposes of ICWA. *Id.*

As we have discussed, the district court premised its determination that ICWA does not apply on the failure of Mother and the children to be formally enrolled at the time of the trial. Apparently, it was the district court's view that in order to be a "member" Mother or the children must be formally enrolled in the Navajo Nation. Mother argues that the district court erroneously based its refusal to apply ICWA on the fact that Mother had not yet obtained her CIB or was not formally enrolled by the Navajo Nation. Mother contends that "member," in the context of ICWA's definition of Indian child, is a flexible term, not limited to persons formally enrolled with an Indian tribe or those issued a CIB by the BIA. *See Cohen's Handbook of Federal Indian Law* § 11.02[2], at 827 (2005) ("[T]he term 'member' is flexible, not limited to persons formally enrolled or possessing a [CIB] issued by the BIA.").

Mother fails to argue or explain how or why she and the children are to be considered "members" of the Navajo Nation other than arguing that the term "member" is flexible. We reject Mother's argument that either she or the children are "members" of the Navajo Nation on this basis alone. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (stating that we will not review unclear or undeveloped arguments). Even if we were to address Mother's argument, it appears that, at least in the context of the Navajo Nation and ICWA, enrollment with the Navajo Nation is synonymous with membership in this case. *See In re Guardianship of Ashley Elizabeth R.*, 116 N.M. 416, 417, 863 P.2d 451, 452 (Ct. App. 1993) (characterizing children not registered with the Navajo Nation as "eligible for membership"); *see also Nielson v. Ketchum*, 640 F.3d 1117, 1124 (10th Cir. 2011) (holding that a child did not fit the definition of Indian child because neither the child nor the mother was enrolled in the Indian tribe).

We therefore proceed under the assumption that Mother and the children are not "members" of the Navajo Nation and instead are eligible to be members subject to the completion of the enrollment process. Because neither Mother nor the children are "members" of the Navajo Nation, the children do not meet either definition of "Indian child[ren]" under ICWA. *See* 25 U.S.C. § 1903(4) (defining Indian child as when the child is a member of an Indian tribe or the child is eligible to be a member and is the biological child of a member). We must nevertheless determine the requirements of ICWA and the New Mexico Abuse and Neglect Act regarding children who are not technically Indian children under ICWA but who are eligible for enrollment as members in an Indian tribe.

Section 32A-4-22(I)

In this regard, Mother argues that the Department failed in its obligation under Section 32A-4-22(I) of the Abuse and Neglect Act to pursue enrollment on behalf of the children who were eligible for enrollment. Section 32A-4-22(I) states that "[w]hen a child is placed in the custody of the [D]epartment, the [D]epartment shall investigate whether the child is eligible for enrollment as a member of an Indian tribe and, if so, the [D]epartment shall pursue the enrollment on the child's behalf." Mother contends that the record does not reflect that the Department made any efforts in pursuing the enrollment of the children despite knowing early in the proceedings that the children were eligible for enrollment.

As we have discussed, the Department stipulated prior to the August 24, 2010 custody order that the children were eligible for enrollment in the Navajo Nation, and the district court memorialized this stipulation in the custody order. Likewise, the Department acknowledged in the predispositional reports adopted by the district court that the children were eligible for enrollment. Although the Department essentially argues that something happened between the custody hearing and the adjudicatory hearing that led it to believe that ICWA does not apply to the children, it acknowledges that the reason it reached the conclusion is unclear from the record. Mother testified during the adjudication that she was not currently registered with the Navajo Nation in response to a question from the Department. From this point forward, the district court's judicial review and status review orders stated that the children were not subject to ICWA. However, at the beginning of the trial, Mother disclosed to the district court that she received a letter from the Navajo Nation tribal enrollment services stating that she and the children were eligible for enrollment and that Mother was pursuing enrollment.

Despite this information, the Department stated that it had no concerns about going forward with the trial at that time without applying ICWA. By taking this position despite knowing early in the case that the children were in fact eligible for enrollment and learning, at least at trial, that Mother had started the enrollment process, the Department failed to fulfill its obligation under Section 32A-4-22(I) that it "shall pursue the enrollment on the child[ren]'s behalf." Under this circumstance, the Department should not have pursued going forward with the trial and should have agreed to the continuance requested by Mother in order to investigate the children's eligibility for enrollment and help Mother pursue enrollment if necessary.

We hold that the district court erred by terminating Mother's parental rights before it ensured that the Department fully complied with Section 32A-4-22(I). The district court has an affirmative obligation to make sure that the requirements of the Abuse and Neglect Act are followed prior to the termination of something as fundamental as the parental rights to a child. *See State ex rel. Children, Youth & Families Dep't v. Hector C.*, 2008-NMCA-079, ¶ 11, 144 N.M. 222, 185 P.3d 1072 ("Terminating parental rights implicates rights of fundamental importance."); *cf. State ex rel. Children, Youth & Families Dep't v. Maria C.*, 2004-NMCA-083, ¶ 52, 136 N.M. 53, 94 P.3d 796 (holding that the district court has an affirmative duty to protect a parent's due process right throughout a termination proceeding). The record is largely devoid of any attempts the Department made to facilitate the enrollment of the children prior to trial. By then, it was clear to the Department that the children were eligible, that Mother had undertaken efforts to attempt to achieve her and their enrollment, and that Mother was delayed due at least in part to a unique circumstance associated with Mother's own adoption and information recorded on one or more of her birth certificates. Thus, we are unable to ascertain the extent the Department complied with Section 32A-4-22(I)'s mandate over the course of the proceedings leading up to the trial. At a minimum, the Department should not have contested the continuance requested by Mother upon learning that Mother had begun the enrollment process with the children.

This case illustrates the important need for district courts to ensure that the Department strictly complies with Section 32A-4-22(I). Had the Department fulfilled its obligation to pursue enrollment on behalf of the children, the children's status would have been determined by the start of the trial. Instead, the district court was faced with an untenable situation in which, on the day of the trial, the status of the children still was not conclusively determined by the Navajo Nation, the children remained merely eligible for enrollment, and the Department wished to press forward with trial by opposing Mother's request for a continuance. It was error for the district court to terminate Mother's parental rights before the Department fulfilled its obligation. Because of our disposition, we do not reach Mother's argument regarding whether the Navajo Nation was entitled to notice of the proceedings under ICWA.

CONCLUSION

We hold that the district court has an affirmative obligation to ensure that the Department complies with Section 32A-4-22(I) before terminating a parent's parental rights. Because the district court terminated Mother's parental rights before the Department fulfilled its obligation under Section 32A-4-22(I), we reverse the judgment terminating Mother's parental rights.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

LINDA M. VANZI, Judge

J. MILES HANISEE, Judge

Certiorari Granted, May 24, 2013, No. 34,132

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-063

Filing Date: April 17, 2013

Docket No. 31,631

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, (AFSCME) COUNCIL 18, AFL-CIO, CLC, AFSCME LOCAL 1888, AFSCME LOCAL 3022, AFSCME LOCAL 624, and AFSCME LOCAL 2962,

Plaintiffs-Appellees,

v.

THE CITY OF ALBUQUERQUE,

Defendant-Appellant,

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Stephen Curtice
Albuquerque, NM

for Appellees

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OPINION

FRY, Judge.

The City of Albuquerque (the City) appeals the district court's order granting multiple chapters of the American Federation of State, County, and Municipal Employees (the Unions) injunctive relief. The district court ordered the City to honor expired collective bargaining agreements (CBAs) until new CBAs were successfully negotiated pursuant to the Public Employee Bargaining Act's (PEBA) "evergreen provision." *See* NMSA 1978, Section 10-7E-18(D) (2003). The City argued, in part, that its Labor-Management Relations Ordinance (LMRO), Albuquerque, N.M., Ordinances ch. 3, art. 2, §§ 3-2-1 to -18 (1974, as amended through 2002), was entitled to grandfather status under NMSA 1978, Section 10-7E-26(A) (2003), and therefore exempt from compliance with the PEBA's evergreen provision. Because we agree with the City and conclude that the City's collective bargaining procedures are exempt from compliance with the evergreen provision, we reverse.

BACKGROUND

The relationship between the City and the Unions is governed by the City's LMRO. The LMRO was enacted in 1974 and was most recently amended in 2002. *See* Albuquerque, N.M., Ordinances, §§ 3-2-1 to -18. The LMRO includes impasse resolution procedures, but it does not require that an expired CBA remain in effect until a successor CBA is reached. *See id.* § 3-2-14.

On June 30, 2011, a number of CBAs between the City and the Unions expired. Despite negotiations, the parties were unable to reach agreement on successor CBAs. Once the CBAs expired, the City notified the Unions that it would no longer honor a provision of the CBAs that required the City to compensate union members for union business conducted during city work time. The City stated that it would, however, grant union representatives leave without pay so that they could continue to represent employees in grievance meetings, hearings, or arbitrations and that it would "offer other arrangements to accommodate efficient management/labor relations."

The Unions sought injunctive relief, seeking to compel the City to comply with the expired CBAs until the parties had

successfully negotiated successor agreements. The Unions argued that the PEBA's evergreen provision required the expired CBAs to remain in effect until new agreements were reached. Section 10-7E-18(D) ("In the event that an impasse continues after the expiration of a contract, the existing contract will continue in full force and effect until it is replaced by a subsequent agreement."). The district court agreed with the Unions and granted the Unions' motion for injunctive relief, requiring the City to abide by the terms of the previous CBAs. The City now appeals.

DISCUSSION

Standard of Review

Whether collective bargaining procedures with grandfather status under Section 10-7E-26(A) are required to comply with the PEBA's evergreen provision is an issue of statutory construction, which we review de novo. *City of Albuquerque v. Montoya*, 2012-NMSC-007, ¶ 12, 274 P.3d 108. "In construing a statute, our charge is to determine and give effect to the Legislature's intent." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135. "We will construe the entire statute as a whole so that all the provisions will be considered in relation to one another." *Regents of 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 also be construed so that "no part of the statute is rendered surplusage or superfluous," *In re Rehab. of W. Investors Life Ins. Co.*, 100 N.M. 370, 373, 671 P.2d 31, 34 (1983), and we will not "read into a statute . . . language which is not there." *Burroughs v. Bd. of Cnty. Comm'rs*, 88 N.M. 303, 306, 540 P.2d 233, 236 (1975).

The PEBA's Grandfather Clause

Consistent with its purpose to guarantee public employees the right to organize and collectively bargain with their employers, the PEBA contains several provisions and procedures to ensure an orderly, harmonious, and efficient collective bargaining process for public employers and employees. NMSA 1978, § 10-7E-2 (2003). But the PEBA also includes an exemption for public employers, like the City, that adopted a system of procedures for collective bargaining prior to October 1, 1991. The applicable grandfather clause states:

> A public employer other than the state that prior to October 1, 1991[,] adopted by ordinance, resolution or charter amendment a system of provisions and procedures permitting employees to form, join or assist a labor organization for the purpose of bargaining collectively through exclusive representatives may continue to operate under those provisions and procedures. Any substantial change after January 1, 2003[,] to any ordinance, resolution or charter amendment shall subject the public employer to full compliance with the provisions of Subsection B of Section 26 . . . of the [PEBA].

Section 10-7E-26(A).

Our Supreme Court has delineated a two-part test for determining when a public employer's procedures are entitled to grandfather status under the predecessor version of Section 10-7E-26(A). *Regents*, 1998-NMSC-020, ¶¶ 34-35 (construing PEBA, Section 10-7D-26(A) (repealed 1999)

(current version at Section 10-7E-26(A)). Tracking the language of the grandfather clause, the test requires that (1) a public employer has in place "a system of provisions and procedures permitting employees to form, join or assist any labor organization for the purpose of bargaining collectively through exclusive representatives" and (2) the public employer adopted the system of procedures before October 1, 1991. *City of Deming v. Deming Firefighters Local 4521*, 2007-NMCA-069, ¶ 9, 141 N.M. 686, 160 P.3d 595 (emphasis, internal quotation marks, and citation omitted) (applying the *Regents*, 1998-NMSC-020, ¶ 34, test to the re-enacted PEBA grandfather clause under Section 10-7E-26(A)). This test is narrowly construed and applies to specific provisions of the public employer's system of procedures rather than to the policy as a whole. *Regents*, 1998-NMSC-020, ¶ 35. "In other words, portions of an employer's collective-bargaining system may fail this two-part test while the remainder may qualify for grandfather status." *Id.*

The District Court's Decision

The district court concluded that the PEBA's evergreen provision applies regardless of the LMRO's grandfather status. Although the district court's reasoning is not entirely clear, it appears that the court was persuaded by the Unions' argument that non-compliance with the PEBA's evergreen clause would result in the City's being able to unilaterally impose new conditions of employment without those conditions having been the result of a good faith collective bargaining process. According to the Unions on appeal, this unilateral control is entirely inconsistent with the basic rights guaranteed by the PEBA, which was designed "to guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions." Section 10-7E-2. Therefore, they argue, regardless of whether the City enjoys grandfather status under the PEBA, the PEBA nonetheless imposes on the City's collective bargaining procedures a requirement that the expired CBAs remain in effect until new agreements are reached.

As an initial matter, we are not persuaded that the absence of an evergreen provision in the LMRO fundamentally violates the PEBA. The LMRO does not permit the City to unilaterally impose conditions of employment once a CBA has expired. Instead, the LMRO includes provisions for impasse resolution through mediation and voluntary binding arbitration. These provisions ensure that the Unions are participants in the determination of employment conditions even after a CBA has expired. This is consistent with the PEBA's overarching purpose.

Furthermore, the Legislature's inclusion of a two-section grandfather clause indicates its intent that certain public employers should be exempt from compliance with every requirement of the PEBA. The first section of the clause, Subsection A (quoted above in Paragraph 6), specifically provides that a public employer, other than the state, which has enacted a collective bargaining system prior to October 1, 1991, "may continue to operate under those provisions and procedures" despite the requirements of the PEBA. Section 10-7E-26(A). The second section of the grandfather clause, Subsection B, by contrast, requires public employers that adopted their collective

bargaining systems after October 1, 1991, to include in those systems additional provisions and procedures in order to be otherwise exempt from the PEBA. *See* Section 10-7E-26(B)(1) to (9). Among the provisions that must be included are "impasse resolution procedures equivalent to those set forth in [Section 10-7E-18]." Section 10-7E-26(B)(8). The evergreen provision at issue is among Section 10-7E-18's designated impasse resolution procedures.

These two subsections of the grandfather clause guide us in interpreting the PEBA as a whole and establish that the Legislature could not have intended the PEBA's evergreen clause to apply to *all* public-employer collective bargaining systems, regardless of grandfather status, as the Unions argue and as the district court held. Had the Legislature intended to impose the PEBA's impasse resolution procedures, including the evergreen provision, on all public employee bargaining procedures regardless of grandfather status, there would be no reason to distinguish between public employers that enacted their systems before October 1, 1991, and those that enacted their systems after that date. By requiring the latter to include an evergreen provision and by exempting the former from that requirement, the Legislature indicated that it did not intend the evergreen provision to be mandatory in all cases.

We therefore reject the Unions' argument that the City must comply with the PEBA's evergreen clause regardless of the City's grandfather status. The Unions' alternative argument is that, although the City enacted its LMRO prior to October 1, 1991, the City's LMRO is not entitled to grandfather status because, in the absence of an evergreen clause, the LMRO violates the grandfather clause's requirement for "bargaining collectively." We must determine whether the Legislature intended to extend grandfather status to an LMRO like the City's that does not include an evergreen provision.

Legislative Intent and the Grandfather Clause

We find guidance in our recent decision in *American Federation of State, County and Municipal Employees (AFSCME) Council 18 v. City of Albuquerque*, 2013-NMCA-012, 293 P.3d 943 (*AFSCME Council 18*), *cert. granted*, 2013-NMCERT-001, 299 P.3d 863. In that case, the unions argued that the city's impasse procedures were not binding, as required by the PEBA, and, therefore, that the LMRO "[did] not satisfy the 'collective bargaining' requirement for grandfather status."[1] *Id.* ¶¶ 12-13. This is similar to the argument the Unions make in the present case to the effect that the absence of an evergreen provision in the LMRO is inconsistent with the notion of collective bargaining. We rejected the unions' argument in *AFSCME Council 18* because it "attache[d] an additional requirement to the PEBA's grandfather clause" by "demand[ing] that we evaluate the effectiveness of the LMRO as an avenue for collective bargaining." *Id.* ¶ 14. We concluded that the PEBA's grandfather clause does not include this requirement because it "requires only that the system adopted permit 'employees to form, join or assist a labor organization for the purpose of

[1]Although the unions in *AFSCME Council 18* also argued that the absence of an evergreen provision precluded the city from attaining grandfather status, *see* 2013-NMCA-012, ¶¶ 12-13, this Court appeared to limit its holding to the absence of binding-impasse arbitration. *Id.* ¶¶ 19, 20, 23.

bargaining collectively through exclusive representatives'." *Id.* (quoting Section 10-7E-26(A)). The PEBA defines "collective bargaining" as "the act of negotiating between a public employer and an exclusive representative for the purpose of entering into a written agreement regarding wages, hours and other terms and conditions of employment." NMSA 1978, Section 10-7E-4(F) (2003) (internal quotation marks omitted). It says nothing about the relative effectiveness of the procedures adopted. *See City of Deming*, 2007-NMCA-069, ¶¶ 22-24 (stating that application of the grandfather clause is not dependent on an evaluation of the quality or effectiveness of the collective bargaining procedures).

This analysis applies equally to the absence of an evergreen provision. According to the Unions, the LMRO's failure to include an evergreen provision constitutes ineffective "collective bargaining" and, as a result, the City does not qualify for grandfather status. But, as we said in *AFSCME Council 18*, the grandfather clause does not include a requirement of effectiveness, and we will not read one into it. *See City of Deming*, 2007-NMCA-069, ¶ 23 ("We do not give effect to or embrace legislative intent if we add language to a statute that the [L]egislature did not adopt.").

In *AFSCME Council 18*, this Court also relied on the history of the PEBA, whose original version included "an effectiveness component" in the language of its grandfather clause. 2013-NMCA-012, ¶ 15. However, the Legislature removed this language when it reenacted the PEBA in 2003, *id.*, and we inferred from this "that the Legislature intended that a public employer's system of provisions and procedures permitting collective bargaining would not be subject to that type of [effectiveness] scrutiny to achieve grandfather status." *Id.*

In addition, as we noted above and as we pointed out in *AFSCME Council 18*, the Legislature made a distinction between public employers, other than the state, that adopted their collective bargaining systems before October 1, 1991, and those that adopted those systems after October 1, 1991. *Id.* ¶ 17. The latter employers must include in their collective bargaining systems "impasse resolution procedures equivalent to those set forth in Section 18 . . . of the [PEBA]," which procedures include the evergreen provision at issue. Section 10-7E-26(B)(8). However, the Legislature specifically did not impose these requirements on employers, like the City, that enacted their systems *before* October 1, 1991. Section 10-7E-26(A). Therefore, we conclude here, as we did under similar circumstances in *AFSCME Council 18*, that the Legislature did not intend that a public employer like the City must include an evergreen provision in its collective bargaining procedures in order to achieve grandfather status.

We agree with the Unions that the PEBA's impasse resolution procedures, including the evergreen provision, would likely provide a more effective avenue for a favorable resolution to the current impasse. But that does not require us to disregard the clear legislative direction that grandfathered systems of collective bargaining under Section 10-7E-26(A) be exempt from compliance with these evergreen procedures. *Cf. Regents*, 1998-NMSC-020, ¶ 25 ("A grandfather clause preserves something old, while the remainder of the law of which it is a part institutes something new. A grandfather clause may have the effect of relieving an entity from submitting to new restrictions, or the clause

may have the reverse effect of permitting the entity to avoid broadening the scope of its activities.").

Because of our disposition on this issue, we need not address the City's remaining arguments concerning the expired CBAs' alleged conflict with the Anti-Donation clause of Article IX, Section 14, of the New Mexico Constitution, or their alleged violation of the Bateman Act, NMSA 1978, Sections 6-6-11 to -18 (1897, as amended through 1999).

CONCLUSION

For the foregoing reasons, we reverse the district court's order granting the Unions preliminary and permanent injunctions requiring the City to honor the expired CBAs pending successful negotiation of successor CBAs.

IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

I CONCUR:

MICHAEL E. VIGIL, Judge

TIMOTHY L. GARCIA, Judge (specially concurring).

GARCIA, Judge (specially concurring).

I agree with the majority's position that language in *AFSCME Council 18*, 2013-NMCA-012, ¶¶ 12-17 and *City of Deming*, 2007-NMCA-069, ¶¶21-24, appear to control our decision in this case. I write to specially concur because in *AFSCME Council 18*, I asked our Supreme Court to re-address *City of Deming* and the grandfather status issue where the City's LMRO did not contain any final impasse resolution procedure that was binding on the City. *AFSCME Council 18*, 2013-NMCA-012, ¶¶ 30-32 (Garcia, J., specially concurring). Because certiorari was granted by the Supreme Court in *AFSCME Council 18* and remains pending at this time, I believe that our ruling in this case could be nullified by the outcome of that appeal. *See id.*

TIMOTHY L. GARCIA, Judge

Certiorari Denied, April 23, 2013, No. 34,023

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-064

Filing Date: January 16, 2013

Docket No. 30,852

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

DEREK GARCIA,

Defendant-Appellant.

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OPINION

BUSTAMANTE, Judge.

Convicted of two counts of second degree criminal sexual contact of a minor (CSCM), Defendant appeals. We hold that the district court erred by concluding that a transcript of Defendant's police station interview would be too confusing for the jury, once it was redacted in a manner consistent with the court's in limine ruling, without first reviewing the redacted form of the transcript. However, we conclude that this error was harmless. We hold further that the district court erred by not conducting an in camera review of records Defendant sought in discovery. We remand for district court review of these records to determine (1) if any portion of the records is material to the charges or the defense against them, and (2) if exclusion of material portions was prejudicial to Defendant. We are not persuaded by Defendant's other assertions of error.

BACKGROUND

Defendant was the live-in boyfriend of Victim's mother, with whom he had three children, the oldest of whom was four years younger than Victim. Victim, who was eight years old, also lived in the home. In February 2009 Defendant was the caretaker of the four children while Victim's mother worked the night shift at a Burger King.

On February 12, 2009, Victim reported at school to a Children, Youth and Families Department (CYFD) services provider that the night before, Defendant had touched her vaginal area when he was in her room. Victim was interviewed about the incident on February 17, 2009, by Hank Baskett, the executive director of Oasis Children's Advocacy Center, a forensic interviewing service, while Detective Todd Moore of the Portales Police Department and Investigator Janelle Pacheco of CYFD watched on a closed-circuit television from another room.

The same day, after watching Victim's Oasis interview, Detective Moore and Investigator Pacheco went to Defendant's home, where they conducted an audio-recorded interview of Defendant. Defendant told Investigator Pacheco and Detective Moore that he had entered Victim's room the night of February 11, 2009, and did not mean to touch her inappropriately, but instead intended to "scoot her over in the bed." The next day, February 18, 2009, Detective Moore conducted a second audio-recorded interview of Defendant at the police station with Investigator Pacheco present. The interview lasted about one hour. Prior to trial, the State prepared a written transcript of the interview.

Defendant was found guilty, and a penitentiary sentence of thirty-one years, with nineteen years suspended, was imposed. Additional facts are included as needed in our analysis of Defendant's arguments.

ANALYSIS

Defendant makes six arguments. He argues first that the district court abused its discretion when it refused to admit the transcript of the police station interview after it was used to refresh the memory of several witnesses. Next, he argues that the district court erred in failing to order disclosure of CYFD records related to allegations of abuse by Victim. He also maintains that the district court's grant of the State's motion in limine to limit reference at trial to earlier allegations by Victim violated his due process rights and ability to cross-examine witnesses against him. In addition, he argues that there was insufficient evidence to support two convictions for CSCM and that the district court improperly denied his motion to suppress the statements he made in the police station interview. Finally, he argues that even if these errors are not reversible individually, their cumulative effect was to deprive him of a fair trial. We address Defendant's arguments in the order presented.

A. The District Court Abused Its Discretion in Excluding the Transcript of Defendant's Police Station Interview Without First Reviewing the Transcript in Redacted Form

Defendant contends that because the State's witnesses mischaracterized his statements from the interview, he was entitled to introduce into evidence the full context of those statements pursuant to the rule of completeness embodied in Rule 11-106 NMRA and, therefore, that the district court erred in its ruling denying admission into evidence of the transcript of the interview. Before analyzing Defendant's contention, we address the State's arguments that the issue is not properly before us.

The State argues that Defendant failed to preserve his argument that he had a right to admission of the transcript under Rule 11-106 because he did not direct the district court to that specific rule when he argued that the transcript should be admitted into evidence. *See State v. Ortiz*, 2009-NMCA-092, ¶ 32, 146 N.M. 873, 215 P.3d 811 ("To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court." (internal quotation marks and citation omitted)). We conclude that the district court and the State were fairly on notice of Defendant's assertion that the transcript was admissible because his statements were being taken out of context through the State's use of Defendant's statements and that the transcript would show the actual context and content of his

statements. Therefore, despite Defendant's failure to cite the specific rule, we conclude that the argument was sufficiently preserved for appellate review. *See State v. Smile*, 2009-NMCA-064, ¶ 39, 146 N.M. 525, 212 P.3d 413, *cert. quashed*, 2010-NMCERT-006, 148 N.M. 584, 241 P.3d 182; *see also* Rule 12-216 NMRA ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked, but formal exceptions are not required[.]").

The State also contends that because contents of the interview were admitted only through the testimony of the State's witnesses and Defendant, and no portion of the written transcript itself was actually introduced into evidence, the rule of completeness does not apply. *See* Rule 11-106 (providing that its provisions apply when "a writing or recorded statement or part thereof is introduced by a party"); Rule 11-612 NMRA[1] (stating in part that when a writing is used to refresh the memory of a witness, the adverse party is entitled to introduce in evidence any portion that relates to the witness's testimony).

We conclude that where, as in this case, the State used the transcript extensively to ask about specific statements made by Defendant, the contents of the transcript were "introduced" into evidence sufficiently to invoke Rule 11-106. *See* 21A Charles Alan Wright et al., *Federal Practice and Procedure: Federal Rules of Evidence* § 5075, at 39-40 (2d ed. 2012).

> Most courts that have considered the question have held that using a writing to refresh the recollection of a witness is a sufficient use of the writing to trigger [Fed. R. Evid.] 106. Given that [Fed. R. Evid.] 612 gives the opponent the power to disrupt the proponent's case to inspect the writing, as well as the right to introduce parts of the writing into evidence, policy would seem to make this an easy case for the application of [Fed. R. Evid.] 10[6].[2]

Id. Under the circumstances, we would be placing form over substance if we required the physical writing itself to be introduced into evidence for Rule 11-106 to be invoked.

Turning to the merits, we review a district court's ruling excluding evidence for an abuse of discretion. *See State v. Lucero*, 1998-NMSC-044, ¶ 5, 126 N.M. 552, 972 P.2d 1143. To the extent our analysis requires interpretation of applicable rules of evidence, our review is de novo. *State v. Moreland*, 2007-NMCA-047, ¶ 9, 141 N.M. 549, 157 P.3d 728, *aff'd*, 2008-NMSC-031, 144 N.M. 192, 185 P.3d 363. The applicable version of Rule 11-106[3] states: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any

[1]We express no opinion as to whether the transcript is independently admissible pursuant to Rule 11-612.

[2]Federal Rule of Evidence 106 is identical to our state "rule of completeness" codified as Rule 11-106. *State v. Barr*, 2009-NMSC-024, ¶ 33, 146 N.M. 301, 210 P.3d 198, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110.

[3]Rule 11-106 was amended in 2012, but because this case was filed before June 16, 2012, the effective date of the amendment, the text of the old rule applies. *See* Rule 11-106, Comm. cmt. to 2012 amendment. We note, however, that the result we reach should be unaffected by the amendments to Rule 11-106 because the changes to the rule were intended to be stylistic, not substantive. *Id.*

other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Rule 11-106. Our rule "is an expression of the common law rule of completeness." *Barr*, 2009-NMSC-024, ¶ 33. "The primary purpose behind the rule of completeness is to eliminate misleading or deceptive impressions created by creative excerpting." *Id.* ¶ 34; *see State v. Baca*, 120 N.M. 383, 390, 902 P.2d 65, 72 (1995) ("The purpose of [Rule 11-106] is to permit parties to introduce recorded statements to place in context other evidence that, when viewed alone, may be misleading."). "[T]he rule of completeness applies to insinuations, innuendos, and omissions." *State v. Patterson*, 625 S.E.2d 239, 243 (S.C. Ct. App. 2006).

Defendant testified at trial on his own behalf. The State refreshed Defendant's recollection with the transcript multiple times during cross-examination. In fact, most of the State's cross-examination concerned Defendant's statements at the police station; the prosecutor often read specific questions and answers directly from the transcript and referenced specific pages and lines. At other times, the State asked questions of Defendant and requested that he locate the answers in the transcript. Indeed, at one point, the court recessed to allow Defendant time to review the entire transcript and count the occurrences of a given statement. Defendant maintained in his testimony that when he made the statements cited by the State he was talking about touches that occurred while play-wrestling with Victim, not inappropriate sexual touching. Since the State, Detective Moore, and Investigator Pacheco characterized Defendant's statements as "admissions," there was a conflict in the testimony as to the meaning of those statements. Thus, the context of the statements was relevant to Defendant's defense. In fairness to Defendant, the transcript, redacted as discussed below, should have been considered for admission by the district court under the rule of completeness.

Here, however, the district court failed to properly consider Defendant's motion to admit the transcript. The district court may exclude even relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Rule 11-403 NMRA. In this case, Defendant moved to admit the transcript on the ground that the State's questions took his statements out of context, and because the State used the transcript extensively in refreshing Defendant's recollection. Defendant argued that the transcript should "be entered into evidence or read in its entirety for the jury." The State countered that the district court's pre-trial ruling excluding reference to previous reports of sexual abuse by Victim would require "copious amounts of time" to redact the transcript. (We note that earlier in the trial the State claimed it would take "at least thirty minutes" to redact the transcript.)

The district court denied Defendant's motion, stating that it would "stand by the ruling." The ruling to which the district court referred was that the audio-recording of the interview would not be admitted because references to Victim's prior reports of sexual abuse, which were excluded by the State's pre-trial motion in limine, were "peppered" throughout and the redacted recording would be too confusing to the jury. Although the transcript was mentioned in argument before this ruling, the ruling was in response to

Defendant's request for the transcript recording to be admitted under the best evidence rule. Thus, that ruling was not specific to the transcript in redacted form.

A district court's determination that potentially probative evidence should be excluded because it is too confusing must be based on an analysis of the evidence itself. *State v. Aragon*, 116 N.M. 291, 293, 861 P.2d 972, 974 (Ct. App. 1993) ("In order to exercise discretion properly, it follows that the facts and circumstances surrounding an issue must be sufficiently set forth to render a reasoned decision."), *overruled on other grounds by Tollardo*, 2012-NMSC-008. Here, the record fails to establish that the district court ever reviewed the recording or transcript in a redacted form. Thus, the district court excluded the transcript without a proper basis on which to determine that the risk of confusion to the jury *substantially outweighed* its probative value in representing the context of Defendant's statements. This was an abuse of discretion. *See Aragon*, 116 N.M. at 293-94, 861 P.2d at 974-75 (concluding that the district court abused its discretion when it did not listen to an offered tape or allow the party to present an offer of proof before excluding the evidence).

Nevertheless, a new trial is not required. This Court has in the past remanded cases for a hearing on admissibility where the district court erred by not considering evidence properly and where exclusion of the evidence was not harmless. *See id.* at 295, 861 P.2d at 976. But here, remand for a hearing on the admissibility of the transcript is unnecessary because we have the transcript available to us and, after review of it, we conclude that even if it were admissible, the district court's failure to review and admit it was harmless.

The error here is non-constitutional. *Barr*, 2009-NMSC-024, ¶ 53 ("[W]here a defendant has established a violation of . . . court rules, non-constitutional error review is appropriate."). "[N]on-constitutional error is reversible only if the reviewing court is able to say, in the context of the specific evidence at trial, that it is reasonably probable that the jury's verdict would have been different but for the error." *Id.* ¶ 54. We "evaluate all of the circumstances surrounding the error. This requires an examination of the error itself, which . . . could include an examination of the source of the error and the emphasis placed upon the error." *Tollardo*, 2012-NMSC-008, ¶ 43. Although it should not be the "singular focus of the harmless error analysis," *id.*, "evidence of a defendant's guilt . . . may often be relevant, even necessary, for a court to consider, since it will provide context for understanding the role the error may have played in the trial proceedings." *State v. Moncayo*, 2012-NMCA-066, ¶ 16, 284 P.3d 423 (internal quotation marks and citation omitted).

We conclude after review of the transcript that there is no "reasonabl[e] probabil[ity] that the jury's verdict would have been different" if the transcript had been admitted. *Barr*, 2009-NMSC-024, ¶ 54. Defendant contends that "since [Defendant] maintained in his testimony that he had been talking about wrestling, denying the jury the ability to review what was actually said was an abuse of discretion." Implicit in this argument is the assumption that the redacted transcript was sufficiently exculpatory to change the verdict notwithstanding the other evidence. *See id.* After a review of both the transcript and the evidence at trial, we disagree.

First, Defendant's statements are not clearly exculpatory even when read in the

context of the transcript. At times in the interview Defendant maintained that the touches Victim complained of occurred when they were wrestling. He said, "Not even touching, I didn't even touch her" and "I don't touch" or "I don't touch" her at least four times. On the other hand, at one point Detective Moore told Defendant, "I'm not talking about wrestling," and shortly thereafter, Defendant said he touched Victim "on her butt" with his hands. Defendant declined to say that Victim was lying and said several times that Victim told him not to touch her in certain places or ways Defendant said that sometimes when Victim protested, she told him to "do that to [M]om."

We review the transcript not to usurp the role of the jury in evaluating Defendant's statements, but to examine "whether [the] error was likely to have affected the[ir] verdict." *Tollardo*, 2012-NMSC-008, ¶ 42 (stating that this question is the "central inquiry" of the harmless error analysis). In this case, although the transcript should have been considered under Rule 11-106 to permit Defendant to put his statements in context after they were characterized as "admissions" by the State, as a whole the value of the transcript to Defendant's case is too dubious for us to conclude that its admission would have influenced the jury's deliberations in Defendant's favor.

The probable impact of the transcript is further diminished in light of the "non-objectionable evidence" adduced at trial. *State v. Leyba*, 2012-NMSC-037, ¶ 24, 289 P.3d 1215 ("To put the error in context, we often look at the other, non-objectionable evidence of guilt, not for a sufficiency-of-the-evidence analysis, but to evaluate what role the error played at trial."). Victim testified with specificity about the way Defendant touched her and demonstrated with props how Defendant touched her. She testified that Defendant had been drinking Budweiser with some guests before he touched her. The forensic interviewer testified about how forensic interviews are conducted with children so as to avoid leading questions and that he had conducted an interview with Victim. The drawings Victim made during the forensic interview showing the places on her body Defendant touched were admitted into evidence. The CYFD employee to whom Victim first reported the alleged inappropriate touching the day after it occurred testified as to what Victim told her and Victim's demeanor. She also testified that when she went to Defendant's home later that day, she observed beer bottles on the lawn, consistent with Victim's testimony that Defendant had been drinking Budweiser the night before, and that Defendant whispered, "What have I done?" after he and Victim's mother were informed of Victim's disclosure. Detective Moore and Investigator Pacheco testified about what Defendant said and did during their interviews with him, including his demeanor. Victim's grandmother testified that since the time of the alleged touching Victim had been "moody" and "aggressive" and her grades had dropped.

Defendant and Victim's mother testified for the defense. Victim's mother testified that she never observed inappropriate touching of Victim by Defendant while they were wrestling. She stated that Victim would get "real mad" when asked to do chores around the house and that Defendant was the one who made sure Victim did them. She said that Victim participated in the wrestling matches with Defendant and "most often" initiated them. Defendant testified that he wrestled with Victim and the other children

and that he went into the bedroom that night to check on the sleeping children.

Given that the transcript was not clearly exculpatory and considering it in the context of the other evidence, we cannot conclude that the district court's failure to consider the transcript for admission and consequent denial of Defendant's motion to admit it had an impact on the jury's verdict. The district court's failure to review the transcript in redacted form was harmless.

B. The District Court Erred in Failing to Conduct an in Camera Review of CYFD Records Sought by Defendant

Defendant next argues that the district court erred by declining to order disclosure of CYFD records related to allegations by Victim before those leading to this case. Defendant made a motion to compel the State to provide the materials because they were potentially exculpatory under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). The State opposed the motion and argued that: (1) the district attorney's office "is not the custodian of any CYFD records" and CYFD is not part of the "prosecution team"; (2) the records were confidential under NMSA 1978, Section 32A-4-33 (2009); and (3) the records were not relevant.

The district court denied the motion, stating that it was premature because Defendant had not subpoenaed CYFD to get the records. Defendant served CYFD with a subpoena duces tecum, but CYFD refused to comply immediately. Instead, pursuant to Section 32A-4-33, it requested additional information from which to determine if Defendant was entitled to the records. Section 32A-4-33(B)(16) permits release of records only to parties in the case or to "any other person or entity, by order of the court, having a legitimate interest in the case," and Section 32A-4-33(C) permits disclosure of limited records to "parent[s], guardian[s] or legal custodian[s] whose child has been the subject of an investigation." Defendant had no right to CYFD records under Section 32A-4-33(C) because he was not a parent, guardian, or legal custodian. In addition, Defendant was provided with the only records to which he was entitled as a party to the present charges under Section 32A-4-33(B). Defendant's arguments, therefore, boiled down to whether he had a "legitimate interest" in the records. *See* § 32A-4-33(B)(16).

The State maintained that Defendant "cannot establish relevance for apparent allegations that occurred PRIOR to the instant offense." Defendant argued that "the defense needed to know the complete picture about the earlier allegations and interviews" and "that it was relevant whether [Victim] learned during those multiple interviews how to answer in such a way that her allegations would be given credence." He argued that the CYFD records were relevant to "the credibility of the witness that the State must rely on in order to proceed to trial, [Victim]." The district court found that Defendant had a legitimate interest "only as to incidents related to [Defendant] and the charges alleged in the criminal information" and declined to order disclosure of any records not related to the present charges. The district court did not state the basis for this finding in either the order for disclosure or at the hearing on the matter.

"A trial judge's denial of a defendant's discovery requests will be reviewed according to an abuse of discretion

standard." *State v. Bobbin*, 103 N.M. 375, 377, 707 P.2d 1185, 1187 (Ct. App. 1985). In order for an abuse of discretion to be reversible, the defendant must demonstrate prejudice. *State v. Desnoyers*, 2002-NMSC-031, ¶ 25, 132 N.M. 756, 55 P.3d 968, *abrogated on other grounds as stated in State v. Forbes*, 2005-NMSC-027, 138 N.M. 264, 119 P.3d 144. The primary issue argued below was whether the records of allegations by Victim before those in the instant case were material to the charges or Defendant's defense. When a defendant has demonstrated "circumstances that reasonably indicate that records may contain information material to the preparation of the defense[,]" *Ortiz*, 2009-NMCA-092, ¶ 28, then "[t]he proper procedure to determine relevance is . . . in camera review [of the documents]." *State v. Gonzales*, 1996-NMCA-026, ¶ 20, 121 N.M. 421, 912 P.2d 297. When, as here, the materials sought are protected by statute, "[i]n camera review of confidential information represents a compromise between the intrusive disclosure of irrelevant information on the one hand and the complete withholding of possibly exculpatory evidence on the other." *State v. Luna*, 1996-NMCA-071, ¶ 13, 122 N.M. 143, 921 P.2d 950.

"A general assertion that inspection of the records is needed for a possible attack on the victim's credibility is insufficient to [trigger in camera review]." *Id.* ¶ 9. But Defendant is not required "to know or show in advance that the records will actually contain helpful information." *Ortiz*, 2009-NMCA-092, ¶ 28; *see* Rule 5-503(C) NMRA (stating that information sought in discovery need not be admissible at trial "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence"). Instead, Defendant must provide a reasonable basis on which to believe that it is likely the records contain material information. *Ortiz*, 2009-NMCA-092, ¶ 28. In *State v. Pohl*, 89 N.M. 523, 524, 554 P.2d 984, 985 (Ct. App. 1976), the Court held that the defendant had made a sufficient showing to require inspection of police personnel records when the "defendant had shown two prior instances of the officer['']s alleged misconduct." In that case, the records of previous misconduct were material to the defense because "the defendant's guilt or innocence [hinged] on whether the jury believe[d] the arresting officer [was] the aggressor." *Id.* Similarly, in *Gonzales*, there was no abuse of discretion when the district court ordered in camera review of mental health records when other records indicated that the victim "had a history of blackouts from alcohol" and the records may have "contained information that [the victim] may have suffered cognitive difficulties which would affect her credibility at trial." 1996-NMCA-026, ¶ 21. The defendant there was charged with criminal sexual penetration and claimed that the sexual encounter was consensual. *Id.* ¶¶ 3, 22. Thus, whether the victim may have blacked out while they were together was material to his defense. *Id.* ¶ 21.

Here, as in *Pohl* and *Gonzales*, Defendant had evidence suggesting that Victim had been interviewed a number of times by CYFD or Oasis and/or had made unsubstantiated allegations of sexual abuse in the past. Victim waved to the camera in the Oasis interview room and stated that she had been there before. Defendant also obtained a summary report of allegations from Victim's mother. This report showed that there had been allegations in 2002, 2003, 2004, 2006, 2008, and 2009 and that Victim had been interviewed about some of the allegations. It

also indicated that some of the allegations were found to be unsubstantiated. Finally, since there was no physical evidence of abuse, the State's case rested entirely on the credibility of the witnesses. Thus, Victim's credibility as to both possible false accusations and learned ability to respond to interview questions was material to Defendant's defense. We conclude that Defendant made a threshold showing sufficient to trigger in camera review.

The State points to *Luna*, 1996-NMCA-071, and *State v. Ramos*, 115 N.M. 718, 858 P.2d 94 (Ct. App. 1993), *modified on other grounds by State v. Gomez*, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1 as examples of cases in which this Court found no abuse of discretion where the district court had denied a defendant's motion for release of confidential or privileged documents. These cases are inapposite. In *Luna*, the district court ordered in camera review of the victim's psychotherapy records on motion by the defendant. 1996-NMCA-071, ¶¶ 3-4. The State initially did not object, but then "raised [an] objection that [the d]efendant had made an insufficient showing to justify . . . in camera review on the day of trial." *Id.* ¶ 4. This Court acknowledged that the defendant's bare assertion that "it is likely that [the victim] revealed information to the therapist which may be relevant to issues of her credibility . . . may not have been sufficiently particularized or compelling to justify in camera review[,]" but did not decide this issue. *Id.* ¶ 10 (internal quotation marks omitted). Rather, it held that the district court's order was not an abuse of discretion because the State did not timely object and the defendant was prejudiced by the delay. *Id.* ¶ 11. In *Ramos*, the district court conducted an in camera review of the victim's psychotherapy records and found "that there was nothing in the records that justified their disclosure." 115 N.M. at 721, 858 P.2d at 97. On appeal, the defendant argued that it was error not to order disclosure of the records directly to him because the records "may well [have] contain[ed] evidence of psychotic or hallucinatory behavior relevant to credibility." *Id.* (internal quotation marks omitted). There, the issue was whether the district court erred in its determination that the records were not relevant *after* in camera review. In contrast, here the issue is whether Defendant made a threshold showing sufficient to require in camera review of the records. Neither *Luna* nor *Ramos* addresses this question.

The State next argues that, even if the records sought were material, Defendant "made no showing that the [district] court's refusal to grant him . . . access . . . denied him a defense or . . . fair trial or resulted in prejudice." *See Chacon v. State*, 88 N.M. 198, 199-200, 539 P.2d 218, 219-20 (Ct. App. 1975) ("[N]ondisclosure of items material to the preparation of the defense is not reversible error in the absence of prejudice."). The district court did not order disclosure of the records for in camera review and did not make a finding as to their relevance; consequently, they are not part of the record on appeal. Since we have no basis on which to assess prejudice, we cannot determine that there was no prejudice. *Pohl*, 89 N.M. at 525, 554 P.2d at 986 ("In the absence of a determination of what the files would have shown we cannot hold there was no prejudice.").

We hold that Defendant made a threshold showing of materiality sufficient to require the district court to conduct in camera review. Therefore, the district court erred in ruling that Defendant did not have a legitimate

interest in the records of previous allegations without assessing fully the relevance of those records through in camera review of them. We remand for in camera review of the records to determine (1) if any portion of them is material to the charges or defense and (2) whether exclusion of the records was prejudicial to Defendant. If the answer to both questions is yes, Defendant must be given a new trial. *See Pa. v. Ritchie*, 480 U.S. 39, 58 (1987) (remanding for review of a children and youth services file in camera and stating that if the file contains no "information that probably would have changed the outcome of [the] trial . . . the lower court will be free to reinstate the prior conviction"). We further note that the district court's ruling in this matter will be subject to appeal.

C. Defendant Failed to Preserve His Arguments as to the District Court's Grant of the State's Motion in Limine

We turn next to Defendant's argument "that the [district] court's refusal to allow the defense to introduce evidence of [Victim]'s prior CYFD contacts was an abuse of its discretion that resulted in deprivation of his constitutional rights to confrontation and due process of law." The State argues that "Defendant waived this issue for appeal" because he "did not oppose the State's motion [in limine to exclude such evidence]" and that, even if the issue were not waived, prior allegations by Victim were irrelevant. Defendant does not address waiver or preservation of this argument in his briefs. We conclude that this issue is not properly before this Court either because Defendant waived his right to appeal exclusion of the evidence by failing to file a notice of intent to admit the prior allegations as required by Rule 11-412(C) NMRA, or because Defendant failed to elicit a ruling at trial on the admissibility of the prior allegations.

We begin by noting that analysis of whether evidence covered by our "rape shield statute," NMSA 1978, Section 30-9-16 (1993), should be admitted at trial is distinct from our analysis of whether Defendant should have been permitted to obtain that evidence through discovery. *Gonzales*, 1996-NMCA-026, ¶ 11 (stating that Rule 11-412, the evidentiary rule related to the rape shield statute, "clearly governs only the admission of evidence at trial and not pretrial discovery"). Thus, Rule 11-412 does not preclude discovery of the CYFD records of prior allegations by Victim. The rule does, however, govern our analysis of the district court's grant of the State's motion in limine to exclude such evidence and the district court's rulings at trial pertaining to the evidence. *See State v. Payton*, 2007-NMCA-110, ¶¶ 5, 10, 142 N.M. 385, 165 P.3d 1161 (discussing the rape shield statute in the context of CSCM charges and proof of the victim's sexual knowledge prior to the alleged CSCM).

Defendant did not argue against the State's motion in the hearing on the matter. In fact, Defendant stated at the motion hearing that he "had not anticipated soliciting that type of information anyway." Although he also stated that "if it comes up, I guess that will be addressed[,]" the district court reiterated that it should not come up in front of the jury, and Defendant did not object further. The State's motion was predicated on Section 30-9-16(A), which prohibits admission of "evidence of the victim's past sexual conduct, opinion evidence of the victim's past sexual conduct or of reputation for past sexual conduct, . . . unless . . . the evidence is material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value." *See*

Rule 11-412(B). The State argued that Defendant had not demonstrated that these conditions were met and that Defendant had not filed a written notice notifying the court of his intent to admit the prior allegations. *See* Rule 11-412(C)(1), (2) ("If the defendant intends to offer evidence under Rule 11-412(B) . . ., the defendant must file a written motion before trial. . . . Before admitting evidence under this rule, the court shall conduct an in camera hearing to determine whether such evidence is admissible."). The district court acknowledged this failure in its oral ruling on the motion and noted both at the hearing and in its order that "if new issues arise during trial, the [district c]ourt will review those issues at that time." *See Proper v. Mowry*, 90 N.M. 710, 715, 568 P.2d 236, 241 (Ct. App. 1977) (noting that a ruling on a motion in limine is "without prejudice to the right to offer proof [and possible introduction of the evidence] during the course of the trial").

In spite of this acknowledgment by the district court, Defendant never filed the required notice under Rule 11-412(C) or sought a hearing on admissibility of the prior allegations by Victim. This failure precluded admission of this evidence. *State v. Johnson*, 1997-NMSC-036, ¶ 20, 123 N.M. 640, 944 P.2d 869 (stating that during the in camera hearing, the movant may "inform the [district] court of the relevant facts and circumstances, make the arguments of relevancy, and explain the respective positions on balancing. In conducting that inquiry, the [district] judge must depend on the moving party or parties to offer proof and argument in support of the ruling sought").

Even if Defendant's conduct vis á vis the motion in limine or Rule 11-412(C) did not constitute waiver, he failed to preserve the issue for appeal. In order to preserve an issue for appeal, Defendant must make a timely objection that apprises the district court specifically of the nature of the claimed error and invokes an intelligent ruling thereon. *State v. Varela*, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280. In addition, "it must appear that [the] appellant fairly invoked a ruling of the [district] court on the same grounds argued in the appellate court." *Woolwine v. Furr's, Inc.*, 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987). At trial, Defendant sought to ask questions of Victim about why she lived with her grandmother in the year before the current allegations. In addition, he questioned the CYFD services provider and the CYFD investigator about why they knew Victim before the investigation of the alleged incidents. He also asked the forensic interviewer why Victim had waved to the camera in the interview room. In each case, the State objected on grounds that the district court had already ruled that reference to "[V]ictim's prior sexual conduct, to include allegations of prior sexual abuse" was excluded. At the beginning of the second day of trial, the district court reiterated its ruling on the motion, stating that "prior allegations with CYFD are not to be elicited or brought in." In response, Defendant argued that the Defendant's statements were hearsay and the best evidence rule required admission of the audio recording of the interview. These arguments at trial related to the admissibility of the audio recording or transcript of Defendant's police station interview, not to the admissibility of Victim's prior allegations. Because Defendant did not file notice of intent to admit Victim's prior allegations and did not object to the Court's ruling on the exclusion of prior allegations at trial, the district court was never alerted to his arguments regarding admission of the evidence so as to make "an intelligent ruling thereon." This issue was not

preserved. *See Woolwine*, 106 N.M. at 496, 745 P.2d at 721.

D. Sufficient Evidence Supported the Jury's Findings That Defendant Committed Two Counts of CSCM

"[A] sufficiency of the evidence question involves a two-step process." *State v. Armendariz-Nunez*, 2012-NMCA-041, ¶16, 276 P.3d 963, *cert. denied*, 2012-NMCERT-003, 293 P.3d 183. "Initially, we view the evidence in the light most favorable to the verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict[.]" *Id.* The next step requires that we "make a legal determination of whether the evidence viewed in this manner could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt." *Id.* (internal quotation marks and citation omitted).

The jury was instructed with identical instructions for both counts as follows:

> For you to find [D]efendant guilty of criminal sexual contact of a child under the age of [thirteen] as charged in Count 1, [replaced with Count 2 in second instruction], the [S]tate must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. [D]efendant touched or applied force to the unclothed buttocks and/or vagina of [Victim];
>
> 2. [Victim] was [twelve] years of age or younger;
>
> 3. This happened in New Mexico on or between January 1, 2009[,] and February 12, 2009.

We have examined the evidence in detail and conclude that it is sufficient to permit retrial if the district court concludes that one is necessary following its in camera review of the records of previous allegations. Although most of the evidence related to February 11, 2009, Victim also testified that Defendant had touched her inappropriately prior to that incident. Victim testified that February 11, 2009, was not the only time that Defendant had touched her "private parts" and that it had started when her mother began work at Burger King in June. Defendant's testimony also supported an inference by the jury that inappropriate touchings had occurred on more than one occasion in the specified time period because Defendant stated during cross-examination that he had told Detective Moore in the interview that "the inappropriate things had been going on between [him and Victim] about a week." Detective Moore also testified that Defendant said he had touched Victim inappropriately "twice within the last week."

Under our standard of review, sufficient evidence was presented for the jury to conclude that Defendant "touched or applied force to the unclothed buttocks and/or vagina" of Victim both on the night of February 11, 2009, and on another occasion between January 1, 2009, and February 12, 2009. The lack of testimony pinpointing a specific date on which the other incident of CSCM occurred does not preclude a finding by the jury that two incidents of touching occurred based upon the evidence presented. *See State v. Altgilbers*, 109 N.M. 453, 471, 786 P.2d 680, 698 (Ct. App. 1989) (stating that "[n]o juror need have a precise day in his

or her own mind in order to vote for conviction" for purposes of a sufficiency of the evidence analysis and concluding that sufficient evidence supported verdicts in spite of the lack of evidence of specific dates of the occurrence of criminal sexual acts). Accordingly, should a new trial be required following in camera review of the CYFD records, Defendant's right to be free from double jeopardy will not be violated by retrial on both counts of CSCM.

E. The District Court Did Not Err in Denying Defendant's Motion to Suppress

The district court denied Defendant's motion to suppress his statements at the February 18 interview at the police station. Defendant argues first that "he felt coerced in [the] interview" and then "that the [district] court erred in finding that there was a proper waiver of his rights to remain silent[during the police interview on February 18] and that this error . . . require[s] retrial." He cites to cases addressing a suspect's rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The State argues that Defendant was not in custody during the questioning and that the questioning was not "the type of interrogation requiring *Miranda* warnings."

It is not entirely clear whether Defendant's argument is that his statements were involuntary (because they were coerced) and, therefore, that they violated his right to due process under the Fourteenth Amendment, or that his statements violated his Fifth Amendment rights because he did not voluntarily, knowingly, and intelligently waive his *Miranda* rights. *See State v. Fekete*, 120 N.M. 290, 298, 901 P.2d 708, 716 (1995) ("A claim that the police coerced a statement requires a different analysis than a claim that an accused voluntarily waived his or her Fifth Amendment protections under *Miranda*."); U.S. Const. amends. V and XIV; *see also Miller v. Dugger*, 838 F.2d 1530, 1537 (11th Cir. 1988). In either case, we conclude that the district court did not err in denying Defendant's motion to suppress.

We first address whether Defendant's due process rights were violated. We review whether a statement was voluntarily given by assessing the totality of the circumstances. *State v. Munoz*, 1998-NMSC-048, ¶ 23, 126 N.M. 535, 972 P.2d 847. In order to determine that a statement was involuntary, we must also conclude that the statement was the result of police misconduct. *Id.* ¶ 21. "[I]ntimidation, coercion, deception, assurances, or other police misconduct . . . constitutes overreaching . . . [and] requires that the [statements] be excluded." *Id.* ¶ 23. Here, Detective Moore asked Defendant during the February 17 interview to come to the police station the next day. He stated, "I would like for you to come to the [p]olice [d]epartment. Not . . . it don't [sic] have to be right now but tomorrow would be good." Defendant responded, "Tomorrow, what time?" When Defendant stated that he didn't have a way to get to the police station, Detective Moore offered to pick Defendant up or have someone else pick him up. Defendant responded, "That will be fine." This conversation occurred while Defendant, Detective Moore, and Investigator Pacheco were standing in front of Defendant's home.

Defendant was transported to the police station by another detective. He testified that the detective placed his duty weapon on his lap during the ride. The detective testified in contrast that he did not remember where exactly his weapon was during the ride, but that "it would not have

been in plain sight." At the police station, Detective Moore interviewed Defendant while Investigator Pacheco observed. Detective Moore began by telling Defendant "You have not been charged with anything. You are not under arrest, in fact, . . . basically you are free to go anytime that you want. . . . [Y]our rights do apply, even though you are not in custody or anything, you still have the right to remain silent." He then told Defendant he would "read . . . the rights that you hear on [TV]" and recited the *Miranda* warnings. Defendant indicated that he understood. Detective Moore presented Defendant with the waiver form, reviewed it orally, and stated, "Again, if you don't want to talk to me that is fine, that's[,] you know, well within your rights, and you are free to go at any time." Defendant responded, "[O]K," and signed the waiver form. The interview lasted approximately one hour. During the interview, Detective Moore told Defendant that Victim was not lying and implied that Defendant was not being truthful. Nonetheless, nothing in the way the interview was conducted amounts to "intimidation, coercion, deception, assurances" or overreaching such that Defendant's due process rights were violated.

We turn next to whether Defendant's Fifth Amendment rights were violated. "[W]e review the [district] court's findings of fact for substantial evidence and review de novo the ultimate determination of whether a defendant validly waived his or her *Miranda* rights prior to police questioning." *State v. Barrera*, 2001-NMSC-014, ¶ 23, 130 N.M. 227, 22 P.3d 1177.

As a preliminary matter, we note that *Miranda* warnings are required only when a suspect is in custody and under interrogation. *Smile*, 2009-NMCA-064, ¶ 24. The State argues that these conditions were not present. We do not address this issue because even if we assume without deciding that Defendant was interrogated while in custody, we conclude that Defendant's Fifth Amendment rights were not violated. Defendant received *Miranda* warnings from Detective Moore orally and in writing. Our inquiry, therefore, is whether he "knowingly, intelligently, and voluntarily waived his . . . constitutional rights under *Miranda*." *Barrera*, 2001-NMSC-014, ¶ 22. This inquiry involves two components. *Fekete*, 120 N.M. at 301, 901 P.2d at 719.

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Id. (internal quotation marks and citation omitted). We have already addressed the first component. "'[V]oluntariness' in the context of a *Miranda* waiver means the same thing as 'voluntariness' in the due process context, i.e., freedom from official coercion." *Miller*, 838 F.2d at 1538. Having determined that there was no official coercion in the arrangements for or conduct of the interview, we conclude that Defendant's waiver of his rights under *Miranda* was voluntary. *See Fekete*, 120 N.M. at 301, 901 P.2d at 719 (stating that since the due process analysis revealed that there was no evidence of intimidation or coercion, the "inquiry focuses on the second element of the waiver").

The remaining question is "whether [Defendant] was fully aware both of the nature

of the rights he waived and the consequences of the waiver." *Id.* Defendant had several opportunities to indicate that he did not understand the nature and consequences of the waiver. After Detective Moore read the rights to Defendant, he asked, "Do you understand all that?" Defendant responded, "Yep." Detective Moore then reviewed the waiver form, on which were printed the *Miranda* rights. He explained, "[T]his is a wa[iv]er just saying that you read the statement about my rights and I understand what my rights are" and "by signing this, this is just signing a wa[iv]er saying that you understand your rights and you are willing to talk. Okay?" Defendant responded, "[O]K." On appeal, Defendant does not direct us to specific evidence that his waiver was not knowing and intelligent. Thus, we conclude that the district court did not err in denying Defendant's motion to suppress. *See In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 15, 121 N.M. 562, 915 P.2d 318 ("The question is whether the [district] court's decision is supported by substantial evidence, not whether the court could have reached a different conclusion.").

F. Cumulative Error

"Under the doctrine of cumulative error, this Court must reverse a conviction when the cumulative impact of the errors [that] occurred at trial was so prejudicial that the defendant was deprived of a fair trial." *Baca*, 120 N.M. at 392, 902 P.2d at 74 (alteration in original) (internal quotation marks and citation omitted). "Several errors that would in themselves be harmless may together create reversible error if they deprived the defendant of a fair trial." *State v. La Madrid*, 1997-NMCA-057, ¶ 24, 123 N.M. 463, 943 P.2d 110. "This doctrine is to be strictly applied, and [Defendant] cannot invoke it if the record as a whole demonstrates that he received a fair trial." *State v. Woodward*, 121 N.M. 1, 12, 908 P.2d 231, 242 (1995), *abrogated on other grounds as recognized in State v. Granillo-Macias*, 2008-NMCA-021, 143 N.M. 455, 176 P.3d 1187.

Defendant argues that "the cumulative net effect of these errors was a denial of a defense." The district court's failure to review CYFD's materials in camera was error, but that error is reversible only if it was prejudicial. If so, Defendant will receive a new trial. In addition, any error in failing to admit the transcript of the police interview was harmless. Defendant's other assertions of error are not only not reversible, but are unfounded. Even in the aggregate, they did not deprive Defendant of a fair trial.

CONCLUSION

We remand for an in camera review of the CYFD records Defendant sought through discovery consistent with this opinion.

IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

MICHAEL E. VIGIL, Judge

Certiorari Denied, April 24, 2013, No. 34,082

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-065

Filing Date: February 18, 2013

Docket No. 30,806

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

KRYSTAL NIETO,

Defendant-Appellant.

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OPINION

HANISEE, Judge.

Defendant appeals the district court's judgment and probated sentence, which orders that Defendant's 103-day-period of pre-sentence confinement be credited only to a future sentence of incarceration arising from a violation of the terms and conditions of her probation. Defendant contends that the district court misconstrued NMSA 1978, Section 31-20-12 (1977) when it did not deduct pre-sentence confinement credit from the length of probation imposed in lieu of an incarcerative sentence it determined to be conditionally unwarranted. We hold that, under NMSA 1978, Section 31-20-5 (2003), the district court's sentencing discretion included the prerogative of imposing any duration of probation, up to five years, not subject to mandatory diminution ascribed by the number of days Defendant was imprisoned immediately following the commission of the offense for which she ultimately accepted responsibility.

I. BACKGROUND

After hitting a victim with her car, Defendant spent 103 days in custody while her case was pending. Subsequently, Defendant entered into a plea agreement with the State, pursuant to which she pled guilty to aggravated battery with a deadly weapon. *See* NMSA 1978, § 30-3-5 (1969) (defining

aggravated battery). Her ensuing sentence of three years' imprisonment was discretionarily suspended by the district court, and Defendant was ordered to successfully complete a three-year period of supervised probation. Accordingly, she is subject to incarceration and any factually applicable sentencing enhancements only in the event her probation is revoked. In its judgment and sentence, the district court additionally ordered that "Defendant, *if imprisoned* at any time pursuant to the . . . conviction, shall be given credit for pre-sentence confinement of 103 days." (Emphasis added.)

Defendant objected to this language, arguing that it conflicted with Section 31-20-12, which states that "[a] person held in official confinement on suspicion or charges of the commission of a felony shall, upon conviction of that or a lesser included offense, be given credit for the period spent in pre[-]sentence confinement against any sentence finally imposed for that offense." Defendant contended that in the event she is never incarcerated for violating her probation, she will never receive the pre-sentence confinement credit to which she asserts she is statutorily entitled. Defendant argued that her term of probation constitutes the sentence imposed as a result of her conviction, and thus is a "sentence finally imposed" to which her credit must be applied. *See id.* The State countered that the time-served credit to be deducted from a "sentence finally imposed" applies only to a sentence of incarceration. The State added that when an incarcerative sentence is suspended or deferred, like Defendant's, it is not yet "a sentence finally imposed" for purposes of the statutorily commanded time-served credit. Following argument, the district court declined to apply pre-sentence confinement credit to the probated sentence it imposed, reasoning that it was within its discretion to determine the duration of probation within the statutorily allowable range. Defendant now appeals this ruling, challenging the length of her probation.

II. DISCUSSION

At issue is whether, under the statutory framework that governs criminal sentences in New Mexico, Defendant is entitled to reduce the length of her probation by the sum of her pre-sentence confinement. Interpretation of a statute is a question of law that we review de novo. *State v. Rowell*, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995). "Our primary goal in interpreting a statute is to give effect to the Legislature's intent. We look first to the words chosen by the Legislature and the plain meaning of the Legislature's language." *State v. Martinez*, 1998-NMSC-023, ¶ 8, 126 N.M. 39, 966 P.2d 747. "There are two sources of interpretative aid upon which we can draw other than the language of the statute itself: (1) other statutes containing similar language, and (2) case law applying the statute." *State v. Fellhauer*, 1997-NMCA-064, ¶ 5, 123 N.M. 476, 943 P.2d 123. "Statutes concerning the same subject matter must be read in connection with each other." *State v. Marquez*, 2008-NMSC-055, ¶ 7, 145 N.M. 1, 193 P.3d 548.

In addressing this issue, we note that Section 31-20-12 and case law discussing it shed minimal light on the issue of whether confinement credit is limited in application to a sentence of confinement, or whether it must likewise be applied to a probated sentence. Rather, we are aided by our examination of statutes that govern the district court's overall authority to suspend a sentence and instead order a period of probation. Specifically, Section 31-20-5 affords the district court authority to order probation upon deferral or

suspension of the defendant's sentence of imprisonment. Section 31-20-5(A) expressly states that "the total period of probation for [the] district court shall not exceed five years." In contrast, that same statute states that "the total period of probation for the magistrate or metropolitan courts shall be no longer than the maximum allowable incarceration time for the offense or as otherwise provided by law." *Id.* Initially, it is noteworthy that both statutes make clear the Legislature's distinction between sentences of incarceration and of probation by the separation of both punishments within the statutory language. We further reason that if the Legislature intended for a district court defendant's probation time to be reduced by pre-sentence confinement credit, it would have likewise drafted the applicable statute to limit probation periods for district courts to the maximum allowable incarceration time, as it did for magistrate and metropolitan courts. Notably, the Legislature expressly limited the district court to a total of five probation years, without reference to maximum incarceration periods.

In *State v. Encinias*, 104 N.M. 740, 726 P.2d 1174 (Ct. App. 1986), we analyzed a similar issue, where a defendant's sentence of probation exceeded the potential length of imprisonment. There, the defendant argued that the district court erred when it placed him on five years of supervised probation following his conviction of a fourth degree felony, which carried only a basic sentence of eighteen months' imprisonment. *Id.* at 742, 726 P.2d at 1176. We first noted that previously repealed legislation "expressly provided that supervised probation [ordered by the district court] could not exceed the maximum term of incarceration for the offense committed." *Id.* We highlighted the fact that the amended version of NMSA 1978, Section 31-20-6 (1987, as amended through 2007)[1] "expressly provides for a term of supervised probation for a period of up to five years." *Encinias*, 104 N.M. at 742, 726 P.2d at 1176. We concluded that since the latest expression of legislative intent gave the district court discretion to award up to five years of probation, we could not limit the probation period to the potential term of incarceration. *Id.* "[S]imply because a court may lose the authority to incarcerate a probationer upon the expiration of the underlying term of the suspended sentence, does not render amended Section 31-20-6[(C)] meaningless." *Encinias,* 104 N.M. at 742, 726 P.2d at 1176 (citation omitted). Because one of the purposes of probation is to aid in rehabilitation of the convicted felon, "a defendant may benefit from complying with a supervised term of probation even where the underlying term of incarceration has expired." *Id.*; *see State v. Donaldson*, 100 N.M. 111, 119, 666 P.2d 1258, 1266 (Ct. App. 1983) ("The broad general purposes of probation are education and rehabilitation[.]"). We also explained that "a defendant may benefit by complying with the terms of probation for the entire probationary period by demonstrating to the sentencing court that he is a good candidate for a second term of probation should he subsequently be convicted of a criminal offense." *Encinias*, 104 N.M. at 742, 726 P.2d at 1176.

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[1]We note that this Court analyzed Section 31-20-6 rather than Section 31-20-5 in *Encinias*. The difference is of no consequence to our analysis. Section 31-20-6 expressly provides that courts can "place[a defendant] on probation under the supervision, guidance[,] or direction of the adult probation and parole division for a term *not to exceed five years*[.]" (Emphasis added.) The statute merely does not distinguish between district courts and other courts within the state. Thus, it can be assumed that the five-year limit on probation time is applicable to all courts in New Mexico.

We underscore that "[t]he suspension . . . of a sentence is not a matter of right but is an act of clemency within the [district] court's discretion." *State v. Follis*, 81 N.M. 690, 692, 472 P.2d 655, 657 (Ct. App. 1970). Under Section 31-20-6, the district court clearly has the discretion to order up to five years of probation, regardless of whether the potential period of incarceration is less than the probation term. Because we read Sections 31-20-6 and 31-20-12 in harmony, we cannot construe Section 31-20-12 to mean that pre-sentence confinement credit must reduce sentences of probation, as proposed by Defendant. *See State v. Lucero*, 2007-NMSC-041, ¶ 8, 142 N.M. 102, 163 P.3d 489 ("We must read statutes harmoniously instead of as contradicting one another when possible."). Such a construction ultimately seeks to limit the probation time ordered by the district court to the period of potential incarceration, which was clearly not the intention of the Legislature. As we explained in *Encinias*, probation serves a rehabilitative purpose that can be achieved even after the district court loses its authority to incarcerate a defendant for a probation violation. Such periods of probation are fundamentally distinct from sentences of imprisonment.

Therefore, we conclude that it was within the discretion of the district court to choose to suspend Defendant's sentence and to decide the parameters of probation most suitable (within the five-year limit). The pre-sentence confinement credit need not be credited against the probation time ordered by the district court.

III. CONCLUSION

For the reasons stated above, we affirm the district court.

IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

CYNTHIA A. FRY, Judge

Certiorari Denied, April 24, 2013, No. 34,081

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-066

Filing Date: March 6, 2013

Docket No. 31,701

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ALEXIS PARRISH,

Defendant-Appellant.

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OPINION

ZAMORA, Judge.

Defendant Alexis Parrish appeals his conviction for failure to register as a sex offender in violation of NMSA 1978, Section 29-11A-4 (2005). The sole issue on appeal is whether the New Mexico Sex Offender Registration and Notification Act (SORNA), NMSA 1978, §§ 29-11A-1 to -10 (1995, as amended through 2007), requires a registered sex offender to renew his registration upon his release from custody of the corrections department on unrelated charges if he returns to his previously registered residence. We hold that the plain meaning of Section 29-11A-4(B) required Defendant to "register with the county sheriff no later than ten days after being released from the custody of the corrections department[.]" Accordingly, we affirm Defendant's conviction for failure to register as a sex offender.

BACKGROUND

The relevant facts are undisputed. Defendant is a convicted sex offender and was properly registered in San Juan County on February 17, 2011. Subsequently, Defendant was incarcerated in the Department of Corrections Central New Mexico Correctional Facility (CNMCF), in Valencia County, on another matter. On August 2, 2011, one day before his release from CNMCF, Defendant received a copy of the New Mexico Corrections Department Notice to Register form, which stated:

> Pursuant to [Section] 29-11A-4, a convicted sex offender is required to register with the Sheriff's Office in the County where he/she will reside. Registration must take place no later than ten (10) days after being released from the custody of the Corrections Department[] or registration must take place no later than ten (10) days after being placed on probation or parole. Registration requirements are summarized more specifically below.
>
> **Willful or knowing failure to comply or willfully or knowingly providing false information is a <u>Fourth Degree Felony Offense</u>.**

Defendant initialed each of the requirements set forth in the notice and signed the last page acknowledging that a corrections department official or employee had explained the notice to him, he had read the notice, and he was

given a copy of the notice. A copy of the signed notice was also sent to the San Juan County Sheriff's Office.

Defendant was released from CNMCF on August 3, 2011, and he returned to his registered address in San Juan County. However, he did not renew his registration with the county sheriff within ten days of his release. On August 30, 2011, a deputy from the San Juan County Sheriff's Office called the telephone number that was previously provided by Defendant. A female answered and advised that she did not know Defendant and that the telephone number was for another residence.

Defendant was charged with failure to register as a sex offender, contrary to Section 29-11A-4. Defense counsel filed a motion to dismiss the charge and argued that Defendant was not required to register upon release from the corrections department because he had registered prior to being incarcerated on the new offense, which was not a sex offense, and he returned to his properly registered residence upon release. The State filed a response and argued that Defendant was required to renew his registration, pursuant to the mandate of Section 29-11A-4(B), because Defendant was a sex offender, a resident of New Mexico, and was released from the custody of the corrections department. During the hearing on Defendant's motion to dismiss, the district court asked the parties if Defendant had to register when he was incarcerated at CNMCF. The prosecutor informed the district court that the corrections department registered Defendant while he was an inmate at CNMCF. The district court found that Defendant was living in San Juan County, changed his residence to Valencia County, and then changed his residence again when he returned to San Juan County. Therefore, the district court denied Defendant's motion to dismiss and concluded that Defendant was required to register upon his release from CNMCF.

Defendant entered into a conditional plea agreement, wherein he pled guilty to "[f]ailure to comply with requirements of SORNA § 29-11A-4." Defendant "reserve[d] the right to appeal on the issue of whether SORNA requires a registered sex offender to register upon a subsequent release from incarceration, when the offender's registration is otherwise current."

DISCUSSION

We must determine whether SORNA requires a registered sex offender to register upon release from custody when he returns to a properly registered residence. "Statutory interpretation is an issue of law, which we review de novo." *State v. Duhon*, 2005-NMCA-120, ¶ 10, 138 N.M. 466, 122 P.3d 50. Our primary goal when interpreting a statute is to give effect to the Legislature's intent, which is determined by looking at the plain language used in the statute, as well as the purpose of the underlying statute. *State v. Johnson*, 2001-NMSC-001, ¶ 6, 130 N.M. 6, 15 P.3d 1233; *State v. Torres*, 2006-NMCA-106, ¶ 8, 140 N.M. 230, 141 P.3d 1284. "When the words used are plain and unambiguous, we give a statute its literal reading, unless that reading would lead to an injustice, absurdity, or contradiction." *Id.*

I. SORNA

The Legislature found that "sex offenders pose a significant risk of recidivism[,]" and "the efforts of law enforcement agencies to protect their communities from sex offenders are impaired

by the lack of information available concerning convicted sex offenders who live within the agencies' jurisdictions." Section 29-11A-2(A). The explicit purpose of SORNA "is to assist law enforcement agencies' efforts to protect their communities" by requiring sex offenders who reside, work, or attend school in New Mexico, to register with the county sheriff. Section 29-11A-2(B)(1)-(2); *see also State v. Hall*, 2013-NMSC-001, ¶¶ 10-17, 294 P.3d 1235 (discussing the purpose and history of SORNA); *State v. Druktenis*, 2004-NMCA-032, ¶¶ 17-24, 135 N.M. 223, 86 P.3d 1050 (same). "The [L]egislature enacted SORNA to protect communities through the registration of and dissemination of information about sex offenders." *State v. Williams*, 2006-NMCA-092, ¶ 6, 140 N.M. 194, 141 P.3d 538. The legislative history and intent of SORNA suggests a broad application. *Hall*, 2013-NMSC-001, ¶16 ("In the seventeen-year history of SORNA, the Legislature has continually amended the law to make it more expansive—that is, to register more people for more offenses, to make information more accessible to the public, and to increase penalties for failing to comply. In this way, the Legislature has demonstrated its preference for a broad registry law that provides more, rather than less, protection for the community.").

Section 29-11A-4 sets forth SORNA's registration requirements. *See generally* § 29-11A-4; *see also* § 29-11A-3(C) (defining "registration requirement" as "any requirement set forth in Section 29-11A-4"). The State argues that the plain and unambiguous language of Section 29-11A-4(B) required Defendant to register as a sex offender with the county sheriff no later then ten days after he was released from CNMCF. Section 29-11A-4(B) provides in pertinent part:

> A sex offender who is a resident of New Mexico shall register with the county sheriff no later than ten days after being released from the custody of the corrections department, a municipal or county jail[,] or a federal, military[,] or tribal correctional facility or detention center or being placed on probation or parole.

Defendant, on the other hand, focuses his argument on Section 29-11A-4(G), which states:

> When a sex offender who is registered changes his residence to a new county in New Mexico, the sex offender shall register with the county sheriff of the new county no later than ten days after establishing his new residence. The sex offender shall also send written notice of the change in residence to the county sheriff with whom he last registered no later than ten days after establishing his new residence.

Defendant argues that he did not change his residence when he was incarcerated at CNMCF; therefore, he was only required to renew his registration annually pursuant to Section 29-11A-4(L)(2).

Even though the district court found that Defendant changed his residence from San Juan County, to Valencia County, and then back to San Juan County, Section 29-11A-4(G) is not the subsection of SORNA that the State accused Defendant of violating. On appeal, we may affirm the district court's ruling if it was right for any reason. *State v. Boyett*, 2008-NMSC-030, ¶25, 144 N.M. 184, 185 P.3d 355. Defendant's written motion to

dismiss clearly stated that the State accused Defendant of violating Section 29-11A-4(B). Likewise, the State's written response, as well as the parties' oral arguments before the district court, centered around the application of Section 29-11A-4(B).

Indeed, Defendant argued before the district court and now on appeal, that Subsection (B) of Section 29-11A-4 only applies to the "initial registration." Defendant relies on Section 29-11A-4(L) to support this assertion. However, Section 29-11A-4(L) simply states how often a sex offender is required to renew his registration after his "initial registration." Neither Subsection (B) nor (L) of Section 29-11A-4 indicates that the Legislature intended to limit the reporting requirement set forth in Section 29-11A-4(B) to a sex offender's "initial registration." *See Torres*, 2006-NMCA-106, ¶ 8 ("When a statute makes sense as written, we will not read in language that is not there.").

On appeal, Defendant claims that a literal interpretation of Section 29-11A-4(B) will lead to an absurd and unreasonable result because it would require a sex offender incarcerated for any period of time to renew his registration upon release from custody, even if the sex offender returns to his properly registered address. Defendant further argues that the purpose of SORNA was fulfilled because the State knew that Defendant was in custody or at the registered address. Defendant's argument is erroneous because it makes several baseless assumptions. First, it would mean that the State, Valencia County, and San Juan County should assume that Defendant would automatically return to San Juan County upon his release from the corrections department. Second, San Juan County would be expected to assume that Defendant would not only return to San Juan County but also that he would return to his previously registered address with all of his contact information being the same and current. Defendant's argument places the burden on everyone else but him.

SORNA is clear that the burden is on Defendant to let the local law enforcement agency know that he will be living within the agency's jurisdiction. *See* §§ 29-11A-2(B)(1) and -7(A)(2). Asking the State to assume that all previously registered sex offenders released from the custody of the corrections department will automatically return to their previously registered addresses is unreasonable. It was not the San Juan County Sheriff's duty to confirm where Defendant will be living upon his release from CNMCF. SORNA requires the county sheriff to maintain a local registry of sex offenders and to forward the registration information "obtained from sex offenders" to the New Mexico Department of Public Safety (DPS). Section 29-11A-5(A)-(B); *see Druktenis*, 2004-NMCA-032, ¶ 21. DPS is required to maintain a central registry of sex offenders and to participate in the national sex offender registry administered by the United States Department of Justice. Section 29-11A-5(C); *see Druktenis*, 2004-NMCA-032, ¶ 21. DPS has created and maintains a website that provides information to the public regarding the location of sex offenders residing in New Mexico. The website allows the public to search for sex offenders by name, ZIP code, city, county, or street. The website also provides information for sex offenders who are incarcerated or who have absconded.

In this case, the prosecutor informed the district court that the corrections department registered Defendant while he was incarcerated at CNMCF. The Valencia County Sheriff's office had notice that

Defendant was living within its jurisdiction. Upon his release, Defendant returned to San Juan County. It was Defendant's duty to update his registration information within ten days of his release from custody of the corrections department and inform the San Juan County Sheriff that he was moving from Valencia County back to San Juan County. *See* § 29-11A-7(B) ("The corrections department, a municipal or county jail[,] or a detention center at the time of release of a sex offender in its custody, shall provide a written notice to the sex offender of his duty to register, pursuant to the provisions of the [SORNA].").

It is critical for law enforcement agencies to have current information about sex offenders in order to protect their communities. The inability of the San Juan County Sheriff's office to contact Defendant because of the outdated telephone number provided by Defendant is a perfect example of the reason behind the legislative intent and purpose of maintaining current information on a sex offender. A literal reading of Section 29-11A-4(B) is consistent with the Legislature's demonstrated "preference for a broad registry law that provides more, rather than less, protection for the community." *Hall*, 2013-NMSC-001, ¶ 16. We conclude that Defendant was required to register upon his release from CNMCF, pursuant to the clear and unambiguous language of Section 29-11A-4(B). It is not absurd or unreasonable to require sex offenders to register with the county sheriff within ten days of their release from custody, regardless of whether they had registered before their incarceration. In light of this conclusion, we do not need to determine whether Defendant had to register pursuant to Section 29-11A-4(G).

II. Rule of Lenity

Defendant asks this Court to apply the rule of lenity if we determine Section 29-11A-4 to be ambiguous. The rule of lenity is not applicable, because Section 29-11A-4 is not ambiguous. *Cf. State v. Davis*, 2003-NMSC-022, ¶ 14, 134 N.M. 172, 74 P.3d 1064 ("The rule of lenity counsels that criminal statutes should be interpreted in a defendant's favor when insurmountable ambiguity persists regarding the intended scope of a criminal statute.").

CONCLUSION

For the foregoing reasons, we affirm.

IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

JONATHAN B. SUTIN, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-067

Filing Date: April 24, 2013

Docket No. 31,041

NEW MEXICO BOARD OF LICENSURE FOR PROFESSIONAL ENGINEERS AND

PROFESSIONAL SURVEYORS,

Petitioner-Appellant,

v.

WILLIAM M. TURNER,

Respondent-Appellee.

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OPINION

HANISEE, Judge.

The New Mexico Board of Licensure for Professional Engineers and Professional Surveyors (the Board) appeals the district court's reversal of the Board's decision finding that William Turner practiced engineering without a license in violation of the Engineering and Surveying Practice Act (ESPA). The Board argues that the district court erred by (1) determining that the Board's interpretation of the ESPA improperly infringed on Turner's free speech rights; (2) reweighing the evidence in the administrative record and substituting its judgment for that of the Board; and (3) making its own findings of fact. For reasons explained below, we affirm the district court.

I. BACKGROUND

Turner is a hydrologist, with a Ph.D in geology-hydrology, and was an elected member of the Middle Rio Grande Conservancy District (MRGCD) Board of Directors in 2007. Although Turner has taken civil engineering courses relating to open channel flow, he is not a licensed engineer. In 2007, at the request of one of his constituents, Turner conducted an inspection of MRGCD irrigation ditches to substantiate the damage caused by the placement of demolition and construction waste, which Turner referred to as "un-engineered rip-rap," into the ditches. For ease of reference, we hereafter refer to the demolition and construction waste as un-

engineered rip-rap[1] throughout this Opinion.

Upon completion of his investigation, which focused mainly on the Pajarito Ditch in Bernalillo County, Turner prepared and presented a report at the February 27, 2007 MRGCD Board of Directors meeting which expressed his concerns regarding the condition of MRGCD ditches. The report was titled "The Consequences of Using Un-Engineered Rip-Rap in MRGCD Ditches and Recommendations." The report criticized MRGCD's method of using un-engineered rip-rap in ditches to prevent erosion because "while it may be cheap, [its use] leads to some extremely dire consequences that affect public safety and the general welfare." Turner applied the Manning Equation, a civil engineering mathematical formula, to compare the conveyance capacity of ditches containing un-engineered rip-rap to that of ditches with fine sand bottoms. In concluding that water flow is more impeded in rough than in smooth channels, he asserted that MRGCD's use of un-engineered rip-rap in ditches resulted in the "significant reduction in ditch conveyance capacity[which] means that farmers are unable to obtain adequate water supplies." Turner also cautioned that the reduction of conveyance capacity could also lead to dangerous flooding in ditch levees and subsequent bank erosion that could lead to failure. The report particularly criticized MRGCD's Chief Engineer Subhas Shah, who, according to Turner, directed the un-engineered rip-rap to be deposited in the ditches.

Turner reiterated that he was not an engineer multiple times during the MRGCD Board of Directors meeting, when giving and in response to comments about his presentation. In addition, Turner insisted that MRGCD should hire a registered engineer to deal with the issues highlighted in his report. At the end of Turner's report, he stated that he "is not a registered professional engineer [and that t]his report should be reviewed by a [r]egistered [p]rofessional [e]ngineer."

Dennis Domrzalski, a contract employee of MRGCD, thereafter filed a complaint against Turner with the Board, alleging that Turner engaged in the forbidden practice of engineering without a license when he wrote and presented his report at the MRGCD Board of Directors meeting. In a letter responding to the complaint, Turner asserted that he "was never paid for the services, nor were the services ever considered anything more than [an] opinion by a board member for a reason to obtain a[] licensed [p]rofessional [e]ngineer's services."

Nonetheless, the Board's professional engineering committee conducted an administrative hearing[2] on December 16, 2009, nearly three years after Turner's February 2007 presentation to the MRGCD Board of Directors. At the proceeding, the Board was presented with testimony and documentary evidence from the Board's prosecutor and Turner. On February 26, 2010, the Board issued its Decision and Order containing its findings of fact and conclusions

[1]The term "rip[-]rap" is defined as "a foundation or sustaining wall of stones or chunks of concrete thrown together without order . . . [or] a layer of this or similar material on an embankment slope to prevent erosion." Merriam-Webster's Collegiate Dictionary 1011 (10th ed. 2010).

[2]*See* NMSA 1978, § 61-23-23.1(A) (2003) (amended 2012) ("The [B]oard may investigate and initiate a hearing on a complaint against a person who does not have a license, who is not exempt from the [ESPA] and who acts in the capacity of a professional engineer within the meaning of the [ESPA].").

of law. The Board concluded that Turner had in fact practiced engineering without a license, in violation of the ESPA, NMSA 1978, Sections 61-23-2 (2003) and -3 (2005), "by his investigation and evaluation of the planning and design of 'engineering works and systems'—MRGCD ditches—described in his . . . [r]eport . . . and his presentation of that [r]eport to the MRGCD Board of Directors."

The Board's decision explained that Turner's "repeated use of the terms 'engineered' and 'engineering' in his [r]eport, as used in the context of his investigation and evaluation of the 'un-engineered rip-rap'. . ., indicates that [Turner] engag[ed] in the 'practice of engineering' as defined by Section 61-23-3(E)." The Board stated that Turner's report "constitutes 'engineering' insofar as it applied the Manning Equation in his investigation and evaluation of the Pajarito Ditch to conclude that there are consequences of using 'un-engineered' rip-rap in MRGCD ditches." The Board's decision went on to state that Turner engaged in the practice of engineering "when he applied engineering principles, equations and concepts to investigate and evaluate the flow of water in MRGCD ditches, and when he compared 'A Smooth Well-Engineered Ditch' with 'A Badly or Completely Non-Engineered Rip-Rapped Ditch.' " Pursuant to NMSA 1978, Section 61-23-10(E) (2005) (stating that the board has exclusive authority over practice disputes), the Board ordered Turner to cease and desist from any further unlicensed practice of engineering, pay a $2,500 civil penalty, and pay an additional administrative hearing cost in the amount of $2,670.93.

Turner timely appealed the Board's decision to the district court. In its appellate capacity, the district court determined that the Board's decision was not supported by substantial evidence. The district court concluded that "Turner's conduct in evaluating an engineering issue, performing engineering calculations, writing his conclusions, and presenting them publicly, cannot constitute the practice of engineering without a license." The district court explained that the Board's actions violated Turner's First Amendment right to freedom of speech, adding that "[i]f Section 61-23-10(E) authorizes the [] Board to order Turner to cease and desist from observing an engineering system, considering possible problems through calculations and analysis, writing his observations and conclusions, and speaking public[ly] on these issues, then Section 61-23-10(E) would be unconstitutional." The Board now petitions for review of the district court's reversal. We granted the Board's petition for certiorari under Rule 12-505(D)(2)(d)(iii)-(iv) NMRA (stating that we may grant such a writ when a case presents significant questions of constitutional law or issues of substantial public interest).

II. DISCUSSION

The Board asserts that the district court erred by determining that the Board's application of Sections 61-23-2, -3, and -10(E) to these facts violated the First Amendment by reweighing the evidence in the administrative record and substituting its judgment for that of the Board, and by making its own findings of fact. We apply the same statutorily mandated standard of review as the district court in reviewing administrative decisions. *Miller v. Bd. of Cnty. Comm'rs of Santa Fe Cnty.*, 2008-NMCA-124, ¶ 16, 144 N.M. 841, 192 P.3d 1218. "The district court may reverse an administrative decision only if it determines that the administrative entity acted fraudulently, arbitrarily, or capriciously;

if the decision was not supported by substantial evidence in the whole record; or if the entity did not act in accordance with the law." *Id.* (alterations, internal quotation marks, and citation omitted). This Court "will 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 Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 16, 133 N.M. 97, 61 P.3d 806. "Although a court will generally defer to an agency's interpretation of an ambiguous statute or regulation that it is charged with administering, it is the function of courts to interpret the law in a manner consistent with the legislative intent." *Howell v. Marto Elec.*, 2006-NMCA-154, ¶ 16, 140 N.M. 737, 148 P.3d 823.

A. The District Court Did Not Err in Determining that the Board's Decision Violated the First Amendment

The Board construed Turner's report and presentation to be a violation of Section 61-23-2, which states:

> The [L]egislature declares that it is a matter of public safety, interest and concern that the practices of engineering and surveying merit and receive the confidence of the public and that only qualified persons be permitted to engage in the practices of engineering and surveying. In order to safeguard life, health and property and to promote the public welfare, any person in either public or private capacity practicing or offering to practice engineering or surveying shall be required to submit evidence that he is qualified to so practice and shall be licensed as provided in the [ESPA]. It is unlawful for any person to practice, offer to practice, engage in the business, act in the capacity of, advertise or use in connection with his name or otherwise assume, use or advertise any title or description tending to convey the impression that he is a professional, licensed engineer or surveyor unless that person is licensed or exempt under the provisions of the [ESPA.]

In reversing the Board's decision, the district court noted the breadth of the ESPA's definition of the "practice of engineering":

> "[E]ngineering", "practice of engineering" or "engineering practice" means any creative or engineering work that requires engineering education, training and experience in the application of special knowledge of the mathematical, physical and engineering sciences to such creative work as consultation, investigation, forensic investigation, evaluation, planning and design of engineering works and systems, expert technical testimony, engineering studies and the review of construction for the purpose of assuring substantial compliance with drawings and specifications; any of which embrace such creative work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects and industrial or consumer products or equipment of a mechanical, electrical, hydraulic, chemical, pneumatic, environmental

> or thermal nature, insofar as they involve safeguarding life, health or property, and including such other professional services as may be necessary to the planning, progress and completion of any engineering work. The "practice of engineering" may include the use of photogrammetric methods to derive topographical and other data. The "practice of engineering" does not include responsibility for the supervision of construction, site conditions, operations, equipment, personnel or the maintenance of safety in the work place[.]

Section 61-23-3(E). With this broad definition in mind, the district court found that the Board's interpretation and enforcement of Section 61-23-2 were unconstitutional.

After reviewing the record, we agree that the Board's interpretation and application of the statute were unconstitutional. Despite the definitionally expansive reach of "practice of engineering," the Board had the obligation to apply Section 61-23-2 in a constitutional manner. *See State v. Wade*, 100 N.M. 152, 154, 667 P.2d 459, 461 (Ct. App. 1983) (stating that courts always strive to construe a statute, "if possible, so that it will be constitutional"); *see also State v. Morley*, 63 N.M. 267, 271, 317 P.2d 317, 319 (1957) ("Where two constructions may be reasonably adopted, one of which will render an act wholly nugatory, and the other will make it effectual, the latter should be adopted." (internal quotation marks and citation omitted)).

In evaluating the constitutionality of the Board's application of this professional regulation, we apply the four-part *O'Brien* test. *State v. Ongley*, 118 N.M. 431, 433, 882 P.2d 22, 24 (Ct. App. 1994). Under the *O'Brien* test, the law will be upheld as constitutional if it satisfies each of the following elements:

> [1] if it is within the constitutional power[s] of the [g]overnment; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Ongley, 118 N.M. at 433, 882 P.2d at 24 (alterations in original) (internal quotation marks and citation omitted) (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

Consistent with the district court's ultimate determination, the fourth prong of the *O'Brien* test is decisive in this case. According to Section 61-23-2, the government's stated interest in implementing this statute is to regulate the practice of engineering in order to "safeguard life, health and property and to promote the public welfare." Section 61-23-3 was effectuated to govern the activities of persons who engage in work and provide professional services in the field of engineering. With this in mind, "the true test [to satisfy the fourth prong is] whether the restrictions imposed on free expression by the [ESPA] are greater than necessary to further the State's interest in ensuring that only qualified persons practice [engineering] within its borders." *Ongley*, 118 N.M. at 434, 882 P.2d at 25.

We first emphasize that the Board's enforcement of this statute against Turner for

his actions in investigating, writing, and presenting a report on the un-engineered rip-rap fails to, in any meaningful way, further the objective of the ESPA. We underscore that Turner investigated and reported on the rip-rap issue at a public meeting of the MRGCD Board of Directors (on which Turner had been elected to sit), at the behest of a constituent, and that during the meeting, he repeatedly disclaimed any status as an engineer and instead asked for the Board of Directors to seek evaluation by a licensed engineer. By restricting speech by any person—including an elected official of a board concerned with the very subject of engineering[3]—under circumstances where the speaker expressly refuses to offer the services of an engineer, does not represent himself to be an engineer, and does not speak in a way that would cause the public to rely on him as an engineer, the Board failed to act in a manner that advances the objective of the statute. Plainly, life, health, property, and the public's welfare were not jeopardized in the least by Turner's discussion of this engineering issue as a concerned MRGCD Board of Directors' member in a public forum.

At its worst, the Board's interpretation of Section 61-23-2 results in a targeted topical elimination of Turner's right to freedom of speech: it punishes Turner for participating in public discourse about technical aspects of engineering matters related to the ongoing management of water in New Mexico. Furthermore, the Board's statutory construction prophylactically eliminates alternative channels of communication for Turner to express such ideas. *See Ongley*, 118 N.M. at 434, 882 P.2d at 25 (holding that a statute prohibiting the practice of medicine without a license did not violate the defendant's right to freedom of speech, where the statute left "open numerous alternative channels of communication for [the d]efendant to express his ideas and opinions concerning effective treatment for various diseases or conditions"). In fact, the Board went so far as to order Turner to globally refrain from further dissemination of his concerns, the results of his investigation, or his paper in any manner or place. Yet the Board has no proprietary interest in the words and concepts of the general field of engineering when professional work is not afoot. Such a broad-brushed interpretation of Section 61-23-2 results in excessively burdensome restrictions on speech that are unnecessary to protect the public from the unlicensed practice of engineering.

We acknowledge that Turner's investigative work and the actual work involved in drafting the report can be viewed differently from the pure speech of his presentation to the MRGCD Board of Directors. His investigation and writing involved to some degree the use of engineering concepts. We conclude nevertheless that this activity is protected by the First Amendment also. The investigation, written report, and presentation to the MRGCD Board of Directors comprise a single piece performed by Turner at the behest of a constituent and in his capacity as an MRGCD board member. Without the ability to use words and ideas that have use in the field of engineering, Turner's investigation and report would have had nothing of substance to present at the MRGCD Board of Directors meeting in regard to his belief that un-engineered rip-rap in the ditches was impeding

[3]NMSA 1978, Section 73-14-46 (1927) expressly permits a conservancy board to make examinations of "stream flow and other scientific and engineering subjects as are necessary and proper for the purpose of the district[,] and they may issue reports thereon."

water flow. It bears repeating that the investigation was conducted and the report was produced for the sole purpose of presentation to the Board for its consideration. Turner had no client, engaged in no business, nor acted in any capacity in which he could reasonably be confused with an engineer. *See* Section 61-23-2.

The genesis and purpose of Turner's actions distinguish them from the acts of the defendant in *Ongley*. In *Ongley*, the defendant was not convicted of violating the Medical Practice Act for delivering a lecture on injection techniques. Rather, his conviction was based on his act of giving injections to patients at the seminar. *Ongley*, 118 N.M. at 432, 882 P.2d at 23. There, this Court concluded that conduct involving actual patients was subject to reasonable regulation because it went to the heart of the state's interest inherent in the regulation of the practice of medicine. *Id.* at 434, 882 P.2d at 25. Here, the investigation and report were equivalent to the preparation necessary for and leading up to the lecture which was recognized as protected conduct in *Ongley*. Moreover, the Board's construction of Section 61-23-2 with regard to the investigatory aspect of Turner's actions results in excessively burdensome restrictions on speech in this context that are unnecessary to protect the public from the unlicensed practice of engineering. Absent any indication that the investigation and report were intended for use in any context other than as support for Turner's presentation to the MRGCD Board, they are protected expressive conduct.

We therefore affirm the district court's reversal because the Board's overtly and unreasonably open-ended interpretation of Section 61-23-2 resulted in constitutionally impermissible restrictions on Turner's speech.

B. The District Court Adhered to the Proper Standard of Review and Did Not Engage in Fact Finding

The Board opines that the district court "elected to disregard the Board's 'fact-finding competence' and instead reevaluated the evidence to support a determination contrary to that made by the Board." The Board contends that the district court failed to describe how "the administrative record as a whole did not support the Board's [d]ecision." The Board asserts that the district court did not view the "evidence in the light most favorable to the Board's [d]ecision, and improperly ignored the Board's expertise in engineering." The Board also argues that the district court made factual findings by concluding that Turner's conduct could not constitute practicing engineering without a license. We disagree.

The district court concluded that the Board's application of Section 61-23-2 to this case was unconstitutional. In its memorandum opinion, the district court noted the facts as they were stated by the Board in its written decision. The district court reversed based upon its legal conclusion that the Board's application of the law to the facts it found was unconstitutional. As such, the district court's decision is best characterized as a conclusion that the Board did not act in accordance with the law. *See Miller*, 2008-NMCA-124, ¶ 16 ("The district court may reverse an administrative decision . . . if it determines that . . . the entity did not act in accordance with the law." (second alteration, internal quotation marks, and citation omitted)). We conclude that the district court's decision was based in law, required no fact finding or reevaluation of evidence, and was not a product of improper review.

Although the Board asserts that *only* the Board can determine whether a person's behavior falls within the statutory definition of "the practice of engineering," this assertion is incorrect. "When an agency addresses a question of law by construing or applying a particular statute, courts will grant some deference to legal determinations that fall within agency expertise." *Chavez v. Mountain States Constructors*, 1996-NMSC-070, ¶ 21, 122 N.M. 579, 929 P.2d 971. But our Supreme Court explicitly cautions that the deference afforded to an administrative body's legal determinations "is not absolute." *Doña Ana Mut. Domestic Water Consumers Ass'n v. N.M. Pub. Regulation Comm'n*, 2006-NMSC-032, ¶ 10, 140 N.M. 6, 139 P.3d 166. Courts "will reject an agency's interpretation even of an ambiguous statute if it appears unreasonable or inconsistent with legislative intent." *Id.* "[I]t is the function of the courts to interpret the law, and courts are in no way bound by the agency's legal interpretation." *Rio Grande Chapter of Sierra Club*, 2003-NMSC-005, ¶ 13 (internal quotation marks and citation omitted). "[A] court may [even] substitute its own interpretation of the applicable law for that of the [administrative body]." *Id.* We too "disagree with [the Board's] characterization of our review function." *Id.* Here, the district court properly exercised its power of judicial review to reverse the Board's decision based on its correct interpretation of Section 61-23-2 and the United States Constitution.

Thus, we conclude that the district court did not engage in fact finding, reevaluating evidence, or improper appellate review. The district court's reversal was based upon the Board's failure to adhere to the constitution in applying Section 61-23-2.

III. CONCLUSION

Based on the foregoing, we conclude the district court did not err. We affirm.

IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

MICHAEL D. BUSTAMANTE, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-020

Filing Date: May 16, 2013

Docket No. 32,279

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

BENJAMIN MONTOYA,

Defendant-Appellant.

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OPINION

DANIELS, Justice.

Criminal prosecutions with multiple charges arising from a common fact situation often create difficult challenges, both in evaluating the offenses separately and in determining whether multiple punishments are permissible or appropriate under statutory and constitutional requirements. Among the issues we consider in this direct appeal are two matters of significant precedential value.

One issue involves the interrelationship between the theoretically separate offenses of causing great bodily harm to a person by shooting at a motor vehicle and the homicide resulting from the penetration of the same bullet into the same person. We hold that current New Mexico jurisprudence precludes cumulative punishment for both crimes, and we therefore overrule *State v. Gonzales*, 113 N.M. 221, 824 P.2d 1023 (1992), and the cases that have followed it, including the divided opinions in *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563, and *State v. Riley*, 2010-NMSC-005, 147 N.M. 557, 226 P.3d 656.

In addition, we hold that in a felony murder prosecution where the evidence will support a conviction for either second-degree murder or voluntary manslaughter, it is fundamental error for the felony murder essential elements jury instruction to omit the defining requirement that the accused did not

act in the heat of passion as a result of the legally adequate provocation that would reduce murder to manslaughter.

I. BACKGROUND

A. Facts

This case, like all too many that come before our courts, erupted from a toxic mixture of testosterone and guns. On the evening of July 15, 2007, Defendant Benjamin Montoya, his girlfriend, his seventeen-year-old brother, and several companions were gathered in the front yard of Defendant's family home. Defendant's parents were inside the house. A group of young men in a Cadillac automobile drove by, honking, yelling "Brewtown" (an Albuquerque gang name), and displaying gang signs. At least some of Defendant's group belonged to a rival gang, the Northside Locos.

A few minutes later, the Cadillac returned and, along with a Ford Expedition and a third car, stopped at a nearby vacant lot. When the occupants continued yelling "Brewtown" and called Defendant's group over, Defendant and his friends started walking toward the vacant lot to confront approximately fifteen people who got out of the three stopped cars. Guns were pulled on both sides, and Defendant's brother was severely wounded by gunshots to his leg and abdomen. One of the Brewtown group also was shot.

Defendant and his friends retreated to his home, dragging Defendant's brother to their driveway. The Brewtown group briefly chased Defendant and his friends before going back to their cars. The three cars initially left the area, but the Expedition turned around and came back toward Defendant's house. The person who had been shooting at Defendant and his friends was in the Expedition. When Defendant's mother saw the Expedition approach and saw gunfire coming out of the car, she yelled, "Here they come and they're still shooting."

Defendant ran into his house and retrieved an AK-47 rifle. While his friends were trying to help his brother in the driveway and stop the bleeding from the gunshot wounds, Defendant ran outside and began shooting at the Expedition. The driver, victim Diego Delgado, was shot seven times and died of multiple gunshot wounds, including one shot to the back of the head.

B. Proceedings

Among the nine felony counts on which Defendant was indicted, including shooting at a motor vehicle resulting in great bodily harm, was a homicide count charging a theory of deliberate first-degree murder of Diego Delgado or, in the alternative, a theory of first-degree felony murder, which was explained in the jury instructions as predicated on the felony of shooting at a motor vehicle.

At the conclusion of the trial, the jurors were given elements instructions on deliberate first-degree murder, with step-down instructions to consider second-degree murder if they could not find first-degree murder and then to consider voluntary manslaughter if they could not find second-degree murder. After those instructions, the jurors were next instructed to consider a separate theory of felony murder committed "during the commission of Shooting at a Motor Vehicle." While the second-degree murder instruction submitted as a step-down alternative to deliberate first-degree murder included the essential provocation element that distinguishes murder from manslaughter, the

felony murder instruction made no reference to the provocation element, and the jury was not instructed in any other fashion that lack of sufficient provocation was an element of felony murder.

During its deliberations, the jury sent out a note to the court: "We need some clarification on whether we must find guilty or not guilty on felony murder if we have already decided on manslaughter." With the acquiescence of trial counsel, the court wrote a response that simply quoted the wording of an instruction previously given to the jury: "Each crime charged in the indictment should be considered separately." No further response was given to the jury's question.

The jury ultimately returned verdicts finding Defendant guilty of both voluntary manslaughter, as a lesser included offense of first-degree deliberate murder, and first-degree felony murder based on the felony of shooting into a motor vehicle, in addition to a separate conviction of shooting at a motor vehicle resulting in great bodily harm. The district court vacated the voluntary manslaughter and shooting at a motor vehicle convictions, leaving only the first-degree felony murder conviction, as required by New Mexico double jeopardy jurisprudence establishing that cumulative punishment may not be imposed for both felony murder and its lesser included predicate felony, *see State v. Frazier*, 2007-NMSC-032, ¶¶ 1, 40, 142 N.M. 120, 164 P.3d 1; *see also id.* ¶ 72 (Chávez, J., specially concurring), and that multiple homicide convictions may not be imposed on a defendant for a single death, *see State v. Santillanes*, 2001-NMSC-018, ¶ 5, 130 N.M. 464, 27 P.3d 456.

Raising a number of issues, Defendant appealed his convictions and life sentence directly to this Court. *See* N.M. Const. art. VI, § 2 ("Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court."); *accord* Rule 12-102(A)(1) NMRA.

II. DISCUSSION

A. Because Lack of Provocation Was an Essential Element That Distinguished Felony Murder from Voluntary Manslaughter, Failure to So Instruct the Jury Was Fundamental Error

We first address whether Defendant's conviction for felony murder should be reversed because the felony murder essential elements jury instruction omitted any reference to the concept of legally sufficient provocation that distinguishes heat-of-passion voluntary manslaughter from cold-blooded second-degree murder.

Because Defendant's trial counsel made no objection to the jury instruction, we review for fundamental error. *See State v. Osborne*, 111 N.M. 654, 662, 808 P.2d 624, 632 (1991) (explaining that the failure to instruct the jury on the essential elements of an offense may constitute fundamental error, even if the defendant failed to object to an inadequate instruction). Under fundamental error review, we will not reverse the jury verdict unless it is necessary to prevent a "miscarriage of justice." *State v. Silva*, 2008-NMSC-051, ¶ 13, 144 N.M. 815, 192 P.3d 1192 (internal quotation marks and citation omitted). In applying the fundamental error analysis to deficient jury instructions, we are required to reverse when the misinstruction leaves us with "no way of knowing whether the conviction was or was not based on the lack of the essential element." *State v. Swick*,

2012-NMSC-018, ¶¶ 46, 58, 279 P.3d 747 (holding that it was fundamental error to fail to instruct on the second-degree murder element of lack of sufficient provocation). In this case, it is highly likely that the felony murder guilty verdict was based on the lack of an essential element in the definitional jury instruction.

Under New Mexico law, felony murder is a second-degree murder that is elevated to first-degree murder when the murder was committed during the commission or attempted commission of some other dangerous felony. *See* NMSA 1978, § 30-2-1(A)(2) (1994); *Frazier*, 2007-NMSC-032, ¶ 8 (observing that "in order to convict a defendant of felony murder, the State must prove that the defendant had a culpable state of mind sufficient to support a conviction for second-degree murder"). Accordingly, a determination of whether an accused has committed felony murder necessarily requires a factfinder to determine whether the accused has committed second-degree murder; simply stated, if there is no second-degree murder, there can be no felony murder.

The Legislature has textually defined second-degree murder as excluding killings committed in the heat of passion:

> Unless he is acting upon sufficient provocation, upon a sudden quarrel or in the heat of passion, a person who kills another human being without lawful justification or excuse commits murder in the second degree if in performing the acts which cause the death he knows that such acts create a strong probability of death or great bodily harm to that individual or another.

Section 30-2-1(B). A heat-of-passion intentional killing, defined as "the unlawful killing of a human being without malice . . . committed upon a sudden quarrel or in the heat of passion," is punishable as the lesser offense, voluntary manslaughter. NMSA 1978, § 30-2-3(A) (1994).

Mitigation of a killing from murder to manslaughter requires legally sufficient "provocation," defined in our Uniform Jury Instructions and case law as "any action, conduct or circumstances which arouse anger, rage, fear, sudden resentment, terror or other extreme emotions" that would "cause a temporary loss of self control in an ordinary person." UJI 14-222 NMRA; *see State v. Stills*, 1998-NMSC-009, ¶ 36, 125 N.M. 66, 957 P.2d 51 (discussing sufficient provocation).

As we recently emphasized in *Swick*, 2012-NMSC-018, ¶ 48, our Uniform Jury Instructions explicitly require inclusion of the essential element of lack of provocation in a second-degree murder elements instruction whenever it is an issue the jury should consider. That is why we provide two separate uniform elements instructions for second-degree murder. One, for use when provocation is in issue, instructs jurors that they cannot convict of second-degree murder unless they find that the defendant "did not act as a result of sufficient provocation." UJI 14-210 NMRA. The other, which the use notes caution is "to be used only when second degree murder is the lowest degree of homicide to be considered by the jury," makes no reference to the provocation element. UJI 14-211 NMRA n.1.

Whether Defendant's killing of Diego Delgado was committed upon a sudden quarrel or in the heat of passion was very

much at issue in this case, as reflected in the district court's instructions that the jury must consider voluntary manslaughter in the stepdown from deliberate first-degree murder, the alternative to felony murder. The jury would have been justified in finding that the sudden violent attack aroused anger, rage, fear, sudden resentment, terror or other extreme emotions in Defendant, particularly in light of the evidence that his brother had just been shot and that a car containing armed assailants was bearing down on Defendant, his family home, and his wounded brother. We recognize that there will be situations in which a defendant's own misconduct may preclude a provocation instruction. *See, e.g.*, *State v. Gaitan*, 2002-NMSC-007, ¶ 13, 131 N.M. 758, 42 P.3d 1207 (holding that "the law does not permit one who intentionally instigates an assault on another to then rely on the victim's reasonable response to that assault as evidence of provocation sufficient to mitigate the subsequent killing of the victim from murder to manslaughter"); *State v. Munoz*, 113 N.M. 489, 827 P.2d 1303 (Ct. App. 1992) (recognizing that "a defendant cannot pose a threat to the victim and then rely on the victim's response as a legal provocation"), *cert. denied*, *Munoz v. State*, 113 N.M. 352, 826 P.2d 573 (1992). This case does not present any such concerns. There was ample evidence that victim Diego Delgado's provocative conduct against Defendant and his family was not the result of any felonious behavior on Defendant's part and that the provocative conduct occurred before Defendant committed the predicate felony of shooting into the victim's car.

But despite the fact that the jury instructions properly contained the essential element of lack of provocation in the second-degree instruction that was given as a lesser included offense of deliberate first-degree murder, the provocation element was omitted from the essential elements of second-degree murder in the separate felony murder instruction. The omission may well have been the result of the failure of our felony murder Uniform Jury Instruction to address all second-degree murder essential elements, including specifically the element of lack of provocation where that may be in issue, an omission which we now request our Committee on Uniform Jury Instructions for Criminal Cases to address. *Compare* UJI 14-210 (second-degree murder, which includes lack of provocation as an essential element), *with* UJI 14-202 NMRA (felony murder, which makes no reference to the element of lack of provocation). There was no other instruction given which would have informed the jury in any way that lack of provocation was as much an element of second-degree murder as an included offense of felony murder as it was of stand-alone second-degree murder.

Failure to include this important distinction between second-degree murder and voluntary manslaughter under the facts of this case was fundamental error. *See Swick*, 2012-NMSC-018, ¶¶ 55-56, 58 (holding that it was fundamental error to fail to instruct the jury that the state had the burden of proving beyond a reasonable doubt that the defendant did not act as a result of sufficient provocation in order to return a second-degree murder conviction where heat of passion was at issue). We therefore must reverse Defendant's conviction for felony murder.

B. The Double Jeopardy Clause Precludes Defendant's Retrial for Felony Murder as a Result of the Jury's Verdict Acquitting Him of Second-Degree Murder and Finding Him Guilty of Voluntary Manslaughter Instead

The jury's separate verdicts finding Defendant guilty of (1) heat-of-passion voluntary manslaughter rather than second-degree murder and (2) first-degree felony murder for the same homicide raise a double jeopardy issue, "a question of law, which we review de novo." *State v. Saiz*, 2008-NMSC-048, ¶ 22, 144 N.M. 663, 191 P.3d 521, *abrogated on other grounds by State v. Belanger*, 2009-NMSC-025, ¶ 36 n.1, 146 N.M. 357, 210 P.3d 783.

The Double Jeopardy Clause of the United States Constitution guarantees: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This terse prohibition often presents difficulties in analysis, in part because it has been held to incorporate a broad and general collection of protections against several conceptually separate kinds of harm: (1) "a second prosecution for the same offense after acquittal," (2) "a second prosecution for the same offense after conviction," and (3) "multiple punishments for the same offense." *Swafford v. State*, 112 N.M. 3, 7, 810 P.2d 1223, 1227 (1991) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). The issue we address here relates to the first of those protections, reprosecution after an acquittal.

Had the State submitted only the felony murder theory of homicide to the jury, our holding that the elements instruction failed to include an accurate and complete definition of the lesser included offense of second-degree murder would result in a remand for retrial. *See Swick*, 2012-NMSC-018, ¶ 58 (remanding for a new trial as a result of a missing provocation element in a second-degree murder instruction). The same would be the case if the jury had returned only a general verdict of guilty of first-degree murder, without specifying whether the verdict was based on a felony murder or a deliberate murder theory. *See State v. Mailman*, 2010-NMSC-036, ¶ 12, 148 N.M. 702, 242 P.3d 269 (holding that "a conviction under a general verdict must be reversed where it is based on more than one legal theory and at least one of those theories is legally, as opposed to factually, invalid").

But in this case we know that the jury actually deliberated and decided whether Defendant committed second-degree murder as a lesser included offense of the alternative theory of first-degree murder. The jury, properly instructed on the distinction between second-degree murder and voluntary manslaughter and instructed to consider voluntary manslaughter only if it could not convict of second-degree murder, effectively acquitted Defendant of second-degree murder by convicting Defendant of the lesser offense of voluntary manslaughter instead. *See State v. Lynch*, 2003-NMSC-020, ¶ 10, 134 N.M. 139, 74 P.3d 73 (discussing the American doctrine that a conviction of a lesser included offense is an implied acquittal of the greater offense that was considered by the same factfinder); *id.* ¶ 37 (Maes, C.J., dissenting but agreeing that the Double Jeopardy Clause of the New Mexico Constitution, Article II, Section 15, incorporates the implied acquittal doctrine). And because "acquittal of a lesser offense necessarily included in a greater offense bars a subsequent prosecution for the greater offense," *State v. Tanton*, 88 N.M. 333, 335, 540 P.2d 813, 815 (1975), Defendant's acquittal of second-degree murder, a lesser included offense of felony murder, bars a subsequent trial for the greater offense of felony murder.

Submitting separate verdict forms for the two alternative theories of first-degree

murder and requiring the jury to return both verdicts in this case was a commendable approach by the trial judge, making it possible for both the trial court and a reviewing court to know exactly what the jury did and did not determine and thereby minimizing the need to submit the case to a second jury in the event of a reversible error in connection with one of the alternative theories.

We therefore hold that Defendant, having been acquitted of second-degree murder, is constitutionally protected from further prosecution for that offense, whether in a stand-alone count, as a stepdown from deliberate first-degree murder, or as a component of felony murder. *See Ashe v. Swenson*, 397 U.S. 436, 446 (1970) (holding that collateral estoppel is a constitutional component of double jeopardy protection in criminal cases and that, after a jury determines a factual issue against the state, the state may not bring a defendant before a new jury to litigate the same issue again).

C. Defendant May Not Be Punished Cumulatively for Both Manslaughter and Causing Great Bodily Harm by Shooting at a Motor Vehicle Where Both Convictions Are Based on the Same Shooting of the Same Victim

Because we must vacate Defendant's felony murder conviction, we next consider reinstating the two convictions the district court vacated solely because Defendant was also convicted of felony murder, the convictions of voluntary manslaughter and shooting at a motor vehicle resulting in great bodily harm. Defendant argues, however, that reinstatement of both convictions for the act of shooting a single victim would constitute double jeopardy of the third type, multiple punishment for the same offense.

Honoring the law's protection against multiple punishments for "the same offense" is one of the most vexing challenges of double jeopardy jurisprudence. *See, e.g., Albernaz v. United States*, 450 U.S. 333, 343 (1981) (observing that "the decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator"). In addition to requiring a narrow and mechanical analysis of generic statutory elements, the inquiry often calls for a broader and substantially more complex search for indicia of legislative intent in the context of particular cases. *See Swafford*, 112 N.M. at 13, 810 P.2d at 1233 (noting that when a defendant's conduct violates more than one statute, the courts must determine whether the Legislature intended multiple punishments). Determinations of legislative intent, like double jeopardy, present issues of law that "are reviewed de novo, with the ultimate goal of such review to be facilitat[ing] and promot[ing] the legislature's accomplishment of its purpose." *State v. Tafoya*, 2012-NMSC-030, ¶ 11, 285 P.3d 604 (alterations in original) (internal quotation marks and citation omitted).

We agree with the State's concession on appeal that Defendant's act of shooting the driver of the Expedition was the common factual basis for both the shooting into the motor vehicle and the voluntary manslaughter convictions, and his culpable conduct was therefore "unitary." *See Gonzales*, 113 N.M. at 224, 824 P.2d at 1026 (concluding that the firing of "multiple gun shots into [the victim's vehicle] in rapid succession" constituted unitary criminal conduct). If Defendant were challenging multiple convictions under the same statute, our determination of unitary conduct would require the conclusion that the Double Jeopardy Clause prohibits multiple punishment, without any further analysis on

our part. *State v. Gallegos*, 2011-NMSC-027, ¶ 33, 149 N.M. 704, 254 P.3d 655 ("[I]f the defendant was charged with multiple violations of the same statute, a unit-of-prosecution case, then the only question to be answered in determining whether two charges are the 'same offense' is whether the defendant's conduct underlying each charge was part of the 'same act or transaction' as defined by the legislature." (alteration in original) (internal quotation marks and citation omitted)). But because this is a "double-description case, where the same conduct results in multiple convictions under different statutes," we must go further before our analysis is complete. *Swick*, 2012-NMSC-018, ¶ 10.

The easiest step in the double-description analysis is to conduct the strict elements test established by the United States Supreme Court more than 80 years ago to determine in the abstract whether each statutory offense "'requires proof of a fact which the other does not.'" *Id.* ¶ 12 (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). "If that test establishes that one statute is subsumed within the other, the inquiry is over and the statutes are the same for double jeopardy purposes—punishment cannot be had for both." *Swafford*, 112 N.M. at 14, 810 P.2d at 1234. Although the *Blockburger* test has the virtue of simplicity, it has been justly criticized as a "mechanical test that compares statutory elements and is only sometimes related to substantive sameness." George C. Thomas III, *A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem*, 83 Calif. L. Rev. 1027, 1028 (1995).

In this case, as in many of the more difficult double punishment cases involving different statutes, *Blockburger*'s simplistic elements test provides no final resolution. Neither the manslaughter statute nor the shooting into a motor vehicle statute is definitionally subsumed within the other; only the offense of manslaughter requires the death of a human being, and only the offense of shooting at a motor vehicle resulting in great bodily harm requires that the harm to the victim be the result of shooting into a vehicle. We therefore must proceed to the most challenging step of the double jeopardy analysis, trying to determine whether the Legislature intended to impose cumulative punishment for unitary conduct violating two statutes that survive the *Blockburger* elements test. In doing so, "we must turn to traditional means of determining legislative intent: the language, history, and subject of the statutes," and we "must identify the particular evil sought to be addressed by each offense." *Swafford*, 112 N.M. at 14, 810 P.2d at 1234. "If several statutes are not only usually violated together, but also seem designed to protect the same social interest, the inference becomes strong that the function of the multiple statutes is only to allow alternative means of prosecution." *Id.*

The Legislature is the branch of government constitutionally vested with the authority to define criminal offenses and prescribe permissible punishment for their violation, and it is the duty of the judicial branch to attempt to discern and effectuate the legislative will. *See, e.g.*, *State v. Martinez*, 1998-NMSC-023, ¶ 14, 126 N.M 39, 966 P.2d 747 ("It is the duty of the judiciary, in implementing the directives of the Legislature, to exercise reason and ensure that the ends of justice are met."); *State ex rel. Helman v. Gallegos*, 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994) ("[W]e believe it to be the high duty and responsibility of the judicial branch of government to facilitate and promote the

legislature's accomplishment of its purpose."). Unfortunately, the Legislature rarely provides textual guidance on its wishes regarding cumulative or alternative punishment. In the absence of explicit legislative direction, determining what the Legislature intended—or perhaps more accurately, what the Legislature most likely would have intended had it contemplated the potential overlap between particular statutes—is a task for which there is no simple test. The problem is exacerbated by the ever increasing number and complexity of criminal statutes:

> [A]t common law, and under early federal criminal statutes, offense categories were relatively few and distinct. A single course of criminal conduct was likely to yield but a single offense. In more recent times, with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction.

Ashe, 397 U.S. at 445 n.10 (citation omitted).

This Court has been wrestling with the double jeopardy concerns raised by the substantial overlap between the two specific statutes in this case for more than two decades. We have always recognized that the preliminary and simplistic *Blockburger* elements test did not provide a final answer to the substantive sameness question, but we have had increasing difficulty reconciling past legislative intent analyses of these statutes with the application of our developing double jeopardy jurisprudence to various other statutes.

Our first consideration of the overlap between these two statutes was in *Gonzales*, 113 N.M. at 225, 824 P.2d at 1027, where we upheld convictions for both first-degree murder and causing great bodily harm by shooting at a motor vehicle, based on the unitary conduct of fatally shooting a victim sitting in a car. The three justices who spoke for the *Gonzales* Court relied primarily on a narrow *Blockburger* statutory elements analysis, noting that the "murder statute requires proof of the unlawful killing of a human being" while the "shooting at an occupied motor vehicle statute requires proof of discharging a firearm at an occupied vehicle but does not require the killing of a human being." *Gonzales*, 113 N.M. at 224-25, 824 P.2d at 1026-27.

In a brief application of the *Swafford* nontechnical legislative intent analysis, this Court concluded, seven months after *Swafford*, that the two statutes were intended to address different social evils, reasoning that the murder statute was intended to address unlawful killing of people and the shooting at a motor vehicle statute was "more narrowly designed to protect the public from reckless shooting into a vehicle and the possible property damage and bodily injury that may result." *Gonzales*, 113 N.M. at 225, 824 P.2d at 1027. After noting that although the statutes "may be violated together, they are not necessarily violated together," and that "punishment for a violation of either statute is not enhanced for a violation of the other statute," the Court concluded that a defendant could be cumulatively punished both for first-degree murder and for causing great bodily harm by shooting into a motor vehicle, based on the same physical act, without violating double jeopardy protections. *Id.*

Thirteen years after *Gonzales*, this

Court found itself sharply divided over the continued viability of that holding. The three-justice *Dominguez* majority reaffirmed *Gonzales* and its rationales in affirming convictions for both voluntary manslaughter and causing great bodily harm by shooting into a motor vehicle. *See Dominguez*, 2005-NMSC-001, ¶¶ 8, 14, 16. Two justices authored separate dissents, primarily on the grounds that (1) the *Gonzales* holding had been undermined by the holding in *Santillanes* and other post-*Gonzales* cases recognizing the double jeopardy principle that "for a single death, there can be only one conviction" and (2) *Gonzales* was inconsistent with more recent developments in New Mexico double jeopardy jurisprudence. *See Dominguez*, 2005-NMSC-001, ¶ 28 (Bosson, C.J., concurring in part and dissenting in part); *id.* ¶ 37 (Chávez, J., dissenting).

We next confronted essentially the same issue in *Riley*. Once again this Court was unable to reach a consensus, but this time three justices wrote separately to express their concerns that *Gonzales* was increasingly out of step with New Mexico double jeopardy jurisprudence. *See Riley*, 2010-NMSC-005, ¶ 39 (Chávez, C.J., specially concurring); *id.* ¶ 44 (Bosson, J., concurring in part and dissenting in part); *id.* ¶ 46 (Daniels, J., specially concurring). The four opinions in *Riley* made it clear that if defense counsel had met this Court's requirements for challenging a binding precedent and seeking to overcome the principle of stare decisis, the continued viability of *Gonzales* would have been in grave doubt. *See Riley*, 2010-NMSC-005, ¶¶ 32-35 (plurality opinion of Serna, J., joined by Maes, J.) (noting that counsel had not identified or argued precedent-overruling principles); *id.* ¶¶ 39-43 (Chávez, C.J., specially concurring) (noting continued disagreement with *Gonzales* and *Dominguez* but declining to "overturn controlling precedent . . . [without] benefit of full briefing and argument on the relevant factors" for doing so); *id.* ¶¶ 44-45 (Bosson, J., concurring in part and dissenting in part) (reiterating disagreement with *Gonzales* and *Dominguez* and observing that the challenge to those precedents "would best be initiated by the parties themselves and not by this Court acting sua sponte); *id.* ¶¶ 46-49 (Daniels, J., specially concurring) (expressing the view that "the Legislature did not intend to punish a person cumulatively for both crimes, simply because a bullet penetrated a motor vehicle before killing its intended victim" but joining in affirmance on grounds of stare decisis because a case had not been made for overruling established precedent).

In this case, Defendant has squarely raised, briefed, and argued specific reasons for overruling *Gonzales* and the cases that have followed it, particularly *Dominguez* and *Riley*. We therefore must conduct the jurisprudential analysis that was not called for in *Riley*.

When deciding whether to overrule our own precedents, this Court considers such common-sense factors as whether the precedent is "a remnant of abandoned doctrine," whether the precedent has proved to be unworkable, whether changing circumstances have deprived the precedent of its original justification, and the extent to which parties relying on the precedent would suffer hardship from its overruling. *Riley*, 2010-NMSC-005, ¶ 34 (plurality opinion) (internal quotation marks and citation omitted). When any of those factors "convincingly demonstrates that a past decision is wrong, the Court has not hesitated to overrule even recent precedent." *State v.*

Pieri, 2009-NMSC-019, ¶ 21, 146 N.M. 155, 207 P.3d 1132 (internal quotation marks and citation omitted).

{41} In order to afford due respect to the principles of stare decisis and to conduct a principled reconsideration of *Gonzales*'s continued precedential soundness, we begin with a thorough review of the more significant developments in our double jeopardy jurisprudence during the two decades since *Gonzales* was decided.

{42} In *State v. Contreras*, nearly four years after *Gonzales*, this Court applied *Swafford* and unanimously held for the first time that when "one's conduct is unitary, one cannot be convicted of and sentenced for both felony murder and the underlying felony." *Contreras*, 120 N.M. 486, 491, 903 P.2d 228, 233 (1995) (overruling the contrary precedent of *State v. Stephens*, 93 N.M. 458, 463, 601 P.2d 428, 433 (1979)). We later took the analysis a step further and held that the Legislature did not intend that dual convictions for both felony murder and its predicate felony be imposed in any case, without the need for a particularized case-by-case unitary conduct analysis. *Frazier*, 2007-NMSC-032, ¶¶ 4, 11, 35 (addressing felony murder and kidnapping). Both *Contreras*, 120 N.M. at 491, 903 P.2d at 233, and *Frazier*, 2007-NMSC-032, ¶ 26, were based on reasoned inferences of what punishment the Legislature intended, in the absence of explicit legislative direction.

{43} The reasoning underlying *Gonzales* was substantially eroded by *State v. Cooper* and *Santillanes*. In *Cooper*, we recognized that the Double Jeopardy Clause precluded dual convictions for felony murder and second-degree murder in the killing of the same victim. *See* 1997-NMSC-058, ¶¶ 53, 63, 124 N.M. 277, 949 P.2d 660. In *Santillanes*, we held that a defendant could not be punished separately for vehicular homicide and child abuse resulting in death, even though the statutes each contained an element the other did not have and thereby passed the *Blockburger* test. *See Santillanes*, 2001-NMSC-018, ¶¶ 5, 24. We specifically affirmed the reasoning of the Court of Appeals "that one death should result in only one homicide conviction" under New Mexico law. *Id.* ¶ 5 (internal quotation marks and citation omitted).

Even though the dual statutes involved in both *Cooper*, 1997-NMSC-058, ¶¶ 53-54, 60, and *Santillanes*, 2001-NMSC-018, ¶ 8, required causation of death as an essential element while one of the two statutes in this case requires only great bodily harm, the significance of those two cases is underscored by our holding in *State v. Varela*, 1999-NMSC-045, 128 N.M. 454, 993 P.2d 1280. Among other convictions appealed by Varela that arose from his shooting and killing the occupant of a house was a conviction for the offense of shooting at a dwelling and causing great bodily harm. *See id.* ¶ 1. That crime is defined in a separate provision of the very statute involved in this case; but for the differing elements of a dwelling and a motor vehicle, the two subsections are identical. *Compare* NMSA 1978, § 30-3-8(A) (1993) (shooting at a dwelling), *with* § 30-3-8(B) (shooting at a motor vehicle). The defendant in *Varela* argued that the statutory element of "great bodily harm" could not be established by proof of a killing. *See Varela*, 1999-NMSC-045, ¶ 10. This Court upheld the conviction by interpreting the great bodily harm element to include causation of death, in language that is difficult to reconcile with the

reasoning in *Gonzales*:

> [T]he wrong the legislature sought to remedy [in the first sentence of Section 30-3-8(A)] is any shooting at a dwelling or occupied dwelling [sic]. The next three sentences assign a level of punishment to three different fact patterns: a shooting at a dwelling or building that does not result in great bodily harm; one that results in injury to another person; and one that results in great bodily harm. *See* § 30-3-8. If we construe the first sentence according to its terms, as prohibiting any shooting at a dwelling or occupied building, then the circumstance in which the shooting results in death must be viewed as falling into one of the three levels of punishment. "[O]ur construction must not render the statute's application absurd, unreasonable, or unjust." To construe the statute as not including situations in which the victim dies would render Section 30-3-8's application absurd.

Varela, 1999-NMSC-045, ¶ 13 (second alteration in original) (internal citation omitted).

Varela is important in our consideration of *Gonzales* because it recognized that death is a part of the harm the Legislature sought to protect against in enacting drive-by shooting offenses. *Varela* is equally significant in its recognition that the drive-by crimes are obviously intended to protect against threats to personal safety, and not to threats to property as *Gonzales* had proposed. *Varela*'s interpretation is supported by the fact that penalty gradations for drive-by shooting, Section 30-3-8(B), like penalties for other assaultive crimes contained within the Article Three assault and battery provisions of the New Mexico Criminal Code, NMSA 1978, Sections 30-3-1 to -18 (1963, as amended through 2010), are based on differing degrees of potential or actual personal harm to a human victim, unlike the Article Fifteen property damage provisions of the Criminal Code, NMSA 1978, Sections 30-15-1 to -7 (1963, as amended through 2007), the gradations of which are based on differing values of property damaged or stolen. *Compare, e.g.*, § 30-3-4 (battery), *and* § 30-3-5 (aggravated battery), *and* § 30-3-9(E) (battery on a school employee), *and* § 30-3-9(F) (aggravated battery on a school employee), *with* § 30-15-1 (criminal damage to property), *and* § 30-15-1.1 (graffiti damage to property).

Our double jeopardy jurisprudence has continued to grow away from the historical strict mechanical elements test and increasingly toward a substantive sameness analysis. In *Gallegos*, 2011-NMSC-027, ¶ 1, we applied our "double jeopardy jurisprudence to multiple conspiracy convictions" and "set a new course for the future application of double jeopardy principles" by holding that multiple conspiracy convictions could not be imposed for a single agreement to violate more than one criminal statute. In light of double jeopardy concerns and given the inherent dangers of overcharging, we recognized that "it is particularly important that the judiciary embrace its unique responsibility to assure the basic fairness and adherence to legislative intent that only the courts can afford." *Id.* ¶ 47. Accordingly, we concluded that "a fair inference to draw from the text, history, and purpose of our conspiracy statute is that the Legislature established . . . a rebuttable

presumption that multiple crimes are the object of only one, overarching, conspiratorial agreement subject to one, severe punishment set at the highest crime conspired to be committed." *Id.* ¶ 55.

In *State v. Gutierrez*, 2011-NMSC-024, ¶¶ 52-53, 60, 150 N.M. 232, 258 P.3d 1024, we held that convictions for both armed robbery of a car and its keys, based on the forcible seizure of its keys, and the separate offense of theft of a motor vehicle constituted double jeopardy. In doing so, we questioned the continued validity of *State v. McGruder*, 1997-NMSC-023, 123 N.M. 302, 940 P.2d 150, *abrogated on other grounds by State v. Chavez*, 2009-NMSC-035, ¶ 16, 146 N.M. 434, 211 P.2d 891, which had found no double jeopardy violation where separate convictions were affirmed for both armed robbery of a set of car keys and the resulting theft of the motor vehicle for which the keys were taken. *See Gutierrez*, 2011-NMSC-024, ¶ 53 (discussing distinguishable conduct in support of the separate charges in *McGruder*). Significantly for the present case, we rejected a mechanical approach that would find no double jeopardy violation simply because two statutory offenses had differing elements. *See id.* ¶ 58. Instead, we expressly "modified the *Blockburger* analysis to be used in New Mexico" and "rejected the . . . strict elements test." *Swick*, 2012-NMSC-018, ¶ 21. In a concurring opinion, Justice Bosson observed that the majority's inclination to look beyond abstract theory and consider concrete realities resulted in the implicit overruling of *McGruder* and exemplified how the Court has been "rethinking some of the underpinnings of our double jeopardy jurisprudence." *See Gutierrez*, 2011-NMSC-024, ¶¶ 73-74, 76, 78 (Bosson, J., specially concurring).

In *Swick*, our most recent significant double jeopardy precedent, we relied on *Gutierrez* to overrule *State v. Armendariz*, 2006-NMSC-036, 140 N.M. 182, 141 P.3d 526, and held that our current double jeopardy jurisprudence precludes multiple convictions for both aggravated battery and attempted murder where both convictions are based on the unitary conduct of beating a victim. *See Swick*, 2012-NMSC-018, ¶¶ 19, 21 (overruling *Armendariz*).

Swick rejected *Armendariz*'s double jeopardy statutory analysis, which cited *Gonzales*, *see Armendariz*, 2006-NMSC-036, ¶ 25, and proceeded in much the same way as the two-decade-old *Gonzales* analysis of the offenses of homicide and causing great bodily harm by shooting into a motor vehicle. *See Swick*, 2012-NMSC-018, ¶¶ 13, 19. *Armendariz* first applied a strict *Blockburger* elements test, determining that the statute defining attempted murder requires proof of intent to commit murder, which is not an element required to prove aggravated battery, and that the aggravated battery statute requires an unlawful application of force, which is not an element of attempted murder. *See Armendariz*, 2006-NMSC-036, ¶¶ 23-24. *Armendariz* then used other indicia to justify its holding that the Legislature had intended to allow cumulative punishments, *see id.* ¶¶ 22, 25, as we described in *Swick*:

> First, . . . attempted murder and aggravated battery were enacted to address different social harms, punishing the state of mind in attempted murder and punishing actual harm in aggravated battery. Second, . . . there was no language in either statute which indicated an intent that these crimes were alternative ways of committing the same crime. Third, . . . the two

> crimes do not necessarily have to be violated at the same time. In other words, a defendant can commit attempted murder without also committing battery.

2012-NMSC-018, ¶ 16 (citations omitted). *Swick* followed the teachings of *Gutierrez* and reaffirmed that a complete double jeopardy analysis may require looking beyond facial statutory language to the actual legal theory in the particular case by considering such resources as the evidence, the charging documents, and the jury instructions. *See Swick*, 2012-NMSC-018, ¶¶ 21, 26. "[T]he State proffered the same testimony to prove the aggravated batteries as it did to prove the attempted murders, which was that Swick beat, stabbed, and slashed" his victims. *Id.* ¶ 26.

Swick rejected *Armendariz*'s narrow view that the two statutes were enacted to address different social evils, aggravated battery to protect against bodily injury and attempted murder to protect against loss of life:

> Both statutes punish overt acts against a person's safety but take different degrees into consideration. The aggravated battery statute concerns itself with the intent to harm and the attempted murder statute concerns itself with the intent to harm fatally.

Swick, 2012-NMSC-018, ¶ 29.

Swick also reaffirmed the established principle that lenity applies in cases of ambiguity regarding the reach of criminal statutes, "because reasonable minds can differ as to the Legislature's intent in punishing the[] two crimes." *Id.* ¶ 30.

In light of the significant journey our double jeopardy jurisprudence has taken over the past two decades, we conclude that "time has set its face against" *Gonzales*'s doctrinal underpinnings. *Mapp v. Ohio*, 367 U.S. 643, 653 (1961) (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949), because the line of authority it relied on had evolved). *Gonzales* and its progeny reflect a remnant of abandoned doctrine that has been deprived of its original justification. "We conclude that the modifications to double jeopardy jurisprudence make this Court's opinion [in *Gonzales*] so unworkable as to be intolerable." *Swick*, 2012-NMSC-018, ¶ 19. It is impossible to reconcile in any principled way the reasoning of *Gonzales* with the reasoning of the more recent precedents we have reviewed here. Applying those precedents and the rule of lenity, we can no longer conclude that the Legislature intended that Defendant should receive more than the maximum punishment it determined appropriate for either a drive-by shooting or a completed homicide, taking into consideration the relationship between the statutory offenses and their common commission by unitary conduct, the identical social harms to which they are directed, and their use by the State in this case to impose double punishment for the killing of a single victim.

One final stare decisis concern is the extent to which any prejudice may flow from any justifiable reliance that has been placed on *Gonzales*'s continued application. As we stated in *Swick*, "reliance, which is most important in cases implicating property and contract rights, and least important in cases involving procedural and evidentiary rules, is not present in this case." *Swick*, 2012-NMSC-018, ¶ 18. "The State could not have relied on

[*Gonzales*] to its detriment because the double jeopardy prohibition is applied at the conclusion of a case to prevent multiple punishments." *Id.*

We therefore expressly overrule *State v. Gonzales*, 113 N.M. 221, 824 P.2d 1023 (1992); *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563; and *State v. Riley* 2010-NMSC-005, 147 N.M. 557, 226 P.3d 656, and hold that the Double Jeopardy Clause protects Defendant against being punished both for the homicide of Diego Delgado and for causing great bodily harm to Diego Delgado by shooting at a motor vehicle, where both convictions were premised on the unitary act of shooting Diego Delgado. One of the convictions must be vacated.

D. The More Severely Punishable Conviction, Shooting at a Motor Vehicle, Should Be Reinstated

As we recently confirmed in *Swick*, 2012-NMSC-018, ¶ 31, New Mexico agrees with the position of other jurisdictions that where one of two otherwise valid convictions must be vacated to avoid violation of double jeopardy protections, we must vacate the conviction carrying the shorter sentence.

In this case, we therefore must uphold the conviction for shooting into a motor vehicle and vacate the conviction for voluntary manslaughter. *Compare* § 30-2-3(A) (providing that voluntary manslaughter is a third-degree felony resulting in the death of a human being), *and* NMSA 1978, § 31-18-15(A)(7) (2007) (providing a penalty of six years' imprisonment for a third-degree felony resulting in the death of a human being), *with* § 30-3-8(B) (providing that shooting at a motor vehicle resulting in great bodily harm is a second-degree felony), *and* § 31-18-15(A)(4) (providing a penalty of fifteen years' imprisonment for a second-degree felony resulting in the death of a human being). Whatever one's personal views may be about the more serious of the offenses of manslaughter and causing great bodily harm by shooting into a motor vehicle, principles of separation of powers and of jurisprudential policy demand adherence to the principle we confirmed in *Swick*. As a matter of separation of powers, it is the exclusive prerogative of the Legislature, the law-making branch of our representative democracy, to determine relative seriousness and punishment for criminal offenses. And as a matter of policy, it would be unacceptable for us to hold that where a person's criminal conduct would have violated either of two statutes, a defendant can escape liability for the one carrying the greater punishment by committing the crime in such a manner as to also violate the statute carrying the lesser penalty. Because the Legislature has determined that causing great bodily harm by shooting at a motor vehicle is a higher degree of felony and carries a more severe potential sentence, we reinstate Defendant's conviction for that crime and preclude reinstatement of his conviction for voluntary manslaughter.

E. Defendant Was Not Denied His Right to an Impartial Jury

On the first day of trial testimony, Defendant's ex-wife Elizabeth, who had been his girlfriend at the time of the shooting, took the stand. Elizabeth testified that she knew a person on the jury, Ms. Romero, who was best friends with the mother of Elizabeth's current boyfriend. The district judge promptly held a hearing outside the presence of the jury to permit the court and counsel to inquire further into the relationship between Elizabeth and

Romero and whether Romero should remain on the jury. Elizabeth testified that Romero's friendship and communications about the case with the mother of her current boyfriend bothered her. She expressed concern that Romero had prejudged Defendant because of his appearance, explaining that after jury selection, Romero had called the boyfriend's mother and told her that Defendant looked "scary."

The judge then called Romero in for questioning. Although Romero insisted that she could remain fair and open-minded, the judge agreed with defense counsel that she should be removed from Defendant's jury.

Before bringing the remaining jurors back in the courtroom, the judge learned that Romero had made negative comments about Defendant to a potential juror, Ms. Herrera, who had not been selected for Defendant's jury. The judge also questioned Herrera and determined that she had no information that anyone else had heard any of Romero's comments.

After Herrera was excused from the courtroom, the judge excused Romero from Defendant's jury, dismissed her from further jury service, and replaced her on Defendant's jury with an alternate juror. The judge brought the jurors back into the courtroom, questioned them to make sure they had not been involved in any discussions of the case with anyone, and reminded them of his admonition not to permit any such discussions to occur.

Defendant now argues that he was denied his right to an impartial jury under the United States and New Mexico Constitutions because of Romero's bias and its possible effect on the remainder of the jury.

The Sixth Amendment to the United States Constitution guarantees the right to trial by a fair and impartial jury. *See State v. Johnson*, 2010-NMSC-016, ¶ 35, 148 N.M. 50, 229 P.3d 523. "The essence of cases involving juror tampering, misconduct, or bias is whether the circumstance unfairly affected the jury's deliberative process and resulted in an unfair jury." *State v. Mann*, 2002-NMSC-001, ¶ 20, 131 N.M. 459, 39 P.3d 124. A complaining party "must make a preliminary showing that [he or she] has competent evidence that material extraneous to the trial actually reached the jury." *Id.* ¶ 19 (alteration in original) (internal quotation marks and citation omitted).

In this case, there was no such showing. To the contrary, the district court took immediate steps to remove the misbehaving juror and ensure that her information had not reached any jurors who would decide Defendant's case. We find no abuse of discretion nor any impairment of Defendant's right to a fair and unbiased jury. *Id.* ¶ 1 (observing that the manner of handling jury misconduct is left to the sound discretion of the trial judge). We thus reject Defendant's claim of error as a result of the events surrounding former juror Romero's activities and communications.

F. Defendant Has Not Established Ineffective Assistance of Counsel

Defendant claims he was denied effective assistance of counsel because his attorney (1) failed to object to the flawed felony murder jury instructions, (2) failed to request a mistrial due to the allegedly biased juror, and (3) may have been ineffective as a result of counsel's suspected cocaine use. We have granted full relief on the merits of the jury instruction issue as a matter of

fundamental error and have also determined that there was no error in the district court's resolution of the potential juror bias issue. The record before us is insufficient for us to address on direct appeal whether there is any merit in Defendant's remaining ineffective assistance claim. *See State v. Arrendondo*, 2012-NMSC-013, ¶ 44, 278 P.3d 517 (declining to review an ineffective assistance claim on direct appeal, without prejudice to a defendant's right to make an adequate record and seek relief in the context of a postconviction habeas corpus proceeding).

III. CONCLUSION

We vacate Defendant's conviction for felony murder of Diego Delgado and hold that he cannot be again placed in jeopardy for that offense. We reinstate Defendant's previously vacated conviction for shooting at a motor vehicle and causing great bodily harm to Mr. Delgado. Because it would constitute double jeopardy to use the same shooting of the same victim to also punish Defendant for homicide, we hold that the manslaughter conviction, the offense with the lesser penalty, cannot be reinstated. We reject Defendant's remaining claims of error and remand to the district court for entry of an amended judgment and sentence in conformity with this Opinion.

IT IS SO ORDERED.

CHARLES W. DANIELS, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

BARBARA J. VIGIL, Justice

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-068

Filing Date: April 30, 2013

Docket No. 31,475

HILLREY BEGGS, MELVINA LANCASTER CROCKETT, JOSE M. GUTIERREZ, ARLY V. HAMNER, MIGUEL S. LUCERO, CURTIS WAGNER, GARY WATKINS, and JIM WOOD,

Plaintiffs-Appellants,

v.

THE CITY OF PORTALES, a municipal corporation,

Defendant-Appellee.

Eric D. Dixon
Portales, NM

for Appellants

Hinkle, Hensley, Shanor & Martin L.L.P.
Richard E. Olson
Rebecca Nichols Johnson
Roswell, NM

for Appellee

OPINION

FRY, Judge.

The opinion originally filed in this case on April 2, 2013, is withdrawn, and this Opinion is filed in its place. Defendant's motion for rehearing is denied.

Plaintiffs, retired employees of the City of Portales (the City), brought suit against the City seeking to recover damages for reduced, and eventually terminated, health insurance reimbursement payments. Plaintiffs appeal the district court's order granting summary judgment on the basis that Plaintiffs' claims were barred by the applicable statute of limitations. The district court concluded that Plaintiffs' claims began to accrue in 2001 when the City stopped offering Plaintiffs health insurance coverage under the City's group plan and stopped reimbursing Plaintiffs for seventy-five percent of their health insurance premiums. Plaintiffs argue on appeal that the statute of limitations did not begin to accrue until the City completely terminated their health insurance reimbursement payments in 2005. Alternatively, Plaintiffs argue that the City should be estopped from asserting the statute of limitations as a defense due to its representations upon which Plaintiffs relied. We affirm the district court's ruling insofar as it relates to the City's alleged agreements (1) to keep Plaintiffs on the City's own health insurance plan, and (2) to reimburse Plaintiffs seventy-five percent of their health insurance premiums. We reverse to the extent that Plaintiffs claim entitlement to reimbursement amounts lower than seventy-five percent, which claim would not have begun to accrue until the City completely terminated the reimbursement payments in 2005.

BACKGROUND

This is the second appeal in this case. In *Beggs v. City of Portales*, 2009-NMSC-023, ¶ 22, 146 N.M. 372, 210 P.3d 798, our Supreme Court held that the district court improperly granted summary judgment to the City because there were genuine issues of material fact as to whether contractual rights existed between the City and Plaintiffs that would entitle Plaintiffs to receive reimbursement payments from the City for their health insurance premiums. Following the Supreme Court's decision, this case was remanded to the district court, had a brief interlude in federal court, and was eventually re-filed in

state district court. The City then filed a motion for partial summary judgment against the eight Plaintiffs who retired before 2002, arguing that the three-year statute of limitations under NMSA 1978, Section 37-1-24 (2011), barred their claims. The district court agreed and granted the City's motion for summary judgment. Plaintiffs referenced in this Opinion are the eight pre-2002 retirees whose claims were dismissed by the district court. The following are the facts relevant to the present appeal.

In October 1994, the City adopted a new personnel policy manual for the City's employees. The portion of the manual covering retiree health care insurance, Section 629, stated:

> The City of Portales shall offer employees upon their retirement the option of continuing their group health and life insurance coverage through the City's group plan, provided they are enrolled in the group health plan at least one year prior to retirement. The cost of the insurance for the retiree shall be the same as the cost for regular employees. If the City is paying [seventy-five percent] of the premium for employees, the City shall pay [seventy-five percent] of the premium for the retiree and shall be budgeted out of the department from which the employee retires. Retirees shall be responsible for paying their portion of the premium on a monthly, timely basis, in order to avoid the lapse of their policy coverage.
>
> Conditions of the policy coverage shall apply in accordance with the retiree's age and circumstances on an individual basis.

Section 629 was retained in its entirety when the 1994 personnel policy was revised in 1997. Three Plaintiffs retired while the 1994 policy was still in effect. The remaining five retired after the 1997 revision. Seven of the eight Plaintiffs chose, pursuant to Section 629, to continue coverage under the City's group plan following retirement, and the City initially paid seventy-five percent of their health insurance premiums while Plaintiffs were covered under the City's group plan. The remaining retiree, Arly Hamner, retired August 31, 2001. While it is clear that Hamner was covered under the City's group plan as an active employee, it appears from the record that Hamner did not continue coverage under the City's group plan upon retirement.

On July 18, 2000, the City adopted Ordinance No. 624 in which the City opted to be included in coverage under the New Mexico Retiree Health Care Act (NMRHCA), effective January 1, 2001, pursuant to NMSA 1978, Sections 10-7C-1 to -19 (1990) (as amended through 2009). The city council noted in its July 11, 2000, meeting that the cost of insuring the retirees had doubled in the past year and "ha[d] the potential to break the [C]ity." Therefore, the City viewed opting into the New Mexico Retiree Health Care Authority's (the Authority's) system as an "alternative for the [C]ity to help its retirees with insurance." Subsequently, the City adopted Portales, N.M., Res. 00-01-12 (2000) (the Resolution), which stated both that retirees would be required to enroll for insurance coverage administered by the Authority and that the City would contribute to the retirees' premiums "at the same amount it is currently participating."

In a letter dated November 21, 2000, the Authority notified Plaintiffs that their health insurance coverage through the City would terminate effective December 31, 2000, that Plaintiffs had the option of receiving coverage under the Authority, and that the Authority would subsidize a portion of Plaintiffs' monthly health insurance premiums. Plaintiffs also received a letter from the city clerk stating that the City had opted into the NMRHCA and that the City "intends to pay toward premiums for those . . . retirees already in the group health care plan." All Plaintiffs who had chosen to continue coverage under the City's group plan after retirement chose to transfer health insurance coverage to the new plan offered by the Authority.

Coverage under the Authority's plan began on January 1, 2001, and the City began reimbursing Plaintiffs for portions of their Authority health insurance premiums. It is undisputed, however, that none of Plaintiffs received a seventy-five percent reimbursement from the City for their Authority premium billing. Instead, the City reimbursed Plaintiffs between fifty and fifty-six percent of their health insurance premiums. Despite the City's lower reimbursement amounts, Plaintiffs continued to pay nearly the same amount for their portion of monthly premium payments due to the subsidization of the premiums by the Authority.

On May 3, 2005, the City adopted Ordinance 654, which replaced the 1997 personnel policy with a new personnel policy that omitted Section 629. At about this time, the City began discussing whether it was obligated to continue reimbursing Plaintiffs for their Authority health insurance premiums, although the City did continue to reimburse Plaintiffs after Section 629 was omitted from the new personnel policy. On August 16, 2005, the city council voted against adopting a resolution stating that its adoption of the Resolution had, in effect, cancelled or rescinded any obligations by the City to the retirees previously offered by Section 629. However, the next day, August 17, 2005, the city manager sent Plaintiffs a letter terminating the City's health insurance reimbursement payments to Plaintiffs. The letter stated:

> In 2001, the City of Portales became a participating entity in the New Mexico Retiree Healthcare Act as approved by Ordinance 624. Based on legal advice provided by our [c]ity [a]ttorneys, the City of Portales can no longer continue to reimburse you for a portion of the premium billing which you receive from New Mexico Retiree Healthcare for your coverage.

Plaintiffs brought suit on October 11, 2005, for declaratory judgment and breach of contract. Although Plaintiffs later amended their claims, the parties agree that the October, 11, 2005, filing date is the relevant date for purposes of the City's defense under the statute of limitations. Furthermore, for the purpose of our analysis, we will assume without deciding that the City's offer of continued coverage under its group plan and Plaintiffs' initial decision, pursuant to Section 629, to continue receiving health insurance coverage upon retirement created an agreement between Plaintiffs and the City consistent with Plaintiffs' allegations.

STANDARD OF REVIEW

We review a grant of summary judgment de novo. *Farmington Police Officers Ass'n v. City of Farmington*, 2006-NMCA-077, ¶ 13, 139 N.M. 750, 137 P.3d

1204. The standard for summary judgment in New Mexico is well established:

> 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. Where reasonable minds will not differ as to an issue of material fact, the court may properly grant summary judgment. All reasonable inferences are construed in favor of the non-moving party.

Montgomery v. Lomos Altos, Inc., 2007-NMSC-002, ¶ 16, 141 N.M. 21, 150 P.3d 971 (internal quotation marks and citation omitted).

DISCUSSION

The parties agree that the controlling statute of limitations for Plaintiffs' claims against the City is three years. Section 37-1-24 provides:

> No suit, action or proceeding at law or equity for the recovery of judgment upon, or the enforcement or collection of, any sum of money claimed due from any city, town or village . . . arising out of or founded upon any ordinance, trust relation or contract . . . shall be commenced except within three years next after the date of the act of omission or commission giving rise to the cause of action, suit or proceeding.

The parties disagree, however, as to when the statute of limitations actually began to accrue. "In a breach of contract action, the statute of limitations begins to run from the time of the breach." *Smith v. Galio*, 95 N.M. 4, 6, 617 P.2d 1325, 1327 (Ct. App. 1980).

Although the existence and terms of any alleged agreement between the City and Plaintiffs have yet to be determined by the fact finder, Plaintiffs' claims are wholly grounded in Section 629. Viewing Section 629 in the light most favorable to Plaintiffs, *see Montgomery*, 2007-NMSC-002, ¶ 16, it arguably contained two material obligations: (1) that the City would provide continuing health insurance coverage to retiring employees under its group plan; and (2) that the City, according to Plaintiffs' reading of Section 629, would reimburse Plaintiffs seventy-five percent of their health insurance premiums. As explained below, we agree with the district court that the statute of limitations bars Plaintiffs' causes of action to enforce these alleged obligations. However, because issues of fact remain as to the precise terms of an alleged agreement by the City to contribute toward Plaintiffs' health insurance premiums, *see Beggs*, 2009-NMSC-023, ¶ 22, we reverse the district court's ruling to the extent that Plaintiffs allege an agreement to reimburse for health insurance premiums at a rate lower than seventy-five percent.

The City's Alleged Obligation to Provide Continuing Coverage Under the City's Group Plan

Plaintiffs' complaint petitioned the district court to "declare the rights of . . . Plaintiffs to receive [retiree] health insurance from the City of Portales pursuant to [Section] 629." Plaintiffs also alleged that they had "an express agreement with the City of Portales to provide retiree health insurance benefits pursuant to the Personnel Policy Section 629." Plaintiffs do not dispute that: (1) the terms of Section 629 required the City to "offer employees upon their retirement the option of

continuing their group health and life insurance coverage through the City's group plan, provided [the retiring employee was] enrolled in the group health plan at least one year prior to retirement"; (2) the City adopted the Resolution on December 19, 2000, requiring any retiree that had elected to continue coverage under the City's group plan pursuant to Section 629 to transfer health insurance coverage to the Authority's plan; and (3) Plaintiffs previously covered under the City's group plan transferred their health insurance coverage to the Authority's plan effective January 1, 2001. Thus, the undisputed material facts establish that, contrary to Section 629, the City stopped offering or providing health insurance coverage under its group plan to retirees effective January 1, 2001. This alleged breach occurred more than three years before Plaintiffs filed suit.

Plaintiffs argue, however, that the alleged agreement was not breached until August 17, 2005, because that is the date Plaintiffs received notice that the City intended to terminate its obligations under Section 629. As an initial matter, we note that the letter received by Plaintiffs makes no mention of Section 629. Rather, the letter references the transfer of retiree health insurance coverage to the Authority and states that the City will no longer reimburse retirees for a portion of the premiums billed by the Authority. Thus, this letter does not contradict the undisputed fact that the City ceased providing coverage under its own plan on January 1, 2001.

Furthermore, we reject Plaintiffs' argument that the transfer of health insurance coverage to the Authority was "just a change in health insurance providers" such that Section 629 still governed the obligations of the parties after the transfer. The material promise of Section 629 was not an offer of health insurance coverage in general. Instead, it was an offer of continued health insurance coverage through the City's group plan. On November 21, 2000, the retirees were notified, "If you currently have coverage through the City of Portales, it will terminate December 31, 2000." Therefore, the City breached its alleged obligation under Section 629 to provide insurance coverage to Plaintiffs under the City's group plan when it stopped offering or providing this coverage effective January 1, 2001. *See Famiglietta v. Ivie-Miller Enters., Inc.*, 1998-NMCA-155, ¶ 17, 126 N.M. 69, 966 P.2d 777 (describing a material breach as the "failure to do something that is so fundamental to the contract that the failure to perform . . . defeats an essential purpose of the contract" (internal quotation marks and citation omitted)). To the extent Plaintiffs allege this breach as a basis for their claims, the statute of limitations bars those claims.

The City's Obligation to Reimburse Plaintiffs Seventy-Five Percent of Their Health Insurance Premiums

Plaintiffs further alleged that the agreement between them and the City obligated the City to reimburse them for seventy-five percent of their premiums. Again, Plaintiffs do not dispute that the City provided reimbursement payments of less than seventy-five percent after Plaintiffs were transferred to the Authority's plan as of January 1, 2001. Therefore, the three-year statute of limitations bars their claim of entitlement to seventy-five percent reimbursement.

Plaintiffs attempt to dispute the effect of these lower reimbursement percentages. They argue that since the premiums were

subsidized by the Authority and were therefore lower than the City's group plan premiums, the "net effect" of the City's lower reimbursement percentages when combined with the Authority's subsidization resulted in the percentages covered for Plaintiffs remaining constant after the transfer of coverage. While this may be true, this argument is contrary to Plaintiffs' allegations and theories of recovery. Plaintiffs maintained that the City was obligated to reimburse them seventy-five percent of their premium billing, even for the Authority's premiums. Consistent with this allegation, Plaintiffs have admitted on multiple occasions that after the transfer to the Authority, they were no longer receiving the seventy-five percent reimbursement payments that they allege they were entitled to. Thus, regardless of the net effect, Plaintiffs' dispute regarding the effect of the City's reduced premium reimbursements does not create a genuine issue of material fact as to when the City stopped complying with its alleged obligations to reimburse Plaintiffs seventy-five percent of their premium billing. *See Clough v. Adventist Health Sys., Inc.*, 108 N.M. 801, 803, 780 P.2d 627, 629 (1989) ("[The] mere argument or bare contentions of the existence of a material issue of fact is insufficient."). Therefore, if Plaintiffs wished to challenge their receipt of reimbursement percentages below seventy-five percent, this challenge should have occurred within three years of the premium reimbursement reduction in 2001.

[redacted] However, Plaintiffs may still be entitled to recover for the City's breach of an alleged agreement to reimburse them for *some* amount of their premiums. To the extent that the City argues that Plaintiffs are limited to their allegations regarding an entitlement to a seventy-five percent reimbursement rate, we disagree. As the Supreme Court recognized in the earlier appeal, there are genuine issues of material fact as to the precise terms of the agreement between Plaintiffs and the City. *See Beggs*, 2009-NMSC-023, ¶¶ 21-22. The fact finder could reasonably determine that the City's representations to Plaintiffs that it would contribute toward Plaintiffs' Authority premiums, albeit at a percentage amount less than seventy-five percent, were made pursuant to its alleged obligations under Section 629. For instance, the City's notification letter to Plaintiffs regarding the transfer of health insurance coverage to the Authority expressly stated that the City intended "to pay toward premiums for those . . . retirees already in the group health care plan." This statement was consistent with discussions by the city council leading up to the transfer, the language of the Resolution, and alleged statements by the city manager to Plaintiffs prior to the transfer that the City would contribute toward their Authority premiums at a reduced percentage. It is undisputed that these reduced reimbursement payments were not terminated until a few months before Plaintiffs filed suit and, therefore, Plaintiffs' claims based on entitlement to continuation of these payments are not barred by the statute of limitations.

[redacted] In remanding on this issue, we emphasize that Plaintiffs are not entitled to seek damages for the difference between the fifty to fifty-six percent reimbursement payments they were receiving and the seventy-five percent reimbursement payments they allege they are entitled to. Plaintiffs forfeited any challenge to the reduction in the City's seventy-five percent contributions by failing to file suit before the statute of limitations ran. But, as stated above, there are genuine issues of material fact as to whether the City obligated itself to continue reimbursing Plaintiffs for a lesser percentage of their Authority premiums consistent with the

amounts the City had previously contributed. This claim could not have begun to accrue until these reimbursement payments were terminated.

Plaintiffs' Allegations Constitute a Single Wrong With Continuing Effects

Plaintiffs argue that even if the termination of coverage under the City's group plan and reimbursement payments of less than seventy-five percent could be construed as a breach of contract, each allegedly deficient reimbursement payment constituted an individual breach of contract and the statute of limitations began accruing against each payment when it became due. *See Pierce v. Metro. Life Ins. Co.*, 307 F. Supp. 2d 325, 328 (D. N.H. 2004) (stating the "universal rule that when an obligation is to be paid in installments the statute of limitations runs only against each installment as it becomes due" (internal quotation marks and citation omitted)). This "continuing violation" theory has found support in the context of claims regarding deficient retirement benefit payments. *See Adams v. City of Detroit*, 591 N.W.2d 67, 68 (Mich. Ct. App. 1998) (applying continuing violation theory to hold that the plaintiffs were entitled to proceed against the defendants for benefits allegedly withheld during the six years prior to the filing of the cause of action); *Harris v. City of Allen Park*, 483 N.W.2d 434, 436 (Mich. Ct. App. 1992) ("Pension benefits are similar to installment contracts and the period of limitation runs from the date each installment is due. Therefore, every periodic payment made that is alleged to be less than the amount due [the] plaintiffs . . . constitutes a continuing breach of contract and the limitations period runs from the due date of each payment.").

Plaintiffs also refer us to *Plaatje v. Plaatje*, 95 N.M. 789, 626 P.2d 1286 (1981), as support for the proposition that the health insurance reimbursement payments should be considered "installment" payments such that a new breach of contract occurs upon each missed or deficient payment. In *Plaatje*, our Supreme Court held that the plaintiff was not barred by the statute of limitations from seeking to recover a portion of her ex-husband's military retirement benefits. *Id.* at 790-91, 626 P.2d at 1287-88. The plaintiff waited nearly five years after the divorce decree was entered to file suit seeking to establish her rights to the retirement benefits. *Id.* at 789-90, 626 P.2d at 1286-87. The Court concluded that the retirement benefits were a form of employee compensation earned during each month of employment and were received in the form of "monthly installments." *Id.* at 790-91, 626 P.2d at 1287-88. Therefore, "the statutory time limitations upon the plaintiff's right to sue for her portion of each installment commenc[ed] to run from the time each installment [became] due." *Id.*

We are not convinced that *Plaatje* controls in the present situation. *Plaatje* involved a division of community property pension payments, not an alleged breach of an employment contract for continued health insurance coverage upon retirement. Similarly, the plaintiff's interest in the retirement benefits in *Plaatje* was undisputed since the defendant's right to receive the benefits matured while the couple was still married. *Id.* at 789, 626 P.2d at 1286. That is not the case here where, even setting aside the statute of limitations, there is considerable dispute as to whether Plaintiffs were entitled to indefinite, continued health insurance coverage provided by the City pursuant to Section 629. *Cf. Brehm v. Sargent & Lundy*, 384 N.E.2d 55, 56 (Ill. App. Ct. 1978) ("[T]he stronger weight of authority has held, at least

where pensions funded by governmental bodies are involved, that an action to determine the existence of the right to a pension necessarily precedes and is distinct, as regards the commencement of the period of limitation, from an action to recover installments[.]").

Furthermore, it is not clear that the continuing violation theory has received such "universal" support as *Pierce* indicates. In fact, the rule has been criticized as undermining the purposes of the statute of limitations. *See Miller v. Fortis Benefits Ins. Co.*, 475 F.3d 516, 522 (3d Cir. 2007) (rejecting continuing violation theory on the basis that it would give rise to an indefinite limitations period); *Lang v. Aetna Life Ins. Co.*, 196 F.3d 1102, 1105 (10th Cir. 1999) ("Under [the] plaintiff's characterization [of her disability policy as an installment contract], her claim would have an indefinite lifespan. Such a result would undermine the overriding purpose of a statute of limitation[s]."). Still other courts have refused to apply it where the plaintiff's "claims are based on a single decision that results in lasting negative effects." *Novella v. Westchester Cnty.*, 661 F.3d 128, 146 (2d Cir. 2011) (internal quotation marks and citation omitted); *see Schultz v. Texaco Inc.*, 127 F. Supp. 2d 443, 447 (S.D.N.Y. 2001) ("[T]he mere fact that the effects of a single, wrongful act continue to be felt over a period of time does not render that single, wrongful act a 'continuing violation.' ").

This Court has previously rejected the continuing violation theory in the context of employment contracts where there has been a "single-wrong with continuing effects." *Tull v. City of Albuquerque*, 120 N.M. 829, 830, 907 P.2d 1010, 1011 (Ct. App. 1995) (internal quotation marks omitted). In *Tull*, the plaintiffs were transferred to supervisory positions and were therefore entitled to an increase in salary. *Id.* at 829, 907 P.2d at 1010. The plaintiffs filed suit seven years after their promotions, alleging that the defendant's failure to increase the plaintiffs' salaries in accordance with their expanded job duties was a breach of their employment contract. *Id.* Due to the seven-year lag between their promotion and the lawsuit, the plaintiffs argued that a new breach of contract occurred each time they received a paycheck that did not include the raise. *Id.* at 829-30, 907 P.2d at 1010-11. This Court held, however, that the continuing consequences of the breach, in the form of lower paychecks, had no effect on the statute of limitations where the initial failure to raise the plaintiffs' salaries constituted the actionable wrong. *Id.* at 830, 907 P.2d at 1011.

We agree with the district court's reliance on *Tull* in this case. Similar to the defendant's conduct in *Tull*, the City made an initial decision to stop complying with its alleged obligations under Section 629. This failure resulted in continuing consequences to Plaintiffs in the form of lower reimbursement payments once Plaintiffs transferred their health insurance coverage to the Authority. However, these continuing consequences do not affect the statute of limitations where the continued negative effects are based solely on the City's failure to comply with the promises Plaintiffs allege are contained in Section 629. *See Tull*, 120 N.M. at 832, 907 P.2d at 1013 ("Although [the] wrong has continuing consequences in the form of lower paychecks, the continuing effects do not extend the life of [the p]laintiffs' breach of contract cause of action, which is based solely on that initial refusal.").

Equitable Estoppel

Plaintiffs also argue that the City should be estopped from asserting a defense under the statute of limitations because of representations that Plaintiffs contend made them refrain from filing suit until after the statute of limitations deadline had expired. We note that this issue was raised for the first time in Plaintiffs' motion for reconsideration, which the district court denied. "We review the denial of a motion for reconsideration for an abuse of discretion." *Nance v. L.J. Dolloff Assocs., Inc.*, 2006-NMCA-012, ¶ 23, 138 N.M. 851, 126 P.3d 1215.

To the extent Plaintiffs' motion for reconsideration raised new matters that could have been raised during the summary judgment briefing but were not, such failure would provide a basis to affirm the district court's denial of the motion. *See id.* ¶ 26 (holding that there was no abuse of discretion in denying a motion for reconsideration on the basis of fraudulent concealment where the matter was raised for the first time in the motion for reconsideration). In addition, a close examination of the facts supporting Plaintiffs' claim for equitable estoppel leads us to conclude that the district court did not abuse its discretion in denying the motion for reconsideration.

Equitable estoppel may prevent a party from "asserting a statute-of-limitations defense if that party's conduct has caused the plaintiff to refrain from filing an action until after the limitations period has expired." *In re Adoption of Drummond*, 1997-NMCA-094, ¶ 13, 123 N.M. 727, 945 P.2d 457. A plaintiff claiming equitable estoppel must show, in part, that it relied upon concealed or falsely represented facts or representations in a way that prejudicially altered its position. *See Vill. of Angel Fire v. Bd. of Cnty. Comm'rs of Colfax Cnty.*, 2010-NMCA-038, ¶ 21, 148 N.M. 804, 242 P.3d 371.

Plaintiffs cite six representations by the City that they argue should prevent the City from relying on the statute of limitations. Four of these representations occurred in 2005, long after the statute of limitations had run on Plaintiffs' claims for breach of contract related to Section 629, and therefore they could not have caused Plaintiffs to refrain from filing suit to enforce those obligations. Plaintiffs additionally point to the July 11, 2000, minutes of the city council meeting characterizing the City's opting into the Authority's health insurance system as "an alternative for the [C]ity to help its retirees with insurance" and the city clerk's November 27, 2000, letter to Plaintiffs stating that "the City of Portales intends to pay toward premiums for those . . . retirees already in the group health care plan and will do so for those retiring before July 1, 2003." We fail to see how these representations were misleading or induced reliance by Plaintiffs causing them to refrain from filing suit. *See Molinar v. City of Carlsbad*, 105 N.M. 628, 631, 735 P.2d 1134, 1137 (1987). By opting into the Authority's health care plan, the City did provide an alternative avenue for retiree health care insurance. Furthermore, as the city clerk's letter stated, the City then began paying toward Plaintiffs' premiums after the transfer, just not at the percentage desired by Plaintiffs. Plaintiffs were clearly aware of that fact before the transfer and once the City actually started making reimbursement payments in amounts less than seventy-five percent. Therefore, the district court properly acted within its discretion in denying Plaintiffs' motion for reconsideration.

Because we partially reverse the

district court, we briefly address the City's contentions that the Bateman Act and the doctrine of ultra vires provide additional grounds for affirmance of the district court's grant of partial summary judgment based on the statute of limitations. Both of these defenses were the subject of separate motions for summary judgment by the City directed toward all plaintiffs, not just the eight before us. Both motions were also separately denied by the district court.

It is within this Court's discretion to affirm the district court under the "right for any reason" doctrine, but we will not exercise such discretion if it would result in unfairness to the appellant. *See Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154. In this case, it would not be appropriate to affirm the district court against these eight plaintiffs on the basis of defenses raised in denied motions for summary judgment directed toward all plaintiffs. Furthermore, because the Supreme Court in the prior appeal held that there were issues of fact as to the exact terms of an alleged agreement between the City and Plaintiffs, the subject matter of the City's additional defenses is more properly addressed in conjunction with a determination of whether a contract actually existed. Therefore, we decline the City's invitation to revisit the district court's ruling on these issues.

CONCLUSION

We affirm summary judgment to the extent it determined that Plaintiffs' claims regarding alleged obligations by the City pursuant to Section 629—(1) to continue coverage under the City's own plan, and (2) to reimburse Plaintiffs seventy-five percent of their health insurance premiums—were barred by the statute of limitations. However, we reverse summary judgment and remand Plaintiffs' claims to the extent they allege that the City was obliged to reimburse Plaintiffs for their Authority premiums at amounts less than seventy-five percent.

IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge

TIMOTHY L. GARCIA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-069

Filing Date: May 3, 2013

Docket No. 31,626

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

BRETT ORR,

Defendant-Appellant.

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Carlos Ruiz de la Torre, Assistant Appellate Defender
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for Appellant

OPINION

WECHSLER, Judge.

Defendant Brett Orr appeals his conviction for failure to register as a sex offender in violation of NMSA 1978, Section 29-11A-4 (2005). The sole issue on appeal is whether Defendant's conviction for "taking indecent liberties with children" in North Carolina is equivalent to any of the twelve enumerated offenses under the New Mexico Sex Offender Registration and Notification Act (SORNA), NMSA 1978, §§ 29-11A-1 to -10 (1995, as amended through 2007). Relying upon *State v. Hall* (*Hall II*), 2013-NMSC-001, 294 P.3d 1235, we hold that an out-of-state offense is "equivalent" to a sex offense in New Mexico if the defendant's actual conduct supporting his or her out-of-state conviction would have constituted any of the twelve sex offenses under SORNA. We further conclude that the record is insufficient to determine the factual basis supporting Defendant's conviction in North Carolina. Accordingly, we remand to the district court for further proceedings.

BACKGROUND

Defendant was convicted of taking indecent liberties with children in North Carolina, which required him to register as a sex offender for life in North Carolina. Subsequently, Defendant moved to New Mexico. He registered as a sex offender in San Juan County, New Mexico on May 12, 2011. Shortly thereafter, he relocated to Cibola County, New Mexico and failed to notify and register with that county's sheriff's offices. As a result, Defendant was charged with failure to register as a sex offender under SORNA.

Defendant entered into a plea agreement on August 22, 2011 and orally reserved his right to withdraw the plea should legal research reveal that his conviction in North Carolina is not equivalent to a sex offense under SORNA such that it did not require him to register as a sex offender in New Mexico. On August 25, 2011, Defendant filed a motion to withdraw his plea and dismiss the charge. The State filed a response and argued that based on Defendant's alleged conduct in North Carolina, he could have been charged

with a number of sex offenses in New Mexico. The district court did not make any formal findings as to the factual basis supporting Defendant's underlying conviction.

After comparing the elements of the North Carolina offense of taking indecent liberties with children with the twelve enumerated offenses under SORNA, the district court concluded that there is no one-to-one correlation between North Carolina's sex offense and a single New Mexico sex offense. Nevertheless, the district court concluded that taking indecent liberties with children encompasses five sex offenses in New Mexico: (1) enticement of a child, contrary to NMSA 1978, Section 30-9-1 (1963); (2) solicitation to commit criminal sexual contact of a minor (CSCM), contrary to NMSA 1978, Section 30-9-13 (2003) and Section 30-28-3 (1979); (3) attempted CSCM, contrary to Section 30-9-13 and NMSA1978, Section 30-28-1 (1963); (4) attempted aggravated indecent exposure, contrary to NMSA 1978, Section 30-9-14.3 (1996) and Section 30-28-1; and (5) attempted sexual exploitation of children, contrary to NMSA 1978, Section 30-6A-3 (2007) and Section 30-28-1. Consequently, the district court denied Defendant's motion to withdraw his plea and dismiss the charge.

OBLIGATION TO REGISTER UNDER SORNA

We must determine whether the North Carolina crime of taking indecent liberties with children is equivalent to any sex offense in New Mexico, thereby requiring Defendant to register as a sex offender in New Mexico under SORNA. "Statutory interpretation is an issue of law, which we review de novo." *State v. Duhon*, 2005-NMCA-120, ¶ 10, 138 N.M. 466, 122 P.3d 50.

SORNA requires sex offenders residing in New Mexico to register with their local county sheriff. *See* § 29-11A-4(A). A "sex offender" is an individual convicted of a "sex offense." *See* § 29-11A-3(D). " 'Sex offense' is defined as any of twelve enumerated New Mexico offenses 'or their equivalents in any other jurisdiction.' " *Hall II*, 2013-NMSC-001, ¶ 6 (quoting Section 29-11A-3(E)).

In *State v. Hall* (*Hall I*), 2011-NMCA-047, 149 N.M. 546, 252 P.3d 770, *rev'd by* 2013-NMSC-001, the defendant was convicted of annoying or molesting a child in California, which required him to register as a sex offender in California. *Hall I*, 2011-NMCA-047, ¶ 2. He subsequently moved to New Mexico, did not register as a sex offender, and was charged with failure to register as a sex offender. *Id.* The defendant moved to dismiss the charge and argued that the "annoying or molesting" statute in California was not equivalent to any of the sex offenses in New Mexico. *Id.* The district court denied the defendant's motion. *Id.*

On appeal, the state in *Hall I* argued that annoying or molesting a child is equivalent to CSCM in New Mexico. *Id.* ¶ 5. Noting that the Legislature did not define "equivalent," we compared the elements of the offenses to determine whether they were equivalent. *Id.* ¶¶ 5-8; *see also State v. Lewis*, 2008-NMCA-070, ¶¶ 22-43, 144 N.M. 156, 184 P.3d 1050 (holding that the defendant's Colorado conviction for driving while ability impaired was "equivalent" to a New Mexico conviction for driving while under the influence of intoxicating liquor or drugs because the elements of both statutes were substantially identical in nature and definition when compared to each other). In *Hall I*, we held that the defendant's California conviction was not equivalent to New Mexico's CSCM

because our CSCM statute requires touching or application of force to the victim, whereas California's annoying or molesting statute does not. *Hall I,* 2011-NMCA-047, ¶ 8. The state petitioned our Supreme Court for a writ of certiorari, which was granted. *State v. Hall,* 2011-NMCERT-005, 150 N.M. 667, 265 P.3d 718.

{9} During the district court proceedings and the initial appellate briefing in the present case, *Hall I* was the applicable law in New Mexico. Therefore, the parties and the district court relied upon *Hall I,* respectively, in making their arguments and reaching its conclusion. The day after the State filed its answer brief, our New Mexico Supreme Court filed *Hall II,* 2013-NMSC-001, which reversed *Hall I,* 2011-NMCA-047. The Supreme Court held that "courts must look beyond the elements of the [out-of-state] conviction to the defendant's actual conduct" to determine equivalence. *Hall II,* 2013-NMSC-001, ¶ 18. In doing so, the Court clarified that a comparison of the elements is still relevant.

> When the elements of the out-of-state sex offense are precisely the same elements of a New Mexico sex offense, the inquiry is at an end. However, even when the elements are dissimilar, courts should consider the defendant's underlying conduct to determine whether the defendant's conduct would have required registration in New Mexico as a sex offender.

Id.

In this case, Defendant was convicted of taking indecent liberties with children contrary to N.C. Gen. Stat., Section 14-202.1 (1994), which states as follows:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.
>
> (b) Taking indecent liberties with children is punishable as a Class F felony.

We agree with the district court that the elements of taking indecent liberties with children do not correspond exactly with the elements of any of the sex offenses under SORNA; nevertheless, this broad offense encompasses a number of sex offenses in New Mexico. This conclusion, however, does not complete our analysis. In accordance with *Hall II,* we must consider Defendant's underlying conduct to determine whether that conduct would have required him to register in New Mexico as a sex offender. Unfortunately, the record before us is insufficient to make this determination.

The State and Defendant acknowledge that the district court did not make any formal findings as to the underlying

conviction. The State asks this Court to remand this case to the district court for an evidentiary hearing. Defendant argues that because the record does not contain sufficient facts as to the underlying conviction, the district court "was limited to the statutory elements comparison . . . under which there was no equivalency and Defendant was not required to register in New Mexico."

Our Supreme Court in *Hall II* recognized that "in some cases, such as a guilty plea in which there was no allocution, there will be no factual findings for a New Mexico court to review." 2013-NMSC-001, ¶ 24. In those cases, "the court will be limited to comparing the elements of the foreign sex offense to those of the enumerated offenses under SORNA." *Id.* This case is not such a case.

Although we do not have a sufficient record on appeal, the State has indicated that during the pendency of this appeal, it obtained several documents from the district attorney's office and court in North Carolina, including an investigation report, grand jury indictment, transcript of plea, prior convictions for sentencing, and judgment and commitment, to understand the underlying facts and procedural posture of Defendant's conviction in North Carolina. *See Hall II*, 2013-NMSC-001, ¶ 22 ("When a defendant enters a plea of guilty or nolo contendere, the charging document, plea agreement, or transcript of the plea hearing should establish the factual basis for the plea."). Accordingly, we remand this case to the district court for further proceedings, with leave for Defendant to withdraw his guilty plea.

OTHER ISSUES RAISED BY BRIEFS

The parties raise other issues in their briefs on appeal that we address summarily. Prior to *Hall II*, Defendant argued that, under the rule of lenity, this Court must construe Sections 29-11A-3 and 29-11A-4 in his favor if we determine that they are ambiguous. However, Defendant does not describe any ambiguity in Sections 29-11A-3 and 29-11A-4 as they relate to the issues in this case. *See State v. Davis*, 2003-NMSC-022, ¶ 14, 134 N.M. 172, 74 P.3d 1064 ("The rule of lenity counsels that criminal statutes should be interpreted in a defendant's favor when insurmountable ambiguity persists regarding the intended scope of a criminal statute."). Absent an insurmountable ambiguity, the rule of lenity does not apply. *See Hall II*, 2013-NMSC-001, ¶¶ 9-19 (discussing SORNA's history and purpose, and rejecting the defendant's argument that the rule of lenity should apply).

Also prior to *Hall II*, the State argued that we must recognize North Carolina's sex offense as a sex offense in New Mexico under the principles of comity and full faith and credit, because a conviction under SORNA is "a conviction in *any* court of competent jurisdiction." Section 29-11A-3(A) (emphasis added). Our Supreme Court rejected a similar argument in *Hall II*. *See Hall II*, 2013-NMSC-001, ¶ 29.

In his reply brief, Defendant argues that the actual conduct approach announced by the Supreme Court in *Hall II* renders the failure to register statute void for vagueness. Because Defendant raises this issue for the first time in this case in his reply brief, the issue is not properly before us for review. *See State v. Castillo-Sanchez*, 1999-NMCA-085, ¶ 20, 127 N.M. 540, 984 P.2d 787 ("We will not consider arguments raised for the first time in a reply brief."). Defendant may assert this argument on remand in the district court.

CONCLUSION

For the foregoing reasons, we remand to the district court for further proceedings consistent with *Hall II* and this opinion, with leave for Defendant to withdraw his guilty plea.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

TIMOTHY L. GARCIA, Judge

Certiorari Granted, June 14, 2013, No. 34,150

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-070

Filing Date: March 13, 2013

Docket No. 30,447 consolidated with No. 31,491

AGALELEI KIMBRELL, also known as LILY KIMBRELL, by and through her next friend and parent W. DAVID KIMBRELL,

Plaintiff-Appellant,

v.

LORRAINE KIMBRELL and KATHRIN M. KINZER-ELLINGTON,

Defendants-Appellees.

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Guardian ad Litem

OPINION

HANISEE, Judge.

David Kimbrell's (Father) consolidated appeals arise from divorce and child custody proceedings that began in May 2006 between Father and Lorraine Kimbrell (Mother). Father first appeals the district court's dismissal of a separate tort action brought by Father on behalf of his eldest child (Daughter) against both Mother and the Guardian Ad Litem (the GAL). Father also appeals the district court's order requiring him to remove a document discussing the GAL from his website and enjoining him from republishing the material. We affirm in part and reverse in part the district court's dismissal of the tort action, and reverse and remand the district court's order with respect to the website for findings regarding defamation.

I. BACKGROUND

At the time divorce proceedings commenced, Mother and Father had four children (the Children), including Daughter. A year into the divorce case, at Father's request, the district court appointed the GAL to represent the interests of the Children. Shortly thereafter, the GAL issued her report and recommendations in which she advised reinstating contact between Mother and the Children, as well as placing one of the Children with Mother. With some modifications, the court largely adopted the GAL's recommendations. Thereafter, Father became displeased with the GAL and the court's order. During the following three years of highly contentious custody proceedings, Father made five attempts to have the GAL removed. Each request was denied by the district court. Father also filed two lawsuits against the GAL, one in federal court in June 2009, and another shortly thereafter in state district court. In addition, Father filed complaints against the GAL with the Disciplinary Board of the New Mexico Supreme Court. Father's lawsuits were subsequently dismissed. On appeal, we

evaluate the dismissal of the latter lawsuit and proceedings related to Father's internet publication of material related to his case.[1]

The lawsuit at issue was brought by Father on behalf of Daughter as her next friend and parent against both Mother and the GAL, naming the GAL in her capacity as guardian ad litem. The complaint alleged that Mother battered, assaulted, and intentionally inflicted emotional distress on and committed prima facie tort against Daughter and that the GAL intentionally inflicted emotional distress on, breached her fiduciary duty to, invaded the privacy of, and committed prima facie tort against Daughter. Mother and the GAL moved to dismiss the suit, arguing that Father lacked standing to sue on behalf of Daughter and that the GAL was immune from suit. The district court granted the motions to dismiss, concluding that Father lacked standing to sue Mother and the GAL. Father now appeals from this dismissal.

After bringing the state lawsuit, Father filed his fifth and final motion to remove the GAL in district court in January 2010. In March 2010, Father, through his attorney, filed his first disciplinary complaint against the GAL with the Disciplinary Board of the New Mexico Supreme Court, alleging that the GAL had engaged in unprofessional conduct. The Disciplinary Board conducted an investigation and determined that the GAL had not engaged in unprofessional conduct and that the complaint was without merit. In May 2010, the district court denied Father's fifth motion to remove the GAL. In its written order of denial, the court found that (1) Father's motion to remove the GAL raised issues previously addressed by the court; (2) the motion was an attack on the GAL's ability to represent the Children; (3) Father inappropriately viewed the GAL as an opponent; (4) Father's continuing attacks on the GAL were becoming problematic for the administration of justice; and (5) Father's continuing attacks on the GAL had become abusive and unfair. The district court ordered both Father and his attorney to refrain from filing any complaint, motion, or other "device" pertaining to the GAL without leave of the court.

In July 2010, Father sought permission to file yet another disciplinary complaint against the GAL. Rather than directly denying Father's motion, the district court entered a preliminary injunction that again reprimanded Father for "improper" behavior and additionally prohibited Father from communicating with the media, the Department of Justice, or the Children's biological parents regarding his complaints about the GAL. Father then circumvented the district court's initial order, which prohibited Father from filing any pleading or device against the GAL, by forming and acting through an organization he named "Stop Court Abuse of Children." Through the organization, Father filed a new disciplinary complaint, without leave of the court, against the GAL and her former law partner and subsequently published the new complaint on a website he created called StopCourtAbuseOfChildren.com. His organization's website solely discussed the custody case at issue in this appeal and displayed copies of documents related to the custody proceeding, including: the newest Disciplinary Board complaint against the

[1] We note that this is not the first appeal in this contentious divorce case. *See Kimbrell v. Kimbrell*, No. 29,752, slip op. (N.M. Ct. App. Mar. 31, 2010) (discussing Father's appeal of the district court's rulings on spousal support, child support, termination of joint custody, procedural matters, and contempt sanctions).

GAL; an emergency motion for an ex parte order to modify periods of responsibility for one of the Children, to which was appended a letter written by that child; and the GAL's motion to continue residential psychiatric treatment of Daughter.

On March 28, 2011, the GAL requested that the district court issue a permanent injunction requiring Father to remove the material from the internet and prohibiting Father from publishing any information about the GAL in the future. At the June 22, 2011, hearing on her motion, the GAL argued that Father's publication was defamatory and therefore constituted speech that could be permissibly restrained by the district court. In response, Father contended that the district court could not issue the requested injunction since it no longer had subject matter jurisdiction over the case under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA). By then, Mother and three of the Children had relocated to Canada, and Mother had agreed in a settlement with Father that the district court no longer had jurisdiction over the custody proceedings. At the hearing on the GAL's motion, Father also argued that the GAL's requested injunction would violate his right to freedom of speech.

On July 1, 2011, the court issued an order (the Internet Order) compelling Father to remove the information he had posted about the GAL and her former law partner from the internet because it was "designed to harass and intimidate the [GAL] in the exercise of her duties." The court also stated that Father "is enjoined from re-publishing these materials or any part thereof about the [GAL], her firm and former law partner in the future." Father's second appeal challenges the legality of the district court's Internet Order.

We separately note that in May 2011, after filing briefs in the appeal related to Father's standing in the personal injury action, Father and Mother entered into a financial settlement agreement (the Agreement) related to their divorce. Within the Agreement, Father released Mother from all liability during the period of time that encompassed the personal injury action at issue in this appeal. In exchange, Mother affirmed that jurisdiction over the parties' child custody matters no longer existed in New Mexico. The Agreement, however, did not specifically release the GAL. After the Agreement was executed, Mother and the GAL submitted a joint motion to dismiss Father's first appeal as moot based on the Agreement. Father opposed the motion. In this consolidated opinion, we now address Mother's and the GAL's joint motion to dismiss, the district court's dismissal of Father's tort lawsuit, and the district court's issuance of its Internet Order.

II. DISCUSSION

A. The District Court Properly Dismissed Part of Father's Lawsuit Brought on Behalf of Daughter

Father contends that the district court improperly dismissed his lawsuit against Mother and the GAL for lack of standing. In district court, the GAL attached documentary exhibits to her motion to dismiss, and it appears that the district court considered those and additional documents outside of the pleadings in issuing its order of dismissal. In fact, the district court expressly took notice of all matters involved in the underlying divorce and custody proceedings and of its own past orders regarding the GAL's appointment. "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." *Foster v. Sun Healthcare Group, Inc.*, 2012-NMCA-072, ¶ 6, 284 P.3d 389 (alteration, internal quotation marks, and citation omitted); *Emery v. Univ. of N.M. Med. Ctr.*, 96 N.M. 144, 147, 628 P.2d 1140, 1143 (Ct. App. 1981) ("The affidavit and attachments were before the [district] court without objection on [the] defendant's part. These items converted the 'motion to dismiss' hearing into one for summary judgment, and the order dismissing with prejudice was a summary judgment in favor of [the] defendant." (internal citation omitted)), *abrogated on other grounds by Maestas v. Zager*, 2007-NMSC-003, 141 N.M. 154, 152 P.3d 141. Thus, we review the order as an order granting summary judgment.

A district court's grant of summary judgment is reviewed de novo. *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280. "In New Mexico, summary judgment may be proper when the moving party has met its initial burden of establishing a prima facie case for summary judgment." *Id.* ¶ 10. "By a prima facie showing is meant such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." *Goodman v. Brock*, 83 N.M. 789, 792-93, 498 P.2d 676, 679-80 (1972) (citations omitted). Once the moving party has made a prima facie case, "[t]he party opposing the summary judgment motion must adduce evidence to justify a trial on the issues." *Romero*, 2010-NMSC-035, ¶ 10 (alteration in original). "A party may not simply argue that such [evidentiary] facts might exist, nor may it rest upon the allegations of the complaint." *Id.* (alteration in original) (internal quotation marks and citation omitted). In addition, we review de novo whether a party is entitled to an appeal. *State v. Wilson*, 2005-NMCA-130, ¶¶ 5-6, 14-15, 138 N.M. 551, 123 P.3d 784 (analyzing whether an appeal is moot). Moreover, "[w]hether a party has standing to bring a claim is a question of law which we review de novo." *Prot. & Advocacy Sys. v. City of Albuquerque*, 2008-NMCA-149, ¶ 17, 145 N.M. 156, 195 P.3d 1.

As we explain below, because the case against Mother is moot, we only address standing with regard to Father's claims against the GAL. Because standing is not dispositive here, we also address the GAL's immunity from suit in her capacity as guardian ad litem because that question was properly preserved by her assertion of judicial immunity in district court. *See State v. Vargas*, 2008-NMSC-019, ¶ 8, 143 N.M. 692, 181 P.3d 684 ("Under the right for any reason doctrine, we may affirm the district court's order on grounds not relied upon by the district court if those grounds do not require us to look beyond the factual allegations that were raised and considered below." (internal quotation marks and citation omitted)).

1. Only Father's Lawsuit Against Mother Is Moot

In Father's written objection to the joint motion brought by Mother and the GAL to dismiss the appeal, he affirmed the release of Mother from liability with regard to the tort action at issue in this case. In accordance with the Agreement he entered into with Mother in May 2011, Father was precluded from suing Mother on behalf of Daughter for any claims that arose prior to May 31, 2011. Therefore, the issue of whether Father has standing to sue Mother on behalf of Daughter for the asserted cause of action that arose in or prior to 2009 is moot as to Mother in light of the fact that Father's claim against her is void. Thus, we

grant Mother's and the GAL's joint motion as to Mother.

As to her own basis for dismissal, the GAL argues that "the execution of the [Agreement] and dismissal of all claims against [Mother] necessitates the dismissal of the claims made against [the GAL]" insofar as the complaint states that they acted jointly. The GAL asserts that "[t]he injury or injuries alleged in [Father]'s [c]omplaint are the same as to both [Mother and the GAL] and are indivisible." As such, the GAL states that "[s]uch claims cannot survive the release of the joint party or co-conspirator when there is an indivisible injury."

Even if some of the claims could be construed as civil conspiracy allegations, we disagree with the GAL's contention that she and Mother must be treated alike for purposes of dismissal. In New Mexico, "[a] civil conspiracy must . . . involve an independent, unlawful act that causes harm—something that would give rise to a civil action on its own." *Ettenson v. Burke*, 2001-NMCA-003, ¶ 12, 130 N.M. 67, 17 P.3d 440. A plaintiff's settlement with the conspirator who committed the underlying unlawful act, which was the objective of the conspiracy, does not absolve other conspirators of liability. "The purpose of a civil conspiracy claim is to impute liability to make members of the conspiracy jointly and severally liable for the torts of any of its members." *Id.* (citation omitted).

"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." *Payne v. Hall*, 2006-NMSC-029, ¶ 11, 139 N.M. 659, 137 P.3d 599. Therefore, in a case like this, where only one conspirator remains subject to suit, "it should not matter whether [the defendant] actively or passively participated in the conspiracy . . . if injury to the [plaintiff] was the object of the conspiracy. In such a case, [the defendant] is liable for the wrongful acts leading to the [plaintiff's] injuries." *York v. InTrust Bank, N.A.*, 962 P.2d 405, 418 (Kan. 1998); *see Kuhn Const. Co. v. Ocean & Coastal Consultants, Inc.*, 723 F. Supp. 2d 676, 689 (D. Del. 2010) ("Conspirators are liable on a joint and several basis and, as such, [the] plaintiff can obtain complete relief without joining all possible co-conspirators. . . . [A] case cannot be dismissed for nonjoinder even though only one conspirator is subject to the jurisdiction of the court." (internal quotation marks and citation omitted)). Thus, Daughter need not sue Mother to recover for injuries incurred as the intended result of a conspiracy involving Mother and the GAL, even if Mother alone committed the independent unlawful act that causes Daughter harm. As long as the independent unlawful act would have been actionable but for the settlement, a cause of action still exists against any conspirator who did not participate in the Agreement.

We also note that New Mexico public policy encourages settlement agreements. *Bd. of Educ. v. Dep't of Pub. Educ.*, 1999-NMCA-156, ¶ 14, 128 N.M. 398, 993 P.2d 112. Thus, consistent with our case law and public policy, we cannot discourage civil settlement agreements by requiring all conspirators to be joined in a single cause of action in order for a plaintiff to obtain recovery. We therefore deny Mother's and the GAL's joint motion to dismiss the appeal as to the GAL based on our conclusion that

Father's Agreement with Mother does not render the lawsuit against the GAL moot.

2. Father Has Standing to Sue the GAL

The GAL also argues and the district court agreed that Father lacked standing to sue the GAL. The GAL asserts that the nature of her appointment as guardian ad litem supersedes Father's natural guardianship. She also contends that allowing Father to sue the GAL would violate public policy supporting the appointment of legal guardians for minors or otherwise incapacitated individuals and would frustrate the court's interest in the "orderly development of the lawsuit."

Generally, Rule 1-017 NMRA confers standing upon a parent to bring suit on behalf of his or her minor child. *Jaramillo v. Heaton*, 2004-NMCA-123, ¶ 16, 136 N.M. 498, 100 P.3d 204 ("[Rule 1-017] permits a parent to bring a cause of action on behalf of a minor child[.]"); Rule 1-017(C) (stating that general guardians or other like fiduciaries, next friends, and guardians ad litem may sue on behalf of infants or incompetent persons). In *Collins ex. rel. Collins v. Tabet*, 111 N.M. 391, 401-02, 806 P.2d 40, 50-51 (1991), our Supreme Court explicitly held that parents may sue their child's guardian ad litem for injuries caused by the guardian to the parents' child if the guardian acts as a private advocate or exceeds the scope of his/her appointment as an arm of the court. In so ruling, our Supreme Court observed that "[i]f there are public policy reasons to grant immunity to guardians ad litem who function primarily as advocates rather than as court assistants, such as the apprehension that private attorneys will be unwilling to accept guardian ad litem appointments, then a legislative grant of immunity might well be warranted." *Id.* at 402, 806 P.2d at 51.

Based on our Supreme Court's statement of law and policy in *Collins* and absent intervening legislative protections, we cannot now extend protections to guardians ad litem other than those currently provided to them through judicial immunity. Under our law as it exists today, parents retain standing to sue their child's guardian on behalf of their child, subject to the guardian's limited immunity as an arm of the court. We thus conclude that Father has standing to assert the tort cause of action in this case. We reverse the district court's contrary determination.

3. The GAL Is Immune in Part From Suit

In *Collins*, our Supreme Court made clear the purpose for its extension of judicial immunity to guardians ad litem was in order to prevent "harassment and intimidation from dissatisfied parents" and to avoid "distortion of the investigative help and other assistance provided [by guardians] to the court." *Collins*, 111 N.M. at 397, 401, 806 P.2d at 46, 50 (internal quotation marks and citation omitted). The Court explained that "[a] guardian ad litem[, acting as an arm of the court,] must also be able to function without the worry of possible later harassment and intimidation from dissatisfied parents." *Id.* at 397, 806 P.2d at 46. Yet, as we noted above, a guardian ad litem's immunity is not absolute.

We employ a functional analysis to determine whether a guardian ad litem is immune from suit in his or her appointed capacity. *Id.* at 395-96, 806 P.2d at 44-45. Under this approach, if the guardian ad litem "was appointed and performed as an 'arm of the court,' [s]he is absolutely immune." *Id.* at 402, 806 P.2d at 51. But, "[w]here the guardian's functions embrace primarily the rendition of professional services in the form of vigorous advocacy on behalf of the child,

. . . the attorney rendering professional service to the child should be held to the same standard as are all other attorneys in their representation of clients." *Id.* at 401, 806 P.2d at 50. Such a circumstance arises either when the guardian's appointment establishes his/her role as a private advocate for the child, or when the guardian is appointed to assist as an arm of the court but then exceeds the scope of that appointment. *Id.* at 402, 806 P.2d at 51.

In *Collins*, our Supreme Court further stated that "[c]onsiderations favoring immunity might well be present when a guardian ad litem is appointed . . . under NMSA 1978, Section 40-4-8 (Repl. Pamp. 1989), to represent minor children in a custody dispute." *Collins*, 111 N.M. at 402, 806 P.2d at 51. Furthermore, in adopting this functional approach, courts around the country have agreed that "a guardian ad litem would be absolutely immune in exercising functions such as testifying in court . . . and making reports and recommendations to the court in which the guardian acts as an actual functionary or arm of the court, not only in status or denomination but in reality." *Id.* at 396, 806 P.2d at 45 (citation omitted).

We note that the functional analysis of a guardian's role is typically a factual inquiry. Nonetheless, "the trial judge, and [appellate courts] on review, [have] important roles to play in assuring that the purpose of the immunity defense is not emasculated by subjecting the person claiming it to the hazards of a trial in every case." *Id.* at 403, 806 P.2d at 52. Our Supreme Court has stated in this context that "[w]here the facts are clear, summary judgment is an important safeguard in preventing frivolous or harassing suits, and trial judges should not hesitate to grant directed verdicts and otherwise perform their function of deciding issues of law in appropriate cases." *Id.* at 403-04, 806 P.2d at 52-53. It is the court's duty "[i]n all cases, [to] be vigilant to guard against dilution of the purpose of the defense through unjustified exposure of the defendant to the burdens and risks of a trial." *Id.* at 404, 806 P.2d at 53.

This case presented an appropriate opportunity for the district court to evaluate the issue of immunity without the aid of a jury because the facts of the GAL's appointment and Father's allegations regarding the GAL's conduct were clearly established. Moreover, we can conclude in part that the GAL was immune and affirm in part the district court under the right for any reason doctrine because the court found below that the GAL was appointed as an arm of the court and, as a matter of law, most of the conduct alleged by Father is insufficient to prove that the GAL exceeded the scope of her appointment.

According to the attachments produced by the GAL, the district court stated that the GAL was appointed under NMSA 1978, Section 40-4-8 (1993), and Rule 1-053.3(A) NMRA. Section 40-4-8(A) gives the district court discretion to appoint, either sua sponte or upon application of a party, an attorney at law as a guardian ad litem for minor children in a custody dispute. As stated above, our Supreme Court indicated that immunity would in most instances extend to guardians appointed under Section 40-4-8 to represent children in custody disputes like this one. In addition, Rule 1-053.3(A) states that the guardian ad litem appointed in a custody dispute "serves as an arm of the court and assists the court in discharging its duty to adjudicate the child's best interests." It also explains that "[t]he guardian ad litem appointed under this rule is a 'best interests attorney' who shall provide independent services to protect the child's best interests

without being bound by the child's or either party's directive or objectives and who shall make findings and recommendations." Rule 1-053.3(C). Furthermore, in its order of appointment, the district court stated that the GAL "serves as an arm of the court and assists the court in discharging its duty to adjudicate the children's best interests." Thus, we conclude that the district court appointed the GAL as an arm of the court, consistent with the circumstances in which a guardian ad litem is immune. Once appointed, the GAL was expressly required to review relevant records, submit a written report of her investigation, and interview the Children, Mother, Father, any mental health professionals treating the Children, and any other relevant persons. We conclude that, as long as the GAL stayed within the scope of her appointment as an arm of the court, she would be immune from suit for actions or inactions related to the performance of her duties. To determine whether the GAL exceeded the scope of her appointment, we examine conduct asserted within the first amended complaint against the GAL, filed by Father on behalf of Daughter.

Father makes four claims against the GAL, alleging that she (1) intentionally inflicted emotional distress (IIED) on, (2) breached her fiduciary duty to, (3) invaded the privacy of, and (4) committed prima facie torts injuring Daughter. First, with respect to the claim for IIED, Father stated that the GAL "acted together with [Mother] to facilitate the blocking of calls from [Daughter] to her siblings" when instead the GAL should have both reported the issue to the district court and undertaken efforts to correct it. Father complained that Daughter's fragile mental and psychological condition was created in part by the GAL's "repeated interference with [Daughter]'s care and treatment, the [GAL's] repeated exacerbation of the conflict between the parties in the [d]ivorce [p]roceeding[,] and [the GAL's] refusal to represent the best interests of [Daughter]." The complaint further alleged that the tort of IIED was committed when the GAL "obtained medical authorizations from [Daughter] and used those authorizations to obtain access to [Daughter]'s medical records" which the GAL "published" to the district court, Mother, and counsel for the parties in the divorce proceeding "notwithstanding [Daughter]'s desire to maintain the confidentiality of her records." Finally in relation to the IIED claim, Father asserted that the GAL acted "in concert" with Mother to increase conflict between the parties by rejecting settlement offers and failing to advance Daughter's interests by taking action to "correct [Mother's] behavior" when Mother "completely ignored [Daughter] psychologically and emotionally."

Second, Father asserted that the GAL breached her fiduciary duty to Daughter by colluding with Mother to block Daughter's phone calls to her siblings and by disclosing Daughter's medical records to the district court. Third, the complaint stated that the GAL invaded Daughter's privacy by disclosing Daughter's "medical and psychological information" to the district court and parties. Lastly, the complaint restates all of the allegations described above as grounds for prima facie tort.

With one exception, we conclude that Father's allegations relate to the GAL's role and actions as an arm of the court and as a matter of law cannot be deemed to have exceeded the scope of her appointment. With respect to the IIED and prima facie tort claims, Father asserts a general failure by the GAL to advance Daughter's interests. The original order appointing the GAL assigned her the tasks of making recommendations on

all issues related to the children, investigating on behalf of the court what constituted the best interests of the children, reporting to parties and the court on issues related to the best interests of the children and otherwise performing the duties of a guardian ad litem. The same order reminded the parties that the GAL "may make recommendations that neither party, nor the children, will like." The order further gave the GAL full access to the children's "medical, therapy, dental, school, court and all other records related to the children." Under the order the GAL's responsibility was to investigate the matter as a whole and report back to the court with her recommendations as to Daughter's best interests. The GAL had a duty to listen to and consider the opinions and desires of Daughter and Father, but had no duty to advocate for their personal positions as such. In fact, if the GAL disagreed with Father or Daughter on a matter she would have a duty to disagree to the court and other parties as she deemed most appropriate. It should be noted also that there are no guarantees that a GAL's judgment will be correct or even wise. But a faulty judgment call by a GAL does not deprive the GAL of the immunity our Supreme Court described in *Collins* so long as the GAL remains within the scope of her appointment.

The allegations in the First Amended Complaint consist for the most part of disagreements with the GAL's judgment calls made within the scope of her appointment or merely assert inadequate, incomplete, or excessive performance of her tasks. For example, the complaint asserts causes of action for IIED, breach of fiduciary duty and prima facie tort based on the GAL's alleged failure to report certain details regarding Mother's relationship with Daughter and the failure to report Mother's efforts to block contact between Daughter and her siblings. In our view these acts or failures to act on the part of the GAL—assuming as we must that they are true—fall within the scope of the district court's appointment order, Section 40-4-8 and Rule 1-053.3. As such, the GAL would be immune from suit for these alleged failures.

Furthermore, as an arm of the court, the GAL had a duty to report to the court whether proposed settlements were in the Children's best interests. To the extent that the GAL advised the court for or against proposed settlements, that too was within the sphere of her responsibility. Lastly, the allegation that the GAL disclosed Daughter's medical records to the district court and the parties, which is related to all four claims against the GAL, involves actions also directly encompassed within a guardian's statutory and rule-based duties in a custody proceeding. According to the district court's order and under Rule 1-053.3(C), the GAL was required to "make findings and recommendations" to the district court regarding the best interests of the Children. In gathering and disclosing the records, she was acting as an investigatory arm of the court and, as such, is immune from suit for such actions. We therefore conclude that the GAL was immune from suit with regard to the allegations addressed above, and we affirm the district court's dismissal of these claims.

There remains one factual issue on which the GAL failed to establish a prima facie showing entitling her to summary judgment. On behalf of Daughter, Father alleged that the GAL colluded with Mother to block Daughter's phone calls to her siblings. If true, such an action would exceed the scope of her appointment, based upon the court orders related to the underlying custody matter that the GAL attached to her motion in this

case, none of which allow her to restrict the Children's communication. But the GAL provided no affidavit or other documentation asserting that she did not collude with Mother to inhibit Plaintiff's communication with her siblings. *See Roth v. Thompson*, 113 N.M. 331, 334-35, 825 P.2d 1241, 1244-45 (1992) ("Upon the movant making a prima facie showing, the burden shifts to the party opposing the motion to demonstrate the existence of specific evidentiary facts which would require trial on the merits."). We therefore reverse the district court's summary judgment solely with regard to claims involving the GAL's alleged involvement with Mother in blocking Daughter's phone calls to her siblings. As explained above, the GAL is immune from suit for any of Father's claims related to the GAL's alleged failure to report that Mother blocked Daughter's phone calls.

B. The Internet Order Was Constitutionally Invalid

Father's argument as to the impropriety of the issuance of the Internet Order is twofold. First, he asserts that the district court lacked subject matter jurisdiction to issue the Internet Order. Second, he argues that the Internet Order violated his right to freedom of speech. We review questions of subject matter jurisdiction and constitutional challenges to the district court's Internet Order de novo. *State v. Atcitty*, 2009-NMCA-086, ¶ 13, 146 N.M. 781, 215 P.3d 90 (stating that issues related to subject matter jurisdiction are reviewed de novo); *State v. Druktenis*, 2004-NMCA-032, ¶ 14, 135 N.M. 223, 86 P.3d 1050 (stating that constitutional challenges are reviewed de novo). "Whether a statement is privileged [under the First Amendment] presents a question of law for the court to determine." *Marchiondo v. Brown*, 98 N.M. 394, 400, 649 P.2d 462, 468 (1982). We address each argument in turn.

1. The District Court Had Subject Matter Jurisdiction to Issue the Internet Order

Father argues that the district court lacked subject matter jurisdiction to issue the July 1, 2011, Internet Order requiring the removal and banning the republication of his disciplinary complaint against the GAL. Father contends that under the UCCJEA, codified within NMSA 1978, Section 40-10A-202 (2001), the district court lacked subject matter jurisdiction to issue the Internet Order because the entire family had relocated to Canada and because Mother agreed that the district court no longer had jurisdiction over the custody case. Section 40-10A-202(a)(2) provides that a New Mexico court will maintain exclusive continuing jurisdiction until "a court of this state or a court of another state determines that the child, the child's parents[,] and any person acting as a parent do not presently reside in this state."

Even if we assume without deciding that the district court lacked jurisdiction over the custody case, it nonetheless retained subject matter jurisdiction to issue the injunction. The UCCJEA only applies to "child-custody determination[s]." Section 40-10A-202(b). "[C]hild-custody determination[s]" are defined by the UCCJEA to "mean[] a judgment, decree or other order of a court providing for legal custody, physical custody or visitation with respect to a child. The term includes a permanent, temporary, initial or modification order. The term does not include an order relating to child support or other monetary obligation of an individual." NMSA 1978, § 40-10A-102(3) (2001).

Thus, the UCCJEA exclusively

applies to curtail the jurisdictional reach of district courts with relation to "child custody determinations" in expressly specified circumstances. Here, the Internet Order is entirely unrelated to "child custody determinations." The court instead simply issued an injunction that forbade Father's website publications that were in direct violation of prior court orders regarding his behavior in the ancillary custody matter.

We dealt with a similar jurisdictional issue in *Ottino v. Ottino*, 2001-NMCA-012, ¶¶ 1-4, 130 N.M. 168, 21 P.3d 37, where a mother and her child sued to enforce post-minority support from the child's adoptive father pursuant to a marriage settlement agreement. The father argued that the district court lacked jurisdiction to hear the claim because under New Mexico law, district courts lack the power to order, on the district court's own authority, post-minority support. *Id.* ¶ 9. The issue in *Ottino* was: "whether the court ha[d] jurisdiction over an agreement of the parties, ancillary to a final divorce decree." *Id.* ¶ 13.

In *Ottino*, we explained that "[o]ur district courts are courts of general jurisdiction." *Id.* ¶ 6. As such, "the district court's original jurisdiction arises from our state's constitution. Therefore, absent a constitutional amendment, the court's jurisdiction cannot be limited by the Legislature's enactment of a statute." *Id.* ¶ 14 (citation omitted). This court held that "the district court has the power, arising from its original jurisdiction over matters sounding in contract, to enforce valid agreements for post-minority support." *Id.* Hence, despite the district court's inability to order post-minority child support on its own initiative, the court still retained its constitutional authority to enforce a contract between the parties. Similarly, the Supreme Court has repeatedly stated that to determine whether the district court has jurisdiction, we must ask "whether or not it had power to enter upon the inquiry." *Sundance Mech. & Util. Corp. v. Atlas*, 109 N.M. 683, 687, 789 P.2d 1250, 1254 (1990) (internal quotation marks and citation omitted).

At issue in the present case is whether the district court constitutionally has the power to enjoin publication by one of the parties, a matter that is ancillary to the underlying custody dispute. Article VI, Section 13 of the New Mexico Constitution states:

> The district court shall have original jurisdiction in all matters and causes not excepted in this constitution, and such jurisdiction of special cases and proceedings as may be conferred by law, and appellate jurisdiction of all cases originating in inferior courts and tribunals in their respective districts, and supervisory control over the same. *The district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition and all other writs, remedial or otherwise in the exercise of their jurisdiction*; provided, that no such writs shall issue directed to judges or courts of equal or superior jurisdiction.

(Emphasis added.) Based on the New Mexico Constitution and our precedent, we conclude that the district court had jurisdiction to issue the Internet Order because it is a court of general jurisdiction with the express authority to issue injunctions regarding speech. *See*

N.M. Const. art. VI, §§ 3, 23, 26 (stating the matters and causes over which the district court does *not* have original jurisdiction). Simply because a district court is primarily tasked with resolving matters related to domestic relations in a given case does not deprive it of jurisdiction over ancillary issues related to general tort law. *In re Guardianship of Arnall*, 94 N.M. 306, 308, 610 P.2d 193, 195 (1980) (stating that although it is "preferable that guardianships of minors, [and] termination proceedings . . . be brought in children's or family court[,] the failure to do so does not constitute a jurisdictional defect"). We therefore hold that there was no defect in the court's exercise of subject matter jurisdiction.

2. The Internet Order Was Not Supported by Proper Findings

Father contends that the portion of the district court's Internet Order requiring him to take down his disciplinary complaint against the GAL and restraining him from republishing it violated his right to freedom of speech. Father emphasizes his assertion that the Internet Order constitutes a prior restraint on his speech because it prevents republication of the complaint.

We first address Father's contention that the Internet Order was a prior restraint. "The term prior restraint is used to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (emphasis in original) (internal quotation marks and citation omitted). "Prior restraint means only that the government may not enjoin or restrain a particular expression prior to its judicial review, even though the same expression could constitutionally be subject to punishment afterwards." *City of Farmington v. Fawcett*, 114 N.M. 537, 540, 843 P.2d 839, 842 (Ct. App. 1992).

In this case, the district court reviewed the disciplinary complaint against the GAL that Father had already published on his organization's website and then ordered Father to remove the content and restrained Father's republication of the document. We highlight the fact that the court specifically restrained republication of only the disciplinary complaint that it reviewed; no other documents regarding the GAL were addressed in the Internet Order. Because the expression at issue was already subject to judicial review, the Internet Order did not constitute a prior restraint on Father's freedom of expression.

Nonetheless, to the extent that Father argues that the Internet Order violates his right to freedom of speech, there exists no basis within the record to conclude otherwise because the Internet Order fails to meet constitutional standards. The First Amendment to the United States Constitution and Article II, Section 17 of the New Mexico Constitution both protect a person's right to speak, write, and publish freely, with several exceptions. "[T]he protection accorded . . . for freedom of speech and press does not protect every publication, such as obscene, fraudulent or untrue defamatory statements." *State v. Powell*, 114 N.M. 395, 407, 839 P.2d 139, 151 (Ct. App. 1992).[2] For the district court to issue an order restraining Father's speech, the speech must not be a type of expression that is within the broad category of what is constitutionally protected.

[2] We note that this list is not exhaustive.

The GAL argued to the district court and again argues on appeal that the speech was defamatory. Yet the district court never determined that the speech was defamatory during the hearing on this issue or in its order. Rather, in the Internet Order compelling removal and enjoining republication of the complaint, the court justified the restraint by stating that it "ha[d] an important and inherent obligation to make parties to this action refrain from harassment and intimidation of other parties and the [GAL and that Father] caused to be published on the internet information designed to harass and intimidate the [GAL] in the exercise of her duties." The court failed to make any other substantive findings about the document itself that was published by Father.

Although the GAL is immune from harassing lawsuits brought by the parties, we lack the constitutional authority to unilaterally extend this policy protecting the GAL in order to separately curtail Father's exercise of free speech on the internet. As explained above, freedom of speech can only be limited where the speech is not protected. Thus, we cannot affirm the district court's Internet Order on its basis that the speech was harassing or intimidating because this alone is insufficient to show that the speech was not protected. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

The GAL argues that we can conclude that the internet publication constituted defamation based upon evidence the GAL presented in the district court, the findings the court made in its Internet Order, and the findings it made in a second order regarding the GAL's attorney fees. Yet the second order simply recognizes that the disciplinary complaint was "nothing more than a thinly disguised attempt by [Father] to use the disciplinary system as an alternative forum in which to pursue his vendetta against [the GAL]." Neither order addressed or established the existence of the requisite elements of defamation, although it appears that the GAL presented evidence regarding the nature and contents of the publication and Father's motives in publishing the contents.[3]

Nevertheless, "a claim of defamation . . . raises questions of fact[,]" *Phillips v. Allstate Ins. Co.*, 93 N.M. 648, 650, 603 P.2d 1105, 1107 (Ct. App. 1979), and we may not weigh the evidence for the first time on appeal in order to affirm on a basis that the district court did not analyze below. *Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154. Because the district court did not make factual findings regarding defamation but rather simply restrained Father's publication based on a constitutionally impermissible rationale, we must reverse. We remand for the district court to consider the GAL's arguments and evidence regarding defamation in light of the facts of this case, should Father wish to persist in his publication efforts.

III. CONCLUSION

For the reasons stated above, we grant Mother's and the GAL's joint motion to dismiss the appeal as to Mother, and we deny the joint motion as to the GAL. We reverse

[3]The Disciplinary Board complaint does not appear in the record before us, but recordings from the hearing and the district court's orders indicate that the district court did examine the complaint.

the district court's order dismissing Father's suit against the GAL, but only to the extent that the order dismissed Father's claims involving the GAL's alleged involvement in blocking Daughter's phone calls to her siblings. We affirm the district court's order dismissing Father's suit against the GAL as to all other claims. We also reverse the district court's Internet Order restraining the publication of the disciplinary complaint. We remand this case to the district court for proceedings consistent with this Opinion.

IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

CYNTHIA A. FRY, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-071

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Docket No. 31,734

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

RAMONA BRADFORD,

Defendant-Appellant.

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OPINION

GARCIA, Judge.

The specific issue before this Court is whether the State's instructions to the grand

jury were insufficient to advise the grand jury on the essential elements of an embezzlement charge in the absence of including the definitional instructions for the terms "fraudulent intent" and "converted." We hold that the grand jury was not properly instructed on the essential elements of the embezzlement charge and reverse the district court.

BACKGROUND

Defendant was arrested for embezzlement after her employer reported to the police that $2,719.98 was missing from the register and that Defendant was videotaped removing money from the register, placing the money into a register bag, entering the restroom with the bag in her hands, and exiting the restroom and the store without the bag. Following her arrest, a grand jury indicted Defendant for one count of embezzlement. Defendant filed a motion to dismiss the indictment and a motion for reconsideration, arguing that the grand jury was not properly instructed on all elements of her embezzlement charge.

NMSA 1978, Section 30-16-8(A) (2007) defines "embezzlement" as "a person embezzling or converting to the person's own use anything of value, with which the person has been entrusted, with fraudulent intent to deprive the owner thereof." The State instructed the grand jury as follows:

> For you to return a true bill on the charge of embezzlement you must find probable cause as to each of the following elements: (1) the target was entrusted with property belonging to another, which had a market value of over $2,500 but no more than $20,000; (2) after being entrusted with the property, the target, with fraudulent intent to deprive the owner of the property, converted it to his own use; and (3) this happened in New Mexico on or about the 26th day of September, 2009.

Defendant argued that this instruction was insufficient because it failed to include uniform jury instruction (UJI) definitions of "fraudulent intent" and "converted" for the benefit of the jury. *See* UJI 14-1641 NMRA. The district court found that the State's instruction was sufficient to advise the jury and denied Defendant's motion to dismiss her indictment. The district court also denied Defendant's motion to reconsider, but certified for interlocutory appeal the question of whether the grand jury was sufficiently instructed on the essential elements of embezzlement.

STANDARD OF REVIEW

"A prosecutor has a duty to advise the grand jury of the essential elements of the charges presented." *State v. Moore*, 2011-NMCA-089, ¶ 8, 150 N.M. 512, 263 P.3d 289 (alteration, internal quotation marks, and citation omitted). This Court reviews de novo the question of whether a grand jury was properly instructed on all essential elements of a charge. *Id.* "[T]he remedy for a failure to advise the grand jury of the essential elements is a dismissal of the charges without prejudice." *Id.*

DISCUSSION

The specific issue before this Court is whether the absence of the definitional terms "fraudulent intent" and "converted" that are specifically included in UJI 14-1641 rendered the instructions given in this case insufficient to advise the grand jury of the essential

elements of Defendant's embezzlement charge. To answer this question, we must evaluate the current status of grand jury instructions promulgated by the Supreme Court.

We first address Defendant's primary argument. Defendant asserts that the definitions of the two terms at issue must be provided to the grand jury because UJI 14-1641 was adopted for the essential elements of an embezzlement charge and this specific UJI includes the definition of the two terms at issue. Although this general observation regarding UJI 14-1641 is correct, we turn to UJI 14-8005 NMRA to resolve the question of what instructions are properly required to be given to the grand jury.

UJI 14-8005 provides a sample grand jury instruction involving the crime of burglary and addresses the proper presentation of definitional instructions for the grand jury in both the Use Note and committee commentary. Use Note 3 states that the grand jury "shall be given" the additional definitional instruction of a dwelling house contained in UJI 14-1631 NMRA, if "the charge is burglary of a dwelling house[.]" The Use Note specifically directs that this definitional instruction "shall be given" even though the elements instruction for burglary, set forth in UJI 14-1630 NMRA, does not independently define a "dwelling house." Thus, the sample instruction utilized by the Supreme Court in UJI 14-8005 requires that a completely separate UJI definitional instruction be given in order to properly instruct the grand jury regarding burglary of a dwelling house.

In contrast to the sample provided in UJI 14-8005, the essential elements instruction for embezzlement specifically includes both of the definitions requested by Defendant as part of the instruction. *See* UJI 14-1641 (defining both "conversion" and "fraudulent intent" in the appropriate sections of the elements instruction). Thus, the prosecution in the present case did not need to go outside the essential elements instruction to include the definitions that the UJI 14-8005 Use Note apparently recognizes as "shall be given" to the grand jury.

The committee commentary also supports a mandate to give the definitional instructions under UJI 14-1641. First, the commentary states that "[a]pplicable [UJIs] giving the essential elements of an offense *shall be prepared and presented* by the district attorney when the offense is being considered by the grand jury." UJI 14-8005 committee cmt. (emphasis added). It also states that "[i]f no uniform essential elements instruction is available for an offense, the prosecutor shall instruct the grand jury based on the applicable statute and shall give a copy of the statute or a written instruction derived from the statute to the grand jury for their consideration." *Id.* Finally, it states that "[a]ny other instructions, *such as definitions*, which are to be given with the essential elements instruction, *shall* also be prepared for the grand jury as required by law." *Id.* (emphasis added). Under the committee commentary, it is clear that the definitional instructions that are included within the essential UJI elements instruction for a crime shall be given to the grand jury. As a result, Defendant's first argument appears to correctly identify the current state of the law regarding the applicable UJIs' that are to be given to the grand jury.

Without any citation to the UJIs or arguments that address the UJIs for grand jury proceedings, the State asserts that the statutory elements set forth in Section 30-16-8(A) are

all that is required to be used when instructing the grand jury on a charge of embezzlement. Other than *State v. Rodarte*, 2011-NMCA-067, 149 N.M. 819, 255 P.3d 397, the relevant authorities cited by the State also predate the current version of UJI 14-8005 adopted by our Supreme Court in 2008. Although this Court previously addressed the need for definitional instructions to the grand jury, the case predates the current version of UJI 14-8005. *See State v. Augustin M.*, 2003-NMCA-065, ¶¶ 56-59, 133 N.M. 636, 68 P.3d 182 (addressing the need for a definitional instruction on proximate cause to the grand jury). In *Rodarte*, this Court only addressed the failure to give a definitional instruction during trial but the matter was raised under a fundamental error standard of review. 2011-NMCA-067, ¶¶ 7-11 (concluding that no fundamental error occurred when a definitional instruction on "intent to defraud" was not given for a conviction involving the refusal to return leased property). Our Supreme Court has not addressed the requirement for providing definitional instructions to the grand jury under UJI 14-8005, but it has previously held that certain definitional instructions are critical at trial, even under a fundamental error standard of review. *State v. Mascarenas*, 2000-NMSC-017, ¶¶ 17-21,129 N.M. 230, 4 P.3d 1221 (recognizing that fundamental error occurred because the definitional instruction for the term "reckless disregard" was critical in order to prevent confusion by the jury and of central importance to the defense of the charge at trial).

We determine that the State's reliance on *Rodarte* is misplaced. First, no UJI existed for the essential elements of the offense of fraudulently refusing to return leased property under NMSA 1978, Section 30-16-40(A)(3) (2006). *Rodarte*, 2011-NMCA-067, ¶ 4. The defendant in *Rodarte* proposed a jury instruction that included elements of the crime of fraud and the instruction was rejected. *Id.* ¶ 8. On appeal, the defendant then asserted a new argument—that it was error not to include a definitional instruction for "intent to defraud," a term that was part of the essential elements of the offense of fraudulently refusing to return leased property under Section 30-16-40(A)(3). *Rodarte*, 2011-NMCA-067, ¶ 4. Applying the general non-UJI approach taken from *State v. Barber*, 2004-NMSC-019, ¶ 19, 135 N.M. 621, 92 P.3d 633, this Court determined that a reasonable jury would not be confused or misdirected regarding the term "intent to defraud" and what it means. *Rodarte*, 2011-NMCA-067, ¶ 14. We also held that the definitional instruction for "fraudulently intended" in UJI 14-1641 did not translate into a mandatory requirement for the imposition of an "intent to defraud" definitional instruction under Section 30-16-40(A)(3). *Rodarte*, 2011-NMCA-067, ¶ 12. This analysis is consistent with established Supreme Court precedent for determining fundamental error where no UJIs exist. *Mascarenas*, 2000-NMSC-017, ¶ 20 (recognizing that only where a critical determination is involved will the failure to include a definitional instruction be akin to a missing elements instruction and constitute fundamental error). In the present case, a jury instruction does exist, UJI 14-1641, and the State has been instructed to use the applicable UJI when giving the elements instruction to the grand jury. UJI 14-8005.

The unique and distinguishable circumstances in *Rodarte* do not convince this Court to deviate from the Supreme Court's instructions in UJI 14-8005 and the accompanying committee commentary. As a result, UJI 14-1641 was required to be given

to the grand jury in this case, including the definitional instructions for "fraudulent intent" and "conversion" that are part of this UJI. The failure to give the grand jury the proper instruction for embezzlement from UJI 14-1641 was error.

CONCLUSION

For the foregoing reasons, we reverse the district court's denial of Defendant's motion to dismiss the grand jury indictment and remand for a dismissal of the indictment without prejudice.

IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

M. MONICA ZAMORA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-072

Filing Date: August 15, 2012

Docket No. 31,167

ARCHIBALD A. SPROUL and LISA McFADDEN SPROUL,

Plaintiffs,

v.

ROB & CHARLIES, INC., GT BICYCLES, INC., PACIFIC CYCLE, INC., and ISHIWATA,

Defendants,

and

ROB & CHARLIES, INC.,

Third-Party Plaintiff-Appellant,

v.

JOY INDUSTRIAL CO., LTD.,

Third-Party Defendant-Appellee,

and

J & B IMPORTS, INC., QUALITY BICYCLE PRODUCTS, INC., and DOREL INDUSTRIES, INC.,

Third-Party Defendants.

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OPINION

VANZI, Judge.

This case arises from an indemnification claim brought by Third-Party Plaintiff Rob and Charlies, Inc. (R&C), a bicycle retailer doing business in New Mexico, against Third-Party Defendant Joy Industrial Co., Ltd. (Joy Co.), a foreign manufacturer of bicycle parts. R&C appeals a judgment of the district court granting Joy Co.'s motion to dismiss for lack of personal jurisdiction. The district court concluded that Joy Co. lacked the constitutionally required minimum contacts with New Mexico necessary to support personal jurisdiction and that, even if the necessary minimum contacts were established, the exercise of jurisdiction over Joy Co. would nevertheless offend traditional notions of fair play and substantial justice. We disagree with the district court and reverse. Further, this Opinion clarifies the standards to be used for evaluating whether a person or entity is subject to the jurisdiction of New Mexico courts despite not having been present in the state, either at the time of the suit or at the time of the alleged injury, and despite not having consented to the exercise of jurisdiction.

I. BACKGROUND

In 1988, Plaintiff Archibald Sproul purchased a GT All-Terra Mountain Bicycle from R&C, a retail bicycle store located in Santa Fe, New Mexico. Sproul was riding that bicycle on May 19, 2003, at a BMX course in Santa Fe County. As he went over a bump, the front wheel separated from the bicycle's front fork assembly. Sproul was thrown off the bicycle and, as a result, he suffered serious, permanent injuries. On May 18, 2006, Sproul filed suit against R&C; GT Bicycles, Inc.; Pacific Cycle, Inc. (the companies that manufactured the bicycle); and Ishiwata (the company that manufactured the bike's frame and fork). Sproul alleged that, among other things, Defendants' negligently designed, manufactured, assembled, and sold the bicycle, quick-release hub, and front fork, which failed, causing the front wheel to fall off.

R&C filed a third-party complaint for indemnity against Joy Co. in May 2008. Joy Co. is the manufacturer of the quick-release mechanism on the GT bicycle that Sproul purchased from R&C. Joy Co. has its principal places of business in China and Taiwan, and its two manufacturing facilities are located in China. Joy Co. "sells its products to the global bicycle marketplace through a network of agents and suppliers."

R&C claimed that it was entitled to a right of indemnification against Joy Co. because Joy Co. was the upstream manufacturer of the allegedly defective quick-release mechanism that was ultimately sold by R&C in New Mexico. Joy Co. responded by filing a motion to dismiss for lack of personal jurisdiction. Joy Co. contended that it had no distributors or clients in New Mexico and did not know where the bicycles that incorporated its quick-release mechanisms were sold. Therefore, Joy Co. argued, there were no facts indicating that it had the necessary systematic and continuous contacts or purposeful contact required to subject it to either general or specific jurisdiction in New Mexico.

After allowing the parties to conduct limited discovery on the jurisdictional issue, the district court considered their written submissions and oral arguments and ultimately granted Joy Co.'s motion to dismiss. Specifically, the court concluded that R&C failed to show as a matter of law that Joy Co. had sufficient contacts with New Mexico to enable it to assert personal jurisdiction. The district court further found that the exercise of jurisdiction over Joy Co. would offend traditional notions of fair play and substantial justice. The district court denied R&C's motion for reconsideration; however, it certified the matter for interlocutory appeal, and we granted the application.

II. STANDARD OF REVIEW

The determination whether a district court has personal jurisdiction over a nonresident defendant is a question of law that we review de novo. *Sublett v. Wallin*, 2004-NMCA-089, ¶ 11, 136 N.M. 102, 94 P.3d 845. Where, as here, the district court bases its ruling on the parties' pleadings, attachments, and non-evidentiary hearings, we apply a standard of review mirroring that of our standard governing appeals from summary judgment. *Id.* "We construe the pleadings and affidavits in the light most favorable to the complainant, and the complainant need only make a prima facie showing that personal jurisdiction exists." *Id.*; *see Tercero v. Roman Catholic Diocese*, 2002-NMSC-018, ¶ 5, 132 N.M. 312, 48 P.3d 50. Accordingly, dismissal is proper in this case only if all the specific facts that R&C alleges collectively fail to state a prima facie case for jurisdiction over Joy Co.

III. ANALYSIS

R&C raises eight issues on appeal. All of these issues can fairly be collapsed into one question: whether Joy Co. has sufficient minimum contacts with New Mexico necessary to support personal jurisdiction and, thus, whether the district court erred by granting Joy Co.'s motion to dismiss. The answer requires us to employ a two-step analysis. The first step is to determine whether personal jurisdiction over Joy Co. would be in accordance with the requirements of New Mexico's long-arm statute. Concluding that jurisdiction may properly be extended under our long-arm statute, we then proceed to the second step. At step two of the analysis, we examine whether the exercise of personal jurisdiction would offend the Due Process Clause of the United States Constitution. Whether a state may exercise personal jurisdiction over a nonresident civil defendant depends on the nature and quality of the defendant's contacts with the forum. In that regard, personal jurisdiction has been described as being either "general" or "specific." R&C contends that both exist in this case. In addressing R&C's respective arguments, we determine that the state may not exercise general jurisdiction over Joy Co. However,

in clarifying our personal jurisdiction jurisprudence—especially with respect to the stream of commerce theory of jurisdiction—Joy Co. has minimum sufficient contacts to subject it to specific jurisdiction in New Mexico under the standard set forth in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). Further, the volume of contacts Joy Co. has with New Mexico make it reasonable to subject Joy Co. to personal jurisdiction. This Opinion ends by analyzing the United States Supreme Court's opinion in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), and its more recent decision in *J. McIntyre Machinery, Ltd. v. Nicastro*, ___ U.S. ___, 131 S. Ct. 2780 (2011), and it addresses why personal jurisdiction cases are not evaluated under any of the competing versions of the stream of commerce theories in those cases.

A. New Mexico's Long-Arm Statute

In construing whether a nonresident defendant may be subject to jurisdiction in the forum state, this Court looks to New Mexico's long-arm statute, which provides, in pertinent part,

> Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts enumerated in this subsection thereby submits himself or his personal representative to the jurisdiction of the courts of this state as to any cause of action arising from:
>
> (1) the transaction of any business within this state;
>
> . . . .
>
> (3) the commission of a tortious act within this state[.]

NMSA 1978, § 38-1-16(A)(1), (3) (1971). The term "person" as used in the statute includes corporations. *See, e.g.*, *Roberts v. Piper Aircraft Corp.*, 100 N.M. 363, 367-68, 670 P.2d 974, 978-79 (Ct. App. 1983) (holding that under our long-arm statute, New Mexico could assert personal jurisdiction over an Oklahoma service provider who advertised nationally and directly served a New Mexican customer). New Mexico courts do not require a technical determination whether a defendant has committed one of the enumerated acts. *Zavala v. El Paso Cnty. Hosp. Dist.*, 2007-NMCA-149, ¶ 10, 143 N.M. 36, 172 P.3d 173. Instead, because we "have construed the state long-arm statute as being coextensive with the requirements of due process, [our] analysis collapses into a single search for the outer limits of what due process permits." *F.D.I.C. v. Hiatt*, 117 N.M. 461, 463, 872 P.2d 879, 881 (1994) (internal quotation marks and citation omitted). The question of personal jurisdiction therefore hinges on federal law.

B. The Due Process Clause

"The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant." *World-Wide Volkswagen*, 444 U.S. at 291. Due process is satisfied only when a defendant has sufficient minimum contacts with the forum state so that the assertion of jurisdiction over the defendant will not violate "traditional notions of fair play and substantial justice." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, ___ U.S. ___, ___, 131 S. Ct. 2846, 2853 (2011) (internal quotation marks and citation omitted); *Tercero*, 2002-NMSC-018, ¶ 7. Accordingly, we must first determine whether a defendant has sufficient minimum contacts with New Mexico. *Burger King Corp. v.*

Rudzewicz, 471 U.S. 462, 474 (1985) ("[T]he constitutional touchstone remains whether the defendant purposefully established minimum contacts in the forum [s]tate." (internal quotation marks and citation omitted)). If a defendant has sufficient minimum contacts for personal jurisdiction, such jurisdiction will be exercised only if it is reasonable to do so. *Zavala*, 2007-NMCA-149, ¶ 12 (setting out the five factors we consider to make this determination). Further, as we have noted, the minimum contacts required for the state to assert personal jurisdiction over a defendant depends on whether the jurisdiction asserted is general (all-purpose) or specific (case-linked). *Goodyear*, ___ U.S. at ___, 131 S. Ct. at 2851; *Zavala*, 2007-NMCA-149, ¶ 12.

In this case, R&C contends that it made a prima facie showing that New Mexico courts could exercise both general and specific jurisdiction over Joy Co. We address each of R&C's contentions in turn.

1. General Jurisdiction

R&C maintains that it has met its prima facie burden of establishing general jurisdiction and that the district court erred in resolving the issue in Joy Co.'s favor. For the reasons that follow, we disagree.

A state exercises general jurisdiction over a nonresident defendant when its "affiliations with the [s]tate are so continuous and systematic as to render [it] essentially at home in the forum [s]tate." *Goodyear*, ___ U.S. at ___, 131 S. Ct. at 2851 (internal quotation marks and citation omitted). As a result, due process prohibits general jurisdiction over corporations when corporate ties arise from "the casual presence of the corporate agent or even his conduct of single or isolated" acts unrelated to the claim. *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 317 (1945). The United States Supreme Court has explained that "[t]o require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process." *Id.* In keeping with United States Supreme Court precedent, we too have said that general jurisdiction exists when a defendant can "reasonably foresee being haled into court in that state for any matter[.]" *Zavala*, 2007-NMCA-149, ¶ 12 (internal quotation marks and citation omitted).

R&C contends that New Mexico has general personal jurisdiction over Joy Co. because the company has continuous and systematic contacts with New Mexico. However, R&C does not allege any facts to support this assertion. For example, R&C has not provided evidence that Joy Co. is incorporated under the laws of New Mexico, that it has corporate operations, employees, or agents here, or that it has manufacturing facilities in the state. Consequently, we conclude that the requisite types of contacts, such as the existence of corporate operations or the manufacture of products in New Mexico, which we have said can be a basis for general jurisdiction, do not exist over Joy Co. in this case. *Cf. United Nuclear Corp. v. Gen. Atomic Co.*, 90 N.M. 97, 102-03, 560 P.2d 161, 166-67 (1976) (holding that the combined facts showing the defendant's multiple activities within the state warranted the assertion of general jurisdiction).

Moreover, to the extent that R&C asserts the sale of Joy Co.'s products in New Mexico may establish general personal jurisdiction, we are not persuaded. As the United States Supreme Court has recently

clarified, the flow of a manufacturer's goods into the forum state alone does not create sufficient ties with that state to give it general jurisdiction over the manufacturer. *Goodyear*, ___ U.S. at ___, 131 S. Ct. at 2855. Consistent with the holding in *Goodyear*, we have previously determined that "mere purchases" of goods by customers in New Mexico, "even if occurring at regular intervals, are not enough to warrant a [s]tate's assertion of *in personam jurisdiction* over a nonresident corporation *in a cause of action not related to those purchase transactions*." *Visarraga v. Gates Rubber Co.*, 104 N.M. 143, 147, 717 P.2d 596, 600 (Ct. App. 1986) (internal quotation marks and citation omitted). Applying the principles in *Goodyear* and *Visarraga*, we conclude that R&C's reliance on the facts showing that Joy Co.'s products are available to consumers in New Mexico—either incorporated into bicycles or through distributors serving the state—by itself, does not create such systematic and continuous contacts so as to require Joy Co. to submit to general jurisdiction in New Mexico. *Cf. Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 448 (1952) (holding that there was general jurisdiction over a foreign corporation that maintained an office in Ohio and made corporate decisions from that office).

The district court correctly determined that there were no facts demonstrating that Joy Co. has the requisite continuous and systematic contacts with New Mexico to confer general personal jurisdiction. However, that is not the end of our jurisdictional inquiry. We now consider whether the claim at issue arose out of Joy Co.'s purposeful contact with our state and, therefore, whether specific jurisdiction applies.

2. Specific Jurisdiction

A state has specific jurisdiction over a nonresident defendant if that defendant's contacts do not rise to the level of general jurisdiction, but the defendant nevertheless "purposefully established contact with New Mexico." *Zavala*, 2007-NMCA-149, ¶ 12 (alteration, internal quotation marks, and citation omitted). In other words, "there [must] be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum [s]tate, thus invoking the benefits and protections of its laws." *Hiatt*, 117 N.M. at 464, 872 P.2d at 882 (internal quotation marks and citation omitted). The central feature of minimum contacts, then, is the requirement of purposeful availment. To determine "purposeful availment," we look at what activities the defendant directed toward New Mexico. *Zavala*, 2007-NMCA-149, ¶ 11.

The United States Supreme Court has clarified that "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Goodyear*, ___ U.S. at ___, 131 S. Ct. at 2851 (internal quotation marks and citation omitted); *see also Visarraga*, 104 N.M. at 146-47, 717 P.2d at 599-600 (recognizing that for New Mexico to assert specific jurisdiction over a nonresident defendant, the plaintiff's claim must "lie[] in the wake" of the defendant's commercial activities in New Mexico (internal quotation marks and citation omitted)). Thus, the flow of a manufacturer's products into the forum state through the stream of commerce may provide specific jurisdiction over a nonresident corporation. *Goodyear*, ___ U.S. at ___, 131 S. Ct. at 2855. Whether or not personal jurisdiction exists over a particular defendant is decided on a case-by-case basis.

See Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 765 (Ill. 1961) ("The question cannot be answered by applying a mechanical formula or rule of thumb but by ascertaining what is fair and reasonable [under] the circumstances."), *abrogated on other grounds as recognized by Telular Corp. v. Mentor Graphics Corp.*, 282 F. Supp. 2d 869 (N.D. Ill. 2003).

R&C argues that Joy Co. is subject to specific jurisdiction in New Mexico because it has purposefully availed itself of the protections and benefits of New Mexico law under the stream of commerce theory. In particular, R&C contends that Joy Co. established sufficient minimum contacts with New Mexico by placing the quick-release mechanism into the stream of commerce with the intent to distribute the product worldwide, including the United States.

We begin with the appropriate due process standard for determining personal jurisdiction on a stream of commerce theory. The United States Supreme Court has noted that "[t]he stream-of-commerce metaphor has been invoked frequently in lower court decisions permitting jurisdiction in products liability cases in which the product has traveled through an extensive chain of distribution before reaching the ultimate consumer." *Goodyear*, ___ U.S. at ___, 131 S. Ct. at 2854-55 (internal quotation marks and citation omitted). While true, the Court's most recent cases have provided no clear guidance regarding the scope and application of the theory, leaving little uniformity among the many different federal and state courts decisions. It is not surprising then, that in this case the parties and the district court each cited to a different United States Supreme Court opinion as *the* controlling decision for its argument and decision. R&C relied on *World-Wide Volkswagen*, while Joy Co. turned to Justice Kennedy's plurality opinion in *J. McIntyre Machinery*. The district court on the other hand relied on the stream of commerce theory set forth in Justice O'Connor's plurality opinion in *Asahi* to find that personal jurisdiction did not exist over Joy Co. Because the United States Supreme Court's splintered view of minimum contacts in *Asahi* and *J. McIntyre Machinery* provide no clear rule on this issue and because the plurality opinions in those cases are not the precedential holdings of the Court, a defendant's contacts with New Mexico continue to be evaluated by the stream of commerce standard as described in *World-Wide Volkswagen*. We later explain in detail why we do not follow any of the rationales in *Asahi* or *J. McIntyre Machinery*.

a. *World-Wide Volkswagen* and New Mexico Law

The stream of commerce theory finds its origins in the United States Supreme Court decision in *World-Wide Volkswagen*. In *World-Wide Volkswagen*, the Court held that an Oklahoma court could not, consistent with the Due Process Clause, exercise jurisdiction over a nonresident automobile retailer and distributor "when the defendants' only connection with Oklahoma is the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma." 444 U.S. at 287. The Court reasoned that foreseeability that a product could cause injury in a state alone is insufficient to confer personal jurisdiction. *Id.* at 295-96. However, the Court explained that personal jurisdiction may exist over a nonresident defendant that "delivers its products into the stream of commerce with the *expectation* that they will be purchased by consumers *in the forum* [*s*]*tate*." *Id.* at 297-98

(emphasis added). Consequently, "if the sale of a product of a manufacturer . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other [s]tates, it is not unreasonable to subject it to suit in one of those [s]tates if its allegedly defective merchandise" injures someone there. *Id.* at 297.

Our appellate courts have not had occasion to construe the stream of commerce theory in a products liability case since the United States Supreme Court decided *Asahi* in 1987. However, we have decided several cases prior to the issuance of that opinion that illuminate the requirements for minimum contacts sufficient to establish personal jurisdiction in New Mexico courts. We recognize that none of our case law is directly on point; however, we believe that these cases can be useful and are consistent with the stream of commerce analysis set forth in *World-Wide Volkswagen*.

In *Visarraga*, we held that New Mexico courts could not assert jurisdiction over defendant Littlejohn's Equipment Company, Inc. (Littlejohn), the secondary distributor of a defective hose. 104 N.M. at 149, 717 P.2d at 602. The plaintiffs in that case sued the defendant after a tank truck making a delivery of gasoline to their gas station exploded and caught on fire. *Id.* at 144, 717 P.2d at 597. Littlejohn, a Colorado corporation, had purchased the hose from another Colorado corporation and then sold the hose to yet another company who installed the hose and sold the tank truck to Robinson Oil Company in New Mexico. *Id.* at 145, 717 P.2d at 598. In analyzing the jurisdictional issue, we relied on *World-Wide Volkswagen* and its progeny to determine whether Littlejohn satisfied the constitutional due process requirements of purposeful availment. *Visarraga*, 104 N.M. at 148-49, 717 P.2d at 601-02. We first noted the distinction between manufacturers and primary distributors who avail themselves of broad markets with known benefits and secondary distributors and local retailers whose contacts with the forum state are more attenuated. *Id.* at 149, 717 P.2d at 602. Because Littlejohn's contact with New Mexico was "minimal and random in nature" and because it did not purposefully cause the hose at issue to be shipped into New Mexico, we ultimately held that the plaintiff failed to establish that Littlejohn had sufficient minimum contacts with New Mexico to subject it to personal jurisdiction. *Id.*

In *Roberts*, the plaintiff's estate sued three defendants after a plane crash that killed the decedent. 100 N.M. at 365, 670 P.2d at 976. None of the defendants were located in New Mexico, and the question we had to answer was whether personal jurisdiction could be exercised over any of them. *Id.* at 365-66, 670 P.2d at 976-77. Although we concluded that jurisdiction did not exist over two of the defendants, we held that Custom Airmotive (Airmotive), an aviation repair shop located in Oklahoma, had the necessary minimum contacts with New Mexico to subject it to personal jurisdiction here. *Id.* at 367-68, 670 P.2d at 978-79. Specifically, the record established that Airmotive had advertised in national trade journals to solicit business, performed work for New Mexico residents, and purposefully availed itself of the benefits and protections of New Mexico law because it would have the right to sue a customer in our courts for failure to pay. *Id.* Citing *World-Wide Volkswagen*, we said that Airmotive thus "should reasonably anticipate being haled into court here." *Roberts*, 100 N.M. at

367-68, 670 P.2d at 978-79 (internal quotation marks and citation omitted).

Our lone Supreme Court opinion dealing with the notion of minimum contacts was decided well before the United States Supreme Court's decision in *World-Wide Volkswagen*. However, in *Blount v. T D Publishing Corp.*, 77 N.M. 384, 423 P.2d 421 (1966), our Supreme Court relied on that same line of cases that eventually became the basis of the *World-Wide Volkswagen* decision. In *Blount*, the plaintiffs brought suit against the defendants alleging invasion of privacy. 77 N.M. at 386, 423 P.2d at 422. The New York publisher in that case sold its magazines to a New York distributor who in turn re-sold the magazines to a New Mexico wholesaler who distributed the products in the state. *Id.* at 386-87, 423 P.2d at 423. The New Mexico Supreme Court recognized that in order to assert personal jurisdiction over the New York publisher, there had to be some act by which the publisher "purposefully avail[ed] itself of the privilege of conducting activities within the forum [s]tate." *Id.* at 391, 423 P.2d at 426 (internal quotation marks and citation omitted). The Court held that the jurisdictional act demonstrating purposeful availment was not the creating of a defect but the nationwide distribution of defective products. *Id.* at 390, 423 P.2d at 425. Articulating a liberal approach to purposeful availment, our Supreme Court reasoned that

> [w]hen a manufacturer voluntarily chooses to sell his product in a way which will be resold from dealer to dealer, transferred from hand to hand and transported from state to state, he cannot reasonably claim that he is surprised at being held to answer in any state for the damage the product causes.

Id. Thus, the regular distribution plan and the commercial benefit to the nonresident defendant, which it derived from the sale of its products, was sufficient to satisfy due process and subject the defendant to our courts. *Id.* at 391, 423 P.2d at 426; *see also Asahi*, 480 U.S. at 117 (Brennan, J., concurring) ("A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum [s]tate, and indirectly benefits from the [s]tate's laws that regulate and facilitate commercial activity."); *Gray*, 176 N.E.2d at 764, 766-67 (holding that personal jurisdiction existed over a manufacturer of a component part manufactured in Ohio, incorporated into a product in Pennsylvania, that was ultimately sold in Illinois where it caused injury because, though the manufacturer did no business in Illinois, it could expect its product would be sold there and benefitted from the sale in the state); *Soria v. Chrysler Canada, Inc.*, 958 N.E.2d 285, 296-97 (Ill. App. Ct. 2011) (continuing to rely on *Gray* for the distribution-channel rationale).

Both *World-Wide Volkswagen* and our New Mexico cases make clear that the mere foreseeability that a product may make its way into our state either by the act of a consumer or through a random or isolated sale is not enough to confer jurisdiction. Rather, there must be some act purposefully directed at the forum state. Thus, "the foreseeability that is critical to due process analysis is . . . that the defendant's conduct and connection with the forum [s]tate are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297.

Reaffirming a preference for Justice Brennan's stream of commerce approach from *World-Wide Volkswagen*, we now turn to the

facts in this case to determine whether R&C has made a prima facie case establishing that New Mexico may assert specific jurisdiction over Joy Co. under the stream of commerce theory of minimum contacts.

b. Joy Co.'s Contacts With New Mexico

R&C contends that the presence of the quick-release mechanisms on bicycles sold within New Mexico through the direct sales of such mechanisms to bicycle sellers in the United States is sufficient to establish that Joy Co. has sufficient minimum contacts under *World-Wide Volkswagen* to subject it to jurisdiction in New Mexico. Based on the undisputed facts in this case, we agree.

Joy Co. is a foreign corporation that has its principal places of business in Taiwan and China and operates under the laws of the Republic of China; Joy Co. designs bicycle component parts, including quick-release mechanisms and manufactures them at facilities in the Republic of China; and Joy Co. sells its products internationally to bicycle manufacturers through a network of agents and suppliers, including J&B Importers, Inc. (J&B). J&B, which is headquartered in Miami, Florida, is a distributor of bicycle parts in the United States, and it serves the New Mexico market from its Denver, Colorado facility. R&C can order the component parts manufactured by Joy Co. by purchasing them from J&B. In addition, Joy Co.'s full-time marketing and sales employee who is located in California sells Joy Co. products as well as provides customer service and support to Joy Co.'s clients throughout the United States, including New Mexico.

Many bicycles sold by R&C have the Joy Co. quick-release mechanisms installed in them, and Joy Co. knows that the bicycles bearing their quick-release mechanism are sold worldwide. There is no dispute that Joy Co. manufactured the quick-release mechanism that was incorporated into Sproul's bike and that R&C sold Sproul the GT bike with the Joy Co. quick-release mechanism at issue in 1988. In fact, at that time, many GT bikes had Joy Co. quick-release mechanisms, including bicycles sold at New Mexico retailers such as K-Mart.

Further, to the extent Joy Co.'s quick release mechanisms are sold in the United States, its manufacturing processes for the production of the item comply with the United States safety standards, and Joy Co. has "never tried not to comply" with the United States standard. Joy Co. does not avoid or prohibit the sale of its products in the United States, although it does specifically avoid selling its products in Central and South America.

Based on the above facts, Joy Co. manufactured the allegedly defective product and placed it into the stream of commerce. The quick-release mechanism was eventually sold to R&C, a New Mexico retailer, which then allegedly caused the injury to Sproul. We conclude that the manufacture and marketing by Joy Co., J&B, and now its California employee, as well as the ultimate sale, reflect more than a mere expectation that the product *might* be purchased by a resident in this forum. Rather, the quick-release mechanism that was incorporated into Sproul's bicycle came to be in New Mexico due to the efforts of the "manufacturer or distributor to serve directly or indirectly" the market here. *See World-Wide Volkswagen*, 444 U.S. at 297. We believe that such directed efforts to the United States market reflect a purposeful intent to reach a consumer such as Sproul. Unlike the facts in *World-*

Wide Volkswagen or *Visarraga*, this is not a situation involving a casual or accidental contact, and it is one that is directly related to the asserted cause of action in this case.

Joy Co.'s principal argument on appeal is that the district court correctly found that New Mexico could not exercise jurisdiction over it because it has never directed its activities specifically toward New Mexico, nor did it have any direct contact with the state or knowledge that its products would be incorporated into bikes specifically sold in New Mexico. We disagree. As an initial matter, we note that Joy Co. does not assess the question here against the standard set forth in *World-Wide Volkswagen*, opting instead to focus solely on *Asahi* and *J. McIntyre Machinery*. In any event, neither *World-Wide Volkswagen* nor our cases require that a manufacturer direct activities specifically at the forum state. Rather, *World-Wide Volkswagen* requires that the defendant place the product into the stream of commerce with the *expectation* that it will be purchased by users in the forum state. 444 U.S. at 297-98. It is in the very nature of the stream of commerce theory of minimum contacts that a product will reach the forum state after a manufacturer has sold it in such a way that it has passed from distributor to distributor to arrive there. *Goodyear*, ___ U.S. at ___, 131 S. Ct. at 2855; *Blount*, 77 N.M. at 390, 423 P.2d at 425. To insulate a foreign manufacturer of an allegedly defective component part that has caused injury in our state, unless it specifically targeted New Mexico or knew that its product will ultimately be resold here, defies logic. *See A. Uberti & C. v. Leonardo*, 892 P.2d 1354, 1362-63 (Ariz. 1995) (in banc) (stating that "a foreign manufacturer that knowingly and intentionally distributes its products in America through an American company [cannot] avoid jurisdiction of American courts by the simple expedient of closing its eyes and making no effort to learn about or restrict its distributor's activities"). Accordingly, we conclude that a manufacturer of an allegedly defective component part that has otherwise placed it into a distribution channel with the expectation it will be sold in our national market cannot be insulated from liability simply because it does not specifically target or know its products are being marketed in New Mexico. *See Bean Dredging Corp. v. Dredge Tech. Corp.*, 744 F.2d 1081, 1082-83 (5th Cir. 1984) (holding that personal jurisdiction existed over the manufacturer of a component part where it did not originate or control the distribution system of its product but did not seek to limit the states in which it would be used or sold); *Nelson v. Park Indus., Inc.*, 717 F.2d 1120, 1127 (7th Cir. 1983) (holding that it was reasonable to assert personal jurisdiction over a foreign manufacturer when they knew their product would be sold by a distributor throughout the United States).

Joy Co. cites much authority from other jurisdictions requiring that a defendant take additional acts directed at the forum state or have actual knowledge that its products are marketed there. *See Windsor v. Spinner Indus. Co.*, 825 F. Supp. 2d 632, 639-40 (D. Md. 2011) (finding no personal jurisdiction over the defendant because the Fourth Circuit requires forum-specific activity); *Dickie v. Cannondale Corp.*, 905 N.E.2d 888, 892-93 (Ill. App. Ct. 2009) (finding no personal jurisdiction over a foreign bicycle pedal manufacturer that sold its products to a distributor and knew its parts were sold in the United States because it had no downstream control); *Morris v. Halsey Enters. Co.*, 882 N.E.2d 1079, 1083-84 (Ill. App. Ct. 2008) (finding no personal jurisdiction over a

foreign ceiling fan manufacturer that sold its products to a distributor and knew the products would be sold to large retailers throughout the United States but did not specifically know they would be sold in Illinois). Joy Co.'s reliance on these cases is misplaced as they were all decided by applying the multiple *Asahi* opinions. Because the different standard set forth in *World-Wide Volkswagen* continues to be applied, we do not discuss those cases here.

Sufficient facts exist in this case to determine that Joy Co. purposefully directed its activities toward the United States market and, as a result, toward the New Mexico market as well. R&C has made a prima facie case establishing that Joy Co. has sufficient minimum contacts with New Mexico through its distribution system to subject it to personal jurisdiction in our courts. We next analyze whether it would be reasonable to assert specific personal jurisdiction over Joy Co.

c. Traditional Notions of Fair Play and Substantial Justice

Having established that Joy Co. has delivered its product into the stream of commerce, we now turn to the issue of reasonableness. The United States Supreme Court has held that even if a defendant has established sufficient minimum contacts with the forum state, the Due Process Clause forbids the assertion of personal jurisdiction over that defendant "under circumstances that would offend traditional notions of fair play and substantial justice." *Asahi*, 480 U.S. at 113 (internal quotation marks and citation omitted). To determine whether it is reasonable to exercise personal jurisdiction in each case, we consider five factors. *Id.*; *Zavala*, 2007-NMCA-149, ¶ 12. We balance the burden on the defendant, New Mexico's interest, the plaintiff's interest in obtaining relief, the interest in the efficient resolution of controversies, and the interest in promoting public policy. *Asahi*, 480 U.S. at 113; *Zavala*, 2007-NMCA-149, ¶ 12.

Joy Co. advances only one argument on appeal: that it would be unduly burdened by being forced to defend this action in a foreign legal system. However, Joy Co. fails to provide any facts to support their argument that defending this case in New Mexico would be unduly burdensome except to say that is so. We recognize that there may be circumstances in which it would be unreasonable to require a foreign defendant whose only connection with the forum state is through the stream of commerce to defend itself in New Mexico courts. However, unlike the hypothetical defendants in Justice Breyer's *J. McIntyre Machinery* concurrence, Joy Co. is not a small farmer or cottage industry potter in a faraway country or state. *See J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2794 (Breyer, J., specially concurring). Nor is Joy Co. like the Japanese manufacturer of component parts in *Asahi* whose only connection with the United States was that its component parts were incorporated into another product abroad and then sold throughout the United States. 480 U.S. at 112-13. Joy Co. is an international manufacturer with recent annual revenues between thirty-seven and forty-six million dollars. It currently does business directly with six United States bicycle manufacturers, and since 2009, has had an employee located in California. In 2009 and 2010, Joy Co. attended a trade show in Nevada. And since 2006 and 2008 respectively, Joy Co. has held two United States patents. These facts demonstrate that Joy Co. currently conducts activities that open it to litigation in the United States and through which it avails itself of our laws. In order to defend its patents or enter

contracts with its United States clients, Joy Co. necessarily employs the legal system of particular states and of the United States. Although we acknowledge defending a suit in New Mexico would impose some burden on any nonresident, based on Joy Co.'s current activities in the United States, we conclude that burden on it is slight.

In contrast, R&C contends that its interest in indemnification against Joy Co. is great. R&C also argues that New Mexico has a clear interest in resolving claims arising from injuries occurring here as the result of defective products sold or supplied by foreign manufacturers that profit from the sale of their product to New Mexico consumers. We agree. R&C's interest in obtaining relief is manifest, and its assertions are consistent with the policies embodied in our long-arm statute. Joy Co. manufactured the quick-release mechanism at issue, and it is thus the party ultimately responsible for the allegedly defective product. Because the burden of defending in the foreign legal system is slight in comparison to R&C's and New Mexico's interest, the district court erred in finding that it is unreasonable to assert personal jurisdiction over Joy Co.

d. Declining to Apply *Asahi* or *J. McIntyre Machinery*

As we have noted, the district court in this case relied on *Asahi* in finding that it could not exercise specific personal jurisdiction over Joy Co. The district court acknowledged the "split view of the 'stream of commerce doctrine'" from that of *World-Wide Volkswagen* but nevertheless adopted the stream of commerce plus test set forth in *Asahi*. Joy Co. on the other hand relies on the United States Supreme Court's recent decision in *J. McIntyre Machinery* in which a plurality of the Court rejected the "national stream of commerce" theory as a basis for personal jurisdiction. We discuss the Court's multiple rationales in these cases and explain why the stream of commerce theories in either *Asahi* or *J. McIntyre Machinery* are not adopted here.

In *Asahi*, the United States Supreme Court issued a fractured decision outlining competing versions of the stream of commerce theory. 480 U.S. 102. The case arose out of a motorcycle accident, and the motorcycle rider filed suit against Cheng Shin Rubber Industrial Co., Ltd. (Cheng Shin), the Taiwanese manufacturer of the motorcycle tube. *Id.* at 105-06. Cheng Shin filed a cross-complaint against Asahi Metal Industry Co. (Asahi), the manufacturer of the tube's valve assembly. *Id.* at 106. The plaintiff's claim settled, and only Cheng Shin's complaint against Asahi remained. *Id.* Although the Justices unanimously held that exercising jurisdiction over Asahi would "offend traditional notions of fair play and substantial justice," they disagreed on whether Asahi has sufficient minimum contacts with the forum. *Id.* at 113-14, 116, 121 (internal quotation marks and citation omitted). Justice O'Connor, writing for a four-Justice plurality, asserted that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum [s]tate." *Id.* at 112. Instead, there must be "*an action of the defendant purposefully directed toward the forum* [*s*]*tate.*" *Id.* Justice O'Connor then explained,

> Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum [s]tate, for example, designing the product for the market in the forum [s]tate, advertising in the forum [s]tate,

> establishing channels for providing regular advice to customers in the forum [s]tate, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum [s]tate. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum [s]tate does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum [s]tate.

Id. Applying this reasoning to Asahi, Justice O'Connor concluded that exercising personal jurisdiction over the company would violate due process because there was no evidence of any action by Asahi to purposefully avail itself of the California market. *Id.* at 112-13.

Justice Brennan, writing for another four-Justice plurality, saw "no need" for a showing of additional conduct directed toward the forum when the defendant is aware that the stream of commerce may or will "sweep the product into the forum [s]tate." *Id.* at 116-17 (Brennan, J., concurring) (internal quotation marks and citation omitted). Instead, Justice Brennan viewed the stream of commerce as "the regular and anticipated flow of products from manufacture to distribution to retail sale" rather than as simply "unpredictable currents or eddies." *Id.* at 117 (Brennan, J., concurring). Accordingly, the facts in *Asahi* were sufficient to establish minimum contacts because Asahi was "aware of the distribution system's operation, and it knew that it would benefit economically from the sale in California of products incorporating its components." *Id.* at 121 (Brennan, J., concurring) (internal quotation marks and citation omitted). Justice Stevens, writing separately and joined by Justices White and Blackmun, first stated that the examination of minimum contacts was unnecessary in light of the Court's determination that exercise of jurisdiction over Asahi would be unreasonable and unfair. *Id.* at 121 (Stevens, J., concurring). In concluding that the minimum contacts part of the test had been satisfied, Justice Stevens criticized the plurality for assuming that a clear line can be drawn between awareness that a part will reach the forum state and purposeful availment of the forum market. *Id.* at 122 (Stevens, J., concurring). According to Justice Stevens, whether or not Asahi's conduct constituted purposeful availment required an examination of the volume, value, and hazardous character of the products. *Id.* (Stevens, J., concurring). Given the facts considered necessary by Justice Stevens, the *Asahi* opinion arguably supports a finding that there were sufficient minimum contacts based on the stream of commerce theory. However, the dueling *Asahi* opinions have done little more than provide a muddled rubric for deciding stream of commerce cases involving nonresident corporations and nowhere has that been more evident than in lower court decisions. For example, some federal and state courts have applied Justice Brennan's more broad stream of commerce approach. *See, e.g.*, *State v. NV Sumatra Tobacco Trading, Co.*, 666 S.E.2d 218, 223 (S.C. 2008) (finding personal jurisdiction under broad stream of commerce theory where the defendant's "actions indicate that it purposely availed itself of conducting business in all 50 states, including South Carolina"); *Kopke v. A. Hartrodt S.R.L.*, 629 N.W.2d 662, 674 (Wis. 2001) ("We believe the stream of commerce theory as set forth by Justice Brennan is the correct analysis to apply to the case at hand."). Others have opted for Justice O'Connor's stream of commerce plus test. *See, e.g.*, *Bridgeport Music, Inc. v. Still N The Water Publ'g*, 327 F.3d 472, 479-80

(6th Cir. 2003) (expressing "preference" for Justice O'Connor's approach and applying it to the case); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 944-46 (4th Cir. 1994) (taking approach similar to that of Justice O'Connor). Still others choose to apply both *Asahi* approaches. *See, e.g.*, *Pennzoil Prods. Co. v. Colelli & Assocs., Inc.*, 149 F.3d 197, 205-07 (3d Cir. 1998) (taking approaches articulated by both Justices O'Connor and Brennan); *Wiles v. Morita Iron Works Co.*, 530 N.E.2d 1382, 1389 (Ill. 1988) (noting that "[u]nder either interpretation of the stream of commerce theory, it is clear that purposeful availment of the forum's market requires, at a minimum, that the alien defendant is aware that the final product is being marketed in the forum [s]tate." (emphasis, internal quotation marks, and citation omitted)). And, finally, some courts decline to follow either approach and continue to follow *World-Wide Volkswagen*. *See, e.g.*, *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 386 (5th Cir. 1989) ("Because the Court's splintered view of minimum contacts in *Asahi* provides no clear guidance on this issue, we continue to gauge [the defendant's] contacts with Texas by the stream of commerce standard as described in *World-Wide Volkswagen* and embraced in this circuit."). In the most recent case before it, the expectation that the United States Supreme Court would articulate a clear rule and workable standard in stream of commerce cases did not materialize, and the issue continues to remain unclear. We explain.

After a twenty-four-year hiatus, the United States Supreme Court returned to the stream of commerce theory last year in *J. McIntyre Machinery*, ___ U.S. at ___, 131 S. Ct. at 2783. J. McIntyre Machinery, Ltd. (McIntyre) is an English corporation that contracted with an independent United States company to sell its machines in the United States. *Id.* at ___, 131 S. Ct. at 2786. Although it appears that four machines ended up in New Jersey, the Court noted that the record suggests only one machine ended up there. *Id.* Robert Nicastro filed suit in New Jersey state court after he injured his hand while using one of McIntyre's machines. *Id.* The United States Supreme Court reversed the New Jersey Supreme Court, which held that due process permitted the exercise jurisdiction over McIntyre. *Id.* at ___, 131 S. Ct. at 2785. Justice Kennedy, writing for Chief Justice Roberts and Justices Scalia and Thomas, explained that when a defendant places its goods in the stream of commerce and they are sold to a person in the forum state, "[t]he principal inquiry . . . is whether the defendant's activities manifest an intention to submit to the power of a sovereign." *Id.* at ___, 131 S. Ct. at 2788. In other words, "[t]he defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum [s]tate." *Id.* Under this theory, therefore, a defendant who targets the United States market as a whole but not the market of any particular state can avoid being subject to jurisdiction in any state for actions arising under state law. Applying this principle, Justice Kennedy recognized that although McIntyre directed marketing and sales at the United States market, it did not purposefully avail itself of the New Jersey market. *Id.* at ___, 131 S. Ct. at 2790. Consequently, the Court concluded that exercise of personal jurisdiction would violate due process. *Id.* at ___, 131 S. Ct. at 2791.

Justices Breyer and Alito concurred in the judgment but for different reasons. Justice Breyer noted that none of the Court's

precedents found that a single, isolated sale of a good in the forum state was constitutionally sufficient to confer personal jurisdiction. *Id.* at ___, 131 S. Ct. at 2792 (Breyer, J., concurring). In this instance, there was no regular course of sales to New Jersey, precluding a finding of jurisdiction even under Justice Brennan's stream of commerce theory. *Id.* (Breyer, J., concurring). Therefore, Justice Breyer concluded that the case could be decided based on precedent and without "making broad pronouncements that refashion basic jurisdictional rules." *Id.* at ___, 131 S. Ct. at 2792-93 (Breyer, J., concurring).

Justices Ginsburg, Sotomayor, and Kagan dissented, taking a more expansive approach to the due process requirements for the exercise of personal jurisdiction. Justice Ginsburg first criticized the plurality, stating that, "the plurality's notion that consent is the animating concept draws no support from controlling decisions of this Court." *Id.* at ___, 131 S. Ct. at 2799 (Ginsburg, J., dissenting). Instead, "[t]he modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*, gave prime place to reason and fairness." *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2800 (Ginsburg, J., dissenting). Here, McIntyre availed itself of the United States market nationwide, "not a market in a single [s]tate or a discrete collection of [s]tates." *See id.* at ___, 131 S. Ct. at 2801 (Ginsburg, J., dissenting). Justice Ginsburg further explained that this suit was distinguishable from *Asahi*, because Asahi, unlike McIntyre, did not seek out customers in the United States or engage distributors to promote its products in the United States. *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2803 (Ginsburg, J., dissenting). In addition, Asahi manufactured component parts "with little control over the final destination of its products"; McIntyre, in contrast, sold finished products. *Id.* (Ginsburg, J., dissenting) (internal quotation marks and citation omitted). Consequently, Justice Ginsburg "would hold McIntyre UK answerable in New Jersey for the harm Nicastro suffered at his workplace in that [s]tate using McIntyre UK's shearing machine." *Id.* at ___, 131 S. Ct. at 2804 (Ginsburg, J., dissenting).

Because *J. McIntyre Machinery* did not produce a majority opinion adopting either Justice O'Connor's or Justice Brennan's stream of commerce theory, and given Justice Breyer's reliance on current United States Supreme Court precedent, pre-*Asahi* case law utilizing the approach set forth in *World-Wide Volkswagen* remains binding in New Mexico. This approach requires us simply to adhere to our precedents, at least until the United States Supreme Court resolves the twenty-five-year-old uncertainty over whether stream of commerce theory is sufficient to establish the required minimum contacts and, if so, how it should be applied. For these reasons, the district court decision applying Justice O'Connor's stream of commerce plus approach from *Asahi* was in error. Joy Co.'s view that the proper approach to applying the minimum contacts test is to follow Justice Kennedy's plurality opinion in *J. McIntyre Machinery* is also rejected.

IV. CONCLUSION

Viewing the facts in a light most favorable to R&C, Joy Co.'s conduct and activities directed at the forum state are sufficient to establish a prima facie showing that personal jurisdiction is proper under the New Mexico long-arm statute and consistent with the requirements of federal due process. We reverse the district court's decision and remand for further proceedings.

IT IS SO ORDERED.

LINDA M. VANZI, Judge

RODERICK T. KENNEDY, Judge (dissenting).

MICHAEL E. VIGIL, Judge (specially concurring).

VIGIL, Judge (specially concurring).

I agree that Joy Co.'s conduct and activities are sufficient to confer specific jurisdiction on the New Mexico district court to decide R&C's claim for indemnification against Joy Co. In my opinion, however, this case does not require us to "reject" or "adopt" any views expressed by the United States Supreme Court. Accordingly, I specially concur.

The question presented in this case is whether Joy Co. has purposefully availed itself of the privilege of conducting activities within New Mexico, thereby invoking the protection of its laws, and whether the claim for indemnification brought by R&C against Joy Co. arises out of Joy Co.'s activities in New Mexico. *See J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2787-88. Two general views have emerged in the analysis of whether a non-resident is subject to the jurisdiction of a state court consistent with due process. Both views command agreement of four justices, while neither commands agreement of a majority. These are Justice Brennan's view, and Justice O'Connor's view, both of which are expressed in *Asahi*, which was decided by a plurality opinion.

I refer to Justice Brennan's view as the "stream of commerce" view. Under this view:

> The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State.

Asahi, 480 U.S. at 117 (Brennan J., concurring). Thus, if a defendant is aware, or could have foreseen, that its product would ultimately be sold in a state in the stream of commerce, it is subject to personal jurisdiction in that state. *Id.*

I refer to Justice O'Connor's view as the "purposefully directed" test. Under this view:

> The 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. The placement of a product into the stream of commerce, without more,

> is not an act of the defendant purposefully directed toward the forum State.

Asahi, 480 U.S. at 112 (emphasis, internal quotation marks, and citations omitted). This view rejects foreseeability as the standard and instead requires a defendant to take some deliberate and overt action to target the market in the forum state. *Id.*

J. McIntyre Machinery is the most recent opinion of the United States Supreme Court addressing personal jurisdiction, and it was also decided by a plurality opinion. Speaking for four justices, Justice Kennedy states:

> [P]ersonal jurisdiction requires a forum-by-forum, or sovereign-by sovereign, analysis. The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct.

___U.S. at ___, 131 S. Ct. at 2789.

Judge Vanzi has fairly summarized the facts in ¶¶ 27-31; 36, and they do not need repeating here. Those facts clearly establish compliance with Justice Brennan's "stream of commerce" test. The facts also satisfy Justice O'Connor's "purposefully directed" test. Through its marketing and distributing scheme, Joy Co. clearly targeted New Mexico as a state in which contractual duties and obligations—the basis for the indemnity claim—would be undertaken. The fact that Joy Co. itself does not enter into New Mexico is not dispositive. Summarizing existing case law in *J. McIntyre Machinery*, Justice Kennedy states, "a defendant may in an appropriate case be subject to jurisdiction without entering the forum—itself an unexceptional proposition—as where manufacturers or distributors 'seek to serve' a given State's market." *Id.* at ___, 131 S. Ct. at 2788 (citations omitted). Specific, concrete examples set forth in Justice O'Connor's opinion which demonstrate an intent or purpose to serve the market in the forum state include, "establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Asahi*, 480 U.S. at 112. Those conditions are plainly present in this case. Finally, I submit that the facts satisfy the view expressed in *J. McIntyre Machinery*. Specifically, the facts demonstrate that through its marketing and distributing scheme, Joy Co. has engaged in a course of conduct directed at the economy existing within New Mexico.

For the foregoing reasons, I do not believe it is necessary to "decline" to apply *Asahi* or *J. McIntyre Machinery* as proposed by Judge Vanzi. However, since I believe that under our standard of review, the facts herein satisfy both *Asahi* and *J. McIntyre Machinery*, I specially concur in the result reached.

MICHAEL E. VIGIL, Judge

KENNEDY, Judge (concurring in part and dissenting in part).

I agree that there is no general jurisdiction to be exercised with regard to Joy Co. I respectfully disagree with the Majority that New Mexico has specific jurisdiction to entertain this indemnity claim. I believe the Opinion's liberal approach is excessively

broad. Placing goods in the worldwide stream of commerce, together with a general awareness that products delivered to distributors elsewhere might land in New Mexico, should not suffice for "purposeful availment" of the benefits and protections of New Mexico's legal system. I am not satisfied that such an approach possesses the degree of certainty and predictability to reliably establish a manufacturer's relationship with New Mexico as a foreign state.

I would use a test requiring behavior on Joy Co.'s part that was more demonstrably "*purposefully directed*" at New Mexico by Joy Co. and not just an artifact of Joy Co. being at the front end of a convoluted distribution chain that brought a bicycle part to our state. *See Asahi*, 480 U.S. at 112. The focus should be on Joy Co.'s actions in their business that are directed toward New Mexico, not a nebulous *post hoc* imputation of their expectations deriving from where their product might turn up. The Opinion's selective approach to specific jurisdiction adopts Justice Brennan's solo dissent in *World-Wide Volkswagen*, where his opinion loosed more limited and amorphous criteria for jurisdiction that "the litigation is connected to the forum, the defendant is linked to the forum, and the burden of defending is not unreasonable," 444 U.S. at 302. There, Justice Brennan rejected any consideration of how a distribution chain might operate to bring goods into the state, or whether goods arrived at the end of a long distribution chain over which no control might be exerted by the manufacturer. Rather, he opined that no more need be required of a defendant than "[i]n each case the seller purposefully injects the goods into the stream of commerce and those goods predictably are used in the forum [s]tate." 444 U.S. at 307.

The standard enunciated by Justice O'Connor in *Asahi* is one I believe to be very much alive and requires a showing that Joy Co. also "purposefully avail[ed] itself of the privilege of conducting activities within the forum [s]tate" and, thereby, "invoke[ed] the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). This is not a products liability case against Joy Co. It is a claim by a bicycle store for indemnity from the maker of a bicycle component that may have failed in a fifteen-year-old bicycle. A court may exercise specific jurisdiction when (1) the defendant purposely directed its activities toward the forum state or purposely availed itself of the privileges of conducting activities there, and (2) the controversy arises out of or is related to the defendant's contacts with the forum state. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). The arrival of Joy Co's bicycle part in New Mexico was an incidental contact with New Mexico and insufficiently purposeful to justify invoking our specific jurisdiction.

Last year, the United States Supreme Court once again visited this cratered battlefield of plurality jurisprudence and managed to forge an agreement between six justices as to two propositions that are applicable here. *J. McIntyre Mach.*, ___ U.S. ___, 131 S. Ct. 2780. First, the stream of commerce notion alone, even to the extent that it is employed to paint a satisfying gloss of foreseeability on the arrival of a product within a particular jurisdiction, is not enough to sufficiently protect the due process right of Joy Co. "not to be coerced except by lawful judicial power." *Id.* at ___, 131 S. Ct. at 2785. This requires "some act" of Joy Co., by which it availed itself of the privilege of conducting activities within the forum state that invokes the benefits and protections of its laws. *See id.* at ___, 131 S. Ct. at 2787. A

specific effort to sell in the forum state, purposeful availment of the privilege of doing business in the forum state and the expectation that one's goods will be purchased in the forum state constitute the points of agreement in which the plurality's opinion was joined by the two concurring justices, giving a six-justice majority to the inapplicability of mere stream of commerce and foreseeability as sufficient to confer special jurisdiction. *Id.* at ___, 131 S. Ct. at 2792.

This is not the loose approach taken by the Opinion in this case that conflates foreseeability with expectation and then availment. It also does not allow for the conflation of Joy Co. seeking to serve the United States market with purposeful intent to reach the New Mexico consumer. Such a view of an intent to reach the consumer is not the test we should use, but rather we should look to purposeful intent to utilize the benefits and protections of the forum upon which the Opinion should focus. It is specifically this relationship with the forum that requires the application of due process, and purposeful availment requires an act by Joy Co. "purposefully directed toward the forum [s]tate" and not merely an awareness or an intention born of using nationwide distribution networks. *Asahi*, 480 U.S. at 112. In *Hanson*, that involved acting so as to gain the "privilege of conducting activities within the forum [s]tate, thus invoking the benefits and protections of its laws." 357 U.S. at 253. In this case, Joy Co. has not purposefully pursued its contacts with New Mexico in a way that it might benefit from the protection of our laws, but rather the other way around. A New Mexico entity seeks to use New Mexico law for its own benefit and protection.

Both the plurality and Justice Breyer's concurrence rejected the notion that a desire for an American distributor to sell its product to any willing customer in the United States, and participation in trade shows were facts that adequately supported finding minimum contacts between a manufacturer and a state. *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2790-91. Joy Co. has no representatives in New Mexico, and none of its products reach our state save through a Denver distributor, or through the inclusion of its parts by bicycle manufacturers who avail themselves of downstream distributors. R&C's manager never established that he has ever independently ordered a Joy Co. component through the Denver distributor for sale in New Mexico, and no direct sale from Joy Co.'s representative in California was documented. Justice Stevens' concurrence in *Asahi* evidenced no more than an inclination that the minimum contacts part of the test had been satisfied, but usefully outlined some circumstances echoed later in *J. McIntyre Machinery* that could be relevant to determining a company's contacts with the forum state, including the volume of sales, the value of the goods, and the hazardous character of the components. *Asahi*, 480 U.S. at 122; *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2790, 2793. Here, the value and volume of sales seems minimal, and the items are not inherently dangerous so as to anticipate their causing injury.

Viewing a worldwide pool of commercial transactions so as to confer upon every manufacturer a specific intention to do business within every jurisdiction, and moreover impute a corporate anticipation of being haled into the courts of New Mexico as a result is a siren's call I believe more sensible jurisprudence requires me to reject. The Majority and I do not agree that *Asahi* and later cases, such as *J. McIntyre Machinery*, owing to their multiple pluralities of opinion,

have limited relevance to this situation. I believe that *World-Wide Volkswagen* has indeed evolved to provide a more sophisticated view of specific jurisdiction that would support affirming the district court in this case. With the frequent reliance placed on *Asahi* by the majority opinion to glean selected precepts, the broader view of development through *J. McIntyre Machinery* is one I find more satisfying to resolve the jurisdictional question posed by this case. Hence, I believe that Joy Co.'s connection with New Mexico is too attenuated to support specific jurisdiction, requiring some additional factor or act on Joy Co.'s part than simply having a marketable item in the "stream of commerce" and an imputed awareness that it would arrive in New Mexico is a better standard.

I view Justice Breyer's concurrence in *J. McIntyre Machinery* as quite explicit in rejecting any jurisdiction based on no more than a producer being subject to jurisdiction "so long as it knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states." ___ U.S. at ___, 131 S. Ct. at 2785. His precise reasoning was that, to adopt such a stream of commerce approach, would be to ignore "the relationship between the defendant, the *forum*, and the litigation." *Id.* at ___, 131 S. Ct. at 2793. In a case such as this, where the distribution chain seems to begin with Joy Co.'s contacts outside of the United States and no direct line between Joy Co. and New Mexico exists, I would not take jurisdiction based on little more than their part showing up in a bicycle fifteen years ago.

I respectfully dissent.

RODERICK T. KENNEDY, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-073

Filing Date: May 20, 2013

Docket No. 31,087

DIANE SLUSSER,

Plaintiff-Appellant,

v.

VANTAGE BUILDERS, INC.,

Defendant-Appellee.

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OPINION

HANISEE, Judge.

Diane Slusser (Plaintiff) appeals the district court's order of summary judgment based on the expiration of the statute of limitations and Plaintiff's failure to meet her burden of persuasion for an age discrimination claim. Plaintiff argues that the statute of limitations should not have commenced until she knew or should have known that a younger person had replaced her as an employee of Vantage Builders, Inc. (Defendant). In the alternative, Plaintiff contends that the statute should have been equitably tolled until she knew or should have known she was replaced by a younger person because Defendant misled her regarding the reason for her termination. We conclude that the statute began to run upon Plaintiff's termination, the circumstances of this case did not require the district court to equitably toll the statute, and Defendant's actions were not grounds for applying equitable estoppel. Because the district court properly concluded that the statute of limitations expired on Plaintiff's claim, we affirm.

I. BACKGROUND

Defendant employed Plaintiff for four years, beginning in 2002. Plaintiff held a managerial position in Defendant's accounting department. In November 2005, Plaintiff received her last employee annual review, which indicated that she generally met or exceeded company expectations as to her work quality, knowledge of the job, adherence to policy, and initiative, but fell below expectations with regard to her work attitude. On February 16, 2006, Defendant terminated Plaintiff's employment. The termination letter stated that Defendant was "restructuring the Accounting and Purchasing Departments. [Plaintiff's] role as Manager is no longer needed within the [c]ompany. Effective immediately your position has been eliminated." Plaintiff was forty-one years old at the time of her termination.

In December 2006, almost ten months following her termination, Plaintiff filed a federal lawsuit under the Fair Labor Standard Act (FLSA), alleging that Defendant had improperly classified her as an exempt employee, failing to pay her the overtime that she had earned. Although that unsuccessful lawsuit is not at issue in this case, depositions taken during the FLSA suit led Plaintiff to file the complaint associated with the present appeal. Specifically, in the June 2007 deposition of her former supervisor, Scott Porter, Porter stated that Plaintiff's termination was performance related. When asked why the termination letter did not mention Plaintiff's deficient performance,

Porter stated, "I personally like [Plaintiff] and I did not want to jeopardize anything as far as her being able to find another job." From that deposition and from two ensuing depositions of employees who continued to work for Defendant after Plaintiff's departure, Plaintiff learned that a younger woman in her twenties named Karie Trahan, who was paid substantially less than Plaintiff, assumed some of Plaintiff's responsibilities after her termination. Plaintiff stated that Trahan "was also assigned . . . Plaintiff's position as 'Assistant Controller'[and] . . . . had the same roles and performed the same job" as Plaintiff.

On October 15, 2007, twenty months following her termination, Plaintiff filed a charge of discrimination under the New Mexico Human Rights Act with the Equal Employment Opportunity Commission (EEOC), alleging:

> In February, 2006 I was laid off. On June 26, 2007, I discovered that a younger female in her [twenties] was placed in my position. . . . I believe that I have been discriminated against because of my age (41 at the time of the incident) in violation of the Age Discrimination in Employment Act of 1967. I believe that I have been retaliated against for complaining.

See NMSA 1978, § 28-1-7(A) (2004) (stating that under New Mexico's Human Rights Act, it is an unlawful discriminatory employment practice to discharge a person based on age); NMSA 1978, § 28-1-10 (2005) (stating the grievance procedure for Human Rights Act violations); *Sabella v. Manor Care, Inc.*, 1996-NMSC-014, ¶¶ 12-13, 121 N.M. 596, 915 P.2d 901 (stating that the initial grievance can be filed with and pursued through either the EEOC or New Mexico Human Rights Division). Plaintiff's case subsequently proceeded to district court, where Defendant made the motion for summary judgment at issue in this appeal, arguing that the claim was time-barred and asserting that Plaintiff failed to meet her burden of persuasion. The district court granted summary judgment on both grounds. Plaintiff now appeals.

II. DISCUSSION

Plaintiff asserts that the district court erred in granting summary judgment based on its conclusion that the statute of limitations unequivocally expired 300 days after Plaintiff was terminated from employment. *See* § 28-1-10(A) ("All complaints shall be filed . . . within three hundred days after the alleged act was committed."). Plaintiff contends that the statute of limitations should only begin to run when she knows or should know that the employer's adverse action was discriminatory. Plaintiff also argues that the statute of limitations should have been equitably tolled because Defendant acted in a deceptive manner by concealing the reason for her termination.

"In a motion for summary judgment, the party claiming that a statute of limitation should be tolled has the burden of alleging sufficient facts that if proven would toll the statute." *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, ¶ 12, 135 N.M. 539, 91 P.3d 58 (internal quotation marks and citation omitted). "Upon [the defendant] making [a] prima facie showing [that the statute of limitations ran], the burden then shifted to [the] claimant, who was required to show at least a reasonable doubt as to the existence of a genuine factual issue on tolling of the statute." *Hutcherson v. Dawn Trucking Co.*, 107 N.M. 358, 360, 758 P.2d 308, 310 (Ct.

App. 1988) *overruled on other grounds by Schultz ex rel. Schultz v. Pojoaque Tribal Police Dep't*, 2013-NMSC-013, ¶ 27, ___ P.3d ___ (No. 33,372, Apr. 11, 2013). "The determination of whether a claim is timely filed is a question of fact, and only becomes a question of law when there is no factual dispute." *Ocana*, 2004-NMSC-018, ¶ 12. "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. "We review . . . legal questions de novo." *Id.*

At the outset, we clarify three principles at play in Plaintiff's arguments regarding the statute of limitations: the discovery rule, equitable tolling, and equitable estoppel. The discovery rule dictates when the statute of limitations begins to run in a case. *Gerke v. Romero*, 2010-NMCA-060, ¶ 10, 148 N.M. 367, 237 P.3d 111. Equitable tolling, on the other hand, operates to suspend the statute of limitations in situations where circumstances beyond a plaintiff's control prevented the plaintiff from filing in a timely manner. *Ocana*, 2004-NMSC-018, ¶ 15. Lastly, equitable estoppel bars a defendant from raising the statute of limitations defense when the defendant actively prevents the plaintiff from filing within the period of limitation. *Tomlinson v. George*, 2005-NMSC-020, ¶ 13, 138 N.M. 34, 116 P.3d 105. We address each of Plaintiff's arguments in turn within the context of these principles.

A. The Statute of Limitations Ran From the Date of the Adverse Employment Action

Plaintiff first argues that she filed within the statute of limitations because the statute should have commenced when she knew or should have known that the termination was motivated by discrimination. "[U]nder the discovery rule, the statute of limitations begins when the plaintiff acquires [or with reasonable diligence should have acquired] knowledge of facts, conditions, or circumstances which would cause a reasonable person to make an inquiry leading to the discovery of the concealed cause of action." *Gerke*, 2010-NMCA-060, ¶ 10 (internal quotation marks and citation omitted); *Williams v. Stewart*, 2005-NMCA-061, ¶ 12, 137 N.M. 420, 112 P.3d 281 (stating that "[t]he discovery rule provides that the cause of action accrues when the plaintiff discovers or with reasonable diligence should have discovered that a claim exists" (internal quotation marks and citation omitted)). "The key consideration under the discovery rule is the factual, not the legal, basis for the cause of action. The action accrues when the plaintiff knows or should know the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action." *Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara*, 2011-NMCA-112, ¶ 29, 267 P.3d 70 (internal quotation marks and citation omitted), *cert. quashed*, 2012-NMCERT-005, 294 P.3d 447. With regard to the discovery rule, our case law thus plainly differentiates between discovering the existence of predicate facts to a cause of action and discerning the theory of law under which to proceed.

There are two divergent applications of the discovery rule specific to age discrimination cases that assign differing values to a plaintiff's knowledge of his or her employer's discriminatory motive. Under the minority rule, "the limitations period does not start to run until the employee knows or should know that he or she has been or will be replaced by a person outside the protected age

group." *Wheatley v. Am. Tel. & Tel. Co.*, 636 N.E.2d 265, 268 (Mass. 1994); *see also Henry v. N.J. Dep't of Human Servs.*, 9 A.3d 882, 894 (N.J. 2010) (commencing the statute of limitation for a racial discrimination claim when the employee learned or by reasonable diligence should have learned that less-qualified Caucasian nurses were hired into advanced positions). In embracing the minority position, the Massachusetts Supreme Court relied on its own statute of limitations case law, and favorably, although in our view incorrectly, cited several federal cases for support. *Wheatley*, 636 N.E.2d at 268. These federal cases did not delay commencement of the discovery rule until the plaintiff's awareness of the legal cause of action, the position favored by the minority of courts, but rather applied equitable principles to toll the statute of limitation under otherwise similar factual circumstances. *See id.* (citing *Sturniolo v. Sheaffer, Eaton, Inc.*, 15 F.3d 1023, 1025-26 (11th Cir. 1994) (stating that the limitation period runs from the date of the adverse employment act, but applying equitable modification to toll the statute); *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 880-82 (5th Cir. 1991) (commencing the statute of limitations when the plaintiff was terminated, but holding that the employer's statement that it would consider rehiring the worker was a misstatement that lulled the worker into not approaching EEOC sooner and justified application of principles of equitable modification); *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307-09 (3d Cir. 1983) (stating that the limitation period runs from the date of the adverse employment act, but applying equitable modification to toll the statute).

In contrast, the majority rule followed by some states and most federal courts, including the Tenth Circuit, requires the applicable statutes of limitation in age-based employment discrimination cases to run from the date the plaintiff learns of the adverse employment action. *See Almond v. Unified Sch. Dist. No. 501*, 665 F.3d 1174, 1177 (10th Cir. 2011) ("[A]n employee who discovers, or should have discovered, the *injury* (the adverse employment decision) need not be aware of the unlawful *discriminatory intent* behind that act for the limitations clock to start ticking."); *Morris v. Gov't Dev. Bank of Puerto Rico*, 27 F.3d 746, 749 (1st Cir. 1994) (holding that the initial termination letter, not subsequent communications, marked beginning of limitations period); *Sturniolo*, 15 F.3d at 1025-26 (commencing the statute of limitations at the time of the adverse employment action); *Rhodes*, 927 F.2d at 880-82 (same); *Meyer*, 720 F.2d at 307-09 (same); *Ching v. Mitre Corp.*, 921 F.2d 11, 14 (1st Cir. 1990) (cause of action accrues on the happening of an event likely to put plaintiff on notice); *Chapman v. Homco, Inc.*, 886 F.2d 756, 758 (5th Cir. 1989) (holding that limitations period on employment discrimination claim triggered on date of discharge, not on date of discovery of discriminatory intent); *McConnell v. Gen. Tel. Co. of Cal.*, 814 F.2d 1311, 1317 (9th Cir. 1987) (recognizing that statute of limitations begins to run from the date of the adverse employment action but noting that it could be tolled by the employer's active concealment of facts); *Ogletree v. Glen Rose Indep. Sch. Dist.*, 314 S.W.3d 450, 454-55 (Tex. App. 2010) (stating that the employment discrimination claim was triggered on date of discharge, not on date of discovery of discriminatory intent).

The rationale behind the majority rule's commencement of the statute of limitations on the date the plaintiff discovers the adverse employment action is that "when

an employee knows that he has been hurt and also knows that his employer has inflicted the injury, it is fair to begin the countdown toward repose . . . [because h]e knew the stated reason for [the adverse employment action] and could assess its legitimacy." *Morris*, 27 F.3d at 750. Like all other causes of action, "the plaintiff need not know all the facts that support his claim in order for countdown to commence." *Id.* "To allow plaintiffs to raise employment discrimination claims whenever they begin to suspect that their employers had illicit motives would effectively eviscerate the time limits prescribed for filing such complaints." *Pacheco v. Rice*, 966 F.2d 904, 906 (5th Cir. 1992). The United States Supreme Court has explained that statutes of limitation "protect employers from the burden of defending claims arising from employment decisions that are long past." *Del. State Coll. v. Ricks*, 449 U.S. 250, 256-57 (1980). Furthermore, equitable principles, as discussed below, protect plaintiffs when it would be unfair to enforce a statute of limitation against them. We agree with and adopt the overwhelming use of the majority rule commencing statutes of limitation in age discrimination cases when a plaintiff knows or should know of the adverse employment action, regardless of whether the plaintiff then has or should have knowledge of the employer's discriminatory intent. Thus, we reject Plaintiff's contrary argument and affirm the district court on this ground.

Next we assess whether reversal is warranted under the related but distinct doctrines of equitable tolling and equitable estoppel, which respectively function to either suspend the statute of limitations or bar a defendant from enforcing a statute of limitation. *Sebelius v. Auburn Reg'l Med. Ctr.*, ___ U.S. ___, 133 S. Ct. 817, 830 (2013) (Sotomayor, J., concurring) ("While equitable tolling extends to circumstances outside both parties' control, the related doctrines of equitable estoppel and fraudulent concealment may bar a defendant from enforcing a statute of limitation when its own deception prevented a reasonably diligent plaintiff from bringing a timely claim."). Notably, equitable tolling ensures that a plaintiff can bring a cause of action when circumstances outside of his or her control unfairly inhibit the plaintiff's ability to file in a timely manner. Whereas, equitable estoppel penalizes a defendant for undertaking actions that are purposefully aimed at inhibiting a plaintiff from filing his or her claim against the defendant in a timely manner.

B. Plaintiff Failed to Allege Sufficient Facts to Equitably Toll the Statute

New Mexico directly recognizes the distinct legal theory of equitable tolling. "Equitable tolling is a nonstatutory tolling theory which suspends a limitations period." *Ocana*, 2004-NMSC-018, ¶ 15. We determine the applicability of equitable tolling on a case-by-case basis, with an eye toward "cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Id.*; *see* 54 C.J.S. *Limitations of Actions* § 134 (2013) (explaining equitable tolling generally).

In *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990), Judge Posner, writing for the Seventh Circuit, provided an outline of the equitable remedies potentially available to a plaintiff in cases where employment discharge is allegedly effectuated on an impermissible discriminatory basis and the plaintiff fails to file in a timely manner. *Cada* explained that equitable tolling "permits a plaintiff to avoid the bar of the statute of limitations if despite

all due diligence he is unable to obtain vital information bearing on the existence of his claim." *Id.* at 451. The purpose of equitable tolling is to give "the plaintiff extra time if he needs it. If he doesn't need it there is no basis for depriving the defendant of the protection of the statute of limitations." *Id.* at 452. Notably, equitable tolling "does not assume a wrongful—or any—effort by the defendant to prevent the plaintiff from suing." *Id.* at 451.

The United States Supreme Court has stated that, "where a pattern remains obscure in the face of a plaintiff's diligence in seeking to identify it, equitable tolling may be one answer to the plaintiff's difficulty[.]" *Rotella v. Wood*, 528 U.S. 549, 561 (2000). Similarly, the Seventh Circuit explained that equitable tolling applies where "the plaintiff is assumed to know that he has been injured [by his termination notice], so that the statute of limitations has begun to run; but he cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant." *Cada*, 920 F.2d at 451; *see Sturniolo*, 15 F.3d at 1025-26 (remanding for further factual development and stating that "[t]he date when [the employee] knew or should have known that [the employer] had hired a younger individual to replace him is the date upon which the tolling period should commence").

"Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *see Ocana*, 2004-NMSC-018, ¶ 15 (stating that the plaintiff must act diligently to pursue her rights in order to assert equitable tolling). In assessing diligence, "[t]o determine whether a plaintiff in fact lacked vital information, a court should ask whether a reasonable person in the plaintiff's position would have been aware that he had been fired in possible violation of the [anti-discrimination law]." *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1329 (8th Cir. 1995) (internal quotation marks and citation omitted); *Chakonas v. City of Chicago*, 42 F.3d 1132, 1135 (7th Cir. 1994) (same). "The qualification 'possible' is important. If a plaintiff were entitled to have all the time he needed to be *certain* his rights had been violated, the statute of limitations would never run—for even after judgment, there is no certainty." *Cada*, 920 F.2d at 451.

Although we can imagine circumstances similar to those in the case at bar where equitable tolling would be appropriate, we conclude that this equitable doctrine does not apply here because Plaintiff failed to produce sufficient facts showing that she has diligently pursued her rights. *Ocana*, 2004-NMSC-018, ¶¶ 12, 15 ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." (internal quotation marks and citation omitted)); *Stringer v. Dudoich*, 92 N.M. 98, 99, 583 P.2d 462, 463 (1978) (stating that the party asserting equitable tolling bears the burden of providing sufficient facts that if proven would toll the statute). In response to Defendant's motion for summary judgment, Plaintiff argued that "testimony from one employee [of Defendant] indicates that [] Trahan assumed Plaintiff's duties soon after she left[,] while [testimony from] another employee says that Trahan assumed some of Plaintiff's duties, at a significantly lower salary, right away." Plaintiff attached excerpts of these depositions from employees Susan Harris and Judy Montoya to her brief responding to Defendant's motion for summary judgment. Harris testified that after

Plaintiff was terminated, Trahan appeared to have taken over some of Plaintiff's duties. Montoya, who was formerly supervised by Plaintiff, testified that Trahan and Plaintiff had the same role, and that sometime after Plaintiff's departure, Trahan became Montoya's boss. Plaintiff stated that this evidence "contradict[ed] Porter's testimony and [Defendant]'s assertion that Trahan was not promoted for [eleven] months after [Plaintiff] was terminated."

Yet, despite the fact that Plaintiff asserts evidence of discrimination existed immediately after her termination, when a younger employee took over at least some of her responsibilities at the company, Plaintiff never showed that she acted diligently to discover such evidence and pursue her rights as required to equitably toll a statute. Even though Plaintiff subjectively lacked such information within the 300 days following her termination, Plaintiff bore an affirmative duty to diligently investigate her potential Human Rights Act causes of action against her employer. Our Supreme Court has made it clear that "where a plaintiff fails to receive notice of the right to sue through his or her own fault, equitable tolling does not apply." *Ocana*, 2004-NMSC-018, ¶ 15. At issue in the motion for summary judgment is whether Plaintiff objectively should have known information necessary to decide whether the injury was due to Defendant's wrongdoing and whether she properly asserted factual evidence regarding her exercise of due diligence.

As we stated above, "[i]n a motion for summary judgment, the party claiming that a statute of limitation should be tolled has the burden of alleging sufficient facts that if proven would toll the statute." *Id.* ¶ 12 (internal quotation marks and citation omitted). Here, Plaintiff failed to assert and support with facts that the circumstances were such that she should not have known about Trahan taking over her duties, even with reasonable diligence in investigating the basis of her termination. Instead, in her response opposing the motion for summary judgment, Plaintiff produced facts indicating that evidence existed well within the statute of limitations that could have supported her claim for age discrimination. In that same response, Plaintiff never asserted or produced factual evidence pertaining to why she could not obtain such evidence of discrimination within the first 300 days of her termination, or assertions regarding the efforts she undertook, if any, to diligently pursue her rights prior to the depositions taken in excess of a year following her termination. Instead, Plaintiff asserted that the information regarding Trahan taking over her responsibilities "did not come to light until . . . Porter's June 27, 2007 deposition[,]" and therefore the statute of limitations should be tolled. But Plaintiff does not describe the manner in which she in fact pursued her claim in the seventeen months following her termination and prior to the taking of Porter's deposition.

To provide the district court with a basis to apply equitable tolling in this case, Plaintiff must show that she was unable to discover the facts constituting Defendant's discriminatory intent, *despite* her diligence to assert her rights. *See Wall v. Nat'l Broad. Co.*, 768 F. Supp. 470, 476 (S.D.N.Y. 1991) (stating that summary judgment appropriate when the plaintiff has "failed to set forth evidence demonstrating that he could not have discovered the alleged discriminatory act at an earlier date in the exercise of reasonable diligence"). Where the "[p]laintiffs have offered no facts . . . to explain why they did not earlier discover the defendant's employment practices at some earlier time[,

t]his court is inclined to believe that such facts should be forthcoming in order to satisfy the due diligence requirement of equitable tolling." *Allen v. Diebold, Inc.*, 807 F. Supp. 1308, 1317 (N.D. Ohio 1992). Neither Plaintiff's complaint nor her response to Defendant's motion for summary judgment asserted facts regarding the nature of her efforts and diligence prior to discovering the cause of action. *See Auguste v. N.Y. Presbyterian Med. Ctr.*, 593 F. Supp. 2d 659, 667 (S.D.N.Y. 2009) (stating that equitable tolling is inapplicable because "allegations [of trickery by the defendant who offered the plaintiff an interview after her termination] are insufficient to merit the application of the equitable tolling doctrine[,]" and that the plaintiff "has not demonstrated that she exercised reasonable diligence in pursuing her discrimination claim"); *see also Allen*, 807 F. Supp. at 1317 (concluding that where the plaintiffs offered no facts to show diligence, equitable tolling does not apply even if the plaintiffs were only informed a year after termination that the defendant company had hired younger individuals to replace them).

We therefore conclude that the district court did not err in granting summary judgment on the ground that the statute of limitations ran because Plaintiff failed to meet her burden of alleging sufficient facts to toll the statute of limitations.

C. Equitable Estoppel Does Not Apply Under These Facts

Lastly, to the extent that Plaintiff's contentions regarding the inconsistently asserted reasons Defendant provided for her termination could be construed as an equitable estoppel argument, we conclude that equitable estoppel is inapplicable here. Under the theory of equitable estoppel, "a party may be estopped from asserting a statute-of-limitations defense if that party's conduct has caused the plaintiff to refrain from filing an action until after the limitations period has expired." *In re Drummond*, 1997-NMCA-094, ¶ 13, 123 N.M. 727, 945 P.2d 457. "The [equitable estoppel] theory is premised on the notion that the one who has prevented the plaintiff from bringing suit within the statutory period should be estopped from asserting the statute of limitation as a defense." *Tomlinson*, 2005-NMSC-020, ¶ 13 (internal quotation marks and citation omitted); *Cont'l Potash, Inc. v. Freeport-McMoran, Inc.*, 115 N.M. 690, 697, 858 P.2d 66, 73 (1993) ("Estoppel precludes one party from asserting a right when another party has relied to his detriment upon the acts or conduct of the first party and when asserting that right would prejudice the other who has acted thereon in reliance.").

> Under the doctrine of equitable estoppel, the party estopped from asserting a statute of limitations must have (1) made a statement or action that amounted to a false representation or concealment of material facts, or intended to convey facts that are inconsistent with those a party subsequently attempts to assert, with (2) the intent to deceive the other party, and (3) knowledge of the real facts other than conveyed. The party arguing estoppel must (1) not know the real facts, and (2) change his or her position in reliance on the estopped party's representations.

Blea v. Fields, 2005-NMSC-029, ¶ 20, 138 N.M. 348, 120 P.3d 430; *Vill. of Angel Fire v. Bd. of Cnty. Comm'rs of Colfax Cnty.*, 2010-NMCA-038, ¶ 21, 148 N.M. 804, 242

P.3d 371 (same). Our courts also apply equitable estoppel in cases where the defendant fraudulently conceals the cause of action from the plaintiff. *Beneficial Fin. Co. of N.M. v. Alarcon*, 112 N.M. 420, 425, 816 P.2d 489, 494 (1991). "When a litigant is relying on fraudulent concealment or estoppel to toll the running of a statute of limitations, the statute is tolled until the right of action is discovered or, by the exercise of ordinary diligence, could have been discovered." *Bolton v. Bd. of Cnty. Comm'rs*, 119 N.M. 355, 369, 890 P.2d 808, 822 (Ct. App. 1994).

Here, Plaintiff argues that Defendant fraudulently concealed the cause of action by stating that Plaintiff was terminated because the company was restructuring the accounting department. The Seventh Circuit's discussion in *Cada*, which rejected a similar argument, is also helpful to our assessment of the applicability of equitable estoppel. 920 F.2d at 450-51. In *Cada*, the plaintiff argued that the defendant's reorganization of his department was a ruse to conceal the plan to fire him because of his age. *Id.* In rejecting this argument, the court explained how active concealment for purposes of estoppel differs from events giving rise to the underlying cause of action. *Id.* at 451. The court concluded that:

> This [argument] merges the substantive wrong with the [equitable estoppel] doctrine, ignoring [the] distinction between [the] two types of fraud. It implies that a defendant is guilty of fraudulent concealment unless it tells the plaintiff, "We're firing you because of your age." It would eliminate the statute of limitations in age discrimination cases.

Id.

Similarly, in this case, Defendant's statement that Plaintiff was terminated because of the company's reorganization did not constitute active steps, independent of the underlying allegedly tortious conduct, to prevent the plaintiff from filing her age discrimination claim on time. Simply because Porter provided two different reasons for Plaintiff's termination in and of itself fails to indicate or establish that the termination was instead motivated by age discrimination. To conclude that such an inconsistency constitutes fraudulent concealment of discriminatory intent would effectuate a practically limitless extension of the New Mexico Human Rights Act's statute of limitations, the very untenable result identified by the Seventh Circuit. Thus, although New Mexico law provides for the application of equitable estoppel in appropriate circumstances, we conclude that the district court's decision not to apply it under the facts of this case was proper.

III. CONCLUSION

Because the statute of limitations is dispositive, we do not address the district court's application of the new and harsher standards of proof recently adopted and implemented by the United States Supreme Court in federal age discrimination claims to claims brought pursuant to the New Mexico Human Rights Act. *Compare Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (establishing for the first time in federal age discrimination cases that the plaintiff must prove that age was the "but-for" cause of the employer's adverse decision, and eliminating the shifting of the burden of persuasion to the employer to show that it would have taken the action regardless of age, even when plaintiff has produced some evidence that age was one motivating factor in that decision), *with Cates*

v. Regents of the N.M. Inst. of Mining & Tech.,1998-NMSC-002, ¶ 17, 124 N.M. 633, 954 P.2d 65 (applying burden shifting rules derived from earlier federal age discrimination cases to age discrimination claims under New Mexico's Human Rights Act; stating that once the plaintiff establishes a prima facie case of age discrimination, the burden shifts to the employer to show a legitimate nondiscriminatory reason for its decision; and explaining that if a legitimate, nondiscriminatory reason is produced by the employer, the burden shifts to the plaintiff either to show direct evidence of age discrimination or to prove that the employer's reasons for dismissal were pretext for age discrimination). While we leave for another day the decision regarding the application of the *Cates* method of proof in light of *Gross*, we affirm the district court because the statute of limitations commenced at the time of the adverse employment action, was not delayed, interrupted, or rendered unavailable to Defendant by equitable tolling or equitable estoppel, and therefore expired prior to the filing of Plaintiff's lawsuit.

IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

LINDA M. VANZI, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-074

Filing Date: May 23, 2013

Docket No. 31,607

RONALD BERNIER, as personal representative of the ESTATE OF THERESE BERNIER, deceased and as Trustee of the Therese Bernier Trust,

Plaintiff-Appellant,

v.

HAROLD BERNIER, deceased, represented by WILLIAM DOUGLAS BERNIER, as substitute representative,

Defendant-Appellee.

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for Appellee

OPINION

SUTIN, Judge.

In this case, the district court assessed a sanction under Rule 1-011 NMRA against the named Plaintiff, Therese Bernier (Mrs. Bernier), where her son, Ronald Bernier (Ronald), acting as Mrs. Bernier's attorney in fact, commenced and prosecuted a lawsuit that lacked good ground. Within that context, we are called upon to determine whether the district court erred in sanctioning Mrs. Bernier under Rule 1-011 in the amount of attorney fees for Defendant Harold Bernier (Harold), deceased, represented by William Douglas Bernier (William), as substitute representative, for Ronald's wrongful conduct. We also consider whether the court abused its discretion in awarding William's costs pursuant to Rule 1-054 NMRA.

We hold that the district court did not err in determining that Ronald lacked a good ground on which to file the underlying lawsuit. We also hold that because Ronald was acting pursuant to Mrs. Bernier's power of attorney, Mrs. Bernier was liable for Ronald's wrongful acts. Thus, the district court did not abuse its discretion by sanctioning Mrs. Bernier and in awarding William his costs. Accordingly, we affirm the district court. Finally, although William asks for his attorney fees on appeal, we conclude that there exists no basis upon which we can award such fees.

BACKGROUND

The following undisputed facts were found by the district court. At the center of this case was a Walgreen Company (Walgreen) stock certificate that evidenced ownership of 25,696 shares of stock in that company. The certificate was in the name of Therese Bernier and also in the name of her trust. The stock certificate represented a portion of the stock that Mrs. Bernier's late husband had accumulated over the course of his working life with Walgreen. Mrs. Bernier was in her nineties throughout the underlying proceedings, and on June 17, 2012, while this appeal was pending, Mrs. Bernier died.

Before the start of litigation in this matter, Mrs. Bernier granted Ronald her power of attorney to, among other things, act on her behalf as her "agent" in "claims and litigation." In April 2007, acting pursuant to that power of attorney as Mrs. Bernier's attorney-in-fact, Ronald retained legal counsel to commence litigation in this matter on behalf

of Mrs. Bernier. At all times during the underlying proceedings, Ronald represented and acted on behalf of Mrs. Bernier as her attorney-in-fact, and when Mrs. Bernier died, Ronald, as personal representative of Mrs. Bernier's estate, was substituted as the plaintiff in this case.

Harold Bernier was the brother of Mrs. Bernier's late husband and, therefore, he was also Ronald's uncle. In 2006, Ronald and his sister, Beverly Kedzior (who was Mrs. Bernier's daughter and Harold's niece), approached their uncle Harold and asked him to hold the Walgreen stock certificate because they wanted a trusted third party to hold it until they both agreed that it should be returned to Ronald when it was needed for Mrs. Bernier's care. Harold agreed to hold the stock certificate until Ronald and Beverly reached an agreement about its distribution or until a court ordered its relinquishment.

In December 2006, Beverly filed a petition for guardianship and conservatorship against Mrs. Bernier in a sequestered case presided over by then district court judge, Judge Barbara Vigil[1] (the sequestered case). The sequestered case was based on Beverly's allegations that Mrs. Bernier was not competent to manage her own affairs and that Ronald was misappropriating or mismanaging Mrs. Bernier's estate. Harold knew about the sequestered case, and he also knew that there was an ongoing dispute between Ronald and Beverly that included concerns regarding Mrs. Bernier's ability to manage her own finances and Ronald's management of Mrs. Bernier's finances.

In January 2007, Ronald caused a letter to be sent to Harold, on Mrs. Bernier's behalf, by an attorney, demanding that Harold return the stock certificate to Mrs. Bernier. Harold did not return the certificate. Ronald knew that Harold did not have any financial interest in or claim to the stock certificate, nor was Harold claiming any fees for holding the certificate.

On April 30, 2007, through legal counsel, Ronald caused a complaint to be filed in Mrs. Bernier's name as Plaintiff, against Harold, for replevin, declaratory judgment, temporary injunction, fraud, breach of contract, resulting trust, and prima facie tort. Among other averments, the complaint alleged that Mrs. Bernier entrusted the stock certificate to Harold and that Harold, by failing to comply with a demand to return the certificate, wrongfully refused to return the certificate.

Harold's answer to the complaint explained that Ronald had asked him to hold the stock certificate because Ronald and Beverly wanted a trusted third party to hold it until they both agreed that it should be returned. Harold specifically disclaimed any personal or financial interest in the stock certificate and explained that he did not return it to Mrs. Bernier upon her demand because, among other reasons, Ronald and Beverly were engaged in a dispute regarding Ronald's management of Mrs. Bernier's finances. With his answer to the complaint, Harold filed a claim for interpleader,[2] asking the court to hold the stock certificate until the dispute between Ronald and Beverly was settled.

[1] Judge Vigil was sworn in on December 7, 2012, as a Justice of the New Mexico Supreme Court.

[2] *See* NMSA 1978, § 55-7-603 (2005) (official cmts.) (stating that replevin "enables a bailee faced with conflicting claims to [personal property] to compel the claimants to litigate their claims with each other rather than with him").

Ronald then caused a motion to be filed for partial summary judgment for replevin and declaratory relief and for dismissal of the counterclaim for interpleader. The district court granted the interpleader and accepted possession of the stock certificate, and it denied the motion for partial summary judgment because, among other reasons, "there was a big hole in the evidence as to where [the stock] went" as between Mrs. Bernier and her trust.

In February 2008, Ronald caused a renewed motion for partial summary judgment for replevin and declaratory relief and for dismissal of the counterclaim for interpleader to be filed. In May 2008, the district court held a hearing on Ronald's renewed motion. Satisfied that Mrs. Bernier was the rightful owner of the stock, the district court granted "a partial summary judgment[] as . . . to replevin[] of the stock certificate and the declaratory relief" and simultaneously acknowledged that by determining that the stock certificate should go to Mrs. Bernier, Harold "acheiv[ed] the interpleader[.]" *See* Rule 1-022(D) NMRA (explaining that "[t]he decree of the district court shall determine the disposition of the [interpleaded] . . . thing in dispute"). Therefore, Mrs. Bernier's motion to dismiss the counterclaim for interpleader was denied. Because, at that point, the sequestered case was ongoing, the district court ordered Mrs. Bernier's counsel to apprise Judge Barbara Vigil of its determination so that questions of how the stock certificate would be handled, to whom it would go, and whether it would be used for Mrs. Bernier's benefit, could be resolved in the sequestered case. The district court concluded that its order resolved all claims, leaving only the issue of damages that resulted from Harold's alleged wrongful retention of the stock certificate.

Harold died on April 26, 2009. Because Ronald insisted that the case against Harold proceed, Harold's son, William, presumably as representative of Harold's estate, was substituted as Defendant on June 23, 2009. William rejected Ronald's offer to settle the damages issue for $234,000, and the issue of damages was adjudicated in a bench trial on October 14, 2009. At the damages trial, Ronald claimed that it was unjust for Harold to keep the stock certificate from Mrs. Bernier and that Harold's estate should be held liable for $275,718, representing the lost value of the stock during the litigation. The district court, Judge James Hall, held in favor of William and awarded no damages. The court reasoned "that Harold's actions were not an unjust detention" because when Harold was "faced with a difficult situation, [he] did what he thought was appropriate in turning the matter over to the [c]ourt."

William then requested that a sanction be imposed against Mrs. Bernier, pursuant to Rule 1-011, in the amount of the defense attorney fees. He also moved for costs pursuant to Rule 1-054.[3] The district court entered judgment imposing the sanction and awarding costs. Ronald caused an appeal from the district court's sanction and award of costs. This Court, in an unpublished memorandum opinion, vacated the sanction award and remanded to the district court for the entry of findings of fact and conclusions of law. *See Bernier v. Bernier*, No. 30,401, 2011 WL 2040702, at *1-2 (N.M. Ct. App. 2011). We instructed the district court to enter findings regarding:

[3] After these motions were filed, but prior to the court hearing them, Judge Hall retired, and this case was reassigned to Judge Vigil.

> what subjective knowledge and specific conduct it intended to sanction; whether, and if so in what manner, the initial filing of the litigation itself was frivolous or brought in bad faith; why Plaintiff's initial filing or subsequent conduct offended Rule 1-011; whether the cost award was part of the Rule 1-011 sanction; and why the amount of the sanction assessed against Plaintiff herself was appropriate to redress the objectionable behavior.

Id. at *2.

On remand the parties filed requested findings of fact and conclusions of law. All of the district court's conclusions of law were adopted verbatim from those the defense requested, and fifty-five of the sixty-one findings were adopted verbatim from those requested by the defense. The court's findings and conclusions will be discussed, as pertinent, within the body of this Opinion. In sum, however, the district court concluded that Ronald knew that the complaint against Harold should not have been filed and that by deliberately pressing an unfounded claim, Ronald violated Rule 1-011. The court also clarified that its award of reasonable costs was pursuant to Rule 1-054.

Ronald caused Mrs. Bernier to appeal from the district court's findings of fact and conclusions of law resulting in imposition of a sanction and award of costs against Mrs. Bernier. Ronald argues that Mrs. Bernier cannot be held liable for his actions because he was not her agent nor was he a party in the case. And he argues that it was error to attempt to impose a sanction against him because he was not a party. Ronald makes a number of other arguments in support of his contention that the court's imposition of a sanction constituted an abuse of discretion. And he argues that the district court abused its discretion in awarding costs to William. We are not persuaded by any of Ronald's claims, and we affirm the district court.

DISCUSSION

Standard of Review

We review a district court's imposition of a Rule 1-011 sanction for an abuse of discretion. *Lowe v. Bloom*, 112 N.M. 203, 204, 813 P.2d 480, 481 (1991). The district court "is in the best position to view the factual circumstances surrounding an alleged violation [of Rule 1-011] and must exercise sound judgment concerning the imposition of sanctions." *Rivera v. Brazos Lodge Corp.*, 111 N.M. 670, 675, 808 P.2d 955, 960 (1991). Although our standard of review is generally very deferential, *Rangel v. Save Mart, Inc.*, 2006-NMCA-120, ¶ 25, 140 N.M. 395, 142 P.3d 983, our deference wanes when the district court adopts verbatim the prevailing party's extensive requested findings of fact and requested conclusions of law in complex cases.[4] Further, "a district court . . .

[4] The practice of full scale verbatim adoption of extensive requested findings of fact and requested conclusions of law of the prevailing party, especially in complex cases, can cause this Court on appeal to grant less deference to a court's findings of fact and conclusions of law than is otherwise accorded. *Los Vigiles Land Grant v. Rebar Haygood Ranch, LLC*, 2013-NMCA-___, ¶ 2, ___ P.3d ___ (No. 31,325, filed May 1, 2013) (stating that "[t]his Court looks askance at wholesale verbatim adoption of the prevailing party's extensive requested findings of fact and conclusions of law" and also stating, "when appropriate, we will relax our usual deferential review"); *see also Pollock v. Ramirez*, 117 N.M. 187, 192, 870 P.2d 149, 154 (Ct. App. 1994) (stating that "the trial court is required to exercise independent judgment in arriving at its decision

abuse[s] its discretion if it base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Rivera*, 111 N.M. at 675, 808 P.2d at 960. Our review of the district court's assessment of costs is also subject to an abuse of discretion standard. *Apodaca v. AAA Gas Co.*, 2003-NMCA-085, ¶ 103, 134 N.M. 77, 73 P.3d 215.

Appellant's Agency Argument

Ronald argues that the district court erred in sanctioning Mrs. Bernier for his conduct. He argues that "[t]here was no demonstration in the proceedings or in the record that Ronald . . . and Mrs. Bernier had an employee or agent relationship[] such that she should be vicariously liable for his alleged actions." Ronald does not state where in the record he raised this argument. We therefore will not consider it. *See Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273 ("[O]n appeal, the party must specifically point out where, in the record, the party invoked the court's ruling on the issue. Absent that citation to the record or any obvious preservation, we will not consider the issue.").

Ronald also argues that, because he was not a party to the action, his actions were not subject to Rule 1-011 sanctions. We observe that by Ronald's own admission, he was, at all times relevant to this case, acting pursuant to an Illinois power of attorney. That document included, among other powers, the authority to "institute, prosecute, defend, abandon, compromise, arbitrate, settle[,] and dispose of any claim in favor of or against [Mrs. Bernier.]" It also expressly deemed Ronald to be Mrs. Bernier's "agent" with the authority to act for Mrs. Bernier and in her name by virtue of his status as her "attorney-in-fact." Ronald ratified the complaint "[a]s Power of Attorney for [Mrs.] Bernier[,]" stating that he had read the complaint and that he believed its contents to be "true and accurate to the best of [his] information, knowledge[,] and belief." No question was raised in the district court and none has been raised on appeal as to Ronald's authority to retain legal counsel and to commence and prosecute the underlying lawsuit on behalf of Mrs. Bernier. Under these circumstances, Ronald's actions, including his signature verifying the truth and accuracy of the complaint, had the same effect as if Mrs. Bernier had herself commenced the action and had signed the document herself. *See Smith v. Walcott*, 85 N.M. 351, 356, 512 P.2d 679, 684 (1973) (explaining that where a husband signed an answer to a complaint on behalf of himself and his wife, as her attorney, his signature had the same effect as if she had personally signed). Moreover, because Ronald was acting pursuant to Mrs. Bernier's power of attorney, Mrs. Bernier was subject to direct liability for Ronald's wrongful conduct. *See* Restatement (Third) of Agency § 1.04(7) (2006) (stating that "[a] power of attorney is an instrument that states an agent's authority"); *id.* cmt. g ("A power of attorney is a formal manifestation from principal to agent, as well as to third parties with whom the agent interacts, that evidences the agent's appointment and the nature or extent of the agent's authority."); Restatement (Third) of Agency § 7.03(1)(a)(i) (2006) (stating that "[a] principal is subject to direct liability to a third party harmed by an agent's conduct when . . . the agent acts with actual authority . . . and . . . the agent's conduct is tortious"). We therefore reject Ronald's argument that

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and should generally avoid verbatim adoption of all of the findings and conclusions submitted by a party").

Mrs. Bernier could not be held liable for his actions.

Rule 1-011 Sanctions

Pursuant to Rule 1-011, the district court assessed a sanction consisting of William's attorney fees in the amount of $56,575.44. Ronald argues that the district court erred by failing to provide adequate evidentiary findings to support the assessment. He also argues that, as a matter of policy, a party should not be sanctioned unless the complaining party has, throughout the litigation, complained of Rule 1-011 violations, and because the issue of sanctions was not raised until the end of the case, the imposition of a sanction against Mrs. Bernier constituted a violation of her due process and an abuse of the court's discretion. Ronald also argues that the district court's decision to order a sanction in the amount of William's attorney fees conflicts with the "American Rule" and that the court erred in assessing a sanction based on the fact that Mrs. Bernier did not prevail in her damages claim. And he further argues that the district court abused its discretion or otherwise erred in awarding a sanction for the entire case when Mrs. Bernier was the prevailing party in the replevin claim. We begin our discussion with an overview of Rule 1-011, followed by an examination of Ronald's arguments.

"The primary goal of Rule [1-011] is to deter baseless filings in district court." *Rivera*, 111 N.M. at 674, 808 P.2d at 959. Rule 1-011(A) provides, in pertinent part, that

> [t]he signature of an attorney or [a] party constitutes a certificate by the signer that the signer has read the pleading, motion[,] or other paper; that to the best of the signer's knowledge, information[,] and belief there is good ground to support it[.] . . . For a willful violation of this rule[,] an attorney or [a] party may be subjected to appropriate disciplinary or other action.

Although Rule 1-011 allows the district court to sanction either an attorney or a party, "[s]anctions should be entered against an attorney rather than a party only when a pleading or other paper is unsupported by existing law rather than unsupported by facts." *Rivera*, 111 N.M. at 675, 808 P.2d at 960.

"Any [Rule 1-011] violation depends on what the . . . litigant knew and believed at the relevant time and involves the question of whether the litigant . . . was aware that a particular pleading should not have been brought." *Rivera*, 111 N.M. at 675, 808 P.2d at 960. Here, the question is whether Ronald had a "good ground" for initiating and continuing to prosecute the lawsuit. *Cf. Rangel*, 2006-NMCA-120, ¶ 11 (stating that "[t]he good ground provision is measured by a subjective standard and is appropriate only in those rare cases in which an attorney deliberately presses an unfounded claim or defense" (internal quotation marks and citation omitted)). "For Rule 1-011 sanctions to be appropriate, there must be subjective evidence that a willful violation has occurred." *Rangel*, 2006-NMCA-120, ¶ 11 (internal quotation marks and citation omitted).

Upon the imposition of Rule 1-011 sanctions, the district court must enter findings of fact that are supported by evidence in the record that indicate the basis for the sanctions. *Benavidez v. Benavidez*, 2006-NMCA-138, ¶¶ 15-16, 140 N.M. 637, 145 P.3d 117. Generalized conclusions that the sanctioned party "acted in bad faith, vexatiously, [or]

wantonly[,]" for example, will not suffice. *State ex rel. State Highway & Transp. Dep't v. Baca*, 120 N.M. 1, 8, 896 P.2d 1148, 1155 (1995) (internal quotation marks and citation omitted). Rather, Rule 1-011 sanctions "must be supported by particularized findings of misconduct[.]" *Id.*

We begin with Ronald's argument that the district court abused its discretion by assessing a sanction without providing adequate evidentiary findings to support the assessment. As an initial matter, we observe that Ronald's argument in regard to the sufficiency of the court's findings focuses on Mrs. Bernier's actions rather than his own. In that regard, Ronald argues that the record does not reflect *Mrs. Bernier's* subjective knowledge that filing the replevin action or "some [other] aspect of the litigation of the replevin action was improper[.]" He also argues that neither Judge Vigil nor Judge Hall found that *Mrs. Bernier* engaged in any wrongful litigation tactics or that *Mrs. Bernier* filed a meritless action. To the extent that these arguments depend on Ronald's lack-of-agency argument, we are not persuaded. As we concluded earlier in this Opinion, because Ronald was acting as Mrs. Bernier's attorney-in-fact, Mrs. Bernier was liable for Ronald's wrongful actions. *See Smith*, 85 N.M. at 356, 512 P.2d at 684; Restatement (Third) of Agency § 1.04(7), cmt. g; Restatement (Third) of Agency § 7.03(1)(a)(I).

Moreover, as William points out in his answer brief, the district court entered extensive findings, which were supported by evidence in the record, that demonstrated that the lawsuit should not have been filed and should not have continued. And Ronald does not attack specific findings pertaining to the wrongful nature of his commencing and continuing to prosecute the underlying litigation. *See* Rule 12-213(A)(4) NMRA (requiring the appellant to "set forth a specific attack on [disputed] finding[s], or such finding[s] shall be deemed conclusive"). Therefore, Ronald's argument that the court assessed a sanction without providing adequate evidentiary findings to support them provides no basis for reversal.

We next examine Ronald's policy-based argument that "where a party moving for Rule 1-011 . . . sanctions at the end of the case has never previously complained of the alleged [Rule 1-011 violations], a court abuses its discretion in awarding sanctions[.]" We understand Ronald's argument in this regard to be an attempt to incorporate the "safe harbor" provision of Rule 11 of the Federal Rules of Civil Procedure into the application, in this case, of Rule 1-011. *See* Fed. R. Civ. P. 11(c)(2) (providing twenty-one days in which a party may withdraw or correct a challenged pleading or other paper to avoid the possible imposition of sanctions); *see also id.* advisory committee's note (1993 amends.) (explaining that under the 1993 amendments (b) and (c), "[g]iven the 'safe harbor' provisions . . . , a party cannot delay serving its Rule 11 motion until conclusion of the case" and recognizing that the twenty-one day period provided for in Rule 11(c)(2) constitutes the provision of a "safe harbor"). Unlike its federal counterpart, however, Rule 1-011 prescribes no time limit within which a party can file a motion for sanctions. *Compare* Fed. R. Civ. P. 11(c)(2), *with* Rule 1-011. Where a New Mexico Rule conflicts with a federal rule, we will adhere to the dictates of the State rule. *See Edington v. Alba*, 74 N.M. 263, 265, 392 P.2d 675, 676 (1964) (declining to follow a Federal Rule of Civil Procedure that was materially different from the applicable New Mexico rule); *cf. Rivera*, 111 N.M. at 673-74, 808 P.2d at 958-

59 (explaining that Rule 1-011 differs from Rule 11, thereby requiring a different inquiry into Rule 1-011 than would apply to its federal counterpart). Thus, we see Ronald's safe harbor-policy argument as unpersuasive.

Nor are we persuaded by Ronald's argument that due process considerations required William to notify him, in advance of the conclusion of the case, of his intention to move for Rule 1-011 sanctions. "Due process requires that the attorney be given notice of the imposition of Rule [1-011] sanctions, may require specific notice of the reasons for the imposition of sanctions, and mandates that the accused be given an opportunity to respond." *Doña Ana Sav. & Loan Ass'n, F.A. v. Mitchell*, 113 N.M. 576, 579, 829 P.2d 655, 658 (Ct. App. 1991). As this Court has previously stated, "[t]he existence of Rule [1-011] gives notice of the . . . possibility of sanctions." *Id.* In this case, Ronald was given notice of William's motions to award attorney fees and other related documents, which included the requests for sanctions, by delivery of copies thereof to Ronald's counsel. And he responded to those motions and related documents by filing responses to them. Additionally, Ronald's counsel orally objected to the attorney fees, and therefore the sanction, at a hearing before the court. Because the record reflects that Mrs. Bernier, acting through Ronald, was given notice and an opportunity to respond to the imposition of the sanction, we conclude that she was not deprived of due process. *Cf. Mitchell*, 113 N.M. at 579, 829 P.2d at 658 (concluding that the attorney was afforded due process in the context of the imposition of Rule 1-011 sanctions because he was given notice and an opportunity to be heard). Moreover, Ronald has not demonstrated why or how his ability to defend against William's requests for the sanction of paying his attorney fees was impaired by the timing of the requests and, therefore, he has not presented a basis for reversal. *See Kysar v. BP Am. Prod. Co.*, 2012-NMCA-036, ¶ 21, 273 P.3d 867 ("A party must show prejudice before reversal is warranted." (internal quotation marks and citation omitted)).

We next consider Ronald's argument that the district court's imposition of a sanction in the amount of attorney fees conflicts with the "American Rule." "New Mexico adheres to the so-called American [R]ule that, absent statutory or other authority, litigants are responsible for their own attorney[] fees." *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 9, 127 N.M. 654, 986 P.2d 450 (internal quotation marks and citation omitted); *see id.* ¶¶ 12-13 (stating that the policies underlying the American Rule are (1) to "promote[] equal access to the courts for the resolution of *bona fide* disputes" and (2) to "preserve judicial resources" (internal quotation marks and citations omitted)). Our Supreme Court has explained that "[a]llowing an award of reasonable attorney fees to sanction bad faith conduct pursuant to a court's inherent powers is consistent with the policies underlying the American [R]ule[, which] policies only require that the losing litigant should not be discouraged from *fairly* prosecuting or defending a claim." *Id.* ¶ 18 (internal quotation marks and citation omitted). The American Rule expressly does not "provide a shield to parties that *unfairly* prosecute or defend a claim by engaging in bad faith conduct." *Id.* Thus, consistent with the American Rule, a court may impose sanctions, in the form of attorney fees. *Id.* Ronald's argument to the contrary is unavailing.

Ronald also argues that "[t]he district court abused its discretion in finding that Mrs.

Bernier's failure to prevail on the damages aspect of the case amounted to sanctionable conduct for the entire case under Rule 1-011[.]" Ronald's argument in this regard references the district court's Finding of Fact No. 60, which read as follows:

> Even though the court granted [Mrs. Bernier's r]enewed [m]otion for [s]ummary [j]udgment and returned the stock certificate to [her], it was because the [c]ourt believed that the [c]ourt's appointed Guardian Ad Litem in the sequestered case before Judge Barbara Vigil could take care of [Mrs. Bernier's] interest. . . . Further, the [c]ourt did not find that [Mrs. Bernier] prevailed on her claims of replevin and declaratory relief but only stated that [she] was the rightful owner of the stock certificate [and that the certificate] would be distributed in accordance with the Guardian Ad Litem's responsibility in the sequestered case.

We disagree with Ronald's interpretation of the district court's finding.

Contrary to Ronald's view, we do not interpret the district court's Finding of Fact No. 60 to indicate that the court imposed a sanction for the entire case based upon Mrs. Bernier's failure to prevail in the damages claim. Instead, we view the finding simply as an acknowledgment by the district court that the conclusion regarding rightful ownership of the stock certificate did not affect the propriety of Ronald's actions. Furthermore, the finding is one of many in support of the court's imposition of a sanction, and Ronald has not shown the sanction to be based on an erroneous view of the law or based on an erroneous assessment of the evidence. *See Rangel*, 2006-NMCA-120, ¶ 12 (providing that "a district court necessarily would abuse its discretion if it based its ruling on an erroneous view of the law" (internal quotation marks and citation omitted)); *Rivera*, 111 N.M. at 675, 808 P.2d at 960 (recognizing a district court's abuse of discretion if its ruling was based "on a clearly erroneous assessment of the evidence"). Accordingly, we are not persuaded that the sanction constituted an abuse of discretion.

Ronald's remaining arguments as to the impropriety of the sanction award arise from or relate to Ronald's position that Mrs. Bernier was the prevailing party in the replevin action. Ronald argues that the fact that Mrs. Bernier was determined to be the rightful owner of the stock certificate constitutes prima facie evidence that there existed good ground for the lawsuit. Additionally, Ronald argues that the district court's sanction in the amount of attorney fees that arose from motions upon which Mrs. Bernier prevailed was unjustified and that she was deprived of an opportunity to oppose those fees, which, Ronald claims, should have been deducted from the award of attorney fees. As framework for our analysis of these arguments, we begin with an examination of the law of replevin.

NMSA 1978, Section 42-8-1 (1907) provides a right of action and the purpose of the remedy in replevin. It reads, "[a]ny person having a right to the immediate possession of any goods or chattels, wrongfully taken or wrongfully detained, may bring an action of replevin for the recovery thereof and for damages sustained by reason of the unjust caption or detention thereof." *Id.* In *Novak v. Dow*, this Court explained that "[r]eplevin . . . is a possessory action" and that "[t]he

primary object of which is [the] plaintiff's right to the immediate possession of the property and, secondarily the recovery of damages by the plaintiff for the unjust caption[] or detention thereof." 82 N.M. 30, 34, 474 P.2d 712, 716 (Ct. App. 1970) (internal quotation marks and citation omitted). Thus, in a replevin action, the district court is called upon to enter a judgment that determines "the right to the immediate possession of the property[] and damages for its unlawful caption or detention." *Id.* (internal quotation marks and citation omitted).

In this case, Ronald contends that Mrs. Bernier succeeded in the "primary motive of her case—the return of her . . . stock [certificate] in the replevin action" and that this constitutes "prima facie evidence that the case was properly brought as a result of [Harold's] refusal to return her certificate." William disputes Ronald's assertion that Mrs. Bernier was the prevailing party. He contends that because the district court dismissed all claims against him except the replevin claim and because the court awarded zero damages for replevin based on its finding that Harold did not wrongfully retain the stock certificate, Harold was actually the prevailing party in the action. *See Hedicke v. Gunville*, 2003-NMCA-032, ¶ 27, 133 N.M. 335, 62 P.3d 1217 (holding that the prevailing party was the party who "successfully avoided an adverse judgment on every claim"); *see also Dunleavy v. Miller*, 116 N.M. 353, 360, 862 P.2d 1212, 1219 (1993) (explaining that "the prevailing party is the party who wins the lawsuit—that is, a plaintiff who recovers a judgment or a defendant who avoids an adverse judgment"). Further, William argues that the matter of who prevailed in the litigation has no bearing on the propriety of the sanctions award because Rule 1-011 does not limit the court's discretion to award sanctions only to the losing party. *See Gonzales v. Surgidev Corp.*, 120 N.M. 151, 156, 899 P.2d 594, 599 (1995) (stating that sanctions are "collateral to or separate from the decision on the merits").

First, on the record before us, we disagree with Ronald's assertion that Mrs. Bernier prevailed in her replevin claim. We note that, although the district court ultimately found that Mrs. Bernier was the rightful owner of the stock certificate, the question of its rightful possession was left to the resolution of the sequestered case. Further, the court also found that Harold's retention of the stock certificate was not wrongful. Even assuming that, in general, a plaintiff who is deemed the rightful owner of the property, but who fails to prove damages, might be said to have prevailed in a replevin claim, we emphasize that Ronald failed to prove wrongful detention. Insofar as wrongful detention is an inextricable element of replevin, Ronald's failure in that regard precludes a holding that Mrs. Bernier prevailed in this cause of action. *See* § 42-8-1 (stating the following elements of replevin (1) the right to the immediate possession of the property, and (2) wrongful taking or wrongful detention of that property). Second, we note that the determination that Mrs. Bernier was the rightful owner of the stock certificate did not solely resolve any aspect of the replevin claim. It also resolved Harold's interpleader counterclaim. Thus, the district court's allowance of the interpleader combined with the ruling that Mrs. Bernier was legally entitled to possession of the stock certificate was equally as favorable to Harold as to Mrs. Bernier.

We also disagree with Ronald's assertion that the fact that the stock certificate was returned to Mrs. Bernier constitutes prima facie evidence that "good ground" existed for

the commencement and continued prosecution of the replevin action. To reiterate, "the good ground requirement is a subjective standard that depends on what the . . . litigant knew and believed at the relevant time and involves the question of whether the litigant . . . was aware that a particular pleading should not have been brought." *Benavidez*, 2006-NMCA-138, ¶ 14 (internal quotation marks and citation omitted). In support of his "good ground" argument, Ronald argues that Judge Hall, before whom the replevin claim was tried, did not indicate that he thought the claim was frivolous. Ronald also argues that "Judge Vigil, who did not preside over the trial or the pre-trial proceedings, could properly have observed no subjective bad faith by Mrs. Bernier" and that "[a] replevin action was required for the return of her stock" because "[a]fter [Harold] failed and refused to return her property after due demand, Mrs. Bernier had no reasonable expectation that it would be returned to her voluntarily." On these bases, Ronald argues that there was no reasonable basis for the sanctions award. We disagree.

Insofar as William's requests for the sanction was raised exclusively before Judge Vigil, we do not view Judge Hall's silence on the matter of the propriety of the lawsuit material to this issue. Moreover, to the extent that Ronald ascribes to Judge Hall a view that the litigation was meritorious as support for his argument that the sanction was unjust, the attribution does not work in Ronald's favor. In regard to Ronald's actions, we again observe that at the conclusion of the damages trial, Judge Hall commented, "My main conclusion is that Harold's actions were not an unjust detention." Judge Hall explained that "you all put [Harold] in an almost impossible situation" and that Harold's decision to not relinquish the stock certificate "was not at all contrary to right and justice [because] I think he was doing the best he could in an impossible situation." Judge Hall's observation of Ronald's participation in creating the "impossible situation" comported with Judge Vigil's findings in that regard. And, we note that, the impossibility of Harold's situation, to which Ronald contributed by joining with Beverly in requesting that Harold hold the stock certificate until they reached an agreement about its distribution, was one of the numerous bases upon which the district court founded the Rule 1-011 sanction.

Further, we are not persuaded by Ronald's argument that because Judge Vigil did not preside over the replevin proceedings, she was unable to discern whether the litigation was brought in bad faith. Ronald's argument in that regard is not supported by authority, and it is contradicted by the record that demonstrates Judge Vigil received extensive briefing on the underlying facts that supported William's requests for and Ronald's opposition to a sanction, and also reflects that Judge Vigil held an evidentiary hearing on the matter. *See Charter Servs., Inc. v. Principal Mut. Life Ins. Co.*, 117 N.M. 82, 87, 868 P.2d 1307, 1312 (Ct. App. 1994) (explaining that where one judge retires and a successor judge is left to determine the matter of costs, the proper procedure is for the successor judge to adduce evidence on the matter of costs and enter findings in accordance therewith). Ronald has demonstrated no error in this regard.

Nor are we persuaded by Ronald's general assertion that Mrs. Bernier essentially had no choice but to bring the replevin action. Under our deferential standard of review in this matter, *cf. Rangel*, 2006-NMCA-120, ¶ 25, it was incumbent upon Ronald to clearly demonstrate that the district court erred.

Ronald fails to meet this burden in two respects. First, he does not develop an argument based on evidence in the record that would support a conclusion that particular findings of fact by the district court were premised on a "clearly erroneous assessment of the evidence." *Rivera*, 111 N.M. at 675, 808 P.2d at 960. And second, he fails to cite to evidence in the record that supports his assertion that Mrs. Bernier felt that she had no option but to bring the lawsuit.

Ronald's remaining arguments in regard to the propriety of the sanction relate to the purpose and structure of Rule 1-011. Our Supreme Court has explained that deterrence of baseless filings in the district court is the primary goal of Rule 1-011. *Rivera*, 111 N.M. at 674, 808 P.2d at 959. Our Supreme Court has also noted that "sanctions are intended to deter future litigation abuse, punish present litigation abuse, [and] compensate victims of litigation abuse[.]" *Id.* Rule 1-011 is also intended to compensate victims of ill-founded litigation for the expenditure of time and resources. *Rivera*, 111 N.M. at 674, 808 P.2d at 959. In accordance with these principles, the structure of the rule requires an inquiry into the subjective knowledge of the alleged offender. *See Rangel,* 2006-NMCA-120, ¶ 11.

Ronald argues that the amount of the sanction in this case is too severe because it punishes conduct for which there existed good ground, and he further argues that had Harold complied with early requests to return the stock certificate directly to Mrs. Bernier, much of the litigation could have been avoided because the suit would have been dismissed. As such, in Ronald's view, the district court should have deducted fees, including, particularly, the amount of fees incurred by Harold to oppose Mrs. Bernier's motion for summary judgment for the return of the stock certificate. Ronald also contends that he had no "meaningful opportunity" to attack the underlying support for those fees. We are not persuaded by Ronald's arguments.

The district court, having heard and reviewed all of the evidence and arguments presented by the parties, found, in pertinent part, that

> 36. Ronald knew that there was an agreement between Beverly, Harold[,] and himself allowing Harold to keep the stock certificate for safe-keeping. Ronald knew that Harold never claimed ownership, right to possession, nor a financial interest in the stock certificate.
>
> 37. Ronald knew that had [his attorney] requested that Harold deliver the stock certificate to a neutral third party so that its ownership could be determined, Harold would have undoubtedly done so.
>
> 38. Ronald knew that there was a dispute between him and Beverly regarding returning the stock certificate to [Mrs. Bernier]. Harold also knew about this dispute when Ronald demanded Harold return the stock certificate to [Mrs. Bernier]. Ronald knew that Harold questioned his management of [Mrs. Bernier's] asset[s] and that Ronald had not answered Harold's questions to Harold's satisfaction.

39. Ronald knew that there was no credible evidence whatsoever that [Mrs. Bernier] intended that protracted litigation against her elderly brother-in-law be undertaken on her behalf.

40. Ronal[d] knew that the causes of actions alleged in the [c]omplaint such as replevin . . . should not have been brought, and despite Ronald's subject knowledge of Harold's decision to keep the stock certificate, Ronald filed the [c]omplaint against Harold.

41. Ronald knew that this case should have been dismissed and the issue of the distribution of the stock certificate could have been pursued in the guardianship case.

42. Instead, Ronald continued to pursue a claim against Harold even though he knew that Harold's health was deteriorating. . . .

43. After Harold passed away on April 26, 2009, Ronald insisted that the case against Harold proceed even though Harold's family was still mourning. Therefore, Harold's son, William, entered as a substituted party on June 23, 2009.

44. This knowledge and the pattern of conduct specified in the above were subject to the [c]ourt's sanctions.

Ronald does not specifically attack the factual bases of any of the foregoing findings. In accordance with its findings, the district court concluded, among other things, that "Ronald's lawsuit was frivolous from inception, burdening both Defendant and the [c]ourt with a senseless attempt to impose liability upon Harold for his attempt to comply with the agreements among him, Ronald[,] and Beverly." The court explained that "Ronald's willful subjection of Harold to this frivolous action is precisely the kind of activity Rule [1]-011 is designed to deter." We agree. Under these circumstances, we conclude that the district court's imposition of the sanction in this case comported with the purpose of Rule 1-011, and we hold that the district court did not abuse its discretion in issuing the sanction.

Finally, we reject Ronald's argument that he was deprived of an adequate opportunity to oppose the requested sanction. This argument is not supported by the record, which reflects that in response to William's requests for the sanction in the amount of all the attorney fees incurred in defending the action, Ronald availed himself of the opportunity to oppose the sanction. We will not consider this argument further. *See Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145 N.M. 451, 200 P.3d 104 (stating that assertions of counsel that are unsupported by the record provide no basis for review). And, to the extent that Ronald contends that the court's error was "compounded" by including in its sanction the award of fees that occurred during the sequestered case, Ronald's citation to the billable hours of William's attorneys, without pointing to evidence in the record of what the charges represent or where in the record his objection to those charges was preserved, we decline to consider his contention. *See Olguin v. Manning*, 104 N.M.

791, 792, 727 P.2d 556, 557 (Ct. App. 1986) ("We will not review issues raised for which there are insufficient references to the record or transcript[s] as required by the rules.").

Rule 1-054 Costs

"District courts have the discretion to grant a prevailing party the necessary and reasonable costs incurred in litigating a case." *H-B-S P'ship v. Aircoa Hospitality Servs., Inc.*, 2008-NMCA-013, ¶ 24, 143 N.M. 404, 176 P.3d 1136. "Costs generally are recoverable only as allowed by statute, Supreme Court rule[,] and case law." *Id.* (internal quotation marks and citation omitted). "We therefore expect district courts to exercise their discretion sparingly with regard to costs that are not specifically authorized." *Id.* And "[w]hen awarding . . . costs, the district court should explain the circumstances justifying the award." *Id.* (internal quotation marks and citation omitted)."

Rule 1-054(D)(2)(f) provides that costs associated with "witness mileage or travel fare and per diem expenses, when the witness testifies at trial" are generally recoverable as limited, in pertinent part, by NMSA 1978, Section 38-6-4(A) (1983). Section 38-6-4(A) explains, in relevant part, that a witness "shall receive per diem expense and mileage at the [current rate of up to ninety-five dollars per diem expenses per day]" when the witness testifies at trial. *See* NMSA, § 10-8-4(A) (2009) (providing the amount of allowable per diem reimbursement).

The second amended cost bill represented: (1) witness travel expenses for Beverly Kedzior, including an air fare, a rental car, and a hotel room, totaling $844.30; (2) witness travel expenses for Beverly Bernier (Harold's widow, William's mother), totaling $2,229.42; and (3) miscellaneous costs (for parking a motor home), totaling $68.10. In awarding these costs, the district court found "that . . . Defendant's [b]ill of [c]osts is reasonable; the travel expenses and fares are reasonable; and that . . . Defendant's witnesses are entitled to recover such costs given the fact [that] they had no choice but to travel to Santa Fe and defend the lawsuit." The district court awarded William's costs pursuant to Rule 1-054 totaling $3,141.82.

Ronald argues that the court abused its discretion by awarding these costs. Alternatively, Ronald argues that the district court should have denied the cost bill based on equitable principles—particularly whether Mrs. Bernier could afford to pay the costs. We disagree.

The district court's award consisted of the actual travel costs of witnesses who testified at trial, and thus, they were allowable pursuant to Rule 1-054(D)(2)(f). We particularly note that the bulk of these costs reflect Beverly Bernier's travel costs. The record reflects that Ronald was afforded an opportunity to avoid the expense of Beverly Bernier's travel costs by granting defense counsel's two requests that she be permitted to testify by telephone owing to her age and her fear of flying. The result of Ronald's failure to grant that request was that Beverly Bernier had to be driven from Florida to New Mexico by her son, William, in a motor home, thus incurring travel costs in excess of $2,000. Under these circumstances, the district court did not abuse its discretion in awarding William his costs.

As to Ronald's equity argument, although he asserts that Mrs. Bernier's assets

were depleted by virtue of the events that occurred in this and in the sequestered case, he fails to point us to evidence in the record to support this assertion. Accordingly, we will not consider this argument further. *See Santa Fe Exploration Co. v. Oil Conservation Comm'n of N.M.*, 114 N.M. 103, 108, 835 P.2d 819, 824 (1992) (explaining that when a party fails to cite any portion of the record to support its factual allegations, the appellate court need not consider its argument on appeal).

Attorney Fees and Cost for This Appeal

Relying on *Landess v. Gardner Turf Grass, Inc.*, 2008-NMCA-159, 145 N.M. 372, 198 P.3d 871, William argued in his answer brief that he is entitled to recover reasonable attorney fees and costs for work done on appeal. *See* Rule 12-403(A), (B)(3) NMRA (stating that "[i]n all proceedings in the appellate court the party prevailing shall recover the party's costs unless otherwise provided by law, by these rules, or unless the court shall otherwise determine" and stating that allowable costs include that "reasonable attorney fees for services rendered on appeal in causes where the award of attorney fees is permitted by law, if requested in the briefs"). Unlike *Landess*, in which the defendants continued, on appeal, to assert the same frivolous contentions that had comprised their case in the district court, Ronald's appeal raised a number of arguable, albeit unpersuasive, arguments that warranted this Court's thoughtful consideration. *Landess*, 2008-NMCA-159, ¶¶ 20-21. Accordingly, we see no basis, in law or otherwise, to award William's attorney fees on appeal. William's attorney conceded as much at oral argument. Therefore, we do not award William's attorney fees on appeal.

CONCLUSION

We affirm the district court's judgment.

IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

M. MONICA ZAMORA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-075

Filing Date: May 23, 2013

Docket No. 30,741

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

MISTY LIGHT,

Defendant-Appellee.

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OPINION

WECHSLER, Judge.

The State appeals the district court's order granting Defendant Misty Light's motion to suppress. We find no error. The search warrant was impermissibly broad in allowing officers to search "all persons" located on the premises when the only evidence tying Defendant to any crime was her presence at an event that was open to the public where illegal activity was taking place. Finally, the officers were not justified in searching Defendant's purse due to the lack of evidence tying Defendant to the criminal activity taking place on the premises and because the officers knew the purse belonged to Defendant. Accordingly, we affirm the order suppressing the evidence found in Defendant's purse and her subsequent statements to the officers.

BACKGROUND

We summarize the underlying facts in the light most favorable to the district court's ruling. *See State v. Flores*, 2008-NMCA-074, ¶ 2, 144 N.M. 217, 185 P.3d 1067. Initially, we note that the parties stipulated to certain facts based on evidence presented at the suppression hearings in the companion case of *State v. Bradley Light*, CR-20090215. The district court incorporated those facts into its findings in this matter, and the testimony from those hearings is part of the record in this case.

Police had been conducting an investigation of Bradley Light (Light), the owner of the Cavern Theater (the theater), for alleged drug trafficking. The officers had information that Light was selling and allowing the use of illegal drugs in the theater. They also had information that Light was hosting circuit or "rave" parties at the theater. At these parties, drugs, primarily ecstasy and marijuana, were being sold and consumed, and underage persons were consuming alcohol.

Officer Allen Sanchez, an officer with the Carlsbad Police Department assigned as an agent to the Pecos Valley Drug Task Force, learned that Light would be hosting a rave

party at the theater on May 9, 2009. Sanchez arranged for Arturo Holguin, a law enforcement officer working with the Otero County Narcotics Enforcement Unit, to attend the party and report back to Sanchez as to what transpired.

Holguin went inside the theater at about 10:15 p.m.; Sanchez parked nearby and observed people entering and leaving the theater between 10:15 p.m. and midnight. At the door of the theater, Holguin was asked for identification to show he was over twenty-one, and he was searched for weapons before being allowed to enter. He was not asked to show an invitation or any other documentation to gain entry.

While inside the theater, Holguin observed, among other things, what appeared to be underage people drinking alcohol, people smoking marijuana in the "cry room," and people taking pills. About twenty-five percent of the occupants appeared to be juveniles under the age of eighteen. Holguin approached a male juvenile and two female juveniles, who told him they were taking ecstasy; another person spoke with the male juvenile, and the male juvenile, in turn, informed Holguin that he would have ecstasy for sale later in the night. Holguin was later able to purchase ecstasy from another male, he saw a male selling ecstasy to others, and he was told that marijuana and more ecstasy would be for sale later. Holguin purchased cocaine from a male standing in the lobby.

Holguin met Light when Holguin entered the theater. Later, Light was passing around syringes containing a red jello-like substance that Holguin heard Light confirm were "jello shots." Holguin knew by training or experience that a jello shot is a mixture of some sort of alcohol and jello.

Someone told Holguin that Light called ecstasy "party favors." Holguin asked Light for party favors, but Light told him that he was having other people pass them out, although Light later gave Holguin five pills that Holguin knew to be ecstasy.

Throughout his time in the theater, Holguin reported his observations by text messages to Sanchez, who remained waiting outside. Other than identifying Light and three other males by name, Holguin gave no description of any of the people he observed except to classify them as male or female and as juvenile.

Around midnight, Sanchez decided that he had probable cause for a warrant to search the theater, and he left the parking lot to meet with agents from the Carlsbad Police Department and the Eddy County Sheriff's Department to brief them on the situation. Sanchez sought permission to call out the Carlsbad Police Department Special Response Team (SRT), and he requested that officers from the Eddy County Sheriff's Department seek permission to use that Department's Tactical Response Team (TRT).

Once the SRT and TRT members arrived, Sanchez briefed the officers as to what Holguin had told him, and he told the officers that they were to enter the theater to secure the building, but they were not to search any person or vehicle until he returned with a warrant. At some point between midnight and 1:00 a.m. on May 10, 2009, approximately fifteen officers secured the theater and held all the occupants, approximately seventy-five to one hundred people, for the next two-and-a-half hours waiting for Sanchez to return with the search warrant. The officers saw drugs on the floor, but they made no effort to collect them, and

Sanchez received no information as to what transpired once the SRT and TRT agents entered the building.

The officers ensured that all the occupants remained seated and did not allow anyone to leave until Sanchez arrived with the search warrant about 2:40 a.m. The district court erroneously found that the warrant was executed at 3:30 a.m., but this error is harmless because it had no impact on the district court's conclusions of law. *See State v. Fernandez*, 117 N.M. 673, 676, 875 P.2d 1104, 1107 (Ct. App. 1994) ("In the absence of prejudice, there is no reversible error.").

The search warrant authorized a search of Light, his residence, the theater, any vehicles found on those properties, and "[a]ny persons found on the properties listed above." It authorized officers to seize "[e]cstacy pills in any shape, form, or size[, and c]ocaine, marijuana, and drug paraphernalia [and p]lastic syringes without needles which contained a red jello type substance."

In executing the warrant, the officers lined all the occupants into two rows and searched each person individually along with any property in their possession. Occupants were then allowed to leave if no contraband was found.

Defendant was present in the front of the theater when the officers arrived to secure the premises. She was searched at approximately 4:05 a.m. There was no testimony that officers found any evidence of illegal drugs or other contraband on Defendant's person, and there was nothing to suggest that Defendant appeared intoxicated or under the influence of drugs.

Defendant sought to leave, and she approached Officer Daniel Vasquez, one of the officers who had helped to secure the perimeter when the officers initially entered the theater. Defendant told Vasquez that she needed her purse and jacket, which were stored in the theater's storage room. Vasquez told Defendant that these items would have to be searched before she could leave with them, and Defendant acquiesced. The parties stipulate that Defendant did not consent to the search of her person or property.

Inside Defendant's purse, Vasquez found a small metal container containing methamphetamine. Vasquez testified that before he opened the purse and container, he had no particularized suspicion that the purse contained contraband, that the purse had no odors and, after opening it, that he saw no obvious evidence of contraband or observed anything suspicious about the metal container.

Defendant was charged with one count of possession of methamphetamine and moved to suppress the evidence. *See* NMSA 1978, § 30-31-23(D) (2011). After considering the State's response and conducting a hearing, the district court entered conclusions that: (1) notwithstanding the search warrant's authorization to search "all persons," the State was required to show probable cause based on a particularized suspicion that Defendant was engaged in criminal activity or possessed contraband, and the State failed to do so; (2) the State failed to justify detaining Defendant for approximately two-and-a-half to three hours while Sanchez obtained the warrant and while the officers executed the warrant; and (3) the search of Defendant's purse was not covered by the search warrant, and the State failed to present probable cause based on particularized suspicion to search Defendant's purse. The district court then granted Defendant's motion

to suppress, stating that: (1) the detention was unlawful such that any subsequent search was also unlawful; (2) even if the detention was reasonable, the State failed to show particularized suspicion that Defendant was engaged in any criminal activity, and thus the search of her person and property were unlawful; and (3) Vasquez knew the purse belonged to Defendant and was not part of the theater's property and, therefore, the search of the purse was not authorized by the warrant, and the State failed to show particularized suspicion justifying the search. The State appeals.

STANDARD OF REVIEW

We review the order granting Defendant's motion to suppress as a mixed question of fact and law. *See State v. Williams*, 2011-NMSC-026, ¶ 8, 149 N.M. 729, 255 P.3d 307. We determine whether the law was correctly applied to the facts and view "the facts in the light most favorable to the prevailing party." *State v. Cline*, 1998-NMCA-154, ¶ 6, 126 N.M. 77, 966 P.2d 785. While deferring to the district court with respect to factual findings and indulging in all reasonable inferences in support of that court's decision, we nonetheless "review the constitutional question of the reasonableness of a search and seizure de novo." *State v. Johnson*, 2006-NMSC-049, ¶ 9, 140 N.M. 653, 146 P.3d 298.

THE SEARCH WARRANT

In order to search Defendant, officers needed a valid warrant or they needed to be acting "pursuant to one of the recognized exceptions to the warrant requirement." *State v. Hamilton*, 2012-NMCA-115, ¶ 13, 290 P.3d 271. A valid search warrant will only issue upon a showing of probable cause to believe that a crime has been committed and that evidence of a crime will be found in the place or on the person to be searched. *See State v. Evans*, 2009-NMSC-027, ¶ 10, 146 N.M. 319, 210 P.3d 216.

"There are no bright-line, hard-and-fast rules for determining probable cause, but the degree of proof necessary to establish probable cause is more than a suspicion or possibility but less than a certainty of proof." *Id.* ¶ 11 (internal quotation marks and citation omitted). "A reviewing court should not substitute its judgment for that of the issuing court [but instead should] determine whether the affidavit as a whole, and the reasonable inferences that may be drawn therefrom, provide a substantial basis for determining that there is probable cause to believe that a search will uncover evidence of wrongdoing." *State v. Williamson*, 2009-NMSC-039, ¶ 29, 146 N.M. 488, 212 P.3d 376. "[T]he substantial basis standard of review is more deferential than the de novo review applied to questions of law, but less deferential than the substantial evidence standard applied to questions of fact." *Id.* ¶ 30.

The affidavit in support of the warrant must also state with particularity the place to be searched and the items to be seized. *See* U.S. Const. amend. IV (providing in part that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized"); *State v. Jones*, 107 N.M. 503, 504, 760 P.2d 796, 797 (Ct. App. 1988) (same). The purpose of the particularity requirement is to prevent general searches. *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) (recognizing that the particularity requirement "ensures that the search will be carefully

tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit"); *see Jones*, 107 N.M. at 504, 760 P.2d at 797 (recognizing that the Fourth Amendment's requirement of particularity is to prevent general, exploratory searches).

The parties agree that there was probable cause to search Light and that the officers were justified in entering the theater and searching the premises for evidence of ecstasy pills, cocaine, marijuana, drug paraphernalia, and jello shots pursuant to the search warrant. *See, e.g.*, *Evans*, 2009-NMSC-027, ¶ 10. However, in order to establish the requisite probable cause to justify searching Defendant, the State was required to show a particularized suspicion as to her. *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) ("Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person."). The parties disagree as to whether the affidavit established the requisite particularized suspicion as to Defendant. *See id.*

Defendant appears to suggest that the warrant was invalid as applied to her because an "all persons" warrant is per se invalid as an impermissible general warrant. *Cf. Jones*, 107 N.M. at 504, 760 P.2d at 797 (recognizing that "[t]he [F]ourth [A]mendment . . . prohibits states from using general search warrants that do not describe with particularity the things to be seized"); *Wilson v. State*, 221 S.E.2d 62, 63 (Ga. Ct. App. 1975) (holding that a warrant authorizing the search of a bar and "all persons on the premises" was void as a general warrant). This position has been adopted by a minority of courts that have considered the issue. *Cf. Owens ex rel. Owens v. Lott*, 372 F.3d 267, 274-75 (4th Cir. 2004) (recognizing that under the minority view, an all persons warrant is per se invalid because it fails to identify the persons to be searched with sufficient particularity).

The State urges this Court to adopt the majority position, which is that an "all persons" warrant is valid as along as it is supported by probable cause that "any and all persons on the premises are either engaged in criminal activity or possess any of the evidence sought in the search[.]" *See id.* at 275 (recognizing that a majority of courts considering the issue have adopted the view that an "all persons" warrant "is valid as long as there is probable cause to believe that *everyone* found on the premises being searched is involved in the illegal activity and that evidence of the crime would be found on their person"). Pursuant to this standard, the warrant would validly authorize the search of all persons found at the theater, including Defendant, if the supporting affidavit established probable cause to believe that every person found on the premises was involved in the criminal activity or was in possession of contraband. *See id.*

We need not decide whether "all persons" warrants are per se invalid because, even applying the majority rule that recognizes the validity of such warrants in some situations, the circumstances in this case do not justify a warrant authorizing the search of all persons found at the theater or, specifically, the search of Defendant. Instead, the "all persons" warrant was not supported by probable cause because there is nothing in the affidavit tying *every* person found in the theater to the criminal behavior taking place there. *See id.* at 276 (holding that the affidavit did not supply sufficient information to establish probable cause when the justification was the officer's statement that, based on his

experience in drug enforcement, people present at the scene when illegal drugs are being distributed are usually in possession of drugs); *State v. Garcia*, 166 P.3d 848, 855-56 (Wash. Ct. App. 2007) (holding that the language in the warrant authorizing the search of "any and all persons present" did not authorize the search of all of the occupants found in a motel room because there was "nothing to establish individualized probable cause for 'any and all' of the persons who may have been present in the motel room where drug activity was suspected to occur"). To the contrary, Holguin never identified or described most of the occupants, and he never reported even seeing Defendant. *Cf. People v. Nieves*, 330 N.E.2d 26, 34 (N.Y. 1975) (holding that an "all persons" warrant "must establish probable cause to believe that the premises are confined to ongoing illegal activity" and that all persons subject to the warrant possess the articles sought and that if "this probability is not present, then each person subject to search must be identified in the warrant . . . by name or sufficient personal description").

In claiming that the affidavit established probable cause to believe that any person present at the rave was likely to be involved in criminal activity, the State relies on the evidence concerning the distribution and use of drugs and the consumption of alcohol by underage persons throughout the theater, all of which Holguin observed. It then argues that any person present would be aware of these illegal activities and that it was "highly probable" any person present would be participating in at least some of the illegal activities.

We disagree because Holguin's general observations of criminal activity taking place in the theater are only sufficient to establish "[a] generalized belief that all persons present in a location are involved in criminal activity." *Garcia*, 166 P.3d at 855. This belief "is insufficient to establish the required nexus" between Defendant and the criminal activity. *Id.* (holding that "[a] sufficient nexus is not established merely through evidence that some of the persons gathered in a particular location are engaged in criminal activity").

Finally, we note that "all persons" warrants authorizing the search of a public place have usually been declared invalid due to the absence of probable cause to believe that all persons present in the establishment were involved in the criminal activity. *See, e.g.*, *State v. Thomas*, 540 N.W.2d 658, 665-66 (Iowa 1995) (holding that there was not probable cause for the warrant to search all persons present in the bar even though the affidavit provided information that the bar had been the site of numerous controlled buys of crack cocaine and numerous arrests involving many people); *State v. Robinson*, 371 N.W.2d 624, 625-26 (Minn. Ct. App. 1985) (striking down a warrant that authorized a drug search of a legally-operating bar and "all persons on the premises" that was executed during normal operating hours with fifty to eighty patrons present); *State v. Sims*, 382 A.2d 638, 645-46 (N.J. 1978) (holding that a warrant that authorized the search of a service station and all persons found therein was void as to the search of the persons found at the station). Courts have observed that a public location, such as a theater, is more likely than a private residence to contain innocent persons who are unrelated to, and perhaps even unaware of, the criminal activity. *See Sutton v. State*, 738 A.2d 286, 294 (Md. Ct. Spec. App. 1999) (observing that courts often recognize that an "all persons" search of a private dwelling is much less likely to entrap innocent persons

than the search of a public or semi-public building or location); *See also State v. Kinney*, 698 N.E.2d 49, 54 (Ohio 1998) (recognizing that in general, "[t]he more public a place, the less likely a search of all persons will be sustained" (internal quotation marks and citation omitted)).

The State seeks to distinguish these cases because even though patrons of a bar or other public venue may gather for purposes other than illegal activities, the purpose of the rave is only to promote illegal drug and alcohol use. It contends that a person who inadvertently entered the theater with no intention of participating in illegal activity would have left after discovering the illegal activity.

We are unpersuaded by the State's argument because there is nothing in the affidavit indicating that the only purpose of the rave was to engage in illegal behavior. Instead, the rave took place in a public theater that anyone could enter, including Holguin who was admitted without any invitation or specialized showing. Given that completely innocent people could enter the theater, we are not convinced that the affidavit contained sufficient information to establish probable cause that every person present was engaged in criminal activity. *See Thomas*, 540 N.W.2d at 665-66 (holding that the "all persons" warrant was invalid despite the information in the affidavit regarding numerous drug transactions and indicating that the bar was a focal point of drug activity in the neighborhood because an innocent person could have inadvertently entered the bar and thus the magistrate had no way of knowing whether every person was involved in criminal activity).

Based upon the foregoing, we affirm the district court's conclusion that the "all persons" warrant impermissibly authorized the search of Defendant's person because it was not supported by information in the affidavit establishing a particularized suspicion that Defendant or "all persons" found on the premises were involved in criminal activity or in possession of contraband.

SEARCH OF DEFENDANT'S PURSE

The State claims that even if the search of Defendant's person was unlawful, the officers were nonetheless entitled to search Defendant's purse because it was located on the premises to be searched. New Mexico appellate courts have yet to specifically address the question of whether a container or personal property belonging to a visitor but found on the premises to be searched is considered to be part of the premises or whether it is an extension of its owner. Thus, we look to the approach taken in other jurisdictions for guidance on this issue.

Some courts apply a "physical possession" test and focus on whether the visitor had the container or personal property in his or her physical possession at the time of the search. *See, e.g., United States v. Johnson*, 475 F.2d 977, 979 (D.C. Cir. 1973) (holding that the search of the visitor's purse was covered by the warrant because it was not being worn by the visitor and thus did not constitute "an extension of her person so as to make the search one of her *person*"); *State v. Reid*, 77 P.3d 1134, 1136-43 (Or. Ct. App. 2003) (criticizing, but nonetheless adopting, the bright-line physical possession test and thus holding that, if the personal property is on the premises but not within the visitor's physical possession and it could contain an item named in the warrant, officers may search it even if they know the property belongs to

the visitor). We decline to adopt the physical possession approach because it insulates guilty parties who could evade detection by giving contraband to visitors. *See United States v. Micheli*, 487 F.2d 429, 431 (1st Cir. 1973) ("It is too broad in that a search warrant could be frustrated to the extent that there are hands inside the premises to pick up objects before the door is opened by the police."). Furthermore, it fails to protect the privacy interests of visitors who merely put down or store their personal effects for purposes of convenience or in order to comply with the requirements of certain public venues. *See id.* (criticizing the physical possession approach as too narrow because "it would leave vulnerable many personal effects, such as wallets, purses, cases, or overcoats, which are often set down upon chairs or counters, hung on racks, or checked for convenient storage").

Defendant encourages us to adopt the "notice" approach that prohibits officers from searching the personal property of visitors on the premises to be searched if the officers knew or should have known that the personal property belonged to the visitor. *See State v. Lohr*, 263 P.3d 1287, 1291-92 (Wash. Ct. App. 2011) (holding that the warrant to search the premises did not cover the defendant's purse that "was readily recognizable as her personal effect" and noting that "if an item is readily recognizable as belonging to an individual not named in the warrant, the item is not within the warrant's scope"); *cf. Waters v. State*, 924 P.2d 437, 440 (Alaska Ct. App. 1996) (assuming for purposes of the decision that personal property belonging to a visitor is exempt from the warrant "if the officers knew or reasonably should have known" that the property does not belong on the premises but nonetheless affirming the search of the defendant's purse because ownership of the purse was ambiguous).

The district court appeared to adopt the notice approach in reaching its determination that Vasquez was not justified in searching Defendant's purse because the purse clearly belonged to her. We need not decide if the district court was correct in determining that Vasquez was precluded from searching Defendant's purse merely based on his knowledge that it belonged to Defendant because the district court's determination is justified on other grounds as well. *See State v. Ruiz*, 2007-NMCA-014, ¶ 38, 141 N.M. 53, 150 P.3d 1003 (holding that, as a general rule, "we will uphold the decision of a district court if it is right for any reason").

A number of jurisdictions have applied an approach that considers the connection between the visitor, the visitor's personal property, and the reason for the search warrant. For example, the "relationship approach" adopted by the court in *Micheli* requires an examination of "the relationship between the person and the place." *See Micheli*, 487 F.2d at 431; *see also United States v. Giwa*, 831 F.2d 538, 544-45 (5th Cir. 1987) (stating that "physical possession should not be the sole criterion . . . used to determine whether a personal item may be searched pursuant to a premises search warrant[,]" but instead the better approach is to examine the "relationship between the person and the place"). This approach recognizes that items found on the premises will not automatically fall within the proper scope of the search warrant, but instead, "it is necessary to examine why a person's belongings happen to be on the premises." *Micheli*, 487 F.2d at 432 (holding that the search of the defendant's briefcase fell within the scope of the warrant to search the premises because the defendant, a co-owner of the premises searched, was not a mere visitor but instead "had a special relation to the place,

which meant that it could reasonably be expected that some of his personal belongings would be there").

In *State v. Jackson*, 260 P.3d 1240, 1243-44 (Kan. Ct. App. 2011), the Kansas Court of Appeals adopted a hybrid approach that it characterized as a "notice test" with a relationship exception. Under this approach, officers may not search a visitor's personal property if they have "actual or reasonable constructive notice" that the property is not subject to the warrant. *Id.* However, the relationship exception will apply to allow the search, despite the officer's notice of ownership, if the surrounding circumstances suggest that the visitor has more than a casual relationship to the premises and that there is a relationship between the visitor and the "illegal activities described in the warrant." *Id.* at 1244.

In *Jackson*, the officers executed a search warrant authorizing a search for illegal drugs and paraphernalia at the residence of Marla Davenport. *Id.* at 1242. Davenport, her son, and five non-residents, including the defendant, were found in the bedroom, but the officers found three or four purses on the floor in the kitchen. *Id.* When the officers looked inside of the purses, ostensibly to determine ownership, they found drug paraphernalia inside the defendant's purse along with methamphetamine. *Id.* at 1242-43. Because the officers knew or should have known that the purse belonged to the defendant *and* because there was no suggestion that the defendant either lived on the premises or was engaged in the illegal activity, the court held that the search warrant did not authorize the search of her purse. *Id.* at 1244-47.

The underlying rationale of the notice approach, the relationship approach adopted in *Micheli*, or the hybrid approach adopted by the court in *Jackson*, and our consideration of the lack of evidence connecting Defendant to the criminal activities, lead us to conclude that the search of Defendant's purse was impermissible. *See id.*; *see also United States v. Young*, 909 F.2d 442, 445 (11th Cir. 1990) (recognizing that application of the "relationship" test is consistent with the Supreme Court's holding in *Ybarra* because it was the patron's lack of a relationship with the illegal activity taking place on the premises that resulted in a finding of lack of probable cause in *Ybarra*). Moreover, even though New Mexico appellate courts have yet to consider this precise issue, this Court's opinion in *State v. Gurule*, 2011-NMCA-063, 150 N.M. 49, 256 P.3d 992, *cert. granted*, 2011-NMCERT-006, 150 N.M. 764, 266 P.3d 633, is consistent with the views articulated by the courts in *Jackson* and *Micheli*, by implicitly recognizing the need to establish a connection between the specific item seized and the reason for the warrant. *See Gurule*, 2011-NMCA-063, ¶ 16 (recognizing that "the scope of the [search] warrant [must] be limited by the probable cause on which the warrant is based" and that courts will suppress the seizure of an *individual item* for lack of probable cause with respect to that item (internal quotation marks and citation omitted)).

In *Gurule*, the search warrant was based on information in the affidavit that computers in the defendant's home were being used to view and share child pornography. *Id.* ¶¶ 2, 5. There was nothing in the affidavit indicating that cameras in the home were being used in connection with the pornography or that anyone in the home was taking pornographic pictures. *Id.* ¶ 5. The search warrant authorized the seizure of a digital camera. *Id.* ¶ 2.

This Court affirmed the district court's order suppressing evidence obtained from the digital camera because, even though the search warrant explicitly authorized the search and seizure of the digital camera,"the dispositive issue is whether there was probable cause to permit the search of the camera." *Id.* ¶¶ 20, 23. In the absence of any showing that the digital camera was being used to store or to manufacture the child pornography, this Court held that "there was no substantial basis for concluding that there was probable cause that the camera would contain child pornography," and the evidence found therein was properly suppressed. *Id.* Applying the analysis of *Gurule* leads us to conclude that the search of Defendant's purse was not supported by probable cause because the State failed to prove that the seizure of that individual item was supported by probable cause and it failed to establish a connection between the purse and the reason for the warrant. *See id.* ¶ 16.

Finally, contrary to the State's contentions, we believe the United States Supreme Court's decisions in *United States v. Ross*, 456 U.S. 798 (1982), and *Wyoming v. Houghton*, 526 U.S. 295 (1999), can be reconciled with the approach taken by the courts in *Jackson* and *Micheli*. The State relies on language in *Ross* stating that "[a] lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search." 456 U.S. at 820-21; *see Houghton*, 526 U.S. at 301-02 (applying *Ross* to conclude that, when there is probable cause to search an automobile, the officers may search containers found within the automobile regardless of ownership and without the need for "individualized probable cause" for each container).

However, the State acknowledges that both *Ross* and *Houghton* involve the warrantless search of automobiles under the federal automobile exception. *See Houghton*, 526 U.S. at 303; *Ross*, 456 U.S. at 800-01. The automobile exception is justified in part by the recognition that passengers, as well as drivers, "possess a reduced expectation of privacy with regard to the property that they transport in cars." *Houghton*, 526 U.S. at 303.

We do not believe that the principles underlying *Ross* and *Houghton* apply in this matter because neither case involves the search of the personal property of a person who is not subject to the search warrant and who has stored his or her property on premises that are open to the public. Therefore, we are not persuaded that these cases warrant a conclusion that the search of Defendant's purse was supported by probable cause or that the search was authorized by the warrant to search the premises of the theater.

In sum, the district court found that Vasquez knew the purse belonged to Defendant at the time he conducted the search. There is nothing in the affidavit or in the officers' testimony to suggest that the purse was connected to the theater or to the illegal activity occurring there. Therefore, Vasquez was not authorized to search Defendant's purse and the evidence found therein, and Defendant's subsequent statements about that evidence were properly suppressed.

NEW MEXICO CONSTITUTION

Because we find that the search of Defendant's person and her personal

belongings violated the Fourth Amendment of the United States Constitution, we need not decide whether it violated Article II, Section 10 of the New Mexico Constitution as well or whether Defendant preserved her claim under the New Mexico Constitution. *See State v. Montano*, 2009-NMCA-130, ¶ 23, 147 N.M. 379, 223 P.3d 376.

CONCLUSION

For these reasons, we affirm the order of the district court.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

LINDA M. VANZI, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-021

Filing Date: May 30, 2013

Docket No. 32,844

JESUS GONZALEZ,

Worker-Petitioner,

v.

PERFORMANCE PAINTING, INC., and BUILDERS TRUST OF NEW MEXICO,

Employer-Insurer-Respondents.

James Rawley
Albuquerque, NM

for Petitioner

Miller Stratvert, P.A.
Nathan A. Cobb
Erica R. Neff
Thomas R. Mack
Albuquerque, NM

for Respondents

OPINION

BOSSON, Justice.

Undocumented workers injured on the job present a special challenge under the Workers' Compensation Act. All workers are encouraged to return to work when medically feasible, yet federal law may preclude some employers from extending rehire offers to undocumented workers once they learn of their status. Federal law also requires employers to hire in good faith and demand documentation of prospective employees showing their lawful status. Because an offer to rehire must be a legitimate offer, we hold that employers who cannot demonstrate such good faith compliance with federal law in the hiring process cannot use their workers' undocumented status as a defense to continued payment of modifier benefits under the Workers' Compensation Act. The Court of Appeals having decided to the contrary, we reverse.

BACKGROUND

Jesus Gonzalez (Worker) is an undocumented immigrant, coming to this country from Mexico for the first time in 2003 and again in 2005. In early February of 2006, he was hired by Performance Painting, Inc. (Employer) as a painter's helper. By all accounts, Worker was a good employee and worked without incident until August 31, 2006. On that date, Worker fell off a ladder, injuring his shoulder. As a result of the injury, Worker was temporarily totally disabled and unable to work. The injury required multiple surgeries and months of physical therapy.

Worker reached maximum medical improvement on August 30, 2007. He was assigned a 3 percent permanent base impairment rating based upon his shoulder injury and its effect upon his whole body. He was also permanently restricted in the type of work he could perform, including no lifting above his head, all lifting limited to ten pounds occasionally or up to five pounds frequently, and no climbing ladders or extended bending.

Worker temporarily returned to work with Employer in January of 2008. By early February, however, Worker stopped going to work, due at least in part to Employer's inability to accommodate his injury-related work restrictions. Worker also claims that he stopped working because of a slowdown in the amount of work available. Worker then filed a complaint for workers' compensation on February 18, 2008.

Sometime in late April, Worker received a letter through his attorney offering Worker a chance to return to work for Employer. The letter was written by and on the letterhead of legal counsel for Employer's Insurer. The employment offer was for modified duty, taking into account Worker's injury-related restrictions. As will be discussed later in more detail, an injured worker with a permanent partial disability is entitled to additional modifier benefits based upon the worker's age, education, and physical capacity but only until the worker returns to work at the same or better wage. NMSA 1978, § 52-1-26(C) & (D) (1990). Hence, Employer's offer among other things was an attempt to limit its continuing obligation to pay modifier benefits. The offer required Worker to fill out a new application which would explicitly "include verification of his eligibility for employment." Worker received at least three such letters.

On June 20, 2008, Worker appeared in Employer's office to fill out the necessary

paperwork to return to work. Worker began filling out the application packet and was asked to produce a social security card, which Employer had not requested previously. Unable to complete the verification, Worker left the office and never returned.

In early August of 2008, Worker began working elsewhere and continued to work there through trial. For the week ending on August 16, 2008, for the first time since his injury, Worker made a wage in excess of his pre-injury wage.

During the proceedings before the Workers' Compensation Administration, Employer argued that Worker's failure to prove eligibility to work on June 20, 2008, constituted an unreasonable refusal to return to work, thereby limiting Worker's benefits to the base impairment rating without any modifier benefits. The Workers' Compensation Judge (WCJ) agreed. The WCJ concluded that Worker was entitled to partial disability benefits commencing August 30, 2007, Worker's date of maximum medical improvement, at the rate of 51 percent, (3 percent permanent physical impairment plus 48 percent modifier points), but only until June 20, 2008. After that date, Worker was only entitled to his 3 percent permanent impairment rating because "Worker could not accept a bona fide return to work offer made by Employer" due to his immigration status, and therefore "Worker unreasonably refused a return-to-work offer from Employer." Worker appealed and the Court of Appeals affirmed but for slightly different reasons which we will discuss in turn. *See Gonzalez v. Performance Painting, Inc.*, 2011-NMCA-025, ¶ 1, 150 N.M. 306, 258 P.3d 1098. We granted certiorari to review an important point of law that potentially affects numerous undocumented workers across this state.

DISCUSSION

Workers' Compensation Act

The purpose of the Workers' Compensation Act (WCA) is to provide "quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to the employers who are subject to [its] provisions." NMSA 1978, § 52-5-1 (1990). The WCA is a delicate balance between the rights and interests of the worker and the employer. *See id.* Thus, "any judicial analysis under the [WCA] must balance equally the interests of the worker and the employer without showing bias or favoritism toward either." *Salazar v. Torres*, 2007-NMSC-019, ¶ 10, 141 N.M. 559, 158 P.3d 449.

Both parties agree that the WCA generally applies to undocumented workers, at least since legislative action taken to that effect in 1984. *See Performance Painting*, 2011-NMCA-025, ¶ 15 (noting the Legislature's 1984 deletion from the WCA of the denial of benefits for a worker's nonresident alien dependents). Accordingly, the benefits awarded prior to Worker reaching maximum medical improvement are not at issue. Neither does Employer dispute Worker's entitlement, despite his undocumented status, to the 3 percent permanent partial disability benefits based on his physical impairment rating. The dispute in this case focuses instead on whether Worker's status as an undocumented immigrant prevents him from receiving permanent partial disability *modifier* benefits which were calculated at 48 percent of his pre-injury wage. We proceed to that question, and begin with the WCA itself.

Permanent Partial Disability

As previously stated, once an injured worker reaches maximum medical improvement, the worker may be eligible for permanent partial disability benefits if the worker has suffered a "permanent impairment." NMSA 1978, § 52-1-26(B) (1990). The amount of benefits are "determined by calculating the worker's impairment as modified by his age, education and physical capacity." Section 52-1-26(C). The age and education modifiers are added together and then multiplied by the physical capacity modifier. NMSA 1978, § 52-1-26.1(B) (1990). This number is then added to the base impairment rating to determine the total award. NMSA 1978, § 52-1-26.1 (C) (1990). This case illustrates the significance of both benefits, where Worker's base impairment was only 3 percent, but his modifier benefits added another 48 percent.

As noted earlier, modifier benefits are not permanent. Section 52-1-26(D) states that "[i]f, on or after the date of maximum medical improvement, an injured worker returns to work at a wage equal to or greater than the worker's pre-injury wage, the worker's permanent partial disability rating shall be equal to his impairment and shall not be subject to modifications." In other words, the WCA provides the employer with an incentive to re-employ the injured worker, and the worker has an incentive to accept a reasonable return-to-work offer, both of which relieve the worker's compensation system.

It could be argued that the plain meaning of the statute is clear, in that an injured worker is entitled to modifier benefits until the worker actually "returns to work," which would allow the worker to decide whether to work at all. Under this theory, an injured worker could refuse even a reasonable and legitimate return-to-work offer and continue collecting modifier benefits, even if the worker simply did not feel like working.

But, this Court has cautioned in the past against reading the WCA too literally. As this Court stated in *Chavez v. Mountain States Constructors*, "New Mexico appellate courts have previously recognized that the provisions of the [WCA] are imprecise. . . . This serves as a warning that the plain language rule may not be the best approach to interpreting this statute." 1996-NMSC-070, ¶ 25, 122 N.M. 579, 929 P.2d 971. Therefore, a literal interpretation of the WCA is not always appropriate.

Such an interpretation would upset the delicate balance between workers and employer interests present in the WCA. It would give sole control over how long a worker collects modifier benefits to the worker. As this case demonstrates, with Worker's base impairment rating of 3 percent and modifier benefits of 48 percent, modifier benefits can be a significant portion of the total amount of permanent partial disability benefits. Allowing a worker to refuse a reasonable and legitimate return-to-work offer in favor of continuing to collect modifier benefits, is simply not the scheme the Legislature intended.

Finally, this interpretation would ignore the following stated purpose of permanent partial disability benefits:

> As a guide to the interpretation and application of this section, the policy and intent of this legislature is declared to be that every person who suffers a compensable injury with resulting permanent partial disability should be provided with the *opportunity* to return to gainful employment as soon as possible with *minimal* dependence on compensation awards.

Section 52-1-26(A) (emphasis added). The stated purpose is to provide an *opportunity* to return to work. A reasonable and legitimate return to work offer would fulfill this purpose, even if the offer is refused. But, if a worker were allowed to refuse a reasonable job offer and continue collecting modifier benefits, the worker would be *more* dependent on the compensation award. Thus, a scheme in which a worker could refuse an employment opportunity in favor of receiving more benefits would directly contradict the Legislature's stated purpose.

Accordingly, our Court of Appeals has correctly interpreted this section of the WCA to mean that if an injured worker refuses a reasonable return-to-work offer, the worker becomes ineligible for modifier benefits. In *Jeffrey v. Hays Plumbing & Heating*, the injured worker refused an employer's return-to-work offer in favor of starting his own business. 118 N.M. 60, 61, 878 P.2d 1009, 1010 (Ct. App. 1994). The Court of Appeals held that rewarding voluntary unemployment or underemployment—by allowing a worker to refuse a reasonable return-to-work offer but continue collecting modifier benefits—"would be contrary to the [WCA]." *Id.* at 64, 878 P.2d at 1013. The Court stated that such benefits should be "denied if a claimant, through voluntary conduct unconnected with his injury, takes himself out of the labor market."[1] *Id.* (internal quotation marks and citation omitted).

The holding in *Jeffrey* was later applied in *Connick v. County of Bernalillo*, 1998-NMCA-060, 125 N.M. 119, 957 P.2d 1153, again to deny modifier benefits. In *Connick*, the injured worker was later sent to prison for second-degree murder, but still claimed he was entitled to continuing modifier benefits. *Id.* ¶¶ 2-3. The *Connick* Court affirmed that "after *Jeffrey*, disability benefits (other than impairment) may be denied, reduced, or suspended if a claimant voluntarily . . . takes himself out of the job market." *Id.* ¶ 8. The Court reasoned that "[a]lthough there is no evidence that a job offer was made in this case, it would have

[1] If Worker had been denied *all* benefits, we would readily agree with the sentiments expressed in the Special Concurrences that undocumented workers are entitled to impairment benefits. The law is clear, as in this case, that impairment benefits—based on physical injury—cannot be denied, and were not denied in this case, due to undocumented status. But since 1991, the Legislature has separated permanent partial disability benefits into two categories, impairment and modifier, and this opinion only concerns the latter. Modifier benefits are based in part on "the difference between the physical capacity necessary to perform the worker's usual and customary work and the worker's residual capacity." Section 52-1-26.4(B). The effect of physical impairment upon ability to work remains, therefore, part of the calculus that the Legislature—not the judiciary—has created to assess overall benefits. *See* Section 52-1-26(A) (declaring legislative policy that injured workers be provided with the opportunity to return to work). It is this *continuing* reference in the Act itself to physical capacity to work that gave rise to *Jeffrey* and directs the result we reach in this case. As suggested in the Special Concurrences, we would all welcome additional clarity from our legislative branch. Until that time, however, we have no choice but to make principled distinctions that reconcile statutory language and purpose.

been futile to do so under the circumstances; Claimant's incarceration effectively removed him from the labor market." *Id.* ¶ 9.

In this case, the WCJ denied Worker modifier benefits, presumably relying on *Jeffrey* and *Connick*. Specifically, the WCJ concluded that "Worker could not accept a bona fide return-to-work offer made by Employer due to Worker's status as an illegal undocumented worker." As a result, "Worker unreasonably refused a return-to-work offer from Employer."

The Court of Appeals also denied Worker modifier benefits, although for different reasons. *Performance Painting*, 2011-NMCA-025, ¶ 1. The Court of Appeals held that undocumented workers are *categorically* ineligible for modifier benefits—in every case—because under federal law they are ineligible to work. *Id.* ¶ 33. The Court reasoned that "[w]here, as here, an employer is legally forbidden to rehire a worker because the worker is undocumented, we doubt that the Legislature intended Section 52-1-26 to nevertheless apply to allow the worker to receive modifier benefits." *Id.* ¶ 29.

To a limited degree, the Court of Appeals' conclusion has certain merit based on the effect of federal law, at least in some instances, on an employer's efforts to rehire an undocumented worker. But that is not the end of our analysis, nor do we believe it captures all of what our Legislature reasonably intended in a situation like this.

Simply put, the Court of Appeals' conclusion in this case turns a blind eye to the reality of undocumented workers all across this state and to the facts of this case in particular. The reasoning, stated simply, is that because Worker is not *allowed* to work, then he cannot work, and that if he cannot work, then he does not work, either for Employer or someone else. Because he cannot work, modifier benefits—based in part on his ability to return to work—cannot apply.

Yet Worker does work. He has held numerous jobs since entering the United States, including his employment by Performance Painting. At the time of trial, Worker had already found a new job and was working full time for a different employer at a better wage. Modifier benefits would have terminated at that point even without a return-to-work offer by Employer. Whether lawful or not, men and women like Worker in this case often do find employment somewhere, and when they do, modifier benefits can be terminated in the manner prescribed by the WCA.

In addition, refusing modifier benefits to undocumented workers across the board would give rise to other problems. It would create a perverse incentive for employers to *hire* undocumented workers over other workers, especially in high-risk jobs that often result in workers' compensation claims. An employer could hire undocumented workers, knowing that in the event of injury the employer would likely pay a much lower amount in workers' compensation benefits due to ineligibility for modifier benefits. This would again upset the balance the Legislature created in the WCA—this time tipping it in favor of the employer as opposed to the worker. Other courts have noted this problem. *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1072 (9th Cir. 2004). ("[E]mployers have a perverse incentive to ignore immigration laws at the time of hiring but insist upon their enforcement when their employees complain.").

There is a better approach, one more consistent with legislative intent. The essence of the Court of Appeals' holding seems based more on the potential unfairness to a particular employer, one who normally would offer re-employment in order to save money on modifier benefits (or avoid higher insurance premiums), but who cannot legally do so once the employer learns of the illegal status of its former worker. We agree that fairness should prevail on behalf of such an employer, so long as the employer can show he did the best he could under the circumstances to avoid the predicament. In other situations, however, where the employer is culpable for improperly hiring the worker in the first place, the worker should not shoulder all the responsibility. That would upset the delicate balance between worker and employer interests that our Legislature has required. *See* Section 52-5-1 (stating that the WCA is not to be construed "in favor of the claimant or employee on the one hand, nor are the rights and interests of the employer to be favored over those of the employee on the other hand."); *Salazar*, 2007-NMSC-019, ¶ 10; *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, ¶ 12, 131 NM 272, 34 P.3d 1148.

The Court of Appeals correctly noted that

> [w]here the pre-injury employer knew or should have known of the injured worker's undocumented status, the employer cannot make a bona fide rehire offer. An offer as contemplated in Section 52-1-26 by a pre-injury employer to rehire an injured, undocumented worker would in that instance be illusory, if not a ruse.

Performance Painting, 2011-NMCA-025, ¶ 29. We agree with this statement of the law. Whether an employer knew or should have known, before the worker was injured, that a worker was undocumented determines whether an employer's rehire offer was legitimate and should be the focus of our inquiry and the basis of determining whether the injured worker is entitled to modifier benefits. Such a focus maintains the appropriate neutrality between employers and workers and in doing so stays true to the original intent of the Legislature.

The Immigration Reform and Control Act

As noted in the Court of Appeals opinion, *see id.* ¶ 17, Congress passed the Immigration Reform and Control Act (IRCA) in 1986. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.). IRCA seeks to discourage illegal immigration by making it unlawful to hire undocumented workers. *See* 8 U.S.C. § 1324a(a)(1)(A) (2006). As stated by the United States Supreme Court, "IRCA forcefully made combating the employment of illegal aliens central to [t]he policy of immigration law." *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147 (2002) (internal quotation marks and citation omitted).

Thus, under IRCA, employers "have an affirmative duty to determine that their employees are authorized." *New El Rey Sausage Co., Inc. v. U.S. I.N.S.*, 925 F.2d 1153, 1158 (9th Cir. 1991). As the Court of Appeals noted, this is accomplished by imposing a legal duty on employers that includes "examining specified documents that establish the person's identity and eligibility for employment in the United States and completing Form I-9, which evidences that examination." *Performance*

Painting, 2011-NMCA-025, ¶ 18 (quoting *Coque v. Wildflower Estates Developers, Inc.*, 58 A.D.3d 44, 49 (2008)). If the employer fails to properly inspect the documents, then the employer "has failed to adequately ensure that the alien is authorized." *New El Rey Sausage Co.*, 925 F.2d at 1158. Accordingly, penalties can be assessed for the failure to follow the proper procedure in filling out an I-9 Form. 8 U.S.C. § 1324a (e)(5) (as amended through 2005). While a completed I-9 Form need not actually be submitted for verification in New Mexico, all employers are required to keep the completed forms for a minimum of three years. 8 U.S.C. § 1324a(b)(3)(B)(i) & (ii).

Based on these federal requirements, an employer who does not properly fill out an I-9 Form and demand necessary documentation, as is required, either should have known or is deemed to have known that the worker would likely be undocumented and ineligible for rehire in the event of injury. The I-9 Form is how an employer gains knowledge of a newly hired worker's eligibility for employment. If an employer fails to fill out the form and demand proof of documentation, either purposefully or negligently, then the employer has failed to perform his affirmative duty to determine the worker's eligibility for employment. Based on this failure, knowledge of the worker's immigration status can be imputed to the employer for the purposes of Workers' Compensation benefits. An offer to rehire would then be, in the words of the Court of Appeals, "illusory, if not a ruse." And under these circumstances the employer should fairly bear the responsibility for that predicament, one of his own creation. The employer would fairly owe modifier benefits.

On the other hand, there are other times when an employer has properly filled out the I-9 form, but an undocumented worker presents false documents. In this situation, IRCA provides for an affirmative defense to a violation, if the employer has complied in good faith with IRCA's requirements. 8 U.S.C. § 1324a(a)(3). We see no reason why such a defense should not apply to cases involving modifier benefits. Accordingly, if a worker presents false documents to an employer during the initial hiring and the employer does not otherwise know or should know of the worker's undocumented status, then the worker should not be allowed to benefit from such deception by collecting modifier benefits. In any case, an employer can protect itself simply by following the law.

In our view, this resolution strikes an appropriate balance between employers and workers, as the Legislature intended in the WCA, regarding undocumented workers and modifier benefits. If an otherwise nonculpable employer has complied with the federal requirements of IRCA, and properly fills out an I-9 form including necessary documentation, the employer cannot be forced to pay modifier benefits to an undocumented worker. This is true even if the employer has, post-injury, learned of the worker's undocumented status. An otherwise nonculpable employer can establish a good faith defense. This approach favors neither the worker or the employer. Whichever party is more culpable, by either failing to perform an affirmative duty or presenting false documents to obtain employment, suffers the most; he is not permitted to benefit from that party's own wrongdoing.

Employer Did Not Properly Confirm Worker's Eligibility to Work

We now turn to the facts of this case

to evaluate Employer's return-to-work offer. Despite both Worker and Employer requesting findings of fact on whether Employer should have known that Worker was undocumented, the WCJ failed to rule on this issue. In his defense, the WCJ admitted that the law regarding undocumented workers and modifier benefits was unclear, and he hoped to get an appellate court ruling on the matter. The Court of Appeals stated that "[i]n the present case, Employer provided no evidence that it used the required I-9 forms, much less used any in connection with Worker's hire." *Performance Painting,* 2011-NMCA-025, ¶ 19. Following our review of the whole record, *see Rodriguez v. Permian Drilling Corp.*, 2011-NMSC-032, ¶ 7, 150 N.M. 164, 258 P.3d 443, we agree. The evidence demonstrates convincingly that Employer did not follow the proper procedures when Worker was initially hired.

Employer testified at trial about the hiring process at Performance Painting. Specifically, Employer testified that the office manager would have been responsible for Worker's paperwork when he was initially hired. In her deposition, the office manager testified that she did not personally hand out any I-9 forms. She also testified that she never received any training regarding how to document immigration status and never inquired about the immigration status of newly hired workers. There was much discussion and testimony before the WCJ about how Worker provided a false social security *number*, but never any indication that he actually presented a social security *card*. In fact, when asked why Worker's employment file contained no copy of such identification, according to Employer's usual practice, Employer stated by assumption that the office manager "was using the New Hires form . . . and using the state to verify."

The record contains two different I-9 forms for Worker, neither of which are properly completed. The first is dated June 20, 2008, and appears to be the I-9 form that Worker began but never completed when attempting to accept Employer's return-to-work offer. The other I-9 form is not dated, making it impossible to determine when it was filled out. Each form, however, is only partially completed, with the section Employer is supposed to complete after the inspection of the appropriate documents left blank on each. There is no other evidence or testimony in the record regarding whether an I-9 Form for Worker was properly completed near the time of his initial hiring.

Thus, it is clear to us that Employer failed to follow appropriate hiring procedures, as required by federal law, and failed to properly fill out an I-9 form and keep it on file for the requisite time period. Accordingly, we hold that Employer should have known that Worker was undocumented, and any return-to-work offer made by Employer was illusory. Therefore, Worker is entitled to modifier benefits.

Employer argued at length before the WCJ that because he sent the appropriate documentation to New Mexico New Hires and never received word of any problems, he could not have known that Worker was undocumented. The Court of Appeals indicated that "[n]othing in the record indicates what the function of this agency is, including what, if anything, the agency does with a person's social security number." *Performance Painting*, 2011-NMCA-025, ¶ 3 n. 1. A cursory examination of the New Mexico New Hire's website and the law that created it instantly reveals the fallacy of Employer's argument. NMSA 1978, Sections 50-13-1 to -4 (1997), established the New

Mexico New Hires database which requires employers to submit certain information about each worker they hire. According to the statute, "[t]he state directory of new hires shall use the information received to locate individuals for purposes of establishing paternity and establishing, modifying and enforcing child support obligations." Section 50-13-3 (B). The database's website also espouses a similar purpose. New Mexico New Hires Directory, *available at* http://newhire-reporting.com/NM-newhire/FAQ.aspx#wdwn. Neither the statute nor the website ever suggest that the database performs employment eligibility verification, and the database should not be relied upon as such. The reason that Employer never received any word from New Mexico New Hires that there were any problems with his newly hired workers is because they did not owe child support or have any paternity issues, not because they were all eligible to work in the United States.

Worker's Entitlement to Modifier Benefits Ceased Upon Returning to Work at His Pre-Injury Wage

Worker also argues that he continues to be eligible for modifier benefits even though he has returned to work at a wage equal to or greater than his pre-injury wage, because he has not returned to work for his pre-injury employer. By analogy, Worker relies on *Grubelnik v. Four-Four, Inc.*, 2001-NMCA-056, 130 N.M. 633, 29 P.3d 533, a case involving a return-to-work provision for temporary total disability as opposed to permanent partial disability, for this proposition.

In *Grubelnik*, the Court of Appeals determined that a worker remained entitled to full temporary total disability after returning to work with a different employer. 2001-NMCA-056, ¶ 1. NMSA 1978, Section 52-1-25.1(B) (1990) (amended 2005) states that "[i]f, 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 the worker's pre-injury wage, worker is not entitled to temporary total disability benefits." The worker in *Grubelnik* did obtain a release to return to work but began working for a different employer, as he knew that his pre-injury employer could not accommodate his restrictions. *Grubelnik*, 2001-NMCA-056, ¶¶ 4-5. The Court of Appeals held that the term "employer" in the return-to-work provision of Section 52-1-25.1(B) specifically referred to the pre-injury employer. *Grubelnik*, 2001-NMCA-056, ¶ 21. As a result, the worker could continue collecting full TTD benefits. *Id.* ¶ 26.

This holding, however, was superceded by the Legislature in 2005, a fact not mentioned in the briefing by either side. The current version of the statute reads as follows:

> B. If, prior to the date of maximum medical improvement, an injured worker's health care provider releases the worker to return to work, the worker is not entitled to temporary total disability if:
>
> (1) the employer offers work at the worker's preinjury wage; or
>
> (2) the worker accepts employment with *another* employer at the worker's preinjury wage.

Section 52-1-25.1(B) (2005) (emphasis added). While there is no specific mention of *Grubelnik* in the amended statute, the expression of legislative policy on this issue is clear. A return-to-work provision is no longer contingent on returning to work for the pre-injury employer. Although the case before us involves permanent partial disability as opposed to temporary total disability in *Grubelnik*, we see no reason, and Worker has not offered one, that the legislative policy was only intended to be applied to temporary total disability. Thus, Worker is not entitled to modifier benefits from the time he began earning an amount equal to or greater than his pre-injury wage with a new employer. According to the WCJ, this occurred beginning with the week ending August 16, 2008, and that finding was not challenged on appeal, *see Johnston v. Sunwest Bank of Grant Cnty.*, 116 N.M. 422, 423-24, 863 P.2d 1043, 1044-45 (1993) ("Unchallenged findings of the trial court are binding on appeal."). Therefore, Worker is ineligible for modifier benefits from that date on. To be clear, *Grubelnik* is hereby overruled.

CONCLUSION

For these reasons, we hereby reverse the Court of Appeals.

IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

BARBARA J. VIGIL, Justice

EDWARD L. CHÁVEZ, Justice (specially concurring).

CHARLES W. DANIELS, Justice (specially concurring).

CHÁVEZ, Justice, specially concurring.

I concur with the opinion authored by Justice Bosson because it strikes a reasonable balance between the New Mexico Legislature's unquestionable policy decision that undocumented workers are to receive workers' compensation benefits consistent with the federal requirements under the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.). Nobody questions or challenges the Legislature's policy decision, and for good reason. The reality is that undocumented workers are part of the history of New Mexico, having contributed the fruits of their labor to improve our economy and fill a void in the labor market that obviously exists both in New Mexico and throughout the United States. *See generally* David Becerra et al., *Fear vs. Facts: Examining the Economic Impact of Undocumented Immigrants in the U.S.*, 39 J. Soc. & Soc. Welfare 111, 123-24 (Issue 4, Dec. 2012). Indeed, the undocumented worker generally works for the lowest wages in the toughest jobs. *See* Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 Harv. C.R.-C.L. L. Rev. 345, 347 (2001) ("Undocumented workers by definition occupy a precarious position in U.S. society: their very presence at the workplace is at the same time unlawful and necessary to perform the most difficult work at the lowest wages.").

It has not been unusual for the United States to historically have had treaties with other countries under which undocumented workers and their dependents are guaranteed

the same rights and privileges as nationals (citizen workers). 2 Arthur Larson, *Workmen's Compensation Law* § 63.52 (1994). The humanitarian policy of the Legislature to allow workers' compensation benefits for the undocumented worker is really no different than these treaties.

To be sure, until 1983 the Legislature had specifically denied relatives or dependents of an undocumented worker any workers' compensation benefits if the relatives and dependents were not residents of the United States. NMSA 1978, § 52-1-52 (1953, as recodified and amended through 1983). This legislative policy decision was the subject of the Supreme Court's opinion in *Pedrazza v. Sid Fleming Contractor, Inc.*, 94 N.M. 59, 607 P.2d 597 (1980), *superseded by statute* in the case at issue in this appeal, *Gonzalez v. Performance Painting, Inc.*, 2011-NMCA-025, ¶ 15, 150 N.M. 306, 258 P.3d 1098, *cert. granted*, 2011-NMCERT-003, 150 N.M. 620, 264 P.3d 521. In *Pedrazza*, Salvador Ontiveros was killed while working for Sid Fleming. *Id.* at 61, 607 P.2d at 599. The natural mother of his children, Carmen Pedrazza, pursued a claim for workers' compensation benefits on behalf of their children, all of whom were residents of the Republic of Mexico. *Id.* In 1980, workers' compensation claims were litigated in district court. The district court denied the claim, relying on the provisions of Section 52-1-52. 94 N.M. at 61, 607 P.2d at 599. Pedrazza appealed, challenging the constitutionality of Section 52-1-52 on due process and equal protection grounds. 94 N.M. at 61, 607 P.2d at 599. A majority of the Supreme Court upheld the constitutionality of Section 52-1-52, 94 N.M. at 62-63, 607 P.2d at 600-01, and closed its opinion by stating:

> This opinion does not deny plaintiffs other avenues of recovery. The worker and his [or her] dependents are independent of and take separately from one another under the Act. Therefore, the bar against using other legal remedies to recover for the injury or death of a worker cannot be raised against those dependents not covered by the Act.

Id. at 63, 607 P.2d at 601. Implicit in this statement was that Pedrazza, or other dependents of a deceased undocumented worker who do not reside in the United States, could pursue a tort action against the employer, assuming that they could prove that the employer's negligence proximately caused the worker's injury or death. The implication of an alternative remedy appears to have been a key rationale for a majority of this Court to have concluded that Section 52-1-52 did not deprive the dependents in *Pedrazza* of due process or equal protection.

Almost three years after *Pedrazza*, this Court was given the opportunity to expressly hold what it had implicitly stated in *Pedrazza*. In *Kent Nowlin Construction Co. v. Gutierrez*, 99 N.M. 389, 658 P.2d 1116 (1983), Bernardo Talamantes, an undocumented worker, was killed while working for Kent Nowlin Construction Co. *Id.* at 389, 658 P.2d at 1116. Nowlin's workers' compensation carrier paid the medical and funeral expenses for Talamantes under the Workers' Compensation Act, NMSA 1978, Chapter 52, Article 1. *Kent Nowlin Constr. Co.*, 99 N.M. at 389, 658 P.2d at 1116. Talamantes's relatives or dependents, who resided in the Republic of Mexico and were therefore not entitled to worker's compensation benefits, brought a wrongful death lawsuit against Nowlin. *Id.* A jury returned a verdict in favor of

Talamantes's dependents. *Id.* The Court of Appeals affirmed the jury verdict, relying on the Supreme Court's opinion in *Pedrazza*, and specifically the language quoted above. *Gutierrez v. Kent Nowlin Constr. Co.*, 99 N.M. 394, 398, 403, 658 P.2d 1121, 1125, 1130 (Ct. App. 1981). This Court granted Nowlin's petition for writ of certiorari and reversed the Court of Appeals. *Kent Nowlin Constr. Co.*, 99 N.M. at 389, 658 P.2d at 1116.

A majority of this Court set aside the tort verdict holding that the Workers' Compensation Act provided the exclusive remedy for the Talamantes dependents, despite the fact that they were not residents of the United States, and were therefore precluded from receiving any benefits under the Workers' Compensation Act. *Id.* at 390-91, 658 P.2d at 1117-18. There simply was no remedy available to the Talamantes dependents under the Workers' Compensation Act, much less an exclusive remedy. Thus, the effect of this Court's majority opinion was to deprive the Talamantes dependents of *any* remedy for the death of their loved one, despite a jury finding that Nowlin negligently took Talamantes's life.

Perhaps it was purely coincidental, or perhaps as an effort to ameliorate the harshness of the result in *Nowlin*, in 1984 the Legislature, almost as if to emphasize its policy decision to make workers' compensation benefits available to undocumented workers, amended Section 52-1-52 to delete the language that deprived relatives or dependents who are not residents of the United States from recovering workers' compensation benefits when their loved one is injured or killed while working in New Mexico. *Compare* 1983 N.M. Laws, ch. 78, § 1, *with* 1984 N.M. Laws, ch. 95, § 1. This history supports the conclusion that the Legislature definitively has made the policy decision to allow undocumented workers to recover workers' compensation benefits when they are injured or killed during the course and scope of their employment with New Mexico employers. Although I question whether any undocumented worker should ever be deprived of modifier benefits based solely on his or her documented status, or for the reasons expressed in Justice Daniels's special concurrence, I believe that the opinion authored by Justice Bosson reasonably balances the policy of the New Mexico Legislature to grant workers' compensation benefits to undocumented workers and their dependents with the Immigration Reform and Control Act of 1986. I therefore concur.

EDWARD L. CHÁVEZ, Justice

DANIELS, Justice, specially concurring.

I concur in the ultimate holding of the majority, that Mr. Gonzalez is entitled to statutory modifier benefits, but I write separately to express my concerns about our having to create a new set of nonstatutory workers' compensation rules especially for undocumented workers.

On its face, the plain language of Section 52-1-26(D) could not be more clear: A worker who is injured on the job, whether undocumented or not, is due full disability benefits until he actually *returns to work* earning at or above his pre-injury wage. *See* 1978 NMSA, § 52-1-26(D) (1990) ("If . . . an injured worker *returns to work* at a wage equal to or greater than the worker's pre-injury wage, the worker's permanent partial disability rating shall be equal to his impairment and shall not be subject to [modifications]." (emphasis added)). Nothing

in the statutory language or history makes an unaccepted job offer—whether reasonable or illusory—a substitute for this textual requirement. *See Gonzales v. Sharp & Fellows Contracting Co.*, 51 N.M. 121, 126, 179 P.2d 762, 765 (1947) ("We have said more than once that when the language of a statute is plain and unambiguous there is no occasion to resort to the rules of statutory construction, and that such statute must be given its plain and obvious meaning."); *see also Sanchez v. Bernalillo County*, 57 N.M. 217, 226, 257 P.2d 909, 915 (1953) ("As has been said many times, it is not the province of the court, but of the legislature, to make changes in the provisions of statute law. Where the lawmaking body has specified clearly who shall be entitled to compensation benefits and under what circumstances, the court should not alter the conditions required to obtain such benefits."). On a straightforward plain language application of the statute, Mr. Gonzales was entitled to his modifier benefits until he actually returned to work at his pre-injury wage.

The reason we are having to create new rules to substitute for the statutory text has its origins in *Jeffrey v. Hays Plumbing & Heating*, 118 N.M. 60, 64, 878 P.2d 1009, 1013 (Ct. App. 1994), which disregarded the plain language of Section 52-1-26(D) and instead applied the historical principle that "[i]n New Mexico, disability benefits are denied if a claimant, through voluntary conduct unconnected with his injury, takes himself out of the labor market.'" (quoting *Feese v. U.S. West Serv. Link, Inc.*, 113 N.M. 92, 94, 823 P.2d 334, 336 (Ct. App. 1991), and citing *Aranda v. Mississippi Chem. Corp.*, 93 N.M. 412, 414, 600 P.2d 1202, 1204 (Ct. App. 1979)). What *Jeffrey* failed to recognize was that only under the earlier version of the disability provision—which, for more than twenty years, defined disability based on the capacity to perform post-injury work—could the denial of benefits be justified when a worker refused to work. *See* NMSA 1953, § 59-10-12.19 (1965) (defining disability based on the "percentage-extent" of a worker's inability "by reason of injury arising out of . . . his employment . . . to perform any work for which he is fitted"); *accord Shores v. Charter Servs., Inc.*, 112 N.M. 431, 432, 816 P.2d 500, 501 (1991) ("[W]e agree that the 1963 amendment in the workers' compensation statute changed the test of disability . . . to capacity to perform work, and that to recover under the statute the worker had to show that she was wholly or partially unable to perform any work for which she was fitted."); *see also Medina v. Zia*, 88 N.M. 615, 616-17, 544 P.2d 1180, 1181-82 (Ct. App. 1975) (denying disability benefits, based on the statutory language of the benefits provision, to a worker who chose not to work); *Aranda v. Mississippi Chem. Corp.*, 93 N.M. 412, 414-15, 600 P.2d 1202, 1204-05 (Ct. App. 1979) (applying *Medina* and holding that a worker was entitled to disability because he did not voluntarily leave his employment); *Feese*, 113 N.M. at 94, 823 P.2d at 336 (Ct. App. 1991) (applying *Aranda* under the 1987 version of the Act defining total disability in terms of the ability to return to work and holding that retirement alone did not necessarily establish voluntarily taking oneself out of the labor market).

Jeffrey did not acknowledge the fact that recent amendments to the Act had abandoned the capacity to work theory in favor of paying a worker for the permanent physical impairment suffered.[2] *See, e.g.*,

[2]Part of the difficulty in interpreting this provision is understanding its statutory history, including the numerous amendments made in 1986, 1987, 1989, and

Varela v. Ariz. Pub. Serv., 109 N.M. 306, 307-08, 784 P.2d 1049,1050-51 (1989) (recognizing the Legislature's adoption of the current definition for permanent partial disability in 1986 based on the American Medical Association guides for physical impairment and that under this new definition, "partial disability is measured purely by the loss of physical function; loss of wages or earning power absolutely plays no part in the determination"); *see also Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, ¶ 19, 122 N.M. 524, 928 P.2d 250 (explaining how the current disability formula is used to calculate impairment and to "award proportional compensation" (internal quotation marks and citation omitted)); *Smith v. Ariz. Pub. Serv. Co.*, 2003-NMCA-097, ¶ 15, 134 N.M. 202, 75 P.3d 418 ("Since the 1990 amendments to the Act, permanent disability is expressly defined in terms of impairment. . . . Permanent partial disability is calculated pursuant to a statutory formula and not in accordance with the worker's ability or inability to function at work.").

By improperly relying on an earlier interpretation of the Act that used now-repealed language to encourage employment and discourage dependence on disability benefits, the *Jeffrey* Court impermissibly perpetuated the conclusion that "[w]e would violate the policy of encouraging employment and independence from compensation benefits if we interpreted Section 52-1-26 to permit a worker to escape a reduction in benefits by voluntarily remaining unemployed or underemployed." *Jeffrey,* 118 N.M. at 64, 878 P.2d at 1013.

The WCA judge and the Court of Appeals in this case tried conscientiously to follow the judge-made policies created from whole cloth in *Jeffrey* and its progeny by holding that the worker had taken himself out of the legal job market by entering the country unlawfully. In order for us to reverse the WCA and Court of Appeals without relying on the statute's plain language and acknowledging that the *Jeffrey* interpretation of the Act was wrong, we now have to create a new set of rules and exceptions for undocumented workers—based on new equitable concerns of compliance with federal law in a worker's initial hiring, none of which can be found anywhere in the plain language or expressed policies in the Act. Granted, if one ignores the statutory text, our judicially created policies, exceptions, and exceptions to exceptions seem like fair ways to deal with compensation for injured workers. But judges are not legislators, and my discomfort arises from the reality that real legislators have not made those decisions.

On the other hand, the Legislature has not seen fit to amend the statute to address any perception on its part that the judicial branch has been misinterpreting the statutory purpose for almost two decades. It may well be that the Legislature believes we are on the right track, and perhaps we should stay the course until we hear otherwise from our colleagues in the legislative branch. The *Jeffrey* approach, rightly or wrongly, has become an integral part of our workers' compensation administrative law and jurisprudence. It is also significant that no party has made a principled argument in this case for our disregarding the principles of stare decisis and reversing long-standing precedent. *See State v. Swick,*

1990 and the relevant caselaw interpreting these amendments. *See* 1965 N.M. Laws, ch. 295, §19; 1986 N.M. Laws, ch. 22, §§ 5, 12; 1987 N.M. Laws, ch. 235, § 12; 1989 N.M. Laws, ch. 263, § 18; and 1990 N.M. Laws 2nd Sess., ch. 2, § 11.

2012-NMSC-018, ¶ 17, 279 P.3d 747 (detailing factors that should be addressed by a litigant seeking to reverse existing precedent). The *Jeffrey* line of precedent, including the majority Opinion in this case, therefore remains the controlling interpretation of the statutory policies we honor in applying the provisions of the Act.

CHARLES W. DANIELS, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-022

Filing Date: May 30, 2013

Docket No. 33,353

EDWARD R. FLEMMA,

Plaintiff-Petitioner,

v.

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

Defendants-Respondents.

Guebert Bruckner, P.C.
Terry R. Guebert
Donald George Bruckner, Jr.
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for Petitioner

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James L. Cook
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Vinson & Elkins, L.L.P.
W. Carl Jordan
Corey E. Devine
Houston, TX

for Respondents

OPINION

VIGIL, Justice.

This case presents a conflict of laws issue that requires us to determine whether enforcement of an arbitration agreement, formed in the State of Texas, would offend New Mexico public policy to overcome our traditional choice of law rule, which requires that we apply the law of the jurisdiction in which the contract was formed. We conclude that the agreement formed in Texas would be unconscionable under New Mexico law, and it therefore violates New Mexico public policy. Thus, we apply New Mexico law and conclude that no valid agreement to arbitrate exists between the parties because Halliburton's promise to arbitrate is illusory. Accordingly, we reverse the Court of Appeals and remand this case to the district court for further proceedings.

I. BACKGROUND

Defendant Halliburton Energy Services (Halliburton) hired Plaintiff Edward Flemma (Flemma) to work as a cement equipment operator in Houma, Louisiana, in January 1982. During his twenty-six years of employment with Halliburton, Flemma was promoted several times and worked for the company in Louisiana, Texas, Angola, and New Mexico. The last position he held was as district manager in Farmington, New Mexico, where he worked from 2006 until the time of his termination in 2008.

As district manager, Flemma was involved in a company initiative to consolidate three Farmington facilities into one suitable facility. Halliburton considered two locations for the consolidated facility: Troy King, located within the Farmington city limits, and Crouch Mesa, located outside the city limits. The company preferred the Troy King location partly due to tax incentives offered by the city. Flemma opposed the Troy King facility for various reasons, including concerns about the safety of the general public.

Flemma alleged that in August 2006, he and Defendant Karl Madden, a district sales manager for Halliburton, received a warning from Defendant Richard Montman, Flemma's supervisor, that "if you value your career, you will keep your mouth shut about the Troy King property." The day after this warning, Rick Grisinger, a Vice President of Halliburton, told Flemma to stop making "negative comments" regarding the Troy King location. Flemma did not heed Grisinger's warning, and in July 2007, Flemma continued to express his concerns when he prepared an executive summary comparing the two locations and reiterating the public safety issues at the Troy King location.

In April 2008, Montman informed Flemma, "Today is your last day with the company, you are not meeting my expectations." Montman gave Flemma the option of signing a resignation, general release, and settlement agreement, as well as accepting twelve weeks of base salary, or being terminated. Flemma refused to sign the documents and was terminated. He stated in an affidavit that he was terminated in retaliation for "not keeping [his] mouth shut" about his concerns related to the Troy King facility. As a result, Flemma filed a complaint in district court on December 22, 2008, against Halliburton and others for wrongful and retaliatory discharge.

After answering Flemma's complaint, Halliburton filed a motion to compel arbitration, alleging that Flemma agreed to a

binding arbitration provision in the company's Dispute Resolution Program (DRP), which was adopted in 1997. In support of its motion, Halliburton attached documentary evidence that on four separate occasions, Halliburton mailed Flemma materials notifying him that continued employment with the company constituted his acceptance of the terms of the DRP. According to Halliburton, the four mailings were essentially identical and expressly stated that continuing employment with Halliburton would constitute an agreement with Flemma to abide by the DRP.

The first two alleged notifications occurred in December 1997 and spring 1998 while Flemma was working in Texas. The third alleged notification occurred in the summer of 1999 while Flemma was working in Louisiana. The fourth alleged notification occurred in October 2001 while Flemma was again working in Texas. Halliburton stated that it maintained a record of all the DRP-related mailings that were returned to Halliburton as undeliverable and none of the mailings sent to Flemma were returned as such. Thus, Halliburton alleged that Flemma must have received the mailings, which it asserted means that he was on notice that he agreed to arbitrate any employment-related disputes by continuing his employment.

Flemma responded to Halliburton's motion to compel, arguing that he was not bound by the DRP's arbitration provisions pursuant to *DeArmond v. Halliburton Energy Services, Inc.*, 2003-NMCA-148, ¶ 14, 134 N.M. 630, 81 P.3d 573, which requires proof that an employee have actual knowledge of both the employer's offer and its invitation that the offer be accepted by performance. Flemma's affidavit stated that he did not remember seeing, receiving, opening, or reading the DRP material and that his ex-wife may have disposed of it. Flemma also argued that the DRP is invalid because Halliburton's promise to arbitrate is illusory, as it allows Halliburton to amend or terminate the DRP after a claim accrues.

After briefing by the parties and a hearing, the district court denied Halliburton's motion to compel arbitration. The district court's order gave little explanation of its reasoning for the denial. However, during the hearing on the motion to compel, the district court gave two reasons for its ruling. First, the district court stated that the arbitration agreement was unenforceable because under New Mexico law it would be illusory, in that there cannot be a change to the arbitration agreement after a claim accrues. Second, the district court declined to apply Texas law on the basis that Texas law offends New Mexico public policy. The district court reasoned that enforcing an agreement solely on the basis of the mailings without affirmative evidence of acceptance or mutual assent would be contrary to public policy.

After it failed to move the district court to reconsider its motion to compel arbitration, Halliburton appealed the denial of its motion to the Court of Appeals. In a split decision, the Court of Appeals reversed the district court. The Court of Appeals framed the issue as "whether the district court correctly applied the public-policy exception in refusing to apply Texas law on the acceptance and assent issue when the sole conflict between Texas and New Mexico law involves only evidentiary requirements of contract formation." *Flemma v. Halliburton Energy Servs., Inc.*, 2012-NMCA-009, ¶ 24, 269 P.3d 931. Concluding that the agreement to arbitrate was enforceable under Texas law, the Court of Appeals reasoned that "[t]he mere differences between Texas and New Mexico

in terms of the evidence required to prove acceptance of and assent to an agreement are not sufficient to overcome the place-of-formation rule on public-policy grounds." *Id.* ¶ 31. Judge Bustamante dissented, stating that the difference between Texas and New Mexico law is "not merely an evidentiary requirement, but instead a reflection of New Mexico public policy protecting workers from contractual obligations they are not aware of and to which they never agreed." *Id.* ¶ 59 (Bustamante, J., dissenting).

Flemma appealed the Court of Appeals' opinion and argues that New Mexico's requirement of proof of actual knowledge and conscious assent is a reflection of public policy protecting workers from contractual obligations of which they are not aware and to which they never agreed. He also argues that Halliburton's ability to modify the terms of the arbitration agreement after a claim has accrued, but before an arbitration proceeding has been initiated, renders the arbitration agreement illusory and thereby unenforceable. We agree with Flemma on the latter, and thus, we decline to enforce the arbitration agreement under Texas law. Applying New Mexico law, we conclude that there is no valid agreement to arbitrate due to a lack of consideration since Halliburton's ability to revoke its promise to arbitrate after a claim has accrued makes the promise illusory.

II. DISCUSSION

At the heart of this dispute is whether the parties have validly agreed to arbitrate Flemma's wrongful and retaliatory discharge claims. In order to determine whether such an agreement exists, we must navigate the arterial corridors of our conflict of laws rules, as well as our laws of contract formation. To determine which state's laws govern our inquiry, we employ a conflict of laws analysis. If the law of a foreign jurisdiction governs, then we look to whether its application would offend a tenet of New Mexico public policy. *United Wholesale Liquor Co. v. Brown-Forman Distillers Corp.*, 108 N.M. 467, 470, 775 P.2d 233, 236 (1989). If the application of the foreign law offends our public policy, we may apply New Mexico law. *Id.* In this case, the arbitration agreement was formed in Texas, where Flemma worked when the DRP was offered, and where Halliburton argues Flemma accepted its terms. Therefore, we analyze whether enforcing the agreement under Texas law would offend New Mexico public policy. Concluding that it does, we apply New Mexico law and conclude that no valid agreement to arbitrate exists.

A. STANDARD OF REVIEW

This Court "appl[ies] a de novo standard of review to a district court's denial of a motion to compel arbitration." *Cordova v. World Fin. Corp. of N.M.*, 2009-NMSC-021, ¶ 11, 146 N.M. 256, 208 P.3d 901. Whether the parties have agreed to arbitrate is a question of law, which we review de novo. *Id.* Choice of law analyses are also reviewed de novo. *Ferrell v. Allstate Ins. Co.*, 2008-NMSC-042, ¶ 39, 144 N.M. 405, 188 P.3d 1156. "Where the issue to be determined rests upon interpretation of documentary evidence, this Court is in as good a position as the trial court to determine the facts and draw its own conclusions." *Verchinski v. Klein*, 105 N.M. 336, 338, 732 P.2d 863, 865 (1987).

B. NEW MEXICO CHOICE OF LAW

"As a general proposition of law, it is settled that the validity of a contract must be determined by the law of the state in which it

was made." *Boggs v. Anderson*, 72 N.M. 136, 140, 381 P.2d 419, 422 (1963); *see also Wooley v. Shell Petroleum Corp.*, 39 N.M. 256, 262, 45 P.2d 927, 930 (1935) ("Generally, the validity of a contract is determinable by the law of the place of contracting."). Halliburton's DRP adopts the Federal Arbitration Act (FAA) as the applicable law. The FAA also defers to state law on the question of whether a contract exists. *Perry v. Thomas,* 482 U.S. 483, 492 n.9 (1987) ("[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."); *see also DeArmond*, 2003-NMCA-148, ¶ 9. Therefore, the DRP's forum selection clause is not helpful to our determination of which state law to apply. New Mexico follows the Restatement (First) of Conflict of Laws when analyzing choice of law issues. *United Wholesale Liquor Co.*, 108 N.M. at 469, 775 P.2d at 235. According to the Restatement (First) of Conflict of Laws § 332(c) (1934), "The law of the place of contracting determines the validity and effect of a promise with respect to . . . consideration, if any, required to make a promise binding . . . ."

Essentially, Halliburton has alleged that its DRP is a unilateral contract. "In a unilateral contract, the offeree accepts the offer by undertaking the requested performance." *Strata Prod. Co. v. Mercury Exploration Co.*, 1996-NMSC-016, ¶ 14, 121 N.M. 622, 916 P.2d 822. Therefore, Halliburton's mailing of the DRP materials constituted an offer, the terms of which Flemma allegedly accepted by continuing his employment with Halliburton. "In the case of an informal unilateral contract, the place of contracting is where the event takes place which makes the promise binding." Restatement (First) of Conflict of Laws § 323; *see also Walter E. Heller & Co. of Cal. v. Stephens*, 79 N.M. 74, 77, 439 P.2d 723, 726 (1968) (holding that where the last act necessary to make the lease agreement binding was performed in California, the lease agreement constituted a California contract).

Under the Restatement (First) of Conflict of Laws, the event that would make the promise binding is Flemma's continued employment. Halliburton last sent notice of the DRP to Flemma when he was working in Texas in October 2001. Flemma stated that no DRP materials were sent to him while he was working in New Mexico. Therefore, Flemma's continued employment with Halliburton in Texas after it mailed the notice in October 2001 would have been the event that made Halliburton's DRP binding upon Flemma. Although Flemma was working in New Mexico when he was terminated, "[w]here the offer invites acceptance through performance, rather than in writing, the *beginning* of invited performance is an implied acceptance." *DeArmond*, 2003-NMCA-148, ¶ 11 (emphasis added). In this case, the beginning of the invited performance occurred in Texas. Therefore, under our choice of law rule, the place of contracting was Texas, which means that Texas law should be used to determine whether a valid agreement to arbitrate exists.

The Court of Appeals correctly concluded that under Texas law, an agreement to arbitrate existed between Halliburton and Flemma. *Flemma*, 2012-NMCA-009, ¶ 15. Because we agree with the Court of Appeals on this issue, we need not repeat its creditable analysis of Texas law here. Nevertheless, we may decline to enforce Texas law if it would violate New Mexico public policy, which is what the district court chose to do. The Court

of Appeals reversed that decision, concluding that Texas law did not offend New Mexico public policy. We disagree.

C. ENFORCING THE AGREEMENT UNDER TEXAS LAW VIOLATES NEW MEXICO PUBLIC POLICY

"New Mexico . . . has a strong public policy of freedom to contract that requires enforcement of contracts unless they clearly contravene some law or rule of public morals." *Berlangieri v. Running Elk Corp.*, 2003-NMSC-024, ¶ 20, 134 N.M. 341, 76 P.3d 1098 (internal quotation marks and citation omitted); *see also Gen. Elec. Credit Corp. v. Tidenberg*, 78 N.M. 59, 62, 428 P.2d 33, 36 (1967) ("[P]ublic policy encourages freedom between competent parties of the right to contract, and requires the enforcement of contracts, unless they clearly contravene some positive law or rule of public morals."). "To overcome the rule favoring the place where a contract is executed, there must be a countervailing interest that is fundamental and separate from general policies of contract interpretation." *State Farm Mut. Auto. Ins. Co. v. Ballard*, 2002-NMSC-030, ¶ 9, 132 N.M. 696, 54 P.3d 357 (internal quotation marks and citation omitted).

We conclude that enforcing the Texas agreement would violate New Mexico public policy because, under New Mexico law, the agreement is unconscionable. Unconscionability is a principle born of public policy, and it is a means of invalidating an otherwise valid contract. *See Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 43, 150 N.M. 398, 259 P.3d 803 ("Unconscionability is an equitable doctrine, rooted in public policy, which allows courts to render unenforceable an agreement that is unreasonably favorable to one party while precluding a meaningful choice of the other party." (internal quotation marks and citation omitted)). "Agreements to arbitrate may . . . be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability." *Id.* ¶ 17 (internal quotation marks and citation omitted); *see also AT&T Mobility LLC v. Concepcion*, ___ U.S. ___, ___, 131 S. Ct. 1740, 1744 (2011) ("Section 2 of the Federal Arbitration Act (FAA) makes agreements to arbitrate 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" (quoting 9 U.S.C. § 2 (2006)). A contract can be substantively unconscionable, procedurally unconscionable, or both. *Rivera*, 2011-NMSC-033, ¶ 47. "Substantive unconscionability concerns the legality and fairness of the contract terms themselves." *Id.* ¶ 45 (internal quotation marks and citation omitted). "Contract provisions that unreasonably benefit one party over another are substantively unconscionable." *Id.* ¶ 25.

{20} This Court has previously found various agreements to arbitrate unconscionable because they were unreasonably one-sided. In *Rivera*, 2011-NMSC-033, ¶¶ 53-54, we found arbitration provisions in car title loan contracts unreasonably one-sided and substantively unconscionable because they permitted the lender to seek judicial redress of its likeliest claims, such as foreclosure and repossession, while forcing the borrower to arbitrate any claim it might have. Similarly, in *Cordova*, 2009-NMSC-021, ¶¶ 26-27, 32, we found an arbitration provision in a loan agreement to be substantively unconscionable because it completely limited the borrower to mandatory arbitration as a forum to settle all disputes, while reserving for the lender the exclusive option of access to the courts for all remedies

the lender was most likely to pursue against a borrower. The borrower had no rights under the provision "to go to any court for any reason whatsoever, including disputes about the validity of any of [the lender's] form loan or arbitration documents." *Id.* ¶ 27. In *Cordova* we also noted that the provision foreclosed claims that the lender was least likely to want to litigate. *Id.*

Courts in other jurisdictions have similarly found arbitration agreements unconscionable because they were unreasonably one-sided in favor of the employer. For instance, in *Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254 (9th Cir. 2005), the court found an arbitration agreement to be unconscionable for several reasons, including that the employer retained the right to unilaterally amend or terminate the agreement. *Id.* at 1261-62. In so holding, the court cited to its earlier decision in *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003). *Al-Safin*, 394 F.3d at 1261-62. The *Ingle* court also found Circuit City's authority to unilaterally amend or terminate an arbitration agreement unconscionable. 328 F.3d at 1179. The court reasoned:

> Although the agreement requires Circuit City to provide exiguous notice to its employees of termination or any modification, such notice is trivial when there is no meaningful opportunity to negotiate the terms of the agreement. By granting itself the sole authority to amend or terminate the arbitration agreement, Circuit City proscribes an employee's ability to consider and negotiate the terms of her contract. Compounded by the fact that this contract is adhesive in the first instance, this provision embeds its adhesiveness by allowing only Circuit City to modify or terminate the terms of the agreement. Therefore, we conclude that the provision affording Circuit City the unilateral power to terminate or modify the contract is substantively unconscionable.

Id. (footnotes omitted). A similar rationale was also employed by the Supreme Court of Appeals of West Virginia to find an arbitration agreement unconscionable. *State ex rel. Saylor v. Wilkes*, 613 S.E.2d 914, 922 (W. Va. 2005).

In *Wilkes*, 613 S.E.2d at 922, the court evaluated an arbitration agreement between an employee and a third party retained by the employer to handle all employment-related disputes. The court held the arbitration agreement to be unconscionable for several reasons, including on the grounds that the third party retained the right to unilaterally amend or terminate the agreement. *Id.* It opined, "The terms of Petitioner's Agreement were not negotiable and clearly weighed in favor of EDSI [Employment Dispute Services, Inc.] and the companies with whom EDSI contracted to provide arbitration services. EDSI retained the right to unilaterally modify rules governing arbitration without input or notice to Petitioner before, during or after amendments are made." *Id.* The same rationale applies to the agreement at issue here.

In this case, we find the arbitration agreement to be substantively unconscionable because it is unreasonably one-sided in that it favors Halliburton in the employment dispute. The relevant provisions of the agreement read as follows:

6. Amendment

A. This Plan may be amended by [Halliburton] at any time by giving at least 10 days notice to current Employees. However, no amendment shall apply to a Dispute for which a proceeding has been initiated pursuant to the Rules.

B. [Halliburton] may amend the Rules at any time . . . . However, no amendment of the Rules shall apply to a Dispute for which a proceeding has been initiated pursuant to the Rules.

7. Termination

This Plan may be terminated by [Halliburton] at any time by giving at least 10 days notice of termination to current Employees. However, termination shall not be effective as to Disputes for which a proceeding has been initiated pursuant to the Rules prior to the date of termination.

While these terms do not distinguish the method of each party's redress, as did the agreements in *Cordova* and *Rivera*, this agreement allows Halliburton to amend its terms even after a claim accrues and before any proceeding is initiated. In effect, Halliburton could change the rules of the game just before it starts. For example, an employee who has been terminated may later find out, prior to initiating a case, that the terms of arbitration have become more restrictive. Halliburton can do this at any time and only give notice to current employees. Therefore, the employees most likely to use the DRP, i.e., terminated employees, would not even get notice of changes to the DRP, which could negatively affect their claims.

For these reasons, the DRP is unconscionable, and enforcing it would offend our public policy. Accordingly, we decline to enforce the agreement under Texas law, and we analyze whether a valid agreement to arbitrate exists under New Mexico law.

D. A VALID AGREEMENT TO ARBITRATE WAS NOT FORMED UNDER NEW MEXICO LAW

Applying New Mexico law to the alleged agreement, we conclude that Flemma and Halliburton never formed a valid agreement to arbitrate because the agreement fails for lack of consideration. It fails because Halliburton's promise to arbitrate is illusory since Halliburton retains the right to unilaterally amend the agreement's terms after an employee's claim has accrued.

There is no dispute that Halliburton made an offer to arbitrate. However, the facts of the case do not support the conclusion that it gave valid consideration for Flemma's promise to arbitrate. Halliburton argues that in exchange for Flemma's promise to arbitrate his claims, it promised to arbitrate its claims, and that these mutual promises are consideration to support enforcement of the arbitration agreement. We disagree. Because the terms of the agreement allow Halliburton to amend the agreement *after* a claim has

accrued, but *before* arbitration proceedings are initiated, Halliburton can decide that it does not want to use alternative dispute resolution, or it may alter the terms on which alternative dispute resolution is based.

The existence of a valid agreement to arbitrate is required to compel arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (holding that the existence of a valid agreement to arbitrate is also a prerequisite to compelling arbitration under the FAA); *see also McMillan v. Allstate Indem. Co.*, 2004-NMSC-002, ¶ 8, 135 N.M. 17, 84 P.3d 65 (explaining that New Mexico's Uniform Arbitration Act does not permit a court to grant a motion to compel arbitration where no agreement to arbitrate exists). "Whether a valid contract to arbitrate exists is a question of state contract law." *DeArmond*, 2003-NMCA-148, ¶ 9 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995)). For a contract to be legally valid and enforceable, it "must be factually supported by an offer, an acceptance, consideration, and mutual assent." *Garcia v. Middle Rio Grande Conservancy Dist.*, 1996-NMSC-029, ¶ 9, 121 N.M. 728, 918 P.2d 7 (internal quotation marks and citation omitted). The burden of proof is on the party asserting that a valid contract exists. *See Camino Real Mobile Home Park P'ship v. Wolfe*, 119 N.M. 436, 442, 891 P.2d 1190, 1196 (1995) ("The plaintiff's burden of proof in an action for breach of warranty thus is identical to the burden of proof in any action for breach of contract. The party relying on the breach of warranty must prove the existence of a warranty, the breach thereof, causation, and damages"), *overruled on other grounds by Sunnyland Farms, Inc. v. Central N.M. Elec. Co-op, Inc.*, 2013-NMSC-017, ¶¶ 11, 14-16, 301 P.3d 387.

A promise is illusory if it consists of "words in promissory form that promise nothing." 2 Joseph M. Perillo & Helen Hadjiyannakis Bender, *Corbin on Contracts* § 5.28 at 142 (rev. ed. 1995). According to the Restatement (Second) of Contracts § 77 (1981), "A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances . . . ." A party's promise to arbitrate is also illusory where it retains the ability to unilaterally change the arbitration agreement. *See id.* cmt. a ("Words of promise which by their terms make performance entirely optional with the 'promisor' do not constitute a promise."); *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002) ("[A]n arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory."); *Salazar v. Citadel Commc'ns Corp.*, 2004-NMSC-013, ¶ 9, 135 N.M. 447, 90 P.3d 466 ("Under general New Mexico contract law, an agreement that is subject to unilateral modification or revocation is illusory and unenforceable."); *Heye v. Am. Golf Corp.*, 2003-NMCA-138, ¶¶ 11-12, 134 N.M. 558, 80 P.3d 45 (same).

The district court stated that Flemma's case "[fell] nicely" between the cases of *Salazar*, 2004-NMSC-0013, and *Sisneros v. Citadel Broad. Co.*, 2006-NMCA-102, 140 N.M. 266, 142 P.3d 34. In *Salazar*, this Court ruled that an arbitration agreement annexed to an employment agreement was unenforceable. 2004-NMSC-013, ¶ 11. The Court found that the policy gave the employer the unrestricted right to amend or terminate its agreement to arbitrate disputes at any time, thereby making it unenforceable. *Id.* ¶ 9.

The Court of Appeals distinguished

Salazar in *Sisneros*. The arbitration agreement at issue in *Sisneros* restricted the employer's right to terminate or amend the agreement to arbitrate. 2006-NMCA-102, ¶ 33. "[A]ny termination or amendment [would] not apply to claims which accrued before the amendment or termination." *Id.* (added emphasis omitted) (internal quotation marks and citation omitted). Therefore, once a claim accrued, the employer and employee were bound to arbitrate the dispute under the rules that applied when the claim accrued. *Id.*

The reason that this case falls between *Salazar* and *Sisneros* is that, as the district court found, the arbitration agreement leaves a period of time between when a claim accrues and when a proceeding is initiated, during which Halliburton retains the authority to unilaterally amend the agreement. A claim for common law tort arising from employment termination accrues when an employee's job is terminated. *Id.* ¶ 34. According to the October 2001 agreement sent to Flemma, "[N]o amendment shall apply to a Dispute for which a proceeding has been *initiated* pursuant to the Rules." (Emphasis added.) In *Salazar*, the employer retained authority to amend the agreement throughout. 2004-NMSC-013, ¶ 11. In *Sisneros*, the employer could not amend the agreement after a claim accrued, i.e., after a termination. 2006-NMCA-102, ¶ 33. Halliburton's agreement only partially fixes the deficiencies highlighted by *Salazar* by providing that no amendment can be made after arbitration proceedings are initiated, but it fails to meet the requirement set by *Sisneros*.

Halliburton's DRP is contrary to *Sisneros* because it can amend the DRP *after* a claim accrues. In addition, Halliburton retains sole discretion to revoke the DRP at any time. Although Halliburton cannot modify the DRP unless it gives advance notice to current employees, terminated employees such as Flemma would not receive advance notice of changes to the agreement. Therefore, Halliburton's DRP is illusory because it retains the authority to unilaterally amend the agreement even after a claim accrues.

III. CONCLUSION

We conclude that the district court did not err in refusing to compel arbitration in this case. Flemma and Halliburton did form a valid agreement to arbitrate in the State of Texas, and under our traditional conflict of laws rule, we would apply Texas law to determine whether the agreement compels arbitration. However, the agreement would be unconscionable under principles of New Mexico law, and enforcing it would violate our public policy. As such, we invoke the public policy exception to the conflict of laws rule and apply New Mexico law in this case.

Under New Mexico law, we conclude that no valid agreement to arbitrate exists, as the agreement lacks consideration because Halliburton can unilaterally amend or revoke its promise to arbitrate after a claim has accrued. In the context of this case, we must ensure that the employee, who has apparently agreed to arbitrate employment-related disputes, has received consideration for this promise. This is particularly crucial where the employer's authority to terminate employment is the cause for the need for dispute resolution. Here, Halliburton made what appears to be a return promise to arbitrate, but a closer evaluation of its promise reveals that it only created the illusion of such a promise because it could amend the DRP or do away with it all together after Flemma's claim accrued. This type of illusory promise is insufficient

consideration for Flemma's promise to arbitrate employment-related disputes, and it is patently unfair in the context of the imbalanced at-will employee-employer relationship.

Accordingly, we reverse the Court of Appeals and affirm the district court's denial of the motion to compel arbitration. We remand this matter to the district court for further proceedings on Flemma's employment claims.

IT IS SO ORDERED.

BARBARA J. VIGIL, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-023

Filing Date: June 3, 2013

Docket No. 33,627

NEW MEXICO TAXATION AND REVENUE DEPARTMENT,

Plaintiff-Respondent,

v.

BARNESANDNOBLE.COM LLC,

Defendant-Petitioner.

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OPINION

CHÁVEZ, Justice.

This case presents the question of whether an out-of-state internet retailer, Barnesandnoble.com LLC (bn.com), which has no physical presence in New Mexico other than through stores owned by a sister corporation, Barnes & Noble Booksellers, Inc. (Booksellers), is subject to New Mexico gross receipts tax on its sales to New Mexico residents without offending the federal Commerce Clause. The answer to this question depends on whether Booksellers engaged in activities in this state on behalf of bn.com that were significantly associated with bn.com's ability to establish and maintain a market for its sales in New Mexico, thus creating a substantial nexus between bn.com and New Mexico. We conclude that Booksellers did engage in such activities, which include (1) Booksellers' promotion of bn.com through sales of gift cards redeemable at bn.com and bearing bn.com's name, (2) Booksellers' policy of sharing customers' email addresses with bn.com, (3) Booksellers' implicit endorsement of bn.com through the companies' shared loyalty program and Booksellers' return policy, and (4) Booksellers' in-state use of Barnes & Noble logos and trademarks, which bn.com also used. Therefore, we hold that Booksellers' in-state activities were sufficient to create a substantial nexus between bn.com and the State of New Mexico, so that the state may tax bn.com's sales to customers in New Mexico without offending the federal Commerce Clause.

BACKGROUND

The facts of this case are not in dispute. Bn.com is a Delaware corporation that sells books, movies, and other media over the internet. In 2006, the New Mexico Taxation and Revenue Department (the Department) assessed gross receipts tax against bn.com on its sales to New Mexico residents during a period from January 1998 through July 2005. *See* NMSA 1978, §§ 7-9-1 to -114 (1966, as amended through 2012) (the Gross Receipts and Compensating Tax Act). Bn.com protested the assessment, and a hearing officer granted summary judgment to bn.com, finding that it lacked a substantial nexus with the State of New Mexico, and therefore it could not constitutionally be required to pay the tax. The Department appealed, and the Court of Appeals held that bn.com had a substantial nexus with the state because of its use of Barnes & Noble trademarks and cross-marketing activities with Booksellers' stores. *N.M. Taxation & Revenue Dep't v.*

Barnesandnoble.com LLC (*In re Barnesandnoble.com LLC*), 2012-NMCA-063, ¶¶ 34-35, 283 P.3d 298. We granted certiorari and now affirm. Although we agree with the holding of the Court of Appeals, we emphasize that our holding does not rest exclusively on bn.com's use of Barnes & Noble trademarks; we conclude that there are several additional reasons to hold that bn.com had a substantial nexus with the State of New Mexico.

DISCUSSION

The parties agree that this appeal concerns the application of the law to the undisputed facts, and therefore the standard of review is de novo. *Sonic Indus. v. State*, 2006-NMSC-038, ¶ 7, 140 N.M. 212, 141 P.3d 1266.

The federal constitutional issue in this case stems from the Commerce Clause, which authorizes Congress "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause has been interpreted not only as an affirmative grant of power to Congress, but also as a limitation on state actions that interfere with interstate commerce. *Quill Corp. v. N.D. ex rel. Heitkamp*, 504 U.S. 298, 309 (1992). In this form, it is known as "the 'negative' or 'dormant' Commerce Clause." *Id.* State taxation of interstate commerce may impose burdens that violate the dormant Commerce Clause. *Id.*

In the absence of specific federal authorization, the Commerce Clause allows a state to tax an actor in interstate commerce "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Of these requirements, the only issue in this case is in the substantial nexus. If bn.com's actual sales have a substantial nexus with New Mexico, New Mexico may constitutionally tax those sales.

A vendor that has a physical presence in the taxing state has a substantial nexus with the state. *Quill Corp.*, 504 U.S. at 315, 317-18. The key distinction is "between mail-order sellers with [a physical presence in the taxing] State and those . . . who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *Id.* at 311 (alterations in original) (quoting *Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551, 559 (1977) (internal quotation marks omitted)). The facts in *Quill Corp.* concern a vendor that did not have a physical presence in the taxing state of North Dakota and *Quill Corp.* sold its products by mail; it had no offices, employees, or significant property in North Dakota. 504 U.S. at 302. Therefore, the U.S. Supreme Court held that the company lacked a substantial nexus with North Dakota, and North Dakota could not require the company to pay a use tax to the state on its sales. *Id.* at 301-02. The Court explained that there is a "safe harbor for vendors 'whose only connection with customers in the [taxing] State is by common carrier or the United States mail' . . . [and] such vendors are free from state-imposed duties to collect sales and use taxes." *Id.* at 315 (first alteration in original) (quoting *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753, 758 (1967), *overruled on other grounds by Quill Corp.*, 504 U.S. at 306-08).

In this case, the parties agree that bn.com itself has no employees or property in New

Mexico, but that is not the end of our inquiry. The U.S. Supreme Court has consistently taken a functional approach to the substantial nexus analysis, and it has been willing to find a substantial nexus even where the business in question had neither property nor regular employees in the taxing state. In *Scripto, Inc. v. Carson*, 362 U.S. 207, 208-09, 211 (1960), the Court rejected a business's argument that it had no substantial nexus with Florida because it had no full-time employees in the state. The business had contracted with ten independent "wholesalers or jobbers" in Florida to solicit orders on its behalf. *Id.* at 209. The Court held that the designation of the agents as independent contractors, rather than employees, was "without constitutional significance," and what mattered was "the nature and extent" of the taxpayer's business in the state. *Id.* at 211-12.

The Supreme Court reaffirmed and expanded *Scripto* in *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987) (*Tyler Pipe U.S.*). In *Tyler Pipe U.S.*, an out-of-state manufacturer challenged the authority of the State of Washington to impose a tax on its sales within the state. 483 U.S. at 234. The manufacturer "maintain[ed] no office, own[ed] no property, and ha[d] no employees residing in the State of Washington." *Id.* at 249. However, the manufacturer hired sales representatives within the state who called on customers, solicited orders, and "maintain[ed] and improve[d] the [manufacturer's] name recognition, market share, goodwill, and individual customer relations" in Washington. *Id.* (quoting *Tyler Pipe Indus., Inc. v. State, Dep't of Revenue*, 715 P.2d 123, 127 (Wash. 1986) (*Tyler Pipe Wash.*) (en banc) (internal quotation marks omitted), *holding modified on other grounds by Digital Equip. Corp. v. State, Dep't of Revenue*, 916 P.2d 933, 941 (Wash. 1996) (en banc)). The U.S. Supreme Court held that even though the manufacturer formally had no property or employees within the state, the sales representatives' in-state activities created a nexus sufficient to allow the state to tax the manufacturer. *Tyler Pipe U.S.*, 483 U.S. at 249-51. The Court held that "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." *Id.* at 250 (quoting *Tyler Pipe Wash.*, 715 P.2d at 126 (internal quotation marks omitted)). Therefore, the question in this case is whether Booksellers performed activities on behalf of bn.com that are significantly associated with bn.com's ability to establish and maintain a market for its sales in New Mexico.

Although bn.com had no property in New Mexico, Booksellers performed activities in New Mexico for bn.com's benefit. Booksellers operated three stores in New Mexico during the audit period. Bn.com and Booksellers are separate corporations, but they share a parent company, Barnes & Noble, Inc., which owned 100% of Booksellers and between 40% and 100% of bn.com throughout the audit period. During the audit period, Booksellers displayed bn.com's web address on gift cards (usable at either Booksellers or bn.com) that they sold in stores during part of the audit period, providing bn.com with advertising. Booksellers sold memberships in a loyalty program that also gave customers a discount at bn.com, and Booksellers shared customers' email addresses with bn.com.

In addition, bn.com and Booksellers both used Barnes & Noble trademarks. A reasonable inference is that consumers would likely have thought of the two corporations as one company. Because of customers'

association of Booksellers with bn.com, bn.com benefitted from brand loyalty established by local branches of Booksellers. Bn.com's parent company recognized the benefits of such customer associations in a filing with the Securities and Exchange Commission during the audit period, in which it wrote that "the Barnes & Noble trade name . . . is a strong motivating factor in attracting customers, especially with regard to the post-early adopter market of consumers who have yet to make an online purchase." The Court of Appeals observed that "Booksellers' customers had no way of knowing . . . that different corporate entities represented the goodwill of . . . Barnes & Noble trademarks on the internet and in physical stores. In fact, consumers saw only one entity: Barnes & Noble." *In re Barnesandnoble.com LLC*, 2012-NMCA-063, ¶ 33 (internal quotation marks and citation omitted). By using the name "Barnes & Noble" and other Barnes & Noble trademarks, bn.com benefitted from the goodwill associated with Booksellers. We therefore hold that Booksellers' in-state activities assisted bn.com's efforts to establish and maintain a market in New Mexico.

The California Court of Appeal applied similar logic in *Borders Online, LLC v. State Board of Equalization*, 29 Cal. Rptr. 3d 176, 178, 186 (Ct. App. 2005), to hold that California could tax sales by Borders Online because of its affiliation with brick-and-mortar Borders stores in the state. Borders Online and Borders, Inc., which owned Borders stores, were separate corporations, *id.* at 178-79, as bn.com and Booksellers are in this case. Some Borders stores advertised Borders Online on their receipts. *Id.* at 179. Borders Online's website contained links to the website for Borders stores, which included a list of store locations. *Id.* Like bn.com and Booksellers, Borders and Borders Online shared some market data and used similar logos. *Id.*

We note briefly that Borders and Borders Online were wholly owned subsidiaries of the same parent, *id.*, while Booksellers and bn.com shared only partial ownership during much of the audit period. However, the case law does not require the in-state actor to have any particular relationship to the out-of-state taxpayer, so long as the in-state actor engages in activities on behalf of the taxpayer. *See Tyler Pipe U.S.*, 483 U.S. at 250 (holding that nexus determination was unaffected by local representatives' status as employees or independent contractors, and that the proper inquiry focused on the activities performed in the state on behalf of the taxpayer). For this reason, we conclude that ownership of the corporations is not dispositive of the substantial nexus inquiry.

The New Mexico Court of Appeals distinguished *Borders Online, LLC* because, unlike Booksellers, Borders store policies treated Borders Online customers preferentially. *In re Barnesandnoble.com LLC*, 2012-NMCA-063, ¶¶ 20-21. Borders stores gave refunds for purchases from Borders stores or Borders Online, but gave only store credit for returns from competitors. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 179-80. In contrast, during the audit period in this case, Booksellers issued refunds only for items purchased from Booksellers; it would accept returns from other retailers, including bn.com, in exchange for store credit. On that basis, the Court of Appeals determined that "Booksellers' return policy did not give preference to [bn.com]," and therefore *Borders* was inapplicable. *In re Barnesandnoble.com LLC*, 2012-NMCA-063, ¶¶ 20-21.

Despite the differences in the stores' formal return policies, we conclude that bn.com received a benefit from Booksellers' return policy similar to the benefit Borders Online received from Borders stores' return policy. Even though Booksellers accepted returns of purchases from bn.com on the same basis as returns from its competitors, bn.com advertised its return policy to customers as follows: "You can return your online purchases of most products to us for a full refund or to any Barnes & Noble Store for an in-store credit." Near its "Easy Returns" link, bn.com also provided a link to a Booksellers store locator. Customers visiting bn.com's website would likely have seen the ability to return items to Booksellers' stores as a benefit of purchasing from bn.com. Nothing on the site suggests that customers could return purchases from Amazon.com or any other bn.com competitor on identical terms, even though that was apparently the case.

In *Borders Online, LLC*, the California Court of Appeal held that easy returns "undoubtedly made purchasing merchandise on [the Borders Online] website more attractive to California customers, as they would know that returning or exchanging any unwanted items would be far simpler than if they purchased items from an e-commerce retailer with no presence in California." 29 Cal. Rptr. 3d at 186. The court noted that at least some customers would not place orders online without a solid return policy, and Borders Online's offer of "convenient returns and exchanges at nearby reputable brick-and-mortar stores . . . would assuredly help promote [customers'] confidence." *Id.* (internal quotation marks and citation omitted). The essential issue in *Borders Online, LLC* was the effect that Borders Online's affiliation with Borders stores would have on potential customers, and its reasoning is equally applicable here. New Mexico customers who lived near a Booksellers location and preferred to return items in person would have thought it in their interest to order from bn.com rather than a different online retailer.

We recognize that courts in several states have reached a different conclusion, holding that the presence of affiliated brick-and-mortar stores in a state does not create a nexus that would allow the state to tax catalogue or online sales. *See SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666, 668 (Conn. 1991) (refusing to impute in-state presence of Saks Fifth Avenue stores to affiliated SFA Folio catalogue corporation); *SFA Folio Collections, Inc. v. Tracy*, 652 N.E.2d 693, 695, 698 (court's fact description outside body of opinion) (Ohio 1995) (per curiam) (same); *Bloomingdale's By Mail, Ltd. v. Commonwealth, Dep't of Revenue*, 567 A.2d 773, 778-79 (Pa. Commw. Ct. 1989) (refusing to impute activities of Bloomingdale's stores to Bloomingdale's by Mail catalogue sales). However, we must follow the standard set forth by the U.S. Supreme Court in *Tyler Pipe U.S.*, 483 U.S. at 250. *Bannon*, *Tracy*, and *Bloomingdale's* do not cite *Tyler Pipe U.S.* or attempt to apply its rule. *See generally Bannon*, 585 A.2d 666; *Tracy*, 652 N.E.2d 693; *Bloomingdale's*, 567 A.2d 773.

We also recognize that one federal district court considered a case almost identical to this one and found no substantial nexus. *St. Tammany Parish Tax Collector v. Barnesandnoble.com*, 481 F. Supp. 2d 575, 582 (E.D. La. 2007). That court seems to have imposed a standard higher than that required by *Tyler Pipe U.S.*—for example, by examining whether Booksellers "solicited orders on behalf of" bn.com or produced

revenue for bn.com. *St. Tammany Parish*, 481 F. Supp. 2d at 581. *Tyler Pipe U.S.* does not require Booksellers to act as sales agents for bn.com; it requires only that activities performed on bn.com's behalf be "significantly associated with [bn.com's] ability to establish and maintain a market" in New Mexico. 483 U.S. at 250 (quoting *Tyler Pipe Wash.*, 715 P.2d at 126 (internal quotation marks omitted)). Booksellers and bn.com presented a single face to the public, so we may infer that Booksellers' New Mexico locations developed name recognition and loyalty for bn.com. Booksellers sold gift cards that encouraged customers to shop at bn.com,and bn.com advertised its connections to Booksellers by offering a store locator and by promoting its return policy. Bn.com and Booksellers also shared customer data. None of bn.com's online competitors received these benefits. We conclude that Booksellers' presence and activities in New Mexico gave bn.com an advantage over its competitors, which helped bn.com establish and maintain a market in this state.

CONCLUSION

Because Booksellers' activities in New Mexico were significantly associated with bn.com's ability to establish and maintain a market here, bn.com had a substantial nexus with the State of New Mexico. Therefore, New Mexico may collect gross receipts tax on bn.com's sales in the state without offending the Commerce Clause of the United States Constitution. We affirm the opinion of the Court of Appeals and remand for further proceedings consistent with this opinion.

IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

RICHARD C. BOSSON, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-024

Filing Date: June 10, 2013

Docket No. 33,257

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

LESTER BOYSE and CAROL BOYSE,

Defendants-Respondents.

Gary K. King, Attorney General
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Santa Fe, NM

for Petitioner

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Las Cruces, NM

for Respondents

OPINION

VIGIL, Justice.

I. INTRODUCTION

This case requires us to interpret the New Mexico Constitution to determine whether it allows for the process of requesting and approving search warrants by telephone. Article II, Section 10 of the New Mexico Constitution requires search warrants to be based on a written showing of probable cause supported by oath or affirmation. We are asked to decide whether the written showing requirement necessarily means that the issuing judge or magistrate must see the writing in order to approve the search warrant. We interpret the meaning of the word "showing" in Article II, Section 10 of the New Mexico Constitution as a presentation or statement of facts that can be made through audible or other sensory means as well as through visual means. Thus, we hold as a matter of law that the New Mexico Constitution allows for alternative methods for requesting and approving search warrants, including by telephone.

II. FACTUAL BACKGROUND

Lester and Carol Boyse (Defendants) were each charged with fifty-two counts of felony cruelty to animals contrary to NMSA 1978, Section 30-18-1(E) (2007), and fifty-five counts of misdemeanor cruelty to animals contrary to Section 30-18-1(B). They sought to suppress evidence discovered by the investigating officer because he obtained approval for a warrant to search their property from the magistrate judge by telephone rather than in person. The district court denied the motion. Defendants entered conditional pleas of no contest to 107 counts of misdemeanor cruelty to animals, preserving their right to appeal.

On August 21, 2008, officers from the Doña Ana County Sheriff's Department and the Mesilla Marshal's Department investigated a neighbor's complaint regarding a dead horse on Defendants' property. During the initial investigation, officer Jeff Gray from the Mesilla Marshal's Department learned that Defendants kept a large number of animals on their property. He also learned that there was a strong foul odor coming from Defendants' property. Officer Gray interviewed Defendant Carol Boyse, who admitted to having two dead horses on her property, keeping several other horses untended, and keeping an unknown number of cats inside her house, including three dead cats in her freezer.

Even though Officer Gray had obtained verbal consent from Defendant Carol Boyse to enter the house, his supervisor instructed him

to obtain a search warrant. Officer Gray prepared a detailed, type-written affidavit as part of an application for a search warrant to investigate what he described as extreme animal cruelty at Defendants' property. By the time Officer Gray completed the search warrant application, the magistrate court was already closed, so he left a voice-recorded message for the on-call judge. The magistrate judge returned the call. Over the telephone, the magistrate judge administered an oath to Officer Gray, who then read the entire written affidavit verbatim. The magistrate judge approved the search warrant over the telephone, and Officer Gray noted the approval on the search warrant form. Officer Gray then immediately executed the search warrant. Officer Gray later obtained the magistrate judge's actual signature and initials on the search warrant and affidavit.

III. PROCEDURAL HISTORY

Defendants moved to suppress the evidence seized from their property, arguing that the search warrant was invalid because it was improperly obtained by telephone in violation of Article II, Section 10 of the New Mexico Constitution, Rule 6-208 NMRA, and Forms 9-213 and 9-214 NMRA of the New Mexico Rules of Criminal Procedure. Defendants argued that, because the search warrant was invalid, their rights against unreasonable search and seizure by the government under Article II, Section 10 of the New Mexico Constitution and the Fourth Amendment to the United States Constitution were violated.

The district court denied Defendants' motion, finding that the search warrant was based upon a sworn written statement of facts showing sufficient probable cause under the requirements of Article II, Section 10 and Rule 6-208. Defendants subsequently pleaded no contest to 107 counts of misdemeanor cruelty to animals, reserving their right to appeal the district court's denial of their suppression motion.

On appeal, the Court of Appeals reversed, interpreting the written "showing" of probable cause requirement in Article II, Section 10 to mean that a judge must see the writing before issuing a warrant. *See State v. Boyse*, 2011-NMCA-113, ¶ 16, 150 N.M. 712, 265 P.3d 1285. We granted certiorari to review the Court of Appeals' opinion.

IV. STANDARD OF REVIEW

This is a case of constitutional interpretation. "We review [questions] of statutory and constitutional interpretation de novo." *State v. Ordunez*, 2012-NMSC-024, ¶ 6, 283 P.3d 282 (internal quotation marks and citation omitted). "The most important consideration for us is that we interpret the constitution in a way that reflects the drafters' intent." *State v. Lynch*, 2003-NMSC-020, ¶ 24, 134 N.M. 139, 74 P.3d 73. In interpreting the Constitution, the rules of statutory construction "apply equally to constitutional construction." *State ex rel. Richardson v. Fifth Judicial Dist. Nominating Comm'n*, 2007-NMSC-023, ¶ 17, 141 N.M. 657, 160 P.3d 566.

Under the rules of statutory construction, we first turn to the plain meaning of the words at issue, often using the dictionary for guidance. *See State v. Nick R.*, 2009-NMSC-050, ¶ 18, 147 N.M. 182, 218 P.3d 868 (recognizing that our courts interpret the intended meaning of statutory language by consulting the dictionary to ascertain the words' ordinary meaning). The plain meaning rule requires that statutes "be given effect as

written without room for construction unless the language is doubtful, ambiguous, or an 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 spirit or reason." *State v. Maestas*, 2007-NMSC-001, ¶ 9, 140 N.M. 836, 149 P.3d 933 (internal quotation marks and citation omitted).

V. DISCUSSION

Defendants argue, and the Court of Appeals agreed, that telephonically approved search warrants violate Article II, Section 10 of the New Mexico Constitution because a written showing of probable cause cannot be made over the telephone. *See Boyse*, 2011-NMCA-113, ¶ 16. Defendants assert that the New Mexico Rules of Criminal Procedure do not provide for the process of requesting and approving search warrants by telephone. As a policy argument in support of their position, Defendants point out that procedural safeguards imposed in jurisdictions that recognize telephonic search warrants were not followed by the law enforcement officers and the court officials in this case. Defendants argue that because the search warrant in this case was invalid, their Fourth Amendment rights under the United States Constitution were violated. We address each of Defendants' points in turn, beginning with their argument under the New Mexico Constitution.

A. THE NEW MEXICO CONSTITUTION ALLOWS FOR REQUESTING AND APPROVING SEARCH WARRANTS BY TELEPHONE

Defendants argue that the process of requesting and approving search warrants by telephone violates the plain language of Article II, Section 10 of the New Mexico Constitution, Rule 6-208, and Forms 9-213 and 9-214. We disagree.

The New Mexico Constitution provides that:

> [t]he people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without *a written showing* of probable cause, supported by oath or affirmation.

N.M. Const. art. II, § 10 (emphasis added). Similarly, our rules of criminal procedure for the magistrate courts provide that a warrant "shall contain or have attached the sworn written statement of facts showing probable cause for its issuance and the name of any person whose sworn written statement has been taken in support of the warrant." Rule 6-208(B); *accord* Rule 5-211(B) NMRA (containing the same requirement for a search warrant obtained in district court); Rule 7-208(B) NMRA (containing the same requirement for a search warrant obtained in metropolitan court); Rule 8-207(B) NMRA (containing the same requirement for a search warrant obtained in municipal court).

We recently amended our rules of criminal procedure for the district courts to specifically recognize the process of requesting and approving search warrants through remote means, including by telephone. *See* Rule 5-211(F) & (G). But the rules were silent as to the recognized methods

for requesting a search warrant on August 21, 2008, when the magistrate judge approved the search warrant at issue in this case. *See* Rule 5-211 (1980) (amended 2012); Rule 6-208; Rule 7-208; Rule 8-207. Notably, Rules 6-208, 7-208, and 8-207 have since been amended to provide for remote issuance of search warrants. *See* Supreme Court Order No. 13-8300-011 (adopting amendments to these rules, which will be effective July 15, 2013).

Therefore, the question before us is whether telephonic approval of search warrants was allowed because at the time the rules did not expressly disallow the issuance of a search warrant telephonically. To answer this question we interpret the constitutional requirements for search warrants as they existed at the time the magistrate judge issued the search warrant in this case.

1. THE PLAIN MEANING OF "SHOWING" IS A PRESENTATION OR STATEMENT OF FACTS OR EVIDENCE

Defendants argue that a written "showing" of probable cause in support of a search warrant cannot be made over the telephone because "[t]o show something obviously means to present it for viewing." Yet, placing something into sight or view is just one of multiple definitions for "show" and "showing." *See, e.g.*, *Webster's Third New Int'l Dictionary of the English Language Unabridged (Webster's Dictionary)* 2105-06 (1976); *see also Nick R.*, 2009-NMSC-050, ¶¶ 18-19 (interpreting the intended meaning of "weapons" as used by the Legislature by consulting dictionaries to ascertain the word's ordinary meaning). Other definitions of "[to] show" include ". . . to make evident or apparent; . . . to give a reading of; . . . to set forth in a statement, account or description; . . . [and] to demonstrate or establish by argument or reasoning." *Webster's Dictionary* 2105. Definitions of "showing" as a noun include "a statement or presentation of a case or an interpretation of a set of facts" and "proof or prima facie proof of a matter of fact or law." *Id.* at 2106. *Black's Law Dictionary* 1385 (7th ed. 1999) defines a "showing" as "[t]he act or instance of establishing through evidence and argument; proof." Historically, *Black's Law Dictionary* 1086 (2d ed. 1910), *available* at http://blacks.worldfreemansociety.org/ 2/S/s1086.jpg, defined "[to] show" as "to make apparent or clear by evidence; to prove." Notably, this definition was available when the New Mexico Constitution was adopted in 1911. Based on the plain meaning of the term, we conclude that a "showing" of probable cause required under Article II, Section 10 is not limited to a writing that the issuing judge sees rather than hears or ascertains by other means. Rather, the plain meaning of "showing" as used in Article II, Section 10 is a presentation or statement of facts or evidence that may be accomplished through visual, audible or other sensory means.

The focus of our interpretation is different than that of the Court of Appeals. It interpreted the operative constitutional clause to mean that a judge must actually see a written statement of probable cause prior to issuance of a search warrant. Our interpretation, based ultimately on the intent and purpose of the clause, focuses instead on how the probable cause statement is shown to the magistrate prior to issuance of a search warrant. We do not agree that the written statement has to be physically shown prior to the issuance of a warrant. Rather, the probable cause statement must be presented to the magistrate—either by audio, visual or

other sensory means—by an officer, under oath, prior to issuance. Such a procedure does not eliminate the requirement that the probable cause statement be in writing, but rather provides flexibility, while still protecting the constitutional guarantees of privacy.

2. OUR INTERPRETATION OF "SHOWING" DOES NOT LEAD TO INJUSTICE, ABSURDITY, OR CONTRADICTION AND IS CONSISTENT WITH THE SPIRIT OF THE CONSTITUTIONAL SEARCH WARRANT REQUIREMENT

Having determined that the plain meaning of "showing" in Article II, Section 10 of the New Mexico Constitution is a statement or presentation of evidence that may be accomplished by other than visual means, we must also consider whether "adherence to [our interpretation] would lead to injustice, absurdity or contradiction[.]" *State v. Davis*, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064. If so, "we will reject the plain meaning in favor of an interpretation driven by the [constitutional provision's] 'obvious spirit or reason.'" *State v. Trujillo*, 2009-NMSC-012, ¶ 21, 146 N.M. 14, 206 P.3d 125 (quoting *Davis*, 2003-NMSC-022, ¶ 6). The "historical" purposes of the constitutional provision are instructive in determining the obvious "spirit . . . utilized in [its drafting]." *Davis*, 2003-NMSC-022, ¶ 6.

a. THE PURPOSES OF THE CONSTITUTIONAL SEARCH WARRANT REQUIREMENT ARE TO PROVIDE ASSURANCE AGAINST UNREASONABLE INTRUSION AND GIVE NOTICE TO THE INDIVIDUAL WHO IS SUBJECT TO THE SEARCH

Article II, Section 10 of the New Mexico Constitution provides that "[t]he people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures[.]" Amendment IV of the United States Constitution provides this guarantee through the Equal Protection Clause in Amendment XIV, Section 1. Thus, law enforcement officers are required to obtain warrants to search private property in order "to prevent unreasonable invasions of the privacy rights of individuals." *State v. Ortega*, 117 N.M. 160, 162, 870 P.2d 122, 124 (1994). "A search warrant is used as a means to establish the reasonableness of an intrusion." *State v. Malloy*, 2001-NMCA-067, ¶ 9, 131 N.M. 222, 34 P.3d 611, *cert. denied*, 130 N.M. 722, 31 P.3d 380 (2001). The search warrant requirement exists "to provide the property owner assurance and notice during the search." *Id.* ¶ 11.

We hold individuals' privacy rights in such high regard that we require every search warrant to be supported by a sworn, written statement of facts—an affidavit—showing probable cause. *See Ortega*, 117 N.M. at 162, 870 P.2d at 124; *accord* Rule 6-208(B) (stating that a search warrant issued by the magistrate court "shall contain or have attached the sworn written statement of facts showing probable cause for its issuance"); Rule 5-211(B) (same for the district court); Rule 7-208(B) (same for the metropolitan court); Rule 8-207(B) (same for the municipal court); *see also State v. Balenquah*, 2009-NMCA-055, ¶ 25, 146 N.M.267, 208 P.3d 912 ("[A] valid warrant *must* be supported by a sworn, written statement—that is to say, an affidavit."). "The purpose of an affidavit is to establish probable cause for the search and seizure." *Malloy*, 2001-NMCA-067, ¶ 16. In other words, the affidavit requirement gives individuals assurance that their property will

not be subject to unreasonable searches by the state.

In addition to establishing probable cause for the search, the search warrant and the affidavit referenced in the warrant also provide notice to an individual of the officer's authority and of the subject property the state has targeted for the search. Once an officer establishes probable cause and secures a warrant from the issuing court, the officer has the right to enter the premises to be searched. *See Ortega*, 117 N.M. at 162, 870 P.2d at 124. However, our rules of criminal procedure for magistrate court also require that a person whose property is subject to search receive notice of the officer's authority. *See* Rule 6-208(D) ("The officer seizing property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the affidavit for search warrant, a copy of the search warrant and a copy of the inventory of the property taken or shall leave the copies of the affidavit for search warrant, the search warrant and inventory at the place from which the property was taken."); *see also* Rule 5-211(C) (same for the district court); Rule 7-208(C) (same for the metropolitan court); Rule 8-207(D) (same for the municipal court). "[P]roviding a copy of the search warrant gives the person to be searched notice of the officer's authority and what the officer is entitled to seize." *Malloy*, 2001-NMCA-067, ¶ 18. The search warrant itself authorizes the officer to conduct the search, and the affidavit referenced in the warrant provides a description of the property to be searched. *See id.* ¶ 19.

b. TELEPHONIC APPROVAL OF SEARCH WARRANTS INCURS NO INJUSTICE, ABSURDITY, OR CONTRADICTION AND PRESERVES THE INTENT AND PURPOSE OF THE CONSTITUTIONAL SEARCH WARRANT PROVISION

The search warrant requirement—together with the constitutional mandate that a search warrant be supported by a sworn, written showing of probable cause—provides the total and permanent record for the individual whose privacy interest the state intrudes upon. This record serves two purposes: assurance against unreasonable searches and notice to persons whose property is subject to search. Our interpretation of the word "showing" in Article II, Section 10 is fully consistent with these purposes that underlie our constitutional law.

Our amended rules of criminal procedure for the district courts and courts of limited jurisdiction now recognize the process of requesting and approving search warrants by telephone. *See* Rule 5-211(F) & (G); Rule 6-208(G) & (H); Rule 7-208(F) & (G); and Rule 8-207(G) & (H). Notably, the amended rules contain the same requirements for executing a search warrant approved by telephone as were required before the amendment explicitly recognized telephonically approved search warrants. *Compare* Rule 5-211(C) (requiring an officer seizing property under the warrant to give the owner copies of (a) the search warrant; (b) the affidavit showing probable cause for the search; and (c) an inventory of the property seized), *with* Rule 5-211(C) (2008) (amended 2012) (listing the same requirements of an officer seizing property as under the amended rule); *accord* Rule 6-208 (D) NMRA (containing the same requirement for

a search warrant obtained in magistrate court); Rule 7-208(C) NMRA (containing the same requirement for a search warrant obtained in metropolitan court); Rule 8-207(D) NMRA (containing the same requirement for a search warrant obtained in municipal court). Our interpretation of the word "showing" in Article II, Section 10 does not alter the purposes—notice and assurance against unreasonable searches—of the search warrant requirement. Whether a written "showing" is made by statement or presentation of evidence over the telephone, or presented for the judge's visual review, the obvious spirit of the search warrant requirement is fulfilled.

B. DEFENDANTS' POLICY ARGUMENTS ARE UNPERSUASIVE

Using policy arguments, Defendants note that jurisdictions that recognize telephonic search warrants also impose additional procedural safeguards that law enforcement and court officers did not follow in this case. Defendants cite the Federal Rules of Criminal Procedure as well as caselaw from Illinois, Mississippi, New Jersey, and Washington.

1. ADDITIONAL PROCEDURAL SAFEGUARDS UNDER FEDERAL LAW APPLY ONLY IN CIRCUMSTANCES THAT DO NOT EXIST HERE

Defendants point out that the Federal Rules of Criminal Procedure contain the requirements that an officer applying for a search warrant by telephone be placed under oath, that the telephone call be recorded, and that the recording be transcribed and certified. *See* Fed. R. Crim. P. 4.1. We are not persuaded that all of these procedures apply in this case.

The federal rules provide that "[a] magistrate judge may consider information communicated by telephone or other reliable electronic means when . . . deciding whether to issue a warrant or summons." Fed. R. Crim. P. 4.1(a). If a federal magistrate judge proceeds under Rule 4.1, then "[t]he judge must place under oath—and may examine—the applicant and any person on whose testimony the application is based." Fed. R. Crim. P. 4.1(b)(1). The judge must also create a record of the testimony and exhibits, but the extent of the record depends on the number of witnesses and exhibits the judge decides to consider. *See* Fed. R. Crim. P. 4.1(b)(2). For example, the additional requirements that a telephone call be recorded, transcribed, and certified are not necessary in every case because "[i]f the applicant does no more than attest to the contents of a written affidavit submitted by reliable electronic means, the judge must acknowledge the attestation in writing on the affidavit." Fed. R. Crim. P. 4.1(b)(2)(A). A recording of the telephone call and a certified transcript are only necessary "[i]f the judge considers additional testimony or exhibits" apart from the testimony of the search warrant applicant. Fed. R. Crim. P. 4.1(b)(2)(B).

In this case, only the procedures described in Federal Rule 4.1(b)(1) and (b)(2)(A) would apply because Officer Gray merely attested to the contents of a written affidavit over the telephone. Thus, under the federal rules, the magistrate judge would be required to place Officer Gray under oath and acknowledge his attestation on the affidavit. Based on the record before us, we conclude that the procedures required under federal law were actually satisfied in this case.

2. DEFENDANTS' RELIANCE ON CASELAW FROM OUTSIDE NEW MEXICO IS MISPLACED

Defendants argue that New Mexico should not permit telephonic approval of search warrants because there are inherent dangers when a search warrant is issued in the absence of face-to-face communication and because states that recognize telephonic warrants impose specific procedural safeguards to mitigate those dangers. *See, e.g.*, *People v. Taylor*, 555 N.E.2d 1218, 1220 (Ill. App. Ct. 1990); *White v. State*, 842 So. 2d 565, 570 (Miss. 2003); *State v. Valencia*, 459 A.2d 1149, 1155 (N.J. 1983); *State v. Myers*, 815 P.2d 761, 768 (Wash. 1991) (en banc). Defendants' reliance on these authorities is misplaced.

We point out that New Mexico's criminal statutes and procedural rules are distinguishable from those of Mississippi, New Jersey, and Washington. For example, the rules in Mississippi and New Jersey specifically require a judge issuing a search warrant to have face-to-face contact with a search warrant applicant, whereas the rules of New Mexico do not. *Compare* Miss. Code Ann. § 41-29-157(a)(2) (2005) (requiring search warrant affidavits to be "sworn to [in person] before the judge," *see White*, 842 So. 2d at 569 *and* N.J. Ct. R. 3:5-3(a) (1994)) (requiring search warrant applicants to "appear personally before the judge"), *with* Rule 6-208 (containing no such requirement). Because the laws of Mississippi and New Jersey impose more stringent requirements for issuing a search warrant, it follows that these states would also impose additional procedural requirements for requesting and approving a search warrant by telephone. This does not mean that such additional requirements must also apply in New Mexico. Therefore, Defendants' reliance on *White* and *Valencia* is misplaced.

The rules of criminal procedure in Washington differ from the rules in New Mexico, most notably in that Washington does not require a search warrant to be based on a "written" showing of probable cause. *Compare* Washington Courts of Limited Jurisdiction Criminal Rules Wa CrRLJ 2.3(c) ("There must be an affidavit . . . or sworn testimony establishing the grounds for issuing the warrant. The sworn testimony *may* be an electronically recorded telephonic statement." (emphasis added)), *with* Rule 6-208 (B) ("The warrant shall contain or have attached the sworn written statement of facts showing probable cause for its issuance[.]"). Since the rules in Washington do not require a "written" showing of probable cause, as the rules in New Mexico require, it follows that Washington would impose alternative procedures in lieu of the writing requirement in order to provide persons whose property is targeted for the search with reasonable assurance that there is probable cause to intrude upon their privacy interests. *See, e.g.*, Washington Courts of Limited Jurisdiction Criminal Rules Wa CrRLJ 2.3(c) ("The recording [of the sworn statement of probable cause], or a duplication of the recording, shall be a part of the court record and shall be [transcribed] if requested by a party or if ordered by the court[.]"). This does not mean these requirements must also apply in New Mexico. Lacking the requirement of a written showing of probable cause, the search warrant procedures under Washington's rules necessarily differ from those under New Mexico's rules. Since our rules have requirements distinguishable from those in the Washington Rules, Defendants' reliance on *Myers* is misplaced.

We also point out that the facts of the case before us are distinguishable from the facts in the case from Illinois on which Defendants rely. In *Taylor*, the Appellate Court of Illinois noted that the procedure used to obtain the search warrant lacked adequate procedural safeguards because "the judge issuing the warrant had no means of ascertaining whether the complaint was in fact in writing and under oath[.]" 555 N.E. 2d at 1220. In the present case, the magistrate judge personally administered an oath to Officer Gray, and later placed his own handwritten signature on the typed affidavit. Moreover, the *Taylor* Court ultimately did not find the search warrant to be invalid because of procedural deficiencies; rather, it held that the search warrant was invalid because it was missing the date and time of issuance as required by Illinois statute. *See id.* at 1221; *see also* 725 ILCS 5/108-4(a) (2007) ("All warrants upon written complaint shall state the time and date of issuance . . . ."). In the present case, the search warrant does not contain the same fatal deficiencies. Therefore, Defendants' reliance on *Taylor* is misplaced.

We are unpersuaded by any of the policy arguments that Defendants advance under federal law and other jurisdictions outside New Mexico to support their claim that the telephonically approved search warrant in this case should be invalid. Accordingly, we hold as a matter of law that the search warrant at issue here is valid.

VI. CONCLUSION

We hold that telephonic approval of search warrants is consistent with Article II, Section 10 of the New Mexico Constitution and that Defendants' rights under Article II, Section 10 and the Fourth Amendment to the United States Constitution were not violated because the search warrant at issue in this case was valid. The Court of Appeals having decided to the contrary, we reverse.

IT IS SO ORDERED.

BARBARA J. VIGIL, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-025

Filing Date: June 13, 2013

Docket No. 33,023

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

CHRISTOPHER GURULE and LINDA DAVIS,

Defendants-Respondents.

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James W. Grayson, Assistant Attorney General
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for Petitioner

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Nina Lalevic, Assistant Appellate Defender
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for Respondent Christopher Gurule

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for Respondent Linda Davis

OPINION

MAES, Chief Justice.

The State raises three issues in its interlocutory appeal from the Court of Appeals' affirmance of the district court's evidentiary rulings. First, the State asserts that there was probable cause to search and seize Defendant Linda Davis and Defendant Christopher Gurule's (collectively, Defendants) digital camera. Second, the State asserts that because there was probable cause to support the search and seizure of the digital camera, the Court of Appeals erred in affirming the district court's exclusion of testimony based on the fruit of the poisonous tree doctrine. Finally, the State contends that the district court and the Court of Appeals erred in concluding that the statement made by Defendant Linda Davis (Defendant Davis) to her son, Robert Davis (Robert), was testimonial and was to be excluded on confrontation grounds. For the reasons that follow, we reverse the Court of Appeals and remand to the district court for an evidentiary hearing regarding the admissibility of Defendant Davis' statement.

I. FACTS AND PROCEDURAL HISTORY

Defendant Christopher Gurule (Defendant Gurule) and Defendant Davis were charged with criminal sexual penetration of a minor contrary to NMSA 1978, Section 30-9-11(D) (2007), criminal sexual contact of a minor contrary to NMSA 1978, Section 30-9-13(A) (2003), kidnapping contrary to NMSA 1978, Section 30-4-1 (2003), sexual exploitation of a minor contrary to NMSA 1978, Section 30-6A-3(C) (2007), and conspiracy contrary to NMSA 1978, Section 30-28-2 (1979). The

cases against the Defendants were joined by the district court.

In early September 2007, Special Agent Lois Kinch (Agent Kinch), with the New Mexico Attorney General's Office's Internet Crimes Against Children Task Force, began an investigation into the distribution of child pornography over the ultra-peer sharing internet site Gnutella. During Agent Kinch's investigation, she uncovered an Internet Protocol (IP) address associated with a New Mexico internet service provider that contained fifty-eight files that were available for sharing over the ultra-peer sharing network. Agent Kinch believed that, based on the file names, the files contained material that was sexually exploitative of children. Agent Kinch examined one of the files associated with the IP address, and confirmed that it contained child pornography. On September 6, 2007, Agent Kinch sent a subpoena duces tecum to Comcast requesting information identifying the subscriber of the IP address. Comcast informed Agent Kinch that the IP address belonged to Defendant Davis, residing at 1520 University Blvd. NE, Apt. 215, Albuquerque, N.M. 87102.

On September 27, 2007, Agent Kinch applied for a search warrant. Agent Kinch's affidavit stated that she believed the computer she identified in her initial investigation was being used to possess or distribute child pornography and that she believed there was probable cause to believe that "evidence of the exploitation of children by means of the possession and attempted distribution of child pornography in violation of New Mexico Statute [Section] 30-6A-3[(C)]" was located at 1520 University Blvd. NE, Apt. 215, Albuquerque, N.M. 87102. The affidavit requested authorization to seize and view "photograph[s], (including but not limited to negatives, still photos, video tapes, artists['] drawings, slides, and any type of computer formatted photograph)" depicting children in a sexually explicit manner, as well as "computer hardware equipment, (including . . . digital cameras . . .)."

Based on the information contained in Agent Kinch's affidavit, the issuing judge concluded that there was probable cause to support a search warrant, and incorporated the affidavit as part of the warrant. The warrant was executed the following day. The inventory of the items seized revealed that, among other things, the executing officers seized two digital cameras, a Diamage 7I and a Sony Cybershot—the camera at issue in this case.

The search of the Sony Cybershot camera's internal memory revealed images of Defendant Gurule engaging in sexual acts with C.S., Defendant Davis' four-year-old granddaughter. Based on these images, Defendant Gurule was charged with criminal sexual penetration in the first degree, conspiracy to commit criminal sexual penetration of a minor, and conspiracy to commit sexual exploitation of a child. The counts against Defendant Gurule concerning sexual abuse are not part of the present case.

Defendants filed three motions that are relevant to this appeal. In the first motion, Defendants objected to the search and seizure of the Sony Cybershot digital camera and filed a motion to suppress the physical evidence stemming from the illegal search and seizure. The district court found that the warrant did not contain specific information regarding the use of a digital camera in relation to the alleged crime and, therefore, there was no probable cause to allow for the search and seizure of the camera. The district court

ordered the digital camera and "all evidence derived from the seizure of the camera and the search of the camera" suppressed.

Defendants' second motion sought to exclude Candace Stevens (Stevens), the mother of C.S., from testifying at trial asserting that the State only became aware of Stevens' existence because of the illegal search and seizure of the digital camera. The State argued that Stevens' testimony should be permitted under the inevitable discovery doctrine because Defendant Davis mentioned to Agent Kinch that Stevens' children had been around the apartment, and therefore Stevens' existence would have been known regardless of the search and/or seizure of the digital camera. The district court granted Defendants' motion to exclude Stevens from testifying as a witness at trial stating that "[h]er existence would not have been known but for the illegal search . . . of the camera."

Defendant Gurule then filed a third motion to limit the testimony of the State's witness Robert, Defendant Davis' son, at trial. The State intended to call Robert to testify that Defendant Davis informed him that she witnessed Defendant Gurule watching child pornography on their computer. The district court expressed concerns that, if admitted at trial, such testimony may violate Defendant Gurule's confrontation rights because Defendant Davis would not be subject to cross-examination regarding the alleged statement. The State asserted that the Confrontation Clause was not implicated because the statement made by Defendant Davis to her son, Robert, was nontestimonial. The district court ruled that the proffered testimony presented classic Confrontation Clause and *Bruton* problems, and granted Defendant Gurule's motion to limit Robert's testimony. The district court also expressed concerns regarding the fact that the State had moved to join Defendants, and then was complaining of the effect of that decision.

The State filed an interlocutory appeal pursuant to NMSA 1978, Section 39-3-3(B)(2) (1972) challenging two of the district court's orders and asserting that Defendants lacked standing to challenge the seizure of the Sony Cybershot camera, and that even if Defendants had standing to challenge the seizure, the district court erred in concluding that the seizure was not supported by probable cause. The State further asserted that the district court erred in excluding the evidence derived from the seizure of the digital camera, namely Stevens' testimony. Lastly, the State argued that the district court erred in excluding the out-of-court statements made by Defendant Davis to her son Robert on the grounds that such testimony would violate Defendant Gurule's confrontation rights.

The Court of Appeals held that Defendants had standing to challenge the seizure of the digital camera; that the seizure of the digital camera was not supported by probable cause; that the testimony of Stevens was tainted by the illegal seizure of the digital camera and was properly excluded; and that the out-of-court statement made by Defendant Davis was testimonial and therefore inadmissible. *State v. Gurule*, 2011-NMCA-063, ¶¶ 1, 23, 26, 29, 150 N.M. 49, 256 P.3d 992. The State filed a timely notice of appeal to this Court pursuant to Rule 12-502 NMRA ("This rule governs petitions for the issuance of writs of certiorari seeking review of decisions of the Court of Appeals.").

We granted certiorari to review the following issues: (1) whether seizure of the digital camera, as permitted by the warrant,

was supported by probable cause based on the accompanying affidavit and whether search of that camera required an additional warrant; (2) whether the district court was correct in excluding Stevens' testimony under the fruit of the poisonous tree doctrine; and (3) whether the Confrontation Clause applies to statements between two family members when there is no involvement by any government official.

II. DISCUSSION

A. Agent Kinch's Affidavit Established Probable Cause to Search the Camera

"The Fourth Amendment to the United States Constitution and [A]rticle II, [S]ection 10 of the New Mexico Constitution both require probable cause to believe that a crime is occurring or seizable evidence exists at a particular location before a search warrant may issue." *State v. Williamson*, 2009-NMSC-039, ¶ 14, 146 N.M. 488, 212 P.3d 376 (alterations in original). Probable cause exists when "there are reasonable grounds to believe that a crime has been committed in that place, or that evidence of a crime will be found there." *State v. Evans*, 2009-NMSC-027, ¶ 10, 146 N.M. 319, 210 P.3d 216. "[B]efore a valid search warrant may issue, the affidavit must show: (1) that the items sought to be seized are evidence of a crime; and (2) that the criminal evidence sought is located at the place to be searched." *Id.* ¶ 11 (internal quotation marks and citation omitted).

"Probable cause must be based on substantial evidence." *State v. Haidle*, 2012-NMSC-033, ¶ 11, 285 P.3d 668 (internal quotation marks and citation omitted). Probable cause determinations, however, are not subject to bright line rules but rather are to be based on the assessment of various probabilities in a given factual context. 2 Wayne LaFave, et. al., *Search and Seizure: A Treatise on the Fourth Amendment*, § 3.2(a), at 25 (5th ed. 2012). Therefore, in order for a search warrant to be issued, "sufficient facts [must be] presented in a sworn affidavit to enable the magistrate to make an informed, deliberate, and independent determination that probable cause exists." *State v. Vest*, 2011-NMCA-037, ¶ 7, 149 N.M. 548, 252 P.3d 272 (internal quotation marks and citation omitted). This requires that the probable cause determination be based on "more than a suspicion or possibility but less than a certainty of proof." *Evans*, 2009-NMSC-027, ¶ 11 (internal quotation marks and citation omitted); *see* 2 LaFave, *supra*, § 3.7(d), at 414 (explaining that a mere suspicion that the objects in question are connected with criminal activity will not suffice).

In order for a search or seizure to be lawful there "must be a sufficient nexus between (1) the criminal activity, and (2) the things to be seized, and (3) the place to be searched." 2 LaFave, *supra*, § 3.7(d), at 518. "[U]nless it is . . . shown to be probable that [the items to be searched] constitute the fruits, instrumentalities, or evidence of [a] crime," then "a lawful basis for a search has not been established" and the items described in a warrant or affidavit "are not a legitimate object of a search." 2 LaFave, *supra*, § 3.7(d), at 518-19.

"[A]n issuing court's determination of probable cause . . . must be upheld if the affidavit [supporting the warrant] provides a substantial basis to support a finding of probable cause." *State v. Trujillo*, 2011-NMSC-040, ¶ 17, 150 N.M. 721, 266 P.3d. 1 (internal quotation marks and citation omitted). "[T]he substantial basis standard of

review is more deferential than the de novo review applied to questions of law, but less deferential than the substantial evidence standard applied to questions of fact." *Williamson*, 2009-NMSC-039, ¶ 30. This "deferential standard of review is appropriate to further the . . . strong preference for searches conducted pursuant to a warrant" and to encourage "police officers to procure a search warrant." *Trujillo*, 2011-NMSC-040, ¶ 18 (alteration in original) (internal quotation marks and citation omitted). In situations that present doubtful or marginal cases of probable cause, the reviewing court should resolve the issue by giving preference to the warrant. *Id.* (quoting *Massachusetts v. Upton*, 466 U.S. 727 (1984)). This standard, however, "does not preclude the reviewing court from conducting a meaningful analysis of whether the search warrant was supported by probable cause," *Williamson*, 2009-NMSC-039, ¶ 30, but rather precludes the reviewing court from substituting its judgment for that of the issuing judge, *Trujillo*, 2011-NMSC-040, ¶ 19.

Therefore, in evaluating a probable cause determination, the reviewing court must focus on the issuing judge's determination regarding the information contained in the four corners of the affidavit. *Haidle*, 2012-NMSC-033, ¶ 10; *Vest*, 2011-NMCA-037, ¶ 7. If the reviewing court concludes that the issuing judge's determination was correct, the reviewing court shall uphold the probable cause determination regardless of how the reviewing court might have handled the warrant as the issuing judge. *Evans*, 2009-NMSC-027, ¶ 12.

The Court of Appeals held that it is "undisputed that Agent Kinch's affidavit provided probable cause to search Defendants' dwelling for evidence of child pornography." *Gurule*, 2011-NMCA-063, ¶16. The Court noted, however, that probable cause is only one consideration in determining whether a search warrant is valid—a warrant must also be specific in both particularity and breadth. *Id.* The Court of Appeals stated that the issue was not whether there was probable cause to search the Defendants' dwelling for evidence of child pornography, but rather whether the warrant was overly broad in its inclusion of the digital camera. *Id.* ¶ 17.

The Court of Appeals looked to Agent Kinch's affidavit to resolve this issue and concluded that

> [i]n the absence of any indication that this camera, which did not contain a memory card, was being used for the storage of internet child pornography, or was being used for the independent manufacture of pornography, there was no substantial basis for concluding that there was probable cause that the camera would contain child pornography.

Id. ¶ 20. The Court explained that absent any indication that the camera was being used for child pornography, the mere fact that the digital camera could hold media storage was insufficient. *Id.* ¶¶ 21-22. The Court also expressed concerns that allowing searches like the one presented would result in fishing expeditions of expressive media, such as digital cameras, and presented First Amendment concerns. *Id.* ¶ 21. The Court of Appeals, therefore, concluded that there was no probable cause to support the seizure of the digital camera and that the district court properly suppressed the digital camera. *Id.* ¶ 23.

The State asserts that both the district

court and Court of Appeals erred in concluding that the search and seizure of the digital camera was not supported by probable cause. The State directs this Court's attention to Agent Kinch's affidavit, which stated that based on "her training and experience, online child predators have a very likely probability of possessing images of child pornography." Agent Kinch's affidavit further stated that those

> interested in child pornography are likely to maintain their collections for months, years and even decades. [That] these collections of child pornography could be in hard form, to wit: magazines, video collections, digitally stored, or loosely kept in hard form. . . . This is why it is important to seize all computer devices, *and photographic equipment to which residents have access*. . . . [It is also necessary] to seize most or all computer items . . . [and c]omputer storage media [that] include[s] but [is] not limited to floppy disks, hard drives, tapes, DVD disks, CD-ROM disks or other magnetic, optical or mechanical storage which can be accessed by computers to store or retrieve data or images of child pornography . . . . [S]earching computer systems for criminal evidence requires experience in the computer field and a properly controlled environment.

(Emphasis added.). The State asserts that this information, coupled with Agent Kinch's investigation regarding the Defendants' use of Gnutella, provided the issuing judge with enough information to "reasonably infer that all or a substantial number of the files offered on the peer-to-peer network were child pornography and that [a person with such] quantities of child pornography would likely have a larger collection in digital or print form."

The State further asserts that when a neutral judicial officer determines that a dwelling contains contraband or evidence of a crime, "the officer can search every container and location within the permitted area where that item could be located." *State v. Hinahara*, 2007-NMCA-116, ¶ 20, 142 N.M. 422, 166 P.3d 1129. Based on this rationale, the State asserts that because the warrant authorized the officers to "search for photographs of children participating in prohibited sexual acts," Agent Kinch was justified in searching the digital camera for images of children participating in such acts without the need for an additional search warrant to search the camera. The State cites *United States v. Paull*, 551 F.3d 516 (6th Cir. 2009) and *United States v. Upham*, 168 F.3d 532 (1st Cir. 1999) to support its assertion.

In *Paull*, the defendant subscribed to an "online sharing-community that was created specifically for sharing child pornography collections." 551 F.3d at 523 (quotation marks omitted). The court held that if there was probable cause to believe the defendant possessed child pornography at this residence, then there was probable cause to search the most likely hiding places where such images could be concealed. *Id.* at 524.

In *Upham*, the defendant challenged the particularity requirement of the warrant, asserting that it was too generic in its description of what was to be seized. 168 F.3d 532, 534-35. In addressing the defendant's concerns, the court explained that a warrant must supply enough information to control the executing officials' judgment regarding what

to take, and cannot be so broad as to include items that should not be seized. *Id.* at 535. The court determined that the defendant's argument rested on the warrant's breadth, and concluded that the warrant's language authorizing "[a]ny and all computer software and hardware, . . . computer disks, disk drivers . . ." to be seized and searched off-premises was not overly broad, but rather was "about the narrowest definable search and seizure reasonably likely to obtain the images" of child pornography. *Id.* (alterations in original). The court went on to note that if the images could have been obtained through an on-site inspection, then there might not have been a sufficient justification for allowing the seizure of all computer equipment, since that category of "computers" may have included items that were not evidence of the crime. *Id.* The court concluded that because it is not easy to search computers and electronics for information that may have been deleted from, or hidden on, a hard drive or internal memory, on-site inspection was not feasible and the search and seizure was lawful. *Id.*

Therefore, by relying on these cases, the State appears to assert that because the issuing judge determined that there was probable cause to search Defendants' residence for evidence of child pornography, and because evidence of possessing or distributing child pornography could be contained on the digital camera's internal memory, that the search and seizure of the digital camera was lawful.

Defendants assert that the warrant was overly broad and did not provide probable cause to support the search and seizure of the camera. Defendants argue that Agent Kinch's investigation did not provide any information that Defendants were creating child pornography and did not establish a nexus between the digital camera and the possession of pornographic images. Defendants, therefore, argue there was no probable cause to search or seize items related to creating or manufacturing child pornography. Defendants further assert that probable cause must exist for each item seized and that the affidavit did not contain any information that would lead an issuing court to believe that the camera was related to the pornographic images on the computer. Defendants contend that *United States v. Gleich*, 397 F.3d 608 (8th Cir. 2005), provides an example of how a situation, like the one presented here, should be handled.

In *Gleich*, the victim told police that the defendant "had sexually assaulted him, photographed him in a sexually explicit pose[,] and exposed him to pornographic images of children on his computer and in magazines." 397 F.3d at 610. Based on this information, Officers obtained a search warrant. *Id.* The warrant permitted officers to search the defendant's "home and personal computer for child pornography and objects which may contain child pornography." *Id.* The police officers conducted a search and seized multiple computers and computer disks, and "found, but did not seize, a digital camera." *Id.* After examining the files on the computer and concluding that some of the images were taken with a digital camera, the officers obtained a second search warrant for the purposes of searching and seizing the digital camera. *Id.* The defendant challenged the validity of the second warrant asserting that there was no connection between the photos on the computer and the digital camera and therefore there was no probable cause. *Id.* at 612. The court disagreed. *Id.* In so doing, the court explained that in the affidavit establishing probable cause to search the camera, the officer stated that the images discovered on the defendant's computer

during the first lawful search appeared to have been taken with a digital camera and that if the camera was analyzed, the bureau of criminal investigation lab could determine if the images on the defendant's computer were taken with that particular digital camera. *Id.* Based on this nexus, the court concluded that there was probable cause to support the issuing of the second warrant and the subsequent search of the camera. *Id.* Defendants, therefore, rely on *Gleich* to support their assertion that the State should have obtained a second warrant before searching the seized digital camera.

We disagree. Although Defendants are correct that Agent Kinch could have attempted to secure an additional search warrant for the digital camera, she did not need to do so under the facts of this case. In *State v. Hinahara*, our Court of Appeals explained that when "there is probable cause to search for a particular item, the officer can search every container and location within the permitted area where that item could be located." 2007-NMCA-116, ¶ 20. In *Hinahara*, the defendant was charged with multiple counts of sexual exploitation of a minor and aggravated assault against a household member. *Id.* ¶ 2. The charges arose after images of minors engaging in sexual activity were discovered on the defendant's computer's hard drive. *Id.* The defendant moved to suppress the images found on the computer as an unconstitutional search, asserting that "the search warrant was insufficiently particular and the search exceeded the scope of the warrant." *Id.* ¶ 6. The warrant and accompanying affidavit provided for the search and seizure of "firearms, magazines, ammunition and gun cases, computers, video tapes, computer diskettes, CD[s], DVDs, photographs and magazines containing child pornography or any other miscellaneous items." *Id.* ¶ 10 (alteration in original). The Court of Appeals concluded that the particularity requirement had been satisfied because "[a]ll of the items sought in the warrant were potentially connected with the assault and the child pornography described in the affidavit." *Id.* The Court concluded that "the seizure of unlawful images from within [the d]efendant's computer was within the scope of the warrant because the warrant authorized the search of the computer for the illegal images." *Id.* ¶ 21.

Here, Agent Kinch's investigation revealed that a computer at Defendants' address was being used to share images of child pornography. Moreover, Agent Kinch stated that, based on her experience, "online child predators have a very likely probability of possessing images of child pornography" in various forms, making it necessary "to seize all computer devices, and photographic equipment to which the [subject of the investigation has] access." Based on this information, Agent Kinch attested that she had probable cause to believe that evidence of "the exploitation of children by means of the possession and attempted distribution of child pornography in violation of [NMSA 1978, Section] 30-6A-3" would be found at Defendants' address. Based on Agent Kinch's investigation, training, and experience investigating online child predators, there was a sufficient nexus between the suspected crime of possessing and attempting to distribute child pornography over an online network and the digital camera where such images might be stored. Therefore, because Agent Kinch had probable cause and was authorized by the warrant to search Defendants' address for evidence related to possession and attempted distribution of child pornography, Agent Kinch was permitted to search every container and location within Defendants' home in which such evidence could be stored,

including computers and the digital camera.

Accordingly, we reverse the Court of Appeals and hold that there was probable cause to support the search and seizure of the digital camera. Because we conclude that there was probable cause to search the digital camera, we further hold that the district court and Court of Appeals erred in excluding Stevens' testimony under the fruit of the poisonous tree doctrine.

B. Confrontation Clause

We first address Defendants' assertion that the State is not an aggrieved party and does not have a right to appeal whether the district court and Court of Appeals' erred in concluding that the statement made by Defendant Davis to her son, Robert, was testimonial and would violate the Confrontation Clause. In support of this assertion, Defendants argue that if the State wishes to use Robert's testimony against Defendant Gurule, the State could move to have the cases severed. Therefore, Defendants assert that this Court need not resolve this issue because the State could do so on its own by filing a motion to sever and proceeding against Defendants separately.

The State has the right to appeal the district court's ruling pursuant to NMSA 1978, Section 39-3-3 (B)(2) (1972). Section 39-3-3 provides that the State may

> [i]n any criminal proceeding in district court . . . appeal . . . to the [S]upreme [C]ourt or [C]ourt of [A]ppeals, . . . within ten days from a decision or order of a district court suppressing or excluding evidence . . . if the district attorney certifies . . . that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

Furthermore, Defendants' argument is nothing more than conjecture and rests on the assumption that the district court would grant the State's motion to sever and would allow for the statement to be admitted into evidence at Defendant Gurule's trial under the hearsay rules. Therefore, we conclude that the State is permitted to appeal the district court's ruling. Because the State is permitted to appeal this issue, we now address the confrontation issue.

The State asserts that the Court of Appeals erred in concluding that the statement made by Defendant Davis to her son, Robert, was testimonial and would violate the Confrontation Clause. The State contends that the Confrontation Clause does not apply to nontestimonial statements like the statement made by Defendant Davis to Robert in which she informed him that she had witnessed Defendant Gurule looking at child pornography. The State, therefore, asserts that because the Confrontation Clause does not apply to nontestimonial statements made between two family members, the Court of Appeals erred in excluding the statement exchanged between Defendant Davis and Robert on confrontation grounds. Defendant Gurule asserts that Defendant Davis' statement to her son was testimonial and, therefore, the Court of Appeals and the district court were correct in excluding Robert's testimony on confrontation grounds.

"The Confrontation Clause of the Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" and "bars the admission of testimonial statements of a witness who did not appear at

trial unless he [or she] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *State v. Walters*, 2007-NMSC-050, ¶ 21, 142 N.M. 644, 168 P.3d 1068 (first two alterations in original) (internal quotation marks and citations omitted). We review questions of admissibility under the Confrontation Clause de novo. *State v. Tollardo*, 2012-NMSC-008, ¶ 15, 275 P.3d 110.

Here, the Court of Appeals concluded that the district court properly excluded Defendant Davis' statement to her son Robert. *Gurule*, 2011-NMCA-063, ¶ 29. In so doing, the Court of Appeals concluded that Defendant Davis' statement fell within the "core class" of testimonial statements as laid out in *Crawford v. Washington*, 541 U.S. 36 (2004), because it was objectively reasonable that the statements made by Defendant Davis would be used at trial. *Gurule*, 2011-NMCA-063, ¶ 29. However, the Court of Appeals reached this conclusion without providing any analysis as to why Defendant Davis' statement fell within the "core class" of testimonial statements.

In *Crawford*, the United States Supreme Court explained that 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. The Court went on to define testimonial statements as "solemn declaration[s] or affirmations made for the purpose of establishing or proving some fact," and provided examples of statements that would be considered testimonial, such as

> ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially[;] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions[;] . . . [and] 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.

Crawford, 541 U.S. at 51-52. Post-*Crawford* cases addressing the issue regarding what constitutes a testimonial statement have focused on the declarant's primary purpose in making the statement. *See Michigan v. Bryant*, 562 U.S. __, ___, 131 S. Ct. 1143, 1162 (2011); *see generally Davis v. Washington*, 547 U.S. 813 (2006). In *Bryant*, the Court explained that the question regarding whether a statement is testimonial requires a court to objectively evaluate the circumstances in which the interrogation occurred, including the motives of the parties involved. 562 U.S. at ___, 131 S. Ct. at 1161, 1163-67.

Defendants assert that the Court of Appeals was correct in classifying the statement as testimonial and that the Confrontation Clause required the exclusion of Robert's testimony. Defendants cite *State v. Walters*, 2007-NMSC-050, ¶ 23, in support of their assertion that the admission of a testimonial statement of a co-defendant violates the Confrontation Clause. *Walters*, however, presented a different situation than the one presented here.

In *Walters*, the co-defendants' statements were "elicited by police" during a police investigation that was intended to "prove past events potentially relevant to [a] later criminal prosecution." *Id.* (internal quotation marks and citation omitted). Therefore, in *Walters*, this Court held that "statements of . . . co[-]defendants, [that are] products of a police investigation, are testimonial for the purposes of *Crawford*." *Walters*, 2007-NMSC-050, ¶ 23. *Walters* is distinguishable from the present case because, here, Defendant Davis' statement was made to her son, not a police officer, and was not part of a police investigation. Although Defendants and the Court of Appeals do not appear to view the distinction between a statement made to police officers or state officials and one made to a family member as relevant to the inquiry regarding whether the admission of Robert's testimony would violate Defendant's confrontation rights, we view this factor to be a relevant consideration when evaluating whether a statement is testimonial.

Here, Defendant Davis' statement to her son is more akin to the situation in which a person makes a casual remark to an acquaintance than to an individual who makes a formal statement to a government official as part of a police investigation. *See Crawford*, 541 U.S. at 51. Moreover, it is not clear that a reasonable person in Defendant Davis' position would objectively believe that a statement made to his or her child would be used in a later criminal prosecution. *See Davis*, 547 U.S. at 814. Thus, Defendant Davis' statement lacks the hallmarks of a testimonial statement. Because Defendant Davis' statement was not testimonial, the Confrontation Clause under the post-*Crawford* line of cases is not implicated. Therefore, we must now determine whether the district court properly excluded Defendant Davis' statement under *Bruton v. United States*, 391 U.S. 123 (1968).

{39} The district court found that Robert's testimony would violate Defendant Gurule's confrontation rights under *Bruton*, 391 U.S. 123. In *Bruton*, two individuals were charged with armed postal robbery. 391 U.S. at 124. At the joint trial a postal inspector testified that one of the defendants confessed to him that he and the co-defendant committed the armed robbery. *Id.* The postal inspector obtained the confession during the course of two interrogations at the city jail where the defendant was being held on state criminal charges. *Id.* The United States Supreme Court held that the admission of one defendant's confession that implicated the co-defendant violated the co-defendant's "right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." *Id.* at 126. The Court explained that the introduction of the defendant's confession, and the statements implicating the co-defendant, added substantial weight to the government's case in a form that was not subject to cross-examination because the defendant did not take the stand. *Id.* at 127-28.

The central question is whether *Bruton* survives as a stand-alone objection under the Confrontation Clause for co-conspirators, independent of *Crawford* analysis, or whether *Crawford* now modifies *Bruton* to the extent of applying only to *testimonial* statements by a co-conspirator implicating another co-conspirator. If the latter, then *Bruton* would not apply to this non-testimonial statement for the very reason that *Crawford* does not apply. Recent federal cases addressing this question would appear to lend support to the latter view that *Bruton* must now be seen in light of *Crawford*. *See*

United States v. Berrios, 676 F.3d 118, 128 (3d Cir. 2012) ("[B]ecause *Bruton* is no more than a by-product of the Confrontation Clause, the [United States Supreme] Court's holdings in *Davis* and *Crawford* likewise limit *Bruton* to testimonial statements."); *United States v. Smalls*, 605 F.3d 765, 789 n.2 (10th Cir. 2010) ("[T]he *Bruton* rule, like the Confrontation Clause upon which it is premised, does not apply to nontestimonial hearsay statements."). For that reason, we conclude that *Bruton* is no help to Defendant in the context of this case. We emphasize, however, that Defendant has not raised a separate claim under our State Constitution, and we offer no opinion as to whether confrontation would be more broadly available on that basis. Also, we point out that hearsay considerations under our state rules of evidence—that do not necessarily track the Confrontation Clause—were raised below but remain undecided due to the priority of constitutional issues. Hearsay objections as well as questions related to joinder and severance remain for the district court to consider on remand.

Accordingly, we conclude that the statement between Defendant Davis and her son was nontestimonial, and that Robert's testimony was improperly excluded under the Confrontation Clause. Therefore, we reverse the Court of Appeals and remand this issue to the district court to determine whether the statement may be admitted pursuant to the rules of evidence.

III. CONCLUSION

We hold that the officers had probable cause to seize the digital camera. Accordingly, the Court of Appeals erred in affirming the exclusion of Stevens' testimony under the fruit of the poisonous tree doctrine. We further hold that the Court of Appeals erred in concluding that the statements made between the two family members were testimonial. However, because the statements are hearsay, we remand this issue back to the district court to conduct a hearing regarding the statement's admissibility under the rules of evidence.

IT IS SO ORDERED.

PETRA JIMENEZ MAES, Chief Justice

WE CONCUR:

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-026

Filing Date: June 13, 2013

Docket No. 34,097

IN THE MATTER OF HON. JAMES NARANJO,
Magistrate Judge, County of Socorro, New Mexico

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OPINION AND PUBLIC CENSURE

DANIELS, Justice.

This matter came before us on a petition to accept the stipulated agreement and consent to discipline between the Judicial Standards Commission and Respondent, the Honorable James Naranjo, a magistrate judge in Socorro, New Mexico. We issued an order granting the petition and imposing a ninety-day suspension with sixty days deferred, subject to the conditions set forth below. We now file this Opinion as a public censure under Rule 17-206(D) NMRA for publication in *New Mexico Appellate Reports* and in the *New Mexico Bar Bulletin*.

INTRODUCTION

Article VI, Section 32 of the New Mexico Constitution, which created the Judicial Standards Commission, provides that "any justice, judge or magistrate of any court may be disciplined or removed for willful misconduct in office." That constitutional provision vests this Court with the ultimate responsibility of reviewing recommendations of the Commission, determining whether a judge has committed willful misconduct, and imposing discipline that we find "just and proper."

Pursuant to this Court's responsibility under Article VI, Section 3 of the New Mexico Constitution to exercise "superintending control over all inferior courts," we have promulgated a Code of Judicial Conduct, Rules 21-100 to -406 NMRA, that "establishes standards for the ethical conduct of judges and judicial candidates" requiring that judges "aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence." *Id.* pmbl. (2)-(3). While violations of Code provisions are not automatic grounds for judicial discipline, they provide "some proof of what constitutes appropriate judicial conduct." *In re Martinez*, 99 N.M. 198, 204, 656 P.2d 861, 867 (1982) (ordering suspension of a judge for willful misconduct in office).

The Commission and Respondent have stipulated to the following facts. Respondent's stepson, Albert Hernandez, was a party in a child-support enforcement proceeding assigned to Seventh Judicial District Court Judge Matthew Reynolds. In August 2012, after Mr. Hernandez was jailed for nonpayment of support, Respondent, who had no official role in the case, placed a telephone call to Judge Reynolds, stating that Mr. Hernandez was not a flight risk and requesting that Judge Reynolds reduce Mr. Hernandez's bond or let him out of jail. As a result of the ex parte communication from

Respondent, Judge Reynolds recused himself from Mr. Hernandez's case.

Upon learning of the incident, the Commission initiated a preliminary investigation and requested a written explanation from Respondent for the phone call. Respondent explained in a letter that he placed the call "to advise Judge Reynolds that Albert Hernandez was not a flight risk and that [Respondent] would personally make sure he made his court date." Respondent also stated that he recognized that his phone call created an appearance of impropriety and promised to comply with any remedial action taken by the Commission.

After receiving Respondent's letter, the Commission filed a notice of formal proceedings against Respondent, alleging in three counts that the phone call to Judge Reynolds was (1) an ex parte communication in Mr. Hernandez's child-support enforcement case, (2) an abuse of the prestige of Respondent's judicial office by attempting to gain favorable treatment for Mr. Hernandez, and (3) an abuse of the prestige of Respondent's judicial office by vouching for the character of Mr. Hernandez. The Commission also alleged that each of the three counts violated specific provisions of the Code of Judicial Conduct and constituted willful misconduct in office.

Respondent obtained counsel and answered the Commission's notice, admitting to the conduct and the violations alleged by the Commission. He and the Commission then entered into the stipulation agreement and consent to discipline (Agreement) in which Respondent acknowledged that the telephone call to Judge Reynolds amounted to willful misconduct and violated Rules 21-101 (requiring compliance with the law), 21-102 (promoting confidence in the judiciary), 21-103 (avoiding abuse of the prestige of judicial office), 21-204(B)-(C) (avoiding external influences on judicial conduct), 21-206(A) (ensuring the right to be heard), 21-209(A) (avoiding ex parte communications), 21-210(A) (prohibiting statements on pending and impending cases), and 21-303 (prohibiting service as a character witness). Respondent also agreed that his misconduct caused Judge Reynolds to disqualify himself from Mr. Hernandez's case.

As stipulated discipline, Respondent agreed to (1) enroll in and successfully complete, at his own expense, the National Judicial College's online course, *Ethics and Judging: Reaching Higher Ground*, (2) receive a public censure, to be published in the *New Mexico Bar Bulletin*, (3) undergo formal mentorship with supervised probation for the remainder of his term in office, and (4) accept a suspension without pay for ninety days, with sixty days deferred on the condition that he successfully complete his probation.

The Commission petitioned this Court for acceptance of the Agreement. We granted the petition and issued our order accepting the terms of the Agreement but conditioning the deferral of sixty days of Respondent's ninety-day suspension on his successful compliance with *all* of the terms of the Agreement, not just with the terms of his probation. *See* Rule 27-401(A)(3) NMRA ("The Supreme Court, in its discretion and under such conditions as it may specify, may . . . impose the discipline recommended by the commission or any other greater or lesser discipline that it deems appropriate under the circumstances . . . ."). Publication of this Opinion constitutes the public censure component of Respondent's discipline.

DISCUSSION

A. Respondent's Ex Parte Efforts to Obtain Favorable Treatment of His Stepson Violated the Code of Judicial Conduct

Respondent's conscious act of placing an ex parte telephone call to Judge Reynolds on behalf of Respondent's stepson violated the following specific provisions of the Code of Judicial Conduct.

1. External Influences on Judicial Conduct

Rule 21-204(C) provides that "[a] judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge," and Rule 21-204(B) provides that "[a] judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment." The committee commentary to Rule 21-204 emphasizes that its provisions are aimed not only at actual improper influences on judicial conduct but also at the creation of appearances of impropriety: "Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences." *See* Arthur Garwin et al., *Annotated Model Code of Judicial Conduct* 122 (2d ed. 2011) ("Not only is it misconduct for a judge to be influenced in her own decision making to advance the judge's private interests or the interests of friends or family members, it is equally improper and a violation of this canon for a judge to attempt to influence others in the decision-making process to advance these relationships and interests."). Respondent's efforts to influence the assigned judge on behalf of his stepson therefore violated Rule 21-204(B) and (C).

All judges must be acutely aware of the harm done to the integrity and reputation of the judiciary when a judge seeks preferential treatment for an acquaintance or relative. Our legal system is built on principles of fairness, justice, and equality, principles which are undermined when a judge attempts to obtain favorable judicial treatment for another. And when such an attempt is directed to another judge behind closed doors, the damage is magnified. It creates the misperception that our judicial system tolerates secret dealings and favoritism among those entrusted with the fair and impartial administration of justice.

A citizen who is entrusted with the increased authority inherent in a judicial position also takes on special ethical obligations designed to ensure litigants and the public that judicial authority will not be abused. We have previously addressed the potential conflicts between a judge's personal relationships and the restrictions imposed by controlling standards of judicial ethics: "From the perspective of a parent, Respondent's attempts to assist his son during a time of trouble may be understandable. . . . Nevertheless, as a judge, Respondent is expected to regulate his behavior in a way that other parents are not." *In re Ramirez*, 2006-NMSC-021, ¶¶ 4, 6-7, 15, 139 N.M. 529, 135 P.3d 230 (per curiam) (disciplining a judge who showed his court identification and verbally identified himself to police officers who were issuing citations to his son and his son's friends, used a volunteer bailiff to assist them in responding to their citations, and spoke to a judge assigned to the cases).

2. Ex Parte Communication

Rule 21-209(A) prohibits a judge from initiating, permitting, or engaging in ex parte communications, and Rule 21-206(A) prohibits a judge from denying a party the right to be heard according to law. Judge Reynolds was the duly assigned presiding judge in the case involving Respondent's stepson and was obligated by law to avoid any participation in ex parte communications in that proceeding. *See In re Larsen*, 616 A.2d 529, 559 (Pa. 1992) (per curiam) (holding that the presiding judge had "an obligation not to consider *ex parte* communications" from Justice Larsen). Judge Reynolds also had a duty to ensure that all of the parties in Mr. Hernandez's case had the right to be heard. Judge Reynolds appropriately disqualified himself when he apparently recognized that his impartiality in Mr. Hernandez's child-support enforcement proceeding might reasonably be questioned after the private conversation initiated by Respondent. *See* Rule 21-211 ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . .").

Even though the provisions of Rules 21-209(A) and 21-206(A) technically apply directly to the assigned judge, they are important in understanding why Respondent's call to Judge Reynolds constituted willful misconduct in office. "Ex parte communications are prohibited generally because they undermine the adversary system, threaten the fairness of a proceeding, and create an appearance of bias and impartiality." Garwin et al., *supra*, at 176 (citing *In re Marek*, 609 N.E.2d 419, 420 (Ind. 1993)); *see also* Rule 21-206 committee commentary ¶ 1 ("The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed."). And when the improper ex parte communication is initiated by a judge, whether presiding or otherwise, the effects are even more severe, violating the principles that lie at the foundation of public confidence in an impartial judiciary. *See* Rule 21-102 ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.").

This case is no exception. Respondent should have been aware of the pernicious effects that his ex parte communication to Judge Reynolds could have on the lawful conduct of his stepson's case and on the public perception of the judiciary. The matter of Mr. Hernandez's bond or release from jail was for Judge Reynolds to decide, with public input from the parties and others as permitted by law and court rules. Respondent simply had no place communicating with Judge Reynolds about Mr. Hernandez's case, particularly in a manner that deprived the parties of notice and an opportunity to respond to Respondent's ex parte guarantee that Mr. Hernandez was not a flight risk. The call to Judge Reynolds not only created the appearance of impropriety, it was clearly prohibited by Rule 21-102.

3. Abusing the Prestige of Judicial Office

The ex parte communication also violated Rule 21-103, which provides, "A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so." The committee commentary is clear that the rule encompasses precisely the type of

conduct at issue in this matter: "It is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind." *Id.* committee commentary ¶ 1. Respondent's judge-to-judge communication attempting to gain favorable treatment for his stepson was a clear violation of this rule and was willful misconduct in office. *See, e.g.*, *In re Garza*, 2007-NMSC-028, ¶¶ 2, 4-5, 19, 141 N.M. 831, 161 P.3d 876 (per curiam) (holding that a magistrate judge abused the prestige of his judicial office by attempting to influence other magistrate judges who were presiding over an acquaintance's DWI case); *In re Maestas*, No. 27,348, ¶¶ 3, 5 (N.M. Sup. Ct. March 5, 2002) (holding that a judge who attempted to obtain favored treatment from law enforcement officers for the judge's friend committed willful misconduct in office); *see also* Garwin et al., *supra*, at 78 ("Rule [21-103] prohibits a judge from lending the prestige of judicial office to advance the personal or economic interests of others. To do so, or to convey that anyone is in a special position of influence, is to prostitute the office.").

4. Vouching for Character of a Person in a Legal Proceeding

Rule 21-303 provides, "A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned." With the adoption of this rule in January 2012, we expanded the former proscription against judicial character vouching, which previously consisted only of a textual ban on formal testimony: "A judge shall not testify voluntarily as a character witness." Rule 21-200(B) (1995). The current rule is taken from the American Bar Association's Model Code of Judicial Conduct, which was amended in 2007 to include the language "or otherwise vouch for the character of a person in a legal proceeding." *See* Model Code of Judicial Conduct Canon 3, R. 3.3 (2007), *available at* http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/mcjc.html (follow hyperlinks to "Model Code of Judicial Conduct, as revised February 2007," and to "Text Comparison—2007 Model Code to 1990 Code"). This language was added "in recognition of the fact that under oath is not the only mode in which judges might abuse the prestige of office when the character of a person is in issue in a legal proceeding." Garwin et al., *supra*, at 352-53 (citing Charles G. Geyh & W. William Hodes, *Reporters' Notes to the Model Code of Judicial Conduct* 60-61 (2009)).

Both the letter and the spirit of Rule 21-303 prohibit the kind of assurances Respondent made to Judge Reynolds that he did not believe Mr. Hernandez would be a flight risk. Respondent candidly admitted that he offered this information "to advise Judge Reynolds that Albert Hernandez was not a flight risk." Clearly, Respondent was vouching for the trustworthiness of his stepson in an attempt to influence Judge Reynolds's judicial determination of the conditions of Mr. Hernandez's potential release from jail. *See* Rule 5-401(C)(3)(a)-(b) NMRA (providing that a factor to be considered in determining conditions of release is "the history and characteristics of the person, including . . . the person's character and . . . the person's family ties"). Respondent's vouching for his stepson as not being a flight risk in an ex parte conversation with the duly assigned judge was even more problematical than if Respondent violated Rule 21-303 by offering sworn character testimony in a public adversary

proceeding because the opposing party in a hearing at least would have known of the vouching and been able to respond with cross-examination and countering testimony.

5. Making a Statement Likely to Interfere with a Fair Hearing

The phone call also violated Rule 21-210(A), which provides, "A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing." Because Respondent's nonpublic statements deprived any adverse party of an opportunity to respond and because the nonpublic statements were made from one judge to another, the statements had the potential not only to "substantially interfere" with the lawful resolution of the release issue in Mr. Hernandez's case but to be outcome determinative.

B. Respondent's Conduct and Code of Judicial Conduct Violations Constituted Willful Misconduct in Office

By both the terms of the stipulation offered by the Commission and Respondent and under our own caselaw, Respondent's conduct and its resulting Code violations constituted willful misconduct in office. *See In re Gentry*, No. 28,986 ¶¶ 4, 6 (N.M. Sup. Ct. July 29, 2005) (per curiam) (holding that a metropolitan judge who initiated ex parte communications with a special commissioner and a district court judge to influence a child placement in a case involving a family member committed willful misconduct in office); *cf. In re Garza*, 2007-NMSC-028, ¶¶ 21, 23 (holding that a magistrate judge who contacted another magistrate judge in seeking preferential treatment for an acquaintance committed willful misconduct in office). Respondent consciously made an impermissible judge-to-judge ex parte telephone call to vouch for the character of and influence the assigned judge's official decision regarding Respondent's stepson and thereby committed willful misconduct in office.

We therefore accept the stipulation of the parties and issue this Opinion and public censure, both as an assurance to those we serve and as a reminder to all members of the New Mexico judiciary that we cannot permit any behavior on the part of any of our judges that creates either the reality or an appearance of judicial favoritism.

CONCLUSION

For the foregoing reasons, we publically censure Respondent for his misconduct and confirm our previous order accepting the stipulation of the parties and imposing the disciplinary sanctions summarized in this Opinion.

IT IS SO ORDERED.

CHARLES W. DANIELS, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

BARBARA J. VIGIL, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-027

Filing Date: June 24, 2013

Docket No. 33,829

IN THE MATTER OF PATRICIA S. ORTIZ, Esquire

An Attorney Licensed to Practice Before the Courts of the State of New Mexico

Christine E. Long, Assistant Disciplinary Counsel
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for Disciplinary Board

The Bryant Law Office, LLC
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for Respondent

OPINION

CHÁVEZ, Justice.

The oath taken by every attorney upon admission to the practice of law in New Mexico includes a promise to "maintain civility at all times, abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which [the attorney is] charged." Rule 15-304 NMRA. By that same oath, every attorney practicing in New Mexico promises to "maintain the respect due to courts of justice and judicial officers." *Id.* Those solemn promises are reflected within our Rules of Professional Conduct, which prohibit a lawyer from engaging in conduct during the course of representing a client that has "no substantial purpose other than to embarrass, delay or burden a third person," Rule 16-404(A) NMRA, and from making statements concerning the qualifications or integrity of a judicial officer that the lawyer knows are false or that the lawyer makes with reckless disregard for the truth, Rule 16-802(A) NMRA.

This disciplinary proceeding arises from a series of incidents in which an attorney failed in her commitment to civility and respect toward others, eroding public confidence in the legal system and weakening the effectiveness of the litigation on many levels. Treating others with respect and abstaining from offensive conduct are not standards unique to the legal profession, but maintaining such standards of behavior is critical to the proper functioning of our adversarial system of justice. Without a steadfast commitment to treating others with respect and dignity, the reputation of our legal system will continue to diminish, and the public's willingness to rely on our legal system to resolve disputes will continue to erode. This opinion underscores this Court's commitment to enforce ethical standards of behavior that will promote a civil and

respectful environment within our legal system.

FACTUAL AND PROCEDURAL BACKGROUND

This case began with the filing of a specification of charges against attorney Patricia S. Ortiz (Respondent) for three counts of violating our Rules of Professional Conduct through her oral and written statements. The charges arose from three separate incidents that occurred during Respondent's representation of three different clients in three different domestic matters in district court. As a result of her conduct, complaints were filed with our disciplinary board by opposing counsel or an opposing party in each case. The disciplinary board's hearing committee issued findings of fact and conclusions of law on each of the three incidents.

Findings on the first incident involved a series of oral and written statements made by Respondent during the course of a domestic violence proceeding. In one conversation between Respondent and opposing counsel, Respondent referred to a fellow member of the bar as a "dumb bitch." During another hearing, Respondent also made uncomplimentary and demeaning comments in the presence of opposing counsel and his client to the effect that the domestic violence commissioner was "a freak" or that the proceedings in his courtroom were "a freak show." In a subsequent letter to opposing counsel, Respondent made other uncomplimentary and demeaning comments about the opposing party and his family, and also stated that opposing counsel was "despicable to be so new to the profession." In yet another letter, Respondent referred to opposing counsel as "eternal lying scum," and in an email one year later accused the opposing party of "lying through his frigging teeth." The hearing committee found that Respondent "demonstrated a pattern of intemperate, disparaging, demeaning, insulting, threatening, uncomplimentary, and unprofessional use of language" throughout the entire course of the proceeding that "aggravated and inflamed the tone of the litigation" and "adversely impacted the progress of the litigation and caused [the opposing party] to incur unnecessary additional expense."

Findings on the second incident arose out of a domestic relations matter involving "very contentious issues" concerning custody, visitation, and a parenting plan. At issue was a prior custody and visitation arrangement ordered by the judge previously assigned to the case, who had since retired. Respondent and her client were in the courtroom with opposing counsel, her client, and his family. The current judge assigned to the case was not in the courtroom while the parties discussed a possible resolution to the case.

During the course of their discussion, opposing counsel, her client, and his family heard Respondent either use the word "drunk" with respect to the retired judge or heard Respondent refer to the retired judge as a "drunkard on the bench," a "drunken idiot on the bench," or "drunk on the bench," while being critical of the order he had entered. They also heard Respondent say that the opposing party's mother had "bought off" the retired judge, which was an accusation that Respondent had previously made to opposing counsel. Although Respondent contended that her remark was made to her client during a confidential conversation in the courtroom, the hearing committee nevertheless found that Respondent's statement was recklessly made

in a public venue and was not made in a confidential conversation with Respondent's client, but was instead made toward opposing counsel and her client. In addition to finding that Respondent's comments about the retired judge increased the acrimony in the case and fueled an adversarial climate, the hearing committee found that Respondent made numerous recurring, uncomplimentary, and demeaning comments to and about the opposing party, referring to him as "goofy" as well as a "dimwit," a "dingbat," and a "duffus."

Findings on the third incident at issue in this disciplinary proceeding, Respondent implied in an email that the judge and opposing counsel in yet another domestic matter were engaged in an impermissible relationship that improperly influenced the judge by stating that "the two of them are bosom buddies." In the same email, Respondent also stated that "we already know that [the judge] did not tell the truth to the teacher—God only knows what she and CASA [Court Appointed Special Advocates for Children] said to each other." Regarding the statements in the email, the hearing committee found that there was no evidence to support Respondent's accusations. During the course of that case, Respondent accused opposing counsel of making improper comments in hearings before the district court that were "designed only to attempt to influence the presiding judge into adopting the same foul, inhumane attitudes that [opposing counsel] holds for fallible human beings." As with Respondent's other accusations, the hearing committee found that there was no evidence to support Respondent's accusations of inappropriate conduct by opposing counsel and that her statements had "no identifiable redeeming justification other than to insult or intimidate opposing counsel or inappropriately [try] to influence the trier of fact."

In light of the foregoing conduct, the hearing committee concluded that Respondent violated several Rules of Professional Conduct. *See* Rule 16-401(A) NMRA (prohibiting a lawyer from knowingly making a false statement of material fact to a third person); Rule 16-404(A) (prohibiting a lawyer during the course of representing a client from engaging in conduct that has "no substantial purpose other than to embarrass, delay or burden a third person"); Rule 16-802(A) (prohibiting a lawyer from making statements concerning the qualifications or integrity of a judicial officer that the lawyer knows are false or that are made with reckless disregard for the truth); Rule 16-804(A) (violating or attempting to violate the Rules of Professional Conduct constitutes professional misconduct by a lawyer); Rule 16-804(C) (engaging in conduct that involves misrepresentation); Rule 16-804(D) (engaging in conduct that is prejudicial to the administration of justice constitutes professional misconduct by a lawyer).

In determining its recommendation for discipline, the hearing committee found that several aggravating circumstances existed, including the fact that Respondent has substantial experience in the practice of law; she has committed multiple offenses that display a pattern of misconduct; she has refused to acknowledge the wrongful nature of her conduct; and she has had prior disciplinary offenses. The hearing committee therefore recommended that Respondent (1) be suspended from the practice of law for a minimum of six months, (2) serve a twelve-month period of supervised probation after the suspension, (3) successfully complete extra continuing legal education in the areas of professionalism and ethics, (4) successfully

complete an accredited anger management program, and (5) pay the costs of the proceeding.

The hearing committee's recommendation then went before a panel of the disciplinary board for review. *See* Rule 17-314(A) NMRA (providing for review of hearing committee recommendations by a hearing panel of the disciplinary board). While the matter was pending before the disciplinary board panel, Respondent moved for reconsideration and asked that the matter be reopened for the taking of new evidence because Respondent claimed that her newly diagnosed bipolar disorder contributed to her misconduct. The disciplinary board panel denied Respondent's request and ultimately adopted the hearing committee's recommendation for discipline.

When the disciplinary board recommends the suspension of an attorney, Rule 17-316(A)(1) NMRA permits that attorney to request a hearing before this Court. Respondent, however, chose not to request a hearing and stated that she was prepared to accept the recommended suspension. At the request of this Court, Respondent nonetheless filed a response. In her response, and subsequently at oral argument before this Court, Respondent did not challenge the evidence of her misconduct, but focused instead on her contention that the recommended six-month suspension was too harsh because she had shown remorse for her misconduct and because her misconduct may have been caused, at least in part, by a previously undiagnosed bipolar disorder.

After deliberations following oral argument, we announced Respondent's discipline from the bench and then issued a written order to memorialize our ruling, which included a six-month suspension from the practice of law, a concurrent two-year period of supervised probation, additional continuing legal education in ethics and professionalism, successful completion of an anger management program, and payment of the costs of the disciplinary proceeding. Regarding the period of suspension, however, we delayed implementing the suspension for 90 days to give Respondent the opportunity to provide evidence that her newly diagnosed bipolar condition contributed to her misconduct and that treatment of the condition would prevent the recurrence of such misconduct. We issue this opinion to explain our decision.

DISCUSSION

We begin by noting that there is no dispute that Respondent engaged in a persistent pattern of misconduct unbecoming to an attorney who has taken an oath to "maintain civility at all times, abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party." Rule 15-304. Thus, our focus is the appropriate level of discipline.

Respondent's words were not innocuous. The hearing committee found, and Respondent has not contested, that her misconduct increased acrimony and fueled an adversarial climate that aggravated, inflamed, and adversely impacted the progress of the litigation in which she was involved. By her intolerable behavior, Respondent caused unnecessary additional expense and sought to intimidate and improperly influence those who stood in her way. Our legal profession must vigilantly strive to maintain the confidence of the public and to earn a reputation as a profession that pursues justice without personal attacks and unnecessary expense.

Respondent's misconduct has undermined such efforts and reinforced public disillusionment with a legal system that has become too costly, hostile, and slow. Our rules of ethics require much more from our attorneys, and our system of justice can afford no less. In short, we agree with the conclusions of both the hearing committee and the disciplinary board hearing panel that Respondent's actions violated the myriad of ethical rules discussed above. *See* Rules 16-401(A), -404(A), -802(A), -804(A), -804(C), & -804(D).

We also agree with the hearing committee's conclusion that a number of aggravating factors are present in this case. First, Respondent committed multiple violations of our ethics rules, and the rules she has violated demonstrate a disturbing pattern of conduct. *See ABA Standards for Imposing Lawyer Sanctions* (*ABA Standards*) 9.21, 9.22(c), & 9.22(d) (1986, as amended through 1992) (providing that a pattern of misconduct and multiple offenses are aggravating factors that may justify an increase in the degree of discipline); *In re Key*, 2005-NMSC-014, ¶ 5, 137 N.M. 517, 113 P.3d 340 (per curiam) (recognizing that this Court looks to the ABA Standards for guidance in determining appropriate lawyer disciplinary sanctions). Second, while the egregious behavior in this case is something we do not want to see from any attorney, it is especially disappointing to see it from a long-time member of the bar who should be serving as a model of professionalism for new attorneys to emulate. *See ABA Standards* 9.22(i) (providing that substantial experience in the practice of law may be an aggravating factor). Perhaps most troubling, Respondent has a history of past disciplinary sanctions imposed by the disciplinary board that never came before this Court for review, but that are quite similar to the misconduct in this case. *See id.* 9.22(a) (providing that past disciplinary offenses may be an aggravating factor); *see also In re Ortiz*, Disciplinary No. 01-2008-534, *Bar Bulletin*, N.M. State Bar, August 18, 2008, at 15 (formal reprimand dated July 25, 2008) (reprimanding respondent for disparaging comments and unfounded accusations directed at a judge).

Because Respondent's conduct was intentional and caused prejudice to both the parties and their attorneys who were the recipients of her intemperate remarks, and because a number of aggravating factors were present in this case, after oral argument this Court was inclined to agree with the disciplinary board's recommendation to suspend Respondent from the practice of law for six months. *See generally ABA Standards* 3.0 (providing that a court should consider the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct, and any aggravating or mitigating factors to determine the appropriate level of discipline). Indeed, other jurisdictions have imposed similar lengths of disciplinary suspension for attorneys who used intemperate and offensive language within the legal system. *See, e.g.*, *Ky. Bar Ass'n v. Waller*, 929 S.W.2d 181, 183 (Ky. 1996) (imposing six-month suspension for use of "scurrilous language with respect to a judge"); *In re Kahn*, 791 N.Y.S.2d 36, 38 (N.Y. App. Div. 2005) (per curiam) (imposing six-month suspension for making unseemly and offensive comments); *Office of Disciplinary Counsel v. Gardner*, 793 N.E.2d 425, 433 (Ohio 2003) (per curiam) (imposing six-month suspension for unfounded attacks on the integrity of the judiciary); *In re White*, 707 S.E.2d 411, 413, 416 (S.C. 2011) (per curiam) (imposing 90-day suspension for "blatant incivility"). However, because Respondent continued to

assert that her newly diagnosed bipolar disorder was the cause of her misconduct, this Court was hesitant to impose an immediate suspension at the close of oral argument. *In re Bristol*, 2006-NMSC-041, ¶ 32, 140 N.M. 317, 142 P.3d 905 (per curiam) (recognizing that suspension is not warranted if the respondent attorney does not possess the requisite culpable mental state).

While Respondent's misconduct, standing alone, would warrant a suspension from the practice of law, we deferred the implementation of the six-month suspension to give Respondent an opportunity to demonstrate whether her misconduct was the result of a bipolar condition that could be successfully treated to the point that this Court could be assured that Respondent would not engage in similar misconduct in the future. Ordinarily such matters should be developed below through evidence before a hearing committee. *Id.* ¶ 15 (noting that the hearing committee is the entity designated to take evidence in a disciplinary hearing). However, under the circumstances of this case, Respondent was not diagnosed with her condition, and that diagnosis was not linked to her ongoing outbursts, until after the hearing committee had concluded its work. Respondent asked the hearing panel to permit the matter to be reopened so that she could develop evidence on these points, but the hearing panel denied her request. We do not fault the hearing panel for its reluctance to reopen the proceeding for new evidence at the eleventh hour, but at the same time, this Court was unwilling to simply discipline Respondent without taking into consideration all pertinent information that might help this Court fashion an effective sanction. We therefore elected to defer Respondent's suspension to see if she could present competent medical evidence to show that her misconduct was caused by her bipolar disorder and could be prevented in the future with proper treatment.

In so doing, we were mindful that a mental infirmity does not provide a defense to professional misconduct. *In re Martin*, 1999-NMSC-022, ¶ 15, 127 N.M. 321, 980 P.2d 646 (per curiam). As we have said before, "a medical condition, though met with sympathy and compassion, is not to be considered as a mitigating factor in discipline absent a meaningful and sustained period of successful rehabilitation." *In re O'Brien*, 2001-NMSC-025, ¶ 17, 130 N.M. 643, 29 P.3d 1044 (per curiam). Respondent could not demonstrate "a meaningful and sustained period of successful rehabilitation," *id.*, at the time of her hearing before this Court because an evidentiary record had not been developed below, given that her condition had been only recently diagnosed, and a course of treatment had just begun. Under these circumstances, we concluded that the prudent course was to delay the imposition of the suspension until we had all the information necessary to make a fully informed decision about the appropriate level of discipline to impose. In this regard, it is important to emphasize that Respondent's bipolar disorder was not a defense to the imposition of disciplinary sanctions. *In re Martin*, 1999-NMSC-022, ¶ 15. Quite the opposite is true. Regardless of the cause, this Court is obligated to impose the appropriate level of discipline necessary to protect the public and our legal system from further damage that might result from continued misconduct by Respondent. *See In re Chavez*, 2013-NMSC-008, ¶ 26, 299 P.3d 403 (recognizing that the Court's primary concern in attorney discipline cases is to protect the public by ensuring that attorneys comply with our standards of professional conduct). Whether Respondent was fully culpable for her misconduct is less important

than ensuring that similar misconduct does not occur in the future. We cannot fashion truly effective sanctions without having all the pertinent information before us.

As it turned out, Respondent was able to provide this Court with uncontested medical evidence demonstrating that her prior outbursts were quite likely caused by a long-standing but untreated bipolar condition, and the treatment she was receiving would prevent such misconduct from recurring. We therefore ultimately rescinded Respondent's suspension, but retained the period of supervised probation. The outcome does not diminish the seriousness of Respondent's misconduct in this case. Regardless of the cause, her offensive language and unfounded accusations caused real harm. We are confident that with continued treatment and a heightened awareness of the importance of civility in all her communications, Respondent will not come before this Court again to answer new disciplinary charges. However, should she relapse, we will not hesitate to impose a more severe disciplinary sanction next time.

CONCLUSION

While the ultimate outcome in this case did not result in Respondent's suspension from the practice of law, all members of the bar should take note that our call for civility in all aspects of the practice of law must be taken seriously. Because legal disputes can be emotionally charged, it is up to every member of the bench and bar to behave in a manner that exemplifies the best of our profession. At a minimum, it is the ethical responsibility of every attorney to maintain a civil demeanor that helps to resolve disputes, rather than escalate them.

IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

RICHARD C. BOSSON, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

Certiorari Granted, May 24, 2012, No. 33,592

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-076

Filing Date: March 29, 2012

Docket No. 30,470

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

VINCENT MONTOYA,

Defendant-Appellant.

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for Appellant

OPINION

BUSTAMANTE, Judge.

Defendant Vincent Montoya was charged with kidnapping, attempt to commit criminal sexual penetration (CSP), aggravated battery against a household member, and interference with communications. He was convicted of all but attempted CSP. At issue in this appeal is whether his Confrontation Clause rights were violated by the district court's pre-trial ruling preventing him from questioning Victim about her prior sexual history with him. We hold that they were not and affirm.

I. BACKGROUND

The facts of this case are not in dispute. Defendant and Victim had been arguing. Defendant wanted to have sex with Victim, but Victim was not similarly inclined. Defendant got on top of Victim and attempted to remove her pants. Victim pushed and kicked Defendant until he stopped. Although Defendant was capable of forcing Victim to have sex with him, he did not. The two continued fighting, and Defendant bit Victim's inner thigh and pushed her over a table, hitting her head and hurting her back. Eventually, Victim's parents arrived and she was able to leave.

What is disputed, and what was the pivotal issue below, was Defendant's intent. Did he intend to commit a sexual offense against Victim regardless of whether she consented, or did he believe he was engaging in a consensual act of "make-up sex"? Arguing the latter, Defendant filed a motion under Rule 11-413 NMRA to introduce evidence of Victim's past sexual conduct with Defendant. Defendant represented that Victim would testify "that she believed Defendant

was trying to have 'make-up sex' with her and that they had engaged in make-up sex in the past." According to Defendant, "make-up sex" meant the use of sexual intercourse as a method of resolving disputes or of reconciling subsequent to a dispute. Defendant argued that the sexual history testimony was relevant to his state of mind regarding the specific intent crimes of kidnapping and CSP because it would show that "his intent was to have consensual sexual relations with his long-time girlfriend, not to have sex with her against her will."

The district court denied Defendant's motion, finding that Victim's past sexual conduct was "inflammatory and prejudicial in nature and [was] not outweighed by its probative value." It ordered that Defendant was precluded from asking whether Victim and Defendant had a long-standing sexual relationship, whether Victim and Defendant "engage[d] in sexual relations after an argument to make[-]up," or whether Victim had ever not consented to Defendant's sexual advances prior to the events at issue in the case. The court noted that "Defendant's confrontation rights are implicated by the material the defense seeks to introduce but that material may be elicited by other legally proper means than through the alleged [V]ictim." A jury acquitted Defendant of attempted CSP but convicted him of kidnapping.

Although Defendant was prevented from introducing evidence of his sexual history with Victim, he was able to produce some evidence at trial in support of his theory that he never intended to commit a sexual offense against Victim. Notably, Victim testified that she had been Defendant's girlfriend for about two years. Victim agreed that she was not terrified that he was going to penetrate her and that penetration was not the issue. She also agreed that she perceived his advances not as an attempt to force sex on her, but as an attempt to obtain her consent for sex. Finally, she agreed that she believed Defendant would not have had sex with her unless she consented.

II. DISCUSSION

Defendant makes two arguments on appeal. First, he contends that the district court erred in excluding evidence of Victim's sexual history with Defendant that Defendant believes would have negated the specific intent element of the kidnapping charge. Second, Defendant argues that it was error for the district court to instruct the jury that attempted CSP was only a general intent crime. We address each argument in turn.

A. The Rape Shield Rule

In 1975, our Legislature enacted a rape shield law which provides that

> [E]vidence of the victim's past sexual conduct, opinion evidence of the victim's past sexual conduct or of reputation for past sexual conduct, shall not be admitted unless, and only to the extent that the court finds that, the evidence is material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

NMSA 1978, § 30-9-16(A) (1975) (amended 1993). Our Supreme Court has adopted a similar rule of evidence. *See* Rule 11-413(A). For convenience, we will confine our discussion to the rule in this Opinion. The rule confers upon the district court discretion to exclude evidence of past conduct. *See id.* However, "[i]f application of the rape shield

law or rule would conflict with the accused's confrontation right, if it operates to preclude the defendant from presenting a full and fair defense, the statute and rule must yield." *State v. Johnson*, 1997-NMSC-036, ¶ 24, 123 N.M. 640, 944 P.2d 869.

Defendant's rape shield argument breaks down into two parts: (1) a constitutional component under the Confrontation Clause; and (2) an evidentiary component, looking at the district court's application of the rule. The admissibility of evidence under the rape shield rule is separate from the objection based on the Confrontation Clause. *Cf. State v. Henderson*, 2006-NMCA-059, ¶ 8, 139 N.M. 595, 136 P.3d 1005 (noting that a hearsay objection to pre-trial testimony was separate from a Confrontation Clause objection to the same testimony). We begin with the Confrontation Clause because, as we discuss below, the rape shield rule must yield when exclusion of the evidence would violate a defendant's confrontation rights. First, however, we must discuss the standard of review.

1. Standard of Review

Our Supreme Court has sent confusing signals regarding the standard of review for cases involving both the rape shield rule and the Confrontation Clause. Most recently, in a case that dealt exclusively with the confrontation implications of the rape shield rule, the Court stated that we review decisions to exclude evidence under the rape shield rule for abuse of discretion. *State v. Stephen F.*, 2008-NMSC-037, ¶ 8, 144 N.M. 360, 188 P.3d 84. However, other cases indicate that we review Confrontation Clause issues de novo. *See, e.g.*, *State v. Lopez*, 2011-NMSC-035, ¶ 10, 150 N.M. 179, 258 P.3d 458; *State v. Lasner*, 2000-NMSC-038, ¶ 24, 129 N.M. 806, 14 P.3d 1282. In *State v. Gonzales*, 1999-NMSC-033, ¶ 22, 128 N.M. 44, 989 P.2d 419, our Supreme Court noted that the right to confrontation is not absolute, and the district court retains wide latitude to limit cross-examination. This language would seem to implicate an abuse of discretion standard, but in its ruling the Court held that "under the de novo standard, . . . the trial court acted within its 'wide latitude.'" *Id.* We find it necessary to review the case history in this area to clarify the standard of review applicable.

In *Johnson*, the Court first considered the tension between the defendant's confrontation right to cross-examine witnesses and the state's interest in protecting the victims' privacy under the rape shield rule. The Court framed the issue by observing that "evidence of prior sexual conduct *must be admitted* if a defendant shows that evidence implicates his or her constitutional right of confrontation." 1997-NMSC-036, ¶ 22 (emphasis added); *id.* ¶ 24 ("If application of the rape shield law or rule would conflict with the accused's confrontation right, if it operates to preclude the defendant from presenting a full and fair defense, the statute and rule must yield."). Citing a Wisconsin case, the Court adopted a five-prong test as a non-exclusive framework for "establish[ing] a constitutional right to present evidence otherwise excluded by" the rape shield rules:

> (1) whether there is a clear showing that the complainant committed the prior acts; (2) whether the circumstances of the prior acts closely resemble those of the present case; (3) whether the prior acts are clearly relevant to a material issue, such as identity, intent, or bias; (4) whether the evidence is necessary to

> the defendant's case; [and] (5) whether the probative value of the evidence outweighs its prejudicial effect[.]

Id. ¶¶ 27-28. It concluded that "a showing sufficient under the five-pronged . . . test establishes a constitutional right to present evidence otherwise excluded by our statute." *Id.* ¶ 28. This statement evokes a de novo determination regarding a constitutional right.

[redacted] However, in the same paragraph, it characterized the confrontation right as merely "inform[ing] the [district] court's exercise of discretion under the statute and rule," a characterization that speaks to the abuse of discretion review normally associated with the application of a rule of evidence. *Id.* At first glance, this latter statement seems to be in conflict with the earlier invocation of a de novo standard of review.

[redacted] After setting forth these apparently contradictory standards, *Johnson* concluded that the defendant had not made any argument that implicated his right to confrontation. *Id.* ¶ 29. The Court concluded that the contested evidence did not support a theory of relevance other than propensity. *See id.* ¶¶ 39-40. It appears to have reached this conclusion as a matter of law, reasoning that the evidence offered was not probative of motive to fabricate and therefore did not implicate the defendant's right to confrontation. *See id.* ¶ 29. Having rejected the confrontation objection, *Johnson* held that the district court had not abused its discretion in applying the rape shield rule to exclude the evidence of prostitution. *Id.* ¶ 40. The Court did not apply the test it had just announced to either the confrontation or the rape shield analysis.

[redacted] Our Supreme Court revisited the tension between the rape shield rule and the Confrontation Clause in *Stephen F.* Although the opinion discussed only the confrontation issue, the Court reviewed the district court's action for abuse of discretion. *See* 2008-NMSC-037, ¶ 8. It employed a two-step process. First, as in *Johnson*, the Court required the defendant to "establish a valid theory of relevance and . . . support that theory with adequate facts showing a nexus between his proffered evidence and his theory." *Stephen F.*, 2008-NMSC-037, ¶ 36. Second, the Court balanced the State's interest in excluding the evidence against the victim's confrontation rights, which it viewed through the lens of the *Johnson* factors. *Stephen F.*, 2008-NMSC-037, ¶¶ 28-31.

[redacted] Applying this process, the Court examined the *Johnson* factors, which it said aided "in determining whether the defendant has adequately established his theory of relevance." *Stephen F.*, 2008-NMSC-037, ¶ 8. First, it concluded that because the second factor was not relevant, this Court had not erred in disregarding it. *See id.* ¶¶ 12-17. The Court noted that the third factor, which is "designed to help the court determine the relevancy of [a] defendant's theory," was met because the defendant was attempting to show the witness's motive to lie. *Id.* ¶ 19. Furthermore, the Court concluded that the testimony was necessary to the defendant's case because without it, his "argument that [the witness] had a motive to lie became groundless and ineffective." *Id.* ¶ 21. The Court concluded that the defendant's constitutional right to cross-examine the victim had been violated. *Id.* ¶ 38.

[redacted] Our understanding of *Stephen F.* is as follows. The Court applied an abuse of discretion standard. However, implicit in the standard in this context is that we review the

application of the law to the facts de novo, and that a district court abuses its discretion when it bases its decision on a misapprehension of the law. *See, e.g.*, *State v. Martinez*, 2008-NMSC-060, ¶ 10, 145 N.M. 220, 195 P.3d 1232 ("A misapprehension of the law upon which a court bases an otherwise discretionary evidentiary ruling is subject to de novo review."). The abuse of discretion review employed in *Stephen F.* thus encompasses both a de novo review of whether the confrontation right is implicated and a de novo review of whether restrictions on cross-examination were within the district court's "wide latitude." *See Gonzales*, 1999-NMSC-033, ¶ 22 (internal quotation marks and citation omitted).

Consistent with this view, we observe in *Johnson* and *Stephen F.* three different questions subject to three different standards of review. First, in both *Johnson* and *Stephen F.*, the Court first reviewed de novo whether the theory upon which the defendant sought to introduce evidence implicated his confrontation rights. In *Johnson*, the defendant's confrontation rights were not implicated, and the inquiry ended. In *Stephen F.*, the defendant's confrontation right to show the witness's motive to lie was implicated, and the inquiry proceeded.

The Court in *Stephen F.* next proceeded to the second step, balancing "the [s]tate's interest in applying the rape shield [rule]" against "the effect that excluding the evidence had on [the defendant's] constitutional rights." 2008-NMSC-037, ¶¶ 28, 31. It measured the defendant's rights by examining the *Johnson* factors and by analogizing to other cases. *Stephen F.*, 2008-NMSC-037, ¶¶ 31-36. The Court appears to have undertaken this balancing de novo as well. We understand this balancing test to represent an inquiry into the district court's ability to restrict the scope of cross-examination under the Confrontation Clause. We believe this is consistent with our Supreme Court's cases that review restrictions on the scope of cross-examination de novo to determine if the district court acted within its wide discretion. *See Gonzales*, 1999-NMSC-033, ¶ 22.

The third and final step is the review of the application of the rule itself—as distinguished from the Confrontation Clause implications—for abuse of discretion. In *Stephen F.*, this was not necessary, as the Court reversed on the Confrontation Clause issue. In *Johnson*, the Court simply stated that it "believe[d] the [district] court's explanation of its reasons for excluding the evidence show[ed] that it exercised its discretion and reached a result a judge reasonably might reach on the arguments and evidence." 1997-NMSC-036, ¶ 40. This is consistent with how evidentiary decisions are generally reviewed. *See, e.g.*, *Martinez*, 2008-NMSC-060, ¶ 10.

In summary, we discern three steps and three standards of review in our case law regarding application of the rape shield rule. First, we review de novo whether a defendant has presented a theory of admissibility that implicates his confrontation rights. If he has, we undertake a de novo balancing of the state's interest in excluding the evidence against the defendant's constitutional rights to determine if the district court acted within the wide scope of its discretion to limit cross-examination. If the Confrontation Clause is not implicated or if there has been no Confrontation Clause violation, we examine whether the district court has abused its discretion in its application of the rule itself.

In practice, some or all of these inquiries appear to have been merged in the *Johnson* factors, but need not be analyzed in that manner. With this framework in mind, we proceed to the facts of the case before us.

2. Confrontation Clause

Defendant argues that the exclusion of evidence of Victim's sexual history with him violated his confrontation rights. In support, he contends that the evidence was relevant to his intent and that therefore the evidence was offered under "a theory of relevance other than propensity." He does not argue that he was prevented from showing Victim's bias or otherwise attacking her credibility. Instead, his argument is that he was prevented from challenging an opposing version of the facts.

"The Confrontation Clause of the Sixth Amendment is made applicable to the states through the Fourteenth Amendment." *State v. Lopez*, 2000-NMSC-003, ¶ 14, 128 N.M. 410, 993 P.2d 727. The Sixth Amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." U.S. Const. Amend. VI. "The most important element of the right of confrontation is the right of cross-examination." *State v. Sanders*, 117 N.M. 452, 459, 872 P.2d 870, 877 (1994). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Although the right to cross-examination is a crucial benefit of confrontation, it is not absolute:

> The trial court retains wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. The Confrontation Clause merely guarantees an opportunity for effective cross-examination; it does not guarantee that the defense may cross-examine a witness in whatever way, and to whatever extent, the defense might wish.

Sanders, 117 N.M. at 459, 872 P.2d at 877 (alterations, internal quotation marks, and citations omitted).

Our appellate courts have found confrontation violations when a defendant was prevented from putting on evidence regarding the bias or credibility of a witness. *See, e.g.*, *Stephen F.*, 2008-NMSC-037, ¶ 31 (finding a confrontation violation when the district court prevented cross-examination necessary to show a witness's motivation to lie); *State v. Martinez*, 1996-NMCA-109, ¶ 17, 122 N.M. 476, 927 P.2d 31 (finding a confrontation violation when a defendant was restricted from cross-examining a witness regarding bias towards the state); *accord Sanders*, 117 N.M. at 460, 872 P.2d at 878 (holding that there was no confrontation violation when the excluded evidence did not reflect the witness's bias, motivation to lie, or credibility). Federal cases have reached similar results. *See, e.g.*, *Davis*, 415 U.S. at 317-18 (holding that it was error to prohibit cross-examination of a witness on bias he might have due to his status as a probationer).

In the instant case, Defendant concedes that neither bias nor credibility is at issue. Instead, he rests his Confrontation Clause argument on his inability to challenge

an opposing version of the facts. This language comes from *Johnson*, where our Supreme Court stated that "[a] defendant's right of confrontation—with its protection of the right to cross-examine, test credibility, detect bias, *and otherwise challenge an opposing version of facts*—is a critical limitation on the [district] court's discretion to exclude evidence a defendant wishes to admit." 1997-NMSC-036, ¶ 23 (emphasis added). Specifically, Defendant argues that this language confers upon him the right to elicit from Victim testimony that the acts occurred "in the context of a long sexual relationship that included 'make[-]up sex' used to resolve arguments."

We do not agree with Defendant's reading of this language from *Johnson*. Under Defendant's interpretation, this language would turn any limitation on cross-examination—regardless of its relation to bias, credibility, and motive to lie—into a violation of the Confrontation Clause. We do not believe this is the effect that our Supreme Court intended. As the Court has stated, "[t]he Confrontation Clause merely guarantees an opportunity for effective cross-examination; it does not guarantee that the defense may cross-examine a witness in whatever way, and to whatever extent, the defense might wish." *Sanders*, 117 N.M. at 459, 872 P.2d at 877 (internal quotation marks and citation omitted). Defendant's proposed reading of *Johnson* is in direct contradiction to the Court's observation that " 'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.' " *State v. Meadors*, 121 N.M. 38, 49, 908 P.2d 731, 742 (1995) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (alteration in original)).

We understand the "challenge an opposing version of facts" language in *Johnson* to refer to a defendant's confrontation right to challenge the truth and accuracy of a witness's testimony through cross-examination. 1997-NMSC-036, ¶ 23; *see Davis*, 415 U.S. at 316 ("Cross-examination is the principal means by which the believability of a witness *and the truth of his testimony* are tested." (Emphasis added)); *but see Stephen F.*, 2008-NMSC-037, ¶ 6 ("[A] court's decision to restrict a defendant's ability to confront a witness, even when based on legitimate state interests, 'calls into question the ultimate integrity of the fact-finding process and requires that the competing interest be closely examined.' " (quoting *Chambers v. Miss.*, 410 U.S. 284, 295 (1973)). Here, Defendant sought not to confront Victim, but to use her to introduce additional substantive evidence unrelated to the truth or accuracy of her testimony. While there may be some cases in which a defendant's confrontation rights are violated by the restriction of cross-examination regarding sexual history evidence not related to bias or credibility, we do not believe this is one of them.

We conclude that Defendant's confrontation rights were neither implicated nor violated. Defendant has explicitly disclaimed reliance on the theories of relevance our cases have indicated are critical to the right to cross-examine. Furthermore, we reject his contention that *Johnson*'s language regarding challenging opposing versions of the facts creates a confrontation right to question witnesses on topics not relevant to the truth or accuracy of the

witness's testimony. We hold that as a matter of law, Defendant has not shown that he has a theory of relevance implicating his right to confront Victim, and therefore his confrontation rights were not violated.

3. Evidentiary Ruling

{27} We proceed to the question of whether the district court abused its discretion in applying the rape shield rule. We have chosen to analyze this in light of the *Johnson* factors. *See Stephen F.*, 2008-NMSC-037, ¶ 8 (suggesting the *Johnson* factors as one possible framework a district court could use in exercising its discretion under the rape shield rule). Under the circumstances of this case, we cannot characterize the district court's ruling 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). Looking to the *Johnson* factors, there were several that Defendant was unable to prove. Neither party contests the first factor, that Victim had an ongoing sexual relationship with Defendant which included make-up sex. We examine each of the remaining four factors in turn.

Before doing so, however, we must briefly address the somewhat unusual procedural posture of this rape shield case. Defendant was acquitted of attempted CSP but convicted of kidnapping, which required the State to prove that he intended to commit "a sexual offense." By its terms, the rape shield rule does not apply to kidnapping. *See* Rule 11-413(A) (limiting the rule to "prosecutions [pursuant to] . . . [NMSA 1978, Sections 30-9-11 to -15 (1975, as amended through 2009"); Section 30-9-16 (same); NMSA 1978, § 30-4-1 (2003) (defining kidnapping). However, it does apply to attempted CSP. *See* § 30-9-11 (defining CSP). Thus, although only the kidnapping conviction is at issue on this appeal, we must also consider the effect of the evidence on the attempted CSP charge of which Defendant was acquitted. With respect to kidnapping, Defendant's intent to commit a sexual offense is at issue. But we must also keep in mind that the excluded evidence was relevant to Victim's consent in the attempted CSP charge.

Returning to the *Johnson* factors, we begin with the second factor, "whether the circumstances of the prior acts closely resemble those of the present case." Defendant claims the circumstances of the charged incident are similar to the previous make-up sex in that "the couple had resolved arguments in the past by having sex." The State counters that "[V]ictim told defense counsel that [the] incident involved in this case[] was different than any other time they had sex in the past and that [D]efendant's behavior during this incident was not normal."

The district court could reasonably have found against Defendant on this factor. First, the court could have concluded that Defendant's arguments under this factor were the sorts of propensity arguments that the rule seeks to exclude. With respect to the CSP charge, the district court could reasonably conclude that the similarity of circumstances was primarily a propensity argument—that because Victim had consented on previous occasions, she consented on this occasion. Regarding the kidnapping charges, the court could also have concluded that the similarity of circumstances was a propensity argument, albeit a strange one—because Victim had engaged in legal consensual make-up sex in the past, Defendant restrained her on this occasion on the expectation that legal consensual make-up sex would once again

ensue. Indeed, this appears to be the exact argument Defendant makes on appeal.

Regarding the fourth factor, "whether the evidence is necessary to the defendant's case," Defendant argues that without the evidence of their history of make-up sex, the jury was led to an inference that Defendant "was acting in anger, indifferent to [Victim's] wishes, and that he intended to rape." The State contends that Defendant presented substantial circumstantial evidence of his intent by showing (1) that Defendant and Victim had been dating for two years, (2) that Defendant was strong enough to have forced sex upon her without consent but did not, (3) that Victim viewed Defendant's actions as an attempt to obtain her consent, (4) that Victim was not terrified of being penetrated and did not think penetration was the issue, and (5) that Victim believed Defendant did not have sex with her because she did not consent. According to the State, the sexual history was therefore merely cumulative. We agree with the State. Significant evidence was introduced that was relevant to Defendant's intent. Evidence of Defendant's sexual history with Victim was not necessary in order to prove that he did not intend to commit a sexual offense.

Finally, with respect to the fifth factor, "whether the probative value of the evidence outweighs its prejudicial effect," Defendant baldly asserts that the sexual history is highly probative, and that "[i]ts only discern[able] 'prejudicial' effect was to negate the State's theory of prosecution." However, as we discussed above, the probative value was diminished in light of the significant amounts of admissible evidence regarding Defendant's intent, and the sexual history evidence was useful primarily to show propensity. Further, the district court found that testimony about Victim's sexual history was "inflammatory and prejudicial in nature." We conclude that the restriction was within the wide scope of permissible limitation on cross-examination. *See Gonzales*, 1999-NMSC-033, ¶ 22. We cannot say the district court abused its discretion in denying Defendant's Rule 11-413 motion.

B. Jury Instructions

Defendant's second argument is that errors in the jury instructions require the reversal of his kidnapping conviction. The State contends that this argument was not preserved and that we should therefore review only for fundamental error. We do not reach the question of whether there was fundamental error because no error exists.

Defendant apparently concedes that his late objection to the instructions was insufficient to preserve the issue, arguing only that the instructions, combined with the district court's refusal to clarify those instructions in response to jury questions, was fundamental error.

In *State v. Benally*, our Supreme Court observed:

> 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 reasonable 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). The difference is that, "[u]nder fundamental error review, . . . the jury verdict will not be reversed unless necessary to prevent a miscarriage of justice." *State v. Sandoval*, 2011-NMSC-022, ¶ 13, 150 N.M. 224, 258 P.3d 1016 (internal quotation marks and citation omitted).

Benally is directly on point to the instant case. In *Benally*, a defendant who had been convicted of second-degree murder argued that incorrect jury instructions "prevented the jury from appreciating that the [s]tate had the burden of disproving self-defense." 2001-NMSC-033, ¶ 1. Instruction 12, which set forth the elements for second-degree murder, did not include the element of unlawfulness. *Id.* ¶ 10. Additionally, instruction 15, which defined self-defense, did not set forth the burden of proof. *Id.* ¶ 11. However, a second self-defense instruction, instruction 25, was also given that correctly set forth the burden of proof but that applied to the separately charged crimes of aggravated battery and voluntary manslaughter. *See id.* ¶¶ 17, 25 (Baca, J., dissenting).

The Court addressed the question of whether instruction 25 "was capable of rescuing the jury from the confusion that stemmed from the omission in instruction 12." *Id.* ¶ 17. It began with "the common sense proposition that the jury understands the inclusion and omission of language in a jury instruction to reflect the intent of its author." *Id.* ¶ 18. The Court concluded that jurors would have understood the omission of burden of proof language in instructions 12 and 15 to be intentional and proceeded to address whether jurors would have thought that the language in instruction 25 applied not only to the offenses it addressed, but also to those addressed by instructions 12 and 15. *See id.* But "[n]othing on the face of the instructions, nor in their placement, suggested to the jury that . . . instruction 25 applied to second-degree murder." *Id.* ¶ 19. The correct instruction was separated from the second-degree murder instruction by thirteen other instructions. *Id.* An additional instruction informed the jury that each crime charged should be considered separately. *Id.* ¶ 20.

We conclude that, under the reasoning from *Benally*, a reasonable juror would not have been confused or misdirected into concluding that only general intent was required in order to convict Defendant of kidnapping in this case. By its terms, the general intent instruction in this case applied only to "criminal sexual penetration, aggravated battery against a household member without great bodily harm, and interference with communications." We conclude that, as in *Benally*, a jury would have understood that the inclusion of these three crimes and the omission of kidnapping was intentional. Also like *Benally*, the kidnapping instruction was separated from the general intent instruction by the numerous (in this case, ten) instructions setting forth the elements of the three crimes to which the general intent instruction did apply. Finally, as in *Benally*, the jury was instructed that "[e]ach crime charged in the indictment should be considered separately." Accordingly, we conclude that a reasonable juror would have arrived at a correct understanding of the intent element of kidnapping from the instructions in this case. As we find no error, we need not decide whether there was fundamental error.

III. CONCLUSION

For the foregoing reasons, we affirm.

IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

CELIA FOY CASTILLO, Chief Judge

MICHAEL E. VIGIL, Judge

Certiorari Denied, October 3, 2012, No. 33,762

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-077

Filing Date: July 18, 2012

Docket No. 30,477

DIDIER L. FIGUEROA, Individually, and as Personal Representative for the ESTATE OF DOLORES FIGUEROA, Deceased,

Plaintiff-Appellee,

v.

THI OF NEW MEXICO AT CASA ARENA BLANCA LLC, a Foreign Limited Liability Company d/b/a CASA ARENA BLANCA NURSING HOME, THI OF BALTIMORE, INC., a Foreign Corporation, JOHN DOE and JANE DOE,

Defendants-Appellants.

Yenson, Lynn, Allen & Wosick, P.C.
Patrick D. Allen
April D. White
Albuquerque, NM

for Appellee

Johnson, Trent, West & Taylor, LLP
Lori D. Proctor
Houston, TX

for Appellant

OPINION

VIGIL, Judge.

This case requires us to examine whether an arbitration agreement that a nursing home requires to be signed as a condition of admission is substantively unconscionable. Agreeing with the district court that the agreement is unfairly and unreasonably one-sided in favor of the nursing home, we affirm.

I. BACKGROUND

Defendant, THI of New Mexico at Casa Arena Blanca, LLC (THICAB), operates Casa Arena Blanca, a nursing home in Alamogordo, New Mexico. Marlene Urbina sought to admit her mother, Dolores Figueroa, to Casa Arena Blanca in August 2008. Ms. Urbina had been granted a general power of attorney by Ms. Figueroa, upon which she acted during the admissions process. As a condition of Ms. Figueroa's admission to Casa Arena Blanca, Ms. Urbina was required to sign various admission agreements, including an arbitration agreement. The agreement states: "Resident/Representative understands that signing this Agreement to arbitrate is a precondition for medical treatment or admission to the Health Care Center." It further provides in pertinent part:

> In the event of any controversy or dispute between the parties arising out of or relating to Resident's stay at the Health Care Center, the Health Care Center's Admission Agreement, or breach thereof, or relating to the provision of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence, contract, consumer protection, claims under the New Mexico Unfair Practices Act, or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the National Arbitration Forum Code of Procedure or other such association.
>
> The parties agree that guardianship proceedings, collection and eviction actions initiated by the Health Care Center, any dispute where the amount in controversy is less than Two Thousand Five Hundred Dollars ($2,500.00) will be excluded from binding arbitration and may be filed and litigated in any court which may have jurisdiction over the dispute.

Ms. Figueroa was a resident at Casa Arena Blanca for four months: from her admission on September 2, 2008, to the date of her death, January 18, 2009. After her death, Ms. Figueroa's son, Didier Figueroa (Plaintiff), individually, and as her personal representative, filed a complaint in the district court against Defendant. The complaint contained allegations of: wrongful death; personal injury; negligent hiring, training, and supervision; negligence per se; misrepresentation; violation of the Unfair Practices Act; and loss of consortium.

Plaintiff stated that "[d]espite her advanced age, Ms. Figueroa was relatively active at the time of her admission," but her health "rapidly declined" following her admission to Casa Arena Blanca due to Defendants' failure to provide proper care. Plaintiff further alleged that while residing at Casa Arena Blanca, Ms. Figueroa suffered unsanitary hygiene conditions, numerous avoidable falls and resulting injuries, skin breakdown, urinary tract infections, dehydration, bruises, pain and suffering, mental anguish, humiliation, and wrongful death.

In response to Plaintiff's complaint, Defendant filed a motion to dismiss the lawsuit from district court for lack of subject matter jurisdiction, to compel arbitration, and to stay litigation. Defendant asserted that the causes of action in the complaint were subject to arbitration under the terms of the agreement that Ms. Urbina had signed on behalf of Ms. Figueroa when she was admitted to Casa Arena Blanca.

The district court ruled that the arbitration agreement was unenforceable under *Cordova v. World Finance Corporation of New Mexico*, in which our Supreme Court held an arbitration agreement that was unfairly and unreasonably one-sided in favor of the drafter was substantively unconscionable and unenforceable. 2009-NMSC-021, ¶ 25, 146 N.M. 256, 208 P.3d 901. The district court noted that the agreement is unreasonably and unfairly one-sided stating: "really this is not a mutual obligation . . . the nursing home has, for all practical purposes, excluded almost every kind of case it would bring against the resident or resident family from arbitration but has bound the resident in almost every instance where the resident and his or her family would be suing the nursing home, so I think the *Cordova* case would be applied in this context to find that the arbitration clause was unenforceable."[1]

Defendant appeals pursuant to NMSA 1978, Section 44-7A-29(a)(1) (2001) (allowing an appeal to be taken from an order denying a motion to compel arbitration). The district court stayed further proceedings pending our decision on appeal.

II. ANALYSIS

Defendant argues: (1) that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-6 (2006), preempts our state law that applies a substantive unconscionability analysis to the terms of arbitration agreements; (2) that the agreement was not unfairly and unreasonably one-sided in favor of Defendant, because the district court misinterpreted the meaning and effect of the exemptions from arbitration; and (3) that even if the exemptions from arbitration are substantively unconscionable, the remainder of the arbitration agreement should be severed and enforced, because the parties have bilateral obligations to arbitrate tort claims. We address each argument in turn.

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[1]We note that Judge Browning of the United States District Court for the District of New Mexico ruled contrarily to Judge Singleton on an identical arbitration clause in a different case. *See THI of N.M. at Hobbs Ctr., LLC v. Patton*, Civ. No. 11-537 LH/CG, 2012 WL 112216, at *21-22 (D.N.M. Jan. 3, 2012). Judge Browning concluded that the arbitration clause was not unconscionable and noted that even if it were, the court could have only stricken the exclusions portion and saved the parties' bilateral agreement to arbitrate all other claims. *See id.* For the reasons herein stated in this opinion, we agree with Judge Singleton's application of New Mexico law to this arbitration clause.

A. Preemption by the Federal Arbitration Act

We agree with Defendant that the FAA applies to its arbitration agreement. *See* 9 U.S.C. §§ 1-2 (stating that the FAA governs all arbitration agreements that involve commerce). The FAA requires that state courts enforce arbitration agreements unless the agreement is otherwise revocable under existing legal or equitable principles. *See* 9 U.S.C. § 2 ("A written provision . . . or a contract [to arbitrate] . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."). Accordingly, arbitration agreements must be placed on "equal footing" with other contracts, and are revocable only by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that single out arbitration agreements or "that derive their meaning from the fact that an agreement to arbitrate is at issue." *Rivera v. Am. Gen. Fin. Servs. Inc.*, 2011-NMSC-033, ¶¶ 16-17, 150 N.M. 398, 259 P.3d 803 (internal quotation marks and citation omitted). Thus, if a state law or judicial doctrine treats arbitration agreements disparately, it is inconsistent with, and preempted by, the FAA and cannot be used to render the arbitration agreement unenforceable. *See id.*; *AT&T Mobility LLC v. Concepcion*, 563 U.S. __, 131 S. Ct. 1740, 1747-53 (2011); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-88 (1996). However, if state law governs issues concerning the validity, revocability, and enforceability of contracts generally, that law's application to arbitration agreements is not preempted by the FAA. *See Cordova*, 2009-NMSC-021, ¶ 37 (" '[S]tate law, whether of legislative or judicial origin, is applicable [and does not contravene the FAA] *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.' " (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)).

For example, in *Fiser v. Dell Computer Corp.*, the defendant sought to enforce an arbitration agreement that precluded the consumer from bringing a class action against the defendant. 2008-NMSC-046, ¶ 4, 144 N.M. 464, 188 P.3d 1215. In analyzing the defendant's arguments, the Court considered a New Mexico statute providing that any waiver of a consumer's right to a class action in an arbitration agreement was void and unenforceable. *See id.* ¶ 13 (citing NMSA 1978, § 44-7A-1(b)(4)(f) (2001) and § 44-7A-5 (2001)).[2] The New Mexico Supreme Court noted that the statute may have been preempted by the FAA because it specifically singled out arbitration agreements, but nevertheless, the Court reasoned that the statute was evidence of New Mexico's strong public policy to provide a procedure for consumers to have a remedy for small claims. *See Fiser*, 2008-NMSC-046, ¶ 13. Therefore, the Court concluded that the provision waiving the plaintiff's right to a class action in the arbitration agreement was substantively unconscionable and unenforceable as contrary

[2]Section 44-7A-5 states: "In the arbitration of a dispute between a consumer, borrower, tenant or employee and another party, a disabling civil dispute clause contained in a document relevant to the dispute is unenforceable against and voidable by the consumer, borrower, tenant or employee." Section 44-7A-1(b)(4)(f) defines "disabling civil dispute clause" as: "a provision modifying or limiting procedural rights necessary or useful to a consumer, borrower, tenant or employee in the enforcement of substantive rights against a party drafting a standard form contract or lease, such as, by way of example, a clause requiring the consumer, tenant or employee to . . . *decline to participate in a class action*." (Emphasis added.)

to our state's public policy. *See id.* ¶¶ 13-22. In considering the dictates of the FAA, the Court reasoned that because unconscionability is a doctrine that applies to all contracts under New Mexico law, its holding was not preempted by the FAA. *See id.* ¶ 23 ("Because our invalidation of the ban on class relief rests on the doctrine of unconscionability, a doctrine that exists for the revocation of any contract, the FAA does not preempt our holding.").

Additionally, in *Cordova*, in concluding that the application of unconscionability was not preempted by the FAA, the Court stated:

> New Mexico's legal doctrine of contractual unconscionability, like that of other jurisdictions, was not developed to target or invalidate this or any other arbitration agreement. Our unconscionability analysis, which is applied in the same manner to arbitration clauses as to any other clauses of a contract, is therefore not inconsistent with the dictates of the FAA. The FAA is intended to promote inexpensive, fair, and reasonable arbitration alternatives to litigation. It is not a license for businesses to take advantage of consumers by the imposition of one-sided, unfair, and legally unconscionable arbitration schemes. We will not allow our courts to be used to enforce unconscionable arbitration clauses any more than we will allow them to be used to enforce any other unconscionable contract in New Mexico.

Id. ¶ 38 (citation omitted).

In spite of the clarity of these Supreme Court cases, Defendant contends that New Mexico's unconscionability analysis, as applied to arbitration agreements, is preempted by the FAA. In support of its argument, Defendant cites *Concepcion*, in which the United States Supreme Court overturned California's *Discover Bank* rule, that invalidated class action waivers in arbitration agreements on the grounds of substantive unconscionability. The *Discover Bank* rule provides:

> When [a class action] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

See Concepcion, ___ U.S. at ___, 131 S. Ct. at 1746 (quoting *Discover Bank v. Superior Ct.*, 113 P.3d 1100, 1110 (Cal. 2005), *overruled by Concepcion*). In *Concepcion*, the Court found that the *Discover Bank* rule targeted arbitration agreements in a manner inconsistent with the dictates of the FAA, and was therefore preempted. *Concepcion*, ___ U.S. at ___, 131 S. Ct. at 1750-51.

Based on *Concepcion*'s reference to the substantive unconscionability analysis of *Discover Bank*, Defendant argues that *Fiser* was implicitly overruled, that *Cordova* is likewise "inapposite," and therefore, the district court erred in relying on *Cordova* as authority for precluding enforcement of its agreement. We disagree that *Concepcion* controls. As an initial matter, we note that *Concepcion* is inapplicable to the issues raised by the arbitration agreement in this case. No class action ban is before us. Furthermore, to the extent that Defendant argues that the substantive unconscionability analysis as applied to class action bans in *Fiser* was overruled by *Concepcion*, we conclude that different public policies underlie the Court's holdings in *Fiser* from the Court's holding in *Cordova*.

Our substantive unconscionability analysis as applied in *Cordova* to one-sided arbitration agreements is distinguishable from the application of the *Discover Bank* rule at issue in *Concepcion*. The equitable doctrine of substantive unconscionability is not a rule that directly targets a specific term of an agreement or an entire class of agreements. *See Concepcion*, ___ U.S. at ___, 131 S. Ct. at 1750-53 (concluding that the rule that rendered class action waiver provisions in an arbitration contract unenforceable was preempted by the FAA); *Doctor's Assocs., Inc.*, 517 U.S. at 684 (concluding that a statute targeted arbitration agreements by requiring any agreement for arbitration, specifically, to have a notice provision on the first page in capital, underlined letters and was therefore preempted by the FAA). Rather, under New Mexico law, substantive unconscionability is an equitable remedy, applied on a case-by-case basis, analyzing the particular contract and its terms for unfair and unreasonable one-sided favorability towards the drafter. *See Guthmann v. La Vida Llena*, 103 N.M. 506, 510, 709 P.2d 675, 679 (1985) (stating that "contract terms which are unreasonably favorable to the other party" can contribute to a finding of unconscionability), *overruled on other grounds by Cordova*, 2009-NMSC-021, ¶ 31; *Pugh v. Phelps*, 37 N.M. 126, 131, 19 P.2d 315, 318 (1932) ("[A] court of equity will not enforce and should not enforce a contract which is unfair, unequal, and unjust, nor one, the performance of which would be in any way unconscionable.").

Thus, we decline to construe *Concepcion* in the broad manner that Defendant requests. *See Concepcion*, ___ U.S. at ___, 131 S. Ct. at 1750-53. Construing *Concepcion* to invalidate the district court's ruling would be inconsistent with our New Mexico Supreme Court precedent. Further, if we were to conclude that arbitration agreements are, as a matter of law, exempted from the unconscionability analysis as it is applied to all other contracts, this would place arbitration agreements on an *unequal* footing, and provide them special treatment under the law. *See Rivera*, 2011-NMSC-033, ¶ 16 (stating that the FAA mandates that arbitration agreements be placed on "equal footing" with other contracts (quoting *Concepcion*, ___ U.S. at ___, 131 S. Ct. at 1745)). Placing arbitration agreements in a special status would be inconsistent with United States Supreme Court precedent, New Mexico precedent, and the FAA. *See Concepcion*, ___ U.S. at ___, 131 S. Ct. at 1745 ("[C]ourts must place arbitration agreements on an equal footing with other

contracts[.]"); *Rivera*, 2011-NMSC-033, ¶ 16. In addition to our reasoning under New Mexico law, we also find support for our conclusion from other jurisdictions.[3]

Furthermore, after the United States Supreme Court issued *Concepcion*, our own Supreme Court reaffirmed its holding in *Cordova*. *See Rivera*, 2011-NMSC-033, ¶¶ 16, 42 (citing *Concepcion* for a general rule of law). In *Rivera*, the Court concluded that an unfairly one-sided arbitration agreement was substantively unconscionable, and explicitly reversed our conclusion that the agreement was not one-sided, stating that we construed *Cordova* too narrowly. *See Rivera*, 2011-NMSC-033, ¶ 42. Thus, to the extent that Defendant disagrees with our analysis, and argues that *Concepcion* governs, we are nonetheless bound by New Mexico Supreme Court precedent. *See State v. Manzanares*, 100 N.M. 621, 622, 674 P.2d 511, 512 (1983) (stating that we are bound by New Mexico Supreme Court precedent even when a United States Supreme Court decision seems contra).

Defendant further asserts that the district court's ruling is inconsistent with the dictates of the FAA because it requires "mutuality of obligation" for arbitration agreements, and mandates the "type" of consideration required for arbitration agreements. Defendant argues: "the FAA would preempt a judicial rule classifying as unconscionable contracts lacking symmetrical promises to arbitrate because such a rule would impose a special consideration requirement applicable solely and uniquely to arbitration agreements." Thus, Defendant contends that the substantive unconscionability analysis acts to treat arbitration agreements differently from other contracts, because we don't generally inquire into the adequacy of consideration to support a contract.

However, Defendant's argument fails to appreciate that consideration and unconscionability are two different analyses under contract law. Consideration is a prerequisite to the legal formation of a valid contract. *See Nance v. L.J. Dolloff Assocs., Inc.*, 2006-NMCA-012, ¶ 19, 138 N.M. 851, 126 P.3d 1215 ("To be legally enforceable[, a contract must have] an offer, acceptance, consideration, and mutual assent."); *Smith v.*

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[3] *See Brewer v. Mo. Title Loans*, No. SC 90647, 2012 WL 716878, at *4 (Mo. Mar. 6, 2012) (en banc) ("Although the majority [in *Concepcion*] held that the *Discover Bank* rule was preempted by the [FAA], it does not follow, as the title company contends, that all state law unconscionability defenses are preempted by the [FAA] in all cases. . . . consistent with the stated issue in *Concepcion*, the Supreme Court's holding was expressly limited to finding that California's *Discover Bank* rule is preempted by the [FAA]." (internal quotation marks and citations omitted)); *Palmer v. Infosys Techs. Ltd.*, No. 2:11cv217-MHT, 2011 WL 5434258, at *4-5 (M.D. Ala. Nov. 9, 2011) (stating that California's rule to invalidate arbitration agreements where a "lack of mutuality" exists on the grounds of substantive unconscionability survives the ruling of *Concepcion*, because it "does not interfere with fundamental attributes of arbitration and is not preempted by the FAA." (alteration, internal quotation marks, and citation omitted)); *Mission Viejo Emergency Med. Assocs. v. Beta Healthcare Group*, 128 Cal. Rptr. 3d 330, 339 n.4 ("Defendants appear to argue that [*Concepcion*] essentially preempts all California law relating to unconscionability. We disagree, as the case simply does not go that far. General state law doctrine pertaining to unconscionability is preserved unless it involves a defense that applies only to arbitration or that derives its meaning from the fact that an agreement to arbitrate is at issue." (alteration, internal quotation marks, and citation omitted)); *Kanbar v. O'Melveny & Myers*, No. C-11-0892 EMC, 2011 WL 2940690, at *6 (N.D. Cal. July 21, 2011) (rejecting the defendant's assertion that *Concepcion* precludes a challenge to an arbitration agreement on the grounds of unconscionability, and concluding that arbitration agreements are still subject to unconscionability analysis in spite of the ruling in *Concepcion*).

Vill. of Ruidoso, 1999-NMCA-151, ¶ 33, 128 N.M. 470, 994 P.2d 50 ("Consideration is essential to the enforcement of a promise."). Unconscionability, on the other hand, "is an *equitable* doctrine, rooted in public policy, which allows courts to render unenforceable an agreement that is unreasonably favorable to one party while precluding a meaningful choice of the other party." *Cordova*, 2009-NMSC-021, ¶ 21 (emphasis added).

New Mexico law does not equate adequate consideration with a conscionable contract. As *Fraser v. State Savings Bank*, states:

> Mere inadequacy of price, or any other inequality in a bargain, we are told, is not to be understood as constituting per se a ground to avoid a bargain in equity. For courts of equity, as well as courts of law, act upon the ground that every person who is not . . . under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargain be wise and discreet or otherwise, or profitable or unprofitable, are considerations not for the courts of justice, but for the party himself to deliberate upon. . . . Still there may be such unconscionableness or inadequacy of consideration in a bargain, as to demonstrate some gross imposition or some undue influence; and in such case, courts of equity ought to interfere, upon satisfactory ground of fraud.

18 N.M. 340, 355-56, 137 P. 592, 596 (1913). Unconscionability is examined by the court where, in spite of adequate consideration to support a contract, the unfair terms of the contract do not warrant enforcement. *See Rivera v. Rivera*, 2010-NMCA-106, ¶¶ 20-26, 149 N.M. 66, 243 P.3d 1148 (concluding that a premarital agreement was valid, but unenforceable as unconscionable, because the agreement restricted the husband's right to spousal support, and was therefore against the public policy of our state), *cert. denied*, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146; *Manzano Indus., Inc. v. Mathis*, 101 N.M. 104, 104, 678 P.2d 1179, 1179 (1984) ("This Court has, however, refused to enforce the literal terms of such [otherwise enforceable] contracts when to do so would work an unfairness which shocks the conscience of the court."); *Smith & Lowe Constr. Co. v. Herrera*, 79 N.M. 239, 240, 442 P.2d 197, 198 (1968) ("[C]ourts generally allow rescission of [a subcontractor's] contract without forfeiture of the bid bond where it appears that . . . the mistake was of such grave consequence that to enforce the contract would be unconscionable" and the mistake was material, not committed negligently or in bad faith, reasonable notice was given, and no serious prejudice would occur to the offeree); *Pugh*, 37 N.M. at 131, 19 P.2d at 318 (stating that contracts will not be enforced that are unconscionable, and "[h]owever valid or legal a contract may be in its execution, he who comes into a court of equity asking its enforcement and seeking equity must at all times be willing to do equity"); *Fraser*, 18 N.M. at 355-56, 137 P. at 596; *see also Motsinger v. Lithia Rose-FT, Inc.*, 156 P.3d 156, 163 (Or. Ct. App. 2007) ("In our view, however, it is possible for a contractual term to be supported by adequate consideration and yet still be so unreasonable as to be unconscionable in the context of a contract of adhesion.").

We find further support for the separate treatment of unconscionability and

consideration in the Supreme Court's analysis of the arbitration agreement in *Cordova*. There, the Court concluded that the consideration to support the contract was not illusory, and therefore, the proper analysis of the alleged unfair terms should be examined "through the framework of a traditional unconscionability analysis." *Cordova*, 2009-NMSC-021, ¶ 16. In spite of the existing consideration to support the agreement, the Court concluded that the terms were unfairly and unreasonably one-sided, and thereby, substantively unconscionable. *See id.* ¶¶ 16, 32.

Thus, because unconscionability and consideration are different analyses under New Mexico law, we disagree with Defendant's contention that our unconscionability analysis equates to a disparate treatment of arbitration agreements. Consideration to support the arbitration agreement is not the issue. Rather, the district court's ruling is predicated on the agreement's unenforceability under the equitable doctrine of substantive unconscionability.

We inquire, on an equal basis for all contracts, whether terms of a contract are so unfairly unequal as to prevent enforcement of the contract under the equitable doctrine of unconscionability. *See, e.g., Bowlin's, Inc. v. Ramsey Oil Co.*, 99 N.M. 660, 668, 662 P.2d 661, 669 (Ct. App. 1983) (discussing substantive unconscionability as applied to all contracts, stating that it applies to "contract clauses which are illegal or contrary to public policy" and that "'[u]nconscionability has generally been recognized to include . . . contract terms which are unreasonably favorable to the other party,'" (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965))); *Nearburg v. Yates Petroleum Corp.*, 1997-NMCA-069, ¶ 31, 123 N.M. 526, 943 P.2d 560 ("A court should thus not interfere with the bargain reached by the parties unless the court concludes that the policy favoring freedom of contract ought to give way to one of the well-defined equitable exceptions, such as unconscionability, mistake, fraud or illegality."). Equal application of a generally applicable contract defense does not violate the FAA. *See Cordova*, 2009-NMSC-021, ¶¶ 36-37; *see also Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 771 (Cal. 2000) ("We disagree that enforcing a 'modicum of bilaterality' in arbitration agreements singles out arbitration for suspect status. . . . the ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context. One such form is an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party."). Accordingly, we conclude that our unconscionability analysis does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of [the FAA]." *See Concepcion*, ___ U.S. at ___, 131 S. Ct. at 1753 (internal quotation marks and citation omitted). We therefore turn to address Defendant's argument that the district court erred in ruling that Defendant's mandatory arbitration agreement is substantively unconscionable.

B. Unconscionability of the Arbitration Agreement

Unconscionability "can be analyzed from both procedural and substantive perspectives." *Cordova*, 2009-NMSC-021, ¶ 21. Substantive unconscionability concerns the "legality and fairness of the contract terms themselves," including "whether the contract terms are commercially reasonable and fair,

the purpose and effect of the terms, the one-sidedness of the terms, and other similar public policy concerns." *Id.* ¶ 22. Procedural unconscionability, on the other hand, "examines the particular factual circumstances surrounding the formation of the contract, including the relative bargaining strength, sophistication of the parties, and the extent to which either party felt free to accept or decline terms demanded by the other." *Id.* ¶ 23.

"While there is a greater likelihood of a contract's being invalidated for unconscionability if there is a combination of both procedural and substantive unconscionability, there is no absolute requirement in our law that both must be present to the same degree or that they both be present at all." *Id.* ¶ 24. Thus, our courts have concluded that where an agreement is so one-sided that the substantive unconscionability is apparent on the face of the contract, analysis of the procedural unconscionability of the formation of the contract is unnecessary to establish that the contract is unconscionable. *See id.* ¶¶ 32-34 (concluding that an arbitration provision that gave no judicial remedies to the consumer while reserving the right to take almost all of the claims the lender would have to court was one-sided, and stating "the substantive unconscionability of these one-sided arbitration provisions is so compelling that we need not rely on any finding of procedural unconscionability"); *Rivera*, 2011-NMSC-033, ¶ 54 (same). Likewise, here, only the substantive unconscionability of the one-sided terms of the agreement are at issue. We review issues relating to the unconscionability of an arbitration agreement de novo. *See Cordova*, 2009-NMSC-021, ¶ 11 (providing that review of a district court's denial of a motion to compel arbitration, review of the applicability and construction of a contractual provision requiring arbitration, and whether a contract is unconscionable are all issues of law which are reviewed de novo).

Our Supreme Court invalidated arbitration agreements that were unfairly and unreasonably one-sided in favor of the drafter in *Cordova* and in *Rivera*. In *Cordova*, the Court invalidated an arbitration agreement in a loan contract. The provision required that the parties arbitrate all their claims, but in the event of a default, the lender was entitled to "seek its remedies in an action at law or in equity, including but not limited to, judicial foreclosure or repossession." *Cordova*, 2009-NMSC-021, ¶ 4 (internal quotation marks omitted). The Court concluded that the arbitration scheme was "self-serving" to the lender and was "so unfairly and unreasonably one-sided that it [was] substantively unconscionable." *Id.* ¶ 32.

Likewise, in *Rivera*, the Court addressed the substantive unconscionability of an arbitration agreement in a car title loan contract that required the borrower to arbitrate any claims that she might have against the lender, but exempted from arbitration the lender's "self-help or judicial remedies including, without limitation, repossession or foreclosure." 2011-NMSC-033, ¶ 3 (internal quotation marks omitted). When the case was in the Court of Appeals, we concluded that the clause was not "completely one-sided," because some claims of the lender would be required to be arbitrated, and the exemptions from arbitration were related to highly statutorily regulated causes of action, and therefore, the agreement to arbitrate was not substantively unconscionable. *See Rivera v. Am. Gen. Fin. Servs., Inc.*, 2010-NMCA-046, ¶¶ 9-13, 148 N.M. 784, 242 P.3d 351, *rev'd by* 2011-NMSC-033. The case was appealed to our Supreme Court, and although it was

unnecessary to the disposition of the case, the Court addressed the unconscionability of the agreement because it wanted to correct this Court's "overly narrow construction on New Mexico's unconscionability jurisprudence and [misapplication] of [the Supreme Court's] holding in *Cordova*." *Rivera*, 2011-NMSC-033, ¶ 1. The Supreme Court explicitly reversed our ruling in *Rivera*, stating that "complete one-sidedness" is not required for the terms of a contract to be substantively unconscionable. *See id.* ¶¶ 39-54 (alteration, internal quotation marks, and citation omitted). The Court reasoned that, in spite of the lender's bilateral obligation to arbitrate certain claims, the arbitration agreement was, in effect, unfairly and unreasonably one-sided in favor of the lender. *See id.* ¶¶ 53-54. The Court stated: "By excepting foreclosure and repossession from arbitration, [the lender] retained the right to obtain through the judicial system the only remedies it was likely to need." *Id.* ¶ 53. Thus, the Court concluded that the lender's ability "to seek judicial redress of its likeliest claims while forcing [the borrower] to arbitrate any claim she may have is unreasonably one-sided." *Id.*

The arbitration agreement signed on behalf of Ms. Figueroa exempts: "guardianship proceedings, collection and eviction actions initiated by the Health Care Center, any dispute where the amount in controversy is less than Two Thousand Five Hundred Dollars ($2,500.00)." Defendant argues that the district court misinterpreted "collection actions" to mean suits against a resident for fees, because in drafting the clause, Defendant meant that exemption to be construed solely to the "enforcement of judgments." Thus, Defendant asserts that the practical effect of the arbitration clause does not reserve its most likely claims for a judicial forum. Defendant asserts that "collection actions" must be construed as being limited to judgment enforcement actions because of its proximity between guardianship and eviction actions in the clause that Defendant asserts require judicial enforcement, like judgment enforcement actions; and because "any dispute" in the exemption for claims under $2,500 covers claims against residents for fees. We disagree with Defendant's construction of the arbitration agreement.

Terms in a contract are to be afforded their usual and ordinary meaning. *See H-B-S P'ship v. Aircoa Hospitality Servs., Inc.*, 2005-NMCA-068, ¶ 19, 137 N.M. 626, 114 P.3d 306. "Collect" is defined in the dictionary as "to present as due and receive payment for." *Webster's Third New Int'l Dictionary* 444 (unabridged) (2002); *see also Black's Law Dictionary* 180 (6th ed. 1991) (defining collect as "[t]o receive payment"). "Collection actions" in its usual and ordinary meaning is broader than enforcement of judgments. Had Defendant intended to limit the exclusion to actions for enforcement of a judgment, it could have narrowly drafted the agreement to refer to those specifically, instead of using the broader term "collection actions." *See Heye v. Am. Golf Corp.*, 2003-NMCA-138, ¶ 14, 134 N.M. 558, 80 P.3d 495 ("We construe ambiguities in a contract against the drafter to protect the rights of the party who did not draft it."). We therefore reject Defendant's argument that the district court erred in construing collection actions as including actions against a resident for fees.[4]

[4]We note that Judge Browning came to the same conclusion in *THI of New Mexico at Hobbs Center, LLC*, Civ. No. 11-537 LH/CG, 2012 WL 112216, at *20 (rejecting the same argument on the grounds that collection actions in its regular usage does not refer solely to enforcement of judgments, but rather, is a broader term and because judgment enforcement is a term of art that

Defendant asserts that even if the "collection actions" exemption is construed to include lawsuits against residents for fees, that this arbitration clause is distinguishable from those in *Rivera* and *Cordova* because they prevented the resident from bringing *any* claims to court. *See Rivera*, 2011-NMSC-033, ¶ 53; *Cordova*, 2009-NMSC-021, ¶ 27. Thus, Defendant asserts that residents' rights under the agreement to bring claims under $2,500 and guardianship proceedings in a judicial forum are sufficient to prevent this agreement from being egregiously one-sided, and that *Cordova* and *Rivera* do not require mirror obligations between the parties to arbitrate claims. We agree that *Cordova* and *Rivera* do not mandate equal obligations, and we recognize that in this case, the arbitration agreement can be construed to grant some rights to a judicial forum to the resident, unlike *Cordova* and *Rivera*. However, even assuming that the exclusions in the agreement allow residents to bring guardianship and claims under $2,500 in a judicial forum as Defendant contends, we conclude that these rights to a judicial forum do not sufficiently act to remedy the gross disparity that results from Defendant's reservation of its most likely claims to a judicial forum, while the resident's most likely claims are subject to arbitration.

First, we question when a circumstance could arise where the resident would have a guardianship action *against* the nursing home. *See Black's Law Dictionary* 776 (9th ed. 2009) (stating that "[a] guardianship is almost always an involuntary procedure imposed by the state on the ward[,]" and defining guardianship as "[t]he fiduciary relationship between a guardian and a ward or other incapacitated person, whereby the guardian assumes the power to make decisions about the ward's person or property"). If there are any, Defendant has failed to point the Court to them. Further, although the exemption from arbitration for claims under $2,500 grants some judicial rights to the resident, this bilateral right to a judicial forum is de minimis. Rather, the practical effect of this agreement is no different from *Cordova* and *Rivera*: the resident is precluded from bringing any claims that he or she would likely have, while the most likely claims the nursing home would have against the resident are excluded from arbitration.

Thus, we conclude that like the arbitration agreements in *Rivera* and *Cordova*, the arbitration agreement in this case is unreasonably and unfairly one-sided in favor of Defendant. While we agree that arbitration obligations do not have to be completely equal, and that parties may freely enter into reasonable agreements to exempt certain claims from arbitration, we refuse to enforce an agreement where the drafter unreasonably reserved the vast majority of his claims for the courts, while subjecting the weaker party to arbitration on essentially all of the claims that party is likely to bring. *See Rivera*, 2011-NMSC-033, ¶ 53. Defendant cannot avoid the equitable doctrine of unconscionability by drafting an agreement that reserves its most likely claims for a judicial forum, and provides some exemptions from arbitration to the resident so that there is some appearance of bilaterality, when that exemption is completely meaningless in practicality because the resident would rarely, if ever, raise that type of claim against the nursing

could have been used if the nursing home had intended to limit the exclusion to only those actions).

home. *See, e.g., Iwen v. U.S. W. Direct*, 1999 MT 63, ¶ 32, 293 Mont. 512, 977 P.2d 989 (concluding that an arbitration agreement that lacked mutuality of obligation, was one-sided, and contained terms that were unreasonably favorable to the drafter was unconscionable the court stated: "this does not mean arbitration agreements must contain mutual promises that give the parties identical rights and obligations, or that the parties must be bound in the exact same manner. This simply restates the rule of law that disparities in the rights of the contracting parties must not be so one-sided and unreasonably favorable to the drafter, as they are in this case, that the agreement becomes unconscionable and oppressive").

In further support of its claim, Defendant asserts that Plaintiff failed to present evidence that the arbitration agreement exempts the most likely claims Defendant would bring against a resident. We conclude that the inference that guardianship, collection, and eviction proceedings would be the most likely claims of the nursing home is self-evident. These claims are, by definition, more likely to be initiated by the nursing home against the resident, as they involve proceedings that are incident to the nursing home's relationship with its resident tenants. *See generally* NMSA 1978, § 47-8-3(G) (1999) ("'[E]viction' means any action initiated by the owner to regain possession of a dwelling unit and use the premises under terms of the Uniform Owner-Resident Relations Act."); *Black's Law Dictionary* 635 (9th ed. 2009) (defining eviction as "[t]he act or process of legally dispossessing a person of land or rental property"); NMSA 1978, § 45-5A-102(F) (2011) (effective January 1, 2012) (" '[G]uardianship proceeding' means a judicial proceeding in which an order for the appointment of a guardian is sought or has been issued.")[5]; *Webster's Third New Int'l Dictionary, supra,* at 444 (defining "collect" as "to present as due and receive payment for"). Common sense dictates that the most likely claims Defendant would have against a resident would be related to its provision of services to that resident: i.e., the collection of fees for services through guardianship proceedings and collection actions, and the procedure for discontinuing those services through eviction. We therefore reject Defendant's contention that the lack of evidence pertaining to the likelihood of Defendant bringing the exempted claims requires reversal of the district court's ruling.

Defendant also argues that the agreement is not unfairly one-sided because it is subject to arbitration on many potential lawsuits it could have against the resident, including the following: (1) tort actions against a resident to recover money damages for negligent or intentional destruction of facility property or injury to other residents or staff; (2) claims for contribution or equitable indemnification arising from tort injuries inflicted by residents on other residents; (3) malicious abuse of process; (4) declaratory judgment to adjudicate resident rights and for injunctive relief; and (5) defamation actions. Despite Defendant's argument that it is conceivable that some claims could be brought by the nursing home that would be subject to arbitration, we reiterate that the agreement nonetheless exempts the *most likely* claims

[5]Defendant points out in its brief that "the Facility pursues fee collections through the formation of a deceased resident's estate or through guardianship proceedings (to obtain Medicaid payments)."

that the nursing home would have against a resident at its facility: guardianship proceedings, collection actions, and evictions. These bilateral obligations that both parties may have to arbitrate certain types of claims do not act to rescind the gross disparity in reservation of the nursing home's *most likely claims* to a judicial forum, while subjecting the resident's most likely claims to arbitration. *See Cordova*, 2009-NMSC-021, ¶ 25 ("Contract provisions that unreasonably benefit one party over another are substantively unconscionable."). As was the case in *Rivera*, where the lender is subject to arbitration for some claims, but exempts those claims it is "likely to need," the agreement is unconscionable as unfairly and unreasonably one-sided. *See Rivera*, 2011-NMSC-033, ¶ 53.

Defendant further argues that the arbitration clause was drafted to exclude guardianship proceedings, collection actions, and evictions because those actions result in remedies that a court must enforce, and because small claims are not cost-effective in arbitration. Therefore, Defendant argues that the clause was drafted to exclude claims from arbitration that are better suited to a judicial forum. However, our Supreme Court rejected a similar proposition in *Rivera*. 2011-NMSC-033, ¶ 51. When *Rivera* was before this Court, we had concluded that because judicial foreclosure and repossession were highly statutorily regulated, it was reasonable for the lender to exempt those proceedings from arbitration in order to maintain statutory protections as a secured creditor. *See id.* ¶ 50. However, our Supreme Court reversed, stating: "As a matter of law arbitrators have broad authority and are deemed capable of granting any remedy necessary to resolve a case," and that "an arbitrator can be given the authority to address any claims a lender may have against a borrower." *Id.* ¶¶ 51-52; *see also* NMSA 1978, § 44-7A-22 (2001) (providing that an arbitrator may award punitive damages, attorney fees and costs, and all other remedies the arbitrator deems "just and appropriate"); NMSA 1978, § 44-7A-23 (2001) (providing that a party may make a motion to the court to confirm an award of the arbitrator). Likewise, here, the assertion that claims might be better suited to a judicial forum does not justify a grossly one-sided arbitration agreement, when an arbitrator can be given the authority to address those claims, and judicial enforcement can be invoked for any remedy granted by the arbitrator.

Finally, Defendant asserts that even if the arbitration agreement is unconscionable on the grounds of its one-sided terms; the agreement was supported by other consideration and is therefore enforceable. Defendant argues that it gave alternate consideration in allowing Ms. Figueroa's admission to the nursing home in exchange for her promise to arbitrate, and thus, the fact that mutual promises to arbitrate were not given by both parties is immaterial. However, we reiterate that the unconscionability analysis is a separate matter from whether consideration existed to support the *legal formation* of a contract. Rather, unconscionability voids a contract when it is unfair and grossly unreasonable, even if otherwise legally enforceable under contract formation principles. *See Cordova*, 2009-NMSC-021, ¶¶ 16, 21 (applying equitable doctrine of unconscionability in spite of consideration to support the contract). Thus, the existence of alternative consideration to support the agreement is immaterial under these circumstances, because the arbitration agreement is unenforceable for its inequitable

unfairness to the resident, not for lack of consideration.

We recognize Defendant's argument that other jurisdictions do not inquire into the substantive unconscionability of the terms of an arbitration agreement, provided there is adequate consideration to support the agreement. *See Motsinger*, 156 P.3d at 162-63 (noting other jurisdictions follow a contrary approach and stating that "[a] number of courts—if not a majority—have rejected challenges of unconscionability, based on the theory that agreements to arbitrate do not require 'mutuality of obligation' but only adequate consideration; that is, as long as the agreement is supported by adequate consideration, the arbitration clause need not apply equally to both parties" (internal quotation marks omitted) (citing *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 183 (3d Cir. 1999); *Blue Cross Blue Shield of Ala. v. Rigas*, 923 So. 2d 1077, 1091 (Ala. 2005); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1255 (Colo. App. 2001); *State ex rel Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mo. 2006) (en banc); *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 757 (Tex. 2001)). In spite of other jurisdictions' approaches to the issue, our Supreme Court has spoken, and has explicitly stated that New Mexico courts will not enforce unfairly one-sided agreements under our equitable doctrine of unconscionability. *Cordova*, 2009-NMSC-021, ¶ 25. We therefore decline to follow these other jurisdictions' approaches to the *application* of substantive unconscionability that is inconsistent with our own. We conclude that the district court accurately applied the holdings of *Cordova* and *Rivera* to this case and appropriately concluded that the terms of this arbitration agreement were unfairly and unreasonably one-sided and thereby, substantively unconscionable.

C. Severability of the Arbitration Provision

Defendant next argues that even if we affirm the district court's ruling that the "collection" portion of the arbitration agreement is substantively unconscionable, the agreement's savings clause should act to sever and enforce the remainder of the arbitration agreement, including the portion that bilaterally subjects the nursing home and the resident's tort claims to arbitration. The Arbitration Agreement's "savings clause" states: "In the event a court having jurisdiction finds any portion of this Agreement unenforceable, that portion shall not be effective and the remainder of the Agreement shall remain effective."

Defendant did not preserve its argument that the arbitration agreement could be severed from the provisions that were unconscionable. However, Defendant argues that we should address the argument in spite of the lack of preservation because it is a matter of widespread public interest. *See Andrews v. Saylor*, 2003-NMCA-132, ¶ 25, 134 N.M. 545, 80 P.3d 482 (reviewing a matter that was not preserved, but was a matter of "general public interest" (internal quotation marks and citation omitted)). We agree.

When a provision of a contract is deemed unconscionable, "we may refuse to enforce the contract, or we may enforce the remainder of the contract without the unconscionable clause, or we may so limit the application of any unconscionable clause as to avoid any unconscionable result." *See Fiser*, 2008-NMSC-046, ¶ 24 (alterations, internal quotation marks, and citation omitted). In *Cordova* and *Rivera*, the Court concluded that the one-sided arbitration provisions were

central to the overall arbitration scheme, and therefore, could not be severed from the arbitration provisions so as to save the parties' general agreement to arbitrate. *Rivera*, 2011-NMSC-033, ¶ 56; *Cordova*, 2009-NMSC-021, ¶ 40. The Court stated in *Cordova*: "we must strike down the arbitration clause in its entirety to avoid a type of judicial surgery that inevitably would remove provisions that were central to the original mechanisms for resolving disputes between the parties." 2009-NMSC-021, ¶ 40.

Here, like the arbitration clauses in *Cordova* and *Rivera*, the exemptions of certain claims from arbitration are so central to the agreement that they are incapable of separation from the agreement to arbitrate, irrespective of any savings clause included in the agreement. *See Rivera*, 2011-NMSC-033, ¶ 56; *Cordova*, 2009-NMSC-021, ¶ 40. Were we to adopt Defendant's suggested severance, it would circumvent our application of the equitable doctrine of unconscionability. The unconscionability of the arbitration clause subjects claims to arbitration that the nursing home resident would most likely bring, while allowing the nursing home's most likely claims to go to court. *Cordova*, 2009-NMSC-021, ¶ 25. Thus, the unbalanced terms of the arbitration agreement, in whole, cause the unfairness and unconscionability of the arbitration agreement. Severing this clause and requiring Plaintiff to arbitrate because this particular claim is bilateral to both parties, but unlikely to be brought by Defendant, would perpetuate the unfairness for which we impose the equitable unconscionability defense. We decline to do so.

Defendant argues that even if *Cordova* applies to prevent severance of the unconscionable provisions, the agreement should still be enforced under the savings clause because *Cordova* was not decided until 2009, one year after the arbitration agreement had been signed by the parties. We are required to presume that judicial decisions in civil cases apply retroactively, unless the case announcing the new rule states that it should only be applied prospectively, or the presumption of retroactivity is overcome. *Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, ¶ 26, 149 N.M. 162, 245 P.3d 1214. To overcome the presumption, a three-factor test is used: (1) the decision must establish a new principle of law or decide an issue of first impression, *id.* ¶ 27, (2) the Court must "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation," *id.* ¶ 28 (internal quotation marks and citations omitted), and (3) the Court must consider "the inequity imposed by retroactive application, for where a decision of [the] Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Id.* ¶ 29 (internal quotation marks and citations omitted).

Cordova did not create new law, but rather, applied the well-settled equitable doctrine of unconscionability to a contract, and clarified our standard for substantive unconscionability. *See Cordova*, 2009-NMSC-021, ¶ 32 ("Applying the settled standards of New Mexico unconscionability law, we conclude that [the arbitration scheme] is so unfairly and unreasonably one-sided that it is substantively unconscionable."). No new rule was created in *Cordova* as to the severance of terms of a contract. *See id.* ¶ 40 (distinguishing the severance from *Padilla*, 2003-NMSC-011, ¶¶ 10, 18, and likening the severance to *Fiser*, 2008-NMSC-046, ¶ 24).

Thus, without considering the other factors of the test to overcome the presumption, we conclude that Defendant has failed to establish that retroactivity is at issue in the application of settled law to an arbitration agreement. *See Gomez v. Chavarria*, 2009-NMCA-035, ¶¶ 12-14, 146 N.M. 46, 206 P.3d 157 (rejecting the plaintiff's argument that an interpretation of a statute should not apply retroactively to his case because we concluded that the judicial decision did not constitute a new rule).

III. CONCLUSION

The judgment of the district court is affirmed.

IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

TIMOTHY L. GARCIA, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-028

Filing Date: June 13, 2013

Docket No. 33,203

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

NORMAN DAVIS,

Defendant-Respondent.

Gary K. King, Attorney General
Martha Anne Kelly, Assistant Attorney General
Santa Fe, NM

for Petitioner

Bennett J. Baur, Acting Chief Public Defender
Allison H. Jaramillo, Assistant Appellate Defender
Santa Fe, NM

for Respondent

OPINION

MAES, Chief Justice.

Defendant Norman Davis was indicted for possession of marijuana of eight ounces or more, a fourth degree felony, contrary to NMSA 1978, Section 30-31-23(A) and (B)(3) (2011), and possession of drug paraphernalia, a misdemeanor, contrary to NMSA 1978, Section 30-31-25.1(A) (2001). These charges resulted from the New Mexico State Police Operation "Yerba Buena 2006" aimed at marijuana eradication in the remote area of Carson Estates in Taos County.

Defendant filed a motion to quash the search warrant and suppress the marijuana and paraphernalia seized. The trial court denied the motion and the Court of Appeals reversed. We granted certiorari to address whether the Court of Appeals erred in overruling the trial court's dismissal of Defendant's motion to suppress because there was substantial evidence to support the trial court's finding that Defendant voluntarily consented to the search of his home.

I. FACTS AND PROCEDURAL HISTORY

The New Mexico State Police, assisted by New Mexico Game and Fish officers, the New Mexico National Guard, and the Region III Narcotics Task Force, utilized two army 0H 58 Jet Ranger helicopters and two ground teams to execute Yerba Buena. The helicopters were intended to spot possible marijuana plantations from the air, guide the ground teams into the area to confirm or to deny the observation, and provide cover and safety for the ground officers. After being alerted by one of the helicopters to the presence of a greenhouse and vegetation in Defendant's backyard, around six or seven law enforcement officers, armed with their semi-automatic service weapons, and several government vehicles created a secured premise around Defendant's property. The helicopter hovered above Defendant's home between the height of 50-500 feet.

Defendant, seventy-two years old, was at home because he was not feeling well. Bothered by the racket of the helicopter, Defendant got out of bed to see what was going on.

Only Officer William Merrell approached Defendant, who was standing outside of his home. Defendant asserts that Officer Merrell "confronted" him while holding a rifle and side arm. There is no evidence on record that any officer ever unholstered his weapon. Officer Merrell's belt tape recorded the conversation. Officer Merrell identified himself and stated that the helicopter had identified marijuana on Defendant's property. Officer Merrell asked permission to search the residence, and Defendant asked what would happen if he said no. Officer Merrell responded that if Defendant refused to allow the search, the officers would secure the residence and that the decision was up to Defendant. Officer Merrell again asked to search Defendant's residence, and said, "wait guys, hold on" to the other officers on the property. Defendant then responded, "sure" and then "it looks like they are searching anyways." Officer Merrell responded that the officers were not yet searching, rather that they were there for safety and if given permission to search, Officer Merrell would provide Defendant with a consent form. Defendant then admitted that he was growing marijuana.

Officer Merrell provided Defendant with

a consent form and asked him to sign it. Defendant responded "I'm not really thrilled about you searching my house" and "I don't know if I should do this; I don't know if it is in my best interest." Officer Merrell told Defendant that this was a decision he would need to make and he could not make it for Defendant. Defendant asked what would happen if he did not sign the consent form and Officer Merrell responded that he "would go forth and try to execute a warrant through the district attorney's office" which would take about 30 minutes. Defendant said, "Well I guess I don't really have any options here do I?" Officer Merrell did not respond. Defendant then signed the consent form. The consent form contained language that Defendant was informed of his "constitutional right not to have a search made of his premises . . . without a search warrant" and his right to refuse to consent to the search.

Officer Merrell's tone was mild throughout the conversation and Defendant's tone was equally conversational. During the initial conversation, Officer Merrell told Defendant at least three times that the decision to consent was strictly Defendant's. The entire encounter, including the search and seizure, lasted approximately one hour. As a result of the search, officers seized fourteen marijuana plants growing in the greenhouse and both an undisclosed amount of marijuana and paraphernalia from the home.

Defendant filed a motion to quash the subpoena and suppress the marijuana and paraphernalia seized. Defendant asserted that his consent to search was not voluntary and his state and federal constitutional rights were violated before consent was given. The trial court denied the motion and Defendant appealed. The Court of Appeals, addressing only the issue of Defendant's consent, concluded that although his consent was specific and unequivocal, the State failed to provide substantial evidence that Defendant's consent was voluntary and the trial court failed to consider the totality of circumstances. *State v. Davis*, 2011-NMCA-102, ¶ 13, 150 N.M. 611, 263 P.3d 953 (citing *State v. Flores*, 1996-NMCA-059, ¶ 20, 122 N.M. 84, 920 P.2d 1038).

The State appealed to this Court. We granted certiorari to address whether the Court of Appeals erred in overruling the trial court's dismissal of Defendant's motion to suppress because the State argues there was substantial evidence to support the trial court's finding that Defendant voluntarily consented to the search of his home.

II. STANDARD OF REVIEW

The voluntariness of consent is a factual question in which the trial court must weigh the evidence and decide if it "is sufficient to clearly and convincingly establish that the consent was voluntary." *State v. Anderson*, 107 N.M. 165, 167-68, 754 P.2d 542, 544-45 (Ct. App. 1988). Factual questions are viewed under a substantial evidence standard, and the application of law to the facts de novo. *State v. Neal*, 2007-NMSC-043, ¶ 15, 142 N.M. 176, 164 P.3d 57. In conducting such a review, "[t]he question is whether the [trial] court's decision is supported by substantial evidence, not whether the trial court could have reached a different conclusion." *In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 15, 121 N.M. 562, 915 P.2d 318 (internal citation omitted)

III. DISCUSSION

The State asserts that Defendant's consent satisfies the test for voluntary consent

as articulated in *Anderson*, 107 N.M. 165 at 167, 754 P.2d at 544. The State agrees with the Court of Appeals that Defendant's consent was specific and unequivocal. However, the State argues that substantial evidence supports the trial court's finding that Defendant did not simply acquiesce to a showing of lawful authority. Instead of deferring to the trial court's finding of facts, the State asserts that the Court of Appeals engaged in its own fact-finding, contrary to its responsibility of review under a substantial evidence standard.

Defendant argues that his consent was not voluntary. Because of the number of armed officers and the presence of the helicopter, he claims he was merely acquiescing to a showing of lawful authority, which *State v. Shaulis-Powell*, 1999-NMCA-090, ¶ 10, 127 N.M. 667, 986 P.2d 463 held does not constitute valid consent. Defendant claims that the Court of Appeals applied the correct standard of review and properly considered the totality of the circumstances, while the trial court did not consider the totality of the circumstances and instead selectively picked facts to make its determination.

The voluntariness of consent is a factual question in which the trial court must weigh the evidence and decide if it is sufficient to clearly and convincingly establish that the consent was voluntary. *Anderson*, 107 N.M. at 167-68, 754 P.2d at 544-45. The State has the burden of proving that, under the totality of the circumstances, consent to search was given freely and voluntarily. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973); *State v. Flores*, 2008-NMCA-074, ¶ 13, 144 N.M. 217, 185 P.3d 1067.

Courts utilize a three-tiered analysis when determining voluntariness: "(1) there must be clear and positive testimony that the consent was specific and unequivocal; (2) the consent must be given without duress or coercion; and (3) the first two factors are to be viewed in light of the presumption that disfavors the waiver of constitutional rights." *Anderson*, 107 N.M. at 167, 754 P.2d at 544 (citations omitted). Because the third prong is an acknowledgment of our presumption against waiving constitutional rights, we focus on the first two prongs. "Ultimately, the essential inquiry is whether [d]efendant's will has been overborne." *State v. Pierce*, 2003-NMCA-117, ¶ 20, 134 N.M. 388, 77 P.3d 292 (internal citation omitted).

A. Defendant gave specific and unequivocal consent

The Court of Appeals concluded "that substantial evidence supports the [trial] court's findings that Defendant's oral and written consent to a search of his property was specific and unequivocal at the time it was given to Officer Merrell." *Davis*, 2011-NMCA-102, ¶ 14. We agree.

Specific and unequivocal consent can be given in a variety of ways. For example, in *United States v. Pena*, the court held that an affirmative and direct oral response to an officer's request to search constituted specific and unequivocal consent. 143 F.3d 1363, 1367 (10th Cir. 1998) (holding that the defendant's response of "go ahead" following a request to search by an officer was unequivocal). More specifically, the clarity of a question and response can indicate specific and unequivocal consent. *State v. Muñoz*, 2008-NMCA-090, ¶ 20, 144 N.M. 350, 187 P.3d 696 (providing that where the Court found that the clarity of the officer's request, followed by the defendant's subsequent compliance by emptying his pockets and

removing his shoes, evidenced specific and unequivocal consent). A response without hesitation is yet another indication of an unequivocal response. *See, e.g.*, *State v. Chapman*, 1999-NMCA-106, ¶ 20, 127 N.M. 721, 986 P.2d 1122 (finding that the consent was unequivocal when the defendant admitted without hesitation to possessing certain items, and, following a request to search by the officer, responded affirmatively, exited the driver's seat and motioned to the trunk).

Evidence of oral consent can be established through testimony of the parties. *Id.* The testimony must be clear and positive in order to show specific and unequivocal consent. *State v. Valencia Olaya*, 105 N.M. 690, 694, 736 P.2d 495, 499 (1987).

The act of signing a consent to search form can also constitute specific and unequivocal consent. *See State v. Cohen*, 103 N.M. 558, 563, 711 P.2d 3, 8 (1985). In *State v. Lara*, 110 N.M. 507, 515, 797 P.2d 296, 304 (Ct. App. 1990), the Court of Appeals held that substantial evidence of such specific and unequivocal consent existed where the defendant responded without hesitation to questioning, provided a written statement and signed a form acknowledging he had been advised of his constitutional rights. *Id.*

In this case, the facts leading up to the search are largely undisputed. Officer Merrell requested and received Defendant's consent prior to searching. Defendant can be heard on Officer Merrell's belt tape giving oral consent to search his property by responding "sure" and "all right." Nothing in the record indicates that Defendant ever firmly objected to or protested Officer Merrell's request to search. Officer Merrell also provided clear testimony as to the purpose of the search and clarified that the officers did not begin searching until they received Defendant's consent.

There is clear testimony on the record constituting proof of Defendant's consent. Accordingly, Defendant's oral and written consent amounted to specific and unequivocal consent.

B. Defendant was not coerced into giving consent

The second tier of our analysis examines the voluntariness of Defendant's consent in the context of coercion. *Anderson*, 107 N.M. at 167-68, 754 P.2d at 544-45. The State argues that substantial evidence exists to support the trial court's finding that Defendant's consent was voluntary and it should be not disturbed on appeal. The State asserts that the Court of Appeals gave improper weight to the presence of a helicopter and the number of armed officers present because the Defendant himself never established that these things overbore his will.

Defendant argues that the Court of Appeals correctly held that the trial court did not consider the totality of the circumstances in determining the coerciveness of Defendant's consent because it ignored competent evidence of coercion. Defendant asserts that the presence of a helicopter, the number of armed officers, and his poor physical state created a coercive atmosphere and rendered his consent involuntary.

"Coercion involves police overreaching that overcomes the will of the defendant." *Chapman*, 1999-NMCA-106, ¶ 21 (internal citation omitted). Specific factors indicating coercion include the use of force, brandishing of weapons, threat of violence or arrest, lengthy and abusive questioning,

deprivation of food or water and promises of leniency in exchange for consent. *Id.* (citing *State v. Rudd*, 90 N.M. 647, 650-52, 567 P.2d 496, 499-501 (Ct. App. 1977)). However, the sheer number of officers or presence of weapons does not automatically generate coercion. *See United States v. Romero*, 743 F. Supp. 2d 1281, 1322 (D.N.M. 2010) (holding that the presence of five agents in and of itself does not render a citizen's consent coerced); *see also United States v. Drayton*, 536 U.S. 194, 204-05 (2002) (providing that the fact that officers are required to wear sidearms is well known to the public and is cause for assurance, thus the holstering of a weapon "is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon"). "[C]onsent is not voluntary if it is a mere acquiescence to a claim of lawful authority." *Shaulis-Powell*, 1999-NMCA-090, ¶ 10. When an officer unequivocally asserts that he will be able to obtain a warrant, a defendant's belief that refusal to consent would be futile demonstrates involuntary consent. *Id.* ¶ 11.

On the other hand, factors of voluntariness can include "the individual characteristics of the defendant, the circumstances of the detention, and the manner in which the police requested consent." *Pierce*, 2003-NMCA-117, ¶ 20 (internal citation omitted); *see also Muñoz*, 2008-NMCA-090, ¶ 20 (explaining that based on the officer's non-confrontational tone and demeanor, the defendant's subsequent compliance with the officer's requests was not coerced). Further, when an officer simply expresses his assessment of the situation, that explanation does not prevent a defendant from insisting that a warrant be obtained prior to searching. *Shaulis-Powell*, 1999-NMCA-090, ¶¶ 10-11 (holding that the officer's comments that he "believed" and "felt" he had enough evidence to secure a warrant were not coercive). Similarly, an officer's assurance to report a suspect's compliance to the district attorney's office does not constitute an improper promise. *See State v. Sanders*, 2000-NMSC-032, ¶ 10, 129 N.M. 728, 13 P.3d 460 (stating that "merely promising to bring a defendant's cooperation to the attention of the prosecutor is not objectionable"). A reasonable explanation of the possibility of arrest and the process that will follow, or an officer's belief in his or her ability to obtain a warrant is permissible and neither constitutes coercion or invalidates consent. *Shaulis-Powell*, 1999-NMCA-090, ¶¶ 11, 15.

As the trial court pointed out, this case is similar to the circumstances in *Shaulis-Powell*. In *Shaulis-Powell*, the Court of Appeals upheld the trial court's finding of voluntariness when officers came to the defendants' house to investigate the potential cultivation of marijuana. 1999-NMCA-090, ¶ 16. There, plain-clothed, armed officers approached defendants at their front door and requested permission to search for marijuana. *Id.* ¶¶ 3-5. One defendant asked whether they had a warrant, which one officer denied but responded that he "felt he had enough information to . . . secure one" and that if defendant did not give consent he would seek to obtain a warrant. *Id.* ¶ 4. The defendant consented. *Id.* ¶ 5. The Court determined that the officer's explanation of the warrant process was reasonable and not a threat. *Id.* ¶¶ 11, 14. Even so, an officer's threat to perform some legal action does not invalidate consent. *Id.* ¶ 14 (internal quotation marks and citation omitted). One *Shaulis-Powell* defendant also attempted to argue that because the officers had secured the premise around her home, she was seized in a coercive atmosphere. *Id.* ¶ 16. Unpersuaded, the Court

held that because defendant was free to come and go from the house, defendant was not seized and thus not coerced into giving consent. *Id.*

As in *Shaulis-Powell,* the officers in this case created a safety perimeter around the property but Defendant was still allowed to move about freely. *See Shaulis-Powell,* 1999-NMCA-090, ¶ 16. The *Shaulis-Powell* officer's belief in his ability to obtain a search warrant without the defendants' consent is similar to Officer Merrell's response that he would "try to obtain a search warrant" if Defendant refused to consent. *Id.* ¶ 11. This statement was a request and not a demand and can logically be construed as a reasonable explanation of the process an officer would follow after a defendant refused to consent to a search. Therefore, Officer Merrell's statement was not coercive.

We next address Defendant's argument that the mere presence of armed officers was enough to create coercion. In *Pena,* the Tenth Circuit found the circumstances to be noncoercive when four armed officers came to the defendant's motel room to search and question him. 143 F.3d at 1367. While the court acknowledged that the presence of several officers in a "home might be intimidating to the point of negating the voluntariness of consent in some situations" (citing *United States v. Davis,* 40 F.3d 1069, 1078 (10th Cir. 1994)), the mere presence of armed officers was not enough to create coercion. *Pena,* 143 F.3d at 1367. Only one officer actually spoke to the defendant, none of the officers unholstered their weapons, and all remained outside of the room until given permission by the defendant to enter. *Id.* The court stated there was no evidence that the officers conducted themselves in an unprofessional manner and thus the defendant's consent to search was not coerced. *Id.* In this case, similar to *Pena,* several armed officers arrived at Defendant's residence to search for marijuana. *Id.* In both situations only one officer approached the defendant. *See id.*; *Davis,* 2011-NMCA-102, ¶ 3. None of the officers in either case unholstered their weapons and all remained professional. *See Pena,* 143 F.3d at 1367. Additionally, the officers in both situations remained on the outskirts of the premises until given permission to enter. *Id.* Accordingly, the mere presence of armed officers was not enough to create coercion.

The Court of Appeals states that there was a valid reason for Defendant to believe his refusal to consent would be futile in this case because Officer Merrell's statement to the other officers to "hold on" was evidence that they had already started searching. *Davis,* 2011-NMCA-102, ¶ 19. However, the trial court found and the record shows that Officer Merrell testified that he had informed Defendant that his officers had not started searching but instead were setting up a perimeter for safety. Officer Merrell further testified that he told Defendant that the officers would only begin searching if Defendant signed a consent form. Accordingly because Officer Merrell directly addressed and corrected Defendant's belief, there was no valid reason for Defendant to believe his refusal to consent would be futile.

We next address cases finding clear coercion that are distinct from this case. The *Recalde* court illustrated a clear example of coercion in finding the defendant's consent to accompany two armed officers to another city was involuntary. *United States v. Recalde,* 761 F.2d 1448, 1453 (1985), *overruled on other grounds by United States v. Enriques-Hernandez,* 94 F.3d 656 (1996). At the time

of the requested consent, the officers had already searched the defendant's car trunk and luggage, taken and withheld his driver's license and registration, neglected to inform the defendant he was free to leave and the defendant himself testified he did not feel free to leave. *Id.* Additionally, the defendant was traveling alone in an isolated area and had been stopped in the middle of a rainstorm. *Id.* at 1453-54. The court held that these factors constituted a coercive atmosphere and rendered his consent involuntary. *Id.*

The Court of Appeals found clear evidence of coercion in *Pierce*. At the time the defendant gave consent, he had been detained for twenty minutes while sitting on a curb handcuffed, with two officers standing over him, subjecting him to searches of his car and person. 2003-NMCA-117, ¶ 21. The Court held that the defendant eventually "capitulated" to the officers' repeated requests for consent. *Id.* "[I]n light of the presumption that disfavors the waiver of constitutional rights" the Court was "unwilling to accept that Defendant's permission . . . was free from coercion and duress." *Id.*

Unlike *Recalde* and *Pierce*, Defendant was never detained. Instead, Defendant's initial conversation with Officer Merrell lasted about nine minutes. Defendant was in his own home and went to lie down after giving the officers permission to search, unlike in *Recalde* where the defendant was traveling alone in an isolated area, during a storm, and was unable to leave. *Recalde*, 761 F.2d at 1453-54. Defendant's situation is also distinguishable from *Pierce* where the defendant eventually capitulated to the officer's repeated questioning after he was detained for twenty minutes while handcuffed and forced to sit on a curb as the two officers stood over him. *Pierce,* 2003-NMCA-117, ¶ 21. In the case at bar, Defendant only spoke with one officer and was never arrested or physically restrained. Defendant never testified that he did not feel free to leave and in fact the testimony shows he was able to move about freely. While the Court of Appeals placed great significance on the presence of the police helicopter, the State argues, and we agree, that there is no evidence that the helicopter influenced Defendant's consent. In fact, the only testimony on record regarding Defendant's feelings about the helicopter was that he was bothered by the noise and had to get out of bed.

Further, Officer Merrell's belt tape shows the conversation between him and Defendant was calm and slow. Both Officer Merrell and Defendant used normal tones. Defendant did not express any feelings of fear or pressure. While Defendant did vacillate between whether or not to consent to the search, Officer Merrell informed Defendant several times that he was not required to provide consent. Defendant orally consented and physically signed a consent to search form which again advised him of his rights.

Finally, the defense argues that Defendant did not have sufficient capacity to consent that day because he was not feeling well. Defendant argues that the physical and mental condition of a defendant is relevant when determining whether consent was voluntary under *United States v. Harrison*, 639 F.3d 1273, 1278 (10th Cir. 2011) and *Pierce,* 2003-NMCA-117, ¶ 20. The trial court did however take Defendant's physical and mental condition into consideration when it determined that Defendant was "thoroughly cooperative, civil and peaceful" and "is an intelligent man with a greater than average storehouse of knowledge." Defendant's physical and mental ability to consent was yet

another factor that the trial court used to determine that his consent had not been coerced.

Therefore, substantial evidence does not exist to show that Defendant's will was overborne by any exertion of coercion by the officers to justify overturning the trial court's decision. Instead, a review of the record, under a totality of the circumstances analysis, suggests that the trial court's finding of voluntary consent should be upheld.

IV. CONCLUSION

We conclude that there was substantial evidence that Defendant voluntarily consented to the search and affirm the trial court's dismissal of Defendant's motion to suppress. We remand to the Court of Appeals for further proceedings consistent with this Opinion.

IT IS SO ORDERED.

PETRA JIMENEZ MAES, Chief Justice

WE CONCUR:

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-029

Filing Date: June 27, 2013

Docket No. 33,380

JAMES M. PALENICK,

Plaintiff-Respondent,

v.

CITY OF RIO RANCHO,

Defendant-Petitioner.

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OPINION

MAES, Chief Justice.

This appeal stems from the termination of Rio Rancho's City Manager, James Palenick (Palenick), and requires us to address the narrow issue of whether Palenick is estopped from pursuing a breach of contract claim against the City of Rio Rancho (the City) based on an alleged violation of the Open Meetings Act (OMA), NMSA 1978, Sections 10-15-1 to -4 (1974, as amended through 2009). We conclude that there is substantial evidence to support the district court's finding that Palenick waived his right to pursue a breach of contract claim against the City based on an alleged violation of the OMA. Because we conclude that Palenick waived his right to pursue a breach of contract claim, we need not decide whether there was in fact a violation of the OMA.

I. FACTS AND PROCEDURAL HISTORY

Palenick was hired by the City to serve as City Manager in November 2006. Palenick and the City entered into an employment agreement which provided that Palenick would be employed for an indefinite period of time and would serve at the pleasure of the City Council, the City's Governing Body. More specifically, the agreement provided that if Palenick was terminated without cause the City was required "to pay [Palenick] a lump sum cash severance payment equal to six (6) months [of Palenick's] aggregate salary and benefits, plus one month for each year in service as City Manager." Palenick was also entitled to compensation for all vacation time earned, holidays, personal annual leave, and all other benefits that he had accrued up until the date of termination. In the event that Palenick was terminated for cause, he was not entitled to any of the aforementioned benefits. According to the terms of the agreement, Palenick was to be exclusively employed by the City and was therefore prohibited from having additional employment unless he obtained prior approval from the City Council.

On December 13, 2006, the City Council held a meeting and voted to terminate Palenick's employment. On December 14, 2006, Palenick hand-delivered a letter to the City's Human Resources Department requesting his severance package as provided for in the employment agreement. The letter made no mention of the circumstances surrounding his termination. On December 21, 2006, Palenick sent a revised letter to the City's Human Resources Department in which he modified his original severance calculations, but did not mention anything about an OMA violation. Human Resources responded to the letters and informed Palenick

that as of December 13, 2006, he was no longer considered a City employee. Palenick did not object to the statements contained in this letter. The City then, pursuant to the employment agreement, paid Palenick his severance payment and all of the other benefits to which he was entitled. After December 13, 2006, Palenick did not perform any work for the City, and the City appointed a new City Manager. In August 2007, Palenick was hired to serve as City Manager for the City of Gastonia, North Carolina.

Shortly thereafter Jim Owen, the former Mayor of Rio Rancho, filed a complaint with the Attorney General's Office alleging that the City had violated the OMA when it terminated Palenick on December 13, 2006. The Attorney General's Office informed the City that the manner in which it terminated Palenick's employment violated the OMA and that the violation invalidated Palenick's termination. The Attorney General informed the City that, because of discussions regarding Respondent's employment status that predated the meeting on December 13, 2006, the City violated the OMA in terminating Respondent's employment at that meeting and that the violation invalidated the City Council's action terminating Respondent. The City Council held a meeting on November 14, 2007, and adopted a resolution to address the Attorney General's concerns. The resolution stated that "[i]f at all relevant, any and all prior actions undertaken in terminating [Palenick's] employment with the City and set forth in writing are hereby ratified and approved." By this resolution, the City Council intended to ratify and approve its prior action terminating Palenick's employment effective December 13, 2006.

Palenick sued the City alleging a violation of the OMA and for breach of contract seeking unpaid salary and benefits dating back to December 13, 2006, when Palenick was last paid by the City. After the bench trial on July 1, 2009, the district court issued its findings of facts and conclusions of law in which it concluded that the City's actions at the December 13, 2006 meeting had violated the OMA, but that the resolution adopted by the City Council on November 14, 2007 retroactively cured the OMA violation, and that Palenick's election to proceed with his demand for severance payments amounted to a waiver of his right to pursue a breach of contract action based on the City's OMA violation. Palenick subsequently filed a motion for a new trial which the district court denied. Palenick appealed to the Court of Appeals

The Court of Appeals held that "the district court erred in determining that the City's November 14, 2007, resolution retroactively rectified, ratified, and approved the invalid December 13, 2006, action taken in violation of the [OMA] thereby making the termination valid and effective as of December 13, 2006." *Palenick v. City of Rio Rancho*, 2012-NMCA-018,¶ 9, 270 P.3d 1281. The Court further held that "[u]nder these circumstances, [there was] no basis upon which [Palenick] should be barred on a waiver or estoppel ground" from pursuing a breach of contract claim; and that the City's failure to file a cross-appeal precluded the Court from addressing the issue regarding whether Palenick had established that there was in fact a violation of the OMA. *Palenick*, 2012-NMCA-018, ¶¶ 11-12.

We granted certiorari to address the following issues: (1) whether the Court of Appeals' holding that a public entity cannot give retroactive effect to the ratification of a prior act taken in violation of the OMA is

inconsistent with controlling precedent and statutory law; (2) whether the Court of Appeals' requirement that a prevailing party must file a notice of cross-appeal in order to raise alternative arguments in favor of affirming the district court is contrary to NMSA 1978, Section 39-3-2 (1966), Rule 12-201(C) NMRA, and New Mexico case law; and, (3) whether the Court of Appeals misapprehended the City's waiver by estoppel defense and further erred by applying the incorrect standard of review when determining whether the district court erred in its application of waiver by estoppel to Palenick's breach of contract claim. Accordingly, for the reasons that follow we reverse the Court of Appeals and hold that Palenick's demand and acceptance of the severance package from the City amounted to a waiver of Palenick's right to pursue claims against the City for its alleged violation of the OMA, as well as his right to bring a breach of contract claim for additional wages. Therefore, we need not address whether the OMA allows for a public entity to ratify prior actions, or whether Section 39-3-2, and Rule 12-201 (C) require a prevailing party to file a notice of cross-appeal in order to raise alternative arguments in favor of affirming the district court.

II. STANDARD OF REVIEW

Unless the facts are undisputed or clearly established, the question regarding whether a party intended to waive a right is ordinarily a question of fact. *See Chavez v. Gomez*, 77 N.M. 341, 345, 423 P.2d 31, 33 (1967). The City asserts that because the issue of waiver is a question of fact, and the facts in this case are in dispute, the Court of Appeals erred in reviewing this issue de novo. Palenick asserts that regardless of what standard of review applies, the Court of Appeals was correct in reversing the district court's order.

Here, the parties were in disagreement about the date of Palenick's termination, the effect that the termination had on Palenick's ability to collect wages from the City, and whether the City's November 14, 2007 actions cured the alleged OMA violation. The facts underlying the waiver by estoppel issue, however, are not in dispute. Therefore, we agree with the Court of Appeals that, in this case, the issue of waiver is a question of law subject to de novo review. *Crutchfield v. New Mexico Dep't of Taxation and Revenue*, 2005-NMCA-022, ¶ 28, 137 N.M. 26, 106 P.3d 1273 (providing that "[w]hen a party is challenging a legal conclusion, the standard for review is whether the law correctly was applied to the facts" (quoting *Golden Cone Concepts, Inc., v. Villa Linda Mall, Ltd.*, 113 N.M. 9, 12, 820 P.2d 1323, 1326 (1991)). Accordingly, we review de novo the issue regarding whether Palenick waived his right to challenge his termination.

III. DISCUSSION

The district court concluded that Palenick's demand for and acceptance of a severance payment waived his right to pursue a breach of contract claim against the City. The Court of Appeals reversed the district court's finding that Palenick had waived his right to any salary and benefits because he had demanded and received the severance payment when he was initially terminated. *Palenick*, 2012-NMCA-018, ¶ 11. In so doing, the Court held that "the circumstances [did] not permit a determination of waiver or relinquishment of a known right or waiver by estoppel." *Id.* The Court reasoned that because Palenick would have been entitled to severance benefits regardless of when he was

fired there [was] no basis to deny him his right to pursue a breach of contract claim. *Id.*

The City asserts that the crux of its waiver by estoppel argument is that Palenick's demand and acceptance of a severance payment is inconsistent with his assertion that he was still an employee after December 13, 2006, and that the Court of Appeals misunderstood its waiver by estoppel argument and that based on that misunderstanding it improperly reversed the district court. The City's argument, therefore, is that because Palenick's actions following the December 13, 2006 termination amounted to waiver by estoppel, it is not required to pay Palenick the salary and benefits that Palenick would have received had he been an employee during the period between December 13, 2006 and November 14, 2007.

Palenick appears to interpret the City's waiver argument as an attempt to prevent him from getting severance payments under the employment agreement. Palenick asserts that by making a demand for the severance payments he was alerting the City to his right to severance payments, not waiving it. Palenick further asserts that the City did not demonstrate that Palenick intended to waive his right to severance payments, and therefore the City's argument regarding waiver would require this Court to engage in unsupported guesswork.

Palenick has not accurately represented the City's assertions. The City has not asserted that Palenick waived all rights to severance payments. Rather, the City has asserted that Palenick waived his right to challenge his termination date by demanding and accepting his severance benefits. Palenick directs this Court's attention to the City's counterclaim to support his assertion that the City is attempting to prevent him from getting his severance package. In the City's counterclaim, however, the City asserts that Palenick is only able to receive severance payments upon termination, and that if the district court concludes that Palenick was not fired until November 14, 2007, then Palenick should be required to reimburse the City for the severance package, plus interest, that was paid to Palenick in December 2006. The City's counterclaim does not state that Palenick is not entitled to severance payments, but rather states that Palenick is not entitled to collect the severance payments in addition to a salary for the period spanning December 14, 2007 through November 14, 2007. Thus, the City's waiver by estoppel argument is based on the fact that Palenick demanded his severance payment at a time when he did not believe he was lawfully terminated. The City asserts that this claim amounted to a misleading representation on which the City relied to its detriment.

"Waiver is the intentional abandonment or relinquishment of a known right." *Gomez*, 77 N.M. at 345, 423 P.2d at 33 (internal citation omitted). "[E]stoppel depends only upon what one's conduct has caused another party to do[,]" and "is justified because the estopped party reasonably could expect that his actions would induce the reliance of the other party." *J.R. Hale Contracting Co. v. United N.M. Bank*, 110 N.M. 712, 716-17, 799 P.2d 581, 585-86 (1990). Our case law has explained waiver by estoppel as being "based upon either an actual waiver or certain 'expressions or conduct' where the reliance of the opposite party and his change of position justifies the inhibition to assert the obligation or condition." *Id.* at 717, 799 P.2d at 586. For a party "[t]o prove waiver by estoppel[,] the party need only show that he [or she] was misled to his [or her]

prejudice by the conduct of the other party into the honest and reasonable belief that such waiver was intended." *Id.* Therefore, the

> following facts must be established to support a claim of waiver by estoppel: (1) the party to be estopped made a misleading representation by conduct; (2) the party claiming estoppel had an honest and reasonable belief based on the conduct that the party to be estopped would not assert a certain right under the contract; and (3) the party claiming estoppel acted in reliance on the conduct to its detriment or prejudice.

Brown v. Taylor, 120 N.M. 302, 305-06, 901 P.2d 720, 723-24 (1995).

There is substantial evidence to support the district court's finding that Palenick made a misleading representation when he demanded, and received, his severance benefits despite his belief that he had not actually been terminated. Following the City Council's action on December 13, 2006, Palenick demanded and received the severance benefits to which he was entitled under his employment contract in the event he was fired without cause. At the time that Palenick demanded his severance benefits he believed that the OMA had been violated and that he was still an employee of the City. Despite these beliefs, Palenick's severance demand made no mention of the OMA, his concerns that the OMA had been violated, or that he was not properly terminated. Palenick did not object to the Human Resources Department's December 27, 2006, letter which stated that effective December 13, 2006, he was no longer an employee of the City. Moreover, on the documentation in which Palenick elected to get COBRA's continuation of coverage for his health insurance, Palenick checked "end of employment" as the basis for continuing the coverage further representing to the City that he believed he had been terminated. Had Palenick believed that the City had violated the OMA, he should have complied with NMSA 1978, Section 10-15-3(B) (1997) and alerted the City to the alleged OMA violation. Section 10-15-3(B) provides that

> [a]ll provisions of the [OMA] shall be enforced by the attorney general or by the district attorney in the county of jurisdiction. However, nothing in that act shall prevent an individual from independently applying for enforcement through the district courts, provided that the *individual first provides written notice of the claimed violation to the public body* and that the public body has denied or not acted on the claim within fifteen days of receiving it. A public meeting held to address a claimed violation of the [OMA] shall include a summary of comments made at the meeting at which the claimed violation occurred.

(Emphasis added.) Palenick failed to comply with Section 10-15-3(B) and alert the City Council of the alleged OMA violation. Based on Palenick's actions it was reasonable for the City to believe that Palenick felt he had been terminated as of December 13, 2006, was no longer an employee, and was no longer entitled to his salary. Palenick even testified that the City had every reason to rely on his representations that he was requesting his severance package on the grounds that his employment had been terminated. The City did in fact rely on Palenick's representations

and dispensed the severance package to which Palenick was entitled only in the event he had been terminated without cause. Therefore, Palenick's failure to notify the City of the potential OMA violation, Palenick's failure to object to his termination, and his demand and acceptance of his severance package amounted to waiver by estoppel. We, therefore, reverse the Court of Appeals.

Accordingly, because we conclude that Palenick's actions amounted to waiver by estoppel, we need not address whether the OMA was violated in this case or the associated issues.

III. CONCLUSION

For the reasons outlined above we conclude that Palenick waived his right to pursue a breach of contract claim and reverse the Court of Appeals.

IT IS SO ORDERED.

PETRA JIMENEZ MAES, Chief Justice

WE CONCUR:

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-030

Filing Date: June 27, 2013

Docket No. 33,364

LEONARD NETTLES and KAY NETTLES,

Plaintiffs-Petitioners,

v.

TICONDEROGA OWNERS' ASSOCIATION, INC., THE TICONDEROGA RECREATIONAL ASSOCIATION, INC., JAMES W. MUNDY, JAMES CUNNINGHAM, RANDALL BEVIS, and DAVID PALM,

Defendants-Respondents.

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Kellie J. Callahan

for Respondents

OPINION

BOSSON, Justice

Covenants in planned subdivisions impose binding obligations upon the owners. When amended by a majority of the owners, to the detriment of a minority, those revised amendments can be subjected to legal scrutiny. In this case we address two criteria for such legal analysis—uniformity and reasonableness. While failing to create a triable question on uniformity, the reasonableness of the amendment in this case—amending the definition of common easement—must be decided at trial and not summary judgment. Accordingly, we reverse summary judgment on this one issue, while affirming all other issues, and remand to the district court for further proceedings.

BACKGROUND

In 2001, Leonard and Kay Nettles (hereinafter collectively Nettles) purchased property and built a home in a remote subdivision in Rio Arriba County, New Mexico known as Ticonderoga. Taking advantage of its mountainous location, Ticonderoga was a planned subdivision that contained common outdoor recreation areas such as lakes, ponds, and hiking trails for use by the property owners. Nettles' home was located in the Boulders area, one of the more remote areas of the subdivision.

At the time of the Nettles purchase, the lots in Ticonderoga were subject to various covenants, and the subdivision was governed by a Homeowners' Association. Under the original covenants, the Homeowners' Association was responsible for maintaining all "[c]ommon [e]asements" which were defined to include all roads in the subdivision, including the particular road serving the Boulders area and the Nettles property.

That changed in 2004 during its annual meeting, when the Homeowners' Association voted to amend the covenants and articles of incorporation. The original covenants explicitly allowed for amendment if passed by those members holding at least 75 percent of the voting power of the Homeowners' Association. The amendments passed by the requisite number of required votes.

Most important to this Opinion, one of the amendments changed the definition of "common easements." The new definition no longer included all roads in Ticonderoga, but instead was limited to certain, specific roads that led to common recreation areas. The new definition now excluded the road that served the Boulders area and more specifically Nettles' home as well as some other roads, but still included those roads that led to the majority of homesites in Ticonderoga. As a result of the changed definition, Nettles was still required to pay common assessments to fund the maintenance costs of these other roads, but was now required to maintain the Boulders road privately, along with a few

other owners of undeveloped lots on that road, at Nettles' own expense. Given the rugged, northern location of the Ticonderoga subdivision, the cost of road maintenance, including snow removal, is likely a considerable expense. Nettles also complains that this amendment made the owners of lots in the Boulders area responsible for installing a gate at the entrance to the Boulders if they desired one, contrary to representations allegedly made by the original developer, but not the Homeowners' Association.

A second amendment allegedly diluted Nettles' voting rights in the Homeowners' Association. According to Nettles, the original articles allowed for one vote per lot. The amendment added a second class of votes, based on one vote per acre owned in Ticonderoga. All future propositions now had to be passed by a majority of both classes of votes.

Unhappy with the consequences of these amendments, Nettles filed suit against the Homeowners' Association. The Association filed for summary judgment, claiming that all the actions taken were explicitly authorized by the governing documents of the Association. Nettles countered, claiming that the amendments violated New Mexico law on the subject of covenant amendments because they were not uniform. The district court granted summary judgment for the Association.

On appeal, the Court of Appeals affirmed in a memorandum opinion. *Nettles v. Ticonderoga*, No. 31,342, slip op. (N.M. Ct. App. Nov. 28, 2011). The Court rejected Nettles' argument based on alleged non-uniformity of the amendments, stating "[t]he change to the covenants applies to all the properties in the subdivision, such that association maintenance will be only for the common easements as identified on the plat." *Nettles,* No. 31,342, slip op. at 3. In addition, the Court noted that "[Nettles] *appear*[*s*] to be arguing that amendments requiring a minority to maintain their own roads while also requiring them to help maintain roads used by the majority is, as a matter of law, unreasonable." *Id.* at 4-5 (emphasis added). This argument was also rejected, with the Court, concluding that "[i]t appears that the purpose of the changes was to clearly define the common easements in the subdivision as those roads that led to Recreation Areas." *Id.* at 5. Accordingly, the Court of Appeals did not find the amendments unreasonable. *Id.*

We granted certiorari to address an area of the law that has received only occasional attention from this Court yet remains vital to those with property interests in planned subdivisions like Ticonderoga throughout our state. 2012-NMCERT-002, 291 P.3d 1291.

DISCUSSION

The Requirement of Uniformity in Covenant Amendments

Nettles continues to claim that the covenant amendments described above were not uniform, and therefore are prohibited under the legal principles of uniformity we previously set forth in *Montoya v. Barreras*, 81 N.M. 749, 473 P.2d 363 (1970). In *Montoya*, this Court invalidated an amendment to restrictive covenants that would have relieved one particular lot from all the burdens of those restrictions and permitted commercial development of only that one lot. *Id.* at 753, 473 P.2d at 367. Clearly, the covenant amendment, benefitting only one lot owner, was not uniform. In the analysis, this Court first determined that non-uniform amendments were not explicitly authorized by

the covenants themselves. *Id.* at 751, 473 P.2d at 365. We then reasoned under such circumstances that allowing non-uniform amendments

> would permit the majority of owners to remove all restrictions from their lots while leaving the burden on the lots of the minority. It would permit the majority of owners, whose lots might not be adversely affected because of their insulated location in the subdivision, to authorize offensive consequences for the minority by removing or imposing restrictions only on certain lots within the area. Because the grantor encumbered all of the property with restrictions, we cannot infer from the declaration the intention that any subsequent change or changes in the restrictions could be made applicable to only one lot or a portion of the lots in the residential subdivision.

Id. at 753, 473 P.2d at 367.

Relying on this holding in *Montoya*, Nettles argues that "[t]he amendment made to the covenants by the Majority had the clear effect of relieving burdens from the Majority while increasing them for the minority. . . . This is prohibited under the uniformity requirement of *Montoya*." While we agree with the sentiment expressed, which we will address shortly, we cannot agree that these amendments violated the uniformity requirement of *Montoya*.

The amendment at issue in *Montoya* was non-uniform on its face. It addressed only one lot, that owned by Montoya, and "relieved and excluded from the burden of residential restrictions and covenants" only that one lot. *Id.* at 750, 473 P.2d at 364. The amendments challenged by Nettles in this case are very different.

In particular, the amended definition of common easement, of which Nettles complains, applies uniformly to each lot in the subdivision. The amendment changed the definition of common easement, which previously included all the roads in the subdivision, to a definition that only addressed roads indicated on a certain plat leading to common recreational areas. Thus, some roads, and Nettles' road in particular, that were previously considered common easements and maintained by the Homeowners' Association, no longer fell within the new definition. The amended definition, however, still applied to every lot in Ticonderoga, just as it had before. It was not directed at only one lot owner, as was the situation in *Montoya*. We affirm the Court of Appeals' analysis on this issue.

Accordingly, Nettles is complaining not that the amended covenants are not uniform on their face, as was the case in *Montoya*, but that they are not uniform in their effects on different lot owners in the subdivision. However, Nettles cites no case, and we have found none, whereby an amendment to a covenant has been invalidated based solely on its non-uniform effect. Therefore, we decline to expand this area of the law as Nettles asks.

Uniform Amendments Must Also Be Reasonable

Aside from uniformity, our Court of Appeals noted that Nettles appeared to be making a reasonableness argument. *Nettles*, No. 31,342, slip op. at 4. According to the Restatement (Third) of Property: Servitudes

§ 6.10 cmt. f (2000), "[u]nder the rules stated in § 6.13, the association and the community members acting collectively have a duty to treat community members fairly and to exercise discretionary powers reasonably. Those duties apply to the power to amend as well. . . ."

{16} This Court has previously recognized the principle that covenant amendments are subject to a test of reasonableness. *See Appel v. Presley Cos.*, 111 N.M. 464, 466, 806 P.2d 1054, 1056 (1991). In *Appel*, the plaintiffs sought to enjoin certain amendments to restrictive covenants made by an architectural control committee that relieved certain lots from the restrictions. *Id.* at 465, 806 P.2d at 1055. This Court agreed that unlike in *Montoya,* "the language [of the covenants] permitted the Architectural Control Committee to make [non-uniform] amendments or exceptions to the restrictive covenant." *Id.* at 466, 806 P.2d 1056. But, this Court also noted that in addition to issues of uniformity, "courts have determined that provisions allowing amendment of subdivision restrictions are subject to a requirement of reasonableness." *Id.* Quoting from Thompson on Real Property, we noted that "[a] court of equity will not enforce restrictions where there are circumstances that render their enforcement inequitable. . . ." *Id.* (quoting 7 G. Thompson, *Real Property*, § 3171 (repl. 1962)).

While this reasonableness requirement has not been thoroughly developed in New Mexico, the legal principle is well settled in other jurisdictions. It often contains reference to protecting the minority from unreasonable actions of the majority. For instance, the Mississippi Supreme Court described the reasonableness standard as follows:

> Applying a reasonableness standard to a regulation, this Court will consider not only the rights of the individual owner, but also the rights of the other association members who expect maintenance in keeping with the general plan. . . . The purpose of balancing these considerations is to ensure that the strength of the association is maintained and the expectations and purpose are not frustrated, while also ensuring that *no individual property owner or class of owners is unduly and unexpectedly burdened for the benefit of others in the association.*

Griffin v. Tall Timbers Dev., Inc., 681 So. 2d 546, 554 (Miss. 1996) (alteration in original) (emphasis added) (internal quotation marks and citation omitted). Ohio has adopted a three-question test for determining the reasonableness of the homeowners' association. According to the Ohio Court of Appeals,

> *The second question is whether the decision or rule is discriminatory or evenhanded.* This may sound like a 'constitutional' consideration applicable only in a case of 'state action,' but we believe it protects against the imposition by a majority of a rule or decision reasonable on its face, in a way that is unreasonable and unfair to the minority because its effect is to isolate and discriminate against the minority. It provides a safeguard against a tyranny of the majority.

Worthinglen Condo. Unit Owners' Ass'n v. Brown, 566 N.E.2d 1275, 1277-78 (Ohio Ct.

App. 1989) (internal quotation marks and citation omitted).

The Restatement (Third) of Property: Servitudes § 6.10 cmt. f, illus. 9, also indicates how reasonableness should be used to protect the minority from the majority. Illustration 9 sets out the general facts that the declaration in a residential subdivision allows for amendment by affirmative votes of two-thirds of the lot owners. *Id.* The illustration goes on to state that

> [t]he declaration provides that the board of directors may promulgate rules governing parking. . . . An amendment is adopted allocating all available parking to a list of units that includes units that hold two-thirds of the voting power. The owners of units holding the remaining voting power opposed the amendment. The conclusion would be justified that the amendment is invalid.

Id.

Although Nettles did not clearly make a reasonableness argument as such, Nettles just as clearly articulated throughout these proceedings a claim that the majority was abusing the minority—the "tyranny of the majority"—that goes to the heart of the reasonableness inquiry. In the response to the motion for summary judgment, Nettles argued that "[t]his is the classic attempt of the majority ganging up on a minority in a subdivision setting which is precluded under New Mexico law." Nettles obviously made a similar argument to the Court of Appeals, which stated that "Plaintiffs appear to be arguing that amendments requiring a *minority* to maintain their own roads while also requiring them to help maintain roads used by the *majority* is, as a matter of law, unreasonable." *Nettles*, No. 31,342, slip op. at 4-5 (emphasis added). In briefing before this Court, Nettles argued that "[t]he amendment made to the covenants by the Majority had the clear effect of relieving burdens from the Majority while increasing them for the minority."

Perhaps confused that *Appel* specifically dealt with non-uniform amendments and thinking that reasonableness only applied to non-uniform amendments, Nettles was less than clear in how they presented what was essentially a reasonableness argument. But this Court has never limited *Appel* to non-uniform amendments and we decline to do so now. Nonetheless, out of an abundance of caution and fairness to both sides, we asked for supplemental briefing which we found helpful. The Homeowners Association took the position that the amendment was reasonable, as its purpose was for the Association to continue to maintain roads leading to common recreation areas, but stop maintaining those roads that do not. There is evidence in the record to that effect. However, there is also evidence in the record that this may not be entirely accurate. The record shows that while the claimed purpose of the amendment was to only maintain the roads that lead to the common recreational areas, the roads themselves are not maintained all the way to the common recreational areas, especially in winter.

The reasonableness of covenant amendments is a question of fact. *Appel*, 111 N.M. at 466, 806 P.2d at 1056. The Court of Appeals appears to have viewed the question differently—that Nettles had to prove these amendments were unreasonable as a matter of

law—and the Court of Appeals was not persuaded. But this factual conflict does not represent a failure on the part of Nettles; it means only that there is more than one view of the evidence. And that, in turn, enables Nettles to at least attempt to persuade the fact finder that this amendment was not reasonable, either in its intent or its impact on minority owners. Accordingly, summary judgment must be reversed and this case remanded to the district court for further proceedings.

Voting Rights

Nettles also claims that at the same time the definition of common easement was amended, the Association's organic documents were amended in a way that diluted their voting rights. According to Nettles, voting was originally based on one vote per lot. Voting rights were then amended so that in addition to one vote per lot, members also had one vote per acre owned in the subdivision. An affirmative majority of each class of votes is now required for any proposition to pass.

The Association countered by arguing that "Petitioners have misread the original Articles of the Homeowners Association." According to the Association, the original Articles of the Homeowners' Association allocated votes on a per acre basis, and the amendment actually added one vote per lot, not the other way around. The Association also points out that the portion of the original Articles dealing with voting rights was never made part of the record.

In response, Nettles points to a portion of the record, claiming it contains the voting rights section of the original Articles of the Homeowners' Association, but Nettles is mistaken. That particular portion of the record shows the voting rights of the Ticonderoga Recreational Association, Inc., not the Ticonderoga *Homeowners'* Association, Inc. The significance of the two different associations was not explained to this Court, but a review of the record indicates they are two separate, incorporated entities.

The failure to put the essential document into the record means it is impossible for this Court to determine whether anyone's voting rights were actually diluted. Accordingly, Nettles failed to create a genuine issue of material fact, and summary judgement was appropriate on this issue.

Representations of the Developer

Lastly, Nettles claims that Ticonderoga's developer made representations to the effect that the Boulders road would be maintained by the Homeowners' Association and that a gate would be installed at the entrance to the Boulders road. Nettles argues that such representations are binding on the Homeowners' Association, relying primarily on *Agua Fria Save the Open Space Ass'n v. Rowe*, 2011-NMCA-054, 149 N.M. 812, 255 P.3d 390, and *Knight v. City of Albuquerque*, 110 N.M. 265, 794 P.2d 739 (Ct. App. 1990).

Neither of these cases, however, holds that a developer's representations are binding on a subsequent homeowners' association. In *Agua Fria*, our Court of Appeals acknowledged that while an original developer's representations to buyers could be binding on a subsequent *developer*, there was no factual evidence to support the contention in that case. 2011-NMCA-054, ¶¶ 12-13. In *Knight*, the Court of Appeals held that "a developer will not be allowed to induce purchasers to buy property by purporting to

include open space such as parks or golf courses in a subdivision plat, only to subsequently change the uses of those open space areas." 110 N.M. at 266, 794 P.2d at 740.

Thus, Nettles has failed to cite any case law, from this jurisdiction or any other, holding that a developer's representations are binding on a subsequent homeowners' association. Rather, Nettles merely argues that a developer should not be allowed to make representations to purchasers and then transfer the authority to enforce those representations to a homeowners' association "and thereby eliminate any possible enforcement of the promises." Having failed to adequately develop the argument by citing any relevant authority for this proposition, persuasive or otherwise, Nettles asks too much of this Court. Therefore, we decline to rule on the issue.

CONCLUSION

The decision of the Court of Appeals is reversed in part and affirmed in part. This case is hereby remanded to the district court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-031

Filing Date: June 27, 2013

Docket No. 33,217

STATE OF NEW MEXICO,

Plaintiff-Respondent,

v.

AARON A. RAMOS,

Defendant-Petitioner.

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for Respondent

OPINION

BOSSON, Justice.

A jury convicted Aaron Ramos (Defendant) of the misdemeanor of violating an order of protection. Defendant appeals because he was refused a jury instruction that would have required the jury to find that he had "knowingly" violated the protection order. Our Court of Appeals upheld the district court's decision not to give the "knowingly" instruction, noting the absence of any such word in the relevant statute and applying general principles of statutory construction. For the reasons that follow, we read the language and structure of the statute together with its legislative policy and purpose, and conclude that our Legislature could only have intended to make the crime a "knowing" violation. Accordingly, it was reversible error to deny Defendant's requested instruction to that effect. We reverse and remand for a new trial consistent with this Opinion.

BACKGROUND

Andrea Reed, Defendant's former girlfriend, obtained an ex parte temporary order of protection (the order) against Defendant on October 31, 2008. Her authority for the order was NMSA 1978, Section 40-13-4(A)(1) (2008) ("Upon the filing of a petition for order of protection, the court shall . . . immediately grant an ex parte temporary order of protection . . . if there is probable cause from the specific facts shown by the affidavit or by the petition to give the judge reason to believe that an act of domestic abuse has occurred[.]"). Ms. Reed's reason for obtaining the order is not entirely clear from the record, but it appears to involve Defendant having entered Ms. Reed's home without her consent. Ms. Reed was apparently upset about this, and she and Defendant had a heated conversation in which Defendant allegedly stated, "What? You act like I'm gonna burn your house down." Based on these events, Ms. Reed obtained the order.

The order explicitly prohibited Defendant from going within 25 yards of Ms. Reed in a public place. The order also contained a provision prohibiting Ms. Reed from doing "any affirmative act the purpose or effect of which is to cause respondent to violate this order." Regarding its enforcement, the order stated that "[i]f the respondent violates any part of this order, the respondent may be charged with a crime, arrested, held in contempt of court, fined or jailed."

A sheriff's deputy personally served Defendant with the order at his workplace. At this time, the deputy told Defendant to "just stay away from her." Defendant testified that to him this meant, "don't call her, don't write her, don't go to talk to her, or engage her." In fact, Defendant was so confident of his understanding of what the order entailed that he failed to read its contents. Additionally, Defendant testified that he told the deputy when he received the order that this "[was] great, this is the best thing that could have happened." When asked what he believed a protective order meant, Defendant replied that it meant to stay away from Ms. Reed. When asked why he did not read the order, Defendant stated that its meaning was "obvious, it's a protective order."

Both Defendant and Ms. Reed are dance instructors and they would often go to a certain bar on Thursday nights to teach students how to dance in public with a live band. On Thursday, November 6, 2008, Defendant went to this bar intending to meet one of his students. Defendant arrived before his student and sat down at the bar and ordered a beer. As it turns out, Ms. Reed was also at this bar with her dance students, seated twelve to fifteen yards away from Defendant. Defendant testified that he did not see Ms. Reed when he arrived at the bar.

After seeing Defendant, Ms. Reed approached the bouncer and told him about her protective order against Defendant and asked for his assistance. The bouncer alerted Defendant that Ms. Reed was in the bar and that she wanted him to leave. Defendant refused, stating, "that's her problem, I am going to drink my beer." According to Defendant, he also told the bouncer, "why can't she leave, why do I need to leave?" and further, "why am I having to leave, I'm not even messing with anybody at all, I'm just here."

The bouncer informed Ms. Reed what Defendant had said. When the bouncer returned, he told Defendant that Ms. Reed was going to call the police. Defendant responded, "F--- her, she can call the cops, I'm finishing my beer." Nevertheless, when Defendant saw Ms. Reed on the telephone, he grabbed his jacket, announced, "I'm outta here," and left for another bar across the street. All told, Defendant was at the bar for an estimated ten to fifteen minutes.

Defendant was arrested shortly thereafter at the bar across the street for violation of the protective order pursuant to NMSA 1978, Section 40-13-6(D) (2008) (describing how a peace officer shall act once presented with probable cause to believe a restrained party has violated a protective order). The District Attorney charged Defendant with one count of violation of a temporary restraining order.

Defendant's trial occurred on March 25, 2009. There is no uniform jury instruction for a violation of a protective order. As such, Defendant proposed a jury instruction requiring the jury to find that he *knowingly* violated the order of protection, which the court denied.

The jury found Defendant guilty, and he was sentenced to 364 days of incarceration based partially upon the court's perception of his attitude, lack of remorse, and as the judge stated, that "[he] doesn't get that what he does is wrong." Defendant served 90 of those days in the Lincoln County Detention Center with credit for time served during his pre-sentence confinement and the remaining 270 days on probation.

The Court of Appeals affirmed Defendant's conviction in a memorandum opinion. *State v. Ramos*, No. 29,514, slip op. at 18 (N.M. Ct. App. Aug. 16, 2011). We granted certiorari to consider the proper mens rea requirement for the crime of violating a protective order. *State v. Ramos*, 2011-NMCERT-010, 289 P.3d 1254. Defendant preserved his objection by tendering a correct jury instruction at trial, and thus we review this appeal for reversible error. *See State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134 ("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.").

DISCUSSION

The Family Violence Protection Act, NMSA 1978, Sections 40-13-1 to -12 (1987) (as amended through 2010) contains the procedures for obtaining and enforcing protection orders. *See* §§ 40-13-3 through -6 (2008). Once a party has violated an order of protection, Section 40-13-6(D) states that "[a] peace officer shall arrest without a warrant and take into custody a restrained party whom the peace officer has probable cause to believe has violated an order of protection that is issued pursuant to the Family Violence Protection Act . . . . " Section 40-13-6(F) states:

> A restrained party convicted of violating an order of protection granted by a court under the Family Violence Protection Act is guilty of a misdemeanor and shall be sentenced in accordance with Section 31-19-1 NMSA 1978. Upon a second or subsequent conviction, an offender shall be sentenced to a jail term of not less than seventy-two consecutive hours that shall not be suspended, deferred or taken under advisement.

The penalty for a misdemeanor is a jail term of less than one year, or payment of a fine of not more than $1000, or both. NMSA 1978, § 31-19-1(A) (1984).

The statute does not specify any particular mental state or mens rea that a restrained party must demonstrate to be found guilty of this misdemeanor. *See* § 40-13-6 (D) & (F). The court gave the jury the following instruction regarding the elements of the offense:

> For you to find the Defendant guilty of violating a temporary order of protection as charged in Count 1, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. A temporary order of protection was filed in the District Court of Lincoln County, N.M. for Cause Number DV 08-87;
>
> 2. The temporary order of protection was valid on November 6, 2008;
>
> 3. The Defendant knew about the temporary order of protection;
>
> 4. The defendant violated the temporary order of protection;
>
> 5. This happened in New Mexico on or about the 6th day

of November 2008.

Defendant objected to this instruction, requesting that the jury be instructed that he must have "*knowingly* violated the order of protection" in order for the jury to find him guilty. (Emphasis added.) The district judge denied this request, reasoning that "knowingly" was not specified in Section 40-13-6. Instead of including the "knowingly" element in the instruction, the district judge granted Defendant's alternative request to give the jury the general criminal intent instruction consistent with UJI 14-141 NMRA. The general criminal intent instruction provided:

> In addition to the other elements of Violation of Restraining Order, the state 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, *even though he may not know that his act is unlawful.* 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.

(Emphasis added).

The Court of Appeals agreed with the district court, holding that Section 40-13-6(D) and (F) does not require a person to knowingly violate a restraining order. *Ramos*, No. 29,514, slip op. at 8. The Court focused on the language of the statute, reasoning that the Legislature knows how to include the word "knowingly" in a statute and that its omission from Section 40-13-6(D) and (F) was intentional. *Ramos*, slip op. at 9. The Court of Appeals held that the general intent instruction sufficed, "absent a specific mens rea requirement in Section 40-13-6(D), (F)." *Id.* at 10. For the reasons that follow, this is an accurate application of the law generally, but not, we believe, in the specific context of Section 40-13-6.

The State argues that no intent instruction—neither general nor specific—was necessary, and we should treat violating an order of protection as a strict liability crime. We disagree. It is well settled that, "[w]hen a criminal statute is silent about whether a *mens rea* element is required, we do not assume that the [L]egislature intended to enact a no-fault or strict liability crime." *Santillanes v. State*, 115 N.M. 215, 218, 849 P.2d 358, 361 (1993). Rather, "we presume criminal intent as an essential element of the crime unless it is clear from the statute that the [L]egislature intended to omit the *mens rea* element." *Id.*; *see also State v. Gonzalez*, 2005-NMCA-031, ¶ 12, 137 N.M. 107, 107 P.3d 547 ("Since at least 1917, we have followed the common law that where an act is prohibited and punishable as a crime, it is construed as also requiring the existence of a criminal intent."). The State also urges us to consider the law regarding contempt of court proceedings. Because Defendant was not held in contempt of court, we decline to do so.

Gonzalez is an instructive case. In that case, our Court of Appeals held that bringing contraband into a jail was not a strict liability crime, and the jury needed to be instructed that the accused had knowingly possessed contraband when he entered the jail. *Gonzalez*, 2005-NMCA-031, ¶¶ 1, 18. Like the Family Violence Protection Act, the criminal statute in *Gonzalez* was silent as to

mental state. *See id.* ¶ 12; NMSA 1978, § 30-22-14(B) (1976). Like the case before us, the jury in *Gonzalez* was only given the general intent instruction. *Gonzalez*, 2005-NMCA-031, ¶ 7. Unlike the case before us, the accused did not request a "knowing" instruction. *Id.* ¶ 19.

The State argued that this was a strict liability crime, but the Court of Appeals disagreed, concluding that this offense "lack[ed] the essential characteristics of a strict liability defense. It is not in the nature of a regulatory measure prescribing conduct which seriously threatens public health or safety." *Id.* ¶ 14. In determining whether the crime encompassed a mental state, the Court of Appeals considered what mental state was required for crimes of a similar nature. *Id.* ¶ 15. The Court of Appeals held that the general intent instruction was insufficient and the failure to give a "knowing" instruction amounted to fundamental error. *Id.* ¶ 26.

We recognize that the Family Violence Protection Act is a civil statute without any separate formulation as a criminal statute and no expression of mens rea. *See generally* New Mexico Judicial Education Center, Inst. of Pub. Law, *New Mexico Domestic Violence Benchbook*, pp. 2-1 to 2-9 (University of New Mexico School of Law 2005) [hereinafter *Benchbook*]. But the Family Violence Protection Act is also a kind of hybrid, being both civil and criminal in consequence. The Legislature created the provisions regarding orders of protection in the Family Violence Protection Act to protect specific persons from domestic abuse and to deter future conduct of the other party. *See generally* §§ 40-13-1 through -7. Typically, violations of court orders are handled with contempt-of-court proceedings, which presumably could have been done here but was not. Yet, in its own terms, a violation of an order of protection can result in either civil or criminal penalties, and the party is specifically put on notice of that possibility.[1] *See* § 40-13-6 (D) & (F); § 40-13-5 (B) ("The order of protection shall contain a notice that violation of any provision of the order constitutes contempt of court and may result in a fine or imprisonment or both.").

When punished criminally, violating an order of protection does not fit comfortably within the norms of the ordinary criminal statute. A person can be convicted for doing a prohibited act, "even if the conduct that violates the order of protection would not otherwise be against the law." *Benchbook, supra*, at p. 8-3. For example, in this case Defendant, being found within 25 yards of Ms. Reed, committed an act which "would not otherwise be against the law," *but for* the protective order. This particular wrong resembles an act *malum prohibitum*—or an act which in its nature is not intrinsically wrong, except for "the fact that its commission is expressly forbidden by law." *State v. Taylor*, 297 A.2d 216, 217 (N.J. Dist. Ct. 1972). This is not a crime *malum in se*—or a crime exhibiting an "evil mind," such as an inherently immoral act like rape or murder. *See Santillanes*, 115 N.M. at 222, 849 P.2d at 365; *see also Black's Law Dictionary* 1045 (9th ed. 2009).

Unlike a *malum in se* criminal statute in which a person should know of inherently unlawful conduct and anticipate its consequences, a party restrained by a

[1]The temporary order of protection standard Form 4-963 NMRA provides under "**ENFORCEMENT OF ORDER**" that "[i]f the respondent violates any part of this order, the respondent may be charged with a crime, arrested, held in contempt of court, fined or jailed."

protective order has to be told that certain otherwise lawful conduct now constitutes a crime; i.e., going within 25 yards of the other party in a public place. Accordingly, the Legislature provided a mandatory notice provision in Section 40-13-6(A), instructing that all orders of protection "shall be personally served upon the restrained party, unless the restrained party or the restrained party's attorney was present at the time the order was issued." Mandatory service of the order of protection provides the restrained party with knowledge that certain actions will be considered criminal, even actions that would not otherwise be considered criminal in other circumstances. Thus notice, and the knowledge that comes with it, would seem to be an integral part of the crime and the legislative intent behind it.

In other contexts, we have required a knowledge instruction when statutes are otherwise silent on a particular mental state regarding the identity of the victim. In *State v. Nozie*, 2009-NMSC-018, ¶ 30, 146 N.M. 142, 207 P.3d 1119, we held that knowledge that a victim was a peace officer was an essential element of the crime of aggravated battery on a peace officer. We reasoned that there was no clear legislative intent to omit this mens rea requirement from the statute and that imposing liability on someone who did not know the victim's identity defeated the " 'specific deterrent purpose expressed by the statute.' " *Id.* (quoting *State v. Morey*, 427 A.2d 479, 483 (Me. 1981)). We also reasoned that the heightened punishment for battering a peace officer supported the knowledge requirement. *Nozie*, 2009-NMSC-018, ¶ 30; *see also State v. Valino*, 2012-NMCA-105, ¶¶ 15, 17, 287 P.3d 372 (holding that even though a statute contained no mental state regarding knowledge of the victim's identity, knowledge that a victim is a health care worker is an essential element of the crime of battery on a health care worker).

We can draw certain parallels here. First, as previously discussed, we see no clear legislative intent to omit any mens rea from Section 40-13-6(D) & (F). *See Nozie*, 2009-NMSC-018, ¶ 30. Second, just as knowledge of the victim's identity was an essential element in both *Nozie* and *Valino,* here knowledge that a restrained party's conduct is endangering or affecting a specific person—the protected party—is imperative. The deterrent purpose of the protective order could only be served by knowledge of who is being protected, just like the deterrent purpose of the battery on a peace officer statute. *See id.* Orders of protection are "powerful tool[s] to reduce violence against current or former intimates[,]" and orders of protection "play a critical role as part of a comprehensive plan designed to protect victims from continuing violence in the home." *Benchbook, supra*, at pp. 2-1, 2-2.

The need for a "knowing" violation is perhaps best illustrated by a common-sense example. The restraining order in this case prohibited Defendant from being in a public place within 25 yards of the protected party. Without knowledge being part of the crime, then a violation could occur, however innocently, at any public place such as a shopping center or an entertainment venue, without one party even being aware of the other's presence. The general intent instruction given in this case requires only an intentional act—e.g., the act of going to a store—even though he may not know that his act is unlawful. Prosecution for that kind of a violation would not serve the deterrent purpose of the Family Violence Protection Act. *See generally* § 40-13-2(D) (defining domestic abuse to include protecting persons

from physical harm, severe emotional distress, harassment, etc.).

We acknowledge that the other "knowing" cases cited herein—*Gonzalez*, *Nozzie*, *Valino*—all derive from felonies, and the severity of the crime is one factor our courts have weighed in favor of requiring a knowing violation. In the case before us, of course, Defendant was convicted of a misdemeanor and sentenced to less than a year in jail. That said, we conclude that under the particular circumstances of this crime, a "knowing" violation is most consistent with the policy behind the Family Violence Protection Act and the intent of the Legislature.[2]

A knowing violation in this instance required proof that the accused knew of (1) the protective order and (2) Ms. Reed's presence within 25 yards in the same location. With respect to the first element—knowledge of the restraining order—a restrained party has knowledge of the order when he receives personal service of the order of protection. *See Maso v. N.M. Taxation & Revenue Dep't*, 2004-NMSC-028, ¶ 13, 136 N.M. 161, 96 P.3d 286 ("[W]here circumstances are such that a reasonably prudent person should make inquiries, that person is charged with knowledge of the facts reasonable inquiry would have revealed." (internal quotation marks and citation omitted)).

At trial, some significance was made about the fact that Defendant did not actually read the details of the order and was therefore unaware of its 25-yard stipulation. The defense argued that because of this, the State presented no evidence that Defendant actually knew he had to stay 25 yards away from Ms. Reed. Defendant's position borders on the frivolous. Defendant's failure to read the contents of the order is no defense. *See Stevenson v. Louis Dreyfus Corp.*, 112 N.M. 97, 100, 811 P.2d 1308, 1311 (1991) ("One who intentionally remains ignorant is chargeable in law with knowledge." (internal quotation marks and citations omitted)). Therefore, knowledge of the contents of the order of protection was imputed to Defendant as a matter of law upon proof of service.

To be clear, when we state that a party must knowingly violate an order of protection, we do not mean that the party must act with a conscious or wilful desire to defy the protective order. We mean only that in this context the general criminal intent instruction is not enough, because "general intent is only the intention to make the bodily

[2] The dissent claims that half of states nationwide do not impose a knowing requirement. But the law from various states differs so dramatically, a majority rule is difficult to discern. For instance, many of the states cited by the dissent impose a willful requirement, which we interpret to be a mental state at least as culpable as knowing. *See, e.g.*, Wyo. Stat. Ann. § 35-21-105(c) (2008) ("The [protective] order shall contain notice that *willful* violation of any provision of the order constitutes a crime as defined by W.S. 6-4-404, can result in immediate arrest and may result in further punishment." (emphasis added)); R.I. Gen. Laws Ann. § 12-29-4(a)(3) (2001). In other states, protective orders are structured in such a specific way that the accused cannot violate them with any less culpable mental state than knowing. *See, e.g.*, *Gerlack v. Roberts*, 952 P.2d 84, 86-87 (Or. Ct. App. 1998) (holding that defendant's coming within 150 feet of petitioner at a video store did not violate protective order because the video store was not specifically designated in the order). Our research indicates that at least one state cited by the dissent explicitly requires a knowing violation by statute. Ind. Code Ann. § 35-46-1-15.1 (as amended through 2010) ("A person who *knowingly* or intentionally violates: (1) a protective order to prevent domestic or family violence . . . commits invasion of privacy, a Class A misdemeanor." (emphasis added)). Thus, we conclude that the views expressed in this opinion do reflect those of a number of our sister states that have grappled with similar issues.

movement which constitutes the act which the crime requires." Wayne R. LaFave, *Substantive Criminal Law* § 5.2(e) (2d ed. 2003), at 355 (internal quotation marks and citation omitted). Additionally, "[k]nowledge and intent are separate, not synonymous, elements." *State v. Hargrove*, 108 N.M. 233, 236, 771 P.2d 166, 169 (1989) (holding that the general criminal intent instruction was not "sufficient to instruct the jury that knowledge of the prohibited blood relationship is an essential element of [the crime of] incest"). We have previously set forth the two elements of knowledge—the protective order and the presence of the protected party within the protected zone—and the State need prove no more than that to sustain a conviction.

Our interpretation of Section 40-13-6 (D) and (F) should not deter the State from enforcing orders of protection through criminal sanctions. For example, if a restrained party were to claim he did not knowingly violate an order of protection because he believed he was 30 yards away from the protected party instead of 25, that would be a question for the jury to determine, no different from similar offenses. In most cases, knowing that the prohibited party was within the protected zone of the protected party, at least after a warning, should be sufficient to prove a knowing violation.

The District Court's Rejection of the Requested Instruction Requires a New Trial

The evidence in this case supports Defendant's conviction under the instructions that were given. Defendant knew about the protective order based on personal service. For the purpose of determining whether there should be a new trial we evaluate the sufficiency of the evidence under the instructions given. We do not evaluate the sufficiency of the evidence for instructions that were not given to the jury. *See State v. Dowling*, 2011-NMSC-016, ¶ 18, 150 N.M. 110, 257 P.3d 930 ("We review Defendant's [sufficiency] claim under the erroneous instruction provided to the jury at trial."). The issue of Defendant's knowing violation will be a question for the jury to consider on remand.

Defendant, like any accused, was fairly entitled to a jury instruction that accurately described the essential elements of the crime and what the State would have to prove for a conviction. Any accused is entitled to such an instruction even if he does not ask for it. *See State v. Osborne*, 111 N.M. 654, 662, 808 P.2d 624, 632 (1991) ("[F]ailure to instruct the jury on the essential elements of an offense constitutes fundamental error. Where fundamental error is involved, it is irrelevant that the defendant was responsible for the error by failing to object to an inadequate instruction[.]"). And here, Defendant unquestionably did ask for the correct instruction.

Because Defendant objected to the jury instruction tendered at trial, we review his conviction for reversible error. *Benally*, 2001-NMSC-033, ¶ 12. "A jury instruction which does not instruct the jury upon all questions of law essential for a conviction of any crime submitted to the jury is reversible error." *State v. Parish*, 118 N.M. 39, 44, 878 P.2d 988, 993 (1994) (internal quotation marks and citations omitted). To determine if a defect in a jury instruction amounts to reversible error, we must determine whether a reasonable jury could have been confused or misdirected by the jury instruction. *Id.* at 42, 878 P.2d at 991 ("Reversible error arises if . . . a reasonable juror would have been confused or misdirected.").

The general intent instruction given in this case could have confused and misdirected the jury notwithstanding the evidence of Defendant's guilt. Under the facts of this case and the instructions given, the jury could have convicted Defendant on either of two theories. First, the jury could have convicted Defendant appropriately based on Defendant's knowledge of the restraining order and knowledge of Ms. Reed's presence. But the jury could also have convicted Defendant based on a lesser showing. The general intent instruction as given allowed the jury to convict for something far less—merely the intentional act of entering and staying at the bar, "even though he may not know that his act is unlawful." We have no way of knowing what was in the jury's mind because the instructions allowed for either. *See Gonzalez*, 2005-NMCA-031, ¶ 23 (holding that the general intent instruction "was not sufficient to instruct the jury that Defendant's knowledge of the cocaine he brought into the Detention Center is an essential element [of the crime] of bringing contraband into a jail"). Accordingly, failure to instruct the jury of a knowing violation constituted reversible error. Under the circumstances we have no choice but to reverse and remand for a new trial.

Finally, consistent with this Opinion, we recognize that there should be a uniform jury instruction for this crime. We request that the rules committee develop a uniform jury instruction reflecting that a restrained party must knowingly violate an order of protection.

CONCLUSION

We reverse Defendant's conviction of one count of violating an order of protection and remand for a new trial.

IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

PETRA JIMENEZ MAES, Chief Justice (dissenting).

MAES, Chief Justice (dissenting).

In imposing a "knowing" requirement for proof of a violation of a restraining order, the majority holds that the general intent instruction is insufficient because it only requires the intention to make a bodily movement that constitutes the act required by the crime. The rationale behind the majority's addition of a "knowing" requirement to NMSA 1978, Section 40-13-6(D) (2008) is the fear of the possibility that a person could be charged with violating a restraining order by merely being in the same vicinity as a protected party, without knowledge of their presence. I respectfully dissent because the general intent instruction given in this case was sufficient to address the concerns of the majority and the definition of the "knowing" requirement set forth by the majority is unclear and appears to be simply one of awareness. I adopt the jury instructions discussion of the Court of Appeals' Memorandum Opinion. I offer the following thoughts to supplement my rationale for dissenting.

The new standard is now a "knowing" violation which requires proof that

the accused knew of (1) the protective order and (2) the protected party's presence in the same location. The majority states that this "knowing" requirement should not deter the State from enforcing orders of protection through criminal sanctions and gives the following example: "if a restrained party were to claim he did not knowingly violate an order of protection because he believed he was 30 yards away from the protected party instead of 25, that would be a question for the jury to determine[.]" This example describes almost exactly what a jury is asked to do using the general intent instruction, which was given in this case. The general intent instruction given pursuant to UJI 14-141 NMRA stated:

> [T]he state 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, even though he may not know that his act is unlawful. 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.

The majority, however, emphasizes the first prong of the general intent instruction, while ignoring the second prong. Although the instruction requires a showing that the defendant made a bodily movement that constituted the act of the crime, such as entering a bar, the second prong of the general intent instruction requires more. A jury must also infer from the surrounding circumstances whether the defendant acted intentionally, meaning that he acted with intent to violate the restraining order. This second sentence accomplishes what the majority attempts to accomplish by adopting a "knowing" requirement.

The primary concern of protecting a defendant from frivolous prosecution resulting from the act of entering a location, without knowledge of the victim's presence, can be sufficiently addressed by providing the jury with a general intent instruction consistent with UJI 14-141, as the court did in this case. After the jury found that all of the elements of the crime existed, it was able to use the testimony presented in court to determine that Defendant intentionally violated the order by staying in the bar after he became aware of Ms. Reed's presence. In this case, Defendant's statements and actions made it clear that he was apathetic to Ms. Reed's presence and intentionally remained at the bar, in violation of the order, to finish his beer.

The second prong of the general intent instruction would allow for a jury to come to the opposite conclusion as well. For example, a defendant enters a bar without knowledge of the protected party's presence. While the defendant is drinking a beer, the protected party calls the police to report a violation of the order. Police arrive and arrest the defendant, although the defendant never had knowledge of the protected party's presence. The jury would be able to evaluate all of these facts at trial, and when given the general intent instruction could determine whether the defendant intentionally violated the restraining order, or was merely enjoying a beer. Imposing an unclear "knowing" requirement does not supplement the general intent instruction and may cause trial courts to treat it as a mens rea requirement, forcing the state to delve into a defendant's state of mind. Instead, with the general intent instruction,

both parties' interests remain protected.

Moreover, abstaining from imposing a "knowing" requirement into Section 40-13-6(D) would be consistent with the national trend to protect victims from recurring domestic violence. Over the past twenty years, all fifty states have enacted laws intended to rein in domestic violence. David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 Ohio St. L.J. 1153, 1158 (1995). Despite these efforts, police estimate that for each of the more than one million domestic violence crimes reported each year, three more go unreported. *Id.* In all, there are an estimated 1.8 to 4 million incidents of domestic violence each year. Zlotnick, *supra* at 1159.

Nationwide, half of the states do not impose a "knowing" requirement for a violation of a temporary restraining order.[3] Logically, this makes sense. If the state had to prove knowledge on the part of every defendant for every violation, conviction rates would likely plummet and animosity between defendant and victim would increase, as well as the likelihood of another incident. A recent study involving over 750 women from various jurisdictions nationwide revealed that nearly 60% of women reported violations of protection orders. TK Logan, Ph.D. & Robert Walker, M.S.W., L.C.S.W., *Civil Protective Order Effectiveness: Justice or Just a Piece of Paper?*, 25 Violence and Victims 332, 333 (2010). The potential effect of imposing a "knowing" requirement to prove a violation is, in all likelihood, extremely dangerous considering most of the reported violations occur within the first three months after the issuance of an order. Christopher T. Benitez, M.D., Dale E. McNiel, Ph.D. & Renée L. Binder, M.D., *Do Protection Orders Protect?*, 38 J. Am. Acad. Psychiatry L. 376, 382 (2010). Additionally, psychological abuse nearly quadruples during the period of a temporary restraining order. *Id.* In order to protect against re-abuse, our law should not make it more difficult to prosecute violations of protective orders. Eventually, if it becomes clear that it is difficult to punish a defendant for violating a restraining order because of failure to prove intent, victims will become less likely to report violations, the deterrent effect decreases, and the purpose of obtaining a protective order becomes moot. Ultimately, this result conflicts with the overall goal of protecting and supporting the public's well-being.

Accordingly, imposing a "knowing" requirement is contrary to the national trend of protecting victims and deterring domestic violence. It is imperative for future litigants to have a clear understanding of what is required to prove a violation. The general intent instruction sufficiently protects both parties' interests and therefore I would affirm the Court of Appeals' holding and adopt the jury

[3]State statutes regarding protective orders that do not require a knowing violation: Ala. Code § 13A-6-143 (1975); Alaska Stat. Ann. § 18.66.130 (2013); Ariz. Rev. Stat. Ann. § 13-3602 (2013); Conn. Gen. Stat. Ann. § 46b-15 (2013); D.C. Code § 16-1031 (2013); Idaho Code Ann. § 39-6312 (1999); Ind. Code Ann. § 31-15-5-1 (2003); Iowa Code Ann. § 664A.7 (2007); La. Rev. Stat. Ann. §46:2137 (1999); Me. Rev. Stat. tit. 19-A, § 4011 (2011); Md. Code Ann., Fam. Law § 4-508.1 (2011); Mich. Comp. Laws Ann. § 764.15b (2002); Minn. Stat. Ann. § 260C.405 (2008); Mo. Ann. Stat. § 455.085 (2011); N.Y. Fam. Ct. Act § 846-a (2013); N.D. Cent. Code Ann. § 14-07.1-06 (2011); Ohio Rev. Code Ann. § 2919.27(A)(1) (2010); Or. Rev. Stat. Ann. § 107.720(4) (2012); 23 Pa. Cons. Stat. Ann. § 6114 (2006); R.I. Gen. Laws Ann. §12-29-4 (2001); S.C. Code Ann. § 16-25-20 (2008); S.D. Codified Laws § 25-10-13 (2011); VA Code Ann § 16.1-253.2 (2012); Vt. Stat. Ann. tit. 15 § 1108 (2010); Wyo. Stat. Ann. § 35-21-105(c)(2008).

instructions discussion regarding the imposition of a knowledge requirement in the attached Memorandum Opinion.

PETRA JIMENEZ MAES, Chief Justice

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **NO. 29,514**

AARON A. RAMOS,

Defendant-Appellant.

Gary K. King, Attorney General
Andrew S. Montgomery, Assistant Attorney General
Santa Fe, NM

for Appellee

Jacqueline L. Cooper, Acting Chief Public Defender
Carlos Ruiz de la Torre, Assistant Appellate Defender
Santa Fe, NM

for Appellant

MEMORANDUM OPINION

GARCIA, Judge.

Defendant appeals his misdemeanor conviction under the Family Violence Protection Act, NMSA 1978, Section 40-13-6(D), (F) (2008), for violating a temporary order of protection that prohibited contact with his ex-girlfriend, Andrea Reed. Defendant contends that the district court's refusal of his requested jury instruction, which included the element that he "knowingly" violated the order of protection, was reversible error. He also argues that if Section 40-13-6(D), (F) does not include "knowingly" as an element, then it is void for vagueness, that the evidence is insufficient to support his conviction; and that imposing a criminal penalty for violation of an *ex parte* order of protection violates due process. We affirm.

BACKGROUND

The district court issued a temporary order of protection against Defendant on October 31, 2008, upon a petition by Andrea Reed. The order prohibited Defendant from going within one-hundred yards of Ms. Reed's home, school, or workplace. The order further prohibited Defendant from going within twenty-five yards of Ms. Reed in a public place.

On Thursday, November 6, 2008, Defendant went to the Win, Place and Show (WPS) bar in Ruidoso, where Defendant testified he and Ms. Reed had danced "countless" times on Thursday nights. Defendant testified that he was not looking for Ms. Reed or anyone else. Defendant was in the bar having a beer when he saw Ms. Reed walk behind him and approach the bouncer. Defendant was concerned that Ms. Reed would try to cause a scene, so he tried to "shield" himself from any kind of "engagement" with Ms. Reed.

Ms. Reed testified that Defendant and she

made eye contact. After Ms. Reed realized that Defendant was not going to leave, Ms. Reed explained to the bouncer that she had an order of protection against Defendant and requested the bouncer's assistance in asking Defendant to leave. The bouncer approached Defendant and explained that Ms. Reed was present and wanted him to leave. Defendant testified that he said to the bouncer, "Why do I have to leave? Why can't she leave?" Defendant told the bouncer that he did not think he should be required to leave since he was just there and was "not messing with anybody." The bouncer then informed Defendant that Ms. Reed was talking about calling the police. Defendant admitted that he told the bouncer, "Fuck her, she can call the cops. . . . I'm finishing my beer." Defendant testified that he finished his beer and then left.

Ms. Reed testified that Defendant did not leave until he realized that she had called the police. After realizing that she was speaking to the police, Defendant announced, "Okay, I'll leave," and then he left. The bouncer testified that Defendant was about twelve to fifteen feet away from Ms. Reed while he was sitting at the bar. The bouncer estimated that ten to fifteen minutes elapsed from the time Defendant arrived to the time he left. He further testified that Defendant left after Ms. Reed walked past Defendant dialing the number to the police department.

Defendant testified that he knew of the order of protection and had been served with the order by a deputy sheriff. The sheriff also explained to Defendant that he was serving him with an order of protection, that he could not call or contact Ms. Reed, and that he was required to stay away from her. However, Defendant was at work and too busy to read the order at the time it was served. Defendant testified that he did not read the order until after the incident occurred. He further testified that he was not aware of the twenty-five-yard restriction at the time of the incident. He said he did not read the order earlier because "it wasn't important to [him] because [he] wanted her out of [his] life, and it was a good thing." He knew that he was required to stay away from Ms. Reed, stating, "It's obvious; it's a protective order." He testified that, in his opinion, "stay away" meant that he was not to take any initiative to contact her, to call her, to write her, or to engage her. Defendant testified that he thought he complied with the order at the time of the incident because he had no intent to contact Ms. Reed and did not approach Ms. Reed at WPS. While Defendant was in jail, he read the order of protection. He testified that the order "specifically says that the twenty-five-yard stipulation is applicable in public places." He further agreed that WPS was a public place.

At trial, Defendant tendered two proposed jury instructions on the elements of violating an order of protection. The first instruction defined criminal intent in conformity with UJI 14-141 NMRA, which required the State to prove beyond a reasonable doubt that Defendant acted intentionally when he committed the crime. Defendant's second proposed instruction included as an element of the offense both that he "knew about the order of protection" and that he "knowingly violated the order of protection." The district court refused Defendant's proposed instruction requiring that the violation of the order of protection have been "knowing." The court did instruct the jury, however, that the State was required to prove beyond a reasonable doubt that Defendant "knew about the temporary order of protection" and that he "acted intentionally when he committed the crime." The jury found Defendant guilty of

violating the order of protection, and Defendant now appeals.

DISCUSSION

A. Jury Instructions

Defendant argues that the district court's refusal of his requested jury instruction, which included the element that he "knowingly violated the order of protection," was reversible error. "The propriety of jury instructions given or denied is a mixed question of law and fact[,]" which we review de novo. *State v. Lucero,* 2010-NMSC-011, ¶ 11, 147 N.M. 747, 228 P.3d 1167 (internal quotation marks and citation omitted).

"A jury instruction is proper, and nothing more is required, if it fairly and accurately presents the law." *State v. Laney,* 2003-NMCA-144, ¶ 38, 134 N.M. 648, 81 P.3d 591. "When a uniform jury instruction exists, that instruction must be used without substantive modification." *State v. Caldwell,* 2008-NMCA-049, ¶ 24, 143 N.M. 792, 182 P.3d 775. In the absence of a uniform jury instruction, this Court must examine whether the jury instruction conforms to the language of the governing statute. *See State v. Doe,* 100 N.M. 481, 483, 672 P.2d 654, 656 (1983) ("[I]f the jury instructions substantially follow the language of the statute or use equivalent language, then they are sufficient."). Whether a crime requires a showing of intent is a question of statutory construction. *State v. Rowell,* 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995). We begin our review by looking at the words selected by the Legislature and the plain meaning of the language. *See State v. Smile,* 2009-NMCA-064, ¶ 8, 146 N.M. 525, 212 P.3d 413, *cert. quashed,* 2010-NMCERT-006, 148 N.M. 584, 241 P.3d 182. When a statute contains language that is clear and unambiguous, we give effect to it and refrain from further statutory interpretation. *Id.*

Section 40-13-6(D), (F) provides the following in pertinent part:

> D. A peace officer shall arrest without a warrant and take into custody a restrained party whom the peace officer has probable cause to believe has violated an order of protection that is issued pursuant to the Family Violence Protection Act . . . .
>
> . . . .
>
> F. A restrained party convicted of violating an order of protection granted by a court under the Family Violence Protection Act is guilty of a misdemeanor . . . .

There is no uniform jury instruction for violation of an order of protection. Defendant requested an instruction requiring the State to prove that an order of protection was issued; that it was in effect on November 6, 2008; that Defendant knew about the order; and that Defendant "knowingly violated" the order. The district court reasoned that absent an applicable uniform jury instruction, the elements instruction should conform to the applicable statute. Defendant conceded that the statute did not explicitly require that the conduct be "knowing," but argued that without including "knowingly" as an element, a person could be unfairly convicted for innocent conduct such as passing the person going the other way on a public street or accidently running into the person at a store. The district court determined that the statute does not require proof of a "knowing" violation and

therefore refused Defendant's proposed instruction.

Defendant then presented the district court with an alternative instruction, suggesting that if the court would not allow his requested instruction requiring a knowing violation, then the court should give an instruction stating that Defendant "violated the order" along with the instruction on general criminal intent. The court ultimately instructed the jury on the following elements of the offense:

1. A temporary order of protection was filed in the [d]istrict [c]ourt . . . ;
2. The temporary order of protection was valid on November 6, 2008;
3. Defendant knew about the temporary order of protection;
4. [D]efendant violated the temporary order of protection;
5. This happened in New Mexico on or about the 6th day of November 2008.

In addition, the court instructed the jury that the State was required to prove beyond a reasonable doubt that Defendant acted intentionally when he committed the crime pursuant to UJI 14-141.

We are not persuaded that Section 40-13-6(D), (F) requires that a person knowingly violate an order of protection. The statute does not contain any language stating that the defendant must "knowingly" violate the order. *See* § 40-13-6(D) (providing that "[a] peace officer shall arrest . . . a restrained party whom the peace officer has probable cause to believe has violated an order of protection"); *see also* § 40-13-6(F) (providing that a person "convicted of violating an order of protection . . . is guilty of a misdemeanor"). Furthermore, "[w]e will not read into a statute language which is not there, especially when it makes sense as it is written." *State v. Hubble*, 2009-NMSC-014, ¶ 10, 146 N.M. 70, 206 P.3d 579. The Legislature knows how to include the word "knowingly." *See, e.g.*, NMSA 1978, § 30-3A-3(A) (2009) (stating that "[s]talking consists of knowingly pursuing a pattern of conduct"); *see also State v. Wilson*, 2010-NMCA-018, ¶ 12, 147 N.M. 706, 228 P.3d 490 (holding that use of the term "knowingly" in NMSA 1978, Section 30-31-20(B), (C) (2006), required specific knowledge that the drug trafficking would occur within a drug-free school zone), *cert. denied*, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055. We therefore conclude that the Legislature intended to omit the word "knowingly" in Section 40-13-6(D), (F), and we will not read such an element into the statute. *See State v. Katrina G.*, 2007-NMCA-048, ¶ 17, 141 N.M. 501, 157 P.3d 66 (reasoning that when the Legislature knew how to include something, and did not, we assume the choice was deliberate); *see also Smile*, 2009-NMCA-064, ¶ 8 (stating that when the Legislature's language is clear and unambiguous we will refrain from further interpretation). As a result, we conclude that Section 40-13-6(D), (F) does not require that a violation of a protection order have been "knowing." Instead, the district court properly instructed the jury regarding general criminal intent, absent a specific mens rea requirement in Section 40-13-6(D), (F). *See State v. Gonzalez*, 2005-NMCA-031, ¶¶ 12-13, 137 N.M. 107, 107 P.3d 547 (reasoning that where criminal statute lacks a mens rea requirement, it is construed as requiring general criminal intent absent legislative intent to the contrary).

Furthermore, given Defendant's testimony, he would not be entitled to his requested instruction. Defendant's defense was that he did not know his conduct was

wrong based on his own deliberate ignorance and failure to read what the order of protection actually required, combined with his speculative assumptions about what the order prohibited. Defendant admitted that he had not read the order of protection prior to the incident even though it was in his possession and contained a twenty-five-yard restriction for public places. He only decided to actually read the order when he was in jail. Defendant also testified that he was entitled to speculate that he had complied with the order despite his knowledge that it was a protective order and he had not read it.

Ignorance of the law is no defense, and a person who is purposely ignorant may not claim he or she had no knowledge. *See State v. Rivera*, 2009-NMCA-132, ¶ 37, 147 N.M. 406, 223 P.3d 951 (stating that ignorance of the law is no defense); *see also Stevenson v. Louis Dreyfus Corp.*, 112 N.M. 97, 100, 811 P.2d 1308, 1311 (1991) (stating that "[o]ne who intentionally remains ignorant is chargeable in law with knowledge" (internal quotation marks and citation omitted)); *accord State v. Sanders*, 96 N.M. 138, 140, 628 P.2d 1134, 1136 (Ct. App. 1981). Consequently, Defendant was not entitled to remain deliberately ignorant of the order's contents and then substitute his own opinion of what was required in order to argue that he did not "knowingly" violate the order of protection.

The weakness of Defendant's position is highlighted by Defendant's admission that after reading the order, he realized that the twenty-five-yard restriction was clearly stated in the order and that WPS was clearly a public place. Under the present facts, Defendant's proposed instruction regarding an inapplicable defense would have constituted a misstatement of law and injected a false issue. *See State v. Nieto*, 2000-NMSC-031, ¶ 17, 129 N.M. 688, 12 P.3d 442 (stating that a requested instruction that presented an inapplicable defense was properly denied because it was a misstatement of law). Given that Defendant's theory of his lack of a knowing violation was based on his own failure to read the order, the district court properly refused to permit Defendant to parlay his self-imposed ignorance into a defense.

Defendant further contends that if we do not recognize that Section 40-13-6(D), (F) contains knowledge as an element, innocent violations will result in unwarranted criminal punishment. Specifically, Defendant asserts that, without knowledge as an element, a person subject to an order of protection could be unfairly convicted for passing someone in a car going the other way on a busy public street, or for accidentally running into someone at a store. These abstract situations are distinguishable from the facts in this case, where Defendant intentionally chose to remain ignorant of the order's requirements and refused to leave WPS even after he was informed that Ms. Reed wanted him to leave pursuant to the order of protection. A defendant is not entitled to an instruction that is not supported by the evidence. *See State v. Nozie*, 2007-NMCA-131, ¶ 6, 142 N.M. 626, 168 P.3d 756 (reasoning that a defendant is only entitled to jury instructions that are supported by sufficient evidence). As a result, we decline to consider whether an instruction that a defendant did not violate an order could conceivably be warranted in some other factual scenario.

Finally, Defendant argues that not requiring that a violation of a protection order be knowing invites absurd results, such as requiring Defendant to immediately exit WPS upon becoming aware of Ms. Reed's presence, leaving his beer unfinished. However,

Defendant fails to persuade us that leaving a beer unfinished in order to comply with an order of protection is an absurd result, and we decline to address his argument further.

As a result, we affirm the district court's denial of Defendant's requested instruction requiring that Defendant must have knowingly violated the order of protection.

B. Void for Vagueness

Defendant argues that if Section 40-13-6(D), (F) does not include "knowingly" as an element, then it is unconstitutionally void for vagueness. Specifically, Defendant contends that absent a requirement that a violation be committed "knowingly," the statute does not give fair notice of what constitutes a violation. We consider this argument although it was not raised below. *See State v. Laguna*, 1999-NMCA-152, ¶ 23, 128 N.M. 345, 992 P.2d 896 (reviewing a defendant's argument that a statute was void for vagueness despite the lack of preservation). "We review a vagueness challenge de novo in light of the facts of the case and the conduct which is prohibited by the statute." *Smile*, 2009-NMCA-064, ¶ 17 (internal quotation marks and citation omitted).

A statute is void for vagueness if it fails to give persons of ordinary intelligence a fair opportunity to determine whether their conduct is prohibited, or if it fails to provide minimum guidelines for the reasonable judge, jury, prosecutor, or police officer to enforce the statute without subjective and ad hoc application. *State v. Jacquez*, 2009-NMCA-124, ¶ 6, 147 N.M. 313, 222 P.3d 685. Statutes are presumed to be constitutional, and Defendant bears the burden of establishing that the statute is unconstitutional. *Smile*, 2009-NMCA-064, ¶ 17. Furthermore, if the statute clearly applies to Defendant's conduct, then there is no constitutional problem. *See Laguna*, 1999-NMCA-152, ¶ 24.

Defendant has failed to demonstrate that Section 40-13-6(D), (F) is unconstitutionally vague on either ground. First, Defendant fails to demonstrate that the statute did not give him a fair opportunity to determine whether his conduct was prohibited. *See Jacquez*, 2009-NMCA-124, ¶ 6. According to Defendant's own testimony, the only reason that he was not aware of the twenty-five-yard restriction was that he did not read the order of protection. After reading the order while he was in jail, however, Defendant testified that the twenty-five-yard restriction was clearly stated in the order and that WPS was a public place. Defendant further testified that even before reading the order, it was "obvious" that a protective order required him to stay away from Ms. Reed. As a result, by Defendant's own admission, the statute gave him a fair opportunity to determine that his conduct was prohibited.

Second, the statute is not so lacking in standards that its enforcement would be subjective and ad hoc. *See Jacquez*, 2009-NMCA-124, ¶ 6. The fact that a statute is written in general terms and that it then must be applied on a case-by-case basis does not establish that it is unconstitutionally vague. *See State v. Fleming*, 2006-NMCA-149, ¶ 5, 140 N.M. 797, 149 P.3d 113 (stating that mere room in a statute for the exercise of charging discretion does not establish that a statute is void for vagueness); *State v. Larson*, 94 N.M. 795, 796, 617 P.2d 1310, 1311 (1980) (stating that a statute is not unconstitutionally vague just because some marginal cases could be hypothesized in which doubts might arise). Furthermore, Defendant's conduct in refusing to leave WPS after he was informed that Ms.

Reed wanted him to leave pursuant to the order of protection constituted a clear violation of the statute. As a result, we conclude that Defendant has failed to demonstrate that Section 40-13-6(D), (F) is unconstitutionally vague. *See Laguna,* 1999-NMCA-152, ¶ 24 (reasoning that if a statute clearly applies to a person's conduct, then it is not unconstitutionally vague).

C. Sufficiency of the Evidence

Defendant argues that the evidence is insufficient to support his conviction because the violation was not intentional. Specifically, he contends that he left WPS "soon after" he became aware that Ms. Reed was present and that he did not attempt to approach Ms. Reed or contact her in any way.

In reviewing the sufficiency of the evidence, we analyze "whether direct or circumstantial substantial evidence exists and supports a verdict of guilt beyond a reasonable doubt with respect to every element essential for conviction." *State v. Kent*, 2006-NMCA-134, ¶ 10, 140 N.M. 606, 145 P.3d 86. "We determine whether a rational factfinder could have found that each element of the crime was established beyond a reasonable doubt." *Id.* Furthermore, "we must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176.

Defendant does not dispute that a temporary order of protection was filed; that the order was valid on November 6, 2008; that he knew about the order of protection and initially refused to leave WPS even after being informed that Ms. Reed wanted him to leave pursuant to the order; that he violated the order by going within twenty-five yards of Ms. Reed in a public place; and that the alleged incident happened in New Mexico on or about November 6, 2008. As a result, there was sufficient evidence for the jury to find that Defendant intentionally violated the protection order.

To the extent that Defendant argues that his testimony supported his belief that he was in compliance with the order, the jury was free to reject his version of the incident. *See State v. Trujillo*, 2002-NMSC-005, ¶ 31, 131 N.M. 709, 42 P.3d 814 (reasoning that a factfinder may reject the defendant's version of an incident); *see also State v. Neal*, 2008-NMCA-008, ¶ 19, 143 N.M. 341, 176 P.3d 330 ("The test is not whether substantial evidence would support an acquittal, but whether substantial evidence supports the verdict actually rendered."). We hold that sufficient evidence supported the jury's finding that Defendant intentionally violated the order of protection.

D. Due Process

Defendant argues that punishing him criminally based on an *ex parte* order of protection violates due process. Defendant does not state how he preserved this issue below, or why this issue need not be preserved, and therefore we decline to address it. *See State v. Dombos*, 2008-NMCA-035, ¶ 21, 143 N.M. 668, 180 P.3d 675 (declining to address the defendant's due process arguments on appeal where the defendant did not preserve them); *see also State v. Torres*, 2005-NMCA-070, ¶ 34, 137 N.M. 607, 113 P.3d 877 (stating that this Court will not address issues unsupported by argument and

authority). As a result, we conclude that Defendant failed to preserve his due process claim.

CONCLUSION

For the foregoing reasons, we affirm Defendant's conviction and sentence.

IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

CYNTHIA A. FRY, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-032

Filing Date: June 27, 2013

Docket No. 33,331

NINA R. STRAUSBERG,

Plaintiff-Respondent,

v.

LAUREL HEALTHCARE PROVIDERS, LLC, ARBOR BROOK, LLC d/b/a ARBOR BROOK HEALTHCARE, LISA S. NOYA BURNETT, M.D., and THE FOUR HUMOURS HEALTHCARE, LLC,

Defendants-Petitioners.

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OPINION

VIGIL, Justice.

I. INTRODUCTION

In this case we address which party has the burden to prove that a contract is unconscionable and, therefore, unenforceable. Plaintiff Nina Strausberg signed an arbitration agreement as a mandatory condition of her admission to the Arbor Brook Healthcare nursing home. Despite having signed the arbitration agreement, Plaintiff subsequently sued Arbor Brook and several other defendants for alleged negligent care. Defendants moved the district court to compel arbitration and to dismiss Plaintiff's case. In response, Plaintiff argued that the arbitration agreement was unconscionable. The district court found that Plaintiff had failed to prove unconscionability and, therefore, granted Defendants' motion to compel arbitration.

The Court of Appeals reversed, concluding that the district court erred by putting the burden on Plaintiff to prove unconscionability. *Strausberg v. Laurel Healthcare Providers, LLC*, 2012-NMCA-006, ¶¶ 21, 23-24, 269 P.3d 914. The Court of Appeals held that "when a nursing home relies upon an arbitration agreement signed by a patient as a condition for admission to the nursing home, and the patient contends that the arbitration agreement is unconscionable, the nursing home has the burden of proving that the arbitration agreement is not unconscionable." *Id.* ¶ 20.

We disagree and hold that Plaintiff has the burden to prove that the arbitration agreement is unconscionable because unconscionability is an affirmative defense to contract enforcement, and under settled principles of New Mexico law, the party asserting an affirmative defense has the burden of proof. We also hold that the Court of Appeals' holding is preempted by federal law because it treats nursing home arbitration agreements differently than other contracts. Accordingly, we reverse and remand this case to the Court of Appeals to determine whether the district court erred by granting Defendants' motion to compel arbitration.

II. BACKGROUND

Plaintiff underwent spinal fusion surgery on April 5, 2007, at the age of forty-eight. Plaintiff required rehabilitation following surgery, and on April 11, 2007, she was admitted to the Arbor Brook nursing home in Albuquerque, New Mexico, where she resided until April 23, 2007.

Prior to Plaintiff's transfer from the hospital to Arbor Brook, Deborah McCullough, a nurse liaison from Arbor Brook, met with Plaintiff at the hospital to evaluate Plaintiff and to facilitate Plaintiff's transfer. One of McCullough's duties as nurse liaison was to give Arbor Brook's mandatory

arbitration agreement to hospital patients and ask them to sign the agreement before they were admitted to the nursing home. On April 10, 2007, McCullough presented the arbitration agreement to Plaintiff, and both Plaintiff and McCullough signed the agreement. The arbitration agreement provides, in part, that:

> **[b]y signing this Arbitration Agreement, the Facility and the Resident relinquish their right to have any and all disputes associated with . . . the provision of services under the [Arbitration] Agreement (including, without limitation, class action or similar proceedings; claim for negligent care or any other claims of inadequate care provide [sic] by the Facility . . .), resolved through a lawsuit, namely by a judge, jury or appellate court, except to the extent that New Mexico law provides for judicial action in arbitration proceedings. This Arbitration Agreement shall not apply to either the Facility or Resident in any disputes pertaining to collections or discharge of residents.**
> **BY SIGNING THIS AGREEMENT, THE FACILITY AND THE RESIDENT UNDERSTAND THAT THEY ARE GIVING UP THEIR CONSTITUTIONAL RIGHT TO A TRIAL IN COURT BY A JUDGE OR JURY, AND THE RIGHT TO APPEAL CONCERNING ANY DISPUTES.**

In June 2008, over one year after her discharge from Arbor Brook, Plaintiff sued Arbor Brook, LLC, d/b/a Arbor Brook Healthcare; Laurel Healthcare Providers, LLC, as Arbor Brook's owner, operator, or manager; a doctor who has since been dismissed from the case; and The Four Humours Healthcare, LLC, the doctor's employer. Plaintiff alleged, among other things, that negligent care at the facility caused her to suffer painful, preventable decubitus ulcers at the site of her surgical wound, a staph infection, hospitalization, and other medical complications.

Defendants moved the district court to dismiss Plaintiff's case and to compel arbitration, arguing that all of Plaintiff's claims arose from her residency at Arbor Brook and they are covered by the arbitration agreement. Plaintiff responded that the district court should deny the motion to compel arbitration because the arbitration agreement is both substantively and procedurally unconscionable. Regarding substantive unconscionability, Plaintiff argued that the terms of the agreement are unfair because the agreement covers only claims that would be brought by the resident, but it excludes the claims that would be initiated by the nursing home. Plaintiff asserted that the arbitration agreement is also procedurally unconscionable due to the facts and circumstances surrounding the contract's formation, including that Plaintiff had limited time to review the agreement before signing it and that she was under the influence of pain medication when she signed the agreement. Additionally, Plaintiff contended that the arbitration agreement is invalid because it is illusory and lacked consideration and mutuality of obligation. Finally, Plaintiff argued that McCullough lacked authority to enter into the contract on behalf of Defendants.

At a hearing on September 2, 2008, the district court found that all of Plaintiff's arguments lacked merit except for Plaintiff's procedural unconscionability claim. The district court explained that it could not evaluate procedural unconscionability without holding an evidentiary hearing. Thus, on October 28, 2008, the district court held an evidentiary hearing on procedural unconscionability during which Plaintiff and McCullouch testified.

On November 4, 2008, the district court issued a letter decision, concluding that the arbitration agreement is not procedurally unconscionable and outlining the court's reasoning. The district court noted that Plaintiff's testimony at the hearing demonstrated her confusion regarding the circumstances surrounding the signing of the arbitration agreement. Plaintiff testified that a male presented the agreement to her at Arbor Brook on April 11, 2007, after her discharge from the hospital, along with nearly forty pages of admission paperwork. Plaintiff testified that the paperwork was not explained to her, that she was given ten minutes to review and sign the paperwork, that she did not have her reading glasses with her, and that she felt "sleepy . . . groggy . . . [and] in a fog."

The district court found that, contrary to her testimony, Plaintiff had signed the arbitration agreement when McCullough presented it to her at the hospital on April 10, 2007, the day before Plaintiff was transferred to the nursing home. The district court observed that Plaintiff did not testify about how she felt on April 10, 2007, the day she actually signed the agreement. However, based on Plaintiff's medical records from April 10, 2007, the district court found that Plaintiff's confusion could be attributed to the pain medication she had taken that day, which included at least two doses of Percocet.

McCullough, Defendants' only witness, testified that she had no recollection of either Plaintiff or the arbitration agreement that she and Plaintiff had signed on April 10, 2007. The district court found that McCullough's inability to recall Plaintiff was caused by the large number of patients with whom McCullough interacted in her capacity as nurse liaison. McCullough testified about her usual practice in obtaining signatures on arbitration agreements and explained that each patient was required to sign the agreement as a precondition to nursing home admission.

In considering whether the evidence at the hearing demonstrated procedural unconscionability, the district court relied on *Fiser v. Dell Computer Corp.*, 2008-NMSC-046, 144 N.M. 464, 188 P.3d 1215, and *Guthmann v. La Vida Llena*, 103 N.M. 506, 709 P.2d 675 (1985), *overruled in part by Cordova v. World Finance Corp. of N.M.*, 2009-NMSC-021, ¶ 31, 146 N.M. 256, 208 P.3d 901. The district court found that the considerations referenced in *Fiser* and *Guthmann* were evenly balanced in this case, with some factors weighing in favor of contract enforcement and some weighing against it.

One factor weighing against enforcement was Defendants' bargaining position, which the district court found to be vastly superior to Plaintiff's because Arbor Brook drafted the form arbitration agreement and offered it to Plaintiff as a precondition of nursing home admission on a take-it-or-leave-it basis. Additionally, the district court expressed concern regarding Defendants' tactic of obtaining contract signatures from patients who are hospitalized and medicated. Finally, the district court noted that "Plaintiff

believed that her only option was to be discharged from the hospital to Defendant's care, but did not testify whether she looked into other placement options."

Ultimately, however, the district court found that Plaintiff's understanding of the arbitration agreement was the controlling factor and weighed in favor of contract enforcement. In response to questioning from the district court, Plaintiff admitted at the hearing that, despite the medication and regardless of which day she signed the agreement, she understood when she signed the arbitration agreement that it significantly limited her right to seek recourse in the court system. The district court noted that Plaintiff is highly educated, even though her high level of education was somewhat nullified by her medicated state. The district court explained that "it was Plaintiff's burden to establish the contract she signed is unenforceable," and the court found that Plaintiff had failed to meet that burden. Thus, the district court concluded that the arbitration agreement is not procedurally unconscionable.

On December 2, 2008, the district court entered an order finding that the arbitration agreement was enforceable and granting Defendants' motion to dismiss and to compel arbitration. The order did not include any findings of fact or explanation regarding the district court's ruling that Plaintiff's other arguments, including her substantive unconscionability argument, lacked merit.

Plaintiff appealed to the Court of Appeals, arguing that a combination of substantive and procedural unconscionability rendered the arbitration agreement unconscionable. The Court of Appeals asked the parties to file supplemental briefs addressing which party has the burden to prove unconscionability. The parties submitted supplemental briefs as directed. Following the parties' submission of supplemental briefs addressing the burden of proof, the Court of Appeals' majority opinion reversed the district court, although there was a dissenting opinion. *See Strausberg*, 2012-NMCA-006, ¶¶ 24, 26-33.

The Court of Appeals' majority held that "when a nursing home relies upon an arbitration agreement signed by a patient as a condition for admission to the nursing home, and the patient contends that the arbitration agreement is unconscionable, the nursing home has the burden of proving that the arbitration agreement is not unconscionable." *Id.* ¶ 20. The majority further concluded that the district court committed reversible error by "shift[ing] the burden to Plaintiff to prove that the arbitration agreement is not unconscionable." *Id.* ¶ 21.

In reaching its holding, the majority opinion relied primarily on the contract law principle that "[t]he party who seeks to compel arbitration has the burden of proof to establish the existence of a valid agreement to arbitrate." *Id.* ¶ 15. The majority also discussed a case from the West Virginia Supreme Court of Appeals, *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250 (W. Va. 2011), which has since been reversed by the United States Supreme Court, *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. ___, ___, 132 S. Ct. 1201, 1204 (2012). *See Strausberg*, 2012-NMCA-006, ¶ 19. In *Genesis Healthcare*, the West Virginia Supreme Court of Appeals held in part that "as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death,

shall not be enforced to compel arbitration of a dispute concerning the negligence." 724 S.E.2d at 292. Although our Court of Appeals declined to adopt the holding of *Genesis Healthcare*, the majority found compelling the West Virginia court's declaration in *Genesis Healthcare* that the realities of nursing home admission render unconscionable "all mandatory arbitration clauses in nursing home admission agreements." *Strausberg*, 2012-NMCA-006, ¶ 19.

The Court of Appeals' majority acknowledged that most courts considering the issue of unconscionability have placed "the burden on the party seeking to set aside an arbitration agreement." *Id.* ¶ 17 & n.1 (citing cases from four United States circuit courts). However, the majority concluded that such cases are distinguishable from this case and are unpersuasive because those cases dealt with commercial transactions. *Id.* ¶¶ 17-18. The majority opined that a nursing home admission contract "is not a mere commercial transaction" and that mandatory nursing home arbitration agreements should be treated differently than other contracts because nursing home agreements are presented to individuals when they are "at their most vulnerable, emotionally or physically, or both." *Id.* ¶ 18.

Thus, the Court of Appeals reversed the district court and remanded Plaintiff's case for the district court to reconsider whether the arbitration agreement is unconscionable, *id.* ¶ 24, explaining that the Court of Appeals had "no way of assessing . . . whether the district court would have come to the same conclusion" regarding enforcement of the arbitration agreement "if the burden of proof had been properly allocated to Defendants." *Id.* ¶¶ 22, 24. The Court of Appeals also noted that the district court did not have the benefit of this Court's recent opinion in *Rivera v. American General Financial Services, Inc.*, 2011-NMSC-033, ¶¶ 39-48, 150 N.M. 398, 259 P.3d 803 (discussing New Mexico's unconscionability doctrine). *Strausberg*, 2012-NMCA-006, ¶ 22.

Judge Wechsler filed a dissenting opinion, concluding that "the district court did not err in determining that Plaintiff had the burden to prove that the arbitration agreement was unconscionable." *Id.* ¶ 33 (Wechsler, J., dissenting). The dissent agreed with the majority that "[t]he party who seeks to compel arbitration has the burden of proof to establish the existence of a valid agreement to arbitrat[e]." *Id.* ¶ 27 (first alteration in original) (internal quotation marks and citation omitted) (Wechsler, J., dissenting). However, the dissent explains, once the party seeking to compel arbitration has shown the existence of a valid agreement, established principles of New Mexico contract law dictate that the "party seeking to set aside enforcement of [the] contract based on a defense or exception, such as unconscionability, has the burden of proof." *Id.* ¶ 28 (Wechsler, J., dissenting).

Following the Court of Appeals' reversal of the district court, Defendants petitioned this Court for certiorari, arguing that (1) the Court of Appeals' opinion is contrary to the precedents of this Court, which establish that a party raising an affirmative defense to the enforcement of a contract bears the burden of proof; (2) the Court of Appeals' holding is preempted by the Federal Arbitration Act; and (3) the Court of Appeals' opinion violates the separation of powers doctrine by intruding on the policy-making authority of the Legislature. Plaintiff did not file a cross-petition for certiorari, but Plaintiff urges this Court in her answer brief either to uphold the Court of Appeals' opinion or to

reach the merits of her substantive unconscionability challenge and hold that the arbitration agreement is substantively unconscionable and, therefore, unenforceable.

We conclude that the Court of Appeals' majority opinion is contrary to established principles of New Mexico contract law and the Federal Arbitration Act's mandate that arbitration agreements must be treated the same as other contracts. Accordingly, we do not address the constitutional separation of powers issue that was raised by Defendants. We also decline to reach the merits of Plaintiff's substantive unconscionability challenge, and we remand this case to the Court of Appeals to review whether the district court erred by dismissing Plaintiff's case.

III. DISCUSSION

We granted certiorari to address which party has the burden of proof on the issue of unconscionability. As a preliminary matter, we recognize that the term "burden of proof" has been used to describe two distinct concepts: (1) the burden of persuasion, i.e., the burden to persuade the factfinder; and (2) the burden of production, i.e., the burden to produce evidence. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005); *see Duke City Lumber Co. v. N.M. Envtl. Improv. Bd.*, 95 N.M. 401, 402-03, 622 P.2d 709, 710-11 (Ct. App. 1980) (noting that the term "burden of proof" describes these two distinct concepts). In this opinion, we use the terms "burden of persuasion" and "burden of proof" interchangeably; both terms refer to the party who must persuade the factfinder in order to prevail. *See Microsoft Corp. v. i4i Ltd. P'ship*, ___ U.S. ___, ___ n.4, 131 S. Ct. 2238, 2245 n.4 (2011).

A. STANDARD OF REVIEW

Whether the district court correctly allocated the burden of proof is a question of law that this Court reviews de novo. *See State v. Torres*, 1999-NMSC-010, ¶ 28, 127 N.M. 20, 976 P.2d 20 ("[W]hether the trial court applied the correct evidentiary rule or standard is subject to de novo review on appeal."). We also interpret statutes, including the New Mexico Uniform Arbitration Act and the Federal Arbitration Act, de novo. *See Martinez v. N.M. Dep't of Transp.*, 2013-NMSC-005, ¶ 10, 296 P.3d 468 ("[S]tatutory construction is a matter of law which is our responsibility to review de novo.").

B. APPLICABLE LAW

"New Mexico respects party autonomy; the law to be applied to a particular dispute may be chosen by the parties through a contractual choice-of-law provision." *Fiser*, 2008-NMSC-046, ¶ 7. The arbitration agreement in this case states that its enforcement shall be governed by New Mexico law, including the Uniform Arbitration Act (UAA), NMSA 1978, §§ 44-7A-1 to -32 (2001), and any applicable federal laws.

Defendants assert that, in addition to New Mexico law, the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16 (2006), applies to the arbitration agreement in this case. Section 2 of the FAA states that the act applies to any arbitration agreement within a "contract evidencing a transaction involving commerce." The United States Supreme Court has construed the FAA's "involving commerce" requirement broadly to include a wide range of economic and transactional activity. *See Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (noting that the FAA

"provides for the enforcement of arbitration agreements within the full reach of the Commerce Clause" (internal quotation marks and citation omitted)). Thus, the FAA applies to arbitration agreements "in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice . . . subject to federal control." *Id.* at 56-57 (internal quotation marks and citation omitted).

Plaintiff does not dispute that the FAA applies or that the arbitration agreement involves commerce. She notes that the contractual relationship between a resident and Arbor Brook obligates the resident to pay for care on a per-day basis. Further, Plaintiff and amicus curiae AARP assert in their briefing to this Court that nursing facilities in New Mexico are subject to an array of federal laws, including Medicare and Medicaid standards and regulations. For example, AARP explains that "New Mexico nursing facilities are subject to the Federal Nursing Home Reform Amendments (FNHRA) and implementing regulations, which set forth minimum nationwide standards of care for any nursing facility that accepts Medicare or Medicaid reimbursement (and virtually all accept one, the other, or both)." Arbor Brook is no exception, and in fact, Plaintiff alleged in her complaint that Defendants violated Medicaid statutes and regulations.

Given that the arbitration agreement at issue indisputably involves commerce and that Arbor Brook is subject to federal regulation and control, we conclude that the FAA applies to the arbitration agreement Plaintiff signed as a mandatory condition of nursing home admission. *See Marmet Health Care Ctr.*, ___ U.S. at ___, 132 S. Ct. at 1202 (applying the FAA to several nursing home arbitration agreements); *see also Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661, 667-68 (Ala. 2004) (per curiam) (concluding that a nursing home admission contract "substantially affects interstate commerce"); *Triad Health Mgmt. of Ga., III, LLC v. Johnson*, 679 S.E.2d 785, 787-88 (Ga. Ct. App. 2009) (explaining why the FAA applied admission contract to a nursing home); *Ping v. Beverly Enters., Inc.*, 376 S.W.3d 581, 589-90 (Ky. 2012) (noting that healthcare involves interstate commerce); *Miller v. Cotter*, 863 N.E.2d 537, 544 (Mass. 2007) (explaining that Congress's commerce power is broad and encompasses healthcare).

Accordingly, in considering which party has the burden to prove unconscionability, this Court will consider general principles of New Mexico contract law, the UAA, the FAA, and United States Supreme Court precedent interpreting the FAA. *See Perry v. Thomas*, 482 U.S. 483, 489 (1987) (explaining that the FAA creates a "body of federal substantive law of arbitrability" that "is enforceable in both state and federal courts").

C. NEW MEXICO'S UNCONSCIONABILITY DOCTRINE

We start with a discussion of New Mexico's unconscionability doctrine, noting that both New Mexico law and federal law require courts to apply generally applicable principles of contract law to arbitration agreements. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686 (1996) ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause upon such grounds as exist at law or in equity for the revocation of any contract." (emphasis, internal quotation marks, and citation

omitted)); *Horne v. Los Alamos Nat'l Sec., L.L.C.*, 2013-NMSC-004, ¶ 16, 296 P.3d 478 ("[A]rbitration agreements are contracts enforceable by the rules of contract law."). Following the district court's dismissal of Plaintiff's case, this Court issued two opinions discussing unconscionability, *Rivera*, 2011-NMSC-033, and *Cordova*, 2009-NMSC-021. These precedents explain that "'[u]nconscionability is an equitable doctrine, rooted in public policy, which allows courts to render unenforceable an agreement that is unreasonably favorable to one party while precluding a meaningful choice of the other party.'" *Rivera*, 2011-NMSC-033, ¶ 43 (quoting *Cordova*, 2009-NMSC-021, ¶ 21).

A New Mexico court may find that a contract or contractual term is unenforceable if the contract or term is procedurally unconscionable, substantively unconscionable, or a combination of both. *See Cordova*, 2009-NMSC-021, ¶¶ 21, 24. "While there is a greater likelihood of a contract's being invalidated for unconscionability if there is a combination of both procedural and substantive unconscionability, there is no absolute requirement in our law that both must be present to the same degree or that they both be present at all." *Id.* ¶¶ 24, 32-33 (holding that the contract at issue was so substantively unconscionable that an analysis of procedural unconscionability was unnecessary); *see also Rivera*, 2011-NMSC-033, ¶ 54 ("As in *Cordova*, the arbitration provisions in this case are so substantively unconscionable that we need not consider whether the provisions are also procedurally unconscionable.").

To analyze whether a contract is substantively unconscionable, the court looks to the terms of the contract itself and considers whether the terms of the agreement are commercially reasonable, fair, and consistent with public policy. *See Rivera*, 2011-NMSC-033, ¶ 45. For example, "[c]ontract provisions that unreasonably benefit one party over another are substantively unconscionable." *Cordova*, 2009-NMSC-021, ¶ 25. In *Cordova*, this Court clarified that New Mexico contract law defines a substantively unconscionable contract provision as one that "is grossly unreasonable and against our public policy under the circumstances," *id.* ¶ 31, and we overruled *Guthmann*, 103 N.M. at 511, 709 P.2d at 680, to the extent that *Guthmann* required the party asserting substantive unconscionability to demonstrate that the contract is one "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Cordova*, 2009-NMSC-021, ¶ 31 (internal quotation marks and citations omitted).

Applying these principles, this Court held in *Rivera* and *Cordova* that the contract at issue in each case was substantively unconscionable because the terms were one-sided and unreasonably benefitted one party over the other. *See Rivera*, 2011-NMSC-033, ¶¶ 53-54 (holding that an arbitration agreement in a title loan contract was substantively unconscionable because the lender "unilaterally chose the forum in which it wanted to resolve its disputes . . . while extinguishing [the borrower's] right to access the courts for any reason"); *Cordova*, 2009-NMSC-021, ¶¶ 26-27, 32 (holding that an arbitration agreement in a small loan contract was substantively unconscionable because the lender reserved non-arbitration remedies exclusively to itself while requiring the borrower to arbitrate all claims).

To evaluate whether a contractual provision is procedurally unconscionable, a court considers the "factual circumstances

surrounding the formation of the contract, including the relative bargaining strength, sophistication of the parties, and the extent to which either party felt free to accept or decline terms demanded by the other." *Id.* ¶ 23. A court evaluating procedural unconscionability should consider whether the agreement is a contract of adhesion, i.e., a "standardized contract offered by a transacting party with superior bargaining strength to a weaker party on a take-it-or-leave-it basis, without opportunity for bargaining." *Rivera*, 2011-NMSC-033, ¶ 44 (internal quotation marks and citation omitted). "[A]n adhesion contract is procedurally unconscionable and unenforceable when the terms are patently unfair to the weaker party." *Id.* (internal quotation marks and citation omitted).

D. UNCONSCIONABILITY IS AN AFFIRMATIVE CONTRACT DEFENSE THAT MUST BE PROVEN BY ITS PROPONENT

We now address three principles of New Mexico law which, considered together, demonstrate that Plaintiff has the burden to prove unconscionability. First, as a general rule, the party alleging an affirmative defense has the burden of proof. *See Ortiz v. Overland Express*, 2010-NMSC-021, ¶ 30, 148 N.M. 405, 237 P.3d 707; *see also Tafoya v. Seay Bros. Corp.*, 119 N.M. 350, 352, 890 P.2d 803, 805 (1995) ("The party alleging an affirmative defense has the burden of persuasion."); *J.A. Silversmith, Inc. v. Marchiondo*, 75 N.M. 290, 294, 404 P.2d 122, 124 (1965) (noting that "it is well settled that the party" asserting an affirmative defense has the burden of proof).

Second, New Mexico courts apply this general rule to affirmative contract defenses. *See, e.g.*, *Pucci Distrib. Co. v. Nellos*, 110 N.M. 374, 376, 796 P.2d 595, 597 (1990) (explaining that the party seeking to preclude contract enforcement based on illegality, an affirmative defense, bore the burden of proving illegality at trial); *Hickey v. Griggs*, 106 N.M. 27, 29, 738 P.2d 899, 902 (1987) ("Mitigation of damages is an affirmative defense and its burden of proof is on the defaulting party."); *Mason v. Salomon*, 62 N.M. 425, 429, 311 P.2d 652, 654 (1957) ("[T]he burden is upon the party alleging fraud to establish its existence.").

Third, New Mexico contract law treats unconscionability as an affirmative contract defense, i.e., an equitable exception to the rule that a contract should be enforced according to its terms. *See Rivera*, 2011-NMSC-033, ¶ 17 ("Agreements to arbitrate may . . . be invalidated by generally applicable contract defenses, such as . . . unconscionability." (internal quotation marks and citation omitted)); *see also State ex rel. State Highway & Transp. Dep't v. Garley*, 111 N.M. 383, 389-91, 806 P.2d 32, 38-40 (1991) (discussing unconscionability as one "exception" to the general principle that parties are bound by the terms of a written contract with plain, unequivocal terms); *Fid. Nat'l Bank v. Tommy L. Goff, Inc.*, 92 N.M. 106, 107, 583 P.2d 470, 471 (1978) (referring to the "affirmative defense" of unconscionability); *Montano v. N.M. Real Estate Appraiser's Bd.*, 2009-NMCA-009, ¶ 12, 145 N.M. 494, 200 P.3d 544 ("We will allow equity to interfere with enforcing clear contractual obligations only when well-defined equitable exceptions, such as unconscionability, mistake, fraud, or illegality justify deviation from the parties' contract." (internal quotation marks and citation omitted)).

Thus, we conclude that Plaintiff, the

party alleging unconscionability in this case, bears the burden of proof because unconscionability is an affirmative contract defense, and under settled principles of New Mexico contract law, the party alleging an affirmative contract defense has the burden to prove that the contract is unenforceable on that basis.

Other jurisdictions likewise place the burden of proving affirmative defenses to contract enforcement, including unconscionability, on the party seeking to set aside a contract. *See, e.g.*, *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC*, 282 P.3d 1217, 1224-25 (Cal. 2012) ("The party seeking arbitration bears the burden of proving the existence of an arbitration agreement, and the party opposing arbitration bears the burden of proving any defense, such as unconscionability."); *Norwest Fin. Miss., Inc. v. McDonald*, 905 So. 2d 1187, 1193 (Miss. 2005) ("The party resisting arbitration must shoulder the burden of proving a defense to arbitration."); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 369 (N.C. 2008) ("[U]nconscionability is an affirmative defense, and the party asserting it has the burden of proof."). Courts have applied this contract law principle in cases involving nursing home arbitration agreements. *See, e.g.*, *Briarcliff Nursing Home*, 894 So. 2d at 665 ("The burden of proving unconscionability of an arbitration agreement rests with the party challenging the agreement." (internal quotation marks and citations omitted)); *Hayes v. Oakridge Home*, 908 N.E.2d 408, 412 (Ohio 2009) ("The party asserting unconscionability of a contract bears the burden of proving that the agreement is . . . unconscionable.").

Plaintiff has not cited, nor has this Court found, a case from any jurisdiction holding that the party seeking contract enforcement has the burden to prove the absence of unconscionability. In fact, even *Genesis Healthcare*, on which the Court of Appeals' majority relied, states that "[t]he burden of proving that a contract term is unconscionable rests with the party attacking the contract." 724 S.E.2d at 284, *vacated by Marmet Health Care Ctr.*, 565 U.S. at ___, 132 S. Ct. at 1204.

By holding that the party seeking to compel arbitration has the burden to prove the absence of unconscionability, the Court of Appeals' majority conflated the elements required for the formation of a valid contract with the affirmative defense of unconscionability. We agree with the Court of Appeals, *see Strausberg*, 2012-NMCA-006, ¶ 15, that the party seeking to compel arbitration bears the initial burden to prove that a valid contract exists. *See Cunningham v. Springer*, 13 N.M. 259, 285, 82 P. 232, 237-38 (1905) (recognizing that the plaintiffs carried the burden to establish the existence of a contract and the terms to be enforced under it), *aff'd*, 204 U.S. 647 (1907); *see also Farmington Police Officers Ass'n Commc'n Workers of Am. Local 7911 v. City of Farmington*, 2006-NMCA-077, ¶ 16, 139 N.M. 750, 137 P.3d 1204 ("A party seeking judicial enforcement of a contract bears the burden of persuasion."). To prove the formation of a valid contract under New Mexico law, the party seeking enforcement generally must show that the contract is "factually supported by an offer, an acceptance, consideration, and mutual assent." *Garcia v. Middle Rio Grande Conservancy Dist.*, 1996-NMSC-029, ¶ 9, 121 N.M. 728, 918 P.2d 7 (internal quotation marks and citation omitted).

However, once the party who seeks to compel arbitration has satisfied the initial

burden of proving the formation of a valid contract, our analysis diverges from that of the Court of Appeals, in that the burden shifts to the party opposing arbitration to demonstrate that an affirmative defense, such as unconscionability, renders the contract unenforceable. *See Newcum v. Lawson*, 101 N.M. 448, 454, 684 P.2d 534, 540 (Ct. App. 1984) ("The general rule in contract actions is that the burden of proof is on the party seeking to prove the existence of a fact."). In this case, Plaintiff does not argue that any of the elements required for valid contract formation are lacking, but instead argues that the district court should not enforce the contract because it is unconscionable. Thus, Plaintiff carries the burden to prove her position that the arbitration agreement should not be enforced because it is unconscionable.

Plaintiff's arguments do not convince us to disregard these well-settled principles of contract law and put the cart before the horse. First, Plaintiff argues that Defendants cannot demonstrate the existence of a valid contract without first proving the absence of unconscionability because unconscionability renders a contract void, and "a void contract is a nullity and has no effect." For support, Plaintiff relies on precedents of this Court, which state that unfair contract terms may render a contract "'void as unconscionable.'" *Rivera*, 2011-NMSC-033, ¶ 46 (quoting *Cordova*, 2009-NMSC-021, ¶ 1). However, our precedents make clear that an unconscionable contract or contract term does not render the contract null and void immediately upon formation. Instead, if a court decides that a contract or contract term is unconscionable, the court must determine what remedy is warranted under the circumstances. As this Court has explained,

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

Padilla v. State Farm Mut. Auto. Ins. Co., 2003-NMSC-011, ¶ 15, 133 N.M. 661, 68 P.3d 901 (internal quotation marks and citations omitted); *see also Cordova*, 2009-NMSC-021, ¶ 39 ("There are two possible remedial actions we can take to give effect to our holding that the one-sided arbitration provisions separately attached to the loan agreements are unenforceable: We can strike the arbitration provisions in their entirety, or we can attempt to refashion parts of them into a fair and balanced arbitration arrangement."). A showing of unconscionability may render an otherwise valid contract voidable, revocable, and unenforceable, but this does not mean that the contract was void from its inception. *See Cordova*, 2009-NMSC-021, ¶ 21 (explaining that unconscionability may render a contract unenforceable); *Fiser*, 2008-NMSC-046, ¶ 23 (noting that unconscionability is grounds for the revocation of any contract); *cf. Curtis v. Curtis*, 56 N.M. 695, 702-05, 248 P.2d 683, 688-89 (1952) (discussing the circumstances under which fraud will render a contract void from the beginning, as opposed to the circumstances under which fraud will render a contract voidable upon the successful assertion of fraud as a defense). Thus, we conclude that the burden to prove the formation of a valid contract does not include the burden to prove the absence of unconscionability.

Next, anticipating our holding that the proponent of an affirmative defense bears

the burden of proof, Plaintiff argues that Defendants' motion to compel arbitration is itself an affirmative defense to Plaintiff's lawsuit and, accordingly, that Defendants bear the burden of proof. However, as this Court has explained, "a motion to compel arbitration is essentially a suit for specific performance," not an affirmative defense. *McMillan v. Allstate Indem. Co.*, 2004-NMSC-002, ¶ 10, 135 N.M. 17, 84 P.3d 65 (internal quotation marks and citation omitted). In addition, as we explained above, although Defendants bear the initial burden to prove the formation of a valid arbitration agreement, Plaintiff bears the burden to prove any defense to enforcement.

In the alternative, Plaintiff urges this Court to take the relative bargaining strength of the parties into account for purposes of determining which party has the burden to prove unconscionability. This we will not do. We disagree that the burden to prove an affirmative contract defense should depend upon the relative bargaining strength of the parties, but we note that consideration of the parties' relative bargaining strength is built into the doctrine of unconscionability itself. *See Rivera*, 2011-NMSC-033, ¶ 44 (explaining that the relative bargaining strength of the parties is one factor for the court to consider when deciding whether a contract is procedurally unconscionable). In this case, the district court properly considered the relative bargaining strength of the parties and concluded that Defendants' bargaining position was vastly superior to Plaintiff's. Although the parties' relative bargaining strength is a factor in the unconscionability analysis, it cannot function to shift the burden of proof.

Finally, Plaintiff invites this Court to consider whether a fiduciary relationship exists between Plaintiff and Defendants, and if so, whether that fiduciary relationship might justify a special rule for allocating the burden of proof. Plaintiff cites no New Mexico law to support her argument, relying instead on cases from other jurisdictions and asserting that "courts have explored the possibility of a fiduciary relationship existing" in the nursing home context. Plaintiff admits that she has not preserved her argument regarding any fiduciary relationship and did not claim a breach of fiduciary duty in her complaint. *See* Rule 12-216(A) NMRA ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked . . . ."). We conclude that Plaintiff's fiduciary relationship argument is not properly before this Court, and we decline to address it.

Finding none of Plaintiff's arguments persuasive, we conclude that unconscionability is an affirmative defense to contract enforcement and that the party asserting unconscionability bears the burden to prove that a contract should not be enforced on that basis. Accordingly, we hold that Plaintiff has the burden to prove that the arbitration agreement is unconscionable.

E. THIS COURT'S HOLDING IS CONSISTENT WITH THE FAA AND THE UAA

This Court's holding, that Plaintiff has the burden to prove unconscionability, is not only dictated by settled principles of New Mexico law, but it is also consistent with both the FAA and the UAA, which require a court to enforce a valid arbitration agreement unless the agreement is revocable under established principles of contract law. *See* 9 U.S.C. § 2 ("A written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such

grounds as exist at law or in equity for the revocation of any contract."); Section 44-7A-7(a) ("An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract."). Thus, a court may, consistent with the FAA and UAA, invalidate an arbitration agreement through the application of an existing common law contract defense such as unconscionability. *See Rivera*, 2011-NMSC-033, ¶ 17 (noting that arbitration agreements may "'be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability'" (quoting *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, ___, 130 S. Ct. 2772, 2776 (2010))).

Unlike this Court's holding, which rests on generally applicable principles of contract law, the Court of Appeals created a rule in this case that applies only to nursing home arbitration agreements. *See Strausberg*, 2012-NMCA-006, ¶ 20 ("[W]hen a nursing home relies upon an arbitration agreement signed by a patient as a condition for admission to the nursing home, and the patient contends that the arbitration agreement is unconscionable, the nursing home has the burden of proving that the arbitration agreement is not unconscionable.").

Defendants argue that the rule espoused by the Court of Appeals in this case is preempted by the FAA. We agree. "Congress enacted the FAA to counteract judicial hostility to arbitration" and to ensure that states place arbitration agreements on equal footing with other contracts. *Fiser*, 2008-NMSC-046, ¶ 23; *see Doctor's Assocs.*, 517 U.S. at 682 ("Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts."). Thus, the FAA preempts state law "'to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Rivera*, 2011-NMSC-033, ¶ 17 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989)); *see* U.S. Const. art. VI, cl. 2 (supremacy clause); *see generally N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995) (explaining that federal law may preempt state law when there is "a conflict between federal and state law"). Specifically, the FAA preempts any state law that "prohibits outright the arbitration of a particular type of claim." *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, ____, 131 S. Ct. 1740, 1747 (2011). Additionally, the FAA preempts any "state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue" because such a principle directly conflicts with the FAA. *Doctor's Assocs.*, 517 U.S. at 685.

Congress did not, however, intend the FAA to entirely displace state law governing contract formation and enforcement. *See Volt Info. Scis.*, 489 U.S. at 477 ("The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."). Courts may invalidate arbitration agreements through the application of " 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' " without violating the FAA. *See Rent-A-Center*, 561 U.S. at ___, 130 S. Ct. at 2776 (quoting *Doctor's Assocs.*, 517 U.S. at 687); *see also Concepcion*, 563 U.S. at ___, 131 S. Ct. at 1748 (explaining that Section 2 of the FAA "preserves generally applicable contract

defenses"). However, state courts cannot refuse to enforce arbitration agreements through the application of " 'defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.' " *Rivera*, 2011-NMSC-033, ¶ 17 (quoting *Concepcion*, 563 U.S. at ____, 131 S. Ct. at 1746). As this Court has recognized, New Mexico's common law of contracts applies to arbitration agreements only if " 'that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.' " *Rivera*, 2011-NMSC-033, ¶ 17 (quoting *Perry*, 482 U.S. at 492-93 n.9).

We conclude that the rule announced by the Court of Appeals in this case is preempted by the FAA because the rule singles out arbitration agreements for special treatment, thereby failing to "place arbitration agreements on an equal footing with other contracts." *Rivera*, 2011-NMSC-033, ¶ 16 (internal quotation marks and citation omitted); *cf. Cordova*, 2009-NMSC-021, ¶¶ 37-38 (explaining that New Mexico's generally applicable unconscionability analysis is not preempted by the FAA because it "is applied in the same manner to arbitration clauses as to any other clauses of a contract"); *Fiser*, 2008-NMSC-046, ¶ 23 (explaining that the FAA does not preempt a rule that rests on generally applicable grounds for the revocation of any contract).

Our conclusion is reinforced by the United States Supreme Court's reversal of *Genesis Healthcare*, the West Virginia Supreme Court of Appeals' opinion upon which our Court of Appeals relied. In *Marmet Health Care Center*, the Supreme Court vacated the decision of the West Virginia court because it had created "a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA." 565 U.S. at ___, 132 S. Ct. at 1203-04. The Supreme Court remanded the case to the West Virginia Supreme Court of Appeals to consider whether the arbitration agreements at issue were enforceable under state common law principles that are "not specific to arbitration." *Id.* at ___, 132 S. Ct. at 1204.

Plaintiff and AARP contend that the FAA does not preempt the rule announced by the Court of Appeals' majority because, unlike *Genesis Healthcare*, the Court of Appeals' opinion does not categorically prohibit nursing home arbitration agreements. However, as we have explained, the FAA preempts not only state laws that prohibit arbitration outright, but also state laws that stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Rivera*, 2011-NMSC-033, ¶ 17 (internal quotation marks and citation omitted). In this case, the Court of Appeals created a presumption that all nursing home arbitration agreements are unconscionable, in clear violation of the FAA's mandate that an arbitration agreement must be treated the same as any other contract. Accordingly, we hold that the rule announced by the Court of Appeals' majority is preempted by the FAA.

F. WE DECLINE TO CONSIDER THE MERITS OF PLAINTIFF'S UNCONSCIONABILITY DEFENSE

Plaintiff invites this Court to decide the merits of her substantive unconscionability defense and hold that the arbitration agreement at issue is substantively unconscionable. Plaintiff argues that the arbitration agreement is substantively unconscionable because it requires arbitration of the types of claims

that the resident might bring against the nursing home while reserving to the nursing home the ability to litigate collections actions, the only claims that a nursing home is likely to bring against a resident. Plaintiff contends that, like the arbitration agreements at issue in *Rivera* and *Cordova*, the arbitration agreement in this case is so one-sided and substantively unconscionable that this Court should declare it unenforceable and it need not consider whether the arbitration agreement is also procedurally unconscionable. Plaintiff also asserts that her claim of unconscionability presents an issue of substantial public interest because at least seven cases involving similar or identical arbitration agreements are pending before the Court of Appeals.

Defendants argue that this Court should decline to reach the merits of Plaintiff's defense without first obtaining the benefit of an opinion from the Court of Appeals. Defendants also contend that it would be unfair for this Court to decide whether the arbitration agreement is substantively unconscionable without allowing participation and briefing from any parties litigating similar or identical arbitration agreements in the Court of Appeals. Finally, Defendants note that Plaintiff did not submit either a petition for writ of certiorari or a conditional cross-petition under Rule 12-502(F) NMRA asking this Court to address the merits of her substantive unconscionability defense.

In light of these concerns, we agree with Defendants that the merits of Plaintiff's unconscionability defense should first be addressed by the Court of Appeals, and we decline to consider whether the arbitration agreement is enforceable.

IV. CONCLUSION

We reverse the Court of Appeals and hold that Plaintiff has the burden to prove that the arbitration agreement is unenforceable on the ground that it is unconscionable. We remand to the Court of Appeals to determine whether the district court erred by granting Defendants' motion to compel arbitration and by dismissing Plaintiff's case.

IT IS SO ORDERED.

BARBARA J. VIGIL, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-033

Filing Date: June 27, 2013

Docket No. 33,021

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

HECTOR FLORES SERNA, JR.,

Defendant-Appellant.

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for Appellee

OPINION

BOSSON, Justice.

In a prosecution for trafficking imitation controlled substances—in this case, baking soda packaged to look like cocaine—the New Mexico Imitation Controlled Substances Act allows the jury to consider evidence of any prior criminal convictions of the accused "related to controlled substances or fraud." *See* NMSA 1978, § 30-31A-2(D)(5) (1983). On the other hand, our Rules of Evidence conscientiously restrict any evidentiary use of prior bad acts including criminal convictions. *See* Rules 11-404(B) NMRA; -403 NMRA. To avoid any conflict, we apply the state statute harmoniously with our Rules of Evidence. We hold that any evidence of prior convictions referred to by statute must also be admissible under our evidence rules.

Because the prior criminal convictions in this case do not satisfy Rule 11-404(B), we conclude that their admission into evidence was in error. After careful examination of the record, however, we acknowledge that the error was harmless and affirm the convictions. Agreeing with Defendant on one point of sentencing error, we remand to the district court for an amended sentence as set forth in this opinion.

BACKGROUND

According to the testimony of Virginia Sanchez—the only eyewitness—she and the man she considered to be her husband, George Vargas, spent July 4, 2009, watching fireworks, grilling steaks, and getting high. At some point in the day, the two ran out of drugs and made some phone calls in an attempt to get more. Later that night, after Sanchez had already gone to bed, Hector "Loco" Flores

Serna, Jr., the Defendant in this case, knocked on her door to sell them an eight ball of cocaine.

Vargas got up to answer the door, and Sanchez reached the living room just in time to witness the drug deal. She saw Vargas handing Defendant money—$120—and Defendant was holding a plastic bag. Sanchez decided to test the substance in the bag, so she got some scissors, cut a small hole in the bag, and tasted the white powdery substance. It was baking soda, not cocaine.

According to Sanchez, "[t]hen all hell broke loose." Defendant accused Sanchez and Vargas of switching the bag. Defendant told them that he had just bought it from a friend for $200, even though he was selling it to them for only $120, "and that his friend wouldn't do that to him."

Defendant then pulled out a gun and waived it at them. The two urged Defendant to leave, but he kept getting more and more agitated. Then, according to Sanchez, as Defendant walked toward the door, he shot Vargas in the head, a wound which proved fatal. At trial, Sanchez testified as an eyewitness to these events, and the jury also heard a contemporaneous 911 call in which Sanchez identified Defendant as the assailant.

Defendant was charged with various crimes, including first-degree murder and trafficking an imitation controlled substance—the baking soda packaged to look like cocaine—a fourth-degree felony. *See* NMSA 1978, §§ 30-31A-1 to -15 (1983) (as amended through 2002) (Imitation Controlled Substances Act hereafter ICSA). Before trial, the State filed a motion to allow testimony about two of Defendant's prior criminal convictions, one for possession of a controlled substance (methamphetamine) and the second for credit card fraud. The State based its argument on a specific provision in the ICSA that authorizes the jury to consider evidence of prior convictions related to "controlled substances or fraud." Section 30-31A-2(D)(5). Although expressing doubts about the admissibility of these prior convictions, the trial court ultimately allowed the evidence based upon the specific language in the ICSA.

After a jury trial, Defendant was convicted of first-degree murder and distribution of an imitation controlled substance, as well as other charges not related to this appeal. In considering the charge of first-degree murder, the jury was instructed on theories of both willful and deliberate murder and felony murder, the predicate felony being distribution of an imitation controlled substance. The jury returned a general verdict of guilty on first-degree murder and, therefore, distribution of an imitation controlled substance was correctly vacated as a separate, stand-alone conviction, though it remained as the predicate for felony murder. In addition to the base life sentence for first-degree murder, Defendant's sentence was enhanced by four years pursuant to the habitual offender statute, NMSA 1978, Section 31-18-17 (2003), as well as an additional one year based on the firearm enhancement statute, NMSA 1978, Section 31-18-16 (1993).

Given his first-degree murder conviction and resulting life sentence, Defendant filed a direct appeal to this Court in which he raises two issues. *See* N.M. Const. art. VI, § 2 (providing for direct appeal from life sentences). First, Defendant claims that testimony about his prior unrelated convictions was not admissible under the New Mexico rules of evidence, which constitutes reversible error and entitles him to a new trial.

Second, Defendant claims that the enhancements to his life sentence, for being a habitual offender and for the use of a firearm, are not authorized in capital cases. We consider these two appellate issues in the order raised.

DISCUSSION

The Imitation Controlled Substances Act

The ICSA renders criminal what ordinarily would be a lawful act—in this case the sale of baking soda packaged as cocaine. The ICSA is directed toward circumstances in which a normally innocuous substance becomes a proxy for an illegal controlled substance, cocaine in this instance. *See* Section 30-31A-2(D). Specifically, the ICSA defines an imitation controlled substance as "a substance that is not a controlled substance which by dosage unit appearance, including color, shape, size and markings and by representations made would lead a reasonable person to believe that the substance is a controlled substance." *Id.*

In addition to this definition, the ICSA also lists "factors" that the fact finder "may consider" which include the following:

> (1) statements made by an owner or by anyone else in control of the substance concerning the nature of the substance or its use or effect;
>
> (2) statements made to the recipient that the substance may be resold for inordinate profit;
>
> (3) whether the substance is packaged in a manner normally used for illicit controlled substances;
>
> (4) evasive tactics or actions utilized by the owner or person in control of the substance to avoid detection by law enforcement authorities;
>
> (5) prior convictions, if any, of the owner or anyone in control of the object, under state or federal law related to controlled substances or fraud; and
>
> (6) whether the physical appearance of the substance is substantially identical to a controlled substance.

Id. (emphasis added).

Adding to the confusion in this case, the trial court noted the absence of any uniform jury instruction for a violation of the ICSA. After due deliberation, the trial court felt compelled to include "all of the elements that can be considered" in its instruction given to the jury, including all of Section 30-31A-2(D)(1)-(5). Thus, over objection of counsel, the court allowed testimony about Defendant's two prior convictions, albeit with a jury instruction limiting consideration of those convictions to the ICSA charge, not murder. On appeal, Defendant challenges the admissibility of that testimony about his prior criminal convictions and asks for a new trial as a result.

Prior Convictions May Be Admitted Only When Permitted by the Rules of Evidence

Defendant has argued throughout these proceedings that the Legislature cannot override by statute what this Court has promulgated by rule. We agree, and observe that the law has been settled on this subject for

some time. *See State v. Belanger*, 2009-NMSC-025, ¶ 17, 146 N.M. 357, 210 P.3d 783 (noting that this Court has the ultimate rule-making authority).

Since *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 311, 551 P.2d 1354, 1358 (1976), it has been clear that the ultimate rule making authority over procedure resides in this Court, including the rules of evidence. This Court's plenary authority to regulate procedure stems from our constitutional power of "superintending control over all inferior courts." N.M. Const. art. VI, § 3; *Belanger*, 2009-NMSC-025, ¶ 17. We have previously acknowledged that our judicial authority "is not necessarily exclusive, and may co-exist with harmonious legislative enactments." *Belanger*, 2009-NMSC-025, ¶ 17 (citing *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶¶ 5-9, 138 N.M. 398, 120 P.3d 820). The pivotal question is whether legislative initiatives are truly "harmonious" with our evidentiary rules.

In this case, such a harmonious reading means that evidence offered under the ICSA, such as these prior criminal convictions, would also have to be admissible under our rules of evidence, or more precisely, would not be excluded under our rules of evidence. *See* Rules 11-401, -404(B), and -403 NMRA. If the convictions would be admissible under our rules of evidence, then Section 30-31A-2(D)(5) instructs the court to inform the jury of the relevance of those prior convictions if they relate to controlled substances or fraud. The controlling question, therefore, is whether Defendant's prior convictions were properly admitted under our rules of evidence, and particularly Rule 11-404(B), without regard to the language in the ICSA.

Evidence of prior bad acts, including prior convictions, may be admitted in certain instances, under Rule 11-404(B) which reads:

> (1) **Prohibited uses.** Evidence of a *crime*, wrong, or other act is *not* admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) **Permitted uses; notice in a criminal case.** This evidence [of a crime] *may be* admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case, the prosecution must
>
> (a) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial, and
>
> (b) do so before trial – or during trial if the court, for good cause, excuses lack of pretrial notice.

(Emphasis added.) Rule 11-404(B) makes clear that evidence of prior convictions is not permitted to prove propensity—that the accused is of bad character and thus more likely to have committed the crimes presently charged.

The procedure for admitting evidence under Rule 11-404(B) "requires counsel to identify the consequential fact to which the proffered evidence of other acts is directed." *State v. Lucero*, 114 N.M. 489, 492, 840 P.2d 1255, 1258 (Ct. App. 1992). "The proponent of the evidence must demonstrate its relevancy

to the consequential facts, and the material issue, such as intent, must in fact be in dispute." *State v. Elinski*, 1997-NMCA-117, ¶ 13, 124 N.M. 261, 948 P.2d 1209, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110. "Evidence of other crimes than the one charged must however have a real probative value, and not just possible worth on issues of intent, motive, absence of mistake or accident, or to establish a scheme or plan." *State v. Mason*, 79 N.M. 663, 667, 448 P.2d 175, 179 (Ct. App. 1968) (internal quotation marks and citation omitted). As this Court recently stated in *State v. Gallegos*,

> Part of the proponent's responsibility is also to cogently inform the court—whether the trial court or a court on appeal—the rationale for admitting the evidence to prove something other than propensity. In other words, more is required to sustain a ruling admitting [other-acts] evidence than the incantation of the illustrative exceptions contained in the Rule.

2007-NMSC-007, ¶ 25, 141 N.M. 185, 152 P.3d 828 (alteration in original) (internal quotation marks and citation omitted). Once "it is shown that evidence of other acts has a legitimate alternative use that does not depend upon an inference of propensity, the proponent must establish that under Rule 11-403 NMRA, the probative value of the evidence used for a legitimate, non-propensity purpose outweighs any unfair prejudice to the defendant." *State v. Kerby*, 2005-NMCA-106, ¶ 25, 138 N.M. 232, 118 P.3d 740.

In spite of this clearly established protocol for admitting prior convictions under Rule 11-404(B), the State chose another path, electing to rely almost exclusively on Section 30-31A-2(D)(5), as if the ICSA were a font of evidentiary authority independent of this Court. Preferring to stand alone on the ICSA, the State omitted Rule 11-404(B) from its written, pretrial motion to have the prior convictions admitted at trial. During a hearing on the motion, the State made a passing reference to the enumerated list in Rule 11-404(B), suggesting that the evidence "specifically could go to intent or knowledge." The State argued that the prior possession conviction showed that Defendant knew what was and was not cocaine, notwithstanding the obvious difference being that Defendant had been previously convicted of methamphetamine possession, not cocaine. The State had nothing relevant to say about the prior fraud conviction other than it might go to "intent."

This hardly survives scrutiny under our case law. Falling short of any effort to "inform the court," whether "cogently" or otherwise, of any true relevance to this particular case, the State did little more than offer "an incantation of the illustrative exceptions contained in the Rule," a shortcoming we warned against in *Gallegos*. And even now on appeal we are left to ponder what possible relevance these prior convictions could have had in this instance, other than, of course, their specific enumeration in the ICSA, but not in Rule 11-404(B).

Defendant's intent was not at issue in the ICSA prosecution; he was not claiming an innocent mistake or lack of knowledge about illicit drugs. Under our case law, the question of intent or knowledge "must in fact be in dispute." His defense went more to the heart of the prosecution's case: that it never happened at all, that he was never there, and

that the witness Sanchez, an admitted drug user, made it all up. The State's "incantation" of intent and knowledge misses the mark.

Far from proving a relevant point under Rule 11-404(B), these prior convictions went solely to propensity, painting Defendant as a bad character from the drug world. Bearing no legitimacy under our rules, these convictions were inadmissible at trial, something the trial court duly recognized under our rules of evidence but was distracted by the confusing, inconsistent, and discordant language of the ICSA. Clearly, admission of this prior-crimes testimony was in error. The question now turns, therefore, on the effect of the trial court's error, and specifically whether it requires us to reverse these convictions and remand for a new trial.

Harmless Error

We review improperly admitted evidence for non-constitutional harmless error. *State v. Branch*, 2010-NMSC-042, ¶ 15, 148 N.M. 601, 241 P.3d 602, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110. "[N]on-constitutional error is harmless when there is no reasonable *probability* the error affected the verdict." *State v. Tollardo*, 2012-NMSC-008, ¶ 36, 275 P.3d 110 (internal quotation marks and citation omitted).

When assessing the probable effect of evidentiary error, "courts should evaluate all of the circumstances surrounding the error." *Id.* ¶ 43. This includes the source of the error, the emphasis placed on the error, evidence of the defendant's guilt apart from the error, the importance of the erroneously admitted evidence to the prosecution's case, and whether the erroneously admitted evidence was merely cumulative. *Id.* These considerations, however, are not exclusive, and they are merely a guide to facilitate the ultimate determination—whether there is a reasonable probability that the error contributed to the verdict. *See id.* We proceed to that analysis.

Here, the erroneous evidence of Defendant's prior convictions was admitted through the testimony of Detective Rudy Sanchez. Detective Sanchez was asked whether, in the course of his investigation, he found documentation of Defendant's prior convictions. The Detective responded that he had learned about Defendant's prior convictions for possession of a controlled substance, methamphetamine, and for credit card fraud. Documentation of the prior convictions was not admitted into evidence, and Defendant did not testify. Thus, this testimony was the only source through which the jury learned of Defendant's criminal record.

Importantly, our review of the record shows that neither side placed much emphasis on the erroneously admitted evidence during trial. Immediately after hearing from Detective Sanchez, the jury was given a limiting instruction, informing them that they were to consider the evidence for the sole purpose of determining whether Defendant "committed the offense of distribution of an imitation controlled substance but for no other purpose." Defendant did not inquire into this testimony on cross examination, nor was it mentioned on redirect. The prior convictions were not mentioned again until the State's closing argument, during which the State briefly reminded the jury about the convictions when explaining the jury instructions. The State told the jury that it could consider "[w]hether the person has prior convictions for controlled substances or fraud.

In this case the defendant has both." Nothing further was said. We can conclude, therefore, that the State did not exploit the erroneously admitted evidence at trial, nor did it make the evidence a significant part of its case against Defendant. Given the abundance of other evidence against Defendant, the State simply did not need to do so.

The evidence of Defendant's guilt was substantial, such that the jury likely did not rely on these two prior convictions when reaching its verdict. Sanchez, the sole eyewitness, identified Defendant as the one who shot Vargas. She gave a detailed account of how she and Vargas called Defendant to purchase more drugs, how Defendant came to the house late at night and became very agitated when she discovered that the baggie was filled with baking soda. She recounted how Defendant pulled a gun and shot Vargas. In court, Sanchez again identified Defendant as the shooter.

In addition, the jury heard the tape of Ms. Sanchez's 911 call, in which she identified Defendant as the one who had shot Vargas. During closing, the State reminded the jury of what they had heard on the 911 tape.

Further corroborating Sanchez's eyewitness testimony, physical evidence found at the scene linked Defendant to the crime. Similar .22 caliber shell casings were found both at the scene of the homicide and at Defendant's home. A ballistics expert testified that the shell casings were fired from the same gun. Although the gun used in the shooting was never found, a witness attending a Fourth of July party at Defendant's neighbor's house stated that she heard numerous gunshots coming from Defendant's house on the day of the shooting.

Ironically, these prior convictions were largely unnecessary to the State's case. Sergeant Ralph Monget testified to being one of the first officers on the scene of the shooting. Inside the residence, he saw "a plastic baggy with what [he] believed was narcotics on a table in the front room." Based on his training and experience, whatever was in the baggie was packaged like narcotics. He explained to the jury that the baggie "appeared to be cocaine . . . because it was a white powdery substance inside of a plastic baggy tied off at the tip" which is "consistent with the way cocaine is typically packaged for resale." Thus, the jury heard specific and uncontradicted evidence that the bag of baking soda was made to appear to be cocaine, compelling evidence for a conviction under the ICSA.

Also important, Defendant never challenged the assertion that the baggie contained an imitation controlled substance. As Defendant argues, "there was no dispute in the present case that the 7.14 grams of baking soda was meant to represent cocaine." Rather, Defendant's primary defense was that Ms. Sanchez was not credible and was making up the whole story. Thus, we agree with Defendant's argument that "[e]ither [Sanchez] was telling the truth, and ***described*** a drug deal, or she was lying, and ***fabricated*** a drug deal. In either case, however, the baggie of baking soda was a prop, unmistakably meant to appear to be cocaine." As Defendant wryly observes, he, Vargas, and Sanchez "were obviously not setting out to make biscuits that night."

Perhaps of greatest significance, the evidence of prior criminal convictions appears to be cumulative. If the State wanted the prior convictions to prove Defendant's intent and knowledge of drugs and the drug trade—and

his resulting bad character—other evidence had already established this at trial. Sanchez testified that Defendant was "one of the people that we would buy [drugs] from." She further explained that when she bought drugs from Defendant "[h]e usually delivered it." None of this testimony was challenged at trial. By the time the State introduced evidence of Defendant's prior convictions, the prosecution had already established Defendant's knowledge of the drug trade, and his bad, drug-dealing character. In the context of this particular case, therefore, it is difficult to see how Defendant, the drug user, could be any more damning than Defendant, the drug dealer.

In light of all the circumstances, therefore, we conclude that reference to these prior convictions, though error, was harmless. Under the standard for nonconstitutional error, the State satisfies us that "there is no reasonable probability" that evidence of Defendant's prior convictions affected this verdict and contributed to Defendant's convictions.

Enhancement of Defendant's Life Sentence Was Not Authorized by Law

Defendant argues, and the State agrees, that the sentencing enhancements applied to Defendant's life sentence were unlawful. Defendant received sentencing enhancements for being a habitual offender, under Section 31-18-17, and for the use of a firearm in the commission of the offense, under Section 31-18-16. Each of these enhancements, by their own terms, only apply to *noncapital* felonies. *See* Section 31-18-17(A) ("A person convicted of a *noncapital* felony . . . ." (emphasis added)); Section 31-18-16(A) ("When a separate finding of fact by the court or jury shows that a firearm was used in the commission of a *noncapital* felony . . . ." (emphasis added)). Yet Defendant's sentence for murder, a capital felony, NMSA 1978, Section 30-2-1 (1994), was enhanced under each of these statutes.

While defense counsel inexplicably did not object to the enhancements, "[a] trial court does not have jurisdiction to impose an illegal sentence on a defendant and, therefore, any party may challenge an illegal sentence for the first time on appeal." *State v. Paiz*, 2011-NMSC-008, ¶ 33, 149 N.M. 412, 249 P.3d 1235. Therefore, we agree with Defendant, as appropriately conceded by the State, that his sentence was improperly enhanced, and we remand to the trial court to correct the sentencing error.

CONCLUSION

We affirm Defendant's convictions and remand for the trial court to correct the sentencing error.

IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-034

Filing Date: June 27, 2013

Docket No. 32,929

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ORLANDO TORREZ,

Defendant-Appellant.

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Santa Fe, NM

for Appellant

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for Appellee

OPINION

CHÁVEZ, Justice.

In this case we discuss, among other issues, how the district court astutely avoided a double jeopardy violation in this felony murder trial. Defendant Orlando Torrez fired multiple shots at a house where he had attended a party earlier in the evening, killing one person and injuring another. A jury rejected his claim of self-defense and found him guilty of felony murder predicated on the felony of shooting at a dwelling resulting in death. The jury also found him guilty of shooting at a dwelling or occupied building and tampering with evidence. Defendant raises several issues on appeal, which we place in four categories for purposes of our discussion: (1) two alleged double jeopardy violations, (2) alleged error in refusing two jury instructions, (3) alleged denial of compulsory process when a witness subpoenaed to testify on his behalf did not appear, and (4) alleged insufficiency of the evidence to support each conviction. We are not persuaded by any of these issues, and we therefore affirm Defendant's convictions.

I. BACKGROUND

On October 31, 2003, Defendant and four others went to a house party near Taos,

New Mexico. Defendant claimed that during the party he became involved in an altercation with another man who had insulted his girlfriend, and that he was also threatened by two unidentified men later that night. After the threats, Defendant, his friend Alfredo, and their three female companions exited the house and walked to Defendant's vehicle, when Defendant noticed that the driver's side window of his car was broken. Defendant testified that he noticed that his sawed-off .22 caliber rifle was missing, so he walked back toward the house, when he heard gunshots. Defendant was approached by the two men who had threatened him earlier, each of whom was holding a gun, who told Defendant that he needed to leave immediately or he and his passengers would be killed. As Defendant and the others drove away, Defendant's vehicle was shot at multiple times and hit twice.

Defendant went to his home and he and Alfredo retrieved three rifles, two shotguns, and one handgun. They then returned to the party. Testimony regarding what happened next is conflicting. Defendant alleged that he returned to the party, armed himself with a 9 millimeter handgun, and walked to the house, where he was assaulted from behind, causing him to lose his weapon. Defendant alleged that he freed himself from the assault and ran back toward the car while shots rang out. Once he was back at the car, Defendant claimed that he took out a rifle and shot in the direction of muzzle flashes.

The State alleged that when Defendant and Alfredo arrived back at the party, they stopped the car, got out, and began firing at the house. In any case, two partygoers inside the house were shot; Naarah Holgate was struck in the left arm, and Danica Concha was hit in the chest. Holgate survived her injury and Concha was pronounced dead in the early hours of November 1, 2003.

II. DOUBLE JEOPARDY

This is Defendant's second appeal in this case. During his first trial, Defendant was charged with and convicted of first degree murder, shooting at a dwelling or occupied building, and tampering with evidence. In Defendant's first appeal, we reversed his convictions and remanded for a new trial, finding error in the admission of testimony by a gang expert. *State v. Torrez*, 2009-NMSC-029, ¶ 34, 146 N.M. 331, 210 P.3d 228. Defendant raises two double jeopardy arguments in this appeal. First, he argues that the Double Jeopardy Clause precluded the State from prosecuting him for depraved mind murder during the second trial because he was implicitly acquitted of depraved mind murder during his first trial. Second, Defendant argues that the Double Jeopardy Clause precludes him from being punished for both felony murder and the predicate felony of shooting at a dwelling. For the reasons that follow, we conclude that Defendant's arguments are without merit.

A. Defendant's Double Jeopardy Rights Were Not Violated When He Was Tried for First Degree Murder under Alternative Theories (Depraved Mind Murder and Felony Murder) in His Second Trial

In his first trial, Defendant was charged with first degree murder under two alternative theories: felony murder and depraved mind murder. The jury returned a general verdict of guilty on the murder charge, and therefore it did not indicate under which alternative it had determined that he was guilty. However, in

the judgment and sentence, the district court indicated that Defendant was found guilty of "Murder in the First Degree (Felony Murder)."

After we reversed Defendant's convictions, the State re-filed the charges. Defendant filed a motion to preclude the State from pursuing a conviction of first degree murder based on depraved mind murder, contending that he was acquitted of depraved mind murder during his first trial. Defendant was ultimately tried under both theories and convicted of felony murder. The jury did not enter a verdict on depraved mind murder.

On appeal, Defendant argues that because the judgment and sentence entered in the first trial stated that he was found guilty of felony murder, he was implicitly acquitted of depraved mind murder. Defendant points out that the State did not appeal the validity of the judgment and sentence in his first appeal, and argues that it was a stipulation between the parties. Therefore, Defendant argues that his right to be free from double jeopardy was violated because he can only be retried "for the offense which resulted in a conviction in the first trial"—i.e., felony murder.

The State denies that there was a stipulation and cites *State v. Davis*, 97 N.M. 745, 748, 643 P.2d 614, 617 (Ct. App. 1982), to support its contention that neither the judge nor the parties may agree to a verdict that is different from the jury's actual verdict. We agree with the State.

The jury in Defendant's first trial entered a general verdict of guilty of first degree murder, but it did not specify whether its verdict was based on felony murder, depraved mind murder, or both. Therefore, neither we nor the district court could know under which theory Defendant was convicted. In *Davis*, the Court of Appeals explained that a district court has a mandatory duty to enter a judgment and sentence consistent with the jury's verdict. *Id.*; *see* Rule 5-701(A) NMRA ("If the defendant is found guilty, a judgment of guilty shall be rendered. If the defendant has been acquitted, a judgment of not guilty shall be rendered."). A district court does not have the authority to override a jury's verdict and enter a verdict different than that handed down by the jury. *See State v. Soliz*, 79 N.M. 263, 267, 442 P.2d 575, 579 (1968) (requiring that the judgment be amended to conform with the jury's verdict). Following the first trial, the district court should simply have entered a judgment stating that the jury found Defendant guilty of first degree murder. Defendant was neither expressly nor impliedly acquitted of depraved mind murder.

Both the United States and the New Mexico Constitutions protect a defendant's right to be free from double jeopardy. U.S. Const. amends. V, XIV, § 1; N.M. Const. art. II, § 15. The Legislature has elaborated on the protections afforded to an accused by the Double Jeopardy Clause in NMSA 1978, Section 30-1-10 (1963), which provides, in relevant part, that "[w]hen the indictment, information or complaint charges different crimes or different degrees of the same crime and a new trial is granted the accused, he [or she] may not again be tried for a crime or degree of the crime greater than the one of which he [or she] was originally convicted." *See also State v. Lynch*, 2003-NMSC-020, ¶ 22, 134 N.M. 139, 74 P.3d 73 (stating that a new trial should not involve an "offense of a greater degree than the degree of which [the defendant] had been convicted at the prior trial"). Depraved mind murder and felony murder are both first degree felonies. NMSA 1978, § 30-2-1(A)(2) & (3) (1963, as

recodified through 1994). Therefore, retrial under both first degree felonies—felony murder and depraved mind murder—did not violate Defendant's right to be free from double jeopardy.

Our jurisprudence is consistent with that of other jurisdictions. In *Commonwealth v. Carlino*, 865 N.E.2d 767 (Mass. 2007), the Supreme Judicial Court of Massachusetts decided a very similar issue as that raised by Defendant in the instant case. The defendant in *Carlino* was tried on three theories of first degree murder and convicted on two theories, as indicated by the jury on the verdict slip. *Id.* at 769. Regarding the third theory, which was based on felony murder, the jury did not indicate whether it found the defendant guilty or not guilty. *Id.* Massachusetts' highest court reversed the defendant's conviction, and he was then retried. *Id.* at 769-70. At the second trial, the jury was again asked to consider all three theories of first degree murder, and the defendant was found guilty under all three theories. *Id.* at 770. The defendant appealed, arguing that his double jeopardy rights had been violated because the jury in his second trial was allowed to convict on a felony murder theory that he claimed was rejected by the jury in his first trial. *Id.*

The *Carlino* court framed the question as whether the jury's silence on the felony murder theory in the first trial was an acquittal for purposes of double jeopardy. *Id.* at 774. Like Defendant in the instant case, the defendant in *Carlino* cited *Green v. United States*, 355 U.S. 184, 189-98 (1957), in which the United States Supreme Court held that "silence on a charge of murder in the first degree and conviction of the lesser included offense of murder in the second degree implied an acquittal of the greater offense." *Carlino*, 865 N.E.2d at 774 (describing *Green*). The *Carlino* court noted that *Green* has never been read as broadly as the defendant suggested, and "[c]ourts have refused to imply an acquittal unless a conviction of one crime logically excludes guilt of another crime." *Carlino*, 865 N.E.2d at 774. The *Carlino* court also concluded that "[t]he jury's failure to check the felony-murder box could not operate as a conviction; likewise, it does not operate as an acquittal." *Id.* at 775. Thus, there was no double jeopardy violation. *Id.*

Here, Defendant makes the exact argument advanced in *Carlino*, and, as in *Carlino*, his argument is unavailing. Defendant's double jeopardy rights were not violated when he was retried for first degree murder under felony murder and depraved mind murder theories.

B. Defendant's Double Jeopardy Rights Were Not Violated When He Was Convicted of Felony Murder with Shooting at a Dwelling as the Predicate Felony Because that Conviction Was Based on Different Conduct than His Separate Conviction for Shooting at a Dwelling

Defendant contends that his right to be free from double jeopardy was violated because he was convicted of both felony murder and the predicate felony of shooting at a dwelling. The general rule is that when a jury convicts a defendant of both felony murder and the same felony upon which the felony murder conviction is predicated, the predicate felony must be vacated to avoid a double jeopardy violation. *State v. Frazier*, 2007-NMSC-032, ¶ 1, 142 N.M. 120, 164 P.3d 1. The predicate felony is vacated because it is subsumed within the felony murder conviction. *Id.* For example, in

Frazier the defendant was convicted of (among other crimes), kidnapping and felony murder predicated on the same kidnapping. *Id.* ¶ 4. We vacated the kidnapping conviction in *Frazier* to cure the double jeopardy violation. *Id.* ¶ 40.

Although vacating the predicate felony is one way to cure a double jeopardy violation, this case illustrates how a double jeopardy violation in a felony murder trial may be avoided altogether. In this case, Defendant was not convicted of shooting at a dwelling and felony murder based on the same shooting at a dwelling charge. Instead, Defendant was found guilty of felony murder based on the predicate felony of shooting at a dwelling resulting in the death of Danica Concha, and also found guilty of a separate count of shooting at a dwelling which resulted in the injury of a second victim, Naarah Holgate. Although the jury considered that the elements of shooting at a dwelling resulting in the death of Danica Concha supported the felony murder conviction, the jury was not asked to enter a separate verdict on the same predicate felony, thus avoiding the double jeopardy problem of multiple punishments for the same offense.

The history of the case explains why there was no violation of the Double Jeopardy Clause. Count 1 of the indictment charged Defendant with depraved mind murder, or in the alternative, the felony murder of Danica Concha during the commission of the felony of shooting at a dwelling. Count 2 charged Defendant with shooting at a dwelling resulting in the injury of Naarah Holgate. At the commencement of voir dire, the district court read the indictment to the jury venire, which indicated that Defendant was charged with three counts. Count 1 alleged first degree murder for the death of Danica Concha. Count 2 alleged shooting at a dwelling resulting in injury to Naarah Holgate. Count 3 alleged tampering with evidence.

At the conclusion of the evidence phase, the jury was instructed on felony murder with the predicate felony of shooting at a dwelling immediately following the felony murder instruction. These two instructions read as follows:

> For you to find the defendant Orlando Torrez guilty of felony murder, which is first degree murder, as charged in the alternative in Count 1, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. The defendant Orlando Torrez committed the crime of shooting at a dwelling or occupied building;
>
> 2. Orlando Torrez caused the death of Danica Concha during the commission of the crime of Shooting at a Dwelling or Occupied Building;
> 3. Orlando Torrez intended to kill or knew that his acts created a strong probability of death or great bodily harm;
>
> 4. The defendant did not act in self-defense;
>
> 5. This happened in New Mexico on or about the 1st day of November, 2003.

This instruction was immediately followed by the elements instruction for the predicate felony of shooting at a dwelling.

> In New Mexico, the elements of the crime of Shooting at a Dwelling or Occupied Building, are as follows:
>
> 1. The defendant willfully shot a firearm at a dwelling or occupied building;
>
> 2. The defendant knew that the building was a dwelling or occupied;
>
> 3. The defendant did not act in self-defense;
>
> 4. The defendant caused the death of Danica Concha.

See UJI 14-340 NMRA. The shooting at a dwelling instruction that was subsumed within the felony murder instruction clearly indicated that it related to the shooting death of Danica Concha. In addition, the district court's instruction to the jury regarding accessory liability for felony murder instructed the jury that to find accessory liability, it must find, among other elements, that during the commission of the felony of shooting at a dwelling, Danica Concha was killed.

Thirteen instructions later, the jury was instructed on the felony of shooting at a dwelling as charged in Count 2, the count that identified the victim as Naarah Holgate. The instruction does not specifically identify Naarah Holgate as the victim, or that she was injured. However, in the instruction that explains the mens rea requirement for shooting at a dwelling, the district court included a parenthetical with the word "injury" which, while not a model of clarity, was clearly intended to alert the jury that this particular shooting at a dwelling instruction involved an injury to someone. Count 2 of the indictment that was read to the jury identified that someone as Naarah Holgate. Therefore, when read in context, it was clear that the first shooting at a dwelling instruction that immediately followed the felony murder instruction was the predicate for felony murder, and the second shooting at a dwelling instruction related only to the injured victim. To improve the clarity of the jury instruction, the parties could have specifically included the victim's name in one of the elements, such as "Naarah Holgate was injured by the shooting." Had the parties done so, the instruction would have read as follows:

> For you to find the defendant guilty of shooting at an inhabited dwelling or occupied building as charged in Count 2, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements:
>
> 1. The defendant willfully shot a firearm at a dwelling or occupied building;
> 2. The defendant knew that the building was a dwelling or occupied building;
>
> 3. Naarah Holgate was injured by the shooting;
>
> 4. This happened in New Mexico on or about the 1st day of November, 2003.

The jury returned three guilty verdicts against Defendant, one for each count in the indictment. The State contends that the

separate guilty verdict of shooting at a dwelling as charged in Count 2, which relates to the injured victim and not to the decedent, does not result in a double jeopardy violation because, as we stated in *Frazier*, "if the facts support multiple charges of a particular felony which can be sustained under a unit-of-prosecution analysis, then the State is free to use one of those charges as the predicate felony and obtain separate convictions for the other charges." 2007-NMSC-032, ¶ 27. We agree. It is a settled principle that when there are two victims and each suffered a separate and distinct harm, a defendant can be convicted of two counts of the same offense, one for each victim, without violating double jeopardy principles. *See State v. Bernal*, 2006-NMSC-050, ¶¶ 18, 20, 140 N.M. 644, 146 P.3d 289 (concluding that there were two offenses where two victims suffered separate and distinct harm).

Defendant was not convicted of felony murder and two separate counts of shooting at a dwelling. The district court avoided the double jeopardy problem by requiring the jury to find all of the elements of felony murder, plus shooting at a dwelling resulting in the death of Danica Concha, to support the felony murder conviction, without also requiring the jury to separately find Defendant guilty of that same predicate felony. A separate verdict form regarding the felony of shooting at a dwelling resulting in the death of Danica Concha was not necessary because this felony was subsumed within the felony murder instruction. Finding all of the elements of shooting at a dwelling plus the elements of felony murder elevated what would have been a second degree murder to a first degree murder. *State v. Montoya*, 2013-NMSC-020, ¶ 15, 306 P.3d 426 (providing that "felony murder is a second-degree murder that is elevated to first-degree murder when the murder was committed during the commission . . . of some other dangerous felony"). It was as though the felony murder instruction had actually read as follows:

> For you to find the defendant Orlando Torrez guilty of felony murder, which is first degree murder, as charged in the alternative in Count 1, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. The defendant Orlando Torrez willfully shot a firearm at a dwelling or occupied building;
> 2. The defendant knew that the building was a dwelling or occupied;
> 3. Orlando Torrez caused the death of Danica Concha;
> 4. Orlando Torrez intended to kill or knew that his acts created a strong probability of death or great bodily harm;
> 5. The defendant did not act in self-defense;
> 6. This happened in New Mexico on or about the 1st day of November, 2003.

Simply stated, the felony shooting at a dwelling in Count 2 was not the predicate felony for the felony murder conviction.

Had the district court instructed the

jury to return verdicts on felony murder as well as the shooting at a dwelling resulting in the death of Danica Concha and shooting at a dwelling under Count 2, guilty verdicts on all three would have required the court to vacate the conviction of shooting at a dwelling resulting in the death of Danica Concha to avoid a double jeopardy violation. The district court astutely avoided the double jeopardy violation by not requiring the jury to return a separate verdict on the shooting at a dwelling felony that served as the predicate for the felony murder conviction.

Defendant shot multiple times at an occupied dwelling, killing one person and injuring another. The felony murder conviction results in the punishment for the death, and the conviction for shooting at a dwelling results in the punishment for the harm to the injured victim. We therefore reject Defendant's argument. We affirm his convictions for felony murder, with shooting at a dwelling resulting in the death of Danica Concha as the predicate felony, and his separate conviction for shooting at a dwelling under Count 2 of the indictment.

III. JURY INSTRUCTIONS

Defendant contends that the district court erred when it declined to give two instructions that he requested. The first instruction he requested relates to the possible loss, destruction, or alteration of evidence by law enforcement officers, and his second requested instruction was that Defendant acted in defense of others. "The propriety of denying a jury instruction is a mixed question of law and fact that we review de novo." *State v. Boyett*, 2008-NMSC-030, ¶ 12, 144 N.M. 184, 185 P.3d 355 (internal quotation marks and citation omitted). For the following reasons, we conclude that the district court correctly declined to give both instructions.

A. The District Court Did Not Err in Refusing Defendant's Requested Jury Instruction Regarding Uncollected Evidence

Two police officers, Charlie Martinez and Lori Garcia, a/k/a Lori Lopez, testified that during their investigation of the shooting, they observed spent and unspent bullet casings in the house where the party was held, but that the bullet casings were never collected as evidence. Several spent .22 bullet casings were also observed on the ground outside the house, and although these bullet casings were photographed, they too were not collected. The district court refused an instruction requested by Defendant that would have allowed the jury to assume that evidence was unfavorable to the prosecution if the jurors found that the evidence was "lost, destroyed or altered . . . without a reasonable explanation." Defendant argues that had the spent bullet casings been collected, such evidence would have bolstered his theory of the case, which was that he shot toward the house at people who were shooting at him.

The case that controls the disposition of this issue is *State v. Ware*, 118 N.M. 319, 881 P.2d 679 (1994). In *Ware*, police officers responded to a domestic violence call and found a woman with a wound to the back of her head. *Id.* at 320, 881 P.2d at 680. The woman's boyfriend was also at the scene, and had blood on his body and clothing. *Id.* While investigating the crime, the officers found a rock that had blood on it. *Id.* They photographed the rock but they did not collect it as evidence, nor did they take samples from it. *Id.* The defendant was charged with three

counts of aggravated battery with a deadly weapon, and he sought dismissal of the charges or suppression of any photographs of or testimony about the rock. *Id.*

We adopted a two-step approach in analyzing whether the defendant in *Ware* was entitled to a remedy for the investigators' failure to collect the rock and preserve it as evidence. *Id.* at 325, 881 P.2d at 685. First, the district court must determine as a matter of law whether the evidence that the state failed to gather from the crime scene is material to the defendant's defense, as opposed to being extraneous or duplicative of other evidence. *Id.* If the evidence is immaterial, then sanctioning the state when police fail to gather evidence from the crime scene is not appropriate. *Id.* "Evidence is material only if there is a reasonable probability that, had the evidence been [available] to the defense, the result of the proceeding would have been different." *Id.* (alteration in original) (internal quotation marks and citation omitted). Further, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (internal quotation marks and citation omitted).

The second step requires the district court to look at the conduct of the investigating officers, but only if the court first concludes that the evidence is material to the defendant's defense. *Id.*

> If the trial court determines that the failure to collect the evidence was done in bad faith, in an attempt to prejudice the defendant's case, then the trial court may order the evidence suppressed. If it is determined that the officers were grossly negligent in failing to gather the evidence—for example, by acting directly contrary to standard police investigatory procedure—then the trial court may instruct the jury that it can infer that the material evidence not gathered from the crime scene would be unfavorable to the State. When the failure to gather evidence is merely negligent, an oversight, or done in good faith, sanctions are inappropriate, but the defendant can still examine the prosecution's witnesses about the deficiencies of the investigation and argue the investigation's shortcomings against the standard of reasonable doubt.

Id. at 325-26, 881 P.2d at 685-86.

In applying this two-part test, the *Ware* court determined "that the rock allegedly used to batter [the victim was] material to Defendant's defense," and concluded that evidence about the rock should not have been suppressed. *Id.* at 326, 881 P.2d at 686.

> Although it is a close call, we believe that there is a reasonable probability that the unavailability of the rock could affect the outcome of the case. However, much like the case in [*People v.*] *Bradley*, [205 Cal. Rptr. 485 (Ct. App. 1984),] the record before us indicates that the decision to photograph the rock, rather than collect it as physical evidence, was a judgment call and certainly not anything more than mere inadvertence or ordinary negligence on the part of the police. Thus, we hold that suppression of the evidence of the rock was inappropriate and

> that the trial court abused its discretion by suppressing this evidence.

Id.

In this case, there are two sets of .22 bullet casings at issue—a set from inside the house that was apparently neither photographed nor collected, but which is referenced in police reports and testimony, and a set from outside the house that was photographed but never collected. Defendant alleges that he shot toward the house after being shot at by people inside or near the house, and that the casings or photographs of the casings in the house could have added support for his defense. The State argues that the bullet casings were not material to Defendant's defense because they would not have provided any additional information other than that provided by the testimony of Officers Charlie Martinez and Lori Garcia, a/k/a Lori Lopez.

Defendant has not explained how it is reasonably probable that had photographs of the casings or the casings themselves been introduced into evidence, the result of his trial would have been different. The existence of shell casings inside the house was not in dispute.

Even if we were to give Defendant the benefit of any doubt and find that the uncollected evidence was material to his defense, he still was not entitled to the jury instruction he requested. Defendant does not contend that the officers acted in bad faith, or even that their failure to collect the evidence was grossly negligent. Instead, Defendant asserts that he was entitled to the requested jury instruction because of the "negligently lost evidence." In *Ware*, we stated that if the court determines

> that the officers were grossly negligent in failing to gather the evidence—for example, by acting directly contrary to standard police investigatory procedure—then the trial court may instruct the jury that it can infer that the material evidence not gathered from the crime scene would be unfavorable to the State.

118 N.M. at 325, 881 P.2d at 685. A claim that officers negligently failed to gather evidence is simply not enough to warrant the instruction. *Id.* at 325-26, 881 P.2d at 685-86. Because Defendant did not tender any evidence to support a finding that the officers were grossly negligent, the district court did not err in rejecting Defendant's tendered jury instruction.

B. The District Court Did Not Err in Refusing to Instruct on Defense of Another

Defendant requested and was refused a "defense of another" instruction. He contends that the district court erred in denying the instruction for two reasons. First, because the instruction was given in the first trial and the State did not object to it during the first trial, the instruction became the law of the case, which obligated the court in the new trial to give the same instruction. Second, the evidence supported giving the instruction. The State argues that there was no evidence that Defendant was acting in defense of another, and therefore refusal of the instruction was proper.

To support his argument, Defendant cites *McMinn v. MBF Operating Acquisition*

Corp., 2007-NMSC-040, ¶ 53, 142 N.M. 160, 164 P.3d 41, for the proposition that "[j]ury instructions not objected to become law of the case." (Internal quotation marks and citation omitted.) In *McMinn*, this rule was applied in a civil case to preclude a party who agreed to an instruction during the trial from challenging the law as contained in the instruction on appeal. *See id.* (emphasizing the party's acquiescence throughout trial to the rule stated in the jury instruction). While there is also criminal case law in New Mexico that holds that jury instructions are the law of the case, the doctrine does not apply in the way that Defendant suggests. *See, e.g.*, *State v. Armijo*, 1999-NMCA-087, ¶ 8, 127 N.M. 594, 985 P.2d 764 (stating that jury instructions become the law of the case, and they establish the elements the State must prove). Contrary to Defendant's argument, during a retrial of a case from remand on appeal, a judge is not required to give the same instructions that were given during the first trial. *See generally People v. Sons*, 78 Cal. Rptr. 3d 679, 689 (Ct. App. 2008) (judge in the defendant's fourth trial for homicide was not bound by the decision of the judge in the defendant's second and third trials to give the instruction). The retrial is a new trial, and the judge has the responsibility of instructing the jury on a claim or defense only if evidence introduced during the new trial warrants the instruction. Other than his out-of-context citation to *McMinn*, Defendant does not cite to any case law to support his argument that the same instructions in the first trial must be given during any retrial. *See In re Adoption of Doe*, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) ("We assume where arguments in briefs are unsupported by cited authority, [that] counsel . . . was unable to find any supporting authority.").

Thus, the real question is whether there was sufficient evidence during the new trial to allow reasonable minds to differ as to all of the elements of defense of another. *State v. Jernigan*, 2006-NMSC-003, ¶ 3, 139 N.M. 1, 127 P.3d 537 ("Failure to instruct a jury on a defendant's theory of the case is reversible error."). Those elements are (1) there was an appearance that some other individual was in immediate danger of death or great bodily harm—in this case, Alfredo and his girlfriend, Ernestina; (2) Defendant believed that Alfredo and Ernestina were in immediate danger of death or great bodily harm, and Defendant's actions would have prevented such harm; and (3) the apparent danger to Alfredo and Ernestina would have caused a reasonable person in the same circumstances to act as Defendant did. UJI 14-5184 NMRA.

The district court refused the defense of another instruction because it concluded that there was no evidence that the reason Defendant shot in the direction of the house was that shots were being fired in the direction of Defendant's vehicle, where Alfredo and Ernestina were allegedly waiting. Defense counsel argued to the district court that while "there isn't direct testimony that [Defendant] was shooting for their behalf, . . . I think that one could infer that." The State countered that Defendant never testified that he shot back to protect Alfredo or Ernestina; rather, he claimed that he shot back to defend himself.

In *Jernigan*, we found no error in the district court's refusal to instruct on defense of another when the evidence at trial showed that the defendant shot two men after he confronted them about attacking a woman and they appeared to be reaching for guns. 2006-NMSC-003, ¶¶ 5-7. We noted that this evidence supported a self-defense instruction, which was given, but not a defense of another

instruction, because the evidence did not support an appearance that the woman was in immediate danger. *Id.* ¶ 6 n.2. The same is true in the instant case. The evidence supports a self-defense instruction, which was given. There was no evidence that Defendant shot to protect anyone other than himself. Defendant only testified that he shot back because the people from the house were shooting at him. In addition, Alfredo testified that he was not aware of any bullets reaching the vicinity of the car where he was standing, which discredits Defendant's argument that Alfredo was in immediate danger. We therefore affirm the district court's refusal to instruct on defense of another.

IV. COMPULSORY PROCESS

Ronnie Trujillo, whom Defendant believed was a person who shot at him upon his return to the party, was subpoenaed by Defendant to appear and testify. However, Ronnie did not appear to testify. Defendant asserts that because Ronnie did not honor the subpoena and appear to testify, Defendant was deprived of his right to compulsory process. Without citing to the record, Defendant claims that he requested a mistrial, but we were unable to find where in the record such a request was made. In any event, Defendant's argument is without merit.

In this case, the district court suggested that the proper remedy when a subpoenaed witness does not appear to testify is for the court to issue a bench warrant for the arrest of the witness. Defense counsel acknowledged that this is indeed a remedy, but noted that the issuance of a bench warrant would be a waste of time. The district court did not abuse its discretion by declining to grant Defendant a mistrial, assuming that Defendant requested one, because issuance of a bench warrant, which Defendant declined, was the appropriate remedy. *See State v. Montoya*, 91 N.M. 752, 753-54, 580 P.2d 973, 974-75 (Ct. App. 1978) (holding that the trial court did not abuse its discretion in refusing to issue a bench warrant for the arrest of a subpoenaed witness who did not appear to testify). Moreover, despite Defendant's belief that Ronnie shot at him, defense counsel admitted that he did not have any witnesses who placed Ronnie at the scene the night of the shooting. We reject Defendant's contention that his right to compulsory process was violated.

V. SUFFICIENCY OF THE EVIDENCE

Defendant contends in a vague and unilluminating argument that there was insufficient evidence to support his convictions for felony murder, shooting at a dwelling, and tampering with evidence.

> "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Riley*, 2010-NMSC-005, ¶ 12, 147 N.M. 557, 226 P.3d 656 (internal quotation marks and citation omitted). The reviewing court "view[s] the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. "The question before us as a reviewing [c]ourt is not whether we

> would have had a reasonable doubt [about guilt] but whether it would have been impermissibly unreasonable for a jury to have concluded otherwise." *See State v. Rudolfo*, 2008-NMSC-036, ¶29, 144 N.M. 305, 187 P.3d 170.

State v. Guerra, 2012-NMSC-027, ¶ 10, 284 P.3d 1076 (alterations in original). Applying this standard of review, we conclude that there is sufficient evidence to support each verdict beyond a reasonable doubt.

A. Felony Murder

Felony murder consists of committing a crime (in this case, shooting at a dwelling), and during the commission of that crime, killing someone with the intent to kill or with the knowledge that the defendant's acts created a strong probability of death or great bodily harm. UJI 14-202 NMRA. Shooting at a dwelling (great bodily harm) consists of willfully shooting a firearm at a dwelling with the knowledge that the building was a dwelling and causing death or great bodily harm. UJI 14-341 NMRA.

Defendant admitted that he shot toward a house multiple times with two different weapons while a party was in progress, and the jury rejected his self-defense claim. *See State v. Cabezuela*, 2011-NMSC-041, ¶ 45, 150 N.M. 654, 265 P.3d 705 (stating that the jury is free to reject the defendant's version of events in the context of a sufficiency of the evidence review). In addition, several witnesses, including Ron Anderson, Katrina Branchal, and Ryan Romero, testified that when Defendant returned to the house where the party was taking place, he opened fire on the house without anyone else firing back at him. It is undisputed that Danica Concha died as a result of a shot fired by Defendant. This evidence supports the felony murder conviction beyond a reasonable doubt.

B. Shooting at a Dwelling

For Defendant's conviction under Count 2 of shooting at a dwelling or occupied building, the elements that must be proven beyond a reasonable doubt are willfully shooting a firearm at a dwelling or occupied building, with the knowledge that the building was a dwelling or was occupied. UJI 14-340. Ron Anderson, Katrina Branchal, and Ryan Romero testified that when Defendant returned to the house where the party was taking place, he opened fire on the house without anyone else firing back at him. In addition, Naarah Holgate testified that she was wounded by the gunfire. This testimony, when combined, supports Defendant's conviction under Count 2 for shooting at a dwelling. We previously discussed the fact that the district court did not specifically instruct the jury that it had to find that Holgate suffered an injury as a result of the shooting. The effect of failing to instruct the jury accordingly is to require that on remand the district court amend the judgment and sentence to conform to the jury verdict. *Soliz*, 79 N.M. at 267, 442 P.2d at 579.

C. Tampering with Evidence

"Tampering with evidence consists of destroying, changing, hiding, placing or fabricating any physical evidence with intent to prevent the apprehension, prosecution or conviction of any person or to throw suspicion of the commission of a crime upon another." NMSA 1978, § 30-22-5(A) (1963, as amended through 2003). Defendant testified

that immediately after the shooting, he took most of the guns and put them behind his refrigerator. Intent to hide evidence can be inferred based upon a person's acts. *See State v. Rudolfo*, 2008-NMSC-036, ¶¶ 30-32, 144 N.M. 305, 187 P.3d 170 (finding evidence sufficient when the defendant hid weapons used during the commission of a crime in his car and attempted to flee the jurisdiction). Although perhaps thin, this evidence, when looked at in the light most favorable to the jury verdict, supports the conclusion that tampering with evidence was proven beyond a reasonable doubt.

III. CONCLUSION

We affirm Defendant's convictions for felony murder and tampering with evidence. With respect to the conviction for shooting at a dwelling, we affirm the jury verdict, but remand to the district court to amend the judgment to reflect the jury verdict of guilty of shooting at a dwelling, a fourth degree felony. *See* NMSA 1978, § 30-3-8(A) (1993) ("Whoever commits shooting at a dwelling or occupied building that does not result in great bodily harm to another person is guilty of a fourth degree felony.").

IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

RICHARD C. BOSSON, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-035

Filing Date: June 27, 2013

Docket No. 33,843

IN THE MATTER OF MARIA E. OWEN, ESQUIRE

An Attorney Suspended from the Practice of Law in the State of New Mexico

and

Docket No. 33,844

IN THE MATTER OF ALAIN JACKSON, ESQUIRE

An Attorney Licensed to Practice Before the Courts of the State of New Mexico

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OPINION AND PUBLIC CENSURE

BOSSON, Justice

This matter comes before this Court following disciplinary proceedings conducted under the Rules Governing Discipline, Rules 17-201 to -214 and 17-301 to -316 NMRA, in which the Disciplinary Board (Board) found that attorneys Maria E. Owen and Alain Jackson (Respondents) violated multiple Rules of Professional Conduct. The disciplinary proceedings arose from a business lease dispute in which Owen transferred representation of clients to Jackson.

On August 6, 2012, a hearing committee of the Disciplinary Board entered findings of fact, conclusions of law, and recommendations for discipline, which were approved by the Board on September 20, 2012. Following oral argument we issued an order on November 15, 2012, adopting the recommendations of the Disciplinary Board with several modifications. We suspended both Respondents for eighteen months to be deferred with certain terms and conditions, including supervision by a licensed attorney and payment of restitution to Complainants. We also ordered Respondents to take and pass the Multistate Professional Responsibility Examination (MPRE). Finally, we ordered that Respondents receive a public censure for their misconduct. This Opinion serves as Respondents' public censure and shall be published in the *State Bar of New Mexico Bar Bulletin* and *New Mexico Appellate Reports*.

BACKGROUND

The following factual background is taken from the Disciplinary Board's findings of fact and conclusions of law. At various points in time, Respondents each represented Ruth Porta and Karen Diaz (Complainants), who owned a daycare business. Owen represented Complainants in a landlord-tenant lease dispute regarding the premises of the daycare as well as two other matters. On May 17, 2010, Owen transferred her representation of Complainants daycare lease dispute to Jackson. All parties agreed and consented to the transfer. Shortly thereafter, on May 25, 2010, Jackson filed a lawsuit on behalf of Complainants against defendants MyBank, the mortgage holder, and Nikolaus and Indra Filip, the property owners.

As a result of personal issues, family illness, and his father's death, Jackson failed to properly attend to the lawsuit after filing it. On July 6, 2010, MyBank filed a motion to dismiss Complainants' lawsuit. Jackson failed to file a response to the motion or to inform his clients of the motion. Due to his inattentiveness, in late July or early August of 2010, Complainants fired Jackson and rehired Owen. Owen agreed to take over Complainants' lawsuit and notified Jackson that she intended to do so. Also at this time, Owen obtained Complainants' file from Jackson's office.

Although Complainants had terminated Jackson as their attorney, Jackson failed to withdraw as counsel of record in the lawsuit, or notify the court or opposing counsel of this

development. To make matters worse, Owen failed to file an entry of appearance or substitution of counsel in the lawsuit. Due to Jackson's failure to properly withdraw as counsel of record and Owen's failure to properly enter her appearance and notify the court that she was now counsel of record, Jackson continued to receive all notices, correspondence, and pleadings regarding the lawsuit. Both Jackson and Owen were aware of this.

Jackson delivered the notices, correspondence, and mail regarding the lawsuit to Owen or Owen's husband, who Owen employed at her law firm. Conveniently, both Owen's and Jackson's offices were located in the same building.

John Campbell, an attorney for the individual defendants, the Filips, entered an appearance and attempted to contact Jackson regarding the lawsuit. Jackson eventually left Mr. Campbell a voice mail informing him that he no longer represented Complainants and that Owen had taken over the case.

Complainants experienced many problems with Owen's representation. Owen took "no action whatsoever on behalf of Complainants in the lawsuit." Additionally, Owen "failed or refused to respond to Complainants' inquiries and at other times gave assurances to the effect that nothing was happening in the lawsuit." Despite these assurances, on November 1, 2010, the Filips filed an answer, a counterclaim, and a motion to dismiss the lawsuit. Campbell also informed both Owen and Jackson that he sought to remove Complainants' daycare center from the Filip's property and was preparing a motion for summary judgment to this effect.

Campbell filed the motion for summary judgment and writ of execution on behalf of the Filips seeking to evict Complainants' daycare business from his clients' property on December 13, 2010. Jackson and Owen failed to respond either to MyBank's motion to dismiss or to the individual defendants' motion to dismiss, counterclaim, motion for summary judgment, and writ of execution.

On December 20, 2010, the court granted MyBank's motion to dismiss, recognizing that neither Complainants nor counsel had appeared. Less than three months later, on March 7, 2011, "the Court substantially granted the Filips' Motion for Summary Judgment and issued a Writ of Execution in Forcible Entry or Detainer." That very same day, Campbell emailed Jackson copies of the court orders.

Jackson and Owen failed to attend court hearings and also failed to inform Complainants about the dismissal order, the summary judgment, or the writ of execution. It was only after the court had granted MyBank's motion to dismiss and the Filip's motion for summary judgment and writ of execution that Owen belatedly notified the clients. Realizing that the court had granted an eviction order, Owen called Complainant Diaz on March 10, 2011, and informed her that their daycare business was being evicted as of April 1, 2011.

Upon learning this, Complainant Diaz asked for her file from Owen, which Owen's husband delivered the next day. Following these events, Complainants obtained new legal counsel who persuaded the court to set aside the summary judgment and writ of execution. This cost Complainants $6,400 in legal fees.

DISCUSSION

Both Respondents violated Rule 16-101 NMRA (requiring a lawyer to "provide competent representation to a client"). Owen violated Rule 16-103 NMRA (requiring diligent and prompt representation of client), Rule 16-104(A)(2) and (3) NMRA (requiring consultation with client regarding objectives and requiring attorney "to keep the client reasonably informed about the status of the matter"), and Rule 16-302 NMRA (requiring lawyer to make "reasonable efforts to expedite litigation"). Jackson violated Rule 16-116(D) NMRA (requiring a lawyer to take steps to the extent reasonably practicable to protect the client's interests when terminating representation).

Violations by Both Respondents

Respondents did not act competently in handling Complainants' lease dispute. *See* Rule 16-101 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). Attorney inaction constitutes lack of competence. *See In re Gallegos*, 104 N.M. 496, 498-99, 723 P.2d 967, 969-70 (1986) (disbarring attorney for, among other things, inaction in a divorce case).

Jackson's inactions included failing to respond to MyBank's motion to dismiss and then, after transferring the case back to Owen, failing to file a notice of withdrawal and substitution of counsel. Owen also failed to competently represent Complainants. Once she re-acquired representation of Complainants, Owen failed to file an entry of appearance or substitution of counsel, leaving Jackson as the only attorney of record. *See In re Trujillo*, 110 N.M. 180, 181, 793 P.2d 862, 863 (1990) (suspending attorney who, among other things, failed to file an answer or enter an appearance in client's divorce case). After again accepting representation of Complainants' case from Jackson, Owen took no further action on the case. Essentially, both attorneys abandoned their clients. *See In re Shepard*, 115 N.M. 687-89, 858 P.2d 63, 63-65 (1993) (concluding that attorney had abandoned her clients when she accepted representation but failed to complete agreed upon services). "An attorney's abandonment of her clients . . . causes direct harm to her clients and undermines public confidence in the legal profession." *Id.* at 689, 858 P.2d at 65.

The failure by both Respondents to file the appropriate entry, withdrawal, or substitution of counsel motions reveals a basic lack of competency and diligence. *See In re Chavez*, 2013-NMSC-008, ¶ 11, 299 P.3d 403 (concluding that attorney's failure to meet a court deadline "fell below the standards of competence and diligence required of attorneys"). A simple follow-up by either Jackson or Owen would have set the record straight as to who legally bore responsibility for continued representation of Complainants. Respondents' inaction and lack of thoroughness caused Complainants to suffer adverse consequences and incur additional attorney fees.

Violations by Owen

Respondent Owen committed numerous violations of the Rules of Professional Conduct. First, Owen was not diligent in representing Complainants. According to Rule 16-103, "A lawyer shall act with reasonable diligence and promptness in

representing a client." Owen took no action on Complainants' case, utterly failing to act with any kind of "reasonable diligence" or "promptness" in representing Complainants. Essentially, Owen did nothing until she notified Complainants that they were being evicted from their property. By doing nothing, she failed to act with diligence on behalf of her clients. *See* Rule 16-103 cmt. 1 ("A lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); Rule 16-302 ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.").

Owen also failed to adequately communicate with Complainants. Pursuant to Rule 16-104(A)(2), "A lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished." In addition, "A lawyer shall . . . keep the client reasonably informed about the status of the matter." Rule 16-104(A)(3). "A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation." Rule 16-104 cmt. 4.

Owen violated these mandates in numerous ways. At no time did Owen communicate with Complainants about how to accomplish their objectives as required by Rule 104(A)(2). Instead, the record reflects that Owen initiated contact with Complainants twice—in August 2010 when she agreed to take over their representation and on March 10, 2011, when she informed Diaz that Complainants were being evicted.

Owen also failed to keep Complainants reasonably informed about the status of their case as required by Rule 16-104(A)(3). The record reflects that Complainants initiated most of the communications with Owen. Owen made little effort to communicate with Complainants and failed to promptly return or acknowledge Complainants' phone calls. *See* Rule 16-104 cmt. 4 ("Client telephone calls should be promptly returned or acknowledged."). Had Owen maintained regular contact with her clients, Complainants would have discovered that their case was not being pursued and could have obtained different counsel sooner.

Additionally, Owen's willingness to misrepresent the status of the case to Complainants is deeply disturbing. Lying to a client implicates the fundamental relationship between the lawyer and the client and an attorney's fitness to practice law. *See Van Orman v. Nelson,* 78 N.M. 11, 22-23, 427 P.2d 896, 907-08 (1967) (explaining that the relationship between attorney and client is "one of trust and confidence," and the law requires that acts and conduct of attorney in transactions with his client "be characterized by absolute fairness, good faith and honesty"). We have severely disciplined attorneys in the past for such conduct. *See e.g., In re Roberts,* 119 N.M. 769, 770, 895 P.2d 669, 670 (1995) (suspending indefinitely an attorney who failed to docket an appeal and lied to his client for seven years about the status of the appeal); *In re Rohr,* 122 N.M. 774, 774-75, 931 P.2d 1390, 1390-91 (1997) (disbarring attorney who embezzled client's money and lied to client regarding settlement proceeds for several months).

Violations by Jackson

Although Respondent Jackson's violations in this case were less numerous, they are no less serious. Jackson violated

Rule 16-116(D) by failing to take steps to protect Complainants' interests.

Pursuant to Rule 16-116(D), "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests . . . . " An attorney has an obligation to protect the interests of his clients upon his withdrawal from their cases. *See In re Roth*, 105 N.M. 255, 255, 731 P.2d 951, 951 (1987) (suspending attorney indefinitely after attorney failed to complete cases, protect interests of former clients, or refund fees); *In re Tapia*, 110 N.M. 693, 694-95, 799 P.2d 129, 130-31 (1990) (extending attorney's suspension because of, *inter alia*, numerous violations of Rule 16-116(D)). We have disciplined attorneys in the past for conduct similar to Jackson's in this case. *See In re Fandey*, 118 N.M. 590, 591-94, 884 P.2d 481, 482-85 (1994) (an attorney who failed to pursue representation of clients and who abandoned his office and all forms of communication with his clients was subject to a one-year suspension).

Jackson's principal violation was that he failed to formally withdraw as counsel of record for Complainants after legal representation was transferred to Owen. His failure to withdraw meant that he remained counsel of record in Complainants' lawsuit. Therefore, he continued to receive notices and orders from the court concerning the lawsuit, and he continued to receive correspondence and pleadings from opposing counsel. After receiving these communications, it should have been apparent to Jackson that he was still counsel of record in the case and had obligations consistent with that role. Jackson's failure to properly withdraw from the case caused confusion for opposing counsel and Complainants. Although we recognize that there were mitigating factors such as Jackson's personal and emotional problems, filing a withdrawal of counsel is not burdensome.

DISCIPLINE

Both Jackson and Owen conducted themselves unprofessionally. The practice of law is a privilege and carries with it substantial responsibility. Respondents have not taken this responsibility seriously. While we do not condone Jackson's conduct, he "has acknowledged the wrongful nature of his conduct and expressed remorse for his conduct." For that reason, we choose to mitigate his discipline and afford him an opportunity to prove himself during a period of supervised probation.

Owen, by contrast, has refused to acknowledge the wrongful nature of her actions. Additionally, she has a prior disciplinary record. She failed to comply with the terms of our November 15, 2012, order. On January 29, 2013, disciplinary counsel filed a motion for an order to show cause noting that Owen had failed to submit names of potential supervising attorneys and failed to make any payments as ordered despite two requests from disciplinary counsel. On February 11, 2013, we granted disciplinary counsel's motion and issued an order requiring Owen to show cause why she should not be held in contempt. Owen was warned that her failure to file a timely response could result in the issuance of a bench warrant for her arrest. Owen failed to comply with this order.

A second order to show cause was issued on March 29, 2013, revoking the deferral of Owen's suspension and immediately suspending her from the practice of law. Owen was also commanded to appear

before this Court on April 24, 2013. Owen failed to appear at this hearing. Therefore, we issued an order on April 24, 2013, permanently disbarring her from the practice of law.

CONCLUSION

For the foregoing reasons, we publically censure Respondents for their misconduct and confirm our previous orders imposing the disciplinary sanctions summarized in this Opinion.

IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-036

Filing Date: June 28, 2013

Docket No. 33,057

STATE OF NEW MEXICO,

Plaintiff-Respondent,

v.

MANUEL TURRIETTA,

Defendant-Petitioner.

Bruce Rogoff, Supervising Attorney, UNM School of Law
Robert Milder, Practicing Law Student
Brianne Bigej, Practicing Law Student
Shannon Crowley, Practicing Law Student
Nicholas Sitterly, Practicing Law Student
Santa Fe, NM

for Petitioner

Gary K. King, Attorney General
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for Respondent

OPINION

MAES, Chief Justice.

In a criminal trial, the accused shall enjoy the right to a speedy and public trial. U.S. Const. amend. VI; N.M. Const. art. II, § 14. However the right to a public trial is not absolute and may give way in certain cases to other rights or interests. In this case we address whether Manuel Turrietta's (Defendant) right to a public trial was violated when the district court partially closed the courtroom during the testimony of two confidential informants. We also address whether the State withheld favorable material evidence that was relevant to the guilt or punishment of Defendant, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

I. PROCEDURAL HISTORY

Defendant, a member of two gangs known as Bad Boys Krew (BBK) and Thugs Causing Kaos (TCK), shot and killed Alberto Sandoval (Victim), a member of the West Side gang. Defendant was found guilty of second degree murder (firearm enhancement) contrary to NMSA 1978, Section 30-2-1(B) (1994), and NMSA 1978, Section 31-18-16(A) (1993), shooting at or from a motor vehicle resulting in great bodily harm contrary to NMSA 1978, Section 30-3-8(B) (1993), aggravated battery with a deadly weapon contrary to NMSA 1978, Section 30-3-5(C) (1969), and tampering with evidence contrary to NMSA 1978, Section 30-22-5(B)(1) (2003).

Following trial, Defendant appealed to the Court of Appeals claiming that

> "(1) the district court improperly closed the courtroom during the testimony of two confidential informants in violation of [his] right to a public trial under the Sixth Amendment to the United States Constitution and Article II, Section 14 of the New Mexico Constitution; (2) the State suppressed favorable material evidence in violation of *Brady v. Maryland*, 373 U.S. 83; and (3) Defendant [was] entitled to a judgment of acquittal or, alternatively, a new trial, under the cumulative error doctrine."

State v. Turrietta, 2011-NMCA-080, ¶ 1, 150 N.M. 195, 258 P.3d 474. The Court of Appeals affirmed Defendant's convictions holding that Defendant's Sixth Amendment right to a public trial was not violated because the specific threats of retaliatory gang violence and evidence of gang presence in the courtroom provided a "substantial reason" for the district court to order a partial closure. *Id.* ¶¶ 18-19. The Court also determined that Defendant failed to establish evidence that the State suppressed *Brady* material because the record indicated that the State alerted Defendant to the deal struck with one of the witnesses during trial and there was no evidence that the other two witnesses ever struck a deal with the State. *Id.* ¶ 30.

Defendant petitioned this Court for certiorari pursuant to Rule 12-502 NMRA. We granted certiorari to address (1) whether the Court of Appeals erred under *Presley v. Georgia*, 558 U.S. 209 (2010), by relying on pre-*Presley* circuit authority providing for a less-strenuous constitutional test than *Presley*

requires and (2) whether the Court of Appeals erroneously concluded that a prosecutor's misrepresentation that demanded *Kyles/Brady* matter did not exist is cured by the discovery of the material during a jury trial. We hold that the Court of Appeals erred by applying the "substantial reason" standard to a Sixth Amendment constitutional challenge. Accordingly, we conclude that when a court is deciding whether a closure, partial or full, is constitutional it must analyze the facts using the more strenuous standard articulated in *Waller v. Georgia*, 467 U.S. 39 (1984). Additionally, we hold that the Court of Appeals was correct in affirming the district court's conclusion that there was no *Brady* violation.

II. DISCUSSION

A. Any closure of a courtroom, over the objection of the accused, must satisfy the *Waller* "overriding interest" standard

The State filed a pre-trial motion requesting that the courtroom be cleared of unnecessary persons during testimony of four cooperating witnesses—David Torrez, George Morales, Brandon Neal and Joshua Ayala—all of whom were former gang members. The State argued that "[b]ased on previous trials involving gang members . . . the State [was] fearful that other gang members, and possibly family members, affiliated with the Defendant [would] 'pack' the Courtroom and 'maddog' the witnesses, or even try to physically intimidate [the witnesses] so that they [would] not testify."

Outside of the presence of the jury, the district court held a hearing on the motion. The district court allowed the State to conduct a limited voir dire of the confidential informants recognizing Defendant's constitutional right to a public trial and that the State had the burden to establish a "substantial probability of danger" in order to justify closure. Defendant objected to the closed proceeding, arguing that a closed courtroom, even during a limited voir dire, violated an individual's First Amendment right to be present at a hearing and Defendant's Sixth Amendment right to a public trial.

Torrez, a former member of TCK, testified that after he became an informant against Defendant and another gang member in an unrelated case, he began receiving threats from TCK. Torrez also testified that he was beaten up twice in jail by members of TCK. Morales testified that after TCK learned he had become an informant for the police, a TCK member called him "a rat or a snitch" and threatened to kill him. Morales did not say that the death threat was specifically related to him testifying at Defendant's trial.

Because Neal testified that he was not concerned about the threats, and the State failed to establish that the threats Ayala had received came from Defendant's gang, the district court denied that part of the motion. The district court judge believed there to be a TCK presence in the courtroom after court security twice found the etched moniker "TCK Blast" outside the courtroom doors. Therefore, the district court partially granted the State's motion to close the courtroom during the testimony of Torrez and Morales. The court ordered that the immediate family members of both Defendant and Victim, as well as attorneys, staff members, and press, could remain in the courtroom but that all other members of the public would not be allowed in the courtroom during the testimony

of Torrez and Morales "for the purposes of witness protection, as well as the protection of the [D]efendant and the [c]ourt." Defendant objected, stating that those who would be excluded had a First Amendment right to attend proceedings and that he had a federal and state constitutional right to their presence. The district court overruled Defendant's objection, reasoning that it did not know of any other alternatives except to request the names and social security numbers of each observer to determine whether they were affiliated with any gangs, thus partial closure of the courtroom was the least intrusive and least limiting alternative available.

The Court of Appeals affirmed Defendant's convictions ruling that Defendant's Sixth Amendment right to a public trial was not violated because the specific threats of retaliatory gang violence and evidence of gang presence in the courtroom provided a "substantial reason" for the district court to order a partial closure. *Turrietta*, 2011-NMCA-080, ¶¶ 18-21. The Court did not rely on the *Waller* "overriding interest" standard in upholding the district court's decision. Rather, because the district court only partially closed the courtroom during the testimony of Torrez and Morales, the Court applied the more lenient "substantial reason" standard which requires the party seeking closure to proffer a "substantial reason" for the partial closure, rather than an "overriding interest." *Id.* ¶ 18.

The Court of Appeals reasoned that "a partial closure satisfies the court's obligation to consider, sua sponte, reasonable alternatives to a complete closure of the proceeding." *Id.* ¶ 17. In applying the more lenient standard in this case, the Court determined that the district court was correct in ordering a partial closure because "Torrez and Morales both testified that TCK gang members had threatened them with death or physical harm in retaliation for their cooperation." *Id.* ¶ 18. In reaching this decision, the Court of Appeals also relied on the fact that there was a "TCK presence" in the courtroom, reflected by the tagging "TCK Blast," found twice by the district court during the trial. *Id.*

The Court of Appeals agreed with the Supreme Court of Ohio, which held that "'the dangerous nature of gang violence and the genuine need to protect witnesses testifying against gang members from the deadly threat of retaliation is a 'substantial reason' to order a partial closure of [a] courtroom.'" *Id.* (quoting *State v. Drummond*, 110 Ohio St. 3d 14, 2006-Ohio-5084, 854 N.E.3d 1038, at ¶ 54). The Court of Appeals went on to state that

> [t]he partial closure of the courtroom was narrowly tailored to protect the witnesses, Defendant, and the court from specific threats of gang violence. The closure did not extend beyond Torrez' and Morales' testimony and did not exclude the immediate family members of Defendant or Victim, attorneys, staff, or the press from the proceedings.

Turrietta, 2011-NMCA-080, ¶ 19.

Defendant argues that his constitutional right to a public trial under the Sixth Amendment was violated when the district court granted the State's motion for a partial closure of the courtroom during the testimony of two witnesses, and as a result, excluded more than thirty people. Defendant argues that closure in this case was broader than necessary by asserting that scores of

people, including family members, were excluded from the courtroom without any specific finding of wrongdoing or that they posed any threat. In support of this Court adopting the more stringent "overriding interest" standard, Defendant argues that "[b]ecause the substantial reason test does not reflect the demanding test articulated by the Court in *Waller*, it is an inaccurate interpretation of Supreme Court precedent." Defendant supplemented the record following oral argument by citing to *Drummond v. Houk*, and pointed out that the Ohio Supreme Court case relied upon by the Court of Appeals in the present case was overturned as a result of a habeas corpus action in federal district court. 761 F. Supp. 2d 638 (N.D. Ohio 2010). Defendant asserts that in *Drummond*, the court held that the Ohio Supreme Court was incorrect in holding that there was a substantial reason to justify the courtroom closure because the court failed to make any specific inquiries into any actual threat and therefore defendant Drummond's case was remanded for a new trial. 761 F. Supp. 2d at 718. Defendant suggests that "[w]hen choosing an appropriate constitutional test, there is no reason for New Mexico to adopt the weakest possible one." Citing to *State v. Gutierrez*, Defendant suggests that "[t]his Court has taken a strong stance in protecting constitutional rights in other areas." 116 N.M.431, 435, 863 P.2d 1052 (1993) (rejecting the federal "good faith" exception in search and seizure cases). Defendant asserts that there is no reason not to do so here and that we should join other courts that have rejected the "substantial reason" standard as inadequate to protect the right to a public trial.

The State argues that Defendant's constitutional right to a public trial was not violated when the district court granted the partial closure because the protection of the two witnesses and court personnel from actual gang threats and acts of intimidation met both the "substantial reason" and "overriding interest" standards. The State argues that the Court of Appeals correctly selected and applied the "substantial reason" standard in this case. Nonetheless, the State submits that the protection of witnesses against actual and specific intimidation and threats from gang members, ensuring the integrity of the judicial system and furthering the search for truth, clearly met both standards. The State claims that based on the evidence of threats and intimidation to witnesses presented at trial there was both a substantial reason and an overriding interest justifying the partial closure of the courtroom.

An improper courtroom closure can violate a defendant's constitutional right to a public trial. *Waller* suggests that the violation of a right to a public trial can be a structural error. 467 U.S. at 49. A structural error can "include such [a] pervasive defect[ ] as . . . [the] denial of the right to a public trial." *State v. Rivera*, 2012-NMSC-003, ¶ 20, 268 P.3d 40 (citation omitted). Structural error, including deprivation of the public trial right, is not subject to harmlessness analysis. *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). The question of whether a defendant's constitutional rights were violated is a question of law which we review de novo. *State v. Brown*, 2006-NMSC-023, ¶ 8, 139 N.M. 466, 134 P.3d 753.

In a criminal trial, the accused shall enjoy the right to a speedy and public trial. U.S. Const. amend. VI; N.M. Const. art. II, § 14. The Supreme Court has "'uniformly recognized the public-trial guarantee as one created for the benefit of the defendant.'" *Presley*, 558 U.S. at 213 (quoting *Gannett*

Co., Inc. v. DePasquale, 443 U.S. 368, 380 (1979)). The right to "a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned," and "encourages witnesses to come forward [while] discourag[ing] perjury." *Waller*, 467 U.S. at 46. The right to a public trial is not absolute and "may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Id.* at 45. However, these circumstances are rare and "the balance of interests must be struck with special care." *Id.*

There are two types of courtroom closures, total courtroom closures and partial courtroom closures. A total courtroom closure occurs when no spectators are allowed in the courtroom and only attorneys and court staff remain. *United States v. Osborne*, 68 F.3d 94, 98 (5th Cir. 1995). A partial closure occurs when the courtroom is closed to some spectators, but not all. *Id.* The court in *Tinsley* v. *United States*, 868 A.2d 867, 874 (D.C. 2005), noted that some partial closures "might approach a total closure in practical effect."

A total courtroom closure is allowed when there is "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Waller*, 467 U.S. at 45 (internal quotation marks and citation omitted). Specifically, using the analysis of *Press-Enterprise Company v. Superior Court of California, Riverside County*, 464 U.S. 501 (1984), *Waller* outlines a four-pronged "overriding interest" standard

> the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the [district] court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Waller, 467 U.S. at 48.

Several federal circuit courts have applied a less stringent "substantial reason" standard "for closure orders which only partially exclude the public or are otherwise narrowly tailored to specific needs." *Davis v. Reynolds*, 890 F.2d 1105, 1109 (10th Cir. 1989). The reason for this standard, according to the 5th Circuit Court of Appeals, is because "partial closures do not implicate the same fairness and secrecy concerns as total closures." *Osborne*, 68 F.3d at 99. The Tenth Circuit has utilized the "substantial reason" standard for partial closures as well. *See, e.g.*, *Nieto v. Sullivan*, 879 F.2d 743, 753 (10th Cir. 1989) (holding that excluding some of the defendant's relatives because the testifying witness was afraid for his safety was a "substantial reason" justifying a constitutional, partial courtroom closure). This "substantial reason" standard appears to originate from a lack of case law addressing *Waller* in the context of partial closures and from the *Press-Enterprise* court alluding to a distinction between constitutional requirements for total and partial closures. *See United States v. Sherlock*, 962 F.2d 1349, 1356-57 (9th Cir. 1989).

We adopt the "overriding interest" standard as discussed by the Supreme Court in *Waller* for any type of courtroom closure. First, the difference between the two standards is not perfectly clear, other than the fact that

the reviewing court knows that the "substantial reason" standard is a more lenient standard than the "overriding interest" standard. Second, within the *Waller* standard, the reviewing court is charged with considering reasonable alternatives to closing the proceeding. Therefore, if a reviewing court is already contemplating a partial closure, something less than a full closure, that analysis seems to already align with the *Waller* standard's requirement that the closure be no broader than necessary. Furthermore, if a party is seeking something less than full closure, the *Waller* standard should still apply as originally intended because any courtroom closure is an infringement on a defendant's Sixth Amendment right to a public trial, and therefore, such a request should not be granted lightly. The four-pronged "overriding interest" standard requires that:

> the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the [district] court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Id. at 48. We now determine whether the district court was correct in granting the State's motion for a partial closure of the courtroom.

1. The State did not demonstrate an overriding interest for closure that is likely to be prejudiced

In this case the State's burden was to "advance an overriding interest that is likely to be prejudiced." *Waller*, 467 U.S. at 48. The State must show "a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent." *Press-Enterprise Co.*, 478 U.S. at 14. When dealing with witness intimidation by gang members, the State must show that "the witness has a legitimate fear that might affect his or her ability to testify truthfully." *Longus v. State*, 7 A.3d 64, 79 (Md. 2010). The proponent of a closure must establish "a nexus between the particular overriding interest asserted and open-court testimony." *People v. Jones*, 750 N.E.2d 524, 527 (N.Y. 2001).

The State asserts that the facts were enough to constitute an overriding interest to close the courtroom. Defendant argues that the State failed to meet its burden because neither witness testified that the threats they received were specifically linked to this case or that intimidation would affect their testimony in court. Defendant further argues that the etched gang moniker does not establish an overriding interest and that speculative and general concerns do not support closure.

Neither Torrez nor Morales ever stated that they were afraid to testify, that their trial testimony would be affected by any received threats, or that having gang members or related family members in the audience would affect their testimony. We are not to assume that the absence of a definitive statement that a witness's testimony would not be affected by an open courtroom means that it automatically would be effected. *Guzman v. Scully*, 80 F.3d 772, 775 (2d Cir. 1996) (explaining that "[s]ince no testimony was elicited from the witness alleged to be feeling intimidated, there was no ascertainment that the reason advanced by the prosecutor was substantial or likely to be prejudiced" (internal

quotation marks and citations omitted)). Further, the State failed to establish whether the threats and violence that Torrez and Morales had experienced prior to trial were directly related to Defendant's case or other cases where both had admitted to snitching. Both Torrez and Morales had received those threats when TCK initially discovered they were assisting the police; the State did not present any evidence that the threats occurred or increased in an effort by TCK members to deter the two informants from testifying. Further, the State never presented any evidence that either Torrez or Morales was aware of the TCK etchings outside of the courtroom. There was insufficient proof that a link existed between the experienced threats and either witnesses' ability or willingness to testify. *See id.* at 775-76 (holding that the court cannot rely on representations from the prosecutor, rather the testimony must come from the witness himself). Without more, the State did not demonstrate an overriding interest that was likely to be prejudiced by an open courtroom. Therefore, the first prong of the *Waller* standard was not satisfied and the closure was unconstitutional. The courtroom closure in this case is deemed unconstitutional because of the failure of the first prong; however, because we are adopting a new standard, we address the remaining three prongs for the purpose of analysis.

2. The closure was overly broad

Defendant contends that the closure in this case was extreme and overly broad because there was no showing that the thirty plus people excluded were in any way gang-affiliated, had done anything wrong, or posed any threat. Defendant cites to a handful of cases holding that the exclusion of observers without specific justification supports a finding that the closure was overly broad: *State v. Ortiz*, 981 P.2d 1127, 1138 (Haw. 1999) (holding that the exclusion of defendant's family based on a "vague suspicion" of jury tampering and witness intimidation constituted an overly broad closure); *Com. v. Cohen*, 921 N.E.2d 906, 923 (Mass. 2010) (holding that the placement of a "Do Not Enter" sign outside of the courtroom due to lack of sufficient seating inside, which prevented observers from entering, was a "[c]losure by policy" and "runs counter to the requirement that a court make a case-specific determination before a closure . . . constitutionally may occur."); *Longus*, 7 A.3d at 79-80, n. 10 (explaining that a court may not "exclude additional spectators who did not participate in the disruption based on the conduct of one spectator"); *cf. Concha v. Sanchez*, 2011-NMSC-031, ¶¶ 1, 37, 45, 150 N.M. 268, 258 P.3d 1060 (finding the blanket detention of thirty-two courtroom spectators invalid where there was no attempt to determine the guilt of individual observers).

The State argues that the closure in this case was narrowly tailored because the court enforced only a partial closure, allowing Defendant's family, Victim's immediate family, attorneys, staff, and members of the press to remain. Further, the State asserts that the closure was not overly broad because it was only enforced during the testimony of Torrez and Morales. However, the State failed to cite to any supporting authority explaining how or why the district court's closure was narrowly tailored so as not to infringe on Defendant's Sixth Amendment right to a public trial.

The second prong of *Waller* requires that the closure "be no broader than necessary to protect [the overriding interest]." *Waller*, 467 U.S. at 48. A properly tailored closure may exist where a careful balance of interests

is struck and only the individuals allegedly involved in the creation of the threat are excluded. *See Longus*, 7 A.3d at 82. Here, both Torrez and Morales testified to the names of specific individuals from TCK who had threatened and intimidated them. The district court could have chosen to exclude those named gang members, possibly creating a narrowly tailored closure. Instead, the district court excluded more than thirty people without knowing how many of them, if any, were gang affiliated. The court also later admitted that as a result of the closure, it had excluded "members of . . . [D]efendant's family and a few of his friends."

"[A]n accused is at the very least entitled to have his friends, relatives and counsel present[.]" *In re Oliver*, 333 U.S. 257, 272 (1948). The relationship between those excluded to the defendant must be taken into account when deciding whether a closure is constitutional. *English v. Artuz*, 164 F.3d 105, 108 (2d Cir. 1998). Here, some family members and friends were excluded without any finding that they posed a threat, suggesting that the exclusion was overly broad and unconstitutional. *See id.* at 109 (holding that the right to a public trial was violated when the court excluded family members, and rejecting the government's contention that removal of spectators was required because the state could not tell who was a family member of the defendant).

Accordingly, the State did not satisfy the second prong of *Waller*.

3. The district court failed to adequately assess possible alternatives to closure

The third *Waller* prong requires that the court consider reasonable alternatives to closure. 467 U.S. at 48. A district court is required to "take every reasonable measure to accommodate public attendance at criminal trials." *Presley*, 558 U.S. at 215. Even if the parties do not offer alternatives to closure, the court is required to assess whether any reasonable alternatives exist. *Id.* at 213-14.

The State argues that the district court's granting of a partial closure was a reasonable alternative to a complete closure. Citing to *Ayala v. Speckard*, 131 F.3d 62, 70 (2d Cir. 1997), the State contends that some courts have interpreted the third prong of *Waller* to mean that trial courts need not consider sua sponte any and all alternatives to partial closure, but rather they must only consider sua sponte alternatives to complete closure. Defendant asserts that *Presley* requires a court to consider all alternatives, even if not offered by the parties. 558 U.S. at 214. Defendant argues that there were a variety of reasonable alternatives to both a partial and complete closure such as screening observers, *see United States v. DeLuca*, 137 F.3d 24, 34 (1st Cir. 1998) (explaining that screening and recording spectators' identification was a constitutional response to the potential witness intimidation), admonishing spectators of possible criminal sanctions, *see Ortiz*, 981 P.2d at 1138; *Longus*, 7 A.3d at 79-80 n.10 (noting that a spectator's in-court misconduct allows removal), the wait-and-see method, *see Sherlock*, 962 F.2d at 1356-57 (explaining that a judge may decide to leave the courtroom open and then based on the witness's demeanor and ability to testify, determine whether closure is appropriate), or increased security in the courtroom, all of which the court in this case chose not to pursue.

We decline to follow the State's interpretation of the third *Waller* prong and instead adopt *Presley's* rule that a court must

consider, sua sponte, all alternatives to any type of closure. *Presley,* 558 U.S. at 214. Although Defendant did not suggest at trial all of the alternatives to closure that he now argues, the district court had the responsibility to consider as many alternatives as possible. In fact, the judge suggested that screening the spectators and recording names to determine gang affiliation was a possibility, but neglected to do so. As Defendant now suggests there were several other alternatives to closure that the district court did not consider such as using the wait-and-see method or increasing security. Because the district court failed to consider all reasonable alternatives to closure, we hold that the third *Waller* prong was not satisfied.

4. The district court failed to make adequate findings under the *Waller* standard to support closure

The final prong of *Waller* requires that the court make legally adequate findings to justify the closure. 467 U.S. at 48. It is appropriate to evaluate the amount of evidence required and the level of findings needed to support an overriding interest in closure. *Drummond*, 854 N.E.2d at 1055. When a trial court fails "to make the requisite case-specific findings of fact, closure of the courtroom violate[s] the defendant's right to a public trial." *Longus*, 7 A.3d at 79-80 (citation omitted).

Defendant argues that the Court of Appeals erred in applying the more lenient "substantial reason" standard as established in *Douglas v. Wainwright*, 739 F.2d 531, 532 (11th Cir. 1984), and thus its findings are not legally adequate to support closure as analyzed through the *Waller* standard. Defendant asserts that if we were to adopt the less stringent standard for closure, the exception would swallow the rule and fear and intimidation would be rewarded instead of discouraged. Defendant maintains that "inside the courthouse constitutional process must govern" and the adoption of the "overriding interest" standard ensures that courts retain the necessary control to remain as open and public as possible.

The State maintains that the district court made adequate legal findings in granting the partial closure to support both the "substantial reason" and "overriding interest" tests. The State points to the Court of Appeals' affirmation of the district court's ruling that protection of a witness who claims to be frightened as a result of perceived threats did not violate Defendant's Sixth Amendment right to a public trial. By implementing a narrowly tailored closure, the State argues that violent and threatening spectators are kept out of the courtroom which prevents disruption of the fairness of trials, contrary to Defendant's reasoning.

The district court justified the closure based on "the danger to the witnesses . . . and the fact that [there were two etchings] outside of [the] courtroom, indicating that there [was a] TCK presence that [was] undetected." This basis however fails to mention any specific threat or possibility of intimidation. In fact, no testimony was ever elicited from Torrez or Morales that either was afraid to testify or that the presence of certain spectators in the courtroom would affect their ability to testify. Similarly, there is nothing in the record that indicates either informant witness was aware of the etchings outside the courtroom. Finally, the district court admitted that it was unable to identify who was gang-affiliated and thus it was unable to ascertain who if anyone posed a real or specific threat. The findings of fact concerning the two etchings and testimony

from the informants about past threats were not sufficient to justify closing the courtroom and did not satisfy the fourth Waller requirement. As such, Defendant's Sixth Amendment right to a public trial was violated.

B. There was no *Brady* violation

The Supreme Court has held that a defendant's due process rights are violated when the prosecution suppresses favorable evidence. *Brady*, 373 U.S. at 86-87. Under *Brady*, a defendant must prove three elements: first, the evidence was suppressed by the prosecution; second, the suppressed evidence was favorable to the defendant; and third, it was material to the defense. *State v. Balenquah*, 2009-NMCA-055, ¶ 12, 146 N.M. 267, 208 P.3d 912. An alleged *Brady* violation constitutes a charge of prosecutorial misconduct, *State v. Trujillo*, 2002-NMSC-005, ¶¶ 48, 50, 131 N.M. 709, 42 P.3d 814, which we review for abuse of discretion "because the trial court is in the best position to evaluate the significance of any alleged prosecutorial errors," *Case v. Hatch*, 2008-NMSC-024, ¶ 47, 144 N.M. 20, 183 P.3d 905 (internal quotation marks and citation omitted). An appellate court, therefore, will affirm the district court "unless its ruling [was] arbitrary, capricious, or beyond reason." *Id.* (alteration in original) (internal quotation marks and citation omitted).

Defendant contends that the State improperly suppressed favorable evidence, namely files and information related to alleged deals the informant witnesses had made with the State. Defense counsel subpoenaed the witnesses' informant files and later filed a motion to compel production of the files when the subpoenas went unanswered. Defendant argues that he wanted to determine whether any consideration was given to each witness for their cooperation in this case or any other, including promises of protection, money or relocation expenses, which was necessary information for cross-examination relating to bias and motive to lie. Defendant ultimately received a redacted version of Torrez' files, but according to the State, such files did not exist for any of the other witnesses.

Prior to trial, the State informed the district court that no witness was paid and that there were no informant files related to this case. At trial, it was discovered that one of the confidential informants struck a deal with the State to be released from jail in exchange for the testimony. The State informed the district court that it had disclosed this information to Defendant and that Defendant was fully aware of this new development. Defendant did not dispute this claim.

The Court of Appeals held that Defendant "failed to establish that the State suppressed evidence in violation of *Brady*." *Turrietta*, 2011-NMCA-080, ¶ 30. Although the Court of Appeals acknowledged that a few of the witnesses' testimony supported an inference that they testified *in hopes* of receiving favorable treatment from the State, there was no evidence to indicate that the hope was realized or that a deal with the State was reached. *Id.* In the absence of such evidence, the Court of Appeals could not "conclude that Defendant was deprived of his constitutional right to due process of law." *Id.*

On appeal, the State argues that Defendant has failed to satisfy any *Brady* element, primarily because no additional files existed to be suppressed. Despite the State's insistence that no other files existed, Defendant maintains that files containing information on deals with the other three

witnesses did exist and were suppressed. We find this argument unavailing as Defendant cannot cite to any evidence suggesting even an inference that additional files existed. The district court was in the best position to evaluate whether any prosecutorial misconduct occurred and found that only a portion of the only existing "gang file" should be produced to Defendant. Because Defendant failed to satisfy the first *Brady* element, that any evidence was suppressed, we need not reach the other two *Brady* elements. Thus, the district court did not abuse its discretion by finding that a *Brady* violation did not occur and that Defendant's due process rights were not violated in regards to any exculpatory information.

III. CONCLUSION

We hold that the "substantial reason" standard does not meet constitutional muster and a court must apply the *Waller* standard prior to any courtroom closure. In this case, Defendant's Sixth Amendment right to a public trial was violated and the closure of the courtroom during his trial was unconstitutional. Additionally, we hold that a *Brady* violation did not occur. Accordingly, we affirm in part and reverse in part Defendant's appeal and remand to the district court for a new trial consistent with this Opinion.

IT IS SO ORDERED.

PETRA JIMENEZ MAES, Chief Justice

WE CONCUR:

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

Certiorari Granted, July 12, 2013, No. 34,122

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-078

Filing Date: April 1, 2013

Docket No. 31,322

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

STEVEN B.,

Defendant-Appellee.

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for Appellee

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OPINION

WECHSLER, Judge.

In *State v. Dick*, 1999-NMCA-062, 127 N.M. 382, 981 P.2d 796, this Court held that the State does not have jurisdiction to prosecute a criminal defendant within Parcel Three of the former Fort Wingate Military Reservation (Parcel Three). A subsequent decision by the United States District Court for the District of New Mexico, *United States v. M.C.*, 311 F. Supp. 2d 1281 (D.N.M. 2004), decided otherwise. In this appeal, the State asks this Court to agree with the federal court decision and overrule its holding in *Dick*. Because we continue to believe that Parcel Three is within "Indian country" as defined by 18 U.S.C. § 1151 (1949) and discussed in *Alaska v. Native Village of Venetie Tribal Government* (*Venetie*), 522 U.S. 520 (1998), we affirm the ruling of the district court dismissing the State's prosecution.

BACKGROUND

A petition charged Child (an enrolled member of the Navajo Nation) with committing the delinquent act of battery upon a school employee. Child filed a motion to dismiss for lack of subject matter jurisdiction, asserting that the incident charged occurred in "Indian country" under *Dick*. As described in detail in *Dick*,

> "Fort Wingate" refers to a tract of 100 square miles designated in 1870, and an additional 30 square miles designated in 1881, as a military reservation. In 1950, Congress enacted a public law retaining title to 13,150 acres of Fort Wingate in the United States, but transferring the land to the Department of the Interior for the use of the Bureau of Indian Affairs (BIA). *See* Public Law 567, 64 Stat. 248 (1950) . . . . The Fort Wingate area remains titled in the United States government, with the exception of sixteen acres that are privately owned.

Dick, 1999-NMCA-062, ¶ 3. As further described in *Dick*, Fort Wingate consists of four separately administered parcels. *Id.* ¶ 4. The incident in this case took place at Wingate High School, which is located in Parcel Three, the same parcel as in *Dick* and *M.C.* *Dick*, 1999-NMCA-062, ¶ 5; *M.C.*, 311 F. Supp. 2d at 1282.

According to the district court's findings of fact, in 1950, Parcel Three was assigned to the BIA for school purposes, and the BIA operates Wingate High School and Wingate Elementary School on Parcel Three "primarily, but not exclusively, for the education of Indian [c]hildren." The BIA

controls all occupancy within Parcel Three except on the privately owned property, which is surrounded by Parcel Three. The BIA housing is exclusively for students and school employees and their families. The students at the schools are mostly Navajo; ninety-eight percent of the 540 students at the high school, with the remainder from other Indian tribes, and the majority of the 617 students at the elementary school. About seventy-five percent of the high school students and fifty percent of the elementary school students board at the student dormitories. A school board elected at Navajo Nation elections establishes school policies, curriculum, and budget, and the schools also comply with the State of New Mexico educational requirements, including teacher licensure. The principals are BIA employees. With respect to law enforcement protective services, the Navajo Nation, McKinley County Sheriff's Office, and the New Mexico State Police all serve Parcel Three. Utility and fire protective services are not provided by "any Indian Tribe, Indian government, or Indian enterprise." The Navajo Nation has prosecuted misdemeanors that have occurred at the schools in the Navajo Nation courts. *M.C.*, 311 F. Supp. 2d at 1284.

Concluding that it was bound by *Dick*, the district court granted Child's motion to dismiss. The State appealed.

DEFINITION OF INDIAN COUNTRY

The central issue before us is whether Parcel Three is within "Indian country" as defined by Congress in 18 U.S.C. § 1151. If Parcel Three, the location of the incident giving rise to the petition charging Child, is within "Indian country," the State would, as a general matter, lack jurisdiction over the case. *See Dick*, 1999-NMCA-062, ¶ 8 (stating that "[a]s a general principle, a state has no jurisdiction over crimes committed by an Indian in 'Indian country'"). Because the State does not contest the facts found by the district court, we review de novo whether the district court correctly applied the law to the facts, viewing the facts in the manner most favorable to Child as the prevailing party. *See State v. Frank*, 2002-NMSC-026, ¶ 10, 132 N.M. 544, 52 P.3d 404.

18 U.S.C. § 1151 provides:

> "Indian country[,]" as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

At issue in this case is Subsection (b), whether Parcel Three is within "Indian country" because it is a "dependent Indian community." The United States Supreme Court has interpreted this subsection to include two requirements for a finding of a dependent Indian community, that the land in question (1) "must have been set aside by the Federal Government for the use of the Indians as Indian land"; and (2) "must be under federal superintendence." *Venetie*, 522 U.S. at 527. The State concedes that Parcel Three

is under federal superintendence; it is the first requirement, a federal set aside, that raises the differences in the parties' positions.

FEDERAL SET-ASIDE REQUIREMENT

In interpreting 18 U.S.C. § 1151, the Supreme Court in *Venetie* observed that the "federal set-aside requirement ensures that the land in question is occupied by an 'Indian community[.]'" *Venetie*, 522 U.S. at 531. By footnote, it further observed that some congressional action was necessary "to create or to recognize Indian country." *Id.* n.6.

The United States Supreme Court stated that 18 U.S.C. § 1151(b) was a codification by Congress of the two requirements that the Court had previously held to be required for a finding of "Indian country" in two cases, *United States v. Sandoval*, 231 U.S. 28 (1913), and *United States v. McGowan*, 302 U.S. 535 (1938). *Venetie*, 522 U.S. at 528-30. *Sandoval* involved the jurisdiction of the Santa Clara Pueblo land that, although held in fee simple by the Pueblo, was recognized by Congress as the Pueblo's ancestral land and was subject to Congressional enactments "in the exercise of the Government's guardianship over . . . [Indian] tribes and their affairs, including federal restrictions on the lands' alienation." *Venetie*, 522 U.S. at 528 (alteration in original) (internal quotation marks and citations omitted). The Court held that Congress "could exercise jurisdiction over the Pueblo lands, under its general power over all dependent Indian communities within its borders[.]" *Id.* (internal quotation marks and citation omitted). In addition, by executive orders, additional public land had been reserved for the Pueblos' "use and occupancy." *Id.* (internal quotation marks and citation omitted). In *McGowan*, the government held the land "in trust for the benefit of the Indians residing there." *Venetie*, 522 U.S. at 529. The Court held that the Government created an Indian colony that had been "validly set apart for the use of the Indians . . . under the superintendence of the Government" was "Indian country." *Id.* (alteration in original) (internal quotation marks and citation omitted).

M.C., relying on *Venetie*, *Sandoval*, and *McGowan*, concluded, as did the Tenth Circuit in *Blatchford v. Sullivan*, 904 F.2d 542 (10th Cir. 1990), that the federal set-aside requirement is not met unless the community at issue is "located on tribal lands or land held in trust for Native Americans." *M.C.*, 311 F. Supp. 2d at 1295. In addition, *M.C.* declined to find a dependent Indian community because the Wingate school community was not "created by Native Americans themselves or the federal government to provide for the use, occupancy[,] and protection of the community." *Id.*

As discussed in *M.C.*, although the federal cases addressed in *Venetie* and *M.C.* do not conclude that there is a dependent Indian community without tribal or trust land, we do not read *Venetie* to restrict a dependent Indian community to tribal or trust land. *M.C.*, 311 F. Supp. 2d at 1294. *Venetie* only necessitates a federal set aside and federal superintendence for a finding of a dependent Indian community. *Venetie*, 522 U.S. at 530. Indeed, the federal set-aside requirement may be more evident if tribal or trust land is involved; nevertheless, such ownership is not required.

M.C. also emphasizes that "no Native American tribe dwells on the land in Parcel Three." 311 F. Supp. 2d at 1295. It discounts that students and staff live at the school or in Parcel Three because such occupancy "is

dependent upon attendance or employment at the [s]chool." *Id.* According to *M.C.*, a federal set aside demands that the resultant community be "created by Native Americans themselves or the federal government to provide for the use, occupancy[,] and protection of the community." *Id.* It relies in this regard on *United States v. Myers*, 206 F. 387 (8th Cir. 1913), in which the Eighth Circuit held that the United States' reserving a tract of land that Indian tribes ceded to the United States for public purposes, including a boarding school for Indians, did not convert the tract of land into "Indian country." *Id.* at 393-94. The Eighth Circuit stated that "Indian country" required retention by Indians of "the right of use and occupancy, involving—under certain restrictions—freedom of action and of enjoyment in their capacity as a distinct people[.]" *Id.* at 394.

However, as with ownership, nothing in the *Venetie* federal set-aside requirement makes such a demand in the limited manner that *M.C.* and *Myers* suggest. *Myers* was decided before 18 U.S.C. § 1151 was enacted and did not address the concept of "dependent Indian community" stated in the statute. By setting aside Parcel Three, the federal government did provide for the use and occupancy of the land by Native Americans. As discussed in *Dick*, by virtue of the federal set aside of Public Law 567, the federal government created a community for the education and occupancy of primarily Native American students. *Dick*, 1999-NMCA-062, ¶ 23. Although the Navajo Nation shares oversight responsibilities over Parcel Three with the BIA and the State, it nevertheless exercises a degree of control with respect to the protection of Parcel Three through emergency response and court jurisdiction and to the operation of the schools through election to the school board.

OVERRULING OF *DICK*

We held in *Dick* that Parcel Three of the former Fort Wingate Military Reservation met both the set-aside and federal-superintendence requirements of *Venetie* such that it is a "dependent Indian community" under 18 U.S.C. § 1151. *Dick*, 1999-NMCA-062, ¶ 28. The State requests that we overturn *Dick*, a request that we do not consider lightly. We share our Supreme Court's view and "are reluctant to overturn precedent because it promotes stability of the law, fairness in assuring that like cases are treated similarly, and judicial economy." *State v. Riley*, 2010-NMSC-005, ¶ 34, 147 N.M. 557, 226 P.3d 656. We will nevertheless deviate from our precedent for compelling reasons, including when the previous decision is "so unworkable as to be intolerable" or "indefensible." *Id.* (internal quotation marks and citation omitted); *State v. Kerby*, 2005-NMCA-106, ¶ 29, 138 N.M. 232, 118 P.3d 740, *aff'd*, 2007-NMSC-014, ¶ 26, 141 N.M. 413, 156 P.3d 704.

The State's arguments in this appeal do not compel our departing from *Dick*. First, as we have discussed, Parcel Three fits within the set-aside requirement of *Venetie* when we do not read *Venetie* in the overly restrictive manner as suggested by *M.C.* and the State. Second, in *State v. Quintana*, 2008-NMSC-012, ¶ 6, 143 N.M. 535, 178 P.3d 820, our Supreme Court relied on *Dick* in considering the sufficiency of the federal set-aside requirement before it in that case. Third, although the State asserts that in the aftermath of *M.C.* an intolerable situation exists in that "federal criminal jurisdiction over major crimes committed" in Parcel Three does not lie, the issue before this Court in *Dick*, and in this case, is the application of state, not federal, jurisdiction. *M.C.* is a decision of a

single federal district court. The decision to prosecute crimes in federal court rests with the United States Attorney.

CONCLUSION

As we held in *Dick*, Parcel Three of the former Fort Wingate Reservation is a "dependent Indian community" under 18 U.S.C. § 1151. Therefore, because the acts addressed in this case occurred in "Indian country," the State did not have jurisdiction to prosecute the case. We affirm the district court's grant of the motion to dismiss.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

MICHAEL E. VIGIL, Judge

Certiorari Denied, June 19, 2013, No. 34,169

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-079

Filing Date: April 23, 2013

Docket No. 32,149 (consolidated with 32,256)

ROBERT NARVAEZ,

Petitioner-Appellant,

v.

NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS, and SOUTHWEST TYRE LTD.,

Respondents-Appellees.

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for Appellant

New Mexico Department of Workforce Solutions
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for Appellees

OPINION

WECHSLER, Judge.

The Department of Workforce Solutions (the Department) granted Petitioner Robert Narvaez unemployment benefits for thirteen months before disqualifying him from benefits and requiring that he repay the benefits because his misconduct caused his employment separation. We reverse the district court's order upholding the Department's action because the Department did not proceed in accordance with the Unemployment Compensation Law, NMSA 1978, §§ 51-1-1 to -59 (1982, as amended through 2012) and the Department's regulations.

BACKGROUND

Petitioner was employed by Respondent Southwest Tyre Ltd. (Employer). Employer terminated Petitioner and another worker for fighting. Petitioner filed a claim with the Department for unemployment benefits on May 16, 2010, his last day of work. Employer did not respond to the Department's request for information concerning the termination. The Department granted benefits for the benefit year ending May 14, 2011, beginning the week ending May 29, 2010. Petitioner filed a second claim for benefits for a new benefit year on May 15, 2011. Employer again did not contest the claim.

On June 28, 2011, the Department initiated telephone contact with Petitioner and Employer. A memorandum concerning the telephone contact with Employer indicates that the telephone contact was the first time Employer responded to the Department concerning the reason for Petitioner's separation from employment. Employer informed the Department, as did Petitioner at that time and in his original claim, that Petitioner was fired for fighting with another employee.

On the same day, June 28, 2011, the Department sent Petitioner a notice of claim determination, informing him that he was disqualified from receiving benefits because of his misconduct for fighting on the job. It also sent Petitioner an overpayment notice, informing him that he was liable to repay the Department for fifty-eight weeks of benefits in the amount of $27,902.

Petitioner filed an administrative appeal. An administrative law judge determined on behalf of the Department's appeals tribunal that Petitioner was disqualified from benefits but did not address overpayment. The Department's board of review affirmed the decision. The district court issued a writ of certiorari, and, upon review of the administrative proceeding, upheld the decision of the board of review. It concluded that Petitioner did not appeal the overpayment notice.

Petitioner filed a notice of appeal in which he states that he is contemporaneously filing a petition for writ of certiorari in order to ensure his appellate rights. Without objection, we consider the appeal. Petitioner argues several issues relating to the Department's failure to follow the time lines of the Unemployment Compensation Law and the Department's regulations, the Department's failure to accept Petitioner's overpayment appeal, due process, and estoppel. Because it is dispositive of the case, we address only Petitioner's argument concerning the Unemployment Compensation Law and the regulations.

STANDARD OF REVIEW

When reviewing an administrative decision regarding unemployment benefits, "[w]e independently employ a whole record standard of review and will affirm the agency's decision only if it is supported by the applicable law and substantial evidence in the record as a whole." *Miss. Potash, Inc. v. Lemon*, 2003-NMCA-014, ¶ 7, 133 N.M. 128, 61 P.3d 837. "The party challenging an agency decision bears the burden on appeal of showing that agency action falls within one of the oft-mentioned grounds for reversal including whether the decision is arbitrary and capricious; whether it is supported by substantial evidence; and whether it represents an abuse of the agency's discretion by being outside the scope of the agency's authority, clear error, or violative of due process." *Id.* ¶ 8 (internal quotation marks and citation omitted). When engaging in whole record review, we review legal questions de novo, including whether the agency misinterpreted or misapplied its statutory or administrative governing provisions. *See AMREP Sw. Inc. v. Sandoval Cnty. Assessor*, 2012-NMCA-082, ¶ 7, 284 P.3d 1118.

REQUIREMENTS OF THE UNEMPLOYMENT COMPENSATION LAW AND DEPARTMENT REGULATIONS

Under the Unemployment Compensation Law, persons who become unemployed "through no fault of their own" may receive benefits from the unemployment compensation fund. Sections 51-1-3, 51-1-4(A). They must make a claim for benefits in accordance with regulations prescribed by the secretary of the Department. Section 51-1-8(A). A Department claims examiner must promptly review the application to make determinations that include a claimant's eligibility and disqualification. Section 51-1-8(B). A person is disqualified under the Unemployment Compensation Law and not eligible to receive benefits if the person either left employment voluntarily without good cause or was discharged for misconduct. Section 51-1-7(A)(1), (2).

The Unemployment Compensation Law further provides procedures for the processing and appeal of claims. The claims examiner must "promptly notify the claimant and any other interested party of the determination [of the claim] and the reasons therefor." Section 51-1-8(B). The claimant's most recent employer is an interested party. Section 51-1-8(C)(1). The claimant and interested parties have fifteen days from the date of the "notification or mailing of the determination" to appeal to an appeals tribunal hearing officer. Section 51-1-8(B). If no appeal is filed, the determination of the claims examiner is final, subject to a redetermination by the claims examiner of a nonmonetary determination made based on additional information not previously available within twenty days of the original nonmonetary determination. *Id.* Further appeals are to the secretary and the board of review. Section 51-1-8(F), (H).

The Department's regulations effective at the time of this case address the filing, determination, and redetermination of claims. 11.3.300.301, 308 NMAC (1/1/03) (amended 11/15/12). The regulations require that, after a claim is filed, the Department notify the employer, which is then obligated to "provide the [D]epartment with full and complete information in response to the inquiry." 11.3.300.308(A) NMAC. If the employer does not provide a timely response and the application does not raise a

nonmonetary issue, the Department may immediately commence benefits without additional notice. 11.3.300.308(C) NMAC. The regulations further provide that an employer's failure to provide a "substantive response" within ten days "shall be an irrevocable waiver of the employer's right to be heard before a determination is made[.]" 11.3.300.308(C)(2) NMAC. The Department is then obligated to "immediately transmit to the parties the determination and the reason for it" and "advise the parties of the right to appeal." 11.3.300.308(C)(3) NMAC. However, if "a separation issue is timely raised," the Department must adjudicate the claim before sending the determination. 11.3.300.308(C)(4) NMAC. The regulations permit a redetermination of a nonmonetary determination only if specific criteria that we will later discuss in this opinion are met. 11.3.300.308(D) NMAC.

APPLICATION OF UNEMPLOYMENT COMPENSATION LAW AND REGULATIONS TO THIS CASE

May 16, 2010 Claim

The principal difficulty in this case arises from the Department's failure to provide a specified notice of determination with respect to Petitioner's May 16, 2010 claim. The Department admits that "[a]s a result of an administrative error, a claim determination was not issued in May 2010." It states that the "first and only" notice of claim determination in the administrative record concerning the separation issue is the one dated June 28, 2011. It appears to argue that, as a result, all time frames set forth in the regulations run from June 28, 2011.

However, upon receiving the May 16, 2010 application, the Department did transmit to Employer the required notification and request for separation information. It began providing benefits to Petitioner effective May 29, 2010, the conclusion of the ten-day period for Employer to respond. Although it failed to provide a notice of claim determination, it did send Petitioner a reemployment services program notice dated June 16, 2010 that informed Petitioner that the Department had "determined that [he is] eligible for unemployment insurance benefits." An unemployed person is only entitled to receive benefits if the person participates in reemployment services based on certain findings by the Department. 11.3.300.321 NMAC (1/1/03) (amended 11/15/12).

The Unemployment Compensation Law and the regulations emphasize the prompt handling of claims. Section 51-1-8(B) requires the Department to promptly examine claims and promptly provide notification of a determination and the reasons for the determination. The regulations require the Department to "immediately" provide such notification. When an employer fails to respond to the Department's notice of claim within ten days, a determination shall be made based on the information in the application. 11.3.300.308(C)(3) NMAC. Only if a separation issue is "timely raised" may the Department delay such notification of a determination until after the Department has adjudicated the claim. 11.3.300.308(C)(4) NMAC.

As to Petitioner's claim, Employer did not respond to the notice of claim and no separation issue had been timely raised. The Department did not request additional information from Employer, Petitioner, or witnesses. *See* 11.3.300.308(B) NMAC

("Prior to issuance of a determination . . . , the [D]epartment may request additional information from the employer, the claimant or witnesses . . . relative to the separation of the claimant from employment."). The Department was obligated to make a determination and provide Petitioner and Employer notice of its determination. It concedes that it failed to "issue" its determination. It does not say that it did not make the determination. Notwithstanding its failure to provide a notice of claim determination, the Department did inform Petitioner that he was determined to be eligible for benefits and provided benefits commencing May 29, 2010 continuously for thirteen months. The Department's administrative error in failing to follow its required procedures and issue a claim determination does not negate the circumstances that indicate that it had made the determination that Petitioner was entitled to benefits.

An administrative agency is bound by its own regulations. *See Atlixco Coalition v. Cnty. of Bernalillo*, 1999-NMCA-088, ¶ 16, 127 N.M. 549, 984 P.2d 796; *see also Hillman v. Health & Soc. Servs. Dep't*, 92 N.M. 480, 481, 590 P.2d 179, 180 (Ct. App. 1979). The circumstances of this case demonstrate the rationale for the requirement of promptness and the time frame of the regulations. If the Department could fail to follow the time frame for notice, a claim could continue indefinitely without being resolved. By requiring specific action by the Department within a specific time frame, the regulations avoid the uncertainty that could result from the lack of prompt action by the Department. An administrative error does not alter the failure to follow the regulations that require the Department to act promptly on claims. It certainly does not extend the time limits of the regulations.

This case is different from *Millar v. New Mexico Department Of Workforce Solutions*, 2013-NMCA-055, 304 P.3d 427. In *Millar*, the department did not provide immediate notice that the employer had appealed a claim determination, and the claimant did not receive notice of the appeal until more than five months later when the department sent notice of hearing. *Id.* ¶ 3. The claimant appealed the department's overpayment determination. *Id.* ¶ 4. This Court addressed the issue of whether the hearing conducted more than five months after the claimant had been awarded benefits violated state and federal law. *Id.* ¶ 10. We concluded that the Unemployment Compensation Law merely incorporated the federal regulation at issue by reference and that the federal regulation that required hearings to be commenced and decided "with the greatest promptness that is administratively feasible" merely established nonmandatory guidelines. *Id.* ¶¶ 13-14 (internal quotation marks and citation omitted). In this case, to the contrary, we address the Department's regulations that provide specific mandatory time frames.

The result of the administrative process in this case was that Petitioner's May 16, 2010 claim was determined in his favor. There was no appeal. While we agree with the Department that Employer did not waive its right to be heard in an appeal because it did not respond to the Department's notice within ten days, we assume that the Department also did not transmit notice of its determination to Employer. It thereby essentially foreclosed Employer's opportunity to be heard by its administrative error.

Connection of the May 15, 2011 Claim to the May 16, 2010 Claim

The Department assigned Petitioner's May 16, 2010 claim a benefit year ending May 14, 2011. *See* § 51-1-42(P) (2007) (amended 2010) (defining "benefit year" in part as "the one-year period beginning with the first day of the first week of unemployment with respect to which the individual first files a claim for benefits . . . and thereafter the one-year period beginning with the first day of the first week of unemployment with respect to which the individual next files such a claim for benefits after the termination of the individual's last preceding benefit year[.]"). On May 15, 2011, Petitioner filed a new claim for the next benefit year.

The Department followed its procedures and provided notice of the claim and a request for separation information to Employer. The form in the record titled "Employer's Statement" is not completed in any way. It is not clear from the record that the Department's form intended to elicit information from Petitioner was sent to him. Although it reflects that it was sent May 23, 2011, it states "do not send" in three places on the form in connection with questions concerning Petitioner's separation from employment.

On May 25, 2011, the Department provided Petitioner with a notice of claim determination, informing him that it denied his new claim because he had not returned to work and earned five times his new weekly benefit amount as required by Section 51-1-5(B). The Department nevertheless determined that it would continue to provide Petitioner emergency unemployment compensation on his old claim if he was otherwise eligible.

On June 28, 2011, a representative of the Department made telephone calls to both Petitioner and Employer concerning Petitioner's separation from employment. The Department on the same day sent its notice of claim determination, advising Petitioner that because he was discharged from employment for fighting on the job, which was misconduct, he was disqualified from benefits effective the calendar week ending May 22, 2010.

Because it disqualified Petitioner from benefits effective the calendar week ending May 22, 2010, the June 28, 2011 notice of claim determination acted on Petitioner's May 16, 2010 claim, not the May 15, 2011 claim. Petitioner does not argue that the Department erred in its determination of the May 15, 2011 claim, and we do not address that claim determination in this opinion. The two claims become intertwined, however, because the Department took action on the May 16, 2010 claim only after Petitioner filed the May 15, 2011 claim.

But the regulations do not authorize the Department's June 28, 2011 action in connection with the May 16, 2010 claim. As we have discussed, the Department had determined the May 16, 2010 claim and provided benefits. This is not a claim based on false statements or misrepresentations, which, under the Unemployment Compensation Law and the regulations, are void. Section 51-1-38(D); 11.3.300.314(A) NMAC (1/1/03) (amended 11/15/12). The law and regulations permit the Department's action re-opening Petitioner's May 16, 2010 claim only upon redetermination. The criteria for redetermination include:

(1) The adjudicator perceives the need for reconsideration either as a result of a protest by an interested party or on the adjudicator's own initiative due to new or additional information received. Examples of the type of errors which may prompt a redetermination are . . . an additional fact not available to the adjudicator at the time of the determination excluding those facts the employer and claimant had the opportunity to provide prior to the initial determination[.]

. . . .

(4) A redetermination can be issued no later than the twentieth calendar day from the original determination date or twenty days from the date of the first payment deriving from the original determination, whichever event occurs latest.

11.3.300.308(D) NMAC.

First, we do not consider the information obtained in the June 28, 2011 telephone calls to be the type of new or additional information contemplated in the regulations. Information that Petitioner or Employer could have provided prior to the initial determination is not sufficient. The information the Department received in the telephone calls was information it could have received in the initial process had Employer timely responded or if the Department had conducted a timely investigation. Second, a redetermination was not timely. The Department may issue a redetermination only within the later of twenty calendar days from the original determination or twenty days from the date of the first payment made under the original determination. 11.3.300.308(D)(4) NMAC. We do not know the precise date of the original determination because of the Department's administrative error in failing to provide notice of it. The first payment was made on the week ending May 29, 2010. A determination made approximately thirteen months after either triggering event does not fall within the time limits of the regulations.

CONCLUSION

The Department's regulations provide specific time frames for the Department to act on claims. They provide a window for the Department to make a determination about entitlement to benefits. The Department did not act in accordance with the time frames of its regulations in its determination that Petitioner was not entitled to benefits. We reverse the decision of the board of review.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

M. MONICA ZAMORA, Judge

Certiorari Granted, July 12, 2013, No. 34,204

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-080

Filing Date: April 25, 2013

Docket No. 31,446

DANIEL M. FABER,

Plaintiff-Appellee,

v.

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

Defendant-Appellant.

Tucker Law Firm, P.C.
Steven L. Tucker
Santa Fe, NM

for Appellee

Gary K. King, Attorney General
Scott Fuqua, Assistant Attorney General
Santa Fe, NM

for Appellant

OPINION

KENNEDY, Chief Judge.

This case requires us to determine if damages of $100 per day was a correct and reasonable award in response to the New Mexico Attorney General's wrongful withholding of documents in violation of the Inspection of Public Records Act (IPRA). We conclude that the district court erred in awarding damages under NMSA 1978, Section 14-2-12(D) (1993) without stating the nature and purpose of the damage award and in failing to further support by findings, and we reverse.

I. BACKGROUND

Plaintiff Daniel Faber is an attorney who represented three employees of the Attorney General's Office in an employment dispute filed in federal court. The federal court ordered a stay of discovery on May 28, 2010, in order to evaluate an Eleventh Amendment immunity defense raised by the Attorney General. On August 23, 2010, while the stay was still in effect, Faber, in his own name, filed an IPRA request for employment records from the Attorney General's Office. NMSA 1978, §§ 14-2-1 to -12 (1947, as amended through 2011). The Attorney General denied

the request three days later, stating that it appeared to "circumvent the discovery process" in the pending lawsuit.

Faber filed a lawsuit against the Attorney General in the state district court to enforce his IPRA request on September 7, 2010. The district court eventually held that the discovery stay did not preempt statutory rights granted to New Mexico citizens by IPRA. It further ruled that the Attorney General had violated IPRA by denying Faber's request and issued a writ of mandamus ordering the Attorney General to comply. The determination of the IPRA violation is not at issue on appeal. Our sole concern is the amount of damages awarded to Faber.

Faber subsequently moved for damages as allowed under IPRA. Section 14-2-12(D). The district court awarded damages of "$10[] per day from the date of the wrongful denial to the date the federal court stay was lifted; thereafter, damages of $100[] per day until the records are provided." The district court also awarded costs. Because Faber was proceeding pro se in this matter, he waived an award of attorney fees. The Attorney General appealed the district court's award of damages.

II. DISCUSSION

We review questions concerning the application of IPRA de novo. *State v. Rivera*, 2004-NMSC-001, ¶ 9, 134 N.M. 768, 82 P.3d 939 (stating that "[i]nterpretation of a statute is a matter of law, which we review de novo" (internal quotation marks and citation omitted)). To the extent that the Attorney General argues the district court awarded an erroneous amount of damages, we review an award for substantial evidence. *Moody v. Stribling*, 1999-NMCA-094, ¶ 40, 127 N.M. 630, 985 P.2d 1210 ("As long as there is a reasonable method used to achieve an amount of damages, we will accept that amount."). The Attorney General argues that per-day damages were wrongfully awarded under the section of IPRA governing failures to respond, rather than the sections applicable to wrongful denials of requests for information. The Attorney General also argues that, once Faber's request was denied, it ceased to exist and, therefore, daily damages were incorrectly calculated to continue to accrue after the denial. For the reasons that follow, we conclude the Attorney General to be incorrect on both issues.

A. Per-Day Damages Are Permitted Under Section 14-2-12

The Attorney General first argues that the district court erroneously applied Section 14-2-11(C)(1) of IPRA to calculate damages. That section states that, if a custodian of records fails to respond to a record request and does not provide a written explanation within fifteen days, the person requesting the information is entitled to damages if the failure to respond was unreasonable. *Id.* Section 14-2-11(C)(2) provides that the damages for failure to respond shall "not exceed . . . []$100[] per day[,]" and they accrue from the day that the custodian is in violation of Section 14-2-11(C)(3) until he complies.

Section 14-2-12, under which Faber moved for damages, covers actions to enforce a request that was denied. It provides that a person whose request was rejected may bring an action seeking to mandate an official's compliance with the statute and empowers the district court to order any "appropriate remedy" to enforce IPRA. Section 14-2-12(B). Most importantly to the case at hand, Subsection (D) is clear that the court "*shall*

award damages, costs[,] and reasonable attorney fees to any person whose written request has been denied and is successful in a court action to enforce [IPRA]." Section 14-2-12(D) (emphasis added). Thus, under the plain language of Section 14-2-12, it is clear that the court must award damages and that those damages are not subject to further restrictions. What type of damages are permitted, and for what reasons, is not stated.

IPRA includes these provisions for damages and other remedies to "encourage compliance and facilitate enforcement." *San Juan Agric. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 12, 150 N.M. 64, 257 P.3d 884; *see* § 14-2-12. First in time among such remedies is the $100 per-day penalty under Section 14-2-11(C) for any agency that does not timely respond to a request. Once an agency denies production of requested documents, however, the party requesting the records is authorized under Section 14-2-12(A)(2) to bring an enforcement action. Then, "[t]he court shall award damages, costs[,] and reasonable attorney[] fees to any person whose written request has been denied and is successful in a court action to enforce the provisions of [IPRA]." Section 14-2-12(D); *San Juan Agric. Water Users*, 2011-NMSC-011, ¶ 13; *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, ¶ 27, 287 P.3d 364; *Derringer v. State*, 2003-NMCA-073, ¶ 10, 133 N.M. 721, 68 P.3d 961. As additional remedies, Section 14-2-12(B) provides for a district court to issue a writ of mandamus directing a defendant to produce the documents as was awarded by the court in this case and also provides for a district court to order an "other appropriate remedy to enforce the provisions of [IPRA]."

Here, the court granted Faber's motion for daily damages from the date of non-compliance until the date of compliance. In the briefs to the district court on damages as well as the hearing, it is clear that all counsel and the court understood the distinction between Section 14-2-11 and Section 14-2-12. Faber never claimed that the $100 maximum in Section 14-2-11(C)(2) applied to his enforcement action. He instead argued below that it was a reasonable amount of damages to apply under Section 14-2-12 because the Attorney General has a constitutional duty to enforce the public's right to access documents. Faber argued that the Attorney General's refusal to honor the request, even after the federal court's stay was lifted, was an egregious act worth $100 per day in damages after the lifting of the stay. The only question we must answer is whether the nature and amount of the award was supported.

{10} The Attorney General argues that the statutory damages are solely intended to be compensatory. We note first that Section 14-2-12 does not limit the nature of damages that may be awarded. Further, the case relied upon by the Attorney General does not support the position that damages under IPRA are compensatory only. *See Southard v. Fox*, 113 N.M. 774, 779, 833 P.2d 251, 256 (Ct. App. 1992) (stating that prejudgment interest is not part of jury-determined damages). The Attorney General also argues that calculating damages by day would leave an agency that denies a request "at the mercy of the court's docket . . . [and] dilatory tactics of the requester[.]" These are factors to be considered by the district court in its discretion. We are confident a district court is capable of managing its docket to avoid these problems as much as it is able to minimize unwarranted, unintended, or excessive damage awards. Here, the court clearly differentiated between the time during which the federal stay was in effect and the time after it was lifted.

Our decision today does not suggest a method of calculating damages under Section 14-2-12(D). We merely examine whether, in this case, the district court's award was supported.

The term "damages" under IPRA has not been construed or limited by our courts. New Mexico has yet to determine if any sort of punitive monetary assessment would be appropriate under Subsections (B) or (D). Existing cases do not help. In *Toomey*, we remanded to the district court to determine an "appropriate award." 2012-NMCA-104, ¶ 28. In *Rio Grande Sun v. Jemez Mountains Public School District*, the plaintiffs were awarded "nominal damages" that were not appealed. 2012-NMCA-091, ¶ 4, 287 P.3d 318, *cert. denied*, 2012-NMCERT-008, 296 P.3d 490. We note that, in *Rio Grande Sun*, we discussed that the provision awarding attorney fees further implements IPRA's policy to encourage private citizens to enforce the Act and lawyers to litigate violations of the Act on their behalf. *Id.* ¶ 19. Here, Faber waived his claim to attorney fees and argued for damages, thus removing from our consideration one possible remedy for successful litigants. C. Clifford Allen, III, *Right of Party Who Is Attorney and Appears for Himself to Award of Attorney's Fees Against Opposing Party as Element of Costs*, 78 A.L.R.3d 1119 (1977) (discussing states that allow pro se attorney litigants to receive attorney fees and those that do not). Faber sought actual damages of $150 to reimburse him for a contempt citation from federal court for making the IPRA request, but the district court did not award that amount, nor did it specify the type of damages as "actual" or otherwise. Attempting to ascertain the district court's intentions with regard to the amount of damages if awarded under Section 14-2-12(D) is impossible, given this lack of precedent and confusing language in the pleadings and the parties' arguments.

The district court's opinion and order of March 2011 was specific in reserving the issue of "an award pursuant to Section 14-2-12(D) upon appropriate motion," which Faber subsequently made. Faber argued that the $100 per-day damages in Section 14-2-11(C) should be seen not as a mandated amount for that section only, but as the upper end of a range of IPRA damages. In fact, Faber specifically asserted in his response to the Attorney General's opposition to any award of damages that, under Section 14-2-12(D), there was no good reason for the court to order less than $100 per day. In light of Faber's specific request for "actual damages" of $150, we could easily view Faber's argument for "statutory damages" as a request for punitive damages based on his assertions that the Attorney General's denial of a fundamental right to inspect public records is "disgraceful," "inexcusable," "egregious" and deserving of being "penalized." *See State ex rel. Newsome v. Alarid*, 90 N.M. 790, 797, 568 P.2d 1236, 1243 (1977) (holding that there is a "fundamental right" to inspect public records), *superceded on other grounds by statute as stated in Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, 283 P.3d 853. "A specific pleading of the theory that supports an award of punitive damages . . . is not required by the rules." *Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, ¶ 22, 140 N.M. 478, 143 P.3d 717. By the same token, "statutory damages" may mean no more than whatever may be permitted by Section 14-2-12(B) or Section 14-2-12(D).

We are foreclosed from adding things that are not provided for in the statute. *Amerada Hess Corp. v. Adee*, 106 N.M. 422, 424, 744 P.2d 550, 552 (Ct. App. 1987). We cannot read into it language that is not there. *State ex rel. Klineline v. Blackhurst*, 106 N.M.

732, 735, 749 P.2d 1111, 1114 (1988), *superceded in statute as stated in Cordova v. State Taxation & Revenue*, 2005-NMCA-009, 136 N.M. 713, 104 P.3d 1104. We give effect to each part of legislation to determine the intent of the Legislature. *Harris v. Vasquez*, 2012-NMCA-110, ¶ 10, 288 P.3d 924. In Faber's motion for an award of damages, he requests "damages of $100 per day." He urges that this amount, already found in IPRA under Subsection (C) (mandating damages for failure to respond) can be used as a benchmark amount for damages in cases of an egregious refusal to provide documents. To Faber, such an amount "should also apply in the case of an agency that refuses to produce public records, such as in this case." We disagree with directly incorporating Section 14-2-11(C) damage amounts into Section 14-2-12(D), as "[w]e will not read into a statute language that it does not contain" and are, therefore, unwilling to conflate the penalties for non-response to a request provided by Section 14-2-11 with the separate remedies in Section 14-2-12. *Cal. First Bank v. State*, 111 N.M. 64, 73, 801 P.2d 646, 655 (1990). We will uphold a trial court's award of compensatory damages if it is supported by substantial evidence. *Chavarria*, 2006-NMSC-046, ¶ 17. "As long as there is a reasonable method used to achieve an amount of damages, we will accept that amount." *Moody*, 1999-NMCA-094, ¶ 40.

Driven by the public interest in government transparency, Section 14-2-11(C) provides a robust available remedy for ignoring requests for documents and is driven by the overwhelming public interest in government transparency. The Attorney General and Faber both agree that the damages in Section 14-2-11(C) extend only from the time of non-compliance to the time the request is denied or fulfilled. So do we. This Court has held that, once the custodian of records answers the request with a denial or otherwise, Section 14-2-11 ceases to apply and, when someone brings an action to enforce production after a denial, the damages are governed by Section 14-2-12(D). *Derringer*, 2003-NMCA-073, ¶¶ 10-11. For this reason, Section 14-2-11 and Section 14-2-12 are separately titled "Procedure for denied requests" and "Enforcement."

We hold that damages for enforcement of a denied request are governed by Section 14-2-12(D), not Section 14-2-11(C). The statutory maximum per-day penalty of Section 14-2-11(C) does not create any "standard" for an amount of damages under Section 14-2-12(D) as asserted by Faber. Faber's prayer for relief asks for "statutory damages of $100 per day" in addition to the "actual damages of $150 to compensate him for the penalty" imposed by the federal court. As far as the Attorney General mistakenly argues that Faber's phrase "statutory damages" refers only to application of Section 14-2-11(C), Faber cannot receive those "statutory damages" under Section 14-2-12(D). Section 14-2-12(D) provides for damages, which we hold must be somehow specified as to their nature and measured by the district court.

The statute is silent as to whether awards of punitive damages are permitted. Section 14-2-12. It is the Attorney General, not Faber or the district court, who is conflating a request for damages by insisting that Faber is proceeding under a specific, but technically inapplicable, statute. Faber instead argues that there is no reason to award less than $100 per day. Section 14-2-11(C) serves as no more than a benchmark for both the degree of behavior worthy of punishment and the measure of what punishment is warranted.

Instead, we evaluate the reasonableness of a punitive damage award based on "the reprehensibility of the defendant's conduct... and the difference between the punitive damages award and the civil and criminal penalties authorized or imposed in comparable cases." *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 2002-NMSC-021, ¶ 20, 132 N.M. 401, 49 P.3d 662; *Chavarria,* 2006-NMSC-046, ¶ 36. The district court seemed to have understood Faber's request as one for a maximum penalty. The court tailored its award to reflect relative culpability between times when the federal stay was still in place and the time after the stay was lifted, but the Attorney General continued to withhold the documents.

However, the court did not award compensatory damages, nor specify that the damages awarded were punitive. We have previously held that punitive damages cannot be recovered in the absence of compensatory or nominal damages. *Madrid v. Marquez,* 2001-NMCA-087, ¶ 3, 131 N.M. 132, 33 P.3d 683. We apply the same standard to the damages named in Section 14-2-12(D). Given that there is no mention of compensatory or nominal damages, and every indication in the record points to the award as punitive, we hold that the award is unsupported and reverse for further proceedings in accordance with our ruling. The district court must enter findings supporting any award of compensatory damages so that we may, on review, know the basis for such damages and may then measure them against any award of punitive damages.

B. Denial of Request Does Not Terminate It for Purposes of Calculating Damages

The Attorney General also argues that Faber is not entitled to per-day damages because the request terminated when it was denied and, therefore, the court should not have counted any of the days after the request was rejected. He argues that the court's award, which counted damages from the wrongful denial to the day the records were produced, implies that the request was still pending that entire time. He argues this would lead to harmful public policy in requiring agencies to keep monitoring a request in case they later acquired documents that they lacked at the time of the original request. We disagree.

As discussed above, no one disputes that the Attorney General withheld the documents from the time of the request through the judgment of the district court. The district court did not assume that the request stayed open after it was denied, or that it would remain open indefinitely as the Attorney General fears. Instead, although unspecified, the district court awarded damages for the wrongdoing under the relevant statute.

III. CONCLUSION

We reverse the district court's award of damages as unsupported by findings supporting compensatory damages, which are a prerequisite to punitive damages such as were awarded in this case.

IT IS SO ORDERED.

RODERICK T. KENNEDY, Chief Judge

WE CONCUR:

LINDA M. VANZI, Judge

J. MILES HANISEE, Judge

Certiorari Denied, June 25, 2013, No. 34,112

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-081

Filing Date: March 19, 2013

Docket No. 31,265

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

VERNARD SMITH,

Defendant-Appellant.

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Santa Fe, NM

for Appellee

Bennett J. Baur, Acting Chief Public Defender
J.K. Theodosia Johnson, Assistant Appellate Defender
Santa Fe, NM

for Appellant

OPINION

KENNEDY, Chief Judge.

This case requires us to determine whether the district court erred in permitting an analyst from the State's Scientific Laboratory Division (SLD) to testify at trial via a video conference as to the conduct and results of a blood test. We hold that the district court did not establish the requisite necessity for allowing video testimony in lieu of live testimony and, as a result, Defendant's rights under the Sixth Amendment to the United States Constitution were violated by the video conference testimony. The error was not harmless, and we reverse Defendant's conviction.

I. BACKGROUND

Vernard Smith (Defendant) was arrested for driving under the influence. His blood

was tested for alcohol. An analyst from the SLD tested the blood. At Defendant's trial, the analyst testified as to the blood test results via two-way video conference over Defendant's objection. The district court found that, to appear in person, the analyst would have to drive several hours, resulting in the SLD being shorthanded, and the analyst inconvenienced in her work. Because it perceived no difference in appearing via two-way video conference and in person, the district court determined that it would permit the testimony via video conference and denied Defendant's objection. The jury convicted Defendant of driving while under the influence. Defendant and the State dispute whether there was other evidence of impairment or intoxication other than the .07 percent test result and, therefore, whether any potential error was harmless.

II. DISCUSSION

We review whether Defendant's right to confront and cross-examine the witness was violated by the district court de novo. *State v. Chung*, 2012-NMCA-049, ¶ 10, 290 P.3d 269, *cert. granted*, 2012-NMCERT-005, 294 P.3d 446.[1] Defendant also raises issues of prosecutorial misconduct and irrelevant evidence, but as we reverse based on the Confrontation Clause, we do not need to address his other arguments.

A. Two-Way Video Conference Testimony Violates the Confrontation Clause Absent a Showing of Necessity

The Confrontation Clause is found in the Sixth Amendment to the United States Constitution and made applicable to the states through the Fourteenth Amendment, as well as in Article II, Section 14 of the New Mexico Constitution. Both constitutional provisions guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend VI.

Case law on video testimony recognizes both the difference between virtual and real testimony and the requirement of substantial necessity when abrogating the right to face-to-face confrontation. Generally, "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 844 (1990) (internal quotation marks and citation omitted). Confrontation requires that the witness be presented in court in such a way as to fulfill the elements of the Confrontation Clause and, if there is to be a departure from that standard, any variance be necessary to further an important public policy. The necessity must be supported by specific findings by the trial court. *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988).

The right to confrontation is not designed just for the criminal defendant, but for the integrity of a trial.

> The combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the purposes of

[1]Although the State asserts that *Chung* is not entitled to precedential value because our Supreme Court has granted certiorari, a formal Court of Appeals opinion has controlling authority in this Court, even when our Supreme Court has granted certiorari in the case. *Arco Materials, Inc. v. State, Taxation & Revenue Dep't*, 118 N.M. 12, 14, 878 P.2d 330, 332 (Ct. App. 1994), *rev'd on other grounds by Blaze Constr. Co. v. Taxation & Revenue Dep't*, 118 N.M. 647, 884 P.2d 803 (1994).

> the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings.

Craig, 497 U.S. at 846.[2]

Although the State maintains that "[l]ive, two-way video-conferencing is identical in all critical respects to live, in-court testimony and thus satisfies the Confrontation Clause," we disagree. Virtual presence created by television falls short of physical presence in satisfying the elements of confrontation. *Harrell v. State*, 709 So. 2d. 1364, 1368-69 (Fla. 1998) (declining to find live satellite testimony to be equivalent to live, face-to-face testimony). Virtual confrontations fall short of constitutional confrontations in that "they do not provide the same truth-inducing effect." *People v. Buie*, 775 N.W.2d 817, 825 (Mich. Ct. App. 2009); *see Craig*, 497 U.S. at 857. Courts applying *Craig* to video testimony are less concerned with differentiating between one- or two-way video than they are in strictly applying a necessity test to any attempt to supplant live testimony. *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005) (stating that "two-way systems share with one-way systems a trait that by itself justifies the application of *Craig*: the confrontations they create are virtual, and not real in the sense that a face-to-face confrontation is real" (internal quotation marks omitted)). Contrary to the State's contention, video testimony does not itself "satisfy" the requirements of the Sixth Amendment.

The State contends that *Craig* fully resolves this case, but we disagree. *Craig* allowed the one-way video testimony of child victims of abuse and stated the method protected several elements of the Confrontation Clause, such as the oath, cross-examination, and the trier of fact's ability to view the witness's demeanor, while only lacking the witness's ability to see the defendant. 497 U.S. at 852. In *Craig*, the United States Supreme Court established an allowable exception to the presence requirement by stating that "our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." 497 U.S. at 850. In *Craig*, the important public policy was rooted in the necessity of protecting the child victims from further physical or psychological harm and, in light of that interest, the Supreme Court stated that one-way television testimony was acceptable. *Id.* at 852. We interpret *Craig* to require a particularized showing of necessity in the service of an important public policy before a court may approve an exception to physical presence. 497 U.S. at 850 (explaining that video testimony may overcome the requirement of physical confrontation only when it is "necessary to further an important public policy"). The question is whether the district court properly allowed the video testimony following an adequate showing of necessity.

We have declined to define necessity as including convenience. *Chung*, 2012-NMCA-

[2]Historically, those proceedings permit "the accused . . . an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face[-]to[-]face with the jury in order that they may . . . judge [him] by his demeanor . . . and . . . manner . . . whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

049, ¶ 11 (disallowing video testimony for convenience as a Confrontation Clause violation); *State v. Almanza*, 2007-NMCA-073, ¶ 12, 141 N.M. 751, 160 P.3d 932 (stating that the use of telephonic testimony violates the Confrontation Clause when used for mere convenience). In *Almanza*, we held that the Sixth Amendment's right of confrontation requires face-to-face confrontation between the witness and the defendant with any exceptions to the rule being "narrowly tailored" and allowed in "only those situations where the exception is necessary to further an important public policy." 2007-NMCA-073, ¶ 8 (internal quotation marks and citation omitted). Courts define "important public policy" narrowly in cases such as this. *See Commonwealth v. Atkinson*, 2009 PA Super 239, ¶ 12, 987 A.2d 743 (Pa. Super. Ct. 2009) (stating that, "[i]n addition to child witness cases, there appear to be two situations in which courts have considered the use of video testimony for adult witnesses: when a witness is too ill to travel and when a witness is located outside of the United States"). *Atkinson* held that the efficiency and security concerns upon which the government based its attempt to have a prisoner testify by video demonstrated insufficient necessity for an exception to the defendant's confrontation rights. *Id.* ¶ 17.

Using a similarly high standard in *Almanza*, we held that the witness's convenience or the convenience of his employer are not situations that demonstrate necessity. *Almanza*, 2007-NMCA-073, ¶ 12. We concluded that a chemist's busy schedule and inconvenience to him or his laboratory caused by traveling to testify did not rise to a consideration of necessity and, thus, did "not satisfy the exceptions to the Confrontation Clause." *Id.* ¶ 12; *see also Chung*, 2012-NMCA-049, ¶ 11. A prosecutor's purpose of using video conferencing to expedite a hearing is similarly insufficient. *Atkinson*, 2009 PA Super 239, ¶ 16; *see United States v. Yates*, 438 F.3d 1307, 1316 (11th Cir. 2006) (stating that "the prosecutor's need for the video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the [d]efendant's rights to confront their accusers face-to-face").

SLD's analysts are part of a system that contemplates their testimony as noted by the United States Supreme Court in *Bullcoming v. New Mexico*:

> [I]n jurisdictions in which it is the acknowledged job of analysts to testify in court about their test results, the sky has not fallen. State and municipal laboratories make operational and staffing decisions to facilitate the analysts' appearance at trial. Prosecutors schedule trial dates to accommodate the analysts' availability, and trial courts liberally grant continuances when unexpected conflicts arise.

131 S. Ct. 2705, 2719 (2011) (alterations, internal quotation marks, and citations omitted). The State asserts that "more than inconvenience" was shown in this case because the analyst would be absent from her laboratory when it is short-staffed, and she would have to travel seven hours, but we are not persuaded that this claim rises to more than inconvenience.

Additionally, the district court's finding of a burden ignores that part of the witness's job as a forensic scientist is testifying to her work in court. *See* David Mills, Ph.D, *Spread Thin: SLD Struggles*

With Shifts in DWI Environment, Scientific Laboratory Division News, Vol. 7, Issue 1, at 2-3 (Fall/Winter 2010) (detailing the increased burdens of statewide travel for analysts after the Confrontation Clause-based decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009), noting that "SLD has [four] individuals who have been trained and are qualified to serve as expert witnesses in alcohol-related DWI cases and [six] who are qualified as experts in drug-related DWI/DUID cases"); *see also Bullcoming*, 131 S. Ct. at 2713 (noting that SLD analysts qualify as expert witnesses in DWI cases and holding that the analyst performing the analysis must personally testify under Confrontation Clause analysis). We conclude that it was error for the district court to permit two-way video testimony absent requiring an adequate showing of necessity.

B. Allowing the Video Conference Testimony Was Not Harmless Error

"Where . . . a constitutional error has been established, the [s]tate bears the burden of proving that the error is harmless." *State v. Tollardo*, 2012-NMSC-008, ¶ 25, 275 P.3d 110. "[C]ourts should evaluate all of the circumstances surrounding the error." *Id.* ¶ 43 (requiring reviewing courts to evaluate error on a case-by-case basis). In the present case, the analyst provided the only testimony proving that Defendant had alcohol in his system.

The other evidence presented at trial indicates that there is a reasonable possibility that the blood test result influenced the jury's decision. A police officer pulled Defendant over because his registration was expired and, in the process, observed Defendant swerve slightly, although the officer could not tell if Defendant had crossed the center line. Defendant did not stumble or seem impaired and spoke intelligibly when pulled over. The officer testified that Defendant had bloodshot eyes and slurred speech and admitted to drinking heavily the night before. In light of the lack of substantial support from the other evidence, there is a reasonable possibility that the results of Defendant's blood test influenced the jury's decision to convict him. We conclude that the error was not harmless.

III. CONCLUSION

We hold that the reasons articulated by the district court for finding it necessary to allow the use of video testimony were insufficient as a matter of law to support its use and, therefore, Defendant's rights under the Confrontation Clause were violated. The error was not harmless beyond a reasonable doubt. We reverse Defendant's conviction and remand the case to the district court for further proceedings consistent with this Opinion.

IT IS SO ORDERED.

RODERICK T. KENNEDY, Chief Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

MICHAEL E. VIGIL, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-082

Filing Date: June 12, 2013

Docket No. 31,779

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

STEPHEN SCHAAF,

Defendant-Appellant.

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for Appellant

OPINION

FRY, Judge.

Defendant appeals from the district court's judgment and sentence, entered pursuant to a bench trial, convicting him of one count of negligent child abuse by endangerment not resulting in death or great bodily harm and one count of possession of drug paraphernalia. On appeal, Defendant argues that the State failed to present evidence of the type of substantial and foreseeable risk of harm necessary to support his conviction for negligent child abuse by endangerment. We are persuaded that sufficient evidence supports Defendant's conviction. We therefore affirm.

BACKGROUND

The State presented the following evidence. Upon information from an anonymous tip that illegal drug use was occurring at the residence, the probation officer assigned to Defendant's wife (Ms. Schaaf) went to Defendant's and Ms. Schaaf's home for a field visit. The probation officer, Ms. Lee, believed that firearms might be present in the home due to Defendant's job as a security guard, despite Defendant's agreement to secure his firearms in a location outside of the residence. As a result, Ms. Lee asked for law enforcement assistance and was accompanied to Defendant's home by a uniformed officer, a detective, and another probation officer. They arrived at Defendant's home at around 2:30 in the afternoon on a school day, soon before the children were getting out of school. At the time, there were four children living in the home with Defendant and Ms. Schaaf: a fifteen-year-old boy, who was Defendant's stepson and Ms. Schaaf's biological son, and five-year-old

triplets from Defendant's and Ms. Schaaf's marriage.

Upon their arrival, the officers noticed that two cars were parked outside, a front window was open, and the television was on. They knocked on the doors several times, announced their presence, identified themselves, and yelled through the open window. It took Ms. Schaaf around five minutes to answer their calls and come to the door, a delay that was of concern to the officers. Ms. Schaaf came to the door wearing only pants and a bra, and she appeared dirty, with greasy hair, dark circles under her eyes, pale skin, and chapped lips. She claimed to have just gotten out of the shower. Soon after, Defendant came out from the master bedroom, looking similarly dirty and disheveled, and a glass pipe fell from his shorts onto the floor. The officers then conducted a search of Defendant's body and found two more glass /pipes in his waistband. The officers identified them as pipes used for smoking methamphetamine. Defendant admitted that he and Ms. Schaaf had been using methamphetamine for three days and had not slept.

When the police and probation officers entered the home, they smelled smoke and an overwhelmingly strong chemical odor that made it hard to breathe and made one probation officer's eyes water. They found a filthy house with three cats running around, cat urine and feces everywhere, and the entire house was littered with trash, rotten food, dirty dishes, and piles of dirty clothes. In the living room on a table by the front door, the officers found a plastic baggie containing thirteen pills, which Defendant stated were antibiotics obtained from Mexico. The children's rooms and bathroom were in the same condition as the rest of the house: the beds had been urinated on; there was not adequate bedding; and there were toys, dirty clothes, rotten food, dried food embedded in the carpet, and cat feces all over.

Defendant was asked where his firearm was located, and he responded that there were four in the master bedroom. The officers entered the master bedroom and found an open gun box on the floor containing two loaded firearms, plus spare ammunition and magazines. There were dirty dishes on the bed, many open and used needle syringes on the bed, food, trash, cat feces, lighters, and dirty clothes all over the floor, and pornographic DVDs strewn about the room. Ms. Lee testified that one could hardly walk in the bedroom. Defendant told the officers that there were two more firearms in the master bedroom in a lockbox on the other side of the bed. There were toy gun replicas in the master bedroom and at least one in the triplets' room. The triplets played with the toy guns with and without permission or supervision. At least one of the toy guns was a Glock replica indistinguishable from real guns in the house in its appearance, weight, and feel.

The master bedroom also had a sliding glass door out to the backyard, which was the only entrance to the backyard from the residence. The backyard was an enclosed space with children's toys, lighters, a small propane torch, and undescribed drug paraphernalia.

In a police interview, Defendant admitted to smoking methamphetamine while the children were at home, both in the master bedroom and in common areas, including the living room and backyard. The residence had three bedrooms and two bathrooms and was estimated to be about 1,400 square feet. One of the officers testified that second-hand

methamphetamine smoke is heavier than cigarette smoke, travels without dissipating, and leaves a residue that sticks to things and can be touched and absorbed into the body. The eldest son, a teenager, testified that one or two days before the police arrived at their house, Ms. Schaaf showed him a glass pipe that was underneath the blankets of the master bed and that he walked away, not knowing what to do. In the police interview, Defendant admitted that smoking methamphetamine in the residence created a risk that the children could have absorbed methamphetamine and could have tested positive for it. He also admitted that the condition of his house was not safe or sanitary for the children and that they could have been killed or injured.

DISCUSSION

Substantial and Foreseeable Risk of Harm

To provide context for Defendant's arguments, we first review our jurisprudence construing the child endangerment statute at issue. The Legislature has defined child abuse, in pertinent part, as "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." NMSA 1978, § 30-6-1(D)(1) (2009). Our Supreme Court has observed that "[t]aken literally, our endangerment statute could be read broadly to permit prosecution for any conduct, however remote the risk, that *may* endanger [a] child's life or health." *State v. Chavez*, 2009-NMSC-035, ¶ 16, 146 N.M. 434, 211 P.3d 891 (alterations in original) (internal quotation marks and citation omitted). However, the Court has further acknowledged that by making child endangerment a third degree felony, the "Legislature anticipated that criminal prosecution would be reserved for the most serious occurrences, and not for minor or theoretical dangers." *Id.* Mindful of these concerns, our courts strive to identify the magnitude and likelihood of the risk of harm to a child that is required for criminal prosecution under the endangerment statute. *See id.* ¶¶ 17-26. Adopting language from the uniform jury instruction for endangerment, our Supreme Court has declared that the defendant's conduct must create " '*a substantial and foreseeable risk*' of harm." *Id.* ¶ 22 (quoting UJI 14-604 NMRA). The Court determined that this standard will more closely achieve the legislative purpose "to punish conduct that creates a truly significant risk of serious harm to children." *Chavez*, 2009-NMSC-035, ¶ 22.

In *Chavez*, our Supreme Court set forth factors for the courts to consider in determining "whether the risk created by an accused's conduct is substantial and foreseeable." *Id.* ¶ 23. One factor is the gravity of the risk, which "serves to place an individual on notice that his conduct is perilous, and potentially criminal." *Id.* A second factor is whether the defendant's conduct violates a separate criminal statute, which bolsters the endangerment charge, *see id.* ¶ 31, because "the Legislature has defined the act as a threat to public health, safety, and welfare." *Id.* ¶ 25; *see State v. Gonzales*, 2011-NMCA-081, ¶ 17, 150 N.M. 494, 263 P.3d 271 (listing criminal behavior as a factor in *Chavez*), *aff'd* No. 33,077, 2013 WL 1339598 (Mar. 28, 2013). A third factor, "although no longer the determinative factor," is the likelihood of harm, which informs the court of the foreseeability of the risk when evaluating its magnitude. *Chavez*, 2009-NMSC-035, ¶ 26. Also relevant is "the length of time that these conditions are allowed to exist and the amount of supervision in the home[, which] are certainly factors that can

increase or mitigate the degree of risk involved." *Id.* ¶ 36. The *Chavez* Court indicated that the state must present specific evidence, including scientific or empirical evidence, connecting the circumstances to a substantial and foreseeable risk of harm, where it is not readily apparent in the record. *See id.* ¶ 37.

Defendant's Arguments

Defendant contends that the State did not present any evidence that any of the four children were actually endangered by the drugs, guns, or other conditions of the house while they were present in the home. Defendant points out that the State presented no expert or scientific testimony as required by *Chavez* and that the State relied solely on the observations and opinions of two probation officers and a detective. Defendant emphasizes that the children tested negative for methamphetamine and that the State failed to have anything in the house tested and failed to conduct any investigation beyond their observations of the residence at a time when the children were not home.

Standard of Review

When reviewing a sufficiency of the evidence claim, we conduct a two-part test. First, "we must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. Then we must "make a legal determination of whether the evidence viewed in this manner could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt." *State v. Apodaca*, 118 N.M. 762, 766, 887 P.2d 756, 760 (1994) (internal quotation marks and citation omitted). The question for us on appeal is whether the district court's "decision is supported by substantial evidence, not whether the [district] court could have reached a different conclusion." *In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 15, 121 N.M. 562, 915 P.2d 318. We emphasize that we do not consider the merit of evidence that may have supported a different result. *See State v. Kersey*, 120 N.M. 517, 520, 903 P.2d 828, 831 (1995). Substantial evidence is defined as "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).

Analysis

We agree with Defendant that the State did not conduct a thorough investigation into the possible effects the household environment may have had on the children or the length of time the household was in that state, and it did not test anything in the house. Thus, the State did not present the clearest case of child endangerment that it could have presented. We are persuaded, however, that the dangerousness of certain conditions in the household were apparent and did not require the type of scientific or empirical testimony that was required in *Chavez* to connect the household conditions to the risk of harm they posed to the children. *See* 2009-NMSC-035, ¶¶ 29, 35, 37-40 (holding that the risk and degree of likelihood of disease or illness caused by the presence of rodent droppings or parasites is a matter of science that should be established by empirical and scientific evidence). The presence of loaded firearms and toy guns, including at least one gun

replica that was nearly identical to the loaded firearms, and with which the teenager and the five-year-old triplets were permitted to play, presented an obvious and serious risk of harm. Also concerning is Defendant's and Ms. Schaaf's extended use of methamphetamine, which is a crime that bolsters the endangerment charge. In addition, Defendant admitted to using methamphetamine in common areas of the home while the children were at home, and he left paraphernalia strewn about the bedroom and the backyard. *See id.* ¶ 25 (stating that the violation of another criminal statute can be useful to an endangerment analysis because it is a "legislative declaration of harm"). The danger posed by the loaded firearms, particularly in the vicinity of gun replicas, the use of methamphetamine at the residence, and the drug paraphernalia strewn about is increased by their presence in the midst of extreme clutter. Also informing our decision about the graveness of the risk to the children is the young age of the triplets and the number of the children in the home. Another important factor is Defendant's recognition and admission regarding the serious nature of the real risks of harm present in the house and the potential injury or death that the children were exposed to there. The current case is unlike *Chavez* where the alleged endangerment was based on a filthy house alone with only speculative and vague dangers. *See id.* ¶¶ 27, 43. Instead, the endangerment here arose from a "combination of risks," *id.* ¶ 30, that together were readily apparent and gravely dangerous.

We agree with Defendant that the problem we face in this case is whether the evidence sufficiently proved that the children were actually exposed to the dangerous conditions in the home, similar to the concerns our Supreme Court addressed in *State v. Trossman*, 2009-NMSC-034, ¶¶ 22-24, 146 N.M. 462, 212 P.3d 350. In *Chavez*, the Court acknowledged that "there are many situations that may not produce a strict mathematical probability of harm, but nevertheless endanger a child." 2009-NMSC-035, ¶ 20. The *Chavez* Court suggested that where there is a showing of a "very real and unacceptable risk of harm," a lesser probability of harm may be needed to show criminal child endangerment. *Id.* Thus, "neither probability nor possibility provides an accurate, universal description of legislative intent." *See id.* ¶ 21. Our Supreme Court has emphasized that we should view the evidence as a whole and refrain from parsing out and evaluating individual pieces of evidence to determine whether a rational fact finder could draw reasonable inferences that the danger was accessible to the children and that the children would come in contact with the danger. *See State v. Graham*, 2005-NMSC-004, ¶¶ 13-14, 137 N.M. 197, 109 P.3d 285. Our examination of whether there was sufficient evidence from which the fact finder could assess the probability that the children were exposed to these hazards is informed further, in part, by Defendant's and Ms. Schaaf's use of methamphetamine for three days without sleep. *See Chavez*, 2009-NMSC-035, ¶ 43 (noting a distinction between a filthy, unsafe home environment that would merit civil action and a situation that could be criminally prosecuted where, for example, the "parents struggled with addiction and the children suffered as a result"). Based on the analysis below, we hold that the State presented sufficient evidence from which the fact finder could have reasonably determined that the children were exposed to an unacceptable level of hazardous conditions and that it was highly

probable that the children were in contact with them.

In *Trossman*, our Supreme Court held that there was insufficient evidence of child endangerment because the state failed to prove the actual presence of the child in the home during the time in question under conditions that could have endangered his life or health. 2009-NMSC-034, ¶ 22. In that case, police found legal household chemicals in the home that could each be dangerous, and together they were most likely used for methamphetamine production, but they were not stored in a manner that would endanger a child. *See id.* ¶ 23. Although there was evidence that methamphetamine production takes only six to eight hours, there was no evidence regarding when or how often it took place in that house. *See id.* Also, there was no evidence that the house was contaminated, and no methamphetamine was found there. *See id.* Although there was undisputed evidence that the child normally lived at the house, the evidence did not show when the child was present in the home, but the evidence did show that child was not present the night before the police arrived. *See id.* ¶ 22. The Court observed that "[p]roof of child endangerment is sufficient for a conviction if a defendant places a child within the zone of danger and physically close to an inherently dangerous situation." *Id.* ¶ 20 (alteration in original). The Court found insufficient evidence, stating that the evidence did not place the child at the house under dangerous conditions nor did it "suggest[] that hazardous conditions must have been ongoing in such a way that the jury could have judged the probability that the child must have encountered them at some point." *Id.* ¶ 24.

In contrast, in the current case, it was not disputed that the children consistently lived at the house, that they were there the night and morning before the officers arrived, and that they were coming home soon after the officers' visit to the home. The evidence suggested that amidst Defendant's and Ms. Schaaf's extended methamphetamine use, Defendant took the eldest boy to school for early practice before the triplets left and that either Defendant or Ms. Schaaf took the triplets to the bus stop that morning for school. As a result, there was sufficient circumstantial evidence to infer that the children's living conditions constituted a prolonged zone of imminent danger, and it was reasonable for the fact finder to conclude that the children were in contact with these hazardous conditions.

Relevant to the State's showing of a prolonged zone of danger, there was evidence that another person using methamphetamine at the house left behind the syringes, and the officers found them open on the bed a day after they had been used. Also, in his statement to police about the firearms, Defendant made a distinction between the secured and unsecured firearms in the master bedroom. Defendant stated that two guns were kept in the lockbox that was locked almost all the time except when he was going out somewhere and needed them. He stated that the other two firearms were for home security purposes because they had experienced some problems, suggesting that those loaded firearms were unsecured regularly, as they were when the officers were present. There was testimony that it was common for all the children to go through the master bedroom to go play outside because it was the only way to access the backyard. Also, a probation officer testified that the extent to which the home appeared to be "unlivable" suggested that this condition of the home was ongoing. *See Chavez*, 2009-NMSC-034, ¶ 36 (stating that the length of

time that the hazardous conditions are permitted to exist can increase the degree of risk); *Trossman*, 2009-NMSC-034, ¶ 24 (stating that in the absence of direct evidence placing the child in the home under the hazardous conditions, there should be evidence that those conditions existed for so long that the fact finder could find that "the child must have encountered them at some point"). Given the facts that the children played with toy guns that replicated the real guns in the home, they had regular access to the master bedroom with unsecured, loaded firearms, and the room was extremely cluttered, we believe that the children were likely to encounter a serious and unacceptable danger.

We also consider the supervision of the children under these conditions. *See Chavez*, 2009-NMSC-035, ¶ 36 (explaining that the amount of supervision in the home "can increase or mitigate the degree of risk involved"). Although there was no expert testimony about the effects of the type of extended use of methamphetamine that Defendant and Ms. Schaaf engaged in, it is reasonable to infer that their judgment was poor and their supervision of the young children around the many hazards in the home was impaired. These inferences are supported by the following: Defendant and Ms. Schaaf permitted the entire household to be in an unlivable state; they left numerous dangers and inappropriate items strewn about the house and in the backyard; their unkempt appearance and behavior when the officers arrived, which occurred soon before the children's expected arrival, indicated their recent methamphetamine use; and they were unable to conceal the signs of their methamphetamine use, drug paraphernalia, or firearms from view of the officers, even where they seemed to take the time to do so before answering the door and were under threat of arrest. Viewed as a whole, the evidence supports a rational inference that their judgment was highly impaired in the presence of substantial risks of harm to the children and that Defendant had not secured and would not secure the substantial risks from the children. *See Graham*, 2005-NMSC-004, ¶¶ 13-14 (emphasizing the inappropriateness of parsing out the testimony and individual pieces of evidence in a divide-and-conquer approach in reviewing the sufficiency of the evidence to support a child endangerment charge). We also note that Defendant presented the fact finder with no evidence to counter these reasonable inferences. *See id.* ¶ 13 (discussing the need to avoid indulging in hypotheses consistent with innocence).

In sum, drawing from the combination of serious risks apparent in the children's living environment, we hold that the State provided sufficient evidence to prove that the children were exposed to an ongoing and pervasive zone of imminent danger in such a manner that, with Defendant's and Ms. Schaaf's compromised state, the risk of harm to the children was so grave and probable that it constituted criminal child endangerment.

CONCLUSION

For these reasons, we affirm Defendant's conviction.

IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:

TIMOTHY L. GARCIA, Judge

J. MILES HANISEE, Judge

Certiorari Granted, July 26, 2013, No. 34,093

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-083

Filing Date: March 11, 2013

Docket No. 30,546

ARSENIO CORDOVA,

Plaintiff-Appellant,

v.

JILL CLINE, THOMAS TAFOYA, LORETTA DELONG, JEANELLE LIVINGSTON, CATHERINE COLLINS, ROSE MARTINEZ, ESTHER WINTER, ELIZABETH TRUJILLO, and JANE DOES 1 THROUGH 10,

Defendants-Appellees.

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for Appellees DeLong, Livingston, Collins, Martinez, Winter, and Trujillo

OPINION

KENNEDY, Judge.

This case requires us to decide whether the New Mexico statute prohibiting strategic litigation against public participation (Anti-SLAPP statute) bars Plaintiff Arsenio Cordova's lawsuit against members of Citizens for Quality Education (CQE), an organization that tried to institute a recall election to remove Cordova from the school board. We conclude that the Anti-SLAPP statute does not apply to a hearing in district court as a part of the recall process. We reverse the district court's grant of the motion to dismiss and determine that Cordova successfully stated a claim for malicious abuse of process, and Defendants were not entitled to dismissal by the First Amendment. We dismiss the appeal as to Defendants Jill Cline and Thomas Tafoya, against whom the judgment is not final.

I. BACKGROUND

Cordova was a member and vice president of the Taos Municipal Schools Board of Education. CQE was formed to initiate a recall process against Cordova under the Local School Board Member Recall Act (Act). NMSA 1978, §§ 22-7-1 to -16 (1977, as amended through 1993). CQE members, many of whom were Taos County school employees, were unhappy with some of Cordova's actions on the school board and filed a recall petition with the Taos County Clerk on June 1, 2009. The clerk duly filed her application for a district court hearing on the sufficiency of the recall allegations as is required by the Act. *See* § 22-7-9.1(A).

Under the Act, the hearing should have taken place within ten days. Section 22-7-9.1(B). However, CQE continued the case twice, and the hearing finally took place on September 16, 2009. CQE voluntarily dismissed the recall petition at the hearing. Because of the dismissal, the district court made no determination of whether sufficient facts existed to allow the recall process to continue. No record of those proceedings was provided for this case.

Cordova filed this suit on September 18, 2009, against eight individual members of CQE, in keeping with his claim that CQE could not legally exist as an entity that may file a recall petition. The individual members of CQE who were named as Defendants were Jill Cline, Thomas Tafoya, Loretta DeLong, Jeanelle Livingston, Catherine Collins, Rose Martinez, Esther Winter, and Elizabeth Trujillo (collectively, Defendants). Cordova alleged that the recall petition was brought without demonstrating probable cause of his misfeasance or malfeasance in office and that CQE's voluntary dismissal of the petition precluded any judicial finding on the question of whether the petition was adequately supported as required under the statute. Cordova's complaint specifically alleged that CQE and its members engaged in a recall petition process that was supported by incompetent and back-dated affidavits that CQE used to improperly accuse him of malfeasance and misfeasance in office. Cordova's complaint claimed that CQE brought the recall petition for purely political reasons because they were afraid his planned actions would hold them accountable for their own misdeeds, rather than because of misfeasance or malfeasance on his part. He

stated that the incompetent affidavits, together with the postponement of the hearing and the eventual voluntary dismissal of the entire petition action, constituted an improper use of process in a judicial proceeding that was illegitimately motivated by hopes of damaging him. Based on these allegations, he maintained that he had been damaged and sought compensation under theories of malicious abuse of process, civil conspiracy, and prima facie tort.

Defendants moved to dismiss the complaint under Rule 1-012(B)(6) NMRA for failure to state a claim and, alternatively, sought dismissal and attorney fees under the Anti-SLAPP statute. NMSA 1978, § 38-2-9.1 (2001). As an affirmative defense, Defendants maintained that the recall petition was protected under the First Amendment of the United States Constitution and New Mexico's Anti-SLAPP statute. Cline and Tafoya also counterclaimed against Cordova for malicious abuse of process.

The district court held a hearing on April 29, 2010, to consider Defendants' motions to dismiss and Cordova's motion to dismiss the two counterclaims. On May 14, 2010, the district court issued its order granting Defendants' motions to dismiss. The court relied on the Anti-SLAPP statute and the First Amendment to find that Defendants' conduct in the recall petition was protected and dismissed Cordova's civil conspiracy and prima facie tort claims for failure to adequately plead sufficient facts to establish either tort. The district court did not address Cline's and Tafoya's counterclaims. The order also set rates for attorney fees and permitted Defendants to submit requests for the fees as allowed under the Anti-SLAPP statute. Section 38-2-9.1(B). Cordova now appeals.

II. DISCUSSION

On appeal, Cordova argues that (1) the Anti-SLAPP statute does not apply to his suit below, (2) his complaint properly stated a claim for malicious abuse of process, (3) Defendants are not immune to the suit under the First Amendment, and (4) CQE did not have standing to bring the recall because it was not a legally cognizable organization. Defendants contest those issues and argue that Cordova's appeal is not from a final judgment. We address each issue in turn.

A. The Anti-SLAPP Statute Does Not Apply

Cordova argues that his suit was improperly dismissed under the Anti-SLAPP statute. The Anti-SLAPP statute permits a defendant, who believes that he or she is being sued in retaliation for certain protected forms of public speech and participation, to file an expedited motion to dismiss. Section 38-2-9.1. We review the application of the Anti-SLAPP statute de novo. *State v. Herrera*, 2001-NMCA-007, ¶ 6, 130 N.M. 85, 18 P.3d 326 (stating that "statutory construction and interpretation are questions of law reviewed de novo").

The Anti-SLAPP statute is intended to save a defendant from incurring the expense and inconvenience of defending a lawsuit that seeks to chill a defendant exercising his or her constitutional rights. Frederick M. Rowe & Leo M. Romero, *Resolving Land-Use Disputes By Intimidation: SLAPP Suits in New Mexico*, 32 N.M. L. Rev. 217, 227 (2002). The statute states:

> Any action seeking money damages against a person for conduct or speech undertaken or

> made in connection with a public hearing or public meeting in a quasi-judicial proceeding before a tribunal or decision-making body of any political subdivision of the state is subject to a special motion to dismiss[.]

Section 38-2-9.1(A). The purpose of the Legislature in adopting the statute is codified at NMSA 1978, Section 38-2-9.2 (2001), which states that its policy is to "protect the rights of its citizens to participate in quasi-judicial proceedings before local and state governmental tribunals" because "[b]aseless civil lawsuits . . . have been filed against persons for exercising their right to petition and to participate in quasi-judicial proceedings."

"In interpreting statutes, we seek to give effect to the Legislature's intent, and in determining intent[,] we look to the language used and consider the statute's history and background." *Key v. Chrysler Motors Corp.*, 121 N.M. 764, 768-69, 918 P.2d 350, 354-55 (1996). When the language of a statute is clear and unambiguous, we will give effect to the statute's language and refrain from further interpretation. *Sims v. Sims*, 1996-NMSC-078, ¶ 17, 122 N.M. 618, 930 P.2d 153.

The Anti-SLAPP statute protects citizen participation in a "public meeting in a quasi-judicial proceeding." Section 38-2-9.1(A). The statute defines "public meeting in a quasi-judicial proceeding" as "any meeting established and held by a state or local governmental entity, including without limitations, meetings or presentations before state, city, town[,] or village councils, planning commissions, review boards[,] or commissions." Section 38-2-9.1(D). We must therefore determine if a recall petition and resulting statutory sufficiency hearing before a district court constitute such participation.

To begin the recall process, a petitioner collects signatures under the procedures of Section 22-7-6. Pursuant to Article XII, Section 14 of the New Mexico Constitution, a petition for a recall election must cite grounds of malfeasance, misfeasance, or violation of the oath of office. The petition citing the specific charges in support of the recall, which charges "shall constitute misfeasance in office, malfeasance in office[,] or violation of oath of office[,]" is submitted to the county clerk. Section 22-7-8(C), (D). The clerk requests a hearing before the district court to evaluate whether the petition alleges sufficient cause to proceed with the recall. Sections 22-7-9(A)(2), -9.1(A), (B). At the sufficiency hearing, the court is charged with reviewing the signatures on the petition along with "affidavits submitted by the petitioner setting forth specific facts in support of the charges." Section 22-7-9.1(C); *Doña Ana Cnty. Clerk v. Martinez*, 2005-NMSC-037, ¶ 11, 138 N.M. 575, 124 P.3d 210 (per curiam); *see CAPS v. Bd. Members*, 113 N.M. 729, 730, 832 P.2d 790, 791 (1992) (describing how petitions are evaluated before the district court).

At the hearing, the district court evaluates the petition to determine whether the petitioner stated a claim and assumes all facts pled in the petition to be true. Section 22-7-9.1(C); *Martinez*, 2005-NMSC-037, ¶ 11 (holding that "the district court was not required to weigh disputed issues of fact"). Under the *CAPS* rule, sufficient evidence of misfeasance or malfeasance must be found to exist.

Cordova based his suit on the

problems he alleged with Defendants' affidavits, CQE's standing, and voluntary dismissal, which all stem from the hearing. Under a plain reading of the Anti-SLAPP statute, we conclude that a sufficiency hearing before a district court for a recall petition is not a public meeting or quasi-judicial proceeding as defined by the Anti-SLAPP statute. It is a judicial proceeding. We consequently hold that the Anti-SLAPP statute does not apply and, therefore, the district court improperly dismissed Cordova's suit under the Anti-SLAPP statute and awarded attorney fees to Defendants.

B. The Appeal is Not From a Final Judgment With Respect to Cline and Tafoya Due to Their Pending Counterclaims

Cline and Tafoya argue that this Court does not have jurisdiction over this appeal because the district court left Cline's and Tafoya's counterclaims unresolved. Cordova argues that the Anti-SLAPP statute provides for an "expedited appeal" from a ruling on a motion to dismiss that would include his appeal against all Defendants. We agree with Cline and Tafoya.

The district court's order dismissed Cordova's claims against all Defendants, but left Cline's and Tafoya's counterclaims unresolved. *See Khalsa v. Levinson*, 1998-NMCA-110, ¶ 12, 125 N.M. 680, 964 P.2d 844 (stating that, in civil cases, this Court has jurisdiction over final orders). Pursuant to Rule 1-054(B)(2) NMRA, the judgment is final for Defendants who did not have counterclaims against Cordova. However, "[a]n order disposing of the issues contained in the complaint but not the counterclaim is not a final judgment." *Watson v. Blakely*, 106 N.M. 687, 691, 748 P.2d 984, 988 (Ct. App. 1987), *overruled on other grounds by Kelly Inn No. 102, Inc. v. Kapnison*, 113 N.M. 231, 824 P.2d 1033 (1992).

Our decision regarding Cordova's appeal applies only to those Defendants without pending counterclaims, not Cline and Tafoya. "In multiple party suits, Rule [1-054(b)(2) NMRA] authorizes a judgment adjudicating 'all issues' as to one or more, but fewer than all parties." *Stotlar v. Hester*, 92 N.M. 26, 27, 582 P.2d 403, 404 (Ct. App. 1978). "Such judgment shall be a final one unless the court, in its discretion, expressly provides otherwise." *Id.* (internal quotation marks and citation omitted). Because all issues were adjudicated regarding the remaining Defendants, we consider it a final judgment for appeal with respect to them despite the failure of Cordova's argument that the Anti-SLAPP statute provides grounds for interlocutory appeal.

C. Cordova's Complaint States a Claim for Malicious Abuse of Process

We now address the district court's determination that Cordova's complaint failed to state a claim for malicious abuse of process. A motion to dismiss for failure to state a claim under Rule 1-012(B)(6) NMRA tests the legal sufficiency of the complaint, not the facts that support it. *Envtl. Improvement Div. of N.M. Health & Env't Dep't v. Aguayo*, 99 N.M. 497, 499, 660 P.2d 587, 589 (1983). "Under Rule 1-012(B)(6), dismissal is proper when the law does not support the claim under any set of facts subject to proof." *Wallis v. Smith*, 2001-NMCA-017, ¶ 6, 130 N.M. 214, 22 P.3d 682. "We review rulings on such motions de novo, accepting all well-pleaded factual allegations as true and resolving all doubts in favor of the sufficiency of the complaint." *Id.* Although Tafoya's motion to dismiss included

an affidavit, which would generally transform the motion into one for summary judgment pursuant to Rule 1-012(C), we decline to treat it as a summary judgment motion if "[i]t would be unfair . . . we would be affirming the judgment on a ground not relied upon, or even pursued, below." *Dunn v. McFeeley*, 1999-NMCA-084, ¶ 17, 127 N.M. 513, 984 P.2d 760.

As a threshold matter, Defendants argue that Cordova's complaint, in response to the recall petition, violates their privilege to petition the courts under the First Amendment. They rely here, as they did below, on the *Noerr-Pennington* doctrine, which grew out of the antitrust arena and requires a higher standard to prove a sham lawsuit in light of the protections of the First Amendment. The district court found this issue to be determinative and dismissed the complaint not only under the Anti-SLAPP statute, but also under the First Amendment. We do not agree that Defendants' petition was shielded from Cordova's suit by the First Amendment.

The New Mexico Supreme Court created the tort of malicious abuse of process to ensure that parties abide by certain procedural boundaries once they initiate a proceeding. *See DeVaney v. Thriftway Mktg. Corp.*, 1998-NMSC-001, ¶¶ 15, 17, 124 N.M. 512, 953 P.2d 277 (describing the elements of the previous torts and creating the new tort), *overruled on other grounds by Durham v. Guest*, 2009-NMSC-007, ¶ 18, 145 N.M. 694, 204 P.3d 19 (describing the creation of the tort); *Fleetwood Retail Corp. of N.M. v. LeDoux*, 2007-NMSC-047, ¶ 12, 142 N.M. 150, 164 P.3d 31 (same). In *DeVaney*, the Court addressed the fact that "[m]eaningful access to the courts is a right of fundamental importance to our system of justice." 1998-NMSC-001, ¶ 19. It noted the First Amendment's implication and determined that "we must construe the tort of malicious abuse of process narrowly in order to protect the right of access to the courts." *Id.* The *DeVaney* Court included a footnote mentioning that "the importance of the right to petition . . . has caused the courts of some states to apply the more stringent requirements of the *Noerr-Pennington* doctrine[.]" *Id.* n.1. This footnote appears to be the only mention of the *Noerr-Pennington* doctrine in New Mexico law. We conclude that the Supreme Court was aware of the *Noerr-Pennington* line of cases when creating the tort of malicious abuse of process and that it declined to apply the doctrine because the new tort satisfied concerns about the right of access to the courts. As an intermediate appellate court, we are bound by the Supreme Court's holding on this issue and, therefore, do not credit Defendants' argument that the *Noerr-Pennington* doctrine's interpretation of the First Amendment protects them from a common-law malicious abuse of process claim.

As neither the Anti-SLAPP statute nor the First Amendment prevents Cordova from bringing his suit for malicious abuse of process, we now examine the claim itself. The elements of malicious abuse of process are "(1) the use of process in a judicial proceeding that would be improper in the regular prosecution or defense of a claim or charge; (2) a primary motive in the use of process to accomplish an illegitimate end; and (3) damages." *Durham*, 2009-NMSC-007, ¶ 29.

The first element—an improper use of process—may be shown by "(1) filing a complaint without probable cause[;] (2) an irregularity or impropriety suggesting extortion, delay, or harassment"; or (3) other conduct formerly actionable under the tort of

abuse of process. *Fleetwood Retail*, 2007-NMSC-047, ¶ 12 (internal quotation marks and citation omitted). A use of process is deemed to be irregular or improper if it (1) involves a procedural irregularity or a misuse of procedural devices, such as "discovery, subpoenas, and attachment[s]"; or (2) "indicates the wrongful use of proceedings, such as an extortion attempt[.]" *DeVaney*, 1998-NMSC-001, ¶ 28 (listing examples of abuse of process) (internal quotation marks and citation omitted).

As we have already discussed, the hearing before the district court as part of the recall petition was a judicial proceeding. Cordova alleged in his complaint that the act of filing affidavits that did not comport with the requirements of Rule 1-056 NMRA was an improper act in the regular prosecution of a claim. He alleged that the affidavits refer to events that took place after their notarization dates and that this was an improper use of process. He also claims that the affidavits, "on their face, are not competent, replete with rumor and innuendo." Cordova also claimed that the delay and eventual voluntary dismissal of the charges of malfeasance brought in the petition was an improper use of process and that Defendants brought the recall petition for an improper purpose.

Cordova's complaint raises enough doubts about the propriety of the affidavits and Defendants' actions to state a claim that Defendants misused procedural devices pursuant to the definition in *DeVaney*, thereby, satisfying the first element of an abuse of process claim. 1998-NMSC-001, ¶ 28. Cordova alleged that Defendants' motives in filing the recall petition were improper and were to avoid accountability for misdeeds. Cordova also alleges that he has suffered damages. We take Cordova's well-pleaded facts to be true. *Wallis*, 2001-NMCA-017, ¶ 6. He therefore stated a claim for malicious abuse of process. We reverse the district court's dismissal of the malicious abuse of process count and remand to let that claim proceed.

D. CQE Had Standing to Bring a Recall Petition

Cordova also sought declaratory judgment, claiming that CQE, as an unincorporated association, lacked standing to bring the recall petition because it lacked the substantive right to vote. Although it appears that he only sought the judgment in order to bolster his claim that the recall was brought improperly, we do not assume that and, therefore, address the issue. It is undisputed that CQE is an unincorporated association registered with the Taos County Clerk, pursuant to NMSA 1978, Section 53-10-1 (1937). The Act explicitly defines a petitioner as a "person, group[,] or organization initiating the petition[.]" Section 22-7-6(D)(4). Several New Mexico cases indicate that voters have created organizations to effect recall elections. *See CAPS*, 113 N.M. at 729, 832 P.2d at 790 (stating simply that the appellants submitted recall petitions pursuant to the Act); *Martinez*, 2005-NMSC-037, ¶ 1 n.1 (stating that the petitioning group was "RECALL," which stood for "Rectify Educational Concerns about Lousy Leaders" (internal quotation marks omitted)); *State ex rel. Citizens for Quality Educ. v. Gallagher*, 102 N.M. 516, 517, 697 P.2d 935, 936 (1985) (referring to "petitioners and other qualified electors"). New Mexico laws allow an unincorporated association to sue or be sued in its common name for the purpose of enforcing for or against it any substantive right. NMSA 1978, § 53-10-6(A), (B) (1959).

In New Mexico, an organization may have standing if "(a) its members would otherwise have standing to sue in their own right, (b) the interests it seeks to protect are germane to the organization's purpose, and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 30, 144 N.M. 471, 188 P.3d 1222. The New Mexico Constitution provides that elected local school board members are subject to recall "by the voters of the school district from which elected." N.M. Const. art. XII, § 14.

It is undisputed that Defendants who comprised CQE are residents of Taos County. Because they are residents and may vote in Taos County, CQE members would have standing to bring the recall petition in their own right. Therefore, we affirm the district court's dismissal of Cordova's claim for declaratory judgment.

E. Cordova's Other Claims Were Unsupported on Appeal

The district court dismissed Cordova's claims for prima facie tort and civil conspiracy for failure to plead sufficient facts. Although a heading in the brief-in-chief states that the complaint stated a cause of action for the prima facie tort claim, Cordova fails to support the statement with authority or analysis. Where a party cites no authority to support an argument, we may assume no such authority exists. *In re Adoption of Doe*, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984). This Court will not consider propositions that are unsupported by citation to authority. *ITT Educ. Servs., Inc. v. Taxation & Revenue Dep't*, 1998-NMCA-078, ¶ 10, 125 N.M. 244, 959 P.2d 969. Cordova's brief-in-chief only mentions the concept of civil conspiracy in his argument for why he sued Defendants individually. For the same reasons regarding the lack of authority or argument of a claim, we consider neither Cordova's civil conspiracy nor prima facie tort claim on appeal.

III. CONCLUSION

The Anti-SLAPP statute does not apply to a determination of probable cause by a district court in a recall petition process because it is a judicial proceeding and not a quasi-judicial process covered by the statute. We reverse the award of attorney fees under the statute. We also reverse the district court's dismissal of Cordova's malicious abuse of process suit because his complaint properly stated a claim, and Defendants are not shielded by the First Amendment. We affirm dismissal of the civil conspiracy, prima facie tort, and declaratory judgment counts.

IT IS SO ORDERED.

RODERICK T. KENNEDY, Chief Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

MICHAEL E. VIGIL, Judge

Certiorari Granted, July 26, 2013, No. 34,232

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-084

Filing Date: June 3, 2013

Docket No. 31,707

GENE E. HINKLE, HINKLE INCOME PROPERTIES, LLC, a New Mexico Limited Liability Company, and BETTY HINKLE,

Plaintiffs-Appellants,

v.

STATE FARM FIRE & CASUALTY COMPANY,

Defendant-Appellee,

and

COLORADO CASUALTY, DEREK SANCHEZ, and FIREMAN'S FUND INSURANCE COMPANY,

Defendants.

Will Ferguson & Associates
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for Appellee

OPINION

WECHSLER, Judge.

In this case, we consider whether the district court erred in granting summary judgment in favor of an insurer in an action alleging that the insurer breached its duty to defend the insured in a third-party suit. The policy at issue included a duty to defend lawsuits arising out of the offenses of abuse of process or malicious prosecution. We conclude that the third-party complaint did not expressly make a claim for the formerly recognized torts of abuse of process or malicious prosecution, or the currently recognized combination of the two torts, malicious abuse of process, and that the underlying facts forming the basis of the third-party complaint were insufficient to state a claim for malicious abuse of process. We also

conclude that the policy did not create a reasonable expectation that the insurer had a duty to defend. We affirm.

BACKGROUND

Plaintiffs Hinkle Income Properties, LLC, Gene E. Hinkle (Hinkle), and Betty Hinkle filed this action against Defendants State Farm Fire and Casualty Company (State Farm); Derek Sanchez, a State Farm insurance adjuster; Colorado Casualty; and Fireman's Fund Insurance Company for Defendants' failure to defend Plaintiffs in an underlying action filed in state district court. In its complaint, Plaintiffs alleged violations for breach of contract, negligence, specific performance, bad faith, and violations of the New Mexico Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -22 (1967, as amended through 2009).

State Farm filed a motion for summary judgment on March 31, 2011, arguing that it had no duty to defend or provide liability coverage to Hinkle under either of two insurance policies that it had issued to Hinkle and Betty Hinkle. The remaining Defendants filed for summary judgment on November 12, 2010. On September 16, 2011, the district court granted summary judgment in favor of State Farm against all Plaintiffs. The district court granted summary judgment in favor of the remainder of Defendants on October 14, 2011 and on July 9, 2012. Plaintiffs filed a notice of appeal regarding the grant of summary judgment in favor of State Farm.

Plaintiffs' complaint in this case against State Farm arose out of State Farm's failure to defend Plaintiffs in a lawsuit filed by Peterson Inv-Juan Tabo, LLC (Peterson). On November 20, 2008, Peterson filed a complaint (the Peterson complaint) against Plaintiffs, as well as the Betty L. Hinkle Revocable Trust, Kenneth Hunt, and Hunt and Davis, P.C. (the Peterson litigation). The Peterson litigation arose out of a dispute over the development of commercial property owned by Plaintiffs. The Peterson complaint asserted claims for economic duress, breach of contract, breach of implied covenant of good faith and fair dealing, unjust enrichment, prima facie tort, civil conspiracy, and punitive damages. It alleged that Peterson and Plaintiffs entered into an agreement in which Peterson leased the property from Plaintiffs. Peterson was to develop the property into a drug store and lease the building to Walgreens. The Peterson complaint alleged that after entering into the agreement, Hinkle used his superior bargaining power to coerce Peterson to provide additional improvements and concessions not covered by the original agreement.

At the time the Peterson litigation commenced, State Farm insured Hinkle and Betty Hinkle under two policies. In the complaint in this action, Plaintiffs contended that State Farm had a duty to defend and to provide liability insurance under the terms of both policies. One policy, entitled a "Personal Liability Umbrella Policy," provided liability insurance and a duty to defend the insured against enumerated classes of claims, including "the commission of an offense which first results in personal injury during the policy period." The "Personal Liability Umbrella Policy" defined "personal injury" as "injury other than bodily injury arising out of one or more of the following offenses:

a. false arrest, false imprisonment, wrongful eviction, wrongful detention of a person;

b. abuse of process, malicious

prosecution;

c. libel, slander, defamation of character[;] or

d. invasion of a person's right to private occupancy by physically entering into that person's personal residence."

The other policy was a "Homeowners Policy," which Plaintiffs do not appear to address on appeal. We therefore only discuss the "Personal Liability Umbrella Policy" (the Policy).

State Farm filed for summary judgment, arguing that it had no duty to defend or provide liability insurance under the Policy. In their response, Plaintiffs argued that the underlying motivation for the Peterson litigation was that Hinkle threatened to use judicial proceedings against Peterson in order to coerce favorable business terms. Plaintiffs asserted that State Farm merely performed a "four corners" examination of the Peterson complaint and determined that there was no duty to defend. According to Plaintiffs, a reasonable investigation would have uncovered underlying facts and triggered a duty to defend under the Policy provision providing coverage for abuse of process and malicious prosecution. The district court assumed that an investigation by State Farm would have revealed that Hinkle threatened Peterson with litigation. Nevertheless, the district court held that summary judgment was proper because the mere threat of litigation does not amount to abuse of process or malicious prosecution under New Mexico law or as the term is ordinarily understood.

On appeal, Plaintiffs argue that the district court erred in granting summary judgment because they presented sufficient evidence to establish material issues of fact that (1) State Farm denied coverage based on a facial review of the complaint and that an investigation would have revealed a duty to defend Hinkle under the scope of the Policy, and (2) Hinkle had a reasonable expectation that a defense would be provided by State Farm. The arguments on appeal address the scope of the Policy based on the underlying facts of the Peterson Litigation only as applied to Hinkle.

STANDARD OF REVIEW

"An appeal from the grant of a motion for summary judgment presents a question of law and is reviewed de novo." *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 16, 141 N.M. 21, 150 P.3d 971. Generally, "[s]ummary 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. In determining whether an issue of material fact exists, we review the whole record in the light most favorable to the party opposing summary judgment. *Yurcic v. City of Gallup*, 2013-NMCA-039, ¶ 5, 298 P.3d 500. "However, if no material issues of fact are in dispute and an appeal presents only a question of law, we . . . are not required to view the appeal in the light most favorable to the party opposing summary judgment." *Id.* (internal quotation marks and citation omitted).

DUTY TO DEFEND

Plaintiffs first argue that State Farm had a duty to defend Hinkle under the Policy because a reasonable investigation would have revealed that the underlying facts of the

Peterson litigation were that Hinkle threatened Peterson with litigation in order to coerce favorable business terms. Plaintiffs contend that during "the Peterson litigation, the depositions of the Peterson [p]laintiffs were taken and [that t]he Peterson [p]laintiffs claimed [Hinkle] threatened to use the litigation process in order to obtain an economic and business advantage" over Peterson. Plaintiffs further contend that, had State Farm conducted a reasonable investigation as obligated under New Mexico law, it would have found the depositions, and it would have had sufficient information to trigger the duty to defend Hinkle because the Peterson litigation was premised on abuse of process or malicious prosecution.

We begin with a brief discussion of an insurer's duty to investigate and defend against a third-party claim against its insured. In *G & G Services, Inc. v. Agora Syndicate, Inc.*, 2000-NMCA-003, ¶ 1, 128 N.M. 434, 993 P.2d 751, this Court "examine[d] the parameters of an insurer's duty to investigate and defend a third-party claim filed against its insured[.]" We stated that under well-established New Mexico law "facts other than those set forth in the complaint may also implicate an insurer's duty to defend." *Id.* ¶ 21. Thus, the "duty of an insurer to defend arises from the allegations on the face of the complaint or from the known but unpleaded factual basis of the claim that brings it arguably within the scope of coverage." *Id.* (emphasis, internal quotation marks, and citation omitted). Turning to the "amount of investigation an insurer is required to undertake when presented with a demand by an insured to provide a defense," we held that "an insurance company is required to conduct such an investigation into the facts and circumstances underlying the complaint against its insured as is reasonable given the factual information provided by the insured or provided by the circumstances surrounding the claim in order to determine whether it has a duty to defend." *Id.* ¶¶ 22-23. Our holding was based on the rationale that "[a]n insurance company cannot construct a formal fortress of the third party's pleadings and retreat behind its walls. The pleadings are malleable, changeable[,] and amendable. In light of the plasticity of modern pleading, we should hardly designate the third party as the arbiter of the policy's coverage." *Id.* ¶ 27 (alterations, internal quotation marks, and citation omitted).

The district court assumed, and the parties do not dispute, that a reasonable investigation would have revealed the underlying facts that the Peterson litigation was based on Hinkle's threat of litigation to Peterson for a business advantage. The dispute in this case centers on whether these underlying facts triggered the duty of State Farm to defend Hinkle under the Policy provision for abuse of process or malicious prosecution.

Originally, the torts of abuse of process and malicious prosecution were two distinct, but closely related, torts in New Mexico. *See DeVaney v. Thriftway Mktg. Corp.*, 1998-NMSC-001, ¶ 13, 124 N.M. 512, 953 P.2d 277, *overruled on other grounds by Durham v. Guest*, 2009-NMSC-007, 145 N.M. 694, 204 P.3d 19. "Both torts [were] designed to offer redress to a plaintiff who has been made the subject of legal process improperly, where the action was wrongfully brought by a defendant merely for the purpose of vexing or injuring the plaintiff, and resulting in damage to his or her personal rights." *DeVaney*, 1998-NMSC-001, ¶ 14.

In *DeVaney*, based on the similarities

of the torts and developments of law that blurred the distinction between them, our Supreme Court combined abuse of process and malicious prosecution into a single cause of action called malicious abuse of process. *Id.* ¶¶ 13-17. The elements for a malicious abuse of process claim are "(1) the initiation of judicial proceedings against the plaintiff by the defendant; (2) an act by the defendant in the use of process other than such as would be proper in the regular prosecution of the claim; (3) a primary motive by the defendant in misusing the process to accomplish an illegitimate end; and (4) damages." *Id.* ¶ 17.

Our Supreme Court subsequently clarified the elements for malicious abuse of process in *Durham*. In *Durham*, the Court overruled *DeVaney* to the extent that *DeVaney* required that the defendant initiate a judicial proceeding against the plaintiff. *Durham*, 2009-NMSC-007, ¶ 29. Consequently, the elements of malicious abuse of process now are "(1) the use of process in a judicial proceeding that would be improper in the regular prosecution or defense of a claim or charge; (2) a primary motive in the use of process to accomplish an illegitimate end; and (3) damages." *Id.* Applying these elements, the *Durham* Court reversed the district court's grant of a motion to dismiss for failure to state a claim when the plaintiff alleged that the defendant maliciously issued subpoenas for an illegitimate purpose during arbitration proceedings not initiated by the defendant. *Id.* ¶¶ 5, 37.

Applying the elements of malicious abuse of process as stated in *Durham*, we conclude that the district court did not err in holding that State Farm did not have a duty to defend Hinkle under the Policy and in granting summary judgment in favor of State Farm. The Peterson complaint does not assert a claim for malicious abuse of process, or even the formerly recognized torts of abuse of process or malicious prosecution. It only asserts claims for economic duress, breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, prima facie tort, civil conspiracy, and punitive damages. Plaintiffs do not argue that any of Peterson's stated claims were covered under the Policy.

Even assuming, as the district court did, that a reasonable investigation into the underlying facts of the Peterson complaint would have revealed that the basis of the Peterson litigation was Hinkle's threat of litigation to Peterson in order to obtain an economic and business advantage over Peterson, these facts are insufficient to state a claim for malicious abuse of process. Under New Mexico law, malicious abuse of process requires "the use of process *in a judicial proceeding* that would be improper in the regular prosecution or defense of a claim or charge[.]" *Id.* ¶ 29 (emphasis added). Although *Durham* modified malicious abuse of process to remove the requirement that the defendant initiate judicial proceedings against the plaintiff, malicious abuse of process still requires the improper use of process within a judicial proceeding. *See id.* A threat of litigation for an improper purpose, without more, is insufficient to satisfy the first element as stated in *Durham*. *See State v. Rendelman*, 947 A.2d 546, 556 n.9 (Md. 2008) (stating that "the mere threat of the initiation of meritless or frivolous litigation would not rise to the level of [abuse of process or malicious use of process]. Rather these civil consequences require the *actual* pursuit of litigation to be applicable" under Maryland law); *see also Regency Motors of Metairie, L.L.C. v. Hibernia-Rosenthal Ins. Agency, L.L.C.*, 868 So. 2d 905, 909 (La. Ct. App.

2004) (stating that threatened legal action was not sufficient to establish malicious prosecution and therefore affirming summary judgment in favor of an insurer for breach of contract for failure to defend the insured); *Lafferty v. Rhudy*, 878 S.W.2d 833, 836 (Mo. Ct. App. 1994) ("[The plaintiff's] petition does not properly plead a claim for abuse of process because it merely alleges that [the defendant] *threatened* to file an ethics complaint against [the plaintiff], not that he ever actually filed such a complaint and pursued it with the improper purpose of extorting payment from [the defendant].").

REASONABLE EXPECTATION DOCTRINE

Plaintiffs next argue that the district court erred in granting summary judgment because a material fact exists as to whether Hinkle had a reasonable expectation that the Policy required State Farm to defend Hinkle in the Peterson litigation. Plaintiffs argue that (1) the terms "abuse of process" and "malicious prosecution" are ambiguous to a non-lawyer or someone not trained in the insurance field; and (2) as a result of the combination of abuse of process and malicious prosecution into one cause of action called malicious abuse of process, the terms "abuse of process" and "malicious prosecution" are ambiguous because they "cease[] to hold meaning in New Mexico [c]ourts."

"[I]nsurance contracts are construed by the same principles which govern the interpretation of all contracts." *Dairyland Ins. Co. v. Herman*, 1998-NMSC-005, ¶ 12, 124 N.M. 624, 954 P.2d 56 (internal quotation marks and citation omitted). Our Supreme Court has held that the doctrine of reasonable expectations applies if the language of an insurance policy would lead the insured to reasonably expect coverage. *Barth v. Coleman*, 118 N.M. 1, 5, 878 P.2d 319, 323 (1994). The doctrine of reasonable expectations also applies when the language of a policy is ambiguous. *See Rummel v. Lexington Ins. Co.*, 1997-NMSC-041, ¶ 22, 123 N.M. 752, 945 P.2d 970; *see also Sanchez v. Herrera*, 109 N.M. 155, 159, 783 P.2d 465, 469 (1989) (stating that the doctrine of reasonable expectations applies if the policy creates an ambiguity or the insured has a reasonable expectation of coverage). Under the doctrine of reasonable expectations, "we refer to what the hypothetical reasonable insured would glean from the wording of the policy and the kind of insurance at issue[.]" *Rodriguez v. Windsor Ins. Co.*, 118 N.M. 127, 130, 879 P.2d 759, 762 (1994), *modified on other grounds by Montano v. Allstate Indem. Co.*, 2004-NMSC-020, 135 N.M. 681, 92 P.3d 1255.

Turning to the language of the Policy, the definition of "personal injury" is defined and limited to specific legal causes of action. The Policy states that its coverage is limited to injury "arising out of one or more of the following *offenses*" and then proceeds to list specific causes of action. In this context, Hinkle, as the policyholder, could not have reasonably expected a defense to be provided for a suit based on a cause of action not enumerated under the Policy. *See id.* (stating that an insured's reasonable expectations are based on the combination and wording and type of policy at issue). An average, reasonably intelligent consumer would read the Policy as covering only the specific "offenses" contained in the definitions of "personal injury," and the Peterson complaint did not make a claim for the formerly recognized torts of abuse of process or malicious prosecution or the current combination of the two torts, malicious abuse

of process. Under these circumstances, the district court did not err by determining that the Policy was unambiguous or that it did not provide a reasonable expectation that State Farm had a duty to defend based on the Peterson complaint. *See Rummel*, 1997-NMSC-041, ¶ 19 (stating that ambiguities arise when sections of a policy appear to conflict, are susceptible to more than one meaning, when the structure is illogical, or when a matter of coverage is not explicitly addressed by the policy).

Plaintiffs also argue that our Supreme Court's consolidation of abuse of process and malicious prosecution into a single tort, malicious abuse of process, renders the Policy ambiguous because the Policy uses the former names of abuse of process and malicious prosecution. Therefore, Plaintiffs contend that we must construe the Policy against State Farm. However, we disagree that the Policy is ambiguous as applied to the facts of this case.

As we have discussed, the Peterson complaint made no express claim for abuse of process, malicious prosecution, or malicious abuse of process. Nor did the facts underlying the Peterson complaint state a claim for malicious abuse of process. The complaint therefore is insufficient to state a claim for the previously recognized torts of abuse of process and malicious prosecution. As a result, although the Policy may refer to the outdated names of abuse of process and malicious prosecution, under the Peterson complaint and the underlying facts forming the basis of the Peterson complaint, there is no ambiguity in the language as to the scope of coverage as applied to the facts of this case. *See Barth*, 118 N.M. at 5, 878 P.2d at 323 (stating that a "lay person's expectations of insurance coverage are of course formed by many factors besides the language of the policies themselves" (internal quotation marks and citation omitted)).

We note that Plaintiffs direct us to two cases in which a court has held that coverage for malicious prosecution is ambiguous and must be construed against the insurer. In *Lunsford v. American Guarantee & Liability Insurance Co.*, 18 F.3d 653, 654-55 (9th Cir. 1994), the Ninth Circuit applied California law and concluded that malicious prosecution was ambiguous because a lay person's understanding of the term would be different from the legal definition of the term. Resolving the ambiguity in favor of the insured, the Ninth Circuit held that malicious prosecution as used in an insurance policy was broad enough to encompass the related tort of abuse of process. *Id.* at 655-56. The court in *St. Paul Fire & Marine Insurance Co. v. Tingley Systems, Inc.*, 722 So. 2d 849, 849 (Fla. Dist. Ct. App. 1998), relied on *Lunsford* to reach the same conclusion. However, *Lunsford* appears to state a minority position, and the majority of courts have reached the opposite conclusion. *See, e.g., Parker Supply Co., Inc. v. Travelers Indem. Co.*, 588 F.2d 180, 182-83 (5th Cir. 1979) ("[T]he policies' reference to the offense of 'malicious prosecution' was not ambiguous and only a suit against [the defendant] for that offense would have created an obligation for the insurers to defend and indemnify."); *Heil Co. v. Hartford Accident & Indem. Co.*, 937 F. Supp. 1355, 1363 (E.D. Wis. 1996) ("Under Wisconsin law, the offense of 'malicious prosecution' is not ambiguous and only a lawsuit against the insured for malicious prosecution would create an obligation to defend."); *William J. Templeman Co. v. Liberty Mut. Ins. Co.*, 735 N.E.2d 669, 679 (Ill. App. Ct. 2000) ("We do not find the term 'malicious prosecution' as deployed in the policy to be ambiguous."). These cases

support our conclusion that the Policy, which defined personal injury as injury arising out of specific offenses including abuse of process and malicious prosecution, unambiguously provided Hinkle with a reasonable expectation only for suits alleging those specific offenses.

CONCLUSION

The district court did not err in holding that State Farm did not have a duty to defend under the Policy and in granting summary judgment in favor of State Farm. Accordingly, we affirm.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

LINDA M. VANZI, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-037

Filing Date: July 25, 2013

Docket No. 32,713

HORACE BOUNDS, JR.,

Plaintiff-Petitioner,

v.

STATE OF NEW MEXICO, ex rel. JOHN R. D'ANTONIO, JR., New Mexico State Engineer,

Defendant-Respondent.

and

Docket No. 32,717

NEW MEXICO FARM & LIVESTOCK BUREAU,

Intervenor-Petitioner,

v.

STATE OF NEW MEXICO, and JOHN R. D'ANTONIO, JR., NEW MEXICO STATE ENGINEER,

Defendants-Respondents

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OPINION

BOSSON, Justice.

Horace Bounds is a rancher and farmer in the Mimbres basin in southwestern New Mexico, a fully appropriated and adjudicated basin. Bounds, joined by the New Mexico Farm and Livestock Bureau (collectively Petitioners), brought a facial constitutional challenge against the New Mexico Domestic Well Statute (DWS), NMSA 1978, Section 72-12-1.1 (2003), which requires the State Engineer to issue domestic well permits without determining the availability of unappropriated water. Petitioners contend that

the DWS violates the New Mexico constitutional doctrine of prior appropriation as well as due process of law. Petitioners' arguments persuaded the district court but not the Court of Appeals, which reversed in a published opinion. Agreeing with the substance of that opinion, we affirm the Court of Appeals. For the reasons that follow, we hold that the DWS does not violate either the doctrine of prior appropriation set forth in the New Mexico Constitution or the guarantees of due process of law.

BACKGROUND

Bounds has the adjudicated right to irrigate 157.63 acres of farm and ranchland with some of the most senior surface water rights along the Upper Mimbres. At the time of this suit, Bounds had fewer than 100 head of cattle, and much of his water rights were used for irrigated pasture to support the herd; the primary purpose of the farm is livestock feed.

This case began on June 15, 2006, when Bounds filed an action for declaratory judgment in the Sixth Judicial District Court. The first count of his complaint asked the district court to declare the DWS unconstitutional because it requires the State Engineer to issue domestic well permits without regard to the availability of unappropriated water, to the detriment of senior water users and in violation of the doctrine of prior appropriation. The second count sought a declaration that the issuance of domestic well permits under the DWS constitutes a taking of vested property rights without compensation, in violation of the United States Constitution, the New Mexico Constitution, and 42 U.S.C. § 1983 (2006). Finally, Bounds sought an injunction preventing the State Engineer from issuing new domestic well permits without first determining that unappropriated water is available.

Before he filed this suit asking the district court to enjoin the State Engineer from issuing further permits under the DWS, Bounds took full advantage of the statute's simple permitting procedures. According to the record, he currently has five domestic and livestock wells, most recently drilled in 2005 and all acquired under the same permitting process that Bounds now challenges. Bounds also enjoyed the benefit of this statute when he subdivided and sold a portion of his farm in 1998. According to the State Engineer, the twelve-lot "subdivision was approved by Grant County, New Mexico, for the sale of individual lots to be served by domestic wells." Jo Bounds, Horace's wife, testified that four of the twelve lots have been developed, leaving five to eight lots yet to drill domestic wells.

The New Mexico Farm and Livestock Bureau (NMFLB) filed a motion to intervene. NMFLB is an independent, nongovernmental entity that represents over 14,000 farm and ranch families, and advocates on their behalf in the state Legislature as well as in state and federal courts. The district court granted the motion to intervene.

After the case was delayed for reasons not relevant to this appeal, the State Engineer filed a motion for summary judgment. The State Engineer argued that the DWS "is a clear expression of legislative intent to treat certain necessary water uses differently," and that "[i]n creating this distinction, the Legislature has articulated a class of uses of public water that is reasonably subject to treatment outside the scope of the general scheme of

appropriations." Thereafter, the parties stipulated to allowing the court to decide the legal issues presented on the pleadings, record, and evidence submitted.

The district court ultimately concluded that the DWS is unconstitutional as a matter of law "because it creates an impermissible exception to the priority administration system." The court reasoned that "[i]t is not logical, let alone consistent with constitutional protections, to require the [State Engineer] to issue domestic well permits without any consideration of the availability of unappropriated water or the priority of appropriated water." In addition, the court found a lack of evidence to support Bounds' claim of impairment of existing rights or his claim to related monetary damages. The court dismissed Bounds' takings claim. The State Engineer appealed the district court's constitutional ruling to the Court of Appeals.

Reversing the district court, the Court of Appeals declared that the prior appropriation doctrine, enshrined in Article XVI of the New Mexico Constitution, is "a broad priority principle, nothing more," an observation that has caused consternation among New Mexico's water community. *Bounds v. State*, 2011-NMCA-011, ¶ 37, 149 N.M. 484, 252 P.3d 708. Noting that the prior-appropriation doctrine in the New Mexico Constitution is not self-executing, the Court of Appeals observed that "a particular priority administration process is not dictated by the priority doctrine but instead is in the Legislature's hands pursuant to its authority to enact statutes providing for the administration of appropriation and use of surface and groundwater." *Id.* ¶ 42. Ultimately, the Court of Appeals concluded that

> the priority doctrine [in the New Mexico Constitution] is not a system of administration. It does not dictate any particular manner of administration of appropriation and use of water or how senior water rights are to be protected from junior users in time of water shortages. That the Legislature determines that domestic well permits are to be issued upon application without prior evaluation of water availability or impairment is not, in and of itself, a per se violation of the priority doctrine or of the Legislature's constitutional duty to assure that senior water rights are protected under the priority doctrine. Although a basin is considered fully appropriated with no unappropriated water available, we do not see how the Legislature is forbidden under a facial constitutional attack from nevertheless enacting an exception to its existing statutory regime permitting additional appropriation for domestic purposes as long as senior water rights are not in fact impaired or subject to impending impairment . . . .

Id. ¶ 45.

Bounds and NMFLB filed separate petitions for certiorari to review both the holding and the reasoning of the Court of Appeals opinion in light of its broad public policy implications, which this Court granted. *See* 2011-NMCERT-001, 150 N.M. 558, 560, 263 P.3d 900, 902. For the reasons that follow, we affirm the facial constitutionality of the DWS.

DISCUSSION

A. Standard of Review

Petitioners present two basic arguments for consideration. First, because the DWS requires the State Engineer to issue domestic well permits without regard to whether unappropriated water is available, the DWS creates an impermissible exception to the language of Article XVI, Section 2 of the New Mexico Constitution which states that "priority of appropriation shall give the better right." Second, a failure to provide notice and an opportunity to be heard prior to issuing a domestic well permit violates Petitioners' due process rights.[1]

Each of these arguments presents a constitutional challenge to the DWS. A constitutional challenge to a statute is reviewed de novo. *Tri-State Transmission & Generation Ass'n v. D'Antonio*, 2012-NMSC-032, ¶ 11, 289 P.3d 1232. "'It is well settled that there is a presumption of the validity and regularity of legislative enactments.'" *State ex rel. Udall v. Pub. Emps. Ret. Bd.*, 120 N.M. 786, 788, 907 P.2d 190, 192 (1995) (quoting *Espanola Hous. Auth. v. Atencio*, 90 N.M. 787, 788, 568 P.2d 1233, 1234 (1977)). We will uphold a statute "unless we are satisfied beyond all reasonable doubt that the Legislature went outside the bounds fixed by the Constitution in enacting the challenged legislation." *Id.* We do not "inquire into the wisdom or policy of an act of the Legislature." *Id.* Rather,

> [w]e presume that the Legislature has performed its duty, and kept within the bounds fixed by the Constitution. Further, if possible, we will give effect to the legislative intent unless it clearly appears to be in conflict with the Constitution. We will not question the wisdom, policy, or justness of a statute, and the burden of establishing that the statute is invalid rests on the party challenging the constitutionality of the statute. An act of the Legislature will not be declared unconstitutional in a doubtful case, and . . . if possible, it will be so construed as to uphold it.

State ex rel. Office of State Eng'r v. Lewis, 2007-NMCA-008, ¶ 37, 141 N.M. 1, 150 P.3d 375 (alteration in original) (internal quotation marks and citations omitted).

B. Preliminary Matters

Petitioners' first argument is relatively straightforward. As NMFLB explains,

> [i]n 1972, the State Engineer declared the Mimbres Basin to be closed and as such, no additional water was available for appropriation. Thus, when the State Engineer made the determination that no additional water was available for appropriation, he became bound by the constitutional provisions of N.M. Const. art. XVI, §§ 1, 2, and 3, and NMSA 1978, § 72-12-4. No further permits could be issued for the appropriation of groundwater in the Mimbres Basin.

Accordingly, the argument goes, if the DWS

[1]Other arguments, such as equal protection, are mentioned in the briefing but not developed. We decline to address such arguments. *See, e.g.*, *State v. Clifford*, 117 N.M. 508, 513, 873 P.2d 254, 259 (1994) ("[T]his Court will not review issues raised in appellate briefs that are unsupported by cited authority.").

requires the State Engineer to issue domestic well permits when there is no additional water available for appropriation, the statute must necessarily impact senior water users whose rights are secured by the New Mexico Constitution. As an initial matter, we address certain basic flaws in this and other arguments advanced by Petitioners.

First and foremost, Petitioners have brought a facial challenge. In the district court, Bounds was unable to show any actual injury, any impairment of his existing senior rights as a result of the DWS. Accordingly, Bounds was unable to pursue an as-applied challenge in which specific facts would be relevant and was left with only a facial challenge.

However, the facts laid out above—relating specifically to Bounds' situation in the Mimbres basin—are not relevant in a facial challenge.[2] Generally, "[i]n a facial challenge to [a statute], we consider only the text of the [statute] itself, not its application; whereas, in an as-applied challenge, we consider the facts of the case to determine whether application of the [statute] even if facially valid deprived the challenger of a protected right." *Vill. of Ruidoso v. Warner*, 2012-NMCA-035, ¶ 5, 274 P.3d 791 (citing *Field Day, LLC v. Cnty. of Suffolk*, 463 F.3d 167, 174-75 (2d Cir. 2006)). Looking at the specific situation in the Mimbres basin—a fully appropriated and fully adjudicated basin—would require us to review the DWS as applied to Bounds, or at least as applied to the basin, and Bounds was unable to prove that the DWS caused any specific injury to himself or others.

Second, a separate argument advanced by Bounds—that the issuance of further permits in the Mimbres basin necessarily impairs senior water users—would require this Court, in order to rule for Petitioners, to hold that a new domestic well permit for taking water in a fully appropriated basin, even for only one well, constitutes impairment as a matter of law. Yet, under our well-established case law, this Court has repeatedly rejected the notion of impairment as a matter of law, or per se impairment as it has been called in the past. *See Mathers v. Texaco, Inc.*, 77 N.M. 239, 245-46, 421 P.2d 771, 776-77 (1966); *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶¶ 21-25, 141 N.M. 21, 150 P.3d 971. In *Montgomery* we explicitly stated that

> this Court has refused to make any bright-line rule regarding what constitutes impairment. "[T]he question of impairment of existing rights is one which must generally be decided upon the facts in each case, and . . . a definition of 'impairment of existing rights' is not only difficult, but an 'attempt to define the same would lead to severe complications.'"

Montgomery, 2007-NMSC-002, ¶ 21 (alterations in original) (*quoting Mathers*, 77 N.M. at 245, 421 P.2d at 776). Accordingly, there can be no constitutional challenge to the statute without at least a specific probability of impairment in a given case. The constitutional

[2]Bounds spent a portion of his briefing arguing that the Court of Appeals ignored the district court's findings of fact and we should defer to such findings. But, "where the challenging party has chosen to mount only a facial challenge, the facts of his or her particular case do not affect our review." *Jackson v. City of Chi.*, 975 N.E.2d 153, 163 (Ill. App. Ct. 2012). The findings of fact made by the district court are certainly not due any deference by an appellate court when answering the purely legal question of a facial challenge.

principles of prior appropriation are not in peril when senior water users cannot demonstrate a concrete risk of impairment—that they are in danger of losing the very water guaranteed them by that same prior appropriation doctrine.

Under our precedent, we could decline to reach the merits of this case. That said, however, we exercise our discretion to decide these important issues. As we stated in *City of Albuquerque v. Campos*, "[i]f, as in the present case, the questions of public importance are likely to recur, . . . reason exists for the exercise by this court of its inherent discretion to resolve those questions." 86 N.M. 488, 491, 525 P.2d 848, 851 (1974).

In the present case, it would make little sense to dismiss Petitioners' claims because the issues would remain. We would merely be forcing these parties or others to litigate the same issues from the beginning, but in an as-applied challenge, all the while the legal questions regarding the constitutionality of the DWS statute would remain.

In addition, we have a Court of Appeals opinion that should be addressed. Before the Court of Appeals, the State Engineer expressed a public-interest "preference" that the judiciary "reach and decide the constitutional issue," a preference to which we are not bound but one which we afford due respect. *See Bounds*, 2011-NMCA-011, ¶ 13. Rather than avoid these difficult but important legal issues, we choose to decide them now as they were briefed by Petitioners and addressed by the State Engineer. We will consider Petitioners' argument as a facial challenge in relation to a fully appropriated, closed, and adjudicated basin.

C. Relevant Legal Framework—the New Mexico Constitution, Statutes, and Regulations

Embedded in the New Mexico Constitution are some of the most basic and universal principles of prior appropriation. These include the right to appropriate public waters for beneficial use, one of the defining features of prior appropriation. *See* A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 Nat. Res. J. 769, 770 (2001). Article XVI, Section 2 of the New Mexico Constitution reads: "The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right." It is the language "[p]riority of appropriation shall give the better right" that renders the DWS unconstitutional, according to Petitioners, because the statute requires the State Engineer to issue domestic well permits even in the face of a fully appropriated water basin.

In 1953, the New Mexico Legislature passed the predecessor to the current DWS. N.M. Laws 1953, ch. 61, § 1. Similar to the present DWS, then codified at NMSA 1953, Section 75-11-1 (1953), the exemption read, in part, as follows:

> By reason of the varying amounts and time such water is used and the relatively small amounts of water consumed in the watering of livestock, in irrigation of not to exceed one [1] acre of noncommercial trees, lawn or garden; in household or other domestic use, and in prospecting,

mining or construction of public works, highways and roads or drilling operations designed to discover or develop the natural resources of the state of New Mexico, application for any such use shall be governed by the following provisions,

Any person, firm or corporation desiring to use any of the waters described in this act for watering livestock, for irrigation of not to exceed one [1] acre of noncommercial trees, lawn, or garden; or for household or other domestic use shall make application or applications from time to time to the state engineer on a form to be prescribed by him. Upon the filing of each such application, describing the use applied for, the *state engineer shall issue a permit* to the applicant to so use the waters applied for.

Id. (emphasis added). Thus, wells for "household or other domestic use," along with other minimally consumptive uses, required an application with certain disclosures, but the language "shall issue" made the permit automatic without publication and notice to other users.

The statute remained largely unchanged until 2003. In that year, the Legislature split the statute into separate sections for domestic, livestock, and temporary uses. The new version of NMSA 1978, Section 72-12-1 (2003) remained a policy statement, features language similar to the previous version, and now reads as follows:

The water of underground streams, channels, artesian basins, reservoirs or lakes, having reasonably ascertainable boundaries, is declared to belong to the public and is subject to appropriation for beneficial use. By reason of the varying amounts and time such water is used and the relatively small amounts of water consumed in the watering of livestock; in irrigation of not to exceed one acre of noncommercial trees, lawn or garden; in household or other domestic use; and in prospecting, mining or construction of public works, highways and roads or drilling operations designed to discover or develop the natural resources of the state, application for any such use shall be governed by the provisions of Sections 72-12-1.1 through 72-12-1.3 NMSA 1978.

The portion dealing with domestic wells was recodified to NMSA 1978, Section 72-12-1.1 (2003). It states that

A person, firm or corporation desiring to use public underground waters described in this section 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 for a well on a form to be prescribed by the state engineer. Upon the filing of each application describing the use applied for, the state engineer *shall* issue a permit to the applicant to use the underground waters applied for; provided that permits for domestic water use within municipalities shall

be conditioned to require the permittee to comply with all applicable municipal ordinances enacted pursuant to Chapter 3, Article 53 NMSA 1978.

Section 72-12-1.1 (emphasis added).[3]

By contrast, NMSA 1978, Section 72-12-3 (2001), sets out the permitting process prescribed for most other ground water appropriations, such as those for agricultural and industrial use, but which does not apply to permits for domestic wells. According to Section 72-12-3(D), the State Engineer is required, upon the filing of an application, to cause notice to be published in a newspaper. Thereafter, any person claiming that the new appropriation will impair existing water rights must be allowed to protest the application. *Id.* Even if no one objects,

> the state engineer shall, if he finds that there are in the underground stream, channel, artesian basin, reservoir or lake unappropriated waters or that the proposed appropriation would not impair existing water rights from the source, is not contrary to conservation of water within the state and is not detrimental to the public welfare of the state, grant the application and issue a permit to the applicant to appropriate all or a part of the waters applied for, subject to the rights of all prior appropriators from the source.

Section 72-12-3(E). According to Petitioners, the requirements of notice, opportunity to be heard, and prior determination of unappropriated waters or lack of impairment found in Section 72-12-3 are required by the New Mexico Constitution to be applied to domestic wells as well.

In 2006, the State Engineer promulgated regulations specifically for domestic wells. *See* 19.27.5 NMAC (8/15/2006, as amended through 10/31/2011). These regulations allow the State Engineer to manage domestic wells in various ways. For example, 19.27.5.13 NMAC subjects domestic wells to certain conditions of approval, the most important of which is curtailment to protect existing water rights in times of shortage: "The right to divert water under [a domestic well] permit is subject to curtailment by priority administration as implemented by the state engineer or a court." 19.27.5.13(B)(11) NMAC.

In addition to imposing conditions upon domestic well permits, the regulations also provide for the State Engineer to "declare all or part of a stream connected aquifer as a domestic well management area *to prevent impairment to valid existing surface water rights.*" 19.27.5.14 NMAC (emphasis added). This and other regulations allow the State Engineer to declare a management area and create specific administrative guidelines for that particular basin to ensure that senior surface water users are not harmed by junior domestic wells. *See* 19.27.5.14(A). In addition, the regulations significantly reduce the maximum diversion from new domestic wells in the management area to 0.25 acre-feet

[3]The Court thanks 4 Daughters Land & Cattle Company, Great Western Ranch, LLC, and Sanders Land & Cattle, Inc. for their collectively filed amicus brief discussing these issues in relation to livestock wells. While we recognize many similarities between the permitting procedures for these wells and domestic wells, we decline to discuss how the principles discussed in this Opinion relate to livestock wells at this time.

per year or even less, as required by the State Engineer. *See* 19.27.5.14(C).

With this background in mind regarding the relevant statutes, regulations, and constitutional provisions, we now turn to Petitioners' allegations of facial unconstitutionality.

D. The DWS Is Not Facially Unconstitutional

Looking at the language in Article XVI, Section 2 of the New Mexico Constitution upon which Petitioners rely—"[p]riority of appropriation shall give the better right"—it is clear that priority administration, including curtailment when justified, is what this Section mandates. "Shall give the *better* right" is a phrase meant to apply to two existing, yet competing, water rights. This phrase implies that two rights are at issue, since if there were only one right, that right could not be *better*, as there would be nothing to be better than. "Priority of appropriation" tells us *how* to determine which right is better. Thus, the entire phrase "priority of appropriation shall give the better right" is meant to dictate how conflicts between water users can be resolved—by priority administration—in which junior users are diminished or cut off when necessary in favor of senior users. In short, this language means that priority administration—exactly what Petitioners desire to protect their senior water rights—may be used to determine how water is allocated in times of shortage. This language deals with how rights, already acquired, will be administered.

This portion of the New Mexico Constitution does not mandate any particular *permitting* procedure. In fact, this language does not appear to pertain to how one *acquires* a water right, as opposed to how that right is *used* and *administered*.

The DWS, on the other hand, is a permitting statute. It dictates the procedure for how one acquires a permit to drill a domestic well. The DWS does relieve the applicant from certain statutory requirements that are applied to other applications for water rights. The statute does not, however, dictate how the permit is administered. In fact, the DWS is entirely silent as to how permits issued under that statute are administered. Nothing in the language of the DWS prevents domestic well permits from being administered in the same way as all other water rights, including priority administration—exactly what Article XVI, Section 2 of the New Mexico Constitution requires.

Theoretically, the State Engineer could issue a domestic well permit and immediately administer priority to curtail diversion under that permit. While this might seem absurd at first glance, further examination suggests otherwise. In such an instance, a permit—even if temporarily inoperative—would give the applicant a priority date. Should conditions in the particular basin change, curtailment by priority administration could be lifted, and the permit holder could then divert water under that permit with a priority date set at the original date when the permit issued. In this regard, the permit would serve as a placeholder should more water become available in the future. The State Engineer has essentially done this in the Gila basin, issuing permits that do not allow for an actual diversion. Depending on the circumstances, the State Engineer could apply a similar procedure elsewhere to meet a growing

shortage of water and imminent threat to senior water users.

This discussion reveals the basic flaw in Petitioners' argument. Petitioners are mistakenly equating the issuance of a permit under the DWS with an absolute right to take and use water pursuant to that permit. It would only be in the case of such an absolute water right that the mere issuance of a permit in a fully appropriated basin would necessarily take water from senior users and impair senior water rights. However, the DWS does not create such an unconditional right—at least not on its face.

All water rights, including those of Petitioners as well as those created by the DWS, are inherently conditional. *See, e.g.*, *Tri-State*, 2012-NMSC-032, ¶ 45 ("A junior water rights holder cannot complain of deprivation when its water is curtailed to serve others more senior in the system . . . . Such are the demands of our state's system of prior appropriation."). They do not create an absolute right to take water. They are conditioned on the *availability* of water to satisfy that right. Water may not be available for a number of reasons, including drought or the lack of priority due to unsatisfied demand of senior water rights. Accordingly, the DWS, which deals solely with permitting and not administration, cannot facially be in conflict with Article XVI, Section 2 of the New Mexico Constitution.

E. Regulation of Domestic Wells to Protect Senior Water Rights

We now turn to the administrative regulations regarding domestic wells currently in place with the State Engineer. We find these regulations informative as to how the actual use of domestic wells can be administered in such a way as to protect senior water users. Today, domestic well permits are more regulated and integrated into the administrative system than ever before. Regulations allow the State Engineer to effectively deal with some of the practical effects of the issues raised in this case, including ways to mitigate the effects of domestic wells on water shortages.

By regulation, the State Engineer has reduced the default maximum allowable diversion from three acre-feet to one acre-foot per year and per well per household. *See* 19.27.5.9(D)(1) NMAC. Presumably, this was done to mitigate the effects that hundreds of domestic wells, considered in the aggregate, could have on a particular basin. Logically, limiting domestic wells in such a way should reduce their impact simply by forcing the well owners to pump less water.

Regulations also provide for the creation of "Domestic Well Management Areas," discussed previously, which allow the State Engineer greater power to protect senior water users. 19.27.5.14 NMAC. In fact, the stated purpose of Domestic Well Management Areas is "to prevent impairment to valid, existing surface water rights." *Id.* Once a Domestic Well Management Area has been declared, the State Engineer is required to "develop administrative guidelines for each declared domestic well management area" that are "based on the hydrologic conditions of the domestic well management area and the valid, existing water rights located therein." 19.27.5.14(A) NMAC. Thus, for each Domestic Well Management Area, the State Engineer must determine, based on the specifics of that particular basin, how to manage future domestic wells to prevent harm to senior water users.

Significantly, according to the very permits that authorize them, domestic wells are "subject to curtailment by priority administration as implemented by the state engineer or a court." 19.27.5.13(B)(11) NMAC. Curtailment by priority administration authorizes the State Engineer to limit water use administratively in times of water shortage to protect senior water rights. *See* NMSA 1978, § 72-2-9 (1907) (giving the State Engineer authority to supervise the apportionment of water in New Mexico).

Despite these legal provisions for priority administration of domestic wells, Petitioners argue that for practical and political reasons the State Engineer will never really curtail domestic wells. Petitioners rely on the deposition of former State Engineer John D'Antonio, in which he stated that he would not curtail *indoor use* of a domestic well. The district court incorrectly took this deposition testimony to mean that Mr. D'Antonio would *never* curtail domestic wells in any manner. We understand the concern. This Court has previously noted the practical challenges facing the state in curtailing the use of domestic wells. *See Herrington v. State of N.M. ex rel. Office of State Eng'r*, 2006-NMSC-014, ¶ 50, 139 N.M. 368, 133 P.3d 258.

But such speculation about what the State Engineer may or may not do in the future cannot form the basis of a facial challenge in the present. As of 2012, Mr. D'Antonio is no longer the State Engineer, and as such his policy is subject to change at the discretion of his successor. Without specific facts supporting an as-applied challenge, we must assume that domestic wells will be administered as the permits themselves are written: "subject to curtailment by priority administration." 19.27.5.13(B)(11) NMAC. In the absence of a record to the contrary, we must assume that the State Engineer will fulfill the responsibility and exercise the authority bestowed on that office by law. Accordingly, Petitioners' reliance on Mr. D'Antonio's deposition to claim that domestic wells will never be curtailed in any fashion is simply shortsighted. That reliance offers no support for a facial constitutional challenge to the DWS.

In addition to curtailment by priority administration, "[t]he drilling of the well and amount and uses of water permitted are subject to such limitations as may be imposed by the courts or by lawful municipal and county ordinances which are more restrictive than the conditions of this permit and applicable state engineer regulations." 19.27.5.13(B)(6) NMAC. Therefore, not only are domestic well permits subject to curtailment by the State Engineer, they are explicitly subject to limitations by our courts and by local ordinance, should such a need arise after a proper evidentiary showing.

As a practical matter then, domestic well permits, though issued upon application without further inquiry, are subject in their *use* to many of the same conditions and restrictions as are well permits for other uses like agriculture and industry. The State Engineer has designed these conditions to protect senior water users—the very class of users that, according to Petitioners, is threatened by the DWS. We have difficulty envisioning how a water permit that is explicitly subject to curtailment by priority administration in times of shortage, the very essence of prior appropriation and precisely what is required by the language upon which Petitioners rely, can be at the same time be an impermissible exception to that doctrine. Instead of creating an exception to prior

appropriation, we view the DWS as merely creating a different, more expeditious permitting procedure for domestic wells.

The Legislature codified this simpler permitting process as a policy choice, something that the New Mexico Constitution generally empowers our Legislature to do. *See* N.M. Constitution art. XVI, § 2 ("[U]nappropriated water . . . [is] subject to appropriation for beneficial use, *in accordance with the laws of the state.*" (emphasis added)). It was understood by the Framers of the New Mexico Constitution that laws would have to be passed, and in many instances were already passed, to define the particulars of water right permitting and administration in New Mexico. The Framers intended for the Legislature to prescribe precisely how an appropriation would occur, subject to the limit of beneficial use. Nothing in the constitutional language indicates that all appropriations must have the same application procedures. Rather, it appears that the New Mexico Constitution gives the Legislature the power to make such policy choices and create different procedures for different appropriations.

The Legislature and the State Engineer have remained attentive since the DWS was first passed in 1953. The Legislature reaffirmed this policy in 2003 when it rewrote and recodified the domestic well exemption. *See* 2003 N.M. Laws ch. 298. Domestic wells were again on the minds of the Legislature in the most recent legislative session. Two bills were passed and signed into law to combat at least some of the potential harmful effects of domestic wells. *See* 2013 N.M. Laws chs. 173, 224.

Codified as NMSA 1978, Section 3-20-9.1 (2013), one of the new statutes requires either State Engineer approval of sufficient water or proof of water rights acquired by means *other than a domestic well permit*, before a subdivision plat may be approved if water rights have been severed from the land upon which the subdivision will sit. Presumably, the statute is directed at the practice of "double dipping," whereby a developer buys a farm with water rights, subdivides the farm, then severs and sells the water rights to a third party, while having the new homeowners drill individual domestic wells for each subdivided lot.

The other new statute, an amendment to NMSA 1978, Section 47-6-11.2 (2013), requires proof of service from a water provider and approval from the State Engineer, or a right to use water other than by a domestic well, for any subdivision of "ten or more parcels, any one of which is two acres or less," before the subdivision can be approved. This appears to preclude dense clusters of domestic wells, and their possible cumulative effect on senior water rights. Based on these new statutes, we observe that the Legislature appears to be aware of potential problems caused by domestic wells and has taken at least some remedial action short of an outright repeal of the DWS to mitigate its effects.

Thus, we cannot conclude that the DWS, a permitting statute, conflicts irreconcilably with Article XVI, Section 2 of the New Mexico Constitution. The Constitution does not require identical permitting procedures for all appropriations. What is required is priority administration for the protection of senior users, a condition to which domestic well permits have been subject for some time. The DWS only deals with how domestic wells are permitted, not how they are administered. Thus, the DWS, at least on its face, does not conflict with Article

XVI, Section 2 and survives Petitioners' facial challenge.

Though Petitioners' facial challenge proves unpersuasive, we emphasize that senior water users do have other recourse under the law. A water user who is able to show actual or impending impairment can make a priority call against junior users and, if that fails, the water user could then file an as-applied challenge against the DWS. The same protections for senior users apply against domestic wells as against any other junior water right. We understand that showing such an impairment can be a difficult task, but without more than the mere speculation of impairment in the present case, we cannot take the drastic step of declaring a statute unconstitutional that has served this state for sixty years.

Accordingly, we hold that the DWS does not on its face violate the New Mexico Constitution, and we affirm the decision of the Court of Appeals to reverse the contrary ruling of the district court. Our Court of Appeals has crafted a thoughtful, scholarly analysis of the constitutional issues before us and the tensions those issues expose regarding competing demands for a precious resource in the arid west. Undoubtedly that tension will continue long after these Opinions issue. We agree with the Court of Appeals that aggrieved citizens must look to the Legislature and the State Engineer for relief from many of these problems, seemingly so intractable. We urge our Legislature to be diligent in the exercise of its constitutional authority over—and responsibility for—the appropriation process. We equally urge the State Engineer to fulfill its superintending responsibility by applying priority administration for the protection of senior water users. Our courts remain available, based upon sufficient evidence, to intervene in appropriate cases to ensure that "priority of appropriation shall give the better right."

We do take issue with the Court of Appeals' opinion in certain of its observations regarding the priority doctrine. For example, its conclusion that "[t]he Constitution's priority doctrine establishes a broad priority principle, nothing more" simply goes too far. *See Bounds*, 2011-NMCA-011, ¶ 37. One could read that statement to mean that priority water rights are nothing more than an aspiration, subject to legislative whim and administrative discretion. Such a reading would be wrong, and it would be a mistake for future litigants to cite the Court of Appeals opinion for any such proposition.

F. The DWS Does Not Violate Petitioners' Due Process Rights

Petitioners also claim that the DWS violates due process of law, both procedurally and substantively. There is some question whether this particular issue was abandoned below. The Court of Appeals considered due process abandoned and said as much in its opinion. *Id.* ¶ 13. The petition for writ of certiorari raised the issue, specifically in one of the questions on which we granted certiorari. Out of an abundance of caution, we will address the due process issue, but only to the extent it was developed in the briefs.

Petitioners argue that "[u]ntil the State/Engineer bring domestic wells under the aegis of the State Engineer's administrative due process protections, the same as all other applications for new groundwater appropriations, their actions are unconstitutional and void."

Similar to the Fourteenth Amendment

of the United States Constitution, Article II, Section 18 of the New Mexico Constitution states that "[n]o person shall be deprived of life, liberty or property without due process of law." "Due process involves both substantive and procedural considerations." *Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, ¶ 25, 122 N.M. 524, 928 P.2d 250. "Procedural due process requires the government to give notice and an opportunity to be heard before depriving an individual of liberty or property." *Id.* "Substantive due process cases inquire whether a statute or government action shocks the conscience or interferes with rights implicit in the concept of ordered liberty." *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 30, 137 N.M. 734, 114 P.3d 1050 (internal quotation marks and citations omitted).

We have said numerous times that "[t]he threshold question in evaluating a due process challenge is whether there is a deprivation of liberty or property." *Mills v. N.M. State Bd. of Psychologist Exam'rs*, 1997-NMSC-028, ¶ 15, 123 N.M. 421, 941 P.2d 502; *cf. Bd. of Educ. of Carlsbad Mun. Schs. v. Harrell*, 118 N.M. 470, 477, 882 P.2d 511, 518 (1994) ("Before a procedural due process claim may be asserted, the plaintiff must establish that he was *deprived* of a legitimate liberty or property interest . . . ." (emphasis added)); *Barreras v. N.M. Corr. Dep't*, 114 N.M. 366, 370, 838 P.2d 983, 987 (1992) ("In order to assert a procedural due process claim under the Fourteenth Amendment, a plaintiff must establish *deprivation* of a legitimate liberty or property interest . . . ." (emphasis added)); *Moongate Water Co. v. State*, 120 N.M. 399, 404, 902 P.2d 554, 559 (Ct. App. 1995) (In order to prevail on a substantive due process claim, the plaintiff "must establish that its property interests were *injured* by governmental action that shocks the conscience." (emphasis added)). Presumably, a property interest in an adjudicated water right would be entitled to due process protections, if subjected to deprivation.

As previously discussed, however, Petitioners have been unable to demonstrate with any specificity how the DWS caused or will cause any deprivation of their water rights. Bounds was unable to show any actual impairment of his water rights before the district court, as he received his full allotment of water. The only potential impairment to Bounds was based on his assertion—with little evidentiary support—that any new appropriations must necessarily cause impairment in a closed and fully appropriated basin. We have already explained the difference between a permit issued pursuant to the DWS, and the subsequent use of that permit subject to priority administration.

Bounds did provide an expert who reasoned that because this is a fully appropriated basin, then water for new appropriations, domestic wells included, must come from senior users. This assertion was not based on the expert's own scientific study of the basin but rather the State Engineer's determination that the basin was closed to further *surface* appropriations. The expert did not make any calculations or present any models to quantify the effect of domestic wells on Bounds' water rights. We reject this kind of conclusory statement as a substitute for scientific analysis. What Petitioners suggest is precisely the bright line rule of impairment that this Court has rejected in the past. *See Montgomery*, 2007-NMSC-002, ¶ 24.

Without any demonstration of actual

impairment or imminent future impairment to Bounds' water rights, or at least something more than a speculative inference from the fact of a closed and fully appropriated basin, the remaining due process analysis is straightforward. Without a proven threat to water rights, there has been no deprivation of property. Without a deprivation of property, there can be no due process violation. Petitioners have not been deprived of anything—at least not on this record—that is subject to either the procedural or substantive protections of the due process clause. As the Washington Supreme Court stated in *Lummi Indian Nation v. State*, "the challengers have cited no case, and we have found none, where mere potential impairment of some hypothetical person's enjoyment of a right has been held to be sufficient for a successful facial due process challenge." 241 P.3d 1220, 1231 (Wash. 2010). Accordingly, we agree that such a facial due process challenge must fail. *See id.* at 1232.

CONCLUSION

For the above reasons, we hereby affirm the Court of Appeals.

IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-085

Filing Date: May 20, 2013

Docket No. 31,454

MICHELLE RUIZ,

Worker-Appellant/Cross-Appellee,

v.

LOS LUNAS PUBLIC SCHOOLS and NEW MEXICO PUBLIC SCHOOLS INSURANCE AUTHORITY,

Employer/Insurer-Appellees/Cross-Appellants.

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for Appellant

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for Appellees

OPINION

VIGIL, Judge.

Worker's motion for rehearing is granted. The memorandum opinion filed in this case on March 26, 2013, is hereby withdrawn, and this Opinion is substituted in its place.

In this workers' compensation case, Worker appeals and Employer cross-appeals from two compensation orders entered by the workers' compensation judge following a trial on the merits. For the reasons set forth below, we affirm in part and reverse in part.

BACKGROUND

Worker was working as a school bus driver with the Los Lunas Public Schools (Employer) when she injured her back and shoulder on October 8, 2007. Following a formal hearing, the workers' compensation judge (WCJ) determined that Worker's average weekly wage (AWW) was $270.30; that she had failed to perform a prescribed home exercise program during her recovery and this failure constituted an injurious practice supporting a reduction of her impairment rating by one percent; that Worker's unreasonable refusal of Employer's job offers rendered her ineligible for temporary total disability (TTD) benefits and modified permanent partial disability (PPD) benefits; and that Worker's residual physical capacity was light duty. Following a hearing on Worker's attorney fees, the WCJ found that Employer's offer of compensation was untimely, and Employer was ordered to pay fifty percent of Worker's attorney fees. Additional pertinent facts are discussed as they relate to the issues below.

ISSUES

On appeal, Worker contends the WCJ erred when it: (1) included wages from the 2006-2007 school year in determining Worker's AWW; (2) found that Worker had persisted in an injurious practice by not following a home exercise program and reduced Worker's impairment rating by one percent; (3) denied Worker's TTD benefits and PPD modifier benefits due to her rejection of job offers; and (4) classified Worker's residual physical capacity as light duty when there was evidence she was unable to push or pull with her arms. In its cross-appeal, Employer argues the WCJ erred by: (1) reducing Worker's impairment rating by one percent for her injurious practice because the evidence supports a reduction of no less than five percent; and (2) ordering Employer to pay fifty percent of Worker's attorney fees because Employer had made a valid offer of compensation prior to the start of trial.

STANDARD OF REVIEW

"We review workers' compensation orders using the whole record standard of review." *Leonard v. Payday Prof'l*, 2007-NMCA-128, ¶ 10, 142 N.M. 605, 168 P.3d 177. "In applying whole record review, this Court reviews both favorable and unfavorable

evidence to determine whether there is evidence that a reasonable mind could accept as adequate to support the conclusions reached by the fact finder." *Levario v. Ysidro Villareal Labor Agency*, 120 N.M. 734, 737, 906 P.2d 266, 269 (Ct. App. 1995). "Under whole record review, the court views the evidence in the light most favorable to the agency decision, but may not view favorable evidence with total disregard to contravening evidence." *Tallman v. ABF (Arkansas Best Freight)*, 108 N.M. 124, 128, 767 P.2d 363, 367 (Ct. App. 1988) (citations omitted), *holding modified on other grounds by Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148. We review the WCJ's application of the law to the facts de novo. *Tom Growney Equip. Co. v. Jouett*, 2005-NMSC-015, ¶ 13, 137 N.M. 497, 113 P.3d 320.

DISCUSSION

I. Worker's Average Weekly Wage

Worker begins by challenging the calculation of her AWW pursuant to NMSA 1978, Section 52-1-20(B) (1990), on the basis of the employment contracts she entered into at the start of each school year. Under the terms of her contract, Worker was hired to drive a school bus for approximately forty weeks between August and May, with her pay distributed to her over the course of fifty-two weeks. If Worker was hired to drive in June and July, the parties entered into a separate employment contract.

The WCJ determined that "Worker's wage can be fairly calculated under Section 52-1-20(B). Wages paid from April 6, 2007 to October 5, 2007 (182 days) total $7,027.86 divided by 26 equals $270.30." Worker contends that the WCJ should have calculated her AWW under Section 52-1-20(B)(1) because a new period of employment began in August 2007 under the terms of her contract, and because she was not offered work in June and July 2007. Worker alternatively argues that this Court should calculate her AWW pursuant to Section 52-1-20(C) because the calculation methods provided under either Section 52-1-20(B) or Section 52-1-20(B)(1) result in an unrealistic calculation. Employer contends that the WCJ correctly applied the plain language of Section 52-1-20(B) after determining that Worker had been paid by the school district for the twenty-six weeks preceding her injury. We agree with Employer.

Under Section 52-1-20(B), a worker's "average weekly wage shall be determined by computing the total wages paid to the worker during the twenty-six weeks immediately preceding the date of injury and dividing by twenty-six." *Id.* "[I]f the worker worked less than twenty-six weeks in the employment in which the worker was injured, the average weekly wage shall be based upon the total wage earned by the worker in the employment in which the worker was injured, divided by the total number of weeks actually worked in that employment." Section 52-1-20(B)(1). "[I]n any case where the foregoing methods of computing the average weekly wage of the employee . . . will not fairly compute the average weekly wage, in each particular case, computation of the average weekly wage of the employee in such other manner and by such other method as will be based upon the facts presented [to] fairly determine such employee's average weekly wage." Section 52-1-20(C).

Under the terms of her employment contract, Worker was paid over a fifty-two week calendar year for approximately forty

weeks of actual work. Therefore, even though Worker was not offered work as a bus driver in June and July, her payroll records indicate that she continually received wages for her work from the 2006-2007 school year during this time. The plain language of Section 52-1-20(B) specifies that a worker's AWW is calculated by examining "the total wages paid to the worker during the twenty-six weeks immediately preceding the date of injury," indicating that our focus is on the wages earned by Worker, not whether she was actually working during this time. Because Worker's payroll records indicate that she did receive wages over the course of the twenty-six weeks preceding her injury, we find that the WCJ's AWW calculation under Section 52-1-20(B) was appropriate. *See Vinyard v. Palo Alto, Inc.*, 2013-NMCA-001, ¶ 16, 293 P.3d 191 (illustrating the propriety of adhering to the methodology set forth in Section 52-1-20(B) where a fair computation results).

Worker contends that Section 52-1-20(B) is inapplicable because the terms of her contract and the fact that she did not work during the summer months preceding her injury establish that she had not worked for twenty-six weeks in the employment. We disagree. The contract for the 2007-2008 school year between Worker and Employer states that Worker is "a non-certified employee with three or more consecutive years of employment with the School District" and neither party disputes that Worker had worked as a bus driver for Employer for seven consecutive school years prior to her injury. Additionally, the fact that Worker did not work during the two summer months in June and July preceding her injury, is not sufficient evidence by itself to constitute a new employment. *See Villanueva v. Sunday Sch. Bd.*, 121 N.M. 98, 102, 908 P.2d 791, 795 (Ct. App. 1995) (finding that a seasonal worker who had not worked for approximately five months during the winter preceding her injury did not conclusively establish that a new period of employment had begun for purposes of an AWW calculation).

Finally, Worker requests this Court to consider an alternative AWW calculation pursuant to Section 52-1-20(C) due to the fact that the 2007-2008 contract was a recent change in Worker's circumstances. In reviewing Worker's payroll records, we find no substantial shift in her wages earned during the 2006-2007 and 2007-2008 school years and Worker makes no argument to explain any effect that the most recent contract had on her wages. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 ("We will not review unclear arguments, or guess at what [a party's] arguments might be."). Further, there is no reason to resort to a Section 52-1-20(C) calculation as the WCJ's calculation under Section 52-1-20(B) resulted in a fair and accurate AWW for Worker.

II. Worker's Home Exercise Program

A home exercise program appears to have been an anticipated part of Worker's therapy. Worker's initial referral for physical therapy specified the need for a home exercise program as part of her rehabilitation. Notations from her various visits with her physical therapists indicate that implementing a home exercise program was planned. However, a note from her physical therapist states that "[Worker] reports she has not been performing any [home exercise program], reports she has not received any home therapy." There is no indication that Worker's doctors or physical therapists ever implemented the planned program by

prescribing specific home exercises for Worker to perform during her recovery.

There is also evidence that two independent evaluators recommended that Worker perform a home exercise program to improve her recovery. The first recommendation came from MaryBeth Plummer, who commented that "[Worker] has not worked for two years and three months; therefore, performing range of motion and mild strengthening exercises may be beneficial for her and could be performed with Thera-Band and light weights at home after proper instruction." Ms. Plummer was a physical therapist who examined Worker for purposes of a functional capacity evaluation (FCE) on January 4, 2010, and wrote her report because "[Worker] is approaching maximum medical improvement [(MMI)] regarding her work-related shoulder and cervical injuries and permanent lifting restrictions need to be established."

The other recommendation came from Dr. Juliana Garcia, who stated in her independent medical examination (IME) report that "[Worker] reports that she is not performing a home exercise program daily and only performs it once per month . . . . I recommend a home-based, self-directed exercise program. [Worker] should be participating in a daily home-based exercise regimen which includes components directed toward strengthening, stretching, flexibility, aerobic and cardiovascular condition." However, the IME report was created for litigation, it is addressed only to the attorneys for the parties, and it does not appear that either Worker or her treating physicians received a copy. Further, the report specifically states that the "[m]edical recommendations are offered or provided as guidance and not as medical orders. The opinions expressed do not constitute a recommendation that specific claims or administrative functions be made or enforced."

Worker challenges the WCJ's determination that "Worker has persisted in an injurious practice which has increased Worker's disability or retarded Worker's recovery from injury. The practice is failure to follow the home exercise plan." Worker contends that she was never prescribed to perform a specific home exercise program by her health care professionals. On cross-appeal, Employer argues that the WCJ correctly found Worker had persisted in an injurious practice, but erred in reducing Worker's impairment rating by only one percent because the evidence supports a reduction of at least five percent.

Under NMSA 1978, Section 52-1-51(I) (2005), "[i]f any worker persists in any unsanitary or injurious practice that tends to imperil, retard or impair the worker's recovery or increase the worker's disability . . . , the workers' compensation judge may in the judge's discretion reduce or suspend the workers' compensation benefits." To "persist in any injurious practice" means "that a workman must, as a matter of habit, go on resolutely or stubbornly in spite of opposition, importunity or warning, to inflict or tend to inflict injury to himself." *Martinez v. Zia Co.*, 99 N.M. 80, 82, 653 P.2d 1226, 1228 (Ct. App. 1982) (internal quotation marks omitted).

While we agree with Employer that the evidence establishes that Worker never did home exercises, nothing in the record establishes that Worker was ever prescribed a specific home exercise program by any of her health care professionals. As Worker was

never instructed to perform any specific exercises, she could not have acted "in spite of opposition, importunity or warning." *Id.* Thus, we conclude the WCJ erred in finding Worker had persisted in an injurious practice. *See id.* (reversing a finding that the worker had persisted in an injurious practice after being informed by his doctors that he "should lose this excess weight" due to the district court's lack of findings regarding what actions the worker had done, or not done, that constituted an injurious practice). Consequently, we need not address Employer's cross-appeal regarding the percentage of benefits to be reduced as a result of the WCJ's findings of Worker's injurious practices.

III. Employer's Job Offers

On January 9, 2008, Dr. Ross released Worker to return to work under a light level of duty, limiting her to "[l]ifting [twenty] pounds maximum with frequent lifting and/or carrying objects weighing up to [ten] pounds" and noting that she "[m]ay return to driving [a] bus." After receiving notification of her release to return to work, Employer offered Worker her former bus driver position with a twenty-pound lifting restriction, which she refused on January 17, 2008, due to her concerns with driving a school bus while on her prescribed mediation. Employer then made a second job offer for a crossing guard position, which Worker also refused, citing pain in her shoulder. Two weeks after Worker refused the offers, Dr. Ross ordered an MRI due to Worker's continuing shoulder pain. Based on the results of the MRI, Dr. Franco diagnosed Worker with a torn rotator cuff, put Worker off work once again, and scheduled her for surgery. Concluding that Worker had unreasonably refused Employer's job offers, the WCJ denied TTD benefits after the date of the offers pursuant to NMSA 1978, Section 52-1-25.1(B)(1) (2005), and denied the modifier portion of Worker's PPD benefits pursuant to NMSA 1978, Section 52-1-26(D) (1990). We address each in turn.

a. Worker's Temporary Total Disability Benefits

TTD is "the inability of a worker, by reason of accidental injury arising out of and in the course of the worker's employment, to perform the duties of that employment prior to the date of the worker's [MMI]." Section 52-1-25.1(A). Therefore, "[i]f, prior to the date of [MMI], an injured worker's health care provider releases the worker to return to work, the worker is not entitled to [TTD] benefits if . . . the employer offers work at the worker's preinjury wage." Section 52-1-25.1(B)(1).

Worker asserts that she remained eligible for TTD benefits throughout her recovery because "TTD means the inability of the [w]orker, by reason of accidental injury . . . to perform the duties of that employment prior to the date of [the] worker's MMI" and that "her injury and medication caused her to be unable to work" even after her doctor released her to return to work. Worker also challenges the release to work itself on the basis that Dr. Ross did not have all the relevant information necessary to make that determination. *See Sanchez v. Zanio's Foods, Inc.*, 2005-NMCA-134, ¶ 14, 138 N.M. 555, 123 P.3d 788 (citing *Niederstadt v. Ancho Rico Consol. Mines*, 88 N.M. 48, 536 P.2d 1104 (Ct. App. 1975) (holding that a doctor's report cannot serve as the basis for establishing causation of an alleged work-related injury when the doctor lacked knowledge of an earlier unrelated incident in which the worker had injured himself)).

Employer argues that the WCJ correctly denied TTD benefits because Employer offered Worker two jobs at her preinjury wage and that Worker's views regarding her ability to perform the offered positions are irrelevant under the language of the statute. We agree with Worker.

"Section 52-1-25.1 applies so long as the worker is offered the position, even if the worker does not accept and become rehired." *Jeffrey v. Hays Plumbing & Heating*, 118 N.M. 60, 63, 878 P.2d 1009, 1012 (Ct. App. 1994). "If a worker can return to work and earn the same wage he was earning prior to his injury, there is no reason for him to receive temporary disability benefits." *Garcia v. Borden, Inc.*, 115 N.M. 486, 492-93, 853 P.2d 737, 743-44 (Ct. App. 1993). However, "the [L]egislature intended that where a worker is given a release to return to work, the release anticipates that the worker return to the type of work he was doing prior to the accident or work which he or she is otherwise physically capable of performing." *Id.* at 493, 853 P.2d at 744. The language of the Workers' Compensation Act (WCA) does not establish "that [the e]mployer can offer any work that has the same pre-injury wage, and thereby make [the w]orker ineligible to receive disability benefits, even though [the w]orker is unable to perform the work." *Id.*; *see also* 4 Arthur Larson & Lex. K. Larson, *Larson's Workers' Compensation* § 85.01, at 85-3 (2012) ("[I]n order for there to be a refusal of suitable employment on the part of the employee, a specific position, within the employee's medical limitations, must exist in fact, not just in theory." (footnote omitted)).

Worker's rejection of the job offers was based on her inability to perform the offered work as demonstrated by the results of the MRI and Dr. Franco's diagnosis. Although Worker was released to return to work on January 9, 2008, by Dr. Ross, medical testing later established that this release was premature and that Worker was in fact unable to return to work at the time Employer made its job offers. We recognize that Employer properly relied on the release to return to work in making the offers. However, we cannot disregard that requiring Worker to accept employment under the circumstances before us would have run the substantial risk of further injury to Worker's shoulder, contrary to the WCA. *See* NMSA 1978, § 52-1-50.1(A)(1) (1990) (requiring an employer to rehire an injured worker, provided that "the worker's treating health care provider certifies that the worker is fit to carry out the pre-injury job or modified work similar to the pre-injury job without significant risk of reinjury"). Thus, we agree with Worker that she remained entitled to TTD benefits throughout her recovery.

The result we reach does not give an employee a right to contravene her attending physician's determination that she is ready to return to her job duties. Worker refused the job offers by Employer at her own peril. However, because subsequent evidence established that Dr. Ross's release was premature and that Worker was in fact unable to return to work, Worker remained eligible for TTD benefits. *See Caldwell v. Joseph W. Vestal & Son, Inc.*, 371 S.W.2d 836, 838-39 (1963) (holding an employer liable for the cost of a worker's surgery when the recommendation for the procedure by the worker's physician later turned out to be the correct treatment despite a contrary diagnosis from the employer's physician); *compare In re Porter v. Triborough Bridge & Tunnel Auth.*, 888 N.Y.S.2d 288, 289 (N.Y. App. Div. 2009) (finding that a worker had voluntarily removed himself from the workforce when he

rejected his employer's job offer for work that he was capable of performing, as established by evidence despite his testimony to the contrary). Therefore, we reverse the denial of TTD benefits to Worker.

b. Worker's Permanent Partial Disability Modifications

Section 52-1-26(D) states, "[i]f, on or after the date of [MMI], an injured worker returns to work at a wage equal to or greater than the worker's pre-injury wage, the worker's permanent partial disability rating shall be equal to his impairment and shall not be subject to the modifications calculated." *Id.* Permitting a worker to evade application of this section by voluntary unemployment or underemployment is contrary to the purposes of the WCA. *Jeffrey*, 118 N.M. at 64, 878 P.2d at 1013. Thus, a worker becomes ineligible for modifier benefits pursuant to Section 52-1-26(D) when either the worker accepts employment at or above his preinjury wage or unreasonably refuses offered employment at or above his preinjury wage. *Cordova v. KSL-Union*, 2012-NMCA-083, ¶ 13, 285 P.3d 686, *cert. denied*, 2012-NMCERT-007, 295 P.3d 599.

Similar to her challenge to the denial of TTD benefits, Worker contends that application of Section 52-1-26(D) was improper here as she "was unable to work because of her injury" and that she "should not be penalized for protecting her health, the safety of children while on medication, or avoiding further injury to herself when her shoulder injury was not properly diagnosed and caused her severe pain." Employer argues that the WCJ correctly denied the modifier portion of her PPD benefits after finding that "Worker would have been earning a wage equal to or greater than her pre-injury wage after [MMI] had she accepted the Employer's light/modified duty job offers." We conclude that Section 52-1-26(D) is inapplicable here.

As already discussed, the results of the MRI and Dr. Franco's diagnosis established that Worker was unable to perform either the offered bus driver position or the crossing guard position. Because she was unable to perform either job, these offers by Employer cannot be applied to render Worker ineligible for workers' compensation benefits. *See Garcia*, 115 N.M. at 493, 853 P.2d at 744 (stating that the WCA does not establish "that [the e]mployer can offer any work that has the same preinjury wage, and thereby make [the w]orker ineligible to receive disability benefits, even though [the w]orker is unable to perform the work"). Because Employer made no further job offers to Worker following her surgery, application of Section 52-1-26(D) is inappropriate here. Therefore, we reverse the order of the WCJ denying Worker the modifier portion of her PPD benefits.

IV. Worker's Residual Physical Capacity

Worker argues that the WCJ erroneously classified her residual physical capacity as light because she is unable to push or pull with her arms, contrary to the requirements under NMSA 1978, Section 52-1-26.4 (2003). Under Section 52-1-26.4(C)(3), a light physical capacity determination

> means the ability to lift up to twenty pounds occasionally or up to ten pounds frequently. Even though the weight lifted may be only a negligible amount, a job is in this category when it requires walking or standing to a significant degree or when it involves sitting most of the

time with a degree of pushing and pulling of arm or leg controls or both.

A sedentary physical capacity determination "means the ability to lift up to ten pounds occasionally or up to five pounds frequently." Section 52-1-26.4(C)(4).

We find no error in the WCJ's finding that Worker's residual physical capacity was light duty. The WCJ heard evidence that Worker had been released to work twice in a light duty capacity by her treating physicians. The two independent medical examiners also agreed that Worker's abilities were consistent with a light duty designation. Despite this evidence, Worker points out a few lines of deposition testimony from Dr. Garcia as conclusive proof of her inability to push and pull with her hands. However, in this same testimony, Dr. Garcia assigned Worker a light duty classification, noted certain inconsistencies with Worker's use of her hands during her evaluation, and stated that she did not believe that these inconsistencies were a true representation of Worker's capacities. We conclude that the record supports the WCJ's determination regarding Worker's residual physical capacity. *See generally Garnsey v. Concrete Inc. of Hobbs*, 1996-NMCA-081, ¶ 20, 122 N.M. 195, 922 P.2d 577 ("It is the duty of the fact-finder to weigh the evidence and resolve any conflicts.").

V. Employer's Offer of Compensation Order

Lastly, we address Employer's cross-appeal regarding the award of Worker's attorney fees. Trial was originally scheduled for March 28, 2011. However, the proceeding held on that date focused on Worker's motion to compel discovery, and the trial was rescheduled for April 27, 2011. On April 15, 2011, Employer made an offer of compensation to Worker, which Worker did not respond to. Trial was then held on April 27, 2011. During a hearing on Worker's attorney fees, Employer requested the WCJ to apply NMSA 1978, Section 52-1-54(F)(3) (2003), but the WCJ refused, finding that Employer had made an untimely offer of compensation after the start of trial on March 28, 2011. Employer challenges this finding, arguing that the facts do not establish that trial commenced on March 28, 2011, but rather on April 27, 2011, making its April 15, 2011 offer timely under Section 52-1-54(F). We agree with Employer.

Section 52-1-54(F) states that "[a]fter a recommended resolution has been issued and rejected, but more than ten days before a trial begins, the employer or claimant may serve upon the opposing party an offer to allow a compensation order to be taken against him[.]" Section 52-1-54(F)(3) then provides: "[I]f the employer's offer was greater than the amount awarded by the compensation order, the employer shall not be liable for his fifty percent share of the attorney fees to be paid the worker's attorney and the worker shall pay one hundred percent of the attorney fees due to the worker's attorney." Otherwise, "the payment of a claimant's attorney fees . . . shall be shared equally by the worker and the employer." Section 52-1-54(J).

We agree with Employer that the facts do not support a finding that trial began on March 28, 2011. On that date, the WCJ began by asking if the parties had "[a]ny preliminary matters prior to the presentation of evidence or opening statement requiring attention." Worker notified the WCJ of her pending motion to compel discovery from

Employer and arguments were heard from both parties. After granting the motion and ordering Employer to send its responses to the interrogatories to Worker within fourteen days, a new trial date was set and the hearing was adjourned. No opening statements were made, no evidence was presented, no witnesses were sworn in or gave testimony, and the depositions and exhibits that had been submitted to the WCJ prior to the start of the proceedings were returned to the parties. During the approximately eleven-minute hearing, the WCJ stated that "[w]e're not going to go to trial today," they would find "the first available trial date" to reschedule, and "this case has been rescheduled for purposes of trial on April 27." Lastly, the WCJ filed a written order granting Worker's motion to compel following the March 28, 2011 hearing, which noted that "[t]his matter is continued for Trial on April 27, 2011."

In light of the foregoing, we conclude that the WCJ erred in finding that trial began on March 28, 2011. *See Black's Law Dictionary* 1644 (9th ed. 2009) (defining a trial as "[a] formal judicial examination of evidence and determination of legal claims in an adversary proceeding"). A trial on the merits is "[a] trial on the substantive issues of a case, as opposed to a motion hearing or interlocutory matter." *Id.* at 1645; *compare Willcox v. United Nuclear Homestake Sapin Co.*, 83 N.M. 73, 75, 488 P.2d 123, 125 (Ct. App. 1971) (finding that an employer's offer for compensation was untimely under an earlier version of Section 52-1-54(F) because it was not made thirty days prior to when the trial took place). Thus, we reverse the WCJ's order requiring Employer to pay fifty percent of Worker's attorney fees.

CONCLUSION

We remand for recalculation of Worker's compensation benefits and entry of a compensation order in conformity with this Opinion.

IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

CYNTHIA A. FRY, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-086

Filing Date: June 17, 2013

Docket No. 32,053

MARY LAWTON,

Plaintiff-Appellant,

v.

RICHARD SCHWARTZ, JANE SCHWARTZ, JAMES JOHNSTONE, BARBARA JOHNSTONE, ALLAN RAFF, HARRIET M. RAFF, ERROL LEVINE and JILL MEYERS,

Defendants-Appellees,

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for Appellees

OPINION

FRY, Judge.

Plaintiff Mary Lawton appeals the district court's order granting Defendants' motion for summary judgment and dismissing her claims for injunctive relief. Plaintiff filed suit attempting to enforce a provision of the Estancia Primera subdivision's (Subdivision) restrictive covenants (CCRs) that prohibited trees maintained within the Subdivision from interfering with homeowners' views. Plaintiff primarily raises two issues on appeal. First, Plaintiff argues that an amendment to the CCRs that terminated the view restriction was improper during the fifty-five year term of the CCR's duration clause. Second, Plaintiff contends that the voting procedures utilized to adopt the amendment failed to comply with the amendment procedures of the CCRs. Because we conclude that the CCRs are ambiguous and that the validity of the amendment should not have been determined as a matter of law, we reverse the district court's order.

BACKGROUND

Plaintiff is a homeowner in the Subdivision and a member of the Estancia Primera Community Services Association (Association). In 1993, Plaintiff purchased a Subdivision lot situated on a small ridge with westerly views of the Jemez Mountains. Plaintiff's home was designed to take advantage of these views and includes two portals off the western-facing living room and master bedroom. In 2009, Plaintiff notified the Association's Architectural Review Board (ARB) that certain cottonwood trees on Defendants' properties were obstructing her view of the Jemez Mountains and requested that the Association remedy the situation

either through extensive pruning or removal of the trees.

The Subdivision's original CCRs were recorded in 1982. Since that time, the CCRs have been amended at least eight times. Plaintiff originally rooted her challenge to the trees in Section 6.18 of the 2005 amended version of the CCRs. Both the 1982 and 2005 versions of Section 6.18 provided, "No shrub, hedge, tree or other landscaping which interferes with the view, solar access and/or privacy of any [l]ot . . . shall be planted, permitted or maintained on any Lot, Living Unit or Parcel or upon any Common Area."

The ARB initially denied Plaintiff's request to enforce the view restriction. Plaintiff's appeal to the Association's board of directors was also unsuccessful. In July 2010, Plaintiff renewed her request that the ARB take action to enforce the view restriction despite voluntary actions by some property owners to trim their trees. While Plaintiff's request was discussed at three subsequent ARB meetings, no action was taken either granting or denying her request. Ultimately, Plaintiff opted to withdraw her request from the ARB and file suit against the property owners in December 2010. Plaintiff's original complaint sought to enforce Section 6.18 of the 2005 amended CCRs.

However, in September 2010, Kurt Sommer, a member of the ARB, circulated ballots among the Subdivision's homeowners proposing to amend Section 6.18 by deleting the word "view." The Association did not hold meetings in regard to the proposed amendment (Sommer Amendment). Instead, Sommer included a letter with the ballots discussing the reasons for the amendment and requesting the homeowners to return the ballots directly to him by mail.

The Sommer Amendment received majority support by the homeowners. Despite reservations by the Association's attorney and some Association board members as to the validity of the voting procedures utilized in adopting the amendment, the Association considered this vote tally sufficient under the amendment procedures provision of the CCRs to record the Sommer Amendment. The amended CCRs, now no longer restricting foliage from obstructing homeowners' views, were recorded in April 2011 by a written instrument signed by the Association president and vice-president.

After the Sommer Amendment was recorded, Plaintiff sought and was granted leave to file an amended complaint. In her amended complaint, Plaintiff sought relief under Section 6.18 of the 2005 amended CCRs and the original CCRs and a declaratory judgment that the Sommer Amendment was void. Plaintiff subsequently filed a motion for partial summary judgment arguing that the duration clause of the CCRs prohibited the Sommer Amendment, and, alternatively, that the voting procedures used to adopt it were improper under the CCRs. Defendants filed their own joint motion for summary judgment arguing that the Sommer Amendment was properly adopted and, as such, that the CCRs no longer contained the view restriction that served as the basis for Plaintiff's suit. The district court granted Defendants' motion and ruled that the Sommer Amendment was valid and barred Plaintiff's remaining claims under the original and 2005 amended CCRs. Plaintiff now appeals.

DISCUSSION

Standard of Review

"An appeal from an order granting a

motion for summary judgment presents a question of law subject to de novo review." *Farmington Police Officers Ass'n Commc'n Workers of Am. Local 7911 v. City of Farmington*, 2006-NMCA-077, ¶ 13, 139 N.M. 750, 137 P.3d 1204. "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." *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280 (internal quotation marks and citations omitted).

The CCR Provisions at Issue

We primarily confine our analysis of the CCR provisions to those provisions in the original CCRs unless otherwise stated. We do so because if the original CCRs did not permit amendments during the fifty-five-year duration period, it is immaterial whether subsequent amendments granted homeowners the authority to amend the CCRs by a majority vote.[1] The following provisions are taken from the original CCRs.

> Section 9.1 (duration clause) of the CCRs provides:
> Term of Declaration. The covenants, conditions[,] and restrictions of this Declaration shall run with and bind the Property and every part thereof, and shall inure to the benefit of and shall be enforceable by the Community Association or any Owner, his respective legal representatives, heirs, successors and assigns, for a term of fifty-five (55) years from the date this Declaration is recorded, after which time they shall be automatically extended for successive periods of ten (10) years each, unless an instrument in writing, signed by at least seventy-five [percent (75%)] of the Owners, has been recorded within the year preceding the beginning of any such ten-year period agreeding [*sic*] to terminate or revise this Declaration.

Section 9.2 of the original CCRs is entitled "Amendment Procedure." Section 9.2 contains two subsections, one applicable to amendments prior to the first sale of a lot by the developer of the Subdivision (Declarant) and one for "Subsequent Amendments." Section 9.2's subsections provide:

> (a) Prior to First Sale. Prior to the close of the first sale of a Lot, Living Unit or Parcel to an Owner other than Declarant or a Merchant Builder, Declarant may amend this Declaration, without the consent or assent of any individual or entity, provided said amendment does not violate the purposes and intent of the Master Development Plan and the Estancia Primera PRC Ordinance.
>
> (b) Subsequent Amendments. After the close of said first sale and subject to Section 9.3, this Declaration may be amended only by the affirmative vote (in person or by proxy) or written assent of at least [fifty-one percent (51%)] of the outstanding Class A votes and with

[1]For similar reasons, we agree with Plaintiff that the fact that there have been several amendments since the original CCRs were filed has no bearing on the initial issue of whether the original CCRs permitted immediately enforceable homeowner amendments. However, given our disposition in this case, the existence of subsequent amendments may have some bearing on the fact finder's determinations on remand.

the consent of the Class C Member. Any such amendment shall not be in violation of the Master Development Plan or the Estancia Primera PRC Ordinance. Provided, however, Declarant shall have the right, at any time and from time to time, to unilaterally amend this Declaration or the provisions of any of the Founding Documents so as to cause the same to comply with the then current requirements of the Master Development Plan, as amended from time to time.

(Emphasis omitted.)

Finally, Section 9.3 of the original CCRs is entitled "Limitations on Amendments." Section 9.3 states:

> In addition to the restrictions stated in Section 9.6, by the acceptance of a deed for their respective Lot, Living Unit or Parcel, each Owner acknowledges and agrees, on behalf of himself and his respective successors-in-interest, personal representatives, and assigns, that: (1) this Declaration was created and recorded, in part, to protect and otherwise enhance the value of the Estancia Primera Property; and (2) in order to ensure such protection and enhancement in value, no provision or condition of this Declaration which either directly or indirectly affects the use and/or operation of the Estancia Primera Property, including, but not limited to, those provisions and conditions relating to the operation and management of the Community or Common Areas, the use by any Owner or his licensees and invitees of any part of the Property, and/or the operation of the Community Association, shall be amended or otherwise modified without the express written consent of Declarant (or its successors-in-interest or assigns).

The Parties' Constructions

Each party maintains that their construction of the relevant CCR provisions is the only logical and harmonious construction. *See Montoya v. Barreras*, 81 N.M. 749, 750, 473 P.2d 363, 364 (1970) ("Restrictive covenants must be considered reasonably, though strictly, and an illogical, unnatural, or strained construction must be avoided."). "In construing a [restrictive] covenant, a court is to give effect to the intention of the parties as shown by the language of the whole instrument, considered with the circumstances surrounding the transaction, and the object of the parties in making the restrictions." *Hines Corp. v. City of Albuquerque*, 95 N.M. 311, 313, 621 P.2d 1116, 1118 (1980). We outline each of the parties' constructions below.

Plaintiff argues a two-step construction to harmonize the fifty-five-year duration period and the seventy-five percent voting requirement in Section 9.1 with the fifty-one percent voting requirement in Section 9.2(b). First, Plaintiff contends that Section 9.1 requires homeowners to wait fifty-five years before they can take any action to decide whether they want to "terminate or revise" the CCRs. An agreement by the homeowners to terminate or amend would then require an "instrument in writing, signed by at least seventy-five [percent (75%)] of the Owners." Second, once that threshold approval has been attained, Section 9.2 takes effect and would govern the actual adoption of

proposed substantive amendments based upon the written assent or vote of the lower fifty-one percent majority. Therefore, Plaintiff contends that the Sommer Amendment is impermissible until the conclusion of the fifty-five-year duration term.

Defendants, on the other hand, argue that while Section 9.1 does establish an initial fifty-five-year duration term, the heightened seventy-five percent voting requirement of Section 9.1 is only applicable to instances in which homeowners agree to "terminate [the CCRs], significantly abandon its restrictions and protections, or revise the primary or extended term established in Section 9.1." Defendants argue that Section 9.2's amendment procedures provide a means for making individual amendments to the CCRs and allow for these amendments before the end of the fifty-five-year duration term in Section 9.1. Thus, Defendants argue that Section 9.2 expressly allows for the Sommer Amendment during the initial fifty-five-year term based upon a majority vote of the homeowners.

The district court agreed with Defendants' construction and concluded that the CCRs "allow[ed] for amendments to the [CCRs] prior to the expiration of the fifty-five[-]year period and any subsequent extension periods specified in the duration clause in Section 9.1 of the [CCRs]." Therefore, because a majority of the homeowners voted in favor of the Sommer Amendment, the district court concluded that there were no genuine issues of material fact, and the Sommer Amendment was valid and enforceable as a matter of law.

The CCRs Are Ambiguous

In *Heltman v. Catanach*, we stated:

> Where a provision [in restrictive covenants] provides that a covenant shall remain in effect for an initial period, after which it may be modified by less than unanimous consent, courts have interpreted these provisions to simply provide an exception, after a certain number of years, to the general rule that unanimity is required in order to amend a restrictive covenant.

2010-NMCA-016, ¶ 7, 148 N.M. 67, 229 P.3d 1239. This strict enforceability of duration clauses reflects the policy that lot owners should be able to "rely on the restrict[ive covenants] for a substantial period of time without the concern that they could be subject to a change at any moment which, as just one example, could result in diminished property values." *Kauffman v. Roling*, 851 S.W.2d 789, 794 (Mo. Ct. App. 1993). However, we also review restrictive covenants using contract interpretation principles, *see Agua Fria Save The Open Space Ass'n v. Rowe*, 2011-NMCA-054, ¶ 19, 149 N.M. 812, 255 P.3d 390, and if the document allows for amendments during the duration period then we must give that language effect. *Cain v. Powers*, 100 N.M. 184, 186, 668 P.2d 300, 302 (1983) (stating that the "words in a restrictive covenant must be given their ordinary and intended meaning"). Therefore, our review of amendments to restrictive covenants that are passed without unanimous consent and during the term stated in the duration clause requires us to determine whether the restrictive covenants expressly provide for the type of amendment at issue during the initial duration period. *See Estates at Desert Ridge Trails Homeowners' Ass'n v. Vazquez*, 2013-NMCA-051, ¶ 29, 300 P.3d 736 (stating that "if the covenants provide an initial duration period, . . . absent other

language in the covenant to the contrary, amendments to the covenants during that initial period are void unless there is unanimous approval among the property owners").

We disagree with the district court that Defendants' construction harmonizes the duration clause with the amendment procedures provision as a matter of law. Defendants attempt to draw parallels to many of the cases we highlighted in *Vazquez* as containing the types of express language in restrictive covenants that allow for immediately enforceable amendments. *See id.* ¶ 33; *see, e.g., Good v. Bear Canyon Ranch Ass'n*, 160 P.3d 251, 254 (Colo. App. 2007) (concluding that language in duration clause stating, "This declaration and any amendments or supplements to it shall remain in effect from the date of recordation for a period of fifty . . . years" allowed for amendments during the duration period (emphasis, internal quotation marks, and citation omitted)); *Reinecke v. Kleinheider*, 804 S.W.2d 838, 841 (Mo. Ct. App. 1991) (concluding that language in a restrictive covenant that amendments could be undertaken "at any time" allowed for immediately enforceable amendments); *Miller v. Sandvick*, 921 S.W.2d 517, 519-20 (Tex. Ct. App. 1996) (concluding that restrictive covenants could be amended during duration period where amendment procedures provision stated, "[t]hese covenants may be amended at any time by an instrument signed by two-thirds (2/3) of the then owners" (internal quotation marks omitted)).

In contrast to those cases, however, the original CCRs in the present case grant the Declarant, not the homeowners, the right to amend "at any time." Similarly, although "Declaration" is defined in the CCRs as "the covenants, conditions, and restrictions . . . as they may from *time to time be amended*[,]" this language, by itself, is not an express authorization to allow for amendments *by homeowners* during the initial duration period. This is especially true where the authority to amend "from time to time" is used throughout the CCRs in reference to the Declarant's authority to amend, not the homeowners' authority. *See Vazquez*, 2013-NMCA-051, ¶ 34 (concluding that specific authorization in the declaration to amend to allow the developer to transfer membership rights to homeowners did not evidence an intent to allow use restriction amendments by homeowners).

However, Plaintiff's construction of these provisions is also problematic. Construing the seventy-five percent voting requirement in Section 9.1 as the voting percentage required to pass an agreement to decide to amend the CCRs contradicts our rule of construction in *Heltman*. 2010-NMCA-016, ¶ 7; *see Vazquez*, 2013-NMCA-051, ¶ 29. Standing alone, Section 9.1 would prohibit amendments during an initial fifty-five-year term, after which the CCRs can be terminated or revised, including by way of amendments, by seventy-five percent approval of homeowners. It would be illogical to conclude that the mere addition of a separate amendment procedures provision transforms the seventy-five percent voting requirement into a threshold procedural hurdle for homeowners to substantively amend the CCRs after the conclusion of the duration period. Furthermore, while we concluded in *Vazquez* that a separate duration clause and amendment procedures provisions did not evidence an intent to allow amendments during the duration term, we were not confronted in *Vazquez* with separate voting requirement percentages in the provisions. *See Vazquez*,

2013-NMCA-051, ¶ 35. This structure could suggest that the heightened voting requirement of Section 9.1 may correspond to extensive revisions to the CCRs, not to an agreement to revise the CCRs in general before applying a majority vote to the actual substantive changes, and that such extensive revisions could not take place until the conclusion of the fifty-five- year term. Under this view, Section 9.2(b) would grant homeowners the authority to adopt certain types of lesser amendments by majority vote after sale of the first lot but subject to the limitations of Section 9.3. In other words, it is possible that the CCRs contemplate some amendments to the CCRs by the majority vote of homeowners "[a]fter the close of [the] first sale," while prohibiting other more significant amendments during the duration period and absent the seventy-five percent approval of homeowners.

In sum, we believe that both parties' constructions highlight, rather than harmonize, the conflicting nature of the duration clause and amendment procedures provisions. Defendants would have us draw a distinction between "revise" and "amend" such that "revise" would be construed as referring to significant modifications to the CCRs commensurate with the heightened seventy-five percent voting requirement of Section 9.1. Without further support in the CCRs for such a distinction, or, at the least, an indication of the contours of the homeowners' amendment power, agreeing with Defendants' construction risks rendering the duration clause meaningless. *See Vazquez*, 2013-NMCA-051, ¶ 35. Plaintiff's construction, on the other hand, asks us to disregard that the triggering event in Section 9.2(b) allowing for homeowner amendments by majority vote is "[a]fter the close of said first sale" and not at the conclusion of the fifty-five year duration period. Regardless, assuming the homeowners were granted the authority to adopt immediately enforceable amendments, without a clearer indication of the extent of that amendment power during the duration period, merely accepting that homeowner amendments were contemplated does not necessarily lead to the conclusion that the Sommer Amendment itself was permissible as a matter of law. This is especially true where Sections 9.3 and 9.6 prohibit use restriction amendments under certain circumstances without the Declarant's consent and Section 2.4(a) permits "complementary" restrictions but prohibits revocation or significant modifications to the restrictions when passing supplementary restrictions for annexed property.

In acknowledging the conflicting nature of these provisions, we cannot escape the conclusion that the CCRs are ambiguous. *See Jones v. Schoellkopf*, 2005-NMCA-124, ¶ 12, 138 N.M. 477, 122 P.3d 844 (stating that an "ambiguity is . . . created when provisions are reasonably and fairly susceptible to two constructions"). Resolving an ambiguity is generally a question of fact. *See Mark V, Inc. v. Mellekas*, 114 N.M. 778, 781, 845 P.2d 1232, 1235 (1993). We recognize that in *Mark V*, our Supreme Court stated that an ambiguity can be resolved as a matter of law when no evidence is offered of the facts and circumstances surrounding the execution of the agreement leading to the conflicting interpretations. *Id.* However, we conclude that the conflicting interpretations of the CCRs present questions of fact that preclude summary judgment and, thus, that the parties may present evidence to the fact finder regarding circumstances that may shed light on the meaning of the CCRs.

In addition to addressing the conflicting provisions discussed above, the

parties may choose to introduce evidence relevant to questions remaining as to whether Section 9.3 prohibits the Sommer Amendment and whether the 1998 amendment that removed reference to the Declarant was valid. As noted above, the "[a]fter the close of said first sale" language in Section 9.2(b) may indicate that the CCRs gave homeowners some authorization to amend during the duration period. Section 9.2(b) goes on to state that these amendments are subject to Section 9.3, which prohibits amendments to provisions or conditions of CCRs that affect "the use by any Owner . . . of any part of the Property" without the express written consent of the Declarant or its successors-in-interest or assigns. The view restriction at issue is among the "[u]se [r]estrictions" of Article 6 of the CCRs. Thus, under the original CCRs, the Sommer Amendment would likely be invalid without the express written consent of the Declarant or its successors-in-interest or assigns.

In 1998, however, the CCRs were amended to remove references to the Declarant who, according to the notice sent to homeowners, was bankrupt and "long gone." After this amendment, Section 9.3 only required the fifty-one percent majority approval of homeowners under Section 9.2 to amend use restrictions. Thus, the question arises whether the 1998 amendment validly substituted a fifty-one percent majority homeowner vote for the express written consent of the Declarant to amend use restrictions. The parties have not argued this issue, and we express no opinion as to the 1998 amendment's ultimate validity. We merely state that this issue may warrant attention by the parties on remand in addition to the remaining issues regarding the Sommer Amendment's validity. In any event, our reversal of the summary judgment allows the parties to present whatever evidence they deem necessary to aid the fact finder in determining the meaning of the CCRs.

Whether the Voting Procedures Complied With the CCRs Must Be Determined on Remand

Because we conclude that the district court erred in granting summary judgment on the validity of the Sommer Amendment, we reverse the district court's conclusion that the "vote exercised by the majority of [the] lot owners was proper." On remand, the fact finder should revisit this issue in the context of interpreting the ambiguities in the CCRs.

CONCLUSION

For the foregoing reasons, we reverse the district court's order granting summary judgment and remand for proceedings consistent with this Opinion.

IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

MICHAEL E. VIGIL, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-038

Filing Date: August 12, 2013

Docket No. 32,597

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

MICHAEL ANTHONY SAMORA,

Defendant-Appellant.

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OPINION

DANIELS, Justice.

Defendant Michael Samora was convicted of first-degree murder and other crimes for the bludgeoning death of his girlfriend and a subsequent robbery and stabbing at an Albuquerque convenience store. One of Defendant's primary issues in his direct appeal to this Court is whether his convictions should be reversed as a result of the district court's excusal of a Spanish-speaking prospective juror who had difficulty understanding the English language. While we agree with Defendant's argument, made for the first time on appeal, that the juror's dismissal violated Article VII, Section 3 of the New Mexico Constitution, we hold that the unpreserved error was not the kind of fundamental error that requires reversal of a conviction without a party's raising the issue in the trial court. We also hold that Defendant's remaining challenges are without merit. Accordingly, while we affirm Defendant's convictions, we stress to trial judges and lawyers that they have a shared responsibility to make every reasonable effort to protect the right of our

non-English-speaking citizens to serve on New Mexico juries.

I. FACTS AND PROCEEDINGS

Defendant's appeal is based primarily on the dismissal of Mr. Rojelio Haros from Defendant's jury pool. During voir dire, the district court noted that Mr. Haros had written in his jury questionnaire that he did not "understand English [well] enough to write in English" and asked him if he understood English well enough to proceed with jury selection without the aid of an interpreter, stating that the interpreter that had been requested by the court mistakenly ended up in another courtroom. When Mr. Haros stated that he had been able to follow the discussions to that point, the court promised to provide an interpreter should Mr. Haros be selected as a juror.

At the conclusion of voir dire, when the court asked Mr. Haros if he had been able to follow the voir dire exchanges, Mr. Haros admitted that there was a large part of it that he had not understood. When the court proposed to excuse Mr. Haros for cause, defense counsel objected, not because the inability to understand English could not provide a lawful basis for dismissal but on the theory that Mr. Haros understood English well enough to serve without an interpreter during voir dire. The State argued that Mr. Haros should be removed. The court ultimately dismissed Mr. Haros, concluding that Mr. Haros had been unable to participate in voir dire in a meaningful way.

On appeal, Defendant argues that his conviction should be reversed because Mr. Haros's dismissal violated Article VII, Section 3 of the New Mexico Constitution, which resulted in a denial of Defendant's constitutional right to be tried by a fair and impartial jury. Defendant also argues that his conviction should be reversed based on violations caused by (1) the late disclosure of DNA evidence, (2) being denied an expert witness, (3) inappropriate testimony by a witness, (4) ineffective assistance of counsel, (5) trial delays, and (6) cumulative error. Because Defendant was sentenced to life imprisonment, this Court has exclusive jurisdiction to hear his direct appeal. *See* N.M. Const. art. VI, § 2 ("Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court."); *accord* Rule 12-102(A)(1) NMRA.

II. DISCUSSION

A. Excusal of a Juror for Inability to Understand English Was Error but Not Fundamental Error Requiring Reversal in the Absence of Preservation

Article VII, Section 3 of the New Mexico Constitution guarantees that "[t]he right of any citizen of the state to . . . sit upon juries, shall never be restricted, abridged or impaired on account of . . . [the] inability to speak, read or write the English or Spanish languages except as may be otherwise provided in this constitution." While we agree that Mr. Haros's dismissal in the circumstances before us violated that constitutional provision, the unpreserved error does not warrant reversal of Defendant's conviction under the fundamental error standard.

1. Mr. Haros's Dismissal Violated Article VII, Section 3 of the New Mexico Constitution

We begin our analysis by examining

whether the dismissal of Mr. Haros violated the New Mexico Constitution. We review constitutional claims de novo. *See State v. Pacheco*, 2007-NMSC-009, ¶ 12, 141 N.M. 340, 155 P.3d 745 (reviewing de novo the two interrelated constitutional rights of a non-English-speaking citizen to serve on a jury and a defendant's right to a fair and impartial jury).

This Court has recognized more than once that Article VII, Section 3 unambiguously protects the rights of non-English speakers to serve on our state juries. *See State v. Rico*, 2002-NMSC-022, ¶ 5, 132 N.M. 570, 52 P.3d 942; *see also Pacheco*, 2007-NMSC-009, ¶ 13 (interpreting Article VII, Section 3 as applying to jury deliberations as well as to trials). This unique right has been a part of our judicial history since our territorial days. *See Territory v. Romine*, 1881-NMSC-010, ¶¶ 11, 14, 2 N.M. 114 (addressing an 1859 statute that lacked any language requirement for jury service and noting that "[a]part from the impracticability of obtaining English-speaking juries, it would have been manifestly unjust to the great majority of the people of the territory, had such a requirement as to language been made"). Today, the right is enshrined in our state Constitution as one of the few provisions that can be amended only by a supermajority of both legislators and voters. *See* N.M. Const., art. XIX, § 1 ("No amendment shall restrict the rights created by Section[] . . . Three of Article VII . . . unless it be proposed by vote of three-fourths of the members elected to each house and be ratified by a vote of the people of this state in an election at which at least three-fourths of the electors voting on the amendment vote in favor of that amendment.").

In order to protect the rights guaranteed by Article VII, Section 3, we have emphasized that New Mexico courts are required to "make *every reasonable effort* to accommodate a potential juror for whom language difficulties present a barrier to participation in court proceedings." *Rico*, 2002-NMSC-022, ¶ 11 (emphasis added). In explaining what we meant by "every reasonable effort," we cautioned that "inconvenience alone will not suffice; a trial court shall not excuse a juror on the basis of an 'inability to speak, read or write the English or Spanish languages' absent a showing that accommodating that juror will create a substantial burden." *Id.* ¶ 12 (quoting N.M. Const. art. VII, § 3). And we went further to provide examples of the factors that may be relevant to the reasonable efforts standard:

> What constitutes sufficiently reasonable efforts will depend on the circumstances in which the problem arises. Whether a reviewing court will find a trial court's efforts in this regard reasonable will depend on several factors, including, but not limited to, the steps actually taken to protect the juror's rights, the rarity of the juror's native language and the difficulty that rarity has created in finding an interpreter, the stage of the jury selection process at which it was discovered that an interpreter will be required, and the burden a continuance would have imposed on the court, the remainder of the jury panel, and the parties.

Id.

In *Rico*, this Court vacated the judgments of two defendants because the district courts failed to provide Navajo interpreters for prospective jurors, even though the nearest interpreter was two and a half hours away. *Id.*

¶¶ 1-2. In determining that the efforts by the district courts were insufficient, we explained that when a trial court becomes aware of a language problem, the court

> should first take steps to determine whether the difficulty will prevent the juror from following the proceedings. Then, the trial court must take steps to ensure the availability of a suitable interpreter, if an interpreter is needed. If an interpreter is needed and not available, the court is under a constitutional obligation to continue the trial for a reasonable time if the continuance will be effective in securing an interpreter.

Id. ¶ 16.

Here, unlike in *Rico*, Defendant's trial took place in the Second Judicial District Court, the most populous district in our state, where a Spanish interpreter should have been readily available. At a minimum, voir dire should have been continued until the misdirected interpreter was brought to the correct court or a replacement interpreter secured. *See id.* ¶ 15 (noting that when "the language for which an interpreter is needed is one commonly spoken in the jurisdiction, particularly when it is one in which interpreters are specially trained, and no interpreter is available on the first scheduled day of the trial, the trial should be continued for a reasonable time in order to secure an interpreter").

The record before us does not document what, if any, efforts the court made to secure an interpreter. Merely stating that an interpreter was requested but unavailable provides an appellate court little insight into what the judge may or may not have done to remedy the situation. *See id.* (explaining that the duration of a continuance appropriate to satisfy the every reasonable effort standard depends on the totality of the circumstances).

Because the record reflects that after determining that Mr. Haros did not understand all of the voir dire exchanges, the district court made no further effort to find an interpreter for Mr. Haros before dismissing him, we conclude that the court violated Article VII, Section 3.

2. Defendant's Unpreserved Error Is Not Fundamental Error

Having concluded that the district court violated Mr. Haros's constitutional right, we review whether the violation requires the reversal of Defendant's conviction.

With few exceptions, we review an issue for reversible error only when the defendant has properly raised the issue in the district court. *See* Rule 12-216(A) NMRA ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked . . . ."); *accord Mitchell v. Allison*, 1949-NMSC-070, ¶ 14, 54 N.M. 56, 213 P.2d 231 ("Unless the trial court's attention is called in some manner to the fact that it is committing error, and given an opportunity to correct it, cases will not be reversed because of errors which could and would have been corrected in the trial court, if they had been called to its attention.").

We have specifically applied this contemporaneous objection requirement to the unconstitutional exclusion of a juror for lack of fluency in English. *See Rico*, 2002-NMSC-022, ¶ 8 (noting "that a criminal defendant who does not object to an exclusion of a juror

in violation of Article VII, Section 3 has waived his or her ability to do so on appeal"). When Article VII, Section 3 is violated and the objection properly preserved, an appellate court is required to reverse what would have been an otherwise valid conviction. *See Rico*, 2002-NMSC-022, ¶¶ 1, 3 (vacating two convictions and remanding for retrial in both cases based on improper juror dismissals in which the state conceded the issue of reversible error).

In this case, the trial judge clearly notified counsel for both Defendant and the State that he was considering dismissing Mr. Haros. The only argument the defense made was that Mr. Haros should remain on the jury because he understood English well enough without an interpreter. Significantly, Defendant did not raise the issue of a violation of Article VII, Section 3, or object to the exclusion of a juror for inability to understand English, or object to the failure of the district court to exercise every reasonable effort to procure an interpreter. Accordingly, Defendant's Article VII, Section 3 issues were not preserved. Because Defendant did not preserve Mr. Haros's right to serve on a jury under Article VII, Section 3, we review only for fundamental error. *See* Rule 12-216(B)(2) (recognizing fundamental error as an exception to the preservation rule).

"The exacting standard of review for reversal for fundamental error requires the question of guilt [be] so doubtful that it would shock the conscience [of the court] to permit the verdict to stand." *State v. Swick*, 2012-NMSC-018, ¶ 46, 279 P.3d 747 (reversing a second-degree murder conviction for fundamental error because a missing element in the jury instructions created an ambiguous verdict, *see id.* ¶ 58) (alterations in original) (internal quotation marks and citation omitted). Here, Defendant fails to demonstrate how the question of his guilt is so doubtful that his convictions should shock the conscience of this Court. There is nothing in the record that indicates Defendant was convicted by an unfair or partial jury, notwithstanding Mr. Haros's improper dismissal, and the evidence of Defendant's guilt was substantial. *See State v. Baca*, 1983-NMSC-049, ¶ 9, 99 N.M. 754, 664 P.2d 360 ("The burden of establishing partiality [of a juror] is upon the party making such a claim."); *State v. Singleton*, 2001-NMCA-054, ¶ 19, 130 N.M. 583, 28 P.3d 1124 (rejecting a defendant's claim of fundamental error because the "[d]efendant has not shown that he was prejudiced in any way by the juror's excusal"). Accordingly, we hold that Defendant's conviction does not warrant reversal under the fundamental error standard.

Although the constitutional violation in this case does not result in the reversal of an otherwise valid conviction, as would have been required if defense counsel had preserved the issue properly, we stress that judges and attorneys on both sides of the courtroom have responsibilities in protecting a non-English-speaking juror's constitutional right to participate in jury service. The appellate record must demonstrate that a trial judge has made every reasonable effort to provide interpreters for non-English-speaking jurors; defense attorneys must raise the unconstitutionality of proposed dismissals of jurors for lack of fluency in English; and prosecutors representing the State must protect the rights of all non-English-speaking New Mexicans to serve on juries, both because it is their duty to do so and because an otherwise unnecessary reversal and retrial may well be the consequence of denying those rights.

B. Defendant's Other Issues Are Insubstantial

Defendant raises six additional challenges to his conviction, none of which we determine to be meritorious.

1. Disclosure of DNA Reanalysis

Defendant argues that the State should be sanctioned because of the disclosure of a second DNA report two weeks before the 2008 trial. The report included the results of DNA reanalysis of physical evidence after disclosure to Defendant in 2005 of the results of the original analysis. However, Defendant did not object to the timing of the second disclosure, and the issue is therefore unpreserved for appellate review. In addition, Defendant does not demonstrate in any way how the timing of the supplemental disclosure harmed his ability to defend himself at trial. *See State v. Duarte*, 2007-NMCA-012, ¶ 15, 140 N.M. 930, 149 P.3d 1027 ("Failure to disclose a witness' identity prior to trial in itself is not grounds for reversal. Defendant has the burden of showing that he was prejudiced by the untimely disclosure." (internal quotation marks and citation omitted)), *recognized by this Court in State v. Harper*, 2011-NMSC-044, ¶ 19, 150 N.M. 745, 266 P.3d 25. Because Defendant did not preserve the issue or demonstrate prejudice, Defendant's late disclosure argument is without merit.

2. Lack of Defense DNA Expert

Relying on *State v. Brown*, Defendant argues that the district court erroneously denied his motion for a new trial based on a claimed violation of his right to a DNA expert to assist in his defense. *See* 2006-NMSC-023, ¶ 31, 139 N.M. 466, 134 P.3d 753 (holding that the right to effective assistance of counsel for indigent defendants, including defendants assisted by private counsel providing pro bono legal services, includes the right to state funding for necessary expert witnesses). Defendant does not cite anything in the record demonstrating that he requested the district court to order expert assistance, and we have found nothing in our own review. Accordingly, Defendant's argument that he should have been granted a new trial because he lacked a DNA expert is without merit.

3. Improper Comment by State Witness

Defendant argues that the district court improperly denied his motion for mistrial because the State's bloodstain pattern expert impermissibly referred to seeing "brain matter" on Defendant's shoes in violation of a pretrial order in limine and that the brain matter remark was so prejudicial it could not be cured by the judge's limiting instruction. "We review a trial court's denial of a motion for mistrial under an abuse of discretion standard." *State v. Fry*, 2006-NMSC-001, ¶ 52, 138 N.M. 700, 126 P.3d 516 (internal quotation marks and citation omitted). In reviewing inadvertent remarks made by witnesses, generally, "the trial court's offer to give a curative instruction, even if refused by the defendant, is sufficient to cure any prejudicial effect." *Id.* ¶ 53. Here, the district court found that the witness's remark was "not . . . in deliberate violation of the [pretrial] order" and therefore inadvertent and curable by a limiting instruction. *See State v. Gonzales*, 2000-NMSC-028, ¶ 39, 129 N.M. 556, 11 P.3d 131 (distinguishing between inadvertent remarks made by a witness about . . . inadmissible [matters] and similar testimony intentionally elicited by the prosecutor"), *overruled on other grounds by*

State v. Tollardo, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110. Because the district court did not abuse its discretion in responding to the witness's unsolicited comment, Defendant was not entitled to a mistrial.

4. Ineffective Assistance of Counsel

Defendant argues that he was denied effective assistance of counsel because of his attorney's failure to (1) secure a DNA expert, (2) request a mistrial over the "brain matter" comment, (3) request a continuance before Mr. Haros's dismissal, and (4) interview witnesses. "For a successful ineffective assistance of counsel claim, a defendant must first demonstrate error on the part of counsel, and then show that the error resulted in prejudice." *State v. Arrendondo*, 2012-NMSC-013, ¶ 38, 278 P.3d 517 (internal quotation marks and citation omitted). "Without such prima facie evidence, the Court presumes that defense counsel's performance fell within the range of reasonable representation." *Id.* In this case, Defendant does not reference anything in the record that supports his ineffective assistance claim. Because we usually have insufficient information before us to evaluate an ineffective assistance claim on direct appeal, as in this case, "this Court prefers that these claims be brought under habeas corpus proceedings so that the defendant may actually develop the record with respect to defense counsel's actions." *Id. See Duncan v. Kerby*, 1993-NMSC-011, ¶ 4, 115 N.M. 344, 851 P.2d 466 (observing that the record before the district court "may not adequately document the sort of evidence essential to a determination of trial counsel's effectiveness because conviction proceedings focus on the defendant's misconduct rather than that of his [trial counsel] . . . , [but] habeas corpus is specifically designed to address such postconviction constitutional claims and is the procedure of choice in this situation").

5. Speedy Trial

Defendant argues that his state and federal rights to a speedy trial were violated because forty-one months elapsed between arrest and trial. As we recently clarified in *State v. Garza*, 2009-NMSC-038, ¶ 13, 146 N.M. 499, 212 P.3d 387, while the length of pretrial delay will trigger a speedy trial analysis, it is not alone dispositive: "Violation of the speedy trial right is only determined through a review of the circumstances of a case, which may not be divorced from a consideration of the State and the defendant's conduct and the harm to the defendant from the delay." The factors taken into account include (1) the length of delay, (2) the reasons for the delay, (3) the defendant's assertion of his right, and (4) the actual prejudice to the defendant resulting from the delay. *Id.*

Defendant clearly was responsible for the delay in taking his case to trial, with his disruptive and uncooperative conduct causing repeated rescheduling of his trial and a succession of appointed defense attorneys with whom he failed to cooperate. In the first twelve months, Defendant went through the first two of his appointed defense attorneys, hampering pretrial preparation and discovery; the next five months saw the entrance of new appointed counsel who had to familiarize herself with the extensive discovery, a failed plea agreement, and the defense's request for a determination of Defendant's competency to stand trial; during the next fifteen months, Defendant's court-ordered competency examinations had to be scheduled three separate times because of Defendant's repeated obstructionist behavior; his persistent refusals to cooperate with his third appointed

attorney and his filing of a federal lawsuit against her finally resulted in her withdrawal; after a series of events in which Defendant filed a motion to proceed pro se and then changed his mind, the district court ordered a fourth attorney to represent him; the district court denied that attorney's efforts to withdraw after Defendant also sued him in federal court, and the case was finally brought to trial despite Defendant's obstructionist efforts. There is nothing in the record or Defendant's briefing that would indicate that the delays in this case were the result of anything but his own obstreperous conduct.

Defendant's claim on appeal that he asserted his speedy trial right in the district court is belied by his own obstructionist conduct that itself was the cause of a delayed trial. *See State v. Spearman*, 2012-NMSC-023, ¶ 31, 283 P.3d 272 ("[W]e accord weight to the frequency and force of the defendant's objections to the delay and analyze the defendant's actions with regard to the delay." (alteration in original) (internal quotation marks and citation omitted)).

A particularly significant factor is the lack of any claim of particularized prejudice to Defendant's right to a fair trial that resulted from the delay. In *Garza*, we explained that "generally a defendant must show particularized prejudice" to his ability to defend himself and that it is only where "the length of delay and the reasons for the delay weigh heavily in defendant's favor and defendant has asserted his right and not acquiesced to the delay" that "the defendant need not show [particularized] prejudice" in order to prevail on a speedy trial claim. *Garza*, 2009-NMSC-038, ¶ 39. Defendant does not claim the loss of any exculpatory witnesses, the deterioration of exculpatory evidence, or any other kind of particularized prejudice to his defense. Accordingly, as in *Garza*, we reject Defendant's speedy trial claim. *See id.* ¶ 40 (holding that because the "other factors do not weigh heavily in Defendant's favor" and "[b]ecause Defendant failed to demonstrate particularized prejudice . . . , we cannot conclude that Defendant's right to a speedy trial was violated").

6. Cumulative Error

Defendant argues that all of the errors raised on appeal constitute cumulative error sufficient to overturn his conviction, relying on *State v. Woodward*, 1995-NMSC-074, ¶ 59, 121 N.M. 1, 908 P.2d 231 ("The doctrine of cumulative error requires reversal of a defendant's conviction when the cumulative impact of errors which occurred at trial was so prejudicial that the defendant was deprived of a fair trial." (internal quotation marks and citation omitted)).[1] The doctrine of cumulative error "is to be strictly applied, and . . . cannot [be] invoke[d] if the record as a whole demonstrates that [the defendant] received a fair trial." *Id.* We have already concluded that Defendant did not preserve the improperly dismissed juror claim and that Defendant's remaining claims are without

[1] Although *State v. Mendez*, 2010-NMSC-044, ¶ 22, 148 N.M. 761, 242 P.3d 328, indicates that *State v. Woodward* was abrogated on other grounds as recognized by *State v. Granillo-Macias*, 2008-NMCA-021, 143 N.M. 455, 176 P.3d 1187, this characterization is inaccurate. *Granillo-Macias* incorrectly states that *State v. Woodward* was reversed in part on other grounds by *Woodward v. Williams*, 263 F.3d 1135 (10th Cir. 2001). *See Granillo-Macias*, 2008-NMCA-021, ¶ 8. However, nothing in *Woodward v. Williams* reversed this Court's holding in *State v. Woodward*. *See Woodward v. Williams*, 263 F.3d at 1138, 1143 (recognizing two issues on appeal and upholding the New Mexico Supreme Court on the issue of exited utterance but reversing in part the defendant's federal statute of limitations claim). Accordingly, *State v. Woodward* remains good law.

merit. The cumulative error claim is therefore meritless. "[W]here there is no error to accumulate, there can be no cumulative error." *State v. Saiz*, 2008-NMSC-048, ¶ 66, 144 N.M. 663, 191 P.3d 521, *abrogated on other grounds by State v. Belanger*, 2009-NMSC-025, ¶ 36 & n.1, 146 N.M. 357, 210 P.3d 783.

III. CONCLUSION

We hold that although the district court failed to make every reasonable effort to provide an interpreter to a prospective juror, in violation of Article VII, Section 3 of the New Mexico Constitution, the unpreserved error was not fundamental error sufficient to require the reversal of Defendant's convictions. We also hold that Defendant's remaining challenges are without merit, individually or cumulatively.

Accordingly, we affirm Defendant's convictions.

IT IS SO ORDERED.

CHARLES W. DANIELS, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

BARBARA J. VIGIL, Justice

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-087

Filing Date: June 4, 2013

Docket No. 30,307

MICHAEL SALOPEK,

Plaintiff-Appellee/Cross-Appellant,

v.

DAVID J. FRIEDMAN, M.D.,

Defendant-Appellant/Cross-Appellee.

The Perrin Law Firm
Doug Perrin
Santa Fe, NM

for Appellee

Kemp Smith LLP
CaraLyn Banks
Las Cruces, NM

for Appellant

OPINION

KENNEDY, Chief Judge.

David J. Friedman, M.D. (Defendant) appeals from a $600,000 judgment against him for medical malpractice on three grounds: (1) the district court failed to properly instruct the jury on the scope of Defendant's duty to Michael Salopek (Plaintiff), (2) the district court gave incorrect "eggshell plaintiff" damages instructions, and (3) the district court erred in failing to order a new trial or remittitur. Plaintiff cross-appeals, contending that the statutory cap on damages in Section 41-5-6 of the Medical Malpractice Act (Act), NMSA 1978, §§ 41-5-1 to -29 (1976, as amended through 2008), is unconstitutional. We affirm.

I. BACKGROUND

Plaintiff has familial adenomatous polyposis (polyposis), which is an inherited disorder characterized by the development of numerous polyps in the colon, which readily leads to colon cancer. Due to this condition, Plaintiff biannually underwent colonoscopies to remove polyps and evaluate the progression of his condition. On February 16, 2005, Plaintiff returned home from a routine colonoscopy with increasingly sharp abdominal pain and a fever. The following day Plaintiff went to the emergency room where he was attended to by Defendant, who, after evaluating the results of a CAT scan, stated that there appeared to be a perforation in Plaintiff's colon. The perforation appeared to have been caused by the colonoscopist puncturing Plaintiff's colon while removing a polyp with hot forceps during his colonoscopy.

On February 17, 2005, to find and mend the perforation in Plaintiff's colon, Defendant performed a laparotomy, an exploratory abdominal surgery. Defendant "anticipated that if found, the perforation[] could be closed with a suture[.]" Defendant did not locate the perforation at this juncture. Evidence indicated that this failure occurred because Defendant did not pressurize the colon with air during the laparotomy, a procedure which would have revealed the perforation. Testimony at trial established that a well-qualified surgeon, practicing under similar circumstances, would have pressurized the colon to locate the perforation. Eleven days after this failed attempt to locate the perforation, Defendant again operated on Plaintiff to find and fix the perforation. By this time, the perforation had enlarged because the injured colon tissue began to disintegrate. During this second surgery, Defendant used dye to pressurize the colon and locate the perforation. Defendant then removed the part of the colon where the perforation was located and created a colostomy to allow the colon to

heal. The colostomy redirected Plaintiff's colon through his abdominal wall, so that stool would drain out of his body through his abdomen and into a colostomy bag that adhered to his skin.

Shortly thereafter, Plaintiff terminated his doctor-patient relationship with Defendant. Plaintiff sought treatment from Dr. William Abbott to perform a take-down of the colostomy, which would reconnect the severed parts of his intestines. Because of Plaintiff's polyposis condition, performing a colostomy take-down that reattached his colon created additional concerns for his health. Due to these additional concerns, Plaintiff chose to have a restorative proctocolectomy that would remove the colon and attach the small intestine to the anus. Plaintiff suffered complications from the restorative proctocolectomy and, ultimately, had to have thirteen surgeries in total. Due to complications, Plaintiff's small intestine was not successfully permanently connected to his anus. As a result, his small intestine was yet again rerouted through his abdominal wall, so that waste could drain from his body through his abdominal wall into an ileostomy bag attached to his abdomen. At the time of trial, Plaintiff was still in this condition and stated that he did not anticipate living without an ileostomy bag in the future.

Plaintiff sued Defendant for malpractice, claiming that Defendant was negligent in failing to use the proper techniques and find the perforation during the initial laparotomy. The jury found Defendant negligent and awarded Plaintiff $1,000,000. The district court reduced the award to $600,000, pursuant to the cap on damages contained in Section 41-5-6 of the Act. These appeals followed.

II. DISCUSSION

A. The District Court Properly Denied Defendant's Motion Regarding Duty

Defendant argues that the district court erred in denying his motion for judgment as a matter of law. Defendant contends that, by denying his motion, the district court "expanded the duty of physicians beyond that recognized under New Mexico law."

> [D]uty . . . is for the court alone to define. Before the jury can resolve any factual matter, . . . the court must first frame the relevant law. In a negligence action, this means the court must first find an actionable duty of care and then define the nature and scope of that duty.

Provencio v. Wenrich, 2011-NMSC-036, ¶16, 150 N.M. 457, 261 P.3d 1089.

It is well established that "a doctor owes a general duty to provide competent care in treating a patient's medical condition." *Id.* ¶27. The duty of care required of a doctor to a patient is set forth in UJI 13-1101 NMRA, which was applied at trial in this case and states:

> In [treating, operating upon, making a diagnosis of, or caring for] a patient, [the doctor] is under the duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified [doctors] . . . practicing under similar circumstances, giving due consideration to the locality involved.

As Defendant argues, we reference "the specific circumstances actually presented" to determine whether a duty exists with reference to a foreseeable plaintiff with foreseeable harm. *Romero v. Giant Stop-N-Go of N.M., Inc.*, 2009-NMCA-059, ¶ 9, 146 N.M. 520, 212 P.3d 408. In the context of duty, "[f]oreseeability is what one might objectively and reasonably expect, not merely what might conceivably occur." *Johnstone v. City of Albuquerque*, 2006-NMCA-119, ¶ 8, 140 N.M. 596, 145 P.3d 76 (internal quotation marks and citation omitted); *see Chavez v. Desert Eagle Distrib. Co. of N.M., LLC*, 2007-NMCA-018, ¶ 17, 141 N.M. 116, 151 P.3d 77 ("The risk must be actual and perceptible, not speculative." (internal quotation marks and citation omitted)). Thus, we frame the question of duty in this case to be whether a well-qualified doctor in New Mexico, who knows his patient likely has a punctured colon and fails to pressurize his patient's colon during a laparotomy, should foresee that he would fail to find the perforation during the laparotomy and that complications related to a corrective procedure would arise as a result of this failure.

Defendant argues that "[t]here is no basis to support the [d]istrict [c]ourt's decision that Defendant owed a duty to Plaintiff related to prospective elective procedures given the circumstances present in this case." Defendant explains that he "could not objectively and reasonably expect that his purported failure to find a perforation in Plaintiff's colon during surgery . . . [would] result in Plaintiff suffering complications [from a later] elective procedure." Defendant concludes that he had "no duty [to Plaintiff for Plaintiff's later complications] given his inability to control the subsequent treatment provided to Plaintiff . . . after the [doctor-patient relationship] was terminated." Defendant argues that he "was therefore not liable for Plaintiff's decision to have the [restorative proctocolectomy] procedure in November 2005 or the resulting complications from that procedure."

We disagree with Defendant and conclude that he should have foreseen that Plaintiff would suffer these particular harms when Defendant failed to pressurize Plaintiff's colon during the laparotomy. At trial, expert testimony indicated that Defendant would have discovered the perforation during the first surgery if he had pressurized the colon. In addition, evidence demonstrated that if the perforation was located in the first surgery, Defendant would have been able to mend it with sutures. Because Defendant waited eleven days, the injured colon tissue began to disintegrate, and the affected part of the colon now required removal rather than a few stitches. In addition, Defendant knew Plaintiff had pre-existing hereditary polyposis and that Plaintiff would require additional surgery to take down the colostomy that Defendant unnecessarily created. We conclude that removal of a section of Plaintiff's colon, a colostomy, and additional surgery were foreseeable harms that Plaintiff would suffer when Defendant did not pressurize the colon and, thereby, failed to locate the puncture during the first surgery.

After the colostomy, Plaintiff had several options, including a take-down of the colostomy and reattaching of the colon, or a restorative proctocolectomy (removing the colon and attaching the small intestine to the anus). The heart of Defendant's argument is that the restorative proctocolectomy was an elective procedure unrelated to the colostomy and that he could not expect complications to occur during the restorative proctocolectomy

due to Plaintiff's anatomy. We disagree and conclude that the restorative proctocolectomy was related to the colostomy, in that it was among several reasonable options presented to Plaintiff to reverse the colostomy and restore Plaintiff's bowels to a more normal function. Plaintiff's expert, a physician and surgeon, testified that it was foreseeable that a restorative proctocolectomy would be an option for Plaintiff following a colostomy because of his polyposis condition. If Defendant had pressurized the colon during the first surgery and discovered the perforation, Plaintiff would not have been prematurely presented with the decision of whether to have a proctocolectomy.

Both Plaintiff and Dr. Abbott appeared to believe that the colostomy take-down would not have been a good solution, given that Plaintiff's polyposis condition would require that he have a colonoscopy every six months, and he had already suffered a punctured colon from a colonoscopy, which caused Plaintiff grave apprehension about ever having another one. A corrective procedure, as well as complications from that surgery, which are not the result of another doctor's negligence, were foreseeable outcomes of a colostomy for Plaintiff. Furthermore, Plaintiff was not required to choose a colostomy take-down and reattachment of the colon over the proctocolectomy simply because it might have had the potential to limit Defendant's liability.

We conclude that simply by operating on Plaintiff, Defendant had a duty to act as a reasonably well-qualified doctor during the surgery. Evidence established that a reasonably well-qualified doctor would have pressurized the colon to locate the perforation. A reasonably well-qualified doctor would objectively and reasonably expect that his failure to do so would result in a patient with polyposis undergoing a colostomy and, subsequently, a restorative proctocolectomy. This doctor would also expect the patient to experience any of the array of possible complications associated with these procedures.

In addition, we are unpersuaded by Defendant's argument that we should conclude that there is no duty because this case is like *Estate of Haar v. Ulwelling*, 2007-NMCA-032, 141 N.M. 252, 154 P.3d 67. In *Estate of Haar*, this Court held that the defendant psychiatrist did not owe a duty of care to a potentially suicidal patient after the patient terminated the doctor-patient relationship with the defendant and started a new doctor-patient relationship with another physician. *Id.* ¶¶ 25-29. Defendant's reliance on this case is misplaced. In *Estate of Haar*, the alleged negligent acts, which included the doctor's failure to "affirmatively monitor [the patient's] medication, enhance [the patient's] compliance with treatment, and schedule follow-up appointments[,]" all occurred after the patient terminated the relationship with the doctor. *Id.* ¶ 25. There, we concluded that after the patient made it clear that he no longer wanted a doctor-patient relationship with the defendant, "it is unreasonable to place upon [the d]efendant a requirement that he have imposed his views or treatment recommendations on [the patient] or [the patient's new treating physicians] for the purpose of guarding against [the patient's] suicide." *Id.* ¶ 28. Our decision in *Estate of Haar* was clearly premised upon the fact that the alleged negligent act occurred after the doctor-patient relationship ended. *Estate of Haar* is inapplicable here because, in this case, the negligent act occurred prior to the termination of the doctor-patient relationship.

We conclude that Defendant had a

duty to act as a reasonably well-qualified doctor toward Plaintiff during the surgery, to use all of the proper procedures, and to protect Plaintiff against unnecessary complications. All injuries that followed were objectively and reasonably foreseeable. We thus affirm the district court's denial of Defendant's motion for judgment as a matter of law.

B. The Jury Instruction About Damages Was Proper

"We review jury instructions de novo to determine whether they correctly state the law and are supported by the evidence introduced at trial." *Benavidez v. City of Gallup*, 2007-NMSC-026, ¶ 19, 141 N.M. 808, 161 P.3d 853 (internal quotation marks and citations omitted). "A party is entitled to instructions on all of his or her correct legal theories of the case if there is evidence in the record to support the theories." *Id.* "It is not error to deny requested instructions when the instructions given adequately cover the law to be applied." *Kirk Co. v. Ashcraft*, 101 N.M. 462, 466, 684 P.2d 1127, 1131 (1984). "A civil case will not be reversed due to error in jury instructions unless the result is fundamentally unjust." *McNeill v. Burlington Res. Oil & Gas Co.*, 2007-NMCA-024, ¶ 19, 141 N.M. 212, 153 P.3d 46, *aff'd*, 2008-NMSC-022, 143 N.M. 740, 182 P.3d 121.

At trial, Plaintiff submitted UJI 13-1802 NMRA to the district court, seeking recovery of damages under two theories that Defendant's actions (1) aggravated Plaintiff's pre-existing condition; or (2) injured Plaintiff, who may have been unusually susceptible to injury. The district court concluded that Defendant's actions did not aggravate Plaintiff's pre-existing condition and, consequently, denied the instruction on aggravation of a pre-existing condition. Yet, the district court concluded that the latter instruction, also known as, the "eggshell plaintiff" instruction, was supported by evidence and the theory of Plaintiff's case and, thus, presented it to the jury. *See* UJI 13-1802 cmt. (describing the jury instruction as the "eggshell plaintiff" instruction). The instruction stated:

> Whether any of these elements of damages have been proved by the evidence is for you to determine. However, damages are to be measured without regard to the fact Plaintiff may have been unusually susceptible to injury or likely to be harmed. . . . Defendant is said to "take the Plaintiff as he finds him," meaning that . . . Defendant, if liable, is responsible for all elements of damages caused by . . . Defendant's conduct even if some of . . . Plaintiff's injury arose because . . . Plaintiff was unusually susceptible to being injured.

Defendant makes two arguments in contending that the district court erred in permitting the eggshell plaintiff instruction to be submitted to the jury. First, Defendant contends that Plaintiff does not fit the requirements of an "eggshell plaintiff." Defendant argues that either the entire UJI 13-1802 should have been given, or no instruction should have been given on the matter at all. In making this argument, Defendant states that "[s]pecifically, the evidence presented at trial established that Plaintiff's injuries, i.e., pain and suffering, loss of enjoyment of life etc., resulted from the effect of his anatomical abnormality (deep narrow pelvis) on Dr. Abbott's ability to

successful[ly] perform the elective procedure on November 15, 2005 to treat Plaintiff's inherited disorder."

Second, Defendant argues in the alternative that error occurred in submitting the instruction without "a reference to Defendant only being liable for the worsening of Plaintiff's cond[ition] and not for elements of damages attributed to Plaintiff's . . . polyposis." Referring to UJI 13-1802, Defendant asserts:

> While the jury instruction on [damages for an] "eggshell" plaintiff describes the extent of the damages that can be imposed on a defendant, the instruction does not relieve a plaintiff of the burden of establishing that the underlying condition was exacerbated by the negligence of the defendant . . . as opposed to the underlying condition.

Defendant contends that the court's failure to do this permitted the jury to impose liability on him for damages that he did not cause.

We disagree with Defendant and conclude that the jury was properly instructed about Plaintiff's status as an "eggshell plaintiff." The jury instruction defines the "eggshell plaintiff" as a person "unusually susceptible to injury or likely to be harmed." UJI 13-1802. The defendant must "take the plaintiff as he finds [him]" and, therefore, "is responsible for all elements of damages caused by the defendant's conduct even if some of the plaintiff's injury arose because the plaintiff was unusually susceptible to being injured." *Id.* This means that "the wrongdoer is liable for the proximate results of that injury, although the consequences are more serious than they would have been, had the injured person been in perfect health." *Rowe v. Munye*, 702 N.W.2d 729, 741 (Minn. 2005) (internal quotation marks and citation omitted). "The eggshell plaintiff rule . . . applies only when the pain or disability arguably caused by another condition arises *after* the injury caused by the defendant's fault has lighted up or exacerbated the prior condition." *Sleeth v. Louvar*, 659 N.W.2d 210, 212 (Iowa 2003); *see Avery v. Ward*, 934 S.W.2d 516, 520 (Ark. 1996) ("[A]n 'eggshell plaintiff' . . . is[] one who was susceptible to enhanced injury by virtue of an existing condition."); *Iazzetta v. Nevas*, 939 A.2d 617, 619 (Conn. App. Ct. 2008) (explaining the meaning of an "eggshell plaintiff").

In this case, Plaintiff had dormant conditions that made him more susceptible to injuries caused by Defendant's failure to find the perforation during the first surgery. Namely, Plaintiff's polyposis condition complicated his recovery from the colostomy because the polyposis necessitated a restorative proctocolectomy in order to undo the colostomy created by Defendant. Plaintiff's anatomical abnormalities made him more susceptible to complications with regard to the restorative proctocolectomy. The pain and disablement that occurred as a result of the restorative proctocolectomy can fairly be viewed as a proximate result of Defendant's failure to find the perforation during the first surgery. The consequences of Defendant's negligence are certainly more serious than they would have been with someone who did not possess these conditions. Yet, the additive effect of Plaintiff's condition does not lessen Defendant's liability for his conduct, as the jury was instructed under UJI 13-1802.

To the extent that Defendant argues that the eggshell plaintiff instruction cannot be given without the aggravation instruction, we

conclude that aggravation and eggshell instructions are two different theories of liability and can be given separately or together, in the alternative, as long as each is supported by a factual basis. *See Sleeth*, 659 N.W.2d at 212-16 (determining whether the trial court properly advised on a theory of aggravation of the plaintiff's pre-existing condition as well as the eggshell plaintiff theory); *Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565, 578 (Iowa 1997) (stating that both instructions can be given because the trial court determined that a factual basis supported each). The Iowa Supreme Court explained:

> Whether the eggshell plaintiff rule applies or the aggravation rule applies depends in the first instance on when the pain or disability for which compensation is sought arose. Where the prior condition resulted in pain or disability *before* the second injury, the tortfeasor is liable only for the *additional* pain and disability arising after the second injury. With respect to any pain or disability arising *after* the second injury, the tortfeasor is fully responsible, even though that pain and disability is greater than the injured person would have suffered in the absence of the prior condition.

Id. at 577-78.

The case before us exemplifies a situation where the eggshell plaintiff instruction, but not the aggravation instruction, is applicable. Plaintiff had pre-existing conditions—polyposis and a deep, narrow pelvis. The specific pain and disability for which Plaintiff sought redress here did not exist before Defendant's negligent action, despite the fact that Plaintiff had these conditions. Only after Defendant injured Plaintiff, did Plaintiff have to endure a proctocolectomy and complications from that surgery. No pre-existing conditions were aggravated, but Plaintiff's pre-existing conditions amplified the effect of Defendant's actions. The pain and disability occurred after Defendant's actions and not before.

At the heart of Defendant's second argument is the contention that the jury should distinguish the damages caused by him from the damages caused by Plaintiff's underlying conditions. Yet, UJI 13-1802 makes it clear that, although the condition may contribute to the injury, as long as Defendant's conduct can be said to have proximately caused the injury, he will be held liable for the resulting injuries. The eggshell plaintiff theory of liability prevents the defendant from escaping liability when his conduct precipitates a more severe injury than a person of normal health would typically suffer. *See Gasiorowski v. Hose*, 897 P.2d 678, 680 (Ariz. Ct. App. 1994) (holding that the "'eggshell plaintiff' instruction [states] that an accident victim's predisposing susceptibility does not relieve a negligent actor of responsibility for whatever injuries his negligence precipitates"); *Hoffman v. Schafer*, 815 P.2d 971, 972-73 (Colo. App. 1991) (stating that, under the eggshell plaintiff rule, "the jury [is] not to refuse to award or to reduce the amount of damages it awarded [the] plaintiff because of 'any physical frailties of the plaintiff that may have made her more susceptible to injury, disability, or impairment'"); *City of Jackson v. Estate of Stewart ex rel. Womack*, 2003-CA-01413-SCT, 908 So. 2d 703, 715 (Miss. 2005) ("It simply provides that plaintiffs who are far more susceptible to a particular harm than the average person may nonetheless recover their full damages without reduction."). Here, there is evidence indicating that both Defendant's

conduct and the underlying condition resulted in the injuries and not one or the other exclusively. Thus, this case fits the requirements of the eggshell plaintiff theory, and we do not apportion damages by attempting to distinguish between how much injury the condition caused, and how much injury Defendant caused, as the injury would not have occurred without his negligence.

In support of his argument, Defendant states that this Court has held that "a defendant was only liable for the damages the defendant caused, regardless of the plaintiff's physical conditioning or lack thereof." *See Thomas v. Henson*, 102 N.M. 417, 424, 696 P.2d 1010, 1017 (Ct. App. 1984), *aff'd in part, rev'd in part on other grounds by* 102 N.M. 326, 695 P.2d 476 (1984). Defendant misapplies our holding in *Thomas*. In *Thomas*, passengers, who were injured in an automobile accident, sued the defendant driver. *Id.* at 419, 696 P.2d at 1012. The passengers were not wearing their seat belts, and the defendant argued that their damages should be reduced because of their failure to wear seat belts. *Id.* at 419-20, 696 P.2d 1012-13. There, we held that, "as part of the continuing duty to exercise reasonable care for his or her own safety, an occupant of an automobile has a duty to fasten an available seat belt or similar safety restraint device unless the circumstances dictate otherwise." *Id.* at 424, 696 P.2d at 1017. We concluded that such damages arising out of the plaintiff's failure to wear a seat belt "may not be recovered from a defendant because such damages resulted from [the] plaintiff's conduct." *Id.* We emphasized that "a defendant will still take the victim as he finds him and be liable for the damages the defendant causes. Where, however, damages are caused by the plaintiff's failure to care for his own safety (not his physical condition), [the] plaintiff may not recover those damages." *Id.* *Thomas* does not support Defendant's argument that he is not liable for Plaintiff's resulting injuries. Rather, it reiterates our rationale for affirming the district court. Defendant must take Plaintiff as he found him with his hereditary condition and anatomical abnormalities. Unlike the plaintiffs in *Thomas*, no evidence in this case indicates that Plaintiff failed to care for his own safety, or that the pre-existing condition caused his damages. As explained above, the jury determined that the damages resulted from Defendant's negligent act.

Furthermore, to the extent that Defendant argues that the proctocolectomy was an elective procedure, we agree that Plaintiff can only recover for the injuries caused by Defendant. At trial, the district court properly instructed the jury that the injuries must be caused by Defendant's negligence and not by another source. These instructions fully inform the jury that Defendant can only be liable for the injuries he actually caused Plaintiff. We read jury instructions as a whole and, when they fairly present the issues and the applicable law in light of the evidence presented at trial, they are sufficient. *Diversey Corp. v. Chem-Source Corp.*, 1998-NMCA-112, ¶ 16, 125 N.M. 748, 965 P.2d 332. The jury instructions given sufficiently allowed the jury to differentiate between the harm caused by Defendant and the harm caused by any other sources.

In arguing that the proctocolectomy was an elective procedure, Defendant seems to indicate that this was an unnecessary procedure chosen by Plaintiff unrelated to the colostomy. As explained above, Plaintiff had to make a choice of how to deal with the colostomy, and the evidence shows that a

proctocolectomy was a reasonable choice given the options facing him. To the extent that Defendant argues the proctocolectomy would have inevitably occurred due to Plaintiff's polyposis, we remind Defendant that the only reason why Plaintiff underwent such a drastic surgery when he did was because of Defendant's negligent conduct. "A tortfeasor is liable for damages suffered by an 'eggshell' plaintiff which are a natural consequence of the accident, even though the plaintiff may inevitably suffer similar injuries from a pre-existing condition unrelated to the accident." *Sumpter v. City of Moulton*, 519 N.W.2d 427, 434 (Iowa Ct. App. 1994). Even if Plaintiff *may* have needed the procedure in the future, he had to undergo the procedure prematurely because of Defendant's negligent act. Furthermore, it remains uncertain whether Plaintiff would have needed the restorative proctocolectomy due to the progression of his polyposis in the future as that set of events never came to fruition.

In conclusion, the district court properly advised the jury on the eggshell plaintiff rule. Defendant must take Plaintiff as he found him with his hereditary condition and anatomical abnormalities and is liable in full for all injuries he proximately caused.

C. The District Court Did Not Err When It Refused to Reduce the Amount of the Jury Verdict or Grant a New Trial

When the jury returned a $1,000,000 judgment against Defendant, he moved for a new trial or remittitur. The district court denied the motion. Defendant contends that the district court erred by refusing to grant either remedy. "The applicable standard in reviewing the denial of a motion for a new trial or remittitur is abuse of discretion." *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 13, 146 N.M. 853, 215 P.3d 791. "An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Sims v. Sims*, 1996-NMSC-078, ¶ 65, 122 N.M. 618, 930 P.2d 153. "When there exist reasons both supporting and detracting from a trial court decision, there is no abuse of discretion." *State v. Moreland*, 2008-NMSC-031, ¶ 9, 144 N.M. 192, 185 P.3d 363 (internal quotation marks and citation omitted). "Where the court's discretion is fact-based, we must look at the facts relied on by the trial court as a basis for the exercise of its discretion, to determine if these facts are supported by substantial evidence." *Apodaca v. AAA Gas Co.*, 2003-NMCA-085, ¶ 60, 134 N.M. 77, 73 P.3d 215 (internal quotation marks and citation omitted).

"In determining whether a jury verdict is excessive, we do not reweigh the evidence but determine whether the verdict is excessive as a matter of law. The jury's verdict is presumed to be correct." *Ennis v. Kmart Corp.*, 2001-NMCA-068, ¶ 27, 131 N.M. 32, 33 P.3d 32. To rebut this presumption, either of the following tests must be met: "(1) whether the evidence, viewed in the light most favorable to [the] plaintiff, substantially supports the award[;] and (2) whether there is an indication of passion, prejudice, partiality, sympathy, undue influence[,] or a mistaken measure of damages on the part of the fact finder." *Sandoval*, 2009-NMCA-095, ¶ 16 (internal quotation marks and citation omitted); *Baxter v. Gannaway*, 113 N.M. 45, 48, 822 P.2d 1128, 1131 (Ct. App. 1991) ("In the absence of an unmistakable indication of passion or prejudice, a reviewing court will not set aside a jury's award of damages unless the amount of the verdict in light of the evidence indicates

the jury was influenced by prejudice, passion, or other improper considerations."). We will not disturb the verdict simply because "a jury's award is possibly larger than the court would have given." *Richardson v. Rutherford*, 109 N.M. 495, 503, 787 P.2d 414, 422 (1990) (internal quotation marks and citation omitted). "Only in extreme cases will an award of damages be found excessive." *Sandoval*, 2009-NMCA-095, ¶ 19. In this case, Defendant argues that both insufficient evidence and improper jury considerations indicate that the jury verdict was excessive.

1. Evidence Substantially Supports the Award

In addressing this prong of the test, "[t]he proper approach is to examine [the p]laintiff's evidence related to damages and determine whether that evidence could justify the amount of the verdict, or determine whether the verdict amount was grossly out of proportion to the evidence of [the p]laintiff's pain and suffering." *Id.* ¶ 22. After examining the evidence, we determine whether any "disproportionality [between the evidence and the verdict] shocks our conscience." *Id.* (footnote omitted). "A jury's damages award will be upheld unless it appears that the amount awarded is so grossly out of proportion to the injury received as to shock the conscience." *Id.* ¶ 20 (internal quotation marks and citations omitted).

Defendant first argues that there was not sufficient evidence to justify the amount of the award. Defendant's argument again centers around causation, as he contends that "Plaintiff's injury was a result of his dormant medical condition and the procedure performed on November 2005 for the treatment of his inherited disease." Defendant states that "[a]ny future pain and suffering incurred by Plaintiff resulted either from the November 2005 procedure or the progression of his inherited disease." Defendant concludes that "[g]iven the evidence regarding the cause of Plaintiff's injury, the lack of substantial evidence regarding damages, and the application of incorrect substantive law (duty and jury instruction) by the [d]istrict [c]ourt, the [d]istrict [c]ourt abused its discretion in not granting a remittitur or new [t]rial."

At trial, the jury was instructed that, if it decided in favor of Plaintiff on the question of liability, it must then determine what amount of money would reasonably and fairly compensate Plaintiff for any of the following elements of damages:

1. Reasonable value of medical care treatment and services received which the parties have stipulated cannot exceed $165,000[];

2. Nature, extent[,] and duration of injury;

3. The pain and suffering, including, but not limited to[,] physical disfigurement, loss of enjoyment of life, between the time of the injury and present; and

4. Future pain and suffering.

We conclude that, based upon the injury suffered by Plaintiff, there was sufficient evidence to support the verdict amount based on these factors. Plaintiff testified in extensive detail about the physical and emotional ramifications of his injury.

While recovering after the first unsuccessful surgery, Plaintiff characterized the pain as "intense" and described himself as a "very frustrated [and] very hurting human being." Plaintiff could not walk well, was in constant pain, and had fevers. Shortly before the second surgery, Plaintiff thought that he "was losing [his] life." Immediately following the second surgery, Plaintiff had complications with his lungs that caused him great discomfort. Over the course of the twenty days that he was in the hospital for the two surgeries and recovery, Plaintiff lost fifty pounds.

Moreover, after the second surgery, Plaintiff woke up in severe pain with a colostomy bag over an open wound through which waste would exit his body. Plaintiff stated that living with the colostomy bag changed his life, explaining that "[i]t is a whole different process of using the restroom. It poses a whole series of things you must now guard. It is quite a big change." Plaintiff explained that the colostomy bag affected how he went out in public, slept, and lived. Plaintiff testified that he no longer had any control of his bowel movements and that this would result in accidents with his colostomy bag filling up and breaking during the day. He explained that sleeping became very difficult, as he would "average about two and a half hours of straight sleep and then . . . get up to change the [colostomy] bag." He described instances of how the colostomy bag would accidentally get caught on something and rip, spilling feces wherever he might be at the time. As a result of the colostomy bag, Plaintiff's return to work on his family farm was limited. Following the surgery, he could not travel because he had issues with the colostomy bag leaking. Plaintiff still deals with these problems today, as his bowels were never restored to normal function due to complications with the restorative proctocolectomy.

Plaintiff testified about how the colostomy affected his relationship with his wife and his teenage daughter, who was just starting high school around the time of the surgeries. The colostomy impacted Plaintiff's sexual relationship with his wife. Plaintiff stated that he has felt "so obligated to his wife for helping [him]." Due to the colostomy and his weakness from the surgery, Plaintiff had trouble taking an active role in his daughter's life, and he could not support her at her athletic events the way he used to.

In order to take down the colostomy, Plaintiff underwent surgery from another doctor who removed the colon and attached the small intestine to the anus. This attempted proctocolectomy resulted in serious complications because scar tissue developed around his rectum and impeded the passage of waste through Plaintiff's body. He described the experience as "really septic[, a]nd it's like if you're having . . . your worst flu that you're living with every day. . . . It was very uncomfortable." Plaintiff testified that when waste was capable of passing, "it was real urgent, and I had accidents all the time." Accidents became common in bed, and he had great difficulty running to the restroom. He felt humiliated by the experience and going out in public or traveling was very difficult for him, as he would need to use the restroom at least twenty times per day. Plaintiff concluded that it "was a real low point in [his] life. . . . [He] was very weak, and the pains of it were horrendous of blockage and gas, and . . . constant . . . internal problem[s]."

After the proctocolectomy, Plaintiff suffered from an abscess as a complication of the surgery, which required doctors to insert a

tube into his side to drain it. Plaintiff stated that "it was very painful having that tube stuck out of [his] abscess. And [he] was not allowed to eat. [He] had to eat through an IV." As a result, he rapidly lost weight during the three months with the tube.

Because of the complications of the proctocolectomy, Plaintiff returned to having an ileostomy bag, so that waste could drain out through his abdominal wall into a bag attached to a stoma. Plaintiff stated that the bag was permanent and that he continued to live with the same set of problems he described with the colostomy bag. Although now he is more familiar with it, he still must take precautions to prevent injury to his stoma and to prevent bag breakage and leaks. He continues to have problems sleeping, as he must wake up in the middle of the night several times to change his bag. Plaintiff testified that he no longer can water ski, is limited when it comes to hunting or fishing, and has been forced to make many life changes. Plaintiff summarized his colostomy and surgical experience with Defendant as "traumatic," indicating that it had a lasting effect on him. He explained that "I go on vacations, and after four or five days I want to be home. I mean, I just can't explain what [twenty] days of . . . fighting for your life in the hospital, going through those processes that I went through. It's very horrifying. The recovery time was very horrifying."

The foregoing evidence provides a clear picture of the nature, extent, and duration of Plaintiff's injury, his present and future pain and suffering, his physical disfigurement, and his loss of enjoyment of life. We hold that there is no disproportionality between the evidence in the verdict that would shock our conscience. We conclude that, in combination with his $165,000 in medical expenses, the evidence of this severe, disturbing, and far-reaching injury substantially supports the jury's $1,000,000 verdict.

To the extent that Defendant argues that he did not cause the injury, pain, suffering, disfigurement, or loss of enjoyment of life because they were a product of complications caused by Plaintiff's polyposis and abnormally shaped pelvis, we have already addressed causation. We reiterate that the evidence substantially supports the jury's finding that Defendant caused Plaintiff's initial injury and the resulting damage. To the extent that Defendant asserts that the "objective evidence" did not support Plaintiff's assertions that he lost weight or suffered a great deal of pain, Defendant fails to provide citations to the record for this proposition. Thus, we do not address this argument. *See Santa Fe Exploration Co. v. Oil Conservation Comm'n*, 114 N.M. 103, 108, 835 P.2d 819, 824 (1992) (holding that where a party fails to cite any portion of the record to support its factual allegation, the Court need not consider its argument on appeal). We hold that substantial evidence ultimately supports the verdict.

2. There is No Indication of Passion, Prejudice, Partiality, Sympathy, Undue Influence, or a Mistaken Measure of Damages on the Part of the Fact Finder

Second, Defendant contends that the timing surrounding the return of a verdict by the jury, coupled with the amount of the judgment, created a suspicion and impression of juror misconduct and thus tainted the verdict. In this case, jury deliberations began on August 28, 2009, at 8:30 a.m. At 12:45 p.m., the jury advised the district court that they were deadlocked six to six. The district

court called the jury into open court and reiterated to the jury that they are the judges of the facts and must deliberate with each other only after impartial consideration of the evidence. At 4:55 p.m., the jury advised the court that they were still deadlocked seven to five. The district court then told the jury to "keep us advised." At 6:52 p.m., the jury advised that it was still deadlocked seven to five, although one juror was considering moving. In response, the district court noted that there was no question posed that the court could answer. At 8:35 p.m., the jury sent the following note to the judge:

> After reviewing the information on the case[,] we are no closer to reaching the required number of [ten] people to agree. Currently[,] the count stands at [seven to five] and we have been deliberating for [twelve] hours[.] At what point[,] do we stop attempting to reach a verdict that [ten] of us can agree[?] The people are tired, hungry[,] and f[r]ustrated[.] We have only changed one vote during the [twelve] hours.

The district court and the parties then agreed that the jury should be brought back into the courtroom, a mistrial declared, and the jury sent home. Shortly thereafter, the bailiff knocked on the jury room door in order to bring them back to open court, and the jury advised the bailiff that there had been a change and that they were coming to an agreement. When the court relayed this news to the parties, Defendant moved for the court to declare a mistrial and requested that the bailiff question the jury as to what caused the change. The court denied the motion. Sometime around 9:20 p.m., the jury returned to the courtroom and rendered a verdict against Defendant in the amount of $1,000,000.

Defendant's argument with regard to passion, prejudice, partiality, sympathy, undue influence, or a mistaken measure of damages on the part of the fact finder can be broken into two contentions. First, Defendant argues that the above-stated facts indicate that the jury did not have sufficient time to reach a verdict and consider a verdict amount and, thus, the verdict was unreliable. Second, Defendant contends that the timing supports a conclusion that there was a quotient verdict. We address each in turn.

Citing *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439 (10th Cir. 1988) (per curiam), *superceded by statute as stated in Guillory-Wuerz v. Brady*, 785 F. Supp. 889 (D. Colo. 1992), Defendant argues that this time line, "particularly beginning with the note the [c]ourt received at 8:35 p.m. . . . that the jury felt they had an agreement, was sufficient for the [d]istrict [c]ourt to arrive at a conclusion of impropriety, and grant a new trial." In *Skinner*, the plaintiff sued his employer for wrongful termination and was awarded $3,945.48 by the jury. *Id.* at 1441-42. The plaintiff moved for a new trial because this amount was only a small fraction of the damages claimed by the plaintiff. *Id.* at 1442. The district court denied the motion, "yet thereafter awarded [the plaintiff] over $40,000[] as compensation for backpay and lost benefits." *Id.* at 1445. The Tenth Circuit Court of Appeals, in holding that the district court abused its discretion in failing to grant the plaintiff's motion for a new trial, evaluated whether the jury verdict was "the result of jury compromise[.]" *Id.* The court stated that "a damages award that is grossly inadequate, a close question of liability, and

an odd chronology of jury deliberations are all indicia of a compromise verdict." *Id.* at 1445-46. The court concluded that the $3,945.48 represented only a small fraction of the damages asserted by the plaintiff and that there was no evidence in the record as to why the jury chose to calculate the damages the way it did. *Id.* at 1446. The court reasoned the pattern of jury deliberations was suspect because the jury told the court it could not reach a unanimous decision shortly before its lunch break and, within two hours after the lunch break, the jury returned its verdict. *Id.* The court held that "[t]his, coupled with the fact that the district court, by awarding substantially greater damages in its Title VII judgment, thus implicitly concluding that the jury's backpay award was inadequate, supports our conclusion that the district court's denial of [the plaintiff's] motion for new trial was an abuse of discretion." *Id.* In concluding that all three indicia were present in the case, the Tenth Circuit reversed. *Id.*

First, *Skinner* is not binding on this Court and, more importantly, is not on point or persuasive because it engages in a juror compromise analysis not relevant to the case at bar. The reversal of the jury award in *Skinner* is based upon several factors, only one of which is the chronology of events associated with the jury verdict. Unlike *Skinner*, we are not evaluating the jury verdict in this case for a compromise verdict. No evidence supports a conclusion that the jury verdict was suspect. However, Defendant's argument is otherwise deficient. As explained above, unlike the evidence in *Skinner*, substantial evidence supports the verdict amount in this case. Moreover, the district court did not adjust the verdict for any other reason than to comply with the statutory cap on medical malpractice damages as it indicated in its order. We conclude that juror passion, prejudice, partiality, sympathy, undue influence, or a mistaken measure of damages has not been established by Defendant.

Second, Defendant contends that the period of time between the jury's note and the interval in which they thought they had an agreement was insufficient "to reach a verdict and then subsequently consider the verdict amount." Defendant states:

> The timing supports a conclusion that the jury only had time to add the amount indicated by the individual jurist, divide by eleven, and round up. . . . [W]hen there is no time for each juror to take the opportunity to approve of, to reject, or to discuss the results, as was the case here, the verdict falls within the definition of a prohibited quotient verdict.

The method of addition and division of the jurors' individual verdicts, "by itself, is not improper and does not brand the result as a quotient verdict." *Bd. of Comm'rs of Doña Ana Cnty. v. Gardner*, 57 N.M. 478, 490, 260 P.2d 682, 689 (1953), *superseded by statute as stated in Yates Petroleum Corp. v. Kennedy*, 108 N.M. 564, 568, 775 P.2d 1281, 1285 (1989). Rather, a quotient verdict occurs when the jurors agree in advance "to accept one-twelfth of the aggregate amount of their several estimates as their verdict, without subsequent reconsideration." *Gardner*, 57 N.M. at 490, 260 P.2d at 689. In essence, Defendant contends that we can infer there was an agreement to average each juror's individual verdict without subsequent consideration based upon the fact that only forty-five minutes lapsed from the jury's note,

indicating that it was deadlocked until the time it gave its verdict.[1]

We disagree and will not make this inference. "Absent express evidence of such a prior agreement, the presumption of the law is that the jury behaved properly." *Id.* at 493, 260 P.2d at 691. Defendant cites no express evidence demonstrating that there was any impermissible agreement. Tentative inferences of a quotient verdict made by Defendant are insufficient proof to overturn a jury verdict award. Defendant's failure to provide express evidence of an agreement is fatal to his argument.

We therefore cannot conclude that the verdict, which was supported by substantial evidence, was tainted by passion, prejudice, partiality, sympathy, undue influence, or a mistaken measure of damages on the part of the fact finder. We affirm the jury's verdict.

D. The Cap on Medical Malpractice Damages is Constitutional

Plaintiff preserved four constitutional challenges to the cap on damages in the Act. Specifically, he contends that the cap infringes on the right to a jury trial and is in violation of the separation of powers doctrine under the New Mexico Constitution. In addition, he contends that the cap violates equal protection and substantive due process under both the New Mexico and United States Constitutions. We begin by reiterating the long-standing presumption that acts of the Legislature are constitutional and that challenges must establish unconstitutionality beyond all reasonable doubt. *City of Albuquerque v. Jones*, 87 N.M. 486, 488, 535 P.2d 1337, 1339 (1975); *ACLU of N.M. v. City of Albuquerque*, 2006-NMCA-078, ¶ 10, 139 N.M. 761, 137 P.3d 1215. We address each argument in turn.

1. The Cap Does Not Violate the Right to a Trial by Jury

The Act expressly provides that "[e]xcept for punitive damages and medical care and related benefits, the aggregate dollar amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice shall not exceed six hundred thousand dollars ($600,000) per occurrence." Section 41-5-6(A). Plaintiff contends this cap violates his constitutional right to have a jury determine his damages under the New Mexico Constitution. We disagree. When the Legislature adopted the Act almost thirty-seven years ago in 1976, it created an entirely new statutory cause of action that was not recognized under the common law. Thus, we conclude that the Act's cap on damages does not violate the constitutional right to a jury trial protected by the New Mexico Constitution.

Article II, Section 12 of the New Mexico Constitution provides "[t]he right to trial by jury as it has heretofore existed shall be secured to all and remain inviolate." In *State ex rel. Bliss v. Greenwood*, 63 N.M. 156,

[1]We note that Defendant argues that less time passed between the note and consensus. Defendant contends that the jury indicated it had an agreement at 8:52 p.m. and, thus, the total amount of time that had passed was seventeen minutes. We disagree. At 8:52 p.m., the jury indicated that they were coming to an agreement, not that there was an agreement and a verdict amount decided upon. We therefore examine Defendant's contentions about the improper verdict amount based upon the time when the jury actually gave their verdict at 9:20 p.m.

161, 315 P.2d 223, 226 (1957), our Supreme Court explained that through Article II, Section 12,

> the Constitution continues the right to jury trial in that class of cases in which it existed either at common law *or by statute* at the time of the adoption of the Constitution . . . . And, as we view the matter, the phrase as it has heretofore existed refers to the right to jury trial as it existed in the Territory of New Mexico at the time immediately preceding the adoption of the Constitution.

Greenwood, 63 N.M. at 161, 315 P.2d at 226 (internal quotation marks and citations omitted). In making a determination about whether the right to trial by jury exists in a specific context, we engage in two related inquiries. First, "we must consider whether such an action fits within that 'class of cases' in which the right [to a jury trial] existed either at common law or by statute at the time of the adoption of our constitution." *State ex rel. Human Servs. Dep't v. Aguirre,* 110 N.M. 528, 529-30, 797 P.2d 317, 318-19; *see Lisanti v. Alamo Title Ins. of Tex.,* 2002-NMSC-032, ¶¶ 13-15, 132 N.M. 750, 55 P.3d 962. If we do not answer this question affirmatively, there is no right to a jury trial, and our inquiry ends. *State ex rel. Children, Youth & Families Dep't v. B.J.,* 1997-NMCA-021, ¶ 6, 123 N.M. 99, 934 P.2d 293. As noted by the court in *Learmonth v. Sears, Roebuck & Co.,* 710 F.3d 249 (5th Cir. 2013), the "inviolate" guarantee of a jury trial "simply means that the jury right is protected absolutely in cases where it applies; the term does not establish what that right encompasses." *Id.* at 263. A second related inquiry is "whether the type of case calls for equitable or legal relief." *B.J.,* 1997-NMCA-021, ¶ 9; *see Aguirre,* 110 N.M. at 530, 797 P.2d at 319. Where the relief sought is essentially equitable, there is no right to a jury trial. *Bd. of Educ. of Carlsbad Mun. Sch. v. Harrell,* 118 N.M. 470, 482, 882 P.2d 511, 523 (1994). Since we conclude that the Act creates a statutory cause of action that did not exist at common law, we do not engage in the second inquiry. *See id.* at 481-82, 882 P.2d at 522-23.

The historical circumstances leading to passage of the Act are well documented. Ruth L. Kovnat, *Medical Malpractice Legislation in New Mexico,* 7 N.M. L. Rev. 5, 7-8 (1976-77), states that the Act was enacted

> in response to a widely-held perception that a medical malpractice crisis existed in the state. New Mexico was not alone in this perception. In 1975 and 1976, [forty-five] states enacted some form of legislation to relieve the malpractice dilemma. The event which immediately triggered public concern in this state was the announced withdrawal, in 1975, of the Travelers Insurance Companies as the underwriter of the New Mexico Medical Society's professional liability program. The Company's withdrawal from the insurance market threatened providers of health care in New Mexico with a lack of protection against liability claims. Of at least equal importance, the withdrawal jeopardized the remedy of a patient suffering because of the negligent acts of such a health care provider even though his right to a remedy could be established employing ordinary negligence principles.

(Footnotes omitted). Thus, the stated purpose of the Act "is to promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico." Section 41-5-2. Against this backdrop, our Supreme Court has declared that the Act "was enacted by the [L]egislature 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." *Wilchinsky v. Medina*, 108 N.M. 511, 516, 775 P.2d 713, 718 (1989); *see Baker v. Hedstrom*, 2012-NMCA-073, ¶¶ 22-23, 284 P.3d 400 (recognizing why the Act was adopted), *cert. granted*, 2012-NMCERT-007, 295 P.3d 600; *Roberts v. Sw. Cmty. Health Servs.*, 114 N.M. 248, 251, 837 P.2d 442, 445 (1992) (same).

To achieve its purposes, the Act adopted by the Legislature creates a new statutory cause of action, which did not exist when the Constitution was adopted and is not recognized under the common law. The Act creates a "malpractice claim" against a "health care provider." A "malpractice claim" is

> 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[.]

Section 41-5-3(C) (1977). In turn, a "health care provider" is

> a person, corporation, organization, facility[,] or institution licensed or certified by this state to provide health care or professional services as a doctor of medicine, hospital, outpatient health care facility, doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist[,] or physician's assistant[.]

Section 41-5-3(A). Construing this language, we have previously concluded that potential defendants under the Act include individuals and entities with which the plaintiff may not have a physician-patient relationship. *Baer v. Regents of Univ. of Cal.*, 118 N.M. 685, 689, 884 P.2d 841, 845 (Ct. App. 1994) ("[T]he statute's broad definition of potential defendants provides significant evidence of the [L]egislature's intent to impose liability beyond the context of a physician-patient relationship.").

Before this statutory cause of action can be filed in court, a plaintiff must first present the claim to the medical review commission created by Section 41-5-14 to be reviewed. Section 41-5-15. The administrative duties of the medical review commission are handled by its director, who is an attorney "appointed by and serving at the pleasure of the [C]hief [J]ustice of the New Mexico [S]upreme [C]ourt." Section 41-5-14(E). Following a hearing conducted before a panel of the medical review commission under procedures statutorily prescribed in Section 41-5-19, the panel determines whether there is substantial evidence that malpractice occurred and whether there is a reasonable medical probability that the patient was injured thereby. Section 41-5-20. If a decision is made in favor of the plaintiff, the panel, its members, the director of the medical review commission, and the professional

association concerned must assist in retaining a physician qualified in the field of medicine involved "who will consult with, assist in trial preparation[,] and testify on behalf of the patient[.]" Section 41-5-23. There is no similar statutory precondition to bringing a common law action, and the common law has no requirement for a plaintiff to be provided assistance in securing a medical expert.

In addition to the foregoing, the Act provides its own statute of limitations for bringing a "malpractice claim." A "malpractice claim" against a "health care provider" must be filed "within three years after the date that the act of malpractice occurred," the only exception being a minor under the full age of six years who has until his ninth birthday in which to file. Section 41-5-13. On the other hand, a common law medical malpractice claim may be brought within three years from the time that the patient discovers, or with reasonable diligence should have discovered, that a claim exists. *See Roberts*, 114 N.M. at 252-53, 837 P.2d at 446-47 (concluding that the Legislature intended to insulate a "health care provider" under the Act from the much greater liability exposure that flows from the discovery-based accrual date which applies to medical providers not covered by the Act).

In a common law medical malpractice claim, a doctor or entity found to be negligent is liable for all actual damages proximately caused by the negligence. *See Collins ex rel. Collins v. Perrine*, 108 N.M. 714, 719-720, 778 P.2d 912, 917-918 (Ct. App. 1989) (concluding that an attorney sued for mishandling a medical malpractice claim could have secured an award of $1,500,000 for medical expenses, lost wages, the nature, extent, and duration of the injury, including disfigurement, pain and suffering, loss of enjoyment of life, and shortened life opportunity). However, under the Act, "[a] health care provider's personal liability is limited to two hundred thousand dollars ($200,000) for monetary damages and medical care and related benefits[,]" and any amount due the plaintiff in excess of this amount "shall be paid from the patient's compensation fund[.]" Section 41-5-6(D); *see* NMSA 1978, § 41-5-25 (1997) (creating the patient's compensation fund to be managed and administered by the superintendent of insurance from surcharges levied on qualified health care providers by the superintendent of insurance).

In a common law medical malpractice claim, a successful plaintiff is entitled to recover the present cash value of all "medical care, treatment[,] and services reasonably certain to be received in the future." UJI 13-1804. In contrast, under the Act, a successful plaintiff who is found to be in need of future medical care "and continuing as long as medical or surgical attention is reasonably necessary . . . shall be furnished with all medical care and related benefits directly or indirectly made necessary by the health care provider's malpractice[.]" Section 41-5-7(B). Payment "shall be made as expenses are incurred." Section 41-5-7(D). Further, when future medical care is awarded, the district court has continuing jurisdiction to enforce and modify the expenses of that care. Sections 41-5-9, -10.

When we consider why the Act was adopted, and how the Act as a whole accomplishes its purposes, we are confident in concluding that the Act created a new statutory cause of action not recognized under the common law. It is settled that "where the [L]egislature creates a right of action pursuant to a special statutory proceeding, there is no

right to a jury trial under our constitution unless the statute so provides." *Smith v. First Alamogordo Bancorp., Inc.*, 114 N.M. 340, 343, 838 P.2d 494, 497 (Ct. App. 1992). Thus, the statutory cap limiting damage awards for anything other than punitive damages, medical care, and related benefits from exceeding $600,000 does not infringe or violate Plaintiff's constitutional right to a jury trial under Article II, Section 12 of the New Mexico Constitution.

2. The Cap Does Not Violate Separation of Powers

Plaintiff argues that the damages cap violates the separation of powers clause in the New Mexico Constitution because it usurps the judiciary's self-regulation and creates an unappealable remittitur. The separation of powers clause states:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive[,] and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except [where constitutionally excepted].

N.M. Const. art. III, § 1. "[T]he separation of powers doctrine precludes the [L]egislature from stepping into the judiciary's exclusive domain of prescribing the rules of judicial practice and procedure and similarly precludes the judiciary from overturning or contradicting a constitutional legislative declaration of substantive law." *In re Daniel H.*, 2003-NMCA-063, ¶ 17, 133 N.M. 630, 68 P.3d 176. In arguing that the damages cap constitutes a form of legislative remittitur, Plaintiff asserts that through the cap on damages, the Legislature infringes on the "rules of judicial practice and procedure." *Id.*

In order for a trial court to grant a remittitur, "the exercise of such discretion must be supported by express reasons, and those reasons must establish the presence of passion, prejudice, partiality, sympathy, undue influence[,] or some corrupt cause or motive." *Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 19, 127 N.M. 1, 976 P.2d 1 (internal quotation marks and citations omitted). Because in a remittitur the court changes the jury's verdict, "under current practice[,] it has been held that the court must offer the plaintiff the alternative of undergoing a new trial." *Id.* ¶ 14.

In *Wachocki v. Bernalillo County Sheriff's Department*, we evaluated a challenge based on separation of powers and legislative remittitur to the TCA cap on damages. 2010-NMCA-021, ¶ 49, 147 N.M. 720, 228 P.3d 504. We determined that the cap, "as a limit on damages for a cause of action created by statute," does not affect the judicial branch's ability to administer its own rules and procedures. *Id.* We agree with *Wachocki*'s reasoning that a statutory cap does not violate the separation of powers doctrine. While *Allsup's* established that it is unconstitutional for a court to change the jury's verdict without offering a new trial, there is a distinction between a judge requiring litigants to accept a reduction of the jury's verdict and a statute mandating that all litigants must accept a legislatively reduced verdict. The cap is applied across the board to all litigants and requires no determination of the proportionality of a particular jury's response to a particular party. The cap,

therefore, does not violate the doctrine of separation of powers.

3. The Cap Does Not Violate Equal Protection

Plaintiff argues that the damages cap violates his right to equal protection under the Fifth Amendment of the United States Constitution made applicable to the states through the Fourteenth Amendment as well as Article 2, Section 18 of the New Mexico Constitution. We agree with Defendant that Plaintiff failed to identify a need to diverge from federal precedent based upon any properly raised assertion of broader protections contained within the state constitution and, thus, only examine the federal equal protection provision. *See ACLU of N.M.*, 2006-NMCA-078, ¶ 18.

The Fourteenth Amendment of the United States Constitution provides that states shall not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Plaintiff argues that the damages cap creates different classes of patients depending on whether they may be fully compensated, that the use of intermediate scrutiny is appropriate under New Mexico case law, and that the Act has not successfully controlled the costs of malpractice insurance and therefore fails to provide an appropriate reason for treating injured persons differently. We disagree, apply rational basis review, and conclude that there is no equal protection violation.

The Act is an economic regulation that requires rational basis review under *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 83 (1978) (stating that "[t]he liability-limitation provision thus emerges as a classic example of an economic regulation—a legislative effort to structure and accommodate the burdens and benefits of economic life" and requiring that the law be irrational to be overturned (internal quotation marks and citation omitted)); *Wachocki*, 2010-NMCA-021, ¶ 41 ("The interests at stake in a challenge of the TCA cap are of an economic or financial nature, and this Court is unconvinced that equal protection rights are affected so substantially that intermediate scrutiny is warranted." (alteration, internal quotation marks, and citation omitted)); *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 28, 125 N.M. 721, 965 P.2d 305 (*Trujillo III*) (determining that the cap in the TCA is economic legislation under the *Duke Power* definition and therefore receives rational basis review); *Marrujo v. N.M. State Highway Transportation Department*, 118 N.M. 753, 757-58, 887 P.2d 747, 751-52 (1994) ("The rational basis standard of review is triggered by all other interests: those that are not fundamental rights, suspect classifications, important individual interests, and sensitive classifications. This level of scrutiny applies in economic and social legislation, classifications based on property use, and business and personal activities that do not involve fundamental rights."). Other jurisdictions have reasoned similarly for medical malpractice caps when faced with an equal protection challenge. *See Hoffman v. United States*, 767 F.2d 1431, 1437 (9th Cir. 1985); *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1055 (Alaska 2002); *Miller v. Johnson*, 289 P.3d 1098, 1120 (Kan. 2012); *Oliver v. Magnolia Clinic*, 85 So. 3d 39, 44 (La. 2012); *Robinson v. Charleston Area Med. Ctr., Inc.*, 414 S.E.2d 877, 888 (W.Va. 1991).

Plaintiff argues that a heightened standard should be used because the cap

creates a classification that does not treat similarly situated people equally. However, the Supreme Court in *Trujillo III* stated that the cap in the TCA did not receive heightened scrutiny because "the interests at stake . . . are of an economic or financial nature," and that it was not convinced that equal protection rights were affected by the damages cap. 1998-NMSC-031, ¶ 26. The Supreme Court stated that "[t]he intermediate scrutiny standard is used to assess legislative classifications infringing important but not fundamental rights, and involving sensitive but not suspect classes. For example, classifications based on gender and illegitimacy traditionally have been measured under intermediate scrutiny." *Id.* ¶ 15 (internal quotation marks and citations omitted).

Our Supreme Court has previously found that the Act creates "a mere administrative categorization. It is a class defined by economic and bureaucratic distinctions that are far removed from racial, religious, or other fundamental categories." *Cummings v. X-Ray Assocs. of N.M., P.C.*, 1996-NMSC-035, ¶ 25, 121 N.M. 821, 918 P.2d 1321 (applying the rational basis test "to legislation directed toward business, social, and financial activities" such as the Act). The Act distinguishes merely between patients whose injuries are fully compensable and those who are prevented from receiving their full award by the cap. The distinction is based on the severity of their injury and not any factor that implicates a classification such as gender or illegitimacy. *See Trujillo III*, 1998-NMSC-031, ¶ 15. Therefore, applying the rational basis test is appropriate.

Under the rational basis standard, "the burden is on the opponent of the legislation to prove that the law lacks a reasonable relationship to a legitimate governmental purpose." *Marrujo*, 118 N.M. at 757-58, 887 P.2d at 751-52 (citing *Trujillo v. City of Albuquerque*, 110 N.M. 621, 628, 798 P.2d 571, 578 (1990) (*Trujillo I*), and *Richardson*, 107 N.M. at 693, 763 P.2d at 1158). The Supreme Court in *Marrujo* noted that this is a high burden for the party contesting the legislation. 118 N.M. at 758, 887 P.2d at 752 ("[T]hey must demonstrate that the challenged legislation is clearly arbitrary and unreasonable, not just that it is possibly so."). In the light of any facts supporting the reasoning for the legislation, the court will uphold the statute. *Id.*

Plaintiff argues that the purposes of the Act are laudable, but that they have not been accomplished and, therefore, the cap is not rationally related to the Legislature's stated purpose. That purpose is "to promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers." Section 41-5-2. The Supreme Court has stated that the Act as a whole "achieves the legislative purposes of assuring that health care providers are adequately insured so that patients may be reasonably compensated for their malpractice injuries." *Cummings*, 1996-NMSC-035, ¶ 28. The Act was passed in response to an insurance crisis that "arose out of a nationwide perception that medical *malpractice* insurance was increasingly becoming unavailable." *Baker*, 2012-NMCA-073, ¶ 22. In response to the crisis, the Legislature limited heath care providers' liability through enacting damage caps, shortening the statute of limitations and mandating an evaluation process by a medical review commission while protecting victims of malpractice with ongoing coverage of their medical expenses. *See id.* ¶¶ 24-25. The Legislature hoped that the limitations on

liability would provide an incentive for insurance companies to continue to provide malpractice insurance.

To show that the Act's purposes have not been achieved, Plaintiff relies solely on the affidavit of Donald Letherer, which states that the cap has not controlled the costs of malpractice insurance and cites supporting statistics. However, this does not meet the difficult burden a challenger has to show that the legislation is arbitrary and unreasonable under *Marrujo*. 118 N.M. at 757-58, 887 P.2d at 751-52. The cap on damages is not an arbitrary response to the malpractice insurance issues. We hold that the Act is rationally related to its stated goals and that, therefore, the Act does not violate the equal protection clause of the United States Constitution.

4. The Cap Does Not Violate Due Process and Fundamental Fairness

Plaintiff finally argues that, under his substantive due process rights, the cap violates a doctrine of fundamental fairness. Although he does not define what he means by "fundamental fairness," he relies on *Garcia ex rel. Garcia v. La Farge*, 119 N.M. 532, 541, 893 P.2d 428, 437 (1995), which held that "considerations of fairness implicit in the Due Process Clauses of the United States and New Mexico Constitutions dictate that[,] when the [L]egislature enacts a limitations period[,] it must allow a reasonable time within which existing or accruing causes of action may be brought." *Garcia* was a challenge to the constitutionality of the statute of limitations in the Act. Because the injury in *Garcia*—cardiac arrest of the Garcias' son—occurred only three months before his parents ran out of time to sue the doctors who had failed to diagnose his condition, our Supreme Court held that the Act's statute of limitations created an unreasonably short period of time within which the Garcias could bring their suit and that it violated due process. 119 N.M. at 542, 893 P.2d at 438.

However, *Garcia*, as a substantive due process case, relies on an analysis of the fairness of legislative classification. *Id.* at 537, 893 P.2d at 433. This is the same analysis that we performed above under Plaintiff's equal protection argument, and "[s]ince no clear due process argument is raised, we will simply restate the idea that analysis under the equal protection clause of the fourteenth amendment is identical to that used under the due process clauses." *Marrujo*, 118 N.M. at 760, 887 P.2d at 754 (alterations, internal quotation marks, and citations omitted); *Duke Power*, 438 U.S. at 93 (noting that "equal protection arguments largely track and duplicate those made in support of the due process claim"). Because Plaintiff fails to distinguish a separate basis for his substantive due process argument, we consider it to be included in our equal protection argument and find that the cap does not violate due process.

III. CONCLUSION

For the reasons stated above, we affirm the district court's decisions with relation to Defendant's duty to Plaintiff, issuance of jury instructions, and refusal to grant further remittitur or grant Defendant a new trial. We also affirm the district court's order reducing the $1,000,000 verdict because the damages cap contained in the Act is constitutional.

IT IS SO ORDERED.

RODERICK T. KENNEDY, Chief Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge

J. MILES HANISEE, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-039

Filing Date: August 15, 2013

Docket No. 33,362

IN RE RESCUE ECOVERSITY PETITION

CLAUDE D. CONVISSER,

Petitioner-Respondent,

v.

ECOVERSITY, PRAJNA FOUNDATION, and JEFFREY HARBOUR,

Respondents-Petitioners.

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for Respondent

OPINION

DANIELS, Justice.

Article II, Section 14 of the New Mexico Constitution provides that, in addition to other permissible methods for convening a criminal grand jury, "a grand jury shall be ordered to convene by [a district] judge upon the filing of a petition therefor signed by not less than the greater of two hundred registered voters or two percent of the registered voters of the county . . . ." We hold that determining whether a grand jury petition is supported by the requisite number of "registered voters" is a judicial function calling for the exercise of judicial discretion and that the district court did not abuse its discretion in this case by rejecting a grand jury petition whose signatories were not confirmed to be registered voters.

I. BACKGROUND

In July 2009, attorney Claude Convisser filed a petition with the First Judicial District Court to initiate[1] a Santa Fe County grand jury proceeding. Convisser's petition sought an investigation of a "suspicion of criminal fraud" in connection with the activities of "[Jeffrey] Harbour and his cohorts" in procuring a will from Frances Harwood shortly before her death in 2003 that gave Harbour control of Harwood's two nonprofit organizations, EcoVersity and Prajna Foundation. Convisser sought to compel a grand jury investigation through a citizens' petition after the New Mexico Attorney General and the Santa Fe District Attorney separately declined Convisser's requests to pursue the matter. The underlying controversy, which is not directly relevant to the issue in this appeal, is discussed more fully in Convisser's related attorney disciplinary proceeding. *See In re Convisser*, 2010-NMSC-037, 148 N.M. 732, 242 P.3d 299.

When Convisser filed his grand jury petition in district court, he included the affidavit of the Santa Fe County Clerk, whom he asked to verify that his petition signatories were Santa Fe County registered voters. In her affidavit, the County Clerk stated (1) that Convisser needed the signatures of 1770 registered voters in order to meet the constitutional requirement and (2) that of the signatures Convisser submitted, the names of 1808 (sixty-eight percent of the 2658 submitted signatures) were the same as names of people who appeared on Santa Fe County's voter registration rolls; but (3) the County Clerk could not verify that any of the petition's signatories were actually registered voters, primarily because the petition failed to include the signatories' addresses, which the County Clerk could use to confirm whether the signatories were registered to vote in Santa Fe County.

Before ruling on whether Convisser's petition satisfied the requirements of Article II, Section 14, the district court issued an order permitting responses from "Santa Fe County and other interested parties." The joint response of Harbour, EcoVersity, and Prajna Foundation argued that Convisser's petition did not meet the requirements of Article II, Section 14 because (1) the County Clerk could not verify its signatories as registered voters, (2) simply comparing signatory names to names of registered voters did not verify that the signatories were in fact the registered voters of the same name, as illustrated by affidavits of Santa Fe County registered voters whose names matched those on Convisser's petition but who swore that they had not signed his petition, and (3) numerous signatures were the result of fraud and misrepresentation, an allegation supported by affidavits, letters, and emails attached to the joint filing.

Santa Fe County also filed a response, arguing that the petition failed to establish compliance with the requirements of Article II, Section 14 because the County Clerk was unable to verify by "an address or some other reliable way" that the signatories were registered voters. The County's response noted that before circulating his petition Convisser did not consult with the County

[1]Although caselaw and the proceedings in this case often refer to "convening a grand jury" by petition, this Court clarified in *Cook v. Smith*, 1992-NMSC-041, ¶ 18, 114 N.M. 41, 834 P.2d 418, that Article II, Section 14 is satisfied by submitting the subject matter of the petition to an already-convened grand jury without the need to convene an additional one.

Clerk to determine what information the Clerk needed in order to verify whether she could confirm a signatory as a registered voter.

In addition to soliciting and considering the written submissions, the district court scheduled a hearing to allow all interested parties to be heard. Following the hearing, the district court issued an order denying Convisser's petition, finding that "the petition signers did not provide sufficient information to determine if any signer is a qualified voter in Santa Fe County."

The Court of Appeals reversed the district court on the theory that the district court's ruling impermissibly added a signatory address requirement to Article II, Section 14. *See In re Rescue EcoVersity Petition*, 2012-NMCA-008, ¶ 8, 270 P.3d 104 ("We will not read language which is not there into the Constitution in order to require petitioners to include addresses of signatories in their petition.").

After first holding that "[o]nce the County Clerk determines that the requisite number of persons purporting to be registered voters in the county have provided their names and signatures, and those names correspond to names of registered voters within the county, the Constitution has been satisfied," *id.* ¶ 4, the Court of Appeals went on to create a new, three-step burden-shifting procedure for grand jury petitions. First, the petitioners would have an initial burden of production, showing that a sufficient number of names of petition signatories facially match the names of registered voters within the county; once petitioners carry that initial burden, the district court would be without discretion to deny the petition unless an opponent of the petition then satisfies a burden of producing "evidence demonstrating that the signatures on the petition are not those of registered voters within the county"; and finally, if an opponent were to satisfy that burden of production, the petitioner would then bear the burden of persuading the district court that the constitutional requirement is met. *Id.* ¶ 11.

Applying its new procedure, the Court of Appeals concluded that petition opponents in this case had not carried their burden of producing sufficient evidence to show that the petition signatures were not those of registered voters and that the district court therefore abused its discretion in determining that Convisser had not met his constitutional burden of establishing compliance with Article II, Section 14. *Id.* ¶ 14.

We granted certiorari to determine the precedential issues of constitutional interpretation that this case presents.

II. DISCUSSION

A. The District Court Has the Judicial Responsibility to Determine That a Voter Petition Meets Constitutional Requirements

Although this Court has not previously considered the precise manner in which a district court must determine whether a voter-initiated grand jury petition meets the constitutional requirement that it be signed by the requisite number of "registered voters of the county," we have addressed other issues relating to the sufficiency of grand jury petitions. *See Pino v. Rich*, 1994-NMSC-105, ¶ 3, 118 N.M. 426, 882 P.2d 17 (A "district court judge must determine the legality of a petition to convene a grand jury by deciding whether 'the petition on its face delimit[s] an area of inquiry that colorably lies within the permissible scope of grand jury inquiry.'"

(alteration in original) (citation omitted)); *Dist. Court of Second Judicial Dist. v. McKenna*, 1994-NMSC-102, ¶¶ 14-15, 118 N.M. 402, 881 P.2d 1387 ("As part of its 'residuum of supervisory authority,' the reviewing court may consider matters beyond the face of the petition if necessary to determine the petition's legal validity," including holding an evidentiary hearing. (citation omitted)); *Cook v. Smith*, 1992-NMSC-041, ¶¶ 6, 12, 114 N.M. 41, 834 P.2d 418 ("[W]e think it clear that the judge must make a legal, nondiscretionary determination that the inquiry proposed by the petition is valid."). While these cases focus on the validity of the petition's inquiry, this Court specifically explained in *Cook* that "the sole issue committed to the discretion of the [district] court appears to be verification that the petition meets the constitutional conditions, namely whether the petition contains the requisite number of signatures and *whether the signatories are registered voters of the county*." *Cook*, 1992-NMSC-041, ¶¶ 5-6 (emphasis added).

We clarify that the issue here is not whether any further constitutional requirements can be added to the text of Article II, Section 14 that grand jury petitions be signed by the requisite number of "registered voters of the county"; instead, the issue is whether the district court acted within its lawful discretion in determining that the petitioners had not shown that they met that constitutional requirement. Although we agree with the view of the Court of Appeals that our courts are not free to add requirements to those set forth in the Constitution, nothing in the district court's rulings purported to add any further constitutional requirements for a grand jury petition. The relevant finding in the final order recites simply that the "Santa Fe County Clerk and the Court cannot verify that any of the signers of the subject petition are registered voters of Santa Fe County because the petition signers did not provide sufficient information to determine if any signer is a qualified voter in Santa Fe County."

To the contrary, it was the appellate creation of a new three-step burden-shifting procedure that added provisions to the constitutional mandate, a creation that we conclude is unjustified by law or reason. Neither the text of Article II, Section 14 nor any of our precedents prescribe shifting burdens or other special standards by which a district judge is constrained in exercising judicial discretion to determine whether a petition has met the constitutional requirements of being signed by a specified number of actual "registered voters of the county."

Requiring a district judge to accept a grand jury petition as sufficient to order a grand jury inquiry simply because it contains signatures that are spelled the same as those of registered voters overlooks the judicial duty of the district court to ensure the actual validity of a grand jury petition. As we recognized in *Cook* and *McKenna*, we will honor "the public's constitutional right to petition the courts to convene a grand jury" by protecting "the balance struck by our constitution between the government and the people." *McKenna*, 1994-NMSC-102, ¶ 10 (citing *Cook* with approval). As part of that balance, the citizen petition right "checks the traditional process by permitting the citizens to trigger inquiry into matters that for reasons of political acquiescence, oversight, or impasse evade traditional means of inquiry." *Cook*, 1992-NMSC-041, ¶ 8. On the other side of the balance is our judicial responsibility to protect "the integrity and respectability of our judicial system" by preventing the grand jury

process from being misused "for a fishing expedition (or worse, a witch hunt)." *McKenna*, 1994-NMSC-102, ¶ 17. As we recently observed in *Jones v. Murdoch*, 2009-NMSC-002, ¶¶ 13, 38-39, 145 N.M. 473, 200 P.3d 523, a court has a supervisory duty "to see that its grand jury and its process are not abused, or used for purposes of oppression and injustice" (internal quotation marks and citation omitted) (holding that the courts may enforce fairness responsibilities of a prosecutor to avoid unwarranted harm to targeted individuals).

As a practical matter, there often is not an identifiable opponent before the court to shoulder the new burden of production imposed by the decision below because nothing in Article II, Section 14 requires naming a target of the proposed investigation. *See Cook*, 1992-NMSC-041, ¶ 14 (observing that "the petition need not articulate specific allegations of crime" so long as it simply "delimit[s] an area of inquiry that colorably lies within the permissible scope of grand jury inquiry"); *McKenna*, 1994-NMSC-102, ¶ 11 (emphasizing that "a petition to convene a grand jury need not name persons specifically, because grand juries investigate crimes or acts of malfeasance, not people"). There is nothing in the Constitution or any other law that requires notification to interested parties of a petition to convene a grand jury. The district court necessarily has the primary duty to ensure that the grand jury process is lawfully invoked, whether or not other interested parties learn of the request and seek to intervene.

We must also recognize that the burden-shifting procedure would place a nearly insurmountable burden on a party who had adequate notice and a timely opportunity to attempt to oppose a grand jury petition. To impose a burden of producing evidence that a petition's signatories are *not* registered voters would necessarily require contacting each and every voter in the county with the same name as each signatory to have each establish that he or she was not the person who signed the petition, a task compounded by the frequency of people who share common names, such as the district judge and one of the Court of Appeals judges in this case.

Because we conclude that the three-step burden-shifting procedure is grounded in neither law nor practicality, we formally hold what we previously stated in addressing other issues in *Cook* and *McKenna*: determining whether grand jury petition signatories are actually registered voters of the county is a judicial determination committed to the sound discretion of the district court. Appellate review is therefore governed by an abuse of discretion standard.

B. The District Court Did Not Abuse Its Discretion in Rejecting Convisser's Petition

Having concluded that the registered voter mandate is a factual determination properly within the discretion of the district court, we address whether the district court abused its discretion when it rejected Convisser's petition.

"An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case." *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citation omitted). "We will uphold a trial court's findings if they are supported by substantial evidence." *Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, ¶ 12, 140 N.M. 478, 143 P.3d 717. "Substantial

evidence is that which a reasonable mind accepts as adequate to support a conclusion." *Id.* (internal quotation marks and citation omitted). Where the exercise of judicial discretion involves fact-finding, "we will not reweigh the evidence nor substitute our judgment for that of the fact finder." *Bishop v. Evangelical Good Samaritan Soc'y*, 2009-NMSC-036, ¶ 28, 146 N.M. 473, 212 P.3d 361 (internal quotation marks and citation omitted). *See Ruiz v. Vigil-Giron*, 2008-NMSC-063, ¶ 13, 145 N.M. 280, 196 P.3d 1286 (reviewing whether a district court's determination of the validity of signatures for a ballot petition satisfied statutory requirements under the abuse of discretion standard); *see also State v. Gonzales*, 2005-NMSC-025, ¶ 21, 138 N.M. 271, 119 P.3d 151 ("Standards of review reflect the different functions trial and appellate courts serve. Disputes over historical facts are resolved by trial courts, and appellate courts give great deference to a trial court's factual determinations, reviewing to determine whether substantial evidence supports those determinations.").

In this case, the district court not only considered the factual and legal materials submitted in writing, it conducted a full hearing on the issues before rejecting Convisser's petition due to an insufficient showing that the petition had been signed by the requisite number of registered Santa Fe County voters. Rather than rebut the sworn statement of the County Clerk that the signatures could not be verified or present other forms of evidence that the signatories were the registered voters, Convisser simply argued that matches between the names of signatories and names of registered voters should be conclusive. However, "matching" is not "verifying." To "match" is "[t]o be like (another)[;] . . . to resemble." *The American Heritage Dictionary of the English Language* 1082 (5th ed. 2011). To "verify" is to "demonstrate the truth or accuracy of, as by the presentation of evidence." *Id.* at 1924. In this case, the County Clerk clearly stated that she could not verify that Convisser's petition was supported by the requisite number of registered voters, and Convisser provided no evidence to prove otherwise. Convisser apparently recognized that merely asserting that a signatory is a registered voter is constitutionally insufficient when he asked the County Clerk to verify his petition's signatures before he submitted the petition to the district court.

Voters' addresses, while not constitutionally required for a grand jury petition, play an important role in voter registration and verification of registered voter status. *See, e.g.*, NMSA 1978, § 1-4-5.1(I)(4)(a) (2007) (requiring one of several forms of identification "that shows the name and current address of the applicant" to support a voter registration application); *see also* NMSA 1978, § 1-4-5.3 (2007) (providing the means of voter registration when a person lacks a physical address); NMSA 1978, § 1-4-5.4(B) (2011) (requiring that the voter registration form include an applicant's residence); and NMSA 1978, § 1-4-17 (1993) (requiring a voter who changes addresses to submit a certificate of registration form).

Our statutes and administrative regulations provide numerous other instances in which addresses are required for petitions in order to aid in the process of signature verification. *See, e.g.*, NMSA 1978, § 1-7-2(A) (2011) (requiring that petitions to establish a political party in New Mexico include signatures and addresses of a requisite number of qualified voters); NMSA 1978, § 1-8-2(B) to (C) (2007) (requiring the county

clerk to certify, based on the inclusion of addresses, that a requisite number of signatories to election nominating petitions voted in the last preceding general election); NMSA 1978, § 1-8-31(A) to (B) (2011) (limiting the number of election nominating petitions a person can sign and requiring signatories to include their registration addresses); NMSA 1978, § 1-15A-6 (2011) (requiring the secretary of state to verify as registered voters the requisite number of signatories to a presidential nominating petition); NMSA 1978, § 1-17-2 (1969) (requiring that a referendum petition include signatory addresses); *see also* 1.10.24.3, .7, .9 NMAC (04/15/2004) (requiring, under the Election Code, verification as "registered voters" of the signatories to a referendum petition); NMSA 1978, § 3-2-1(A) (2013) (requiring a petition seeking incorporation as a municipality to include the street addresses of "qualified elector" signatories); NMSA 1978, §§ 22-7-6 (1993) and 22-7-10(F) (1977) (requiring inclusion of "Address as Registered" for school board recall petitions as well as verification that a recall petition includes the requisite number of valid signatures); *accord State ex rel. Citizens for Quality Educ. v. Gallagher*, 1985-NMSC-030, ¶ 17, 102 N.M. 516, 697 P.2d 935 (holding that "where the information contained in the [school board recall] petition substantially complies with [the statutory requirements] and is sufficient to allow the county clerk to verify that the signer is a registered voter of the county and school district," the statute's purpose is satisfied).

We note that voter addresses play an important role in petition verification in the few states that provide for voter-initiated grand juries. While not dispositive, we also consider the approaches taken by the five other states with similar grand jury provisions. Oklahoma is the only other state that provides such a right in its constitution. *See* Okla. Const. art. II, § 18 (A "grand jury shall be ordered by a district judge upon the filing of a petition therefor signed by qualified electors of the county."). Four other states provide for grand jury petitions in statutes. *See* Kan. Stat. Ann. § 22-3001(c) (2013); Neb. Rev. Stat. Ann. § 29-1401(3) (2010); Nev. Rev. Stat. Ann. § 6.132 (2001); N.D. Cent. Code Ann. § 29-10.1-02 (2013).

Of these five states, three—Kansas, Nebraska, and Nevada—explicitly require a grand jury petition to include signatories' addresses. *See* Kan. Stat. Ann. § 22-3001(c)(3) (requiring a petition to include a "signer's place of residence, giving the street and number or rural route number, if any"); Neb. Rev. Stat. Ann. § 32-628(1) (2012) (requiring "date of birth and street name and number, city or village, and zip code" for all petitions requiring signature verification); Nev. Rev. Stat. Ann. § 6.132(2)(a)(3) ("Each signature contained in the petition . . . [m]ust be followed by the address of the person signing the petition and the date on which the person is signing the petition.").

Regardless of the source of the authority, each of these five states explicitly requires signatory verification. Kansas and Nebraska rely on either the county clerk or a county election officer to verify signatories. *See* Kan. Stat. Ann. § 22-3001(c)(3) (requiring the county election officer to "determine whether the persons whose signatures are affixed to the petition are qualified electors of the county" after which the reviewing judge "shall then consider the petition and, if it is found that the petition is in proper form and bears the signatures of the required number of electors, a grand jury shall be ordered to be summoned"); Neb. Rev. Stat. Ann. §

29-1401.02(3) (2002) (requiring either the county clerk or the election commission to "determine the number of valid signatures appearing on such petitions and certify the findings"). Nevada requires the district court clerk to certify a grand jury petition as statutorily sufficient, including that it contains signatures of the requisite number of registered voters. *See* Nev. Rev. Stat. Ann. § 6.132(2)(a), (6)(a); *cf.* Nev. Rev. Stat. Ann. § 6.132(7) (requiring that a petition not be certified as insufficient when, absent other proof of disqualification, any signature does not correspond exactly with the signature on the official register of voters and the signatory's identity can be ascertained from the face of the petition); *see also* Nev. Rev. Stat. Ann. § 6.132(8)(b) (providing judicial review of any petition determined to be insufficient). North Dakota takes yet another approach, requiring a petition to "be verified on information and belief by at least three of the petitioners." N.D. Cent. Code Ann. § 29-10.1-04 (1971). Oklahoma vests verification directly with the presiding district court judge, who "shall determine whether or not that number meets the requirement of a grand jury petition pursuant to Section 18 of Article II of the Oklahoma Constitution." Okla. Stat. Ann. tit. 38, § 107 (1989).

The fact that all of the states with citizen-initiated grand jury provisions not only require the verification of signatories but most commonly do so through the use of voter addresses supports our conclusion that it was a reasonable exercise of judicial discretion for the district judge in this case to take into account the lack of voter addresses or other means of confirming the registration status of the petition signatories.

In upholding the district court's exercise of discretion in this case, we do not rigidly require voters' addresses on grand jury petitions, however useful addresses may be to the County Clerk and the court. Other verification aids are theoretically possible, particularly in light of New Mexico statutory requirements that voter registration records maintained by election officials must contain other identifying information in addition to voter addresses, such as dates of birth and social security numbers. *See* § 1-4-5.4(B) ("The certificate of registration form shall require the following elements of information concerning the applicant for registration: name, gender, residence, municipality, post office, county of former registration, social security number, date of birth, political party affiliation, zip code, telephone number at the applicant's option and statement of qualification for voting"). Other options conceivably could include handwriting comparisons by a qualified witness or testimony of questionable signatories. *See* § 1-4-5.4(C) ("Provision shall be made for the usual signature or mark of the applicant, for the signature of the county clerk and for the dates of such signatures."). We need not address the sufficiency of any of those methods because none were presented to the district court in this case.

We do not intend to circumscribe the reasoned exercise of judicial discretion by dictating what particular forms of evidence the district court must consider in the course of determining whether a signatory is a registered voter, any more than we would do in the context of other factual determinations. We have long recognized that "[a]ny attempt to define the phrase 'judicial discretion' is generally regarded as a difficult and dangerous undertaking." *Pankey v. Hot Springs Nat'l Bank*, 1938-NMSC-067, ¶ 21, 42 N.M. 674, 84 P.2d 649. "But we venture that such a discretion as the law sanctions is not arbitrary,

vague, or fanciful, nor is it to be controlled by humor or caprice, but is to be governed by principle and regular procedure for the accomplishment of the ends of right and justice." *Id.* Our approach is consistent with that of courts elsewhere. *See, e.g.*, *Shook v. Bd. of Cnty. Comm'rs of El Paso*, 543 F.3d 597, 603 (10th Cir. 2008) ("When applying an abuse of discretion standard of review, we necessarily recognize that there may be no single right answer to the question at hand, but a range of possible outcomes sustainable on the law and facts, and we will defer to the district court's judgment so long as it falls within the realm of these rationally available choices." (internal quotation marks and citation omitted)).

Accordingly, we hold that the district court did not abuse its discretion in rejecting Convisser's petition in this case. In order to provide guidance for all in the future, we ask our criminal rules committee to consider recommendations for rules and forms to assist in implementing the citizen grand jury petition requirements in a way that will "secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Rule 5-101(B) NMRA.

III. CONCLUSION

We reverse the Court of Appeals and affirm the district court's denial of Convisser's grand jury petition.

IT IS SO ORDERED.

CHARLES W. DANIELS, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

BARBARA J. VIGIL, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-040

Filing Date: August 22, 2013

Docket No. 33,687

ELANE PHOTOGRAPHY, LLC,

Plaintiff-Petitioner,

v.

VANESSA WILLOCK,

Defendant-Respondent.

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OPINION

CHÁVEZ, Justice.

By enacting the New Mexico Human Rights Act (NMHRA), NMSA 1978, §§ 28-1-1 to -13 (1969, as amended through 2007), the Legislature has made the policy decision to prohibit public accommodations from discriminating against people based on their sexual orientation. Elane Photography, which does not contest its public accommodation status under the NMHRA, offers wedding photography services to the general public and posts its photographs on a password-protected website for its customers. In this case, Elane Photography refused to photograph a commitment ceremony between two women. The questions presented are (1) whether Elane Photography violated the NMHRA when it refused to photograph the commitment ceremony, and if so, (2) whether this application of the NMHRA violates either the Free Speech or the Free Exercise Clause of the First Amendment to the United States Constitution, or (3) whether this application violates the New Mexico Religious Freedom Restoration Act (NMRFRA), NMSA 1978, §§ 28-22-1 to -5 (2000).

First, we conclude that a commercial photography business that offers its services to the public, thereby increasing its visibility to potential clients, is subject to the antidiscrimination provisions of the NMHRA and must serve same-sex couples on the same basis that it serves opposite-sex couples. Therefore, when Elane Photography refused to photograph a same-sex commitment ceremony, it violated the NMHRA in the same way as if it had refused to photograph a wedding between people of different races.

Second, we conclude that the NMHRA does not violate free speech guarantees because the NMHRA does not compel Elane Photography to either speak a government-mandated message or to publish the speech of another. The purpose of the NMHRA is to ensure that businesses offering services to the general public do not discriminate against protected classes of people, and the United States Supreme Court has made it clear that the First Amendment permits such regulation by states. Businesses that choose to be public accommodations must comply with the NMHRA, although such businesses retain their First Amendment rights to express their religious or political beliefs. They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws. We also hold that the NMHRA is a neutral law of general applicability, and as such, it does not violate the Free Exercise Clause of the First Amendment.

Finally, we hold that the NMRFRA is inapplicable in this case because the government is not a party. For these reasons, we affirm the judgment of the Court of Appeals.

BACKGROUND

The NMHRA prohibits, among other things, discriminatory practices against certain defined classes of people. *See* § 28-1-7. In 2003, the NMHRA was amended to add "sexual orientation" as a class of persons protected from discriminatory treatment. 2003 N.M. Laws, ch. 383, § 2. "Sexual orientation" is defined in the NMHRA as "heterosexuality, homosexuality or bisexuality, whether actual or perceived." Section 28-1-2(P). In this case, we are

concerned with discrimination by a public accommodation against a person because of that person's real or perceived homosexuality—that person's propensity to experience feelings of attraction and romantic love for other members of the same sex.

"Public accommodation" is defined in the NMHRA as "any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private." Section 28-1-2(H). Thus, a business that elects not to offer its goods or services to the public is not subject to the NMHRA.

Vanessa Willock contacted Elane Photography, LLC, by e-mail to inquire about Elane Photography's services and to determine whether it would be available to photograph her commitment ceremony[1] to another woman. Elane Photography's co-owner and lead photographer, Elaine Huguenin, is personally opposed to same-sex marriage and will not photograph any image or event that violates her religious beliefs. Huguenin responded to Willock that Elane Photography photographed only "traditional weddings." Willock e-mailed back and asked, "Are you saying that your company does not offer your photography services to same-sex couples?" Huguenin responded, "Yes, you are correct in saying we do not photograph same-sex weddings," and thanked Willock for her interest.

In order to verify Elane Photography's policy, Willock's partner, Misti Collinsworth, e-mailed Elane Photography and inquired about its willingness to photograph a wedding, without mentioning the sexes of the participants. Huguenin sent Collinsworth a list of pricing information and an invitation to meet with her and discuss her services. A few weeks later, Huguenin again e-mailed Collinsworth to follow up.

Willock filed a discrimination complaint against Elane Photography with the New Mexico Human Rights Commission for discriminating against her based on her sexual orientation in violation of the NMHRA. The Commission concluded that Elane Photography had discriminated against Willock in violation of Section 28-1-7(F), which prohibits discrimination by public accommodations on the basis of sexual orientation, among other protected classifications. It awarded Willock attorneys' fees, which Willock later waived. No other monetary or injunctive relief was granted.

Elane Photography appealed to the Second Judicial District Court for a trial de novo pursuant to Section 28-1-13(A). *See* NMSA 1978, § 39-3-1 (1955) ("All appeals from inferior tribunals to the district courts shall be tried anew in said courts on their merits, as if no trial had been had below, except as otherwise provided by law."). Elane Photography sought a reversal of the award of attorneys' fees, a declaratory judgment that it had not discriminated on the basis of sexual orientation, and a ruling that its rights had been violated, among other relief. The parties filed cross-motions for summary judgment, and the district court granted summary

[1]Willock referred to the event as a "commitment ceremony" in her e-mail to Elane Photography. However, the parties agree that the ceremony was essentially a wedding—Elane Photography emphasizes that there were vows, rings, a minister, flower girls, and a wedding dress, and Willock uses the word "wedding" to describe the ceremony in her brief. We use the terms "wedding" and "commitment ceremony" interchangeably.

judgment for Willock. Elane Photography again appealed, and the Court of Appeals affirmed. *Elane Photography, LLC v. Willock*, 2012-NMCA-086, ¶ 1, 284 P.3d 428. We granted certiorari.

Elane Photography argues before this Court that: (1) it did not discriminate on the basis of sexual orientation, and therefore it did not violate the NMHRA; or, alternatively, (2) by requiring Elane Photography to accept clients against its will, the NMHRA violates the protection of the First Amendment against compelled speech; (3) the NMHRA violates Elane Photography's First Amendment right to freely exercise its religion; and (4) the NMHRA violates Elane Photography's right under the NMRFRA to freely exercise its religion. For the reasons that follow, we reject Elane Photography's arguments and affirm summary judgment for Willock.

DISCUSSION

The parties agree on the facts in this case, and the only question for this Court to consider is whether Willock 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 ("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."). On appeal, we review a grant of summary judgment de novo. *Id.*

I. ELANE PHOTOGRAPHY REFUSED TO SERVE WILLOCK ON THE BASIS OF HER SEXUAL ORIENTATION IN VIOLATION OF THE NMHRA

The NMHRA seeks to promote the equal rights of people within certain specified classes by protecting them against discriminatory treatment. *See Juneau v. Intel Corp.*, 2006-NMSC-002, ¶ 14, 139 N.M. 12, 127 P.3d 548 ("The NMHRA protects against discriminatory treatment . . . ."). To accomplish this goal, the NMHRA makes it unlawful for "any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodations or goods to any person because of race, religion, color, national origin, ancestry, sex, *sexual orientation*, gender identity, spousal affiliation or physical or mental handicap." Section 28-1-7(F) (emphasis added). The Court of Appeals affirmed the district court's holding that Elane Photography was a public accommodation under Section 28-1-2(H), *Elane Photography*, 2012-NMCA-086, ¶ 18, and Elane Photography did not challenge that holding in this appeal. Accordingly, Elane Photography waived its right to challenge that conclusion as a matter of New Mexico law. *See Fikes v. Furst*, 2003-NMSC-033, ¶ 8, 134 N.M. 602, 81 P.3d 545 ("[I]t is improper for this Court to consider any questions except those set forth in the petition for certiorari."). We therefore accept the Court of Appeals' conclusion that at the time of its interactions with Willock and Collinsworth, Elane Photography was a public accommodation as defined in Section 28-1-2(H), and as such, was subject to Section 28-1-7(F) of the NMHRA. *See Elane Photography*, 2012-NMCA-086, ¶¶ 14, 18.

Elane Photography argues that it did not violate the NMHRA because it did not discriminate on the basis of sexual orientation when it refused service to Willock. Instead, Elane Photography explains that it "did not want to convey through [Huguenin]'s pictures the story of an event celebrating an understanding of marriage that conflicts with

[the owners'] beliefs." Elane Photography argues that it would have taken portrait photographs and performed other services for same-sex customers, so long as they did not request photographs that involved or endorsed same-sex weddings. However, Elane Photography's owners testified that they would also have refused to take photos of same-sex couples in other contexts, including photos of a couple holding hands or showing affection for each other. Elane Photography also argues in its brief that it would have turned away heterosexual customers if the customers asked for photographs in a context that endorsed same-sex marriage. For example, Elane Photography states that it "would have declined the request even if the ceremony was part of a movie and the actors playing the same-sex couple were heterosexual." Therefore, Elane Photography reasons that it did not discriminate "because of . . . sexual orientation," § 28-1-7(F), but because it did not wish to endorse Willock's and Collinsworth's wedding.

The NMHRA prohibits discrimination in broad terms by forbidding "any person in any public accommodation to make a distinction, *directly or indirectly*, in offering or refusing to offer its services . . . because of . . . sexual orientation." Section 28-1-7(F) (emphasis added). Elane Photography is primarily a wedding photography business. It provides wedding photography services to heterosexual couples, but it refuses to work with homosexual couples under equivalent circumstances.

Elane Photography's argument is an attempt to distinguish between an individual's status of being homosexual and his or her conduct in openly committing to a person of the same sex. It was apparently Willock's e-mail request to have Elane Photography photograph Willock's commitment ceremony to another woman that signaled Willock's sexual orientation to Elane Photography, regardless of whether that assessment was real or merely perceived. The difficulty in distinguishing between status and conduct in the context of sexual orientation discrimination is that people may base their judgment about an individual's sexual orientation on the individual's conduct. To allow discrimination based on conduct so closely correlated with sexual orientation would severely undermine the purpose of the NMHRA.

The United States Supreme Court has rejected similar attempts to distinguish between a protected status and conduct closely correlated with that status. In *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, ___ U.S. ___, ___, 130 S. Ct. 2971, 2980 (2010), students at Hastings College of the Law formed a chapter of the Christian Legal Society and sought formal recognition from the school. The Christian Legal Society required its members to affirm their belief in the divinity of Jesus Christ and to refrain from "'unrepentant homosexual conduct.'" *Id.* & *id.* n.3. Hastings refused to recognize the organization on the ground that it violated Hastings' nondiscrimination policy, which prohibited exclusion based on religion or sexual orientation. *Id.* at ___, 130 S. Ct. at 2980. The Christian Legal Society argued that "it [did] not exclude individuals because of sexual orientation, but rather on the basis of a conjunction of conduct and the belief that the conduct is not wrong." *Id.* at ___, 130 S. Ct. at 2990 (internal quotation marks omitted). The United States Supreme Court rejected this argument, stating:

Our decisions have declined to

> distinguish between status and conduct in this context. See *Lawrence v. Texas*, 539 U.S. 558, 575, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination." (emphasis added)); *id.*, at 583, 123 S.Ct. 2472 (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."); cf. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

Id. We agree that when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation. Otherwise we would interpret the NMHRA as protecting same-gender couples against discriminatory treatment, but only to the extent that they do not openly display their same-gender sexual orientation.

In this case, we see no basis for distinguishing between discrimination based on sexual orientation and discrimination based on someone's conduct of publicly committing to a person of the same sex. Our role is to determine and follow the intent of the Legislature, *State v. Hall*, 2013-NMSC-001, ¶ 9, 294 P.3d 1235, and the NMHRA evinces a clear intent to prevent discrimination as it is broadly defined in Section 28-1-7(F). New Mexico has a strong state policy of promoting equality for its residents regardless of sexual orientation. *See* Section 28-1-7 (defining unlawful discriminatory practices); NMSA 1978, § 29-21-2 (2009) (prohibiting profiling by law enforcement on the basis of sexual orientation); NMSA 1978, § 31-18B-2(D) (2007) (including sexual orientation as a protected status under the Hate Crimes Act); *Chatterjee v. King*, 2012-NMSC-019, ¶ 36, 280 P.3d 283 (recognizing that a child can have two legal parents of the same sex); *In re Jacinta M.*, 1988-NMCA-100, ¶ 11, 107 N.M. 769, 764 P.2d 1327 (holding that a children's court could not find a custodian unsuitable solely because of his or her sexual orientation). As a matter of New Mexico law, the NMHRA prohibits a public accommodation from refusing to serve a client based on sexual orientation, and Elane Photography violated the law by refusing to photograph Willock's same-sex commitment ceremony.

We are not persuaded by Elane Photography's argument that it does not violate the NMHRA because it will photograph a gay person (for example, in single-person portraits) so long as the photographs do not reflect the client's sexual preferences. The NMHRA prohibits public accommodations from making any distinction in the services they offer to customers on the basis of protected classifications. Section 28-1-7(F). For example, if a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women, even if it will serve them appetizers. The NMHRA does not permit businesses to offer a "limited menu" of goods or services to customers on the basis of a status that fits within one of the protected

categories. Therefore, Elane Photography's willingness to offer some services to Willock does not cure its refusal to provide other services that it offered to the general public. Similarly, it does not help Elane Photography to argue that it would have turned away heterosexual polygamous weddings or heterosexual persons pretending to have a same-sex wedding. Those situations are not at issue here, and, if anything, these arguments support a finding that Elane Photography intended to discriminate against Willock based on her same-sex sexual orientation. Therefore, we hold that Elane Photography discriminated against Willock on the basis of sexual orientation in violation of the NMHRA.

II. THE NMHRA DOES NOT VIOLATE ELANE PHOTOGRAPHY'S FIRST AMENDMENT RIGHTS

Elane Photography challenges enforcement of the NMHRA on the grounds that enforcement of the law violates its right to free speech and the free exercise of its religion under the First Amendment to the United States Constitution. For the reasons that follow, we reject both of these arguments.

A. THE NMHRA DOES NOT VIOLATE ELANE PHOTOGRAPHY'S FREE SPEECH RIGHTS

Specifically regarding its free speech rights, Elane Photography argues that the NMHRA compels it to speak in violation of the First Amendment by requiring it to photograph a same-sex commitment ceremony, even though it is against the owners' personal beliefs. We disagree.

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This prohibition applies equally to state governments. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (assuming without deciding that free speech and press rights are incorporated by the Due Process Clause of the Fourteenth Amendment); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) ("It has long been established that these First Amendment freedoms [of speech, assembly, and petition] are protected by the Fourteenth Amendment from invasion by the States."). United States Supreme Court precedent makes it clear that the right to speak freely includes the right to refrain from speaking. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

Elane Photography observes that photography is an expressive art form and that photographs can fall within the constitutional protections of free speech. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995) (observing that abstract art and instrumental music are "unquestionably shielded" by the First Amendment). Elane Photography also states that in the course of its business, it creates and edits photographs for its clients so as to tell a positive story about each wedding it photographs, and the company and its owners would prefer not to send a positive message about same-sex weddings or same-sex marriage. Elane Photography concludes that by requiring it to photograph same-sex weddings on the same basis that it photographs opposite-sex weddings, the NMHRA unconstitutionally compels it to "create and engage in expression" that sends a positive message about same-sex marriage not shared by its owner.

The compelled-speech doctrine on which Elane Photography relies is comprised of two lines of cases. The first line of cases establishes the proposition that the government may not require an individual to "speak the government's message." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006). The second line of cases prohibits the government from requiring a private actor "to host or accommodate another speaker's message." *Id.* Elane Photography argues that by requiring it to photograph same-sex weddings on the same basis as opposite-sex weddings, the NMHRA violates both prohibitions. We address each argument in turn.

1. The NMHRA does not compel Elane Photography to speak the government's message

The right to refrain from speaking was established in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), in which the United States Supreme Court held that the State of West Virginia could not constitutionally require students to salute the American flag and recite the Pledge of Allegiance. The Court held that a state could not require "affirmation of a belief and an attitude of mind," *id.* at 633, and that the state had impermissibly "invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control," *id.* at 642.

Similarly, in *Wooley*, 430 U.S. at 717, the United States Supreme Court held that the State of New Hampshire could not constitutionally punish a man for covering the state motto on the license plate of his car. The *Wooley* plaintiffs considered "Live Free or Die," the state motto, "repugnant to their moral, religious, and political beliefs," *id.* at 707, and they raised a First Amendment challenge to the state's law forbidding residents to hide or alter the motto. *Id.* at 709, 713. The *Wooley* Court framed the question presented as "whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his [or her] private property in a manner and for the express purpose that it be observed and read by the public" and concluded that the measure was unconstitutional. *Id.* at 713.

Elane Photography reads *Wooley* and *Barnette* to mean that the government may not compel people "to engage in unwanted expression." However, the cases themselves are narrower than Elane Photography suggests; they involve situations in which the speakers were compelled to publicly "speak the government's message." *Rumsfeld*, 547 U.S. at 63. In *Wooley* and *Barnette*, the respective states impermissibly required their residents to affirm or display a specific government-selected message: "Live Free or Die" in *Wooley*, 430 U.S. at 707, and allegiance to the flag in *Barnette*, 319 U.S. at 632-33. Both cases stand for the proposition that the First Amendment does not permit the government to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. However, unlike the laws at issue in *Wooley* and *Barnette*, the NMHRA does not require Elane Photography to recite or display any message. It does not even require Elane Photography to take photographs. The NMHRA only mandates that if Elane Photography operates a business as a public accommodation, it cannot discriminate against potential clients based on their sexual orientation.

Furthermore, the laws at issue in *Wooley* and *Barnette* had little purpose other than to promote the government-sanctioned message. *See Wooley*, 430 U.S. at 716-17 (rejecting the state's contentions that (1) the state motto made it easier for law enforcement to identify improper license plates, and (2) the state hoped "to communicate to others an official view as to proper appreciation of history, state pride, and individualism"); *Barnette*, 319 U.S. at 640 (identifying "national unity" as the goal of compulsory flag salutes (internal quotation marks and citation omitted)). The *Barnette* Court noted that the dissenting students' choice not to salute the flag "[did] not bring them into collision with rights asserted by any other individual." 319 U.S. at 630. That is not the case here, where Elane Photography's asserted right not to serve same-sex couples directly conflicts with Willock's right under Section 28-1-7(F) of the NMHRA to obtain goods and services from a public accommodation without discrimination on the basis of her sexual orientation. Antidiscrimination laws have important purposes that go beyond expressing government values: they ensure that services are freely available in the market, and they protect individuals from humiliation and dignitary harm. *See Daniel v. Paul*, 395 U.S. 298, 307-08 (1969) (stating that the purpose of Title II of the Civil Rights Act of 1964 was "to [re]move the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public" (internal quotation marks and citation omitted)); *Katzenbach v. McClung*, 379 U.S. 294, 299-300 (1964) (discussing the economic impact of discrimination in public accommodations).

The fact that compliance with the NMHRA will require Elane Photography to produce photographs for same-sex weddings to the extent that it would provide those services to a heterosexual couple does not mean that the NMHRA compels speech in the manner of the laws challenged in *Wooley* and *Barnette*. Elane Photography's argument here is more analogous to the claims raised by the law schools in *Rumsfeld*. In that case, a federal law made universities' federal funding contingent on the universities allowing military recruiters access to university facilities and services on the same basis as other, non-military recruiters. 547 U.S. at 52-53. A group of law schools that objected to the ban on gays in the military challenged the law on a number of constitutional grounds, including that the law in question compelled them to speak the government's message. *Id.* at 52, 53, 61-62. In order to assist the military recruiters, schools had to provide services that involved speech, "such as sending e-mails and distributing flyers." *Id.* at 60.

The United States Supreme Court held that this requirement did not constitute compelled speech. *Id.* at 62. The Court observed that the federal law "neither limits what law schools may say nor requires them to say anything." *Id.* at 60. Schools were compelled only to provide the type of speech-related services to military recruiters that they provided to non-military recruiters. *Id.* at 62. "There [was] nothing . . . approaching a Government-mandated pledge or motto that the school [had to] endorse." *Id.*

The same situation is true in the instant case. Like the law in *Rumsfeld*, the NMHRA does not require any affirmation of belief by regulated public accommodations; instead, it requires businesses that offer services to the public at large to provide those services without regard for race, sex, sexual orientation, or other protected classifications. Section 28-1-7(F). The fact that these services

may involve speech or other expressive services does not render the NMHRA unconstitutional. *See Rumsfeld*, 547 U.S. at 62 ("The compelled speech to which the law schools point is plainly incidental to the [law's] regulation of conduct, and it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." (internal quotation marks and citation omitted)). Elane Photography is compelled to take photographs of same-sex weddings only to the extent that it would provide the same services to a heterosexual couple. *See id.* at 62 (speech assisting military recruiters was "only 'compelled' if, and to the extent, the school provide[d] such speech for other recruiters").

2. The NMHRA does not compel Elane Photography to host or accommodate the message of another speaker

a. *State laws prohibiting discrimination by public accommodations do not constitute compelled speech*

The second line of compelled-speech cases deals with situations in which a government entity has required a speaker to "host or accommodate another speaker's message." *Id.* at 63. Elane Photography argues that a same-sex wedding or commitment ceremony is an expressive event, and that by requiring it to accept a client who is having a same-sex wedding, the NMHRA compels it to facilitate the messages inherent in that event. Elane Photography argues that there are two messages conveyed by a same-sex wedding or commitment ceremony: first, that such ceremonies exist, and second, that these occasions deserve celebration and approval. Elane Photography does not wish to convey either of these messages.

The United States Supreme Court has never found a compelled-speech violation arising from the application of antidiscrimination laws to a for-profit public accommodation. In fact, it has suggested that public accommodation laws are generally constitutional. *See Hurley*, 515 U.S. at 572 ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments . . . . [T]he focal point of [such statutes is] rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds."). The United States Supreme Court has found constitutional problems with some applications of state public accommodation laws, but those problems have arisen when states have applied their public accommodation laws to free-speech events such as privately organized parades, *id.* at 566, 573, 580-81, and private membership organizations, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659, 659 n.4 (2000).[2] Elane Photography, however, is an ordinary public accommodation, a "clearly commercial entit[y]," *id.* at 657, that sells goods and services to the public.

The NMHRA does not, nor could it, regulate the content of the photographs that Elane Photography produces. It does not, for example, mandate that Elane Photography take posed photographs rather than candid

[2]*Dale* also was decided on freedom of association grounds. *Id.* at 644. Elane Photography has not argued that its right of expressive association was violated.

shots, nor does it require every wedding album to contain a picture of the bride's bouquet. Indeed, the NMHRA does not mandate that Elane Photography choose to take wedding pictures; that is the exclusive choice of Elane Photography. Like all public accommodation laws, the NMHRA regulates "the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds." *See Hurley*, 515 U.S. at 572 (describing the Massachusetts public accommodation law). Elane Photography argues that because the service it provides is photography, and because photography is expressive, "some of [the] images will inevitably express the messages inherent in [the] event." In essence, then, Elane Photography argues that by limiting its ability to choose its clients, the NMHRA forces it to produce photographs expressing its clients' messages even when the messages are contrary to Elane Photography's beliefs.

Elane Photography has misunderstood this issue. It believes that because it is a photography business, it cannot be subject to public accommodation laws. The reality is that because it is a public accommodation, its provision of services can be regulated, even though those services include artistic and creative work. If Elane Photography took photographs on its own time and sold them at a gallery, or if it was hired by certain clients but did not offer its services to the general public, the law would not apply to Elane Photography's choice of whom to photograph or not. The difference in the present case is that the photographs that are allegedly compelled by the NMHRA are photographs that Elane Photography produces for hire in the ordinary course of its business as a public accommodation. This determination has no relation to the artistic merit of photographs produced by Elane Photography. If Annie Leibovitz or Peter Lindbergh worked as public accommodations in New Mexico, they would be subject to the provisions of the NMHRA. Unlike the defendants in *Hurley* or the other cases in which the United States Supreme Court has found compelled-speech violations, Elane Photography sells its expressive services to the public. It may be that Elane Photography expresses its clients' messages in its photographs, but only because it is hired to do so. The NMHRA requires that Elane Photography perform the same services for a same-sex couple as it would for an opposite-sex couple; the fact that these services require photography stems from the nature of Elane Photography's chosen line of business.

The cases in which the United States Supreme Court found that the government unconstitutionally required a speaker to host or accommodate another speaker's message are distinctly different because they involve direct government interference with the speaker's own message, as opposed to a message-for-hire. In two cases, the Court found a compelled-speech problem where the government explicitly required a publisher to distribute an opposing point of view. In the first of these cases, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 244 (1974), the United States Supreme Court invalidated Florida's "'right of reply'" statute. The law provided that if a candidate for public office was criticized in a Florida newspaper, the candidate could demand that the newspaper print his or her reply, free of cost, in as conspicuous a location as the criticism that had appeared. *Id.* The Court expressed concern that the statute might deter editors from printing criticism of candidates, thereby

chilling political news coverage and commentary in the state. *Id.* at 257. Furthermore, the statute unconstitutionally wrested control over editorial decisions about "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials" away from the editors and into the hands of the state. *Id.* at 258.

Similarly, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 4, 20-21, 26 (1986) (plurality opinion; Marshall, J., concurring in judgment), a plurality of the United States Supreme Court held unconstitutional a decision by the California Public Utilities Commission to allow a third-party group to send out messages with a utility's billing statements. The utility had traditionally distributed a newsletter to its customers with its monthly billing statements. *Id.* at 5 (plurality opinion). The Public Utility Commission decided that the space in the billing envelopes belonged to the customers, not to the utility, and it allowed an intervenor in a ratemaking proceeding involving the utility to send out messages in the utility's billing envelopes four times per year. *Id.* at 5-6, 13 (plurality opinion). Citing *Tornillo*, the United States Supreme Court held that this decision unconstitutionally compelled the utility to accommodate the intervenor's speech. *Pacific Gas*, 475 U.S. at 9-13 (plurality opinion). The Court noted that the Commission's ruling required the utility to disseminate messages that were hostile to the utility's own interests, *id.* at 14 (plurality opinion), and, depending on what the intervenors said, the utility might "be forced either to appear to agree with [the intervenors'] views or to respond," when it would have preferred to remain silent on an issue. *Id.* at 15 (plurality opinion).

In both *Pacific Gas* and *Tornillo*, the government commandeered a speaker's means of reaching its audience and required the speaker to disseminate an opposing point of view. Nothing analogous occurred in the present case. Elane Photography is not required to print the names and addresses of rival photographers in its albums, nor does Elane Photography distribute a newsletter in which the government has required it to print someone else's ideas. Instead, the allegedly compelled message is Elane Photography's own work on behalf of its clients, which it distributes only to its clients and their loved ones. The government has not interfered with Elane Photography's editorial judgment; the only choice regulated is Elane Photography's choice of clients.

In addition, although Elane Photography raises concerns that its speech will be chilled, there is no risk of a chilling effect in this case. In *Tornillo*, the "'right of reply'" statute could have discouraged newspapers from printing criticism of political candidates. 418 U.S. at 257. By contrast, the relevant choice facing Elane Photography and similar businesses is not whether to publish a story, as in *Tornillo*, but whether to operate as a public accommodation. If a commercial photography business wishes to offer its services to the public, thereby increasing its visibility to potential clients, it will be subject to the antidiscrimination provisions of the NMHRA. If a commercial photography business believes that the NMHRA stifles its creativity, it can remain in business, but it can cease to offer its services to the public at large. Elane Photography's choice to offer its services to the public is a business decision, not a decision about its freedom of speech.

In *Pacific Gas* and *Tornillo*, a government entity overtly required a speaker to publicize an opposing message. Elane Photography cites a third case, *Hurley*, in which the compelled-speech violation was more subtle. In *Hurley*, 515 U.S. at 560-61, the private organizers of the Boston St. Patrick's Day parade denied the application of a group of gay, lesbian, and bisexual Irish-Americans (known as GLIB) to march as a unit in the parade. *Id.* at 561. Massachusetts courts held that this constituted discrimination on the basis of sexual orientation. *Id.* at 561, 563-64. The United States Supreme Court reversed, holding that the parade did not discriminate against gay participants; instead, the issue was "the admission of GLIB as its own parade unit carrying its own banner," which had unquestionable expressive content. *Id.* at 572, 581.

Hurley is different from the instant case in two significant ways. First, the Massachusetts courts appear to have erroneously classified the privately organized parade as a public accommodation. *See id.* at 573 ("[T]he state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation."). Second, parades by their nature express a message to the public. *Id.* at 568. By requiring the parade organizers to include GLIB, the Massachusetts courts directly altered the expressive content of the parade. *Id.* at 572-73. The presence of a group in a parade carries expressive weight, and *Hurley* implicated associational rights as well as free-speech rights. *Id.* at 565; *see Dale*, 530 U.S. at 659 ("Although we did not explicitly deem the parade in *Hurley* an expressive association, the analysis we applied there is similar to the analysis we apply here."). Elane Photography argues that photographs are also inherently expressive, so *Hurley* must apply to this case as well. However, the NMHRA applies not to Elane Photography's photographs but to its business operation, and in particular, its business decision not to offer its services to protected classes of people. While photography may be expressive, the operation of a photography business is not. By way of analogy, the NMHRA could not dictate which groups a parade organizer had to include. However, if a business sold parade-planning services, and that business operated as a public accommodation, the NMHRA would prohibit that business from refusing to offer parade-planning services to persons because of their sexual orientation. Thus, Elane Photography's reliance on *Hurley* is misplaced.

Elane Photography's situation is actually clearer than that of our hypothetical business that organized parades, because even a parade for hire would still be a public event. *See id.* at 568 (describing the public nature of parades and their dependence on parade-watchers). By contrast, Elane Photography does not routinely publish for or display its wedding photographs to the public. Instead, it creates an album for each customer and posts the photographs on a password-protected website for the customers and their friends and family to view. Whatever message Elane Photography's photographs may express, they express that message only to the clients and their loved ones, not to the public.

We note that when Elane Photography displays its photographs publicly and on its own behalf, rather than for a client, such as in advertising, its choices of which photographs to display are entirely its own. The NMHRA does not require Elane Photography to either include photographs of same-sex couples in its advertisements or display them in its studio. However, if Elane

Photography offers its services to the public, the NMHRA requires Elane Photography to provide those same services to clients who are members of a protected class under the NMHRA.

b. *Observers are unlikely to believe that Elane Photography's photographs reflect the views of either its owners or its employees*

Elane Photography also argues that if it is compelled to photograph same-sex weddings, observers will believe that it and its owners approve of same-sex marriage. The United States Supreme Court incorporates the question of perceived endorsement into its analysis in cases that involve compulsion to host or accommodate third-party speech. *See, e.g.*, *Hurley*, 515 U.S. at 577 ("Without deciding on the precise significance of the likelihood of misattribution, it nonetheless becomes clear that in the context of an expressive parade . . . the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole."). The *Hurley* Court observed that admitting GLIB or any other organization into a parade would likely be perceived as a message from the parade organizers "that [GLIB's] message was worthy of presentation and quite possibly of support as well." *Id.* at 575. Therefore, the Court further observed that the government's forced inclusion of GLIB compromised the parade organizer's "right to autonomy over [its] message." *Id.* at 576.

In contrast to *Pacific Gas* and *Tornillo*, the United States Supreme Court has not found compelled speech violations where the government has not explicitly required a publisher to disseminate opposing points of view *and* where observers are unlikely to mistake a person's compliance with the law for endorsement of third-party messages, as in *Hurley*. In *Rumsfeld*, the United States Supreme Court rejected not only the law schools' argument that they were forced to speak the government's message, but also their argument that they were required to host the recruiters' speech in such a way that violated compelled speech principles. 547 U.S. at 64-65 ("[The law schools'] accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school."). The law schools in *Rumsfeld* worried that "treat[ing] military and nonmilitary recruiters alike . . . could be viewed as sending the message that they see nothing wrong with the military's policies [regarding gays in the military], when they do." *Id.* The *Rumsfeld* Court held that students "can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so," and that the law schools were free to express their disagreement with the military's policy. *Id.* at 65.

Rumsfeld drew on earlier cases that had considered whether observers would conflate the speech of third parties with the opinions of the parties to the suit. In *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 76-78 (1980), a California shopping center was sued under a California constitutional provision that required privately owned shopping centers to allow individuals to engage in expressive activities on their premises. The shopping center argued that the state could not constitutionally compel it "to participate in the dissemination of an ideological message." *Id.* at 86-87. The United States Supreme Court rejected the argument, *id.* at 88, holding that because the

shopping center was a business establishment that was open to the public, "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner." *Id.* at 87. The Court also noted that the government had not dictated any particular message or engaged in viewpoint discrimination and that the shopping center could disavow the third-party messages by posting its own signs. *Id.* "Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law." *Id.*

Elane Photography makes an argument very similar to one rejected by the *Rumsfeld* Court: by treating customers alike, regardless of whether they are having same-sex or opposite-sex weddings, Elane Photography is concerned that it will send the message that it sees nothing wrong with same-sex marriage. Reasonable observers are unlikely to interpret Elane Photography's photographs as an endorsement of the photographed events. It is well known to the public that wedding photographers are hired by paying customers and that a photographer may not share the happy couple's views on issues ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom). As in *Rumsfeld* and *PruneYard*, Elane Photography is free to disavow, implicitly or explicitly, any messages that it believes the photographs convey. We note that after *Rumsfeld*, many law schools published open letters expressing their continued opposition to military policies and military recruitment on campus. *See, e.g.*, Dean's Letter Regarding Military Recruiting on Campus & Faculty Letter Regarding Military Recruitment, Columbia Law School, http://web.law.columbia.edu/careers/military-recruiting-on-campus (last visited Aug. 9, 2013); Military Recruitment Policy, University of Dayton School of Law, http://www.udayton.edu/law/career_services/military_recruitment_policy.php (last visited Aug. 9, 2013); Employer Recruiting Policies and Guidelines, Harvard Law School, http://www.law.harvard.edu/current/careers/ocs/employers/recruiting-policies-employers/index.html#Non-Discrimination (last visited Aug. 9, 2013). Elane Photography and its owners likewise retain their First Amendment rights to express their religious and political beliefs. They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws.

c. *Elane Photography's allocation of its work time does not raise First Amendment concerns*

Elane Photography next argues that when its employees spend time taking and editing photographs of same-sex weddings, they have less time to spend doing their preferred work of photographing opposite-sex weddings. Therefore, by Elane Photography's reasoning, the state has interfered with Elane Photography's message, just as it did in *Pacific Gas* and *Tornillo*. In *Tornillo*, the newspaper had limited space to print its stories, and printing replies by politicians took up space in which the newspaper could have published other material. 418 U.S. at 256-57. Similarly, the utility in *Pacific Gas* was required to share the space inside its billing envelopes; when a third party used the space, the utility could not distribute its own newsletter without paying additional postage. 475 U.S. at 5-6 (plurality opinion). The instant case is different because Elane

Photography does not produce a publication whose limited space has been taken over by the government.

. Instead, Elane Photography's complaint is based on its staff's limited time. Elane Photography argues that if it accepts same-sex couples as clients, its employees must "spend a day shooting pictures and three to four weeks selecting, editing, and arranging images" of the clients' weddings, when they would prefer to spend this time working on images of heterosexual weddings. Therefore, it argues, the NMHRA interferes with Elane Photography's own speech.

We disagree because the allocation of work time is a matter of personal preference, not compelled speech, and it is not constitutionally protected. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (rejecting Thirteenth Amendment challenge to law requiring motel to serve African-American guests). By their nature, laws prohibiting discrimination in public accommodations require businesses and their employees to spend time and energy serving customers whom they might prefer not to serve. *See Hurley*, 515 U.S. at 578 (describing common law public accommodation rules as guaranteeing that individuals "will not be turned away merely on the proprietor's exercise of personal preference"). These laws apply even when the businesses provide skillful or physically intimate services. *See Bragdon v. Abbott*, 524 U.S. 624, 628-29 (1998) (applying public accommodations provisions of the Americans with Disabilities Act to dental practice). This is the purpose of antidiscrimination laws: they force businesses to treat customers alike, regardless of their race, religion, or other protected status. These laws are necessary precisely because some businesses would otherwise refuse to work with certain customers whom the laws protect.

Antidiscrimination laws have been consistently upheld as constitutional. *See, e.g.*, *Hurley*, 515 U.S. at 572 ("[Public accommodations laws] do not, as a general matter, violate the First or Fourteenth Amendments."); *Heart of Atlanta Motel*, 379 U.S. at 242-44, 258, 261 (sustaining Title II of the Civil Rights Act of 1964 against challenges based on the Commerce Clause and the Fifth and Thirteenth Amendments). Elane Photography's desire to work with heterosexual rather than homosexual couples does not give it license to violate the NMHRA.

3. There is no exemption from antidiscrimination laws for creative or expressive professions

There are no cases from either New Mexico jurisprudence or that of the United States Supreme Court that would compel a conclusion that the NMHRA violates Elane Photography's freedom of speech because it is engaged in a creative and expressive profession. We decline to draw the line between "creative" or "expressive" professions and all others. While individuals in such professions undoubtedly engage in speech, and sometimes even create speech for others as part of their services, there is no precedent to suggest that First Amendment protections allow such individuals or businesses to violate antidiscrimination laws. The wedding industry in particular employs a variety of professionals who offer their services to the public and whose work involves significant skills and creativity. For example, a flower shop is not intuitively "expressive," but florists use artistic skills

and training to design and construct floral displays. Bakeries also offer services for hire, and wedding cakes are famously intricate and artistic. Courts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws. These suggestions are not idle hypotheticals: we take judicial notice of a variety of situations in which florists, bakeries, and other wedding vendors have refused to serve same-sex couples. *See, e.g.*, Lee Moran, *Baker refuses to make wedding cake for lesbian couple*, N.Y. Daily News (Feb. 4, 2013), http://www.nydailynews.com/news/national/baker-refuses-wedding-cake-lesbian- couple-article-1.1254776; Annette Cary, *Arlene's Flowers in Richland sued by gay couple*, Tri-City Herald (Apr. 18, 2013), http://www.tri-cityherald.com/2013/04/18/2361691/arlenes-flowers-in-richland-sued.html (quoting a florist as objecting to "using her time and *artistic talent* to support an event . . . that she believes is wrong" (emphasis added)); *see also Cervelli v. Aloha Bed & Breakfast*, Civ. No. 11-1-3103-12 ECN, Order (Haw. Circ. Court 1st Cir. Apr. 15, 2013) www.lambdalegal.org/sites/default/files/2013-04-15_-_cervelli_order.pdf (finding that a bed and breakfast violated Hawaii's public accommodation law when it refused service to a same-sex couple and granting partial summary judgment for declaratory and injunctive relief).

We are persuaded by cases suggesting that the First Amendment does not exempt creative or expressive businesses from antidiscrimination laws. In *Hishon v. King & Spalding*, 467 U.S. 69, 71-73 (1984), the United States Supreme Court reversed the dismissal of a Title VII employment discrimination complaint against the law firm of King & Spalding. In doing so, the Court rejected the firm's argument that by applying antidiscrimination laws to the firm's selection of its partners, the government "would infringe [First Amendment] constitutional rights of expression or association." *Id.* at 78. The Court held that "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Id.* (alteration in original) (internal quotation marks and citation omitted). Legal work unquestionably involves creative and expressive skill and effort, but antidiscrimination laws still govern how a law firm runs its business.

Elane Photography attempts to distinguish *King & Spalding* by arguing that the type of compelled-speech claim Elane Photography advances should apply only to public accommodations law because such an exemption "would protect a firm's decision not to advocate an argument that its partners cannot in good conscience advance." However, this decision would already be protected under New Mexico law. The NMHRA does not prohibit a law firm, even one that is a public accommodation, from turning away clients with whose views the firm disagrees or with whom it simply does not wish to work. *See* § 28-1-7(F) (prohibited grounds do not include ideology or personal dislike). What the NMHRA forbids, and what Elane Photography's proposed exception would allow, is for a law firm to turn away a client because the firm finds the client offensive on the basis of a protected classification. Accepting Elane Photography's argument would exempt from antidiscrimination laws any business that provided a creative or expressive service.

Such an exemption would not be limited to religious objections or to sexual orientation discrimination; it would allow any business in a creative or expressive field to refuse service on any protected basis, including race, national origin, religion, sex, or disability.

Elane Photography also suggests that enforcing the NMHRA against it would mean that an African-American photographer could not legally refuse to photograph a Ku Klux Klan rally. This hypothetical suffers from the reality that political views and political group membership, including membership in the Klan, are not protected categories under the NMHRA. *See* § 28-1-7(F) (prohibiting public accommodation discrimination based on "race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap"). Therefore, an African-American could decline to photograph a Ku Klux Klan rally. However, the point is well-taken when the roles in the hypothetical are reversed—a Ku Klux Klan member who operates a photography business as a public accommodation would be compelled to photograph an African-American under the NMHRA. This result is required by the NMHRA, which seeks to promote equal rights and access to public accommodations by prohibiting discrimination based on certain specified protected classifications.

However, adoption of Elane Photography's argument *would* allow a photographer who was a Klan member to refuse to photograph an African-American customer's wedding, graduation, newborn child, or other event if the photographer felt that the photographs would cast African-Americans in a positive light or be interpreted as the photographer's endorsement of African-Americans. A holding that the First Amendment mandates an exception to public accommodations laws for commercial photographers would license commercial photographers to freely discriminate against any protected class on the basis that the photographer was only exercising his or her right not to express a viewpoint with which he or she disagrees. Such a holding would undermine all of the protections provided by antidiscrimination laws.

In short, we conclude that the NMHRA's prohibition on sexual-orientation discrimination does not violate Elane Photography's First Amendment right to refrain from speaking. The government has not required Elane Photography to promote the government's message, nor has the government required Elane Photography to facilitate third parties' messages, *except* to the extent that Elane Photography already facilitates third parties' messages, for hire, as part of the services that it offers as a for-profit public accommodation. Even if the services it offers are creative or expressive, Elane Photography must offer its services to customers without regard for the customers' race, sex, sexual orientation, or other protected classification.

B. THE NMHRA DOES NOT VIOLATE ELANE PHOTOGRAPHY'S FIRST AMENDMENT FREE EXERCISE RIGHTS

Elane Photography argues that enforcement of the NMHRA against it for refusing to photograph Willock's wedding violates its First Amendment right to freely exercise its religion. *See* U.S. Const. amend. I (Congress shall make no law prohibiting the free exercise of religion).

It is an open question whether Elane Photography, which is a limited liability company rather than a natural person, has First Amendment free exercise rights. Several federal courts have recently addressed this question with differing outcomes. *Compare, e.g.*, *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 381 (3d Cir. July 26, 2013) ("[W]e conclude that for-profit, secular corporations cannot engage in religious exercise . . . ."), *with Grote v. Sebelius*, 708 F.3d 850, 854 (7th Cir. 2013) ("[T]he [plaintiffs'] use of the corporate form is not dispositive of the [free exercise] claim."). However, it is not necessary for this Court to address whether Elane Photography has a constitutionally protected right to exercise its religion. Assuming that Elane Photography has such rights, they are not offended by enforcement of the NMHRA.

Under established law, "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (internal quotation marks and citation omitted).[3] In order to state a valid First Amendment free exercise claim, a party must show either (a) that the law in question is not a "neutral law of general applicability," *id.* (internal quotation marks and citation omitted) or (b) that the challenge implicates both the Free Exercise Clause and an independent constitutional protection, *id.* at 881, or possibly (c) that the law operates "in a context that len[ds] itself to individualized government assessment of the reasons for the relevant conduct." *Id.* at 884. Elane Photography does not claim that the individualized assessment situation is applicable to the present case. We address its claims under the other two categories below.

1. The NMHRA is a neutral law of general applicability

The United States Supreme Court elaborated on the rule concerning "law that is neutral and of general applicability" in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 546 (1993). A law is not neutral "if [its] object . . . is to infringe upon or restrict practices because of their religious motivation." *Id.* at 533. It is not generally applicable if it "impose[s] burdens only on conduct motivated by religious belief" while permitting exceptions for secular conduct or for favored religions. *Id.* at 543. These inquiries are related, *id.* at 531; the Court observed that improper intent could be inferred if the law was a " 'religious gerrymander' " that burdened religion but exempted similar secular activity. *Id.* at 534-35. If a law is neither neutral nor generally applicable, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531-32; *see also id.* at 546 ("The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not water[ed] . . . down but

[3]Congress attempted to overrule *Smith* by passing the Religious Freedom Restoration Act of 1993 (USRFRA), 42 U.S.C. §§ 2000bb (2006). However, the application of the USRFRA to state and local laws was held unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507, 511, 519 (1997). The *Smith* standard continues to be good law for evaluating federal free exercise challenges to state actions. *See Christian Legal Soc'y*, ___ U.S. at ___ n.24, ___ n.27, 130 S. Ct. at 2993 n.24, 2995 n.27 (applying *Smith* standard).

really means what it says." (internal quotation marks and citation omitted)).

In *Lukumi Babalu Aye*, the city of Hialeah had passed several ordinances that prohibited religious sacrifice of animals but exempted secular slaughterhouses, kosher slaughterhouses, hunting, fishing, euthanasia of unwanted animals, and extermination of pests. *Id.* at 526-28, 536, 543-44. The Court held that this was a "religious gerrymander," *id.* at 535, the result of which was "that few if any killings of animals [were] prohibited other than Santeria sacrifice," *id.* at 536. The Court concluded that "[t]he ordinances had as their object the suppression of religion" and were therefore nonneutral. *Id.* at 542. The Court then examined whether the ordinances were generally applicable and whether the government was selectively burdening only religiously motivated conduct. *Id.* at 542-43. The Court did not precisely define the standard for assessing general applicability, but it did observe that the Hialeah ordinances were grossly under-inclusive with respect to the laws' stated goals, *id.* at 543-45, and it concluded that the laws burdened "only . . . conduct motivated by religious belief." *Id.* at 545. The Court applied strict scrutiny to the ordinances and found them unconstitutional. *Id.* at 546-47.

Elane Photography argues that the NMHRA is not generally applicable and that this Court therefore should apply strict scrutiny to the application of the NMHRA to Elane Photography. Elane Photography identifies several exemptions from the antidiscrimination provisions of the NMHRA and argues that these exemptions make it not generally applicable. Specifically, Elane Photography points to Section 28-1-9(A)(1), which exempts sales or rentals of single-family homes if the owner does not own more than three houses,[4] and Section 28-1-9(D), which exempts owners who live in small multi-family dwellings and rent out the other units. Elane Photography argues that these exemptions, like those in *Lukumi Babalu Aye*, "impermissibly prefer the secular to the religious."

This is a misreading of Section 28-1-9. Unlike the exemptions in *Lukumi Babalu Aye*, the exemptions in Section 28-1-9(A) and (D) apply equally to religious and secular conduct. Neither subsection discusses motivation; homeowners who meet the criteria of Section 28-1-9(A) and (D) are permitted to discriminate regardless of whether they do so on religious or nonreligious grounds. Therefore, the NMHRA does not target only religiously motivated discrimination, and these exemptions do not prevent the NMHRA from being generally applicable. These exemptions also do not indicate any animus toward religion by the Legislature that might render the law nonneutral; similar exemptions commonly appear in housing discrimination laws, including the federal Fair Housing Act. *See* 42 U.S.C. § 3603(b)(1) & (2) (2012) (exempting from compliance "any single-family house sold or rented by an owner," provided such "owner does not own more than three such . . . houses" and subject to additional limitations, and also exempting "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his [or her] residence").

[4]The owner also may not engage in discriminatory advertising. Section 28-1-9(A). In addition, if the seller was not the most recent occupant of the house, he or she is exempt from the NMHRA for only one sale per twenty-four month period. Section 28-1-9(A)(2).

Elane Photography also argues that the exemptions to the NMHRA for religious organizations undercut the purpose of the statute. In particular, Elane Photography highlights Section 28-1-9(B) and (C), which in its reading permits religious organizations to "decline same-sex couples as customers."

Once again, Elane Photography's interpretation rests on a distorted reading of the statute. Section 28-1-9(B) allows religious organizations to "limit[] admission to or giv[e] preference to persons of the same religion or denomination or [to make] selections of buyers, lessees or tenants" that promote the organization's religious principles. In the context of "buyers, lessees or tenants," "buyers" clearly refers to purchasers of real estate rather than retail customers. *Id.* Subsection (C) exempts religious organizations from provisions of the NMHRA governing sexual orientation and gender identity, but only regarding "employment or renting." If a religious organization sold goods or services to the general public, neither subsection would allow the organization to turn away same-sex couples while catering to opposite-sex couples of all faiths. Subsection (B) permits religious organizations to serve only or primarily people of their own faith, as well as to discriminate in certain limited real estate transactions; Subsection (C) applies only to employment and, again, to real estate.

In other words, neither of the religious exemptions in Section 28-1-9 would permit a religious organization to take the actions that Elane Photography did in this case. Furthermore, these exemptions do not prevent the NMHRA from being generally applicable. Exemptions for religious organizations are common in a wide variety of laws, and they reflect the attempts of the Legislature to respect free exercise rights by reducing legal burdens on religion. *See, e.g.*, *Hobbie v. Unemp't Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987) (observing that the United States Supreme Court "has long recognized that the government may (and sometimes must) accommodate religious practices" and listing examples). Such exemptions are generally permissible, *see Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329-30 (1987) (upholding religious exemption to Title VII of the Civil Rights Act of 1964 against an Establishment Clause challenge), and in some situations they may be constitutionally mandated, *see Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, ___ U.S. ___, ___, 132 S. Ct. 694, 705-06 (2012) (holding that the First Amendment precludes the application of employment discrimination laws to disputes between religious organizations and their ministers).

The exemptions in the NMHRA are ordinary exemptions for religious organizations and for certain limited employment and real-estate transactions. The exemptions do not prefer secular conduct over religious conduct or evince any hostility toward religion. We hold that the NMHRA is a neutral law of general applicability, and as such it does not offend the Free Exercise Clause of the First Amendment.

2. Elane Photography has not adequately briefed its hybrid rights claim

In *Smith*, the United States Supreme Court left open the possibility that a neutral law of general applicability could nevertheless be unconstitutional if the law infringed both free exercise rights and an independent constitutional protection. 494 U.S. at 881. The Court recognized that in pre-*Smith* cases,

it had sometimes applied more rigorous scrutiny to neutral, generally applicable laws. *Id.* The Court distinguished those cases by characterizing them not as simple free exercise cases, but as "hybrid situation[s]," *id.* at 882, in which the free exercise claims were raised "in conjunction with other constitutional protections, such as freedom of speech and of the press." *Id.* at 881. Elane Photography mentions that because it raised both a free exercise claim and a compelled-speech claim, it has made a hybrid-rights claim under which the NMHRA should receive strict scrutiny.

This Court requires that the parties adequately brief all appellate issues to include an argument, the standard of review, and citations to authorities for each issue presented. *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 ("[T]o present an issue on appeal for review, an appellant must submit argument and authority as required by rule." (emphasis omitted)). "We will not review unclear arguments, or guess at what [a party's] arguments might be." *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076. To rule on an inadequately briefed issue, this Court would have to develop the arguments itself, effectively performing the parties' work for them. *See State v. Clifford*, 1994-NMSC-048, ¶ 19, 117 N.M. 508, 873 P.2d 254 ("We remind counsel that we are not required to do their research . . . ."). This creates a strain on judicial resources and a substantial risk of error. It is of no benefit either to the parties or to future litigants for this Court to promulgate case law based on our own speculation rather than the parties' carefully considered arguments.

{71} Elane Photography devotes a single three-sentence paragraph to its hybrid-rights claim, stating that a hybrid claim exists because it has raised a compelled-speech claim and a free exercise claim under the NMRFRA. However, as discussed in this opinion, neither of these claims is independently viable, and Elane Photography offers no analysis to explain why the two claims together should be greater than the sum of their parts. Elane Photography cites two cases, *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), and *Health Services Division, Health & Environment Dep't v. Temple Baptist Church*, 1991-NMCA-055, 112 N.M. 262, 814 P.2d 130, but provides no explanation of how or why we should apply these precedents to the facts of this case. As a matter of New Mexico law, Elane Photography's briefing of its hybrid-rights claim is inadequate to permit us to review the issue. For this reason, we do not consider its hybrid-rights argument.

III. ENFORCEMENT OF THE NMHRA DOES NOT VIOLATE THE NMRFRA BECAUSE THE NMRFRA IS NOT APPLICABLE IN A SUIT BETWEEN PRIVATE PARTIES

Finally, Elane Photography argues that the Commission's enforcement of the NMHRA against it violates the New Mexico Religious Freedom Restoration Act. The NMRFRA provides:

> A government agency shall not restrict a person's free exercise of religion unless:
>
> A. the restriction is in the form of a rule of general applicability and does not directly discriminate against religion or among religions; and
>
> B. the application of the

> restriction to the person is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

Section 28-22-3. "Free exercise of religion" is defined as "an act or a refusal to act that is substantially motivated by religious belief." Section 28-22-2(A).

Willock argues, and the Court of Appeals held, that the NMRFRA did not protect Elane Photography's refusal to photograph Willock's wedding, even though the refusal was religiously motivated, because the NMRFRA "was not meant to apply in suits between private litigants." *Elane Photography*, 2012-NMCA-086, ¶ 46. There is no other case law on this point in New Mexico; the Court of Appeals relied on federal cases interpreting the federal Religious Freedom Restoration Act. *Id.* ¶¶ 46-47.

The NMRFRA states that "[a] person whose free exercise of religion has been restricted by a violation of the New Mexico Religious Freedom Restoration Act may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief *against a government agency*." Section 28-22-4(A) (emphasis added). Elane Photography argues that the phrase "against a government agency" modifies "appropriate relief," rather than "a judicial proceeding." In other words, Elane Photography argues that although the relief available is limited, the NMRFRA can be invoked even when the government is not a party.

However, the statute is violated only if a "government agency" restricts a person's free exercise of religion. Section 28-22-3. A "government agency" includes "the state or any of its political subdivisions, institutions, departments, agencies, commissions, committees, boards, councils, bureaus or authorities." Section 28-22-2(B). The list of government agencies does *not* include the Legislature or the courts. It could be expected that the Legislature would have included itself and the courts in Section 28-22-2(B) if it meant the NMRFRA to apply in common-law disputes or private enforcement actions. Instead, the examples of government agencies are exclusively administrative or executive entities.

Moreover, the structure of the NMRFRA as a whole suggests that the Legislature contemplated that the statute would apply only to legal actions in which the government was a party. The only relief authorized by the statute is "injunctive or declaratory relief against a government agency," § 28-22-4(A)(1), or "damages pursuant to the Tort Claims Act" with attorneys' fees and costs, § 28-22-4(A)(2). Nowhere does the NMRFRA authorize damages or injunctive relief against a non-governmental party.

Elane Photography argues that because Willock's suit was adjudicated by the New Mexico Human Rights Commission, which is presumably a "government agency" for purposes of Section 28-22-2(B), the Commission's decision against it qualifies as a restriction of its free exercise of religion. However, Elane Photography appealed the Commission's determination to a New Mexico district court for a trial de novo pursuant to Section 28-1-13(A). The instant appeal concerns the district court's grant of summary judgment for Willock; the Commission is not a party to this case, and its order no longer has any legal effect. *See* § 39-3-1 (stating that appeals to the district court for trials de novo

"shall be tried anew . . . as if no trial had been had below"). Willock argues, and we agree, that the Commission acted merely as an administrative tribunal to decide the dispute between Elane Photography and herself. The government's adjudication of disputes between private parties does not constitute government restriction of a party's free exercise rights for purposes of the NMRFRA.

For the reasons stated above, we hold that as a matter of New Mexico law, the New Mexico Religious Freedom Restoration Act is inapplicable to disputes in which a government agency is not a party.

CONCLUSION

Elane Photography's refusal to serve Vanessa Willock violated the New Mexico Human Rights Act, which prohibits a public accommodation from refusing to offer its services to a person based on that person's sexual orientation. Enforcing the NMHRA against Elane Photography does not violate the Free Speech or the Free Exercise clause of the First Amendment or the NMRFRA. For these reasons, we affirm the grant of summary judgment in Willock's favor.

IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

RICHARD C. BOSSON, Justice, specially concurring

BOSSON, Justice, specially concurring.

In 1943 during the darkest days of World War II, the State of West Virginia required students to salute the American flag and decreed that refusal to salute would "be regarded an Act of insubordination" which could lead to expulsion for the student and criminal action against the parent. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626-29 (1943). Some students refused to salute, believing as Jehovah's Witnesses "that the obligation imposed by law of God is superior to that of laws enacted by temporal government." *Id.* at 629. They looked for authority in the Bible, Book of Exodus, Chapter 20, verses 4 and 5: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth: thou shalt not bow down thyself to them, nor serve them." *Id.* (internal quotation marks omitted). Jehovah's Witnesses considered "the flag is an 'image' within this command," which they were bound by God not to salute. *Id.*

In a ringing endorsement of the First Amendment, the United States Supreme Court struck down the West Virginia statute, noting the irony of the state's position: "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." *Id.* at 634. And again, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642. In his concurrence, Justice Black had this to add:

> The Jehovah's Witnesses, without any desire to show disrespect for either the flag or the country, interpret the Bible as commanding, at the risk of God's displeasure, that they not go through the form of a pledge of allegiance to any flag. The devoutness of their belief is evidenced by their willingness to suffer persecution and punishment, rather than make the pledge.

Id. at 643 (Black, J., concurring). Considering the times, the *Barnette* opinion stands today as an act of the utmost courage; it represents one of the Court's finest moments.

Jonathan and Elaine Huguenin see themselves in much the same position as the students in *Barnette*. As devout, practicing Christians, they believe, as a matter of faith, that certain commands of the Bible are not left open to secular interpretation; they are meant to be obeyed. Among those commands, according to the Huguenins, is an injunction against same-sex marriage. On the record before us, no one has questioned the Huguenin's devoutness or their sincerity; their religious convictions deserve our respect. In the words of their legal counsel, the Huguenins "believed that creating photographs telling the story of that event [a same-sex wedding] would express a message contrary to their sincerely held beliefs, and that doing so would disobey God." If honoring same-sex marriage would so conflict with their fundamental religious tenets, no less than the Jehovah's Witnesses in *Barnette*, how then, they ask, can the State of New Mexico compel them to "disobey God" in this case? How indeed?

Twenty-four years later, during the zenith of the Civil Rights era, the Supreme Court provided a partial answer. In *Loving v. Virginia*, the State of Virginia, like sixteen similarly situated states with miscegenation laws, prohibited marriage between the white and black races, making it a crime punishable by imprisonment. 388 U.S. 1, 4, 6 (1967). Such laws arose as an incident of slavery and were common in Virginia and elsewhere since early times. *Id.* at 6. The Lovings, an interracial couple, had been lawfully married elsewhere and wanted to live openly as husband and wife in Virginia. *Id.* at 2-3. For their honesty, they were prosecuted and convicted; their prison sentences were suspended on condition that they leave Virginia and not return for 25 years. *Id.* at 3. The Virginia trial judge, in justifying the convictions, drew strength from his view of the Bible:

> "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with this arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

Id. at 3. Whatever opinion one might have of the trial judge's religious views, which mirrored those of millions of Americans of the time, no one questioned his sincerity either or his religious conviction. In affirming the Lovings' convictions, Virginia's highest court observed the religious, cultural, historical, and moral roots that justified miscegenation laws. *See id.*

The Supreme Court struck down Virginia's miscegenation statute. *Id.* at 11-12. Observing that "[t]he freedom to marry has long been recognized as one of the vital

personal rights essential in the orderly pursuit of happiness by free men," the Court held categorically that "[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.* at 12. State laws, even those religiously inspired, may not discriminate invidiously on the basis of race.

There is a lesson here. In a constitutional form of government, personal, religious, and moral beliefs, when *acted upon* to the detriment of someone else's rights, have constitutional limits. One is free to believe, think, and speak as one's conscience, or God, dictates. But when actions, even religiously inspired, conflict with other constitutionally protected rights—in *Loving* the right to be free from invidious racial discrimination—then there must be some accommodation. Recall that *Barnette* was all about the students; their exercise of First Amendment rights did not infringe upon anyone else. The Huguenins cannot make that claim. Their refusal to do business with the same-sex couple in this case, no matter how religiously inspired, was an affront to the legal rights of that couple, the right granted them under New Mexico law to engage in the commercial marketplace free from discrimination.

But of course, the Huguenins are not trying to prohibit anyone from marrying. They only want to be left alone to conduct their photography business in a manner consistent with their moral convictions. In their view, they seek only the freedom *not* to endorse someone else's lifestyle. *Loving*, therefore, does not completely answer the question the Huguenins pose. To complete the circle, we turn to our third case.

Heart of Atlanta Motel, Inc. v. United States, upheld the federal Civil Rights Act of 1964, a milestone enactment which, among other achievements, declared invidious discrimination unlawful, not just by the state but by private citizens, when providing goods and services in the sphere of public accommodations. 379 U.S. 241, 246, 261-62 (1964). The Act declared: "'All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion or national origin.'" *Id.* at 247. A watershed achievement, the Act vindicated nearly a century of frustrated effort to fulfill the promise of the Fourteenth Amendment, to end not only slavery but all of its traces as well. *See id.* at 244-46. And ending second-class citizenship, being denied a seat in a restaurant or a room in an inn—purely on the basis of one's race or religion—was a goal that drove the passage of the Act. *See id.* at 252-53.

By the time of the success of the Civil Rights Act of 1964, many states had already passed their own public accommodation laws. *See id.* at 358-59 (noting that thirty-two states already had public accommodation laws); *see also* Lisa Gabrielle & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. Rev. L. & Soc. Change 215, 240 (1978) (recognizing that "the existence of numerous state laws facilitated Congress' acceptance of Title II" of the Civil Rights Act). Today, many states have Human Rights Acts similar to New Mexico's. *See, e.g.*, 775 Ill. Comp. Stat. Ann. 5/1-102(A) (2010); Iowa Code Ann. § 216.7 (2007); Md. Code Ann., State Government § 20-304 (2009); Nev. Rev. Stat. Ann. §

651.070 (2011). Public accommodations have been expanded to preclude invidious discrimination in most every public business, including the Huguenin's photography business. Prohibited classifications have been enlarged from the historical classes—race, religion, gender, national origin—to include sexual orientation. *See, e.g.,* Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 Cal. L. Rev. 1169, 1190 (2012) ("Twenty-one states and the District of Columbia cover sexual orientation in their antidiscrimination laws governing employment, housing, and public accommodations."). The New Mexico Legislature has made it clear that to discriminate in business on the basis of sexual orientation is just as intolerable as discrimination directed toward race, color, national origin, or religion. *See* NMSA 1978, § 28-1-7(F) (2004). The Huguenins today can no more turn away customers on the basis of sexual orientation—photographing a same-sex marriage ceremony—than they could refuse to photograph African-Americans or Muslims.

All of which, I assume, is little comfort to the Huguenins, who now are compelled by law to compromise the very religious beliefs that inspire their lives. Though the rule of law requires it, the result is sobering. It will no doubt leave a tangible mark on the Huguenins and others of similar views.

On a larger scale, this case provokes reflection on what this nation is all about, its promise of fairness, liberty, equality of opportunity, and justice. At its heart, this case teaches that at some point in our lives all of us must compromise, if only a little, to accommodate the contrasting values of others. A multicultural, pluralistic society, one of our nation's strengths, demands no less. The Huguenins are free to think, to say, to believe, as they wish; they may pray to the God of their choice and follow those commandments in their personal lives wherever they lead. The Constitution protects the Huguenins in that respect and much more. But there is a price, one that we all have to pay somewhere in our civic life.

In the smaller, more focused world of the marketplace, of commerce, of public accommodation, the Huguenins have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people. That sense of respect we owe others, whether or not we believe as they do, illuminates this country, setting it apart from the discord that afflicts much of the rest of the world. In short, I would say to the Huguenins, with the utmost respect: it is the price of citizenship. I therefore concur.

RICHARD C. BOSSON, Justice

Certiorari Denied, July 24, 2013, No. 34,205

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-088

Filing Date: May 20, 2013

Docket No. 32,074

LARRY V. LAUGHLIN,

Worker-Appellee/Cross-Appellant,

v.

CONVENIENT MANAGEMENT SERVICES, INC. and ARGONAUT INSURANCE COMPANY,

Employer/Insurer-Appellants/Cross-Appellees.

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Albuquerque, NM

for Worker-Appellee/Cross-Appellant

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for Employer/Insurer-Appellants/Cross-Appellees

OPINION

WECHSLER, Judge.

Employer Convenience Management Services, Inc. appeals from a compensation order entered pursuant to the Workers' Compensation Act (the Act), NMSA 1978, Sections 52-1-1 to -70 (1929, as amended through 2007). Worker filed a cross-appeal, which we address in a separate memorandum opinion. In the compensation order, the Workers Compensation Judge (the WCJ) determined that Worker Larry Laughlin was not at maximum medical improvement despite previously finding that Worker had reached maximum medical improvement five months earlier in an order granting Worker a partial lump sum payment from future permanent partial disability for payment of debts, pursuant to NMSA 1978, Section 52-5-12(C) (2009). We hold that the WCJ did not err by determining that Worker had a "change of condition" under NMSA 1978, Section 52-5-9(B)(1) (1989) by electing to undergo surgery on his work-related injury and determining that Worker was no longer at maximum medical improvement. We further hold that neither judicial estoppel nor the law-of-the-case doctrine bars Worker's change of position regarding whether he was at maximum medical improvement at the date of his formal hearing despite the WCJ's finding that he was at maximum medical improvement at the time of the lump sum order. Accordingly, we affirm.

BACKGROUND

Worker suffered accidents on August 22,

2008 and September 14 or 30, 2008 while working for Employer. Worker suffered injuries to both his lower back and left testicle. He filed a complaint with the Workers' Compensation Administration (the WCA) on March 3, 2009, requesting temporary total disability benefits until he reached maximum medical improvement and permanent partial disability benefits upon reaching maximum medical improvement.

The parties entered a recommended resolution on May 7, 2009 that provided a $5000 payment to Worker and named Dr. Benito Gallardo as Worker's authorized treating physician. Dr. Gallardo examined Worker on May 6, 2009 and found a causal connection between Worker's injuries and the accidents on August 22, 2008 and September 14 or 30, 2008. When Employer refused to provide any temporary total disability after Dr. Gallardo's report, Worker filed a second worker's compensation complaint. Employer rejected a second recommended resolution on September 29, 2009, and the claim entered the adjudication process. Employer did issue worker temporary total disability benefits of $213.91 a week from July 8, 2009 through August 18, 2009 and October 21, 2009 through May 3, 2011.

Dr. Gallardo testified by deposition on September 24, 2010 that Worker's back injury reached maximum medical improvement by March 4, 2010. Likewise, at his second deposition, Dr. Gallardo testified that Worker's left testicle injury had reached maximum medical improvement by January 25, 2011, at the time that Worker elected not to have surgery on his left testicle. Dr. Gallardo also stated in his second deposition that Worker was not interested in having surgery on his left testicle but that if Worker did have a surgical procedure, his left testicle injury would no longer be at maximum medical improvement. After Dr. Gallardo reported maximum medical improvement on January 25, 2011, Employer issued partial permanent disability benefits to Worker at 44% impairment commencing on May 4, 2011.

On June 30, 2011, Worker filed a petition for partial lump sum payment for debts, pursuant to Section 52-5-12(C). The WCJ granted the lump sum request by order on July 20, 2011. The order granting partial lump sum payment for debts (the lump sum order) determined that Worker's injuries had reached maximum medical improvement. The WCJ found that Worker had debts of $4,200.73 and approved an advance payment of that amount to be deducted from future partial permanent disability benefits. The WCJ also approved an advance payment for an amount equal to Worker's first and last month's rent, plus a damage deposit in the event that Worker entered into a written rental agreement. Worker subsequently entered into a new lease agreement, and Employer advanced an additional $1250 to Worker.

The WCJ held the formal hearing on Worker's claims on December 22, 2012 and issued a memorandum decision and order on February 8, 2012 regarding the effect of the prior lump sum award. The WCJ determined that the Act allows for a worker to reach a status of maximum medical improvement and subsequently be removed from that status under Sections 52-5-9(B)(1) and 52-1-56 upon, among other reasons, a change in condition. The WCJ concluded that the Act contemplates that judicial estoppel would not be applicable to a previous determination that a worker is not at maximum medical improvement. Additionally, the WCJ determined that the law-of-the-case doctrine

does not preclude a worker from arguing about a change of maximum medical improvement status as long as the change is asserted more than six months after the entry of the order.

At the formal hearing, Worker testified that he tried to delay surgery as long as possible on his injured testicle. However, he testified that he now wanted the surgical procedure. Both parties requested findings and conclusions after the December 22, 2011 formal hearing, and the WCJ issued a compensation order on March 14, 2012. Regarding the legal effect of the lump sum order of July 20, 2011, the WCJ concluded that the lump sum order did not bar Worker from arguing that he was no longer on maximum medical improvement at the formal hearing. Accordingly, the WCA found that Worker first reached maximum medical improvement as of September 10, 2010 but that "Worker ceased to be on maximum medical improvement status as of December 22, 2011 when Worker indicated his willingness to be treated surgically for the [testicle injury]."

On appeal, Employer raises three arguments regarding the WCJ's finding that Worker was no longer at maximum medical improvement because of his willingness to have surgery to treat his injured left testicle. Employer argues that the WCJ erred by determining that (1) Worker's willingness to have surgery constituted a change of condition under Sections 52-1-9(B)(1) and 52-1-56 even though his physical or medical condition had not changed since the WCJ determined he was at maximum medical improvement in the lump sum order; (2) judicial estoppel did not preclude Worker from arguing that his left testicle injury had not reached maximum medical improvement at the formal hearing; and (3) the law-of-the-case doctrine did not preclude Worker's change of position that he was no longer at maximum medical improvement.

STANDARD OF REVIEW

"All workers' compensation cases are reviewed under a whole record standard of review." *Moya v. City of Albuquerque*, 2008-NMSC-004, ¶ 6, 143 N.M. 258, 175 P.3d 926. When our review consists of reviewing a "WCJ's interpretation of statutory requirements, we apply a de novo standard of review." *DeWitt v. Rent-A-Ctr., Inc.*, 2009-NMSC-032, ¶ 14, 146 N.M. 453, 212 P.3d 341. We review the WCJ's application of the law to the facts de novo. *Tom Growney Equip. Co. v. Jouett*, 2005-NMSC-015, ¶ 13, 137 N.M. 497, 113 P.3d 320. However, "[w]here the testimony is conflicting, the issue on appeal is not whether there is evidence to support a contrary result, but rather whether the evidence supports the findings of the trier of fact." *Id.* (internal quotation marks and citation omitted); *Bagwell v. Shady Grove Truck Stop*, 104 N.M. 14, 17, 715 P.2d 462, 465 (Ct. App. 1986).

CHANGE OF CONDITION

Employer first argues that Worker's testimony that he now wants surgery to treat his left testicle injury does not constitute a change of condition and, therefore, the WCJ erred by ruling that Worker was no longer at maximum medical improvement as of December 22, 2011. In Employer's view, the term "change of condition" refers to a change in a worker's medical or physical condition, and Worker presented no testimony that his physical condition had changed, only that he now wishes to have surgery to address the condition. Worker's response is twofold:

first, he argues that the lump sum order is not a compensation order for purposes of Sections 52-5-9(B)(1) and 52-1-56 and, second, that his decision to have surgery on his left testicle is a change of condition.

Employer premises his argument that the WCJ was required to find that Worker's physical or medical condition changed in order to determine that Worker was no longer at maximum medical improvement on Sections 52-1-56 and 52-5-9(B)(1). Section 52-1-56 provides:

> The [WCJ] may, upon the application of the employer, worker or other person bound by the compensation order, fix a time and place for hearing upon the issue of claimant's recovery. If it appears upon such hearing that diminution or termination of disability has taken place, the [WCJ] shall order diminution or termination of payments of compensation as the facts may warrant. If it appears upon such hearing that the disability of the worker has become more aggravated or has increased without the fault of the worker, the [WCJ] shall order an increase in the amount of compensation allowable as the facts may warrant. Hearings shall not be held more frequently than at six-month intervals.

In relevant part, Section 52-5-9 provides:

> A. Compensation orders are reviewable subject to the conditions stated in this section upon application of any party in interest in accordance with the procedures relating to hearings. The [WCJ], after a hearing, may issue a compensation order to terminate, continue, reinstate, increase, decrease or otherwise properly affect compensation benefits provided by the . . . Act . . . .
>
> B. A review may be obtained upon application of a party in interest filed with the director at any time within two years after the date of the last payment or the denial of benefits upon the following grounds:
>
> (1) change in condition[.]

Under these provisions, the Act allows for modification of compensation orders upon the aggravation of the worker's disability or upon a change of condition. Employer contends that the term "change in condition" as used in Section 52-5-9(B)(1) refers only to a "change in a worker's medical or physical condition" and is not broad enough to encompass a situation in which the worker elects to undergo a different treatment option without a change in his medical condition. *See Fasso v. Sierra Healthcare Ctr.*, 119 N.M. 132, 134, 888 P.2d 1014, 1016 (Ct. App. 1994), *overruled on other grounds by Hidalgo v. Ribble Contracting*, 2008-NMSC-028, 144 N.M. 117, 184 P.3d 429. Employer additionally states that the case law construing Section 52-1-56 mandates that the worker's disability must increase in order to constitute a change of condition.

We conclude that, although a change of condition must relate to a worker's physical or medical condition, a change in condition is broad enough to encompass a situation such as in this case in which the worker's physical or medical condition will change due to a worker's election to undergo different

treatment. Viewed in the context of the Act's definition of maximum medical improvement, Worker, by electing to have the surgery, had a change in his physical condition sufficient to support the WCJ's conclusion that he was not at maximum medical improvement. *See DeWitt*, 2009-NMSC-032, ¶ 14 ("[W]e construe the provisions of the Act together to produce a harmonious whole."). The Act defines the date of maximum medical improvement as "the date after which further recovery from or lasting improvement to an injury can no longer be reasonably anticipated based upon reasonable medical probability as determined by a health care provider." Section 52-1-24.1. The WCJ's conclusion that Worker was no longer at maximum medical improvement was based on evidence that his left testicle injury would improve with surgical treatment. This conclusion directly implicates and relates to Worker's physical condition. As such, the WCJ did not err by determining that Worker had a change of condition for purposes of Section 52-5-9(B)(1) by electing to undergo surgery on his left testicle and determining that Worker was no longer at maximum medical improvement.

The cases relied upon by Employer for the proposition that a change in condition must be based on an aggravation or change to Worker's physical or medical condition apart from treatment are inapposite. In *Herrera v. Quality Imports*, 1999-NMCA-140, ¶ 12, 128 N.M. 300, 992 P.2d 313, this Court held that a change in the worker's educational status did not relate to the "disability" or physical condition of the worker and therefore modification under Section 52-1-56 was improper based solely on a change in education status. However, *Herrera* expressly declined to determine whether modification would be warranted under the "change of condition" provision of Section 52-5-9(B)(1). *Herrera*, 1999-NMCA-140, ¶ 3. Additionally, in this case, Worker's election to have surgery was tied to his physical condition and the expected improvement of the condition by undergoing the surgery. The other cases cited by Employer address substantial evidence issues regarding whether the worker adequately showed an increase in the disability percentage and therefore justified a modification of the award and do not stand for any broad propositions limiting what constitutes a change in condition. *See, e.g.*, *Jaramillo v. Consolidated Freightways*, 109 N.M. 712, 715, 790 P.2d 509, 512 (Ct. App. 1990) (holding that substantial evidence supported the WCJ's conclusion that there was no change in the worker's physical condition); *Holliday v. Talk of the Town Inc.*, 98 N.M. 354, 356, 648 P.2d 812, 814 (Ct. App. 1982) (holding that the worker failed to show that his injuries were aggravated and thus justified an increased award).

JUDICIAL ESTOPPEL

Employer next argues that the WCJ erred by determining that the doctrine of judicial estoppel did not preclude Worker from arguing that his work-related injuries had not reached maximum medical improvement at the formal hearing. Employer argues that because Worker took the position that his injury had reached maximum medical improvement when he sought and received the partial lump sum payment for future PPD benefits on July 20, 2011, the district court should have determined that judicial estoppel precluded Worker from claiming that his injuries had not reached maximum medical improvement at the December 22, 2011 formal hearing. We review the proper application of judicial estoppel under an abuse of discretion standard. *Keith v. ManorCare,*

Inc., 2009-NMCA-119, ¶ 17, 147 N.M. 209, 218 P.3d 1257.

The doctrine of judicial estoppel "prevents a party who has successfully assumed a certain position in judicial proceedings from then assuming an inconsistent position, especially if doing so prejudices a party who had acquiesced in the former position." *Rodriguez v. La Mesilla Constr. Co.*, 1997-NMCA-062, ¶ 20, 123 N.M. 489, 943 P.2d 136. The purpose of judicial estoppel is to prevent a party "from playing fast and loose with the court during the course of litigation." *Citizens Bank v. C & H Constr. & Paving Co.*, 89 N.M. 360, 366, 552 P.2d 796, 802 (Ct. App. 1976) (internal quotation marks and citation omitted). Our Supreme Court has stated that

> [t]hree elements must be addressed for a party to prevail under the doctrine of judicial estoppel. First, the party against whom the doctrine is to be used must have successfully assumed a position during the course of litigation. Second, that first position must be necessarily inconsistent with the position the party takes later in the proceedings. Finally, while not an absolute requirement, judicial estoppel will be especially applicable when the party's change of position prejudices a party who had acquiesced in the former position.

Santa Fe Pac. Trust, Inc. v. City of Albuquerque, 2012-NMSC-028, ¶ 32, 285 P.3d 595 (internal quotation marks and citation omitted).

It appears that the first two elements exist in this case. Worker took the position that his injuries were at maximum medical improvement as of the July 20, 2011 order granting partial lump sum payment for debts and took the inconsistent position that he was no longer at maximum medical improvement at the formal hearing on December 22, 2011. However, under the facts and circumstances of this case, judicial estoppel does not apply. First, Employer fails to show how it was prejudiced by the change of position in this case. At the time of the interim order, Employer was aware that the matter was still in active litigation and that a final compensation order based on the formal hearing had not been entered. The interim order did not prevent Employer from contesting the maximum medical improvement date at the formal hearing. Most importantly, although the interim order required Employer to advance $4,200.73 to Worker, the funds were from Worker's future permanent partial disability benefits, and Employer received a dollar-for-dollar credit for the advance payment in the final compensation order. Our cases have generally required the party asserting judicial estoppel to make a showing of prejudice caused by the opposing party's change of position. *See, e.g., Guzman v. Laguna Dev. Corp.*, 2009-NMCA-116, ¶ 15, 147 N.M. 244, 219 P.3d 12 (applying judicial estoppel to bar the defendant from arguing that workers' compensation was the plaintiffs' exclusive remedy due to the prejudicial effect of depriving the plaintiffs of a forum because the defendant previously successfully argued in the workers' compensation administration that the claim was outside the scope of the Act).

Second, as we have discussed, the purpose of judicial estoppel is to prevent "a party from playing fast and loose with the court during litigation." *Santa Fe Pac. Trust, Inc.*, 2012-NMSC-028, ¶ 33 (internal

quotation marks and citation omitted). Nothing in the circumstances of this case indicates that Worker was trying to "play fast and loose" with the WCJ by changing his position about whether his injuries had reached maximum medical improvement. At the time that Worker requested the partial lump sum payment for future PPD benefits, his position was that he was at maximum medical improvement because he had elected to not have surgery on his left testicle injury. At the formal hearing, Worker's position was that he was not at maximum medical improvement because he had elected to have the surgery. Nothing in the record indicates that Worker's change of position was designed to mislead the WCJ or otherwise take advantage of the system. *Cf. id.* ¶ 33 (stating that "nothing in the record indicates that the [party opposing judicial estoppel] intentionally attempted to mislead the Court" by changing its position).

LAW OF THE CASE

Employer lastly argues that the law-of-the-case doctrine barred Worker from changing his position on whether he had reached maximum medical improvement at the formal hearing because the law of the case is that Worker reached maximum medical improvement by July 20, 2011. We review this issue de novo. *See State ex rel. King v. UU Bar Ranch Ltd. P'ship.*, 2009-NMSC-010, ¶ 20, 145 N.M. 769, 205 P.3d 816 (stating that review of "[w]hether law of the case applies, as well as how it applies, are questions of law subject to de novo review").

The doctrine of "law of the case . . . relates to litigation of the same issue recurring within the same suit." *Cordova v. Larsen*, 2004-NMCA-087, ¶ 10, 136 N.M. 87, 94 P.3d 830. "Under the law of the case doctrine, a decision on an issue of law made at one stage of a case becomes a binding precedent in successive stages of the same litigation." *Id.* (internal quotation marks and citation omitted). It is based on "a matter of precedent and policy; it is a determination that, in the interests of the parties and judicial economy, once a particular issue in a case is settled it should remain settled." *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 40, 125 N.M. 721, 965 P.2d 305. The law of the case doctrine is "discretionary and flexible and is not a doctrine of inflexible law[.]" *King*, 2009-NMSC-010, ¶ 21 (internal quotation marks and citations omitted).

In its memorandum opinion accompanying the partial lump sum order for payment of debts, the WCJ stated that the order "awarding partial lump sum does constitute the law of the case but that it does not preclude Worker from arguing about a change on maximum medical improvement status as long as that change is asserted more than six months after entry of the order." However, less than six months later, at the formal hearing, Worker argued that he was not at maximum medical improvement, and the WCJ agreed that Worker ceased to be at maximum medical improvement on December 22, 2011. Employer's argument is two-fold: first, Employer contends that the WCJ violated the WCJ's own determination on the law of the case because he miscalculated that six months had not passed between entry of the July 20, 2011 order and the December 22, 2011 formal hearing. Second, Employer contends that on a more general level, once the WCJ determined that Worker was at maximum medical improvement for purposes of granting the partial lump sum request, the determination becomes law of the case and is conclusively binding on the parties.

We first address Employer's contention that the WCJ erred by not following his own ruling that Worker's maximum medical improvement determination was law of the case for the six months subsequent to the order. The WCJ determined that the Act requires that the maximum medical improvement determination remain the law of the case for six months because Section 52-1-56 mandates that hearings regarding the diminution, termination, or increase of benefits "shall not be held more frequently than at six-month intervals." However, the change in maximum medical improvement status resulted not from a hearing conducted pursuant to an application for modification based on Section 52-1-56, but instead from the evidence presented at the formal hearing on Worker's claims. We therefore decline to apply the law of the case doctrine to the determination that Worker's maximum medical improvement determination was law of the case for six months. *See Trujillo*, 1998-NMSC-031, ¶ 41 ("The application of the law-of-the-case doctrine . . . is discretionary and flexible; it will not be used to uphold a clearly incorrect decision[.]").

Addressing Employer's more general contention that once the WCJ determined that Worker was at maximum medical improvement and issued the lump sum order, the maximum medical improvement determination became law of the case, we observe that "[a]lthough it would be grossly inefficient for district courts to review repeatedly their interlocutory rulings, the law-of-the-case doctrine does not prohibit the practice." *State ex rel. Udall v. Pub. Employees Ret. Bd.*, 118 N.M. 507, 510, 882 P.2d 548, 551 (Ct. App. 1994), *rev'd on other grounds by* 120 N.M. 786, 907 P.2d 190 (1995). For example, in *Bell v. N.M. Interstate Stream Comm'n*, 1996-NMCA-010, ¶¶ 12-17, 121 N.M. 328, 911 P.2d 222, this Court held that the law-of-the-case doctrine did not prevent a district court from overturning its previous interlocutory order denying summary judgment after remand on appeal. Applying this principle, the WCJ did not err by determining that the law-of-the-case doctrine did not apply. Based on the facts presented at the hearing, the WCJ determined that Worker was no longer at maximum medical improvement because Worker elected to have surgery on his injury. The law-of-the-case doctrine does not require the WCJ to ignore the facts before it at the time of the formal hearing based on a previous determination of maximum medical improvement contained in an interim order when the claims raised in Worker's complaint were still pending.

CONCLUSION

We hold that the WCJ did not err by determining that Worker had a change of condition for purposes of Section 52-5-9(B)(1) by electing to undergo surgery on his left testicle and determining that Worker was no longer at maximum medical improvement. We further hold that neither judicial estoppel nor the law-of-the-case doctrine bars Worker's change of position regarding whether he was no longer at maximum medical improvement at the time of his formal hearing despite the WCJ's finding that he was at maximum medical improvement at the time of the lump sum order. Accordingly, we affirm.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

MICHAEL D. BUSTAMANTE, Judge

Certiorari Denied, August 26, 2013, No. 34,221

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-089

Filing Date: May 29, 2013

Docket No. 31,558

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

SHAWN T. REDD,

Defendant-Appellee.

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for Appellee

OPINION

WECHSLER, Judge.

The State appeals from the district court's order dismissing charges filed against Defendant Shawn Redd. The district court dismissed the charges because, due to computer problems, the State lost an audio recording of the alleged victim's initial interview with the investigating officer conducted on the day the allegations were reported to the police. We hold that the district court erred in dismissing the charges

because the loss of the recording of the initial interview was not prejudicial to Defendant. Accordingly, we reverse the district court's dismissal of Defendant's charges.

BACKGROUND

The district court dismissed three counts of criminal sexual penetration of a minor (CSPM), one count of criminal sexual contact of a minor (CSCM), one count of false imprisonment, and two counts of intentional child abuse. The charges arose out of allegations of sexual abuse against Defendant by a ten-year-old victim (the Victim). Two CSPM counts were based on allegations that Defendant caused Victim to engage in anal intercourse with Defendant, and the remaining CSPM count was based on an allegation that Defendant caused Victim to engage in oral penetration. Both child abuse counts were based on allegations that Defendant anally penetrated Victim.

On November 5, 2009, Investigator Merle Bates, a deputy sheriff with the McKinley County Sheriff's Department, responded to a domestic call at Defendant's home. Once Investigator Bates arrived at the residence, he conducted interviews with Victim and Victim's mother. Investigator Bates recorded the interviews on a digital recorder and later transferred the files to his computer. The ten-minute interview Investigator Bates conducted and recorded with Victim (hereafter referred to as the initial interview) is the subject of this case.

In the initial interview, Victim told Investigator Bates that Defendant attempted oral penetration, but she did not allege any other type of sexual penetration, including anal penetration. In later interviews and during grand jury testimony, Victim alleged that Defendant attempted or completed anal penetration, which formed the basis of two of the CSPM counts and both child abuse counts.

The district court held a pretrial conference on August 16, 2010, in which Defendant raised discovery issues, including that the State had not disclosed the audio recording of the initial interview. The State told the district court that it had only been able to retrieve two of the ten minutes of the initial interview due to "computer problems" and that Investigator Bates said that it was impossible to access the remaining eight minutes because the computer file could not be read. The district court advised Defendant to file a motion so that it could order Investigator Bates to come before the court and explain the issue with the audio file.

Defendant filed a motion to compel production of the initial interview and Victim's mother's interview on August 30, 2010. In his motion, Defendant asserted that the initial interview was lost or destroyed due to a computer difficulty and that the loss of the evidence violated his right to a fair trial. Defendant stated that the initial interview was critical to his defense because Victim did not disclose anal penetration or any other type of sexual penetration to Investigator Bates. Defendant asserted that if the recording could not be produced, the proper remedy would be for the district court to dismiss the charges with prejudice, and he asked the district court to order that the audio files be provided to Defendant or that the recording be sent to an expert for analysis. In the alternative, Defendant asked the district court to suppress the testimony of Victim and any other testimony the recording of the initial interview would impeach. The State, in its response, acknowledged that the recording of the initial interview was "damaged," but argued that

there was no prejudice because Investigator Bates routinely does not ask for details when interviewing a child victim of sexual abuse, and Investigator Bates could testify as to his memory of the initial interview.

The district court held a motions hearing on January 27, 2011, at which Investigator Bates testified. He stated that he recorded the initial interview using a digital recorder and transferred the recording to his computer. His computer crashed in December 2009, and his hard drive was replaced. Investigator Bates testified that he had only recovered two of the ten minutes of the initial interview after he hired a private computer company to recover his data files. He stated that a county information technology employee, John Goins, tried but could not further recover the remaining eight minutes of the initial interview. Investigator Bates further testified that it might be possible to send the old hard drive containing the initial interview, or at least the new hard drive that contained the partially recovered file, to a computer expert for analysis and that he would be willing to try to find the old hard drive. The State indicated that it had no objection to sending the hard drive to a computer expert. The district court directed Defendant to choose an expert and determine the cost and stated that the district court would determine the action to pursue after receiving this information.

At the next status conference, on February 7, 2011, defense counsel indicated that she found an out-of-state company specializing in data recovery and that the cost would be between $500 and $1800. Defense counsel stated that she accompanied Investigator Bates to speak with Goins and that Goins indicated that the old hard drive was available to send to the expert. Defense counsel indicated that she would provide the district court with an order to sign, ordering the hard drive to be sent to the expert. The district court set a status conference for March 7, 2011, in order to determine the status of the hard drive.

On March 4, 2011, Defendant filed a motion to compel production of the hard drive. The motion indicated that defense counsel and Investigator Bates spoke with Goins, who had removed the hard drive from Investigator Bates' computer. Goins initially said that he could locate Investigator Bates' hard drive as defense counsel told the district court at the February 7, 2011 hearing, but Goins later told defense counsel that the hard drive was placed unlabeled with around one hundred other discarded hard drives and that he had not attempted to find the one belonging to Investigator Bates. Defendant asked the district court to order the hard drive be turned over to the defense or to dismiss the charges against Defendant.

At the status conference three days later, on March 7, 2011, the district court stated that it was its understanding that Defendant was going to locate an expert and that the State would provide the hard drive. Defendant then reiterated what he stated in his motion: that Goins indicated that Investigator Bates' hard drive was among one hundred unlabeled hard drives and that Goins had not attempted to locate the hard drive. Defendant stated that he would ask the district court for an order directing Goins to begin opening the unlabeled hard drives so that he could locate the one belonging to Investigator Bates. The district court responded that "the hard drive needs to be produced." The State likewise asked the district court for an order. The district court indicated that it would agree to such an order but that it needed to know how many hard drives Goins would have to analyze and acknowledged it had no familiarity with

recovering data from hard drives and the time it takes. The district court ultimately directed the State to speak with Goins and determine how long it would take to find Investigator Bates' hard drive and if Goins would be willing to do so. The district court then scheduled another status conference.

At a status conference held on March 21, 2011, the State informed the district court that Goins indicated that it would not be possible to locate the hard drive, and that he could not identify Investigator Bates' hard drive. The State also informed the district court that Goins told the State that it would be against county protocol to release all the hard drives to an outside expert for analysis because the hard drives contained confidential information from various county agencies. Upon questioning by the district court, the State indicated that its information was based on conversations with Goins. The district court indicated that if the hard drive was not turned over to Defendant, dismissal might be the only viable option. Defendant suggested an evidentiary hearing in which Goins could testify about the possibility of locating the hard drive, and the district court agreed to set a hearing once Defendant filed whatever motion he deemed appropriate.

Defendant filed a motion to dismiss on June 1, 2011. In his motion, Defendant argued that the initial interview was critical to his defense because the "only consistency in [Victim]'s . . . version of events is the[] inconsistency." Defendant specifically pointed out that Victim disclosed anal penetration in her pre-trial interview and during grand jury testimony and said that she told Investigator Bates about anal penetration, which differed from Investigator Bates' report from the initial interview. Defendant's motion characterized the conclusion of the January 27, 2011 hearing as the district court "order[ing] the State to produce the crashed hard drive . . . for inspection and analysis by an expert" and argued that "the State has failed to comply with the [district court's] order compelling the production of the crashed hard drive for analysis by a defense expert." The motion to dismiss included an affidavit from a computer expert that it is "reasonably likely" or "most likely" that a professional data recovery specialist could recover the entire initial interview from the hard drive. The State responded, arguing that issues regarding credibility and inconsistent versions of events should be decided by the jury, that it did not intentionally destroy evidence, that Investigator Bates engaged in his best efforts to retrieve the lost recording of the initial interview, and that dismissal was an inappropriate remedy under the circumstances in this case.

The district court held an evidentiary hearing on the motion to dismiss on July 21, 2011. At the hearing, Goins testified that he attempted to recover data from Investigator Bates' hard drive by "slav[ing]" it to another machine, in other words, by connecting it to another computer and attempting to read the data on the other computer. He testified that other companies specialize in advanced data recovery and may have other methods of recovering data that he did not. Goins stated that he placed Investigator Bates' old hard drive in the "junk pile," or a trash can, once he removed it from Investigator Bates' computer and that he does not label hard drives he puts in the trash can. Goins testified that he received a request from Investigator Bates and Defendant to locate Investigator Bates' original hard drive. He spent most of one day trying to access ten hard drives of the roughly one hundred that were saved in one trash bin, he saw information on two that did not match

the data on Investigator Bates' hard drive, and he informed Investigator Bates that the drive could not be located at that point.

Richard Chavez testified that he is an employee with two companies that specialize in data recovery. He testified that Investigator Bates brought his computer to one of Chavez' stores and asked Chavez to do everything possible to fix his computer and recover the lost data. Chavez used his experience and a software program to recover between ten and fourteen gigabytes of data and testified that he was not aware of any more sophisticated software that he could have used to recover more data. Chavez testified that Investigator Bates' computer had faulty memory due to a manufacturer's defect and that the defect caused data to become corrupted when it was saved onto the computer. He stated that more sophisticated techniques could be used to retrieve more data when a drive is not physically working but that Investigator Bates' computer suffered defective memory that corrupted the data as it was saved.

After the testimony, Defendant argued that dismissal was the only appropriate remedy based on (1) the legal analysis for lost or destroyed evidence, and (2) the State's failure to comply with the district court's order to produce the evidence, in particular to find the hard drive and notify the district court how long it would take to search the approximate one hundred unlabeled hard drives to determine which hard drive belonged to Investigator Bates. The State conceded that it breached a duty to preserve but argued that the appropriate remedy was admitting the loss of the initial interview and the circumstances to the jury and permitting Investigator Bates to disclose to the jury that Victim did not disclose anal penetration in the initial interview.

The district court issued an order granting Defendant's motion to dismiss. The district court stated that the initial interview contained inconsistencies with other statements made by Victim. It concluded that the lost initial interview was material and that the loss was prejudicial to Defendant. Additionally, the district court's order contains language indicating that the dismissal was, at least partially, based on a discovery sanction for the State's inability or refusal to locate Investigator Bates' hard drive and turn it over to Defendant. In its findings granting the motion to dismiss, the district court stated, apparently based on its oral directive at the January 27, 2011 hearing, that "[p]rior to January [2011], as well as after January 2011, the [district court] directed the State to identify the hard drive." Additionally, the order contained findings that "[f]rom January 2011 until July 2011, the State spent only eight hours trying to identify the correct hard drive after it was commingled with other hard drives, and examined only ten percent of the hard drives in the trash can." Further, "[t]o [the] date of this order, the State has not identified [Investigator] Bate[s'] hard drive." There was no express finding of bad faith or intentional conduct on the part of the State.

The State appeals the district court's order granting the motion to dismiss and makes several arguments as to why the district court abused its discretion. It argues that dismissal was not an appropriate remedy under a lost or destroyed evidence analysis because (1) the evidentiary value of the lost recording was minimal, and Defendant failed to establish materiality and prejudice due to the lost recording, and (2) dismissal is not a proper remedy when raised pre-trial. The State also contends that the district court erred to the extent that it granted Defendant's motion to dismiss as a discovery sanction for

failure to provide the hard drive to Defendant because (1) the district court never ordered the State to produce the hard drive, (2) Defendant failed to show actual prejudice, and (3) the district court failed to consider less severe sanctions.

STANDARD OF REVIEW

We review a district court's remedy for lost or destroyed evidence for an abuse of discretion. *See State v. Duarte*, 2007-NMCA-012, ¶¶ 5, 11, 140 N.M. 930, 149 P.3d 1027. Likewise, "[s]anctions for violations of discovery orders are discretionary" and will not be reversed absent an abuse of that discretion. *State v. Bartlett*, 109 N.M. 679, 680, 789 P.2d 627, 628 (Ct. App. 1990). "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case." *Duarte*, 2007-NMCA-012, ¶ 3 (internal quotation marks and citation omitted). Additionally, we view the evidence and the inferences drawn from that evidence in favor of the district court's ruling. *See Mathis v. State*, 112 N.M. 744, 747-48, 819 P.2d 1302, 1305-06 (1991).

BASIS FOR GRANTING THE MOTION TO DISMISS

As an initial matter, the parties dispute the type of analysis this Court should apply to the order dismissing this case. Both parties point out the distinction between cases in which evidence is lost or destroyed and cases in which a district court sanctions the state for a bad faith or intentional violation of a discovery order. In *State v. Chouinard*, 96 N.M. 658, 661, 634 P.2d 680, 683 (1981), our Supreme Court formulated a three-part test to determine the appropriate remedy for lost or destroyed evidence. Under this test, in evaluating whether the district court abused its discretion in dismissing the case for lost or destroyed evidence, we look to whether (1) the state breached a duty or intentionally deprived the defendant of evidence, (2) the lost or destroyed evidence is material, and (3) the defendant suffered prejudice. *See id.* The purpose of this test is to assure that the district court arrived at a determination that will serve the ends of justice. *Id.*

In contrast, as a general rule, a district court may impose sanctions against the state for a failure to comply with a discovery order. *See Mathis*, 112 N.M. at 747, 819 P.2d at 1305. Our Supreme Court has clarified that dismissal for the violation of a discovery order requires (1) culpable state conduct such as "bad faith, willful non-compliance, or flat-out disregard for a discovery order"; (2) tangible prejudice to the defendant as a result of the deprivation of the evidence; and (3) a consideration of lesser sanctions. *State v. Harper*, 2011-NMSC-044, ¶¶ 16-18, 27, 150 N.M. 745, 266 P.3d 25. We initially discuss discovery sanctions as they apply to this case and then address the *Chouinard* test for lost or destroyed evidence.

The district court's order dismissing the charges did contain the following findings regarding the production of the hard drive:

> 4. Prior to January 2011, as well as after January, the [district court] directed the State to identify the hard drive.
>
> 5. . . . Defendant requested the hard drive be identified so that Defendant's expert could attempt to retrieve the lost portion of the [initial] interview.
>
> 6. From January 2011 until July

2011, the State spent only eight hours trying to identify the correct hard drive after it was commingled with other hard drives, and examined only ten percent of the hard drives in the trash can.

7. To date of this order, the State has not identified [Investigator] Bate[s'] hard drive.

These findings stop short of finding that (1) the district court issued a discovery order compelling the State to turn over Investigator Bates' hard drive, and (2) the State willfully did not comply with or intentionally disregarded such a discovery order or otherwise failed to find the hard drive in bad faith. To be sure, these findings indicate a level of frustration from the district court. Additionally, as Defendant points out, at times during the proceedings, the district court questioned the State's efforts to locate the hard drive. However, it is dispositive that the district court never issued an unambiguous order requiring the State to turn over the hard drive to Defendant.

As we have discussed, at the January 27, 2011 hearing, the district court told Defendant to determine the cost and identify an expert and that the issue of turning over the hard drive could be discussed at a later time upon receipt of that information. At the February 7, 2011 status conference, Defendant indicated that he would present an order to the district court to sign compelling production of the hard drive, but such an order does not appear in the record. At the March 7, 2011 status conference, the State likewise asked for an order compelling the production, but the district court indicated that it needed to know the number of hard drives that Goins would have to analyze and acknowledged that it had no familiarity with the process for recovering data from hard drives or the time that it takes. At the March 21, 2011 status conference, once the State indicated that Goins was unable or unwilling to locate the hard drive, the district court directed Defendant to file whatever motion he deemed necessary. Defendant subsequently filed his motion to dismiss. Under these circumstances, the district court did not unambiguously order the State to produce the hard drive before dismissing the case, and the State therefore could not have intentionally disregarded or defied a discovery order. *See Harper*, 2011-NMSC-044, ¶ 27 (reversing the suppression of witness testimony because, among other reasons, the district court did not unambiguously order the state to produce the witness for a witness interview).

Additionally, it is unclear to what extent the district court granted the motion to dismiss as a discovery sanction for the failure of the State to produce the hard drive. As we have discussed, and as the State points out, the district court's order lacks any specific finding of bad faith, willful noncompliance, or intentional disregard of a discovery order to produce the hard drive. On this basis alone, the district court's order is an abuse of discretion in dismissing the case to the extent it did so as a discovery sanction for the State's failure to provide the hard drive to Defendant. *Cf. State v. Hill,* 2005-NMCA-143, ¶¶ 22-23, 138 N.M. 693, 125 P.3d 1175 (reversing a district court's dismissal of charges because the district court's finding did not indicate that it applied all three prongs of the test for lost or destroyed evidence). To the extent that the district court dismissed Defendant's charges for the failure of the State to produce Investigator Bates' hard drive in defiance of a discovery order to produce the hard drive, the

district court abused its discretion. We thus turn to whether the district court abused its discretion in dismissing the charges against Defendant under the framework for lost or destroyed evidence based on the lost or destroyed eight minutes of the recording of the initial interview.

LOST OR DESTROYED EVIDENCE

From the order granting the motion to dismiss, it appears that the district court granted the motion based on the *Chouinard* line of cases for lost or destroyed evidence. The district court made findings, although conclusory, that the lost audio recording of the initial interview was material and that the loss was prejudicial to Defendant. In evaluating whether the district court abused its discretion under *Chouinard*, we look to whether (1) the State breached a duty or intentionally deprived Defendant of the recording of the initial interview, (2) the lost or destroyed recording of the initial interview is material to the defense, and (3) whether Defendant suffered prejudice. *See Chouinard*, 96 N.M. at 661, 634 P.2d at 683. The purpose of this test is to assure that the district court arrived at a determination that will serve the ends of justice. *Id.*

The State concedes that the first prong of the test is met because the State is required to disclose statements made by any anticipated State witness. *See* Rule 5-501(A)(5) NMRA. The State challenges the district court's determination as to the second and third prongs of the *Chouinard* test. As to materiality, Defendant primarily contended in the district court that the initial interview was material because Victim did not disclose anal penetration in the initial interview in contrast to subsequent interviews in which she disclosed anal penetration. Defendant argued that the inconsistency between the initial interview and subsequent interviews bears on the credibility of Victim and is exculpatory in the sense that it does not support any allegation of anal penetration, which formed the basis of four counts of the indictment.

The State contends that the district court abused its discretion in finding materiality because (1) Victim disclosed oral penetration and identified Defendant as the perpetrator, and therefore the initial interview did not fully support a claim of innocence; (2) the initial interview was not exculpatory because the hearsay rules prevent Defendant from introducing the statement as substantive evidence for the truth of the matter asserted; and (3) although the initial interview could be used to impeach Victim and question her credibility, it did not rise to the level of "material" as defined by our Supreme Court under the framework for lost or destroyed evidence because it was simply cumulative impeachment evidence in view of numerous inconsistencies made during her interviews with the safe house, her grand jury testimony, and her pre-trial interview. Our Supreme Court has defined "material" as a " 'reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.' " *State v. Fero*, 107 N.M. 369, 371, 758 P.2d 783, 785 (1988) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985) for the definition of materiality from the United States Supreme Court's test for due process analysis for undisclosed evidence).

We do not agree with the State that Victim's initial statement to Investigator Bates was not material because its only purpose was to impeach Victim's testimony and challenge

her credibility. The State primarily cites *State v. Boeglin*, 105 N.M. 247, 254, 731 P.2d 943, 950 (1987) and *United States v. Cooper*, 654 F.3d 1104, 1120 (10th Cir. 2011), for the proposition that "cumulative impeachment evidence" is not material under our standard. However, both cases are distinguishable. *Boeglin* involved a case in which the defendant claimed that the state knowingly used false evidence after trial in a different procedural posture than this case. 105 N.M. at 253-54, 731 P.2d at 949-50. In *Boeglin*, the state conceded and disclosed to the jury that the transcript at issue was erroneous because it was missing information, and the district court instructed the jury to rely upon the actual tapes and not on the transcript with the missing information. *Id.* at 254, 731 P.2d at 950. Our Supreme Court considered the alleged omission in the "context of the entire record" and determined that it was not material because its only purpose was to bolster the defendant's credibility "generally" and to attack the credibility of the two investigators conducting the interview. *Id.*

Cooper addressed a situation in which the district court suppressed testimony that a government witness prepared false or fraudulent tax returns, which the defendant intended to use for impeachment purposes. 654 F.3d at 1122. The Tenth Circuit held that the testimony was not "material" because it was only for impeachment and the witness was not a crucial or critical witness to the government's claim. *Id.* at 1123. In this case, we cannot say that Victim is not a crucial or critical witness. An initial statement to investigators made by an alleged victim shortly after the incident in question and which the defendant wishes to use to attack the alleged victim's credibility is material under the second prong of the *Chouinard* test. *See Bartlett*, 109 N.M. at 681, 789 P.2d at 629 (holding that a tape recorded statement made to investigators after the incident in which the alleged victim described the perpetrator was material because it bore on the credibility of the alleged victim); *see also Smith v. Cain*, __ U.S. __, 132 S. Ct. 627, 629-30 (2012) (holding that notes from the investigating investigator that the only eyewitness could not describe the perpetrator was material).

We thus turn to whether Defendant suffered prejudice by the loss of the recording of the initial interview with Investigator Bates. *See Chouinard*, 96 N.M. at 661, 634 P.2d at 683. In the district court, Defendant argued that the loss of the recording was prejudicial because it was the most contemporaneous account of the allegations against Defendant, it was inconsistent with later accounts Victim gave investigators, and the later accounts occurred only after Victim had the opportunity to talk with her mother. Defendant also contends that the initial interview was "extremely critical" to the defense because Victim was the only eyewitness to the alleged crimes and there was no inculpatory physical evidence against Defendant. The district court found that the loss of the initial interview prejudiced Defendant without elaborating upon its finding.

On appeal, the State contends that the district court erred in finding prejudice because (1) Defendant did not need the recording to establish the inconsistency because Investigator Bates could have testified that Victim did not disclose anal penetration in the initial interview, and (2) the district court could have considered a stipulation or instruction to the jury regarding the contents of the initial interview and explaining the circumstances regarding the lost recording. The State points out that Defendant conceded at the January 27, 2011 hearing that

Investigator Bates took "copious notes," that Investigator Bates testified that his report contained everything said during the initial interview, and that Investigator Bates listened to the recording several times before the file was corrupted to ensure his report was accurate. Investigator Bates further testified that he would testify at trial that Victim did not disclose anal penetration during the initial interview.

When evaluating prejudice, we examine "the importance of the missing evidence to [the] defendant[] and the strength of the other evidence of [the] defendant's guilt." *Bartlett*, 109 N.M. at 681, 789 P.2d at 629. Because the district court granted the motion to dismiss and the case did not proceed to trial, we focus on the importance of the missing evidence to Defendant's case. *Cf. id.* (focusing on the importance of the missing evidence to the defendant's case because the jury failed to reach a verdict and therefore the strength of the other evidence was not evident).

This Court has examined the prejudice prong in a similar case involving a similar piece of missing evidence. In *Bartlett*, the state charged the defendant with criminal sexual penetration, and the investigating officer interviewed the alleged victim on two occasions. *Id.* at 680, 789 P.2d at 628. The state failed to produce the recording of the first interview, and the district court dismissed the charge against the defendant after a first trial resulted in a mistrial and the state indicated that it intended to retry the defendant. *Id.* Although this Court characterized the dismissal as a discovery sanction, we applied the *Chouinard* test for lost or missing evidence in determining whether the district court abused its discretion in dismissing the charge. *Bartlett*, 109 N.M. at 680, 789 P.2d at 628. We held that the recording of the interview was "important to [the] defendant[, but not] so important as to deprive [the] defendant of a fair trial." *Id.* at 681, 789 P.2d at 629. We concluded that the defendant "was still able to vigorously raise and pursue" mistaken identity and fabrication defenses by pointing out discrepancies in the description contained in the initial police report, testimony at the preliminary hearing, and testimony at the first trial. *Id.* at 682, 789 P.2d at 630. Additionally, the defendant cross-examined the victim and the investigating officer at the first trial about the inconsistency and "extensively argued" the issues regarding the missing interview. *Id.* We therefore held that the district court abused its discretion in dismissing the charge. *Id.*

Similarly, in *Duarte*, 2007-NMCA-012, ¶¶ 1, 4-5, the state lost a videotape showing the defendant taking a second set of field sobriety tests, and the defendant moved to suppress all evidence that the videotape may have impeached or for dismissal of the charge. Applying *Chouinard*, this Court held that the defendant was not prejudiced by the loss of the videotape. *Duarte*, 2007-NMCA-012, ¶¶ 9-11. We reasoned that (1) the defendant was able to cross-examine the officer about the lost video and to argue its significance to the jury, including attacking the officer's credibility and reliability; (2) the defendant had the officer's report at his disposal and the report contained information relating to the field sobriety tests; and (3) there was other evidence of the defendant's guilt including his breath alcohol content reading. *Id.* ¶ 11.

In this case, the district court abused its discretion in dismissing the charges against Defendant due to the lost audio recording of

the initial interview because the loss of the recording of the initial interview was not prejudicial to Defendant. First, the record reveals that Defendant had other means to point out the inconsistencies between the initial interview and her later statements and interviews. Investigator Bates testified that his police report on the incident contained the contents of the initial interview, that he listened to the initial interview several times while preparing his report, and that he would testify that Victim did not reveal anal penetration during the initial interview. Defendant initially conceded that Investigator Bates took "copious notes" of the initial interview. The actual recording was therefore unnecessary for Defendant to prove that particular inconsistency to the jury and for Defendant to impeach Victim. *See Bartlett*, 109 N.M. at 682, 789 P.2d at 630 (holding that the defendant suffered no prejudice from the loss of evidence because the defendant could use the police reports and cross-examinations of the investigating officer and the victim to establish the inconsistency between the victim's description of the perpetrator). Second, the district court should have considered other alternatives to dismissal that would have ameliorated any prejudice suffered by Defendant. At the March 7, 2011 hearing, the district court suggested that the loss of the initial interview could be resolved by a stipulation. At the evidentiary hearing, the State agreed that it would consent to a jury instruction explaining the circumstances of the lost recording. However, in its order granting the motion to dismiss, the district court did not address either alternative or why they would be inadequate given the circumstances of the case. Third, as we stated in *Duarte*, reversal is not mandated unless the lost evidence materially affected a determination of guilt or innocence. 2007-NMCA-012, ¶ 11. Given that Defendant only sought to use the initial interview as impeachment evidence and because Defendant had other means to introduce the contents of the initial interview into evidence, the ultimate remedy of dismissal was not appropriate. *See Chouinard*, 96 N.M at 661, 634 P.2d at 683 (stating that the three-part test for a remedy for lost or destroyed evidence is intended to serve the ends of justice). We note that it would have been helpful for us to have findings by the district court explaining its findings of prejudice for our appellate review.

Defendant argues that *Smith*, ___ U.S. ___, 132 S. Ct. 627 is controlling in this case. In *Smith*, the United States Supreme Court held that witness statements made to an investigating detective that the state failed to disclose to the defendant were material because the defendant could have used the statements to impeach the witness. *Id.* ___, 132 S. Ct. at 629-30. However, *Smith* involved a claim for post-conviction relief, and the defendant was convicted without being aware of the statements that he could have used to impeach the witness. *Id.* In this case, although evidence regarding Victim's initial interview is material to Defendant in order to impeach Victim, Defendant had alternative means to present inconsistencies to the jury, and he will not be deprived of presenting a defense based on the loss of the recording. It is on the basis of the absence of prejudice, not materiality, that we base our conclusion that the district court abused its discretion in dismissing the charges.

Because we have concluded that the district court abused its discretion in finding prejudice against Defendant for the loss of the initial interview to the extent that it dismissed the case and, therefore, reverse on this ground, we need not address the State's argument that dismissal is not an available remedy when an

issue of lost or destroyed evidence is raised pretrial.

CONCLUSION

We hold that the district court abused its discretion in dismissing the charges against Defendant due to the lost audio recording of the initial interview because the loss of the recording of the initial interview was not prejudicial to Defendant. Accordingly, we reverse the district court's dismissal of Defendant's charges.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

CYNTHIA A. FRY, Judge

Certiorari Denied, August 29, 2013, No. 34,255

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-090

Filing Date: June 3, 2013

Docket Nos. 32,176 & 32,180 (Consolidated)

ESTATE OF DAVID SWIFT by RICKY SWIFT, Personal Representative,

Petitioner-Appellant,

v.

NICOLE BULLINGTON,

Respondent-Appellee,

and

RICKY D. SWIFT and MARY L. SWIFT,

Petitioners-Appellants,

v.

NICOLE BULLINGTON,

Respondent-Appellee.

Lori Bauer Apodaca
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for Appellants

New Mexico Legal Aid, Inc.
Petra E. Rogers
Albuquerque, NM

for Appellee

OPINION

VANZI, Judge.

In this consolidated appeal, we address whether a personal representative of a decedent's estate has standing to bring an action for an adjudication of parentage under the New Mexico Uniform Parentage Act (UPA), NMSA 1978, §§ 40-11A-101 to -903 (2009). In the proceedings below, the district court dismissed a paternity action filed by Ricky Swift, the personal representative of the estate of his son, on the basis that a personal representative lacks standing under the UPA to bring an action to adjudicate paternity. Upon dismissing the paternity action, the district court also dismissed a separate action for grandparent visitation privileges that was brought by Ricky Swift and Mary Swift in their capacity as the putative grandparents of the child.

We hold that a personal representative has standing as a representative authorized by law to bring an action to adjudicate parentage pursuant to Section 40-11A-602(F) of the UPA. *See id.* (providing that a proceeding to adjudicate parentage may be maintained by "a representative authorized by law to act for a person who would otherwise be entitled to maintain a proceeding but who is deceased, incapacitated or a minor"). Because the district court concluded otherwise, we reverse its dismissal of both the paternity action as well as the grandparent visitation action.

BACKGROUND

David Swift (Swift) was the putative father of a child whom Respondent-Appellee Nicole Bullington (Mother) gave birth to in September 2010. Swift committed suicide approximately six months prior to the birth of the child. On December 9, 2010, Swift's father, Ricky Swift (Personal Representative), in his capacity as the personal representative of his son's estate, filed a petition in district court seeking an adjudication of the child's paternity. Hand-written on the face of the petition was the statement that "the [e]state basically wants to clarify whether David Swift is the father [of the child]" and "seeks genetic testing." Attached to the petition was a document filed in a separate probate proceeding establishing Ricky Swift's appointment as Personal Representative of his son's estate.

Mother filed a motion to dismiss the Personal Representative's petition to establish paternity, arguing that the Personal Representative lacked standing to maintain such a proceeding under the UPA and the New Mexico Uniform Probate Code (Probate Code), NMSA 1978, §§ 45-1-101 to -404 (1975, as amended through 2011). Mother further asserted that, under New Mexico law, a cause of action to establish paternity does not survive the death of the putative father. The district court subsequently held a hearing on Mother's motion to dismiss, at which time the court requested that the parties fully brief the issue of the Personal Representative's standing under New Mexico law. After

briefing was completed, the district court held a second hearing at which it entered an oral ruling dismissing the paternity action based on its determination that the Personal Representative lacked standing. A written order was later entered dismissing the paternity action.

In addition to the paternity action above, Ricky Swift and his wife, Mary Swift, filed a separate action in district court seeking grandparent visitation privileges with the child. The district court dismissed the grandparent visitation action at the same hearing as the paternity action. The written order dismissing the visitation action stated that the case was being dismissed because it was "premised on standing which does not exist."

Separate appeals were filed from the district court's dismissal of the paternity action and the grandparent visitation action. The appeals were consolidated by this Court, and we now address each appeal in turn.

DISCUSSION

A. Dismissal of Paternity Action

The UPA governs determinations of parentage in New Mexico. Section 40-11A-103(A). Section 40-11A-602 of the UPA specifies that the following individuals or entities have standing to maintain a proceeding to adjudicate parentage:

A. the child;

B. the mother of the child;

C. a man whose paternity of the child is to be adjudicated;

D. the support-enforcement agency;

E. an authorized adoption agency or licensed child-placing agency; or

F. a representative authorized by law to act for a person who would otherwise be entitled to maintain a proceeding but who is deceased, incapacitated or a minor.

In this case of first impression, the putative father of the child passed away prior to the child's birth and the filing of the parentage action in district court. The sole issue before us on appeal is whether the Personal Representative of the putative father's estate had standing to bring the parentage action under Section 40-11A-602(F) as "a representative authorized by law to act for a person who would otherwise be entitled to maintain a proceeding but who is deceased[.]" On appeal, the Personal Representative argues that the district court erroneously determined that a personal representative lacks standing within the meaning of Section 40-11A-602(F) and also erred in determining that a paternity action does not survive the death of the putative father.

Whether a party has standing to bring a claim is a question of law that we review de novo on appeal. *Disabled Am. Veterans v. Lakeside Veterans Club, Inc.*, 2011-NMCA-099, ¶ 9, 150 N.M. 569, 263 P.3d 911. "Where the Legislature has granted specific persons a cause of action by statute, the statute governs who has standing to sue." *San Juan Agric. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 8, 150 N.M. 64, 257 P.3d 884. In determining whether a personal representative has standing to bring a

parentage action under the UPA, "[t]he entire statute is to be read as a whole so that each provision may be considered in its relation to every other part." *Id.* ¶ 9 (internal quotation marks and citation omitted). We begin by examining "the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different meaning was intended." *Disabled Am. Veterans*, 2011-NMCA-099, ¶ 13 (alteration, internal quotation marks, and citation omitted). "When a statute contains language that is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *Id.* (alterations, internal quotation marks, and citation omitted).

As noted above, Section 40-11A-602(F) of the UPA grants standing to maintain a parentage action in district court to "a representative authorized by law to act for a person who would otherwise be entitled to maintain a proceeding but who is deceased[.]" Based on the plain language of this provision, we conclude that the district court erred in determining that a personal representative of the estate of an individual who would otherwise be entitled to maintain a parentage proceeding—in this case, the putative father—does not qualify as a "representative authorized by law" under Section 40-11A-602(F). It is generally well established that a personal representative is an individual legally authorized to act on behalf of a decedent. *See Black's Law Dictionary* 1416 (9th ed. 2009) (defining "personal representative" as "[a] person who manages the legal affairs of another because of incapacity or death"). This Court has stated that "[i]n probate law, [the term] 'personal representative[]' refers generally to persons with the duty of settling and distributing a decedent's estate under the supervision of a court, and includes executors and administrators." *In re Estate of Sumler*, 2003-NMCA-030, ¶ 8, 133 N.M. 319, 62 P.3d 776; *see* NMSA 1978, § 45-3-703 (2011) (describing general duties and powers of personal representatives). The Probate Code further provides that "[e]xcept as to proceedings that do not survive the death of the decedent, a personal representative of a decedent domiciled in New Mexico at the decedent's death has the *same* standing to sue and be sued in the courts of New Mexico and the courts of any other jurisdiction as the decedent had immediately prior to death." Section 45-3-703(E) (emphasis added). Thus, based on the general duties and powers of a personal representative to act on behalf of a decedent, it is readily apparent that a personal representative qualifies as a "representative authorized by law" to act on behalf of a decedent within the meaning of Section 40-11A-602(F).

We observe that at least one other state that has adopted the UPA has found that a personal representative of a putative father's estate has standing to bring an action to adjudicate parentage. In *R.F. v. M.M.*, 2010 ND 195, ¶ 3, 789 N.W.2d 723, the North Dakota Supreme Court considered a case where a grandfather in his individual capacity filed an action to establish paternity of an alleged grandchild and to obtain grandparent visitation privileges. The grandfather later amended the action to clarify that he was also bringing the paternity action in his capacity as the personal representative of the estate of his son, the putative father of the child. *Id.* The North Dakota Supreme Court determined that the grandfather, as the personal representative, had standing to bring the paternity action under the North Dakota UPA standing provision that is identical to Section 40-11A-602. *R.F.*, 2010 ND 195, ¶¶ 6, 13. Although Mother argues that *R.F.* is distinguishable

because the respondent in that case conceded that the grandfather had standing after he was appointed as a personal representative, *id.* ¶ 9, we observe that, despite this concession, the North Dakota Supreme Court expressly concluded in its analysis of the standing issue that the grandfather's "appointment as a personal representative gave him standing to bring a paternity action." *Id.* ¶ 13. We therefore consider the case to be persuasive authority that a personal representative has standing to maintain a paternity action under Section 40-11A-602 of the UPA.

Mother contends that the Probate Code only grants a personal representative the authority to bring causes of action that survive the decedent's death, and a paternity action is not a type of action that survives a putative father's death. *See* § 45-3-703(E) (providing that a personal representative has the same standing as the decedent to maintain an action on behalf of the decedent "[e]xcept as to proceedings that do not survive the death of the decedent"). Mother argues that a paternity action does not survive a putative father's death because a paternity action did not exist at common law and the Legislature has not enacted any statute authorizing the survival of a paternity action following the death of the putative father. We disagree with Mother's argument for several reasons.

First, by adopting the UPA, the Legislature has provided statutory authority that a parentage action can be maintained after the death of a putative father. Provisions of the UPA clearly contemplate that a parentage action can be maintained after the death of the putative father. A prime example is the standing provision itself that is at issue in this appeal, Section 40-11A-602, which provides that a parentage action can be maintained on behalf of a deceased individual who would otherwise be entitled to maintain a proceeding but for his/her death. In addition, the venue provision, Section 40-11A-605(C), states that venue for a proceeding to adjudicate parentage is proper in the county where "a proceeding for probate or administration of the presumed, acknowledged or alleged father's estate is pending." And one of the statute of limitations provisions of the UPA provides that a child with no presumed, acknowledged, or adjudicated father may commence a parentage proceeding "at any time, even after . . . the child becomes an adult[.]" Section 40-11A-606(A)(1). Given this extraordinary statute of limitations, it is certainly conceivable that a child could initiate a paternity action after the death of the putative father.

Second, although decided under a prior version of the UPA, this Court in *In re Estate of DeLara*, 2002-NMCA-004, 131 N.M. 430, 38 P.3d 198, has previously considered the issue of parentage adjudications occurring after the death of the putative father. In *DeLara*, a mother filed an action to establish paternity and obtain child support against a deceased putative father, naming the personal representative of the putative father's estate as the respondent in the action. *Id.* ¶¶ 3-4. We reversed the district court's ruling that the claim for child support could not proceed against the father's estate because no action for paternity or child support had been filed prior to the father's death. *Id.* ¶ 1. Relying on the venue provision in an earlier version of the UPA, which remains substantively similar to the current venue provision,[1] we stated that the venue

[1]Although the venue provision in the earlier version of the UPA is not identical to the current provision, both provide that venue is proper in the county where probate

provision "clearly envisions a suit under the UPA after the death of the father." *Id.* ¶¶ 8-9. In addressing whether an action to establish paternity and obtain child support must be filed prior to the father's death, this Court stated that "[t]he UPA's only express limitation *on a paternity* . . . action depends on the age of the child, not on the death of the father, nor on whether suit was filed before the father died." *Id.* ¶ 13 (emphasis added). The Legislature did not intend to "require [a paternity and support] action [to be filed] prior to the father's death as a prerequisite to filing a claim against the father's estate." *Id.* Under the current UPA, the limits on when a parentage proceeding may be initiated also do not depend on whether the proceeding was initiated prior to the death of the father.[2] Thus, although *DeLara* was decided under a prior version of the UPA, its reasoning is persuasive and further supports our determination that the UPA permits a parentage proceeding to be initiated after the death of the putative father.

Third, we are not persuaded by the cases from other jurisdictions relied upon by Mother that have held that a paternity action does not survive the death of a putative father. Several of the cases are from jurisdictions that have not adopted the UPA and are thus distinguishable due to the lack of specific statutory authority as to whether a paternity action survives the death of the putative father. *See, e.g.*, *Bullock v. J.B.*, 725 N.W.2d 401, 403-05 (Neb. 2006); *K.K. v. Estate of M.F.*, 367 A.2d 466, 468 (N.J. Super. Ct. Ch. Div. 1976); *Bell v. Setzer*, 375 So. 2d 61, 62 (Fla. Dist. Ct. App. 1979). In fact, the only case relied upon by Mother where the UPA has been adopted held that a paternity claim survives the death of the putative father because "[a]n action brought under the [UPA] is an equitable action," and paternity claims are equitable in nature. *See Ex parte L.F.B.*, 599 So. 2d 1179, 1181-82 (Ala. 1992). In addition, Mother's reliance on cases that have held that a paternity action abates where the death of the father occurs during the pendency of a paternity action is misplaced. *See Bullock*, 725 N.W.2d at 403-05 (holding that a paternity action filed prior to the putative father's death did not survive his death and could not be revived by the personal representative of the father's estate because a paternity action is personal in nature and does not survive the death of the putative father). Unlike *Bullock* and the cases cited therein, our Legislature has specifically enacted an anti-abatement statute for paternity actions. *See* NMSA 1978, § 40-4-20(B) (1993) ("Upon the filing and service of a petition for . . . determination of paternity. . . , if a party to the action dies during the pendency of the action, but prior to the . . . determination of paternity, the proceedings for the determination . . . of paternity shall not abate. The court shall conclude the proceedings as if both parties had survived."). As a final matter, we note that Mother cites to cases that have held that a

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of the putative father's estate is pending. *Compare* § 40-11A-605 (stating that venue for a proceeding to adjudicate parentage is proper in the county where "a proceeding for probate or administration of the presumed, acknowledged or alleged father's estate is pending"), *with* § 40-11-8(C) (providing that if the father is deceased, an "action may be brought in the county in which . . . proceedings for probate of his estate have been or could be commenced") (1986, repealed effective January 1, 2010).

[2]Section 40-11A-606(A) provides that an adjudication of parentage may be commenced *by the child* "at any time," while any other proceeding to adjudicate parentage is to be commenced "not later than three years after the child has reached the age of majority," pursuant to Section 40-11A-607(B). A proceeding to adjudicate child support "shall be brought not later than three years after the child has reached the age of majority." Section 40-11A-607(A).

paternity action does survive the death of the putative father, thereby acknowledging the split of authority that exists in other jurisdictions on this issue. *See, e.g.*, *In re M.E.W.F.*, 600 P.2d 108, 108 (Colo. Ct. App. 1979) (holding that a paternity action survives the death of the putative father because paternity actions are not listed as an exception in Colorado's survival statute); *Ex parte L.F.B.*, 599 So. 2d at 1182 (holding that a personal representative had standing to bring a paternity action on behalf of a deceased father). Regardless of this split in authority, we nevertheless conclude that, based on the plain language of Section 40-11A-602 and other statutory provisions of the UPA, as well as our case law, a paternity action in New Mexico may be instituted after the death of the putative father.

Thus, we hold that a personal representative of the estate of an individual who would otherwise be entitled to maintain a parentage proceeding but for his/her death has standing to bring an action to adjudicate parentage under Section 40-11A-602(F) of the UPA. Accordingly, we reverse the district court's dismissal of the paternity action filed by the Personal Representative of Swift's estate.

B. Dismissal of Grandparent Visitation Action

The district court based its dismissal of the grandparent visitation action on the dismissal of the paternity action. Our review of the record indicates that the district court's determination that the grandparents lacked standing to bring the visitation action was premised solely on its earlier ruling that the grandfather, as Personal Representative of his deceased son's estate, lacked standing to adjudicate parentage in the paternity action. Having concluded that the district court erred in dismissing the paternity action on the basis of a lack of standing, we also reverse the district court's dismissal of the grandparent visitation action.

CONCLUSION

For the reasons stated above, we reverse the district court's dismissal of both the paternity and the grandparent visitation actions, and we remand for further proceedings consistent with this Opinion.

IT IS SO ORDERED.

LINDA M. VANZI, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

MICHAEL D. BUSTAMANTE, Judge

Certiorari Granted, August 16, 2013, No. 34,235

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-091

Filing Date: June 6, 2013

Docket No. 32,046

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

KEVIN ALVERSON,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY
James Waylon Counts, District Judge

Gary K. King, Attorney General
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Santa Fe, NM

for Appellant

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Nancy L. Simmons
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for Appellee

OPINION

SUTIN, Judge.

Owing to his possession of what the State characterized as "dry ice bombs," Defendant Kevin Alverson was charged with possession of an explosive or incendiary device, contrary to NMSA 1978, Section 30-7-19.1 (1990), a fourth degree felony. The district court dismissed the charge as a matter of law. The State appeals. We hold that the device was neither an "explosive" nor an "explosive device" under New Mexico law. Accordingly, we affirm.

BACKGROUND

In September 2011, Officer Karl Becker of the Alamogordo Department of Public Safety made "public contact" with Defendant, who was seated in his car. Officer Becker recognized Defendant to be a person whose driver's license was suspended or revoked, a fact that he later confirmed with dispatch. Defendant consented to a vehicle search. During the search, Officer Becker found, in pertinent part, two bottles with dry ice and two partially full gallon jugs of water. Officer Becker recognized that the jugs of water were "a precursor to make the dry ice generate explosive gases in the bottles." According to Officer Becker, Defendant stated that "he and a friend were going to go to a desert area [to] detonate them." Defendant was arrested and charged with possession of an explosive or incendiary device based on allegedly "knowingly and unlawfully possess[ing], manufactur[ing,] or transport[ing an] explosive device, incendiary device[,] or complete combination of parts needed to make such a device, a fourth degree felony, contrary to Section 30-7-19.1[.]"

Defendant filed a motion to dismiss the charge of possession of an explosive or incendiary device. He argued that, as a matter of law, the items found in Defendant's possession did not meet the definition of an "explosive device" as defined in NMSA 1978, Section 30-7-18(B) (1990) of the Explosives

Act, NMSA 1978, §§ 30-7-17 to -22 (1981, as amended through 1990). He further argued that pursuant to the principles of statutory construction the items were not contemplated by the Legislature to be encompassed within the definitions of a "destructive device" in NMSA 1978, Section 30-7-16(C)(1) (2001), or "explosive device" in Section 30-7-18(B).

In opposition, the State argued, among other things, that Defendant, by his own admission, intended to make dry ice bombs[1] and that his intent combined with the fact that he possessed the necessary components to assemble such "bombs" rendered Section 30-7-18(B) applicable in this case. Alternatively, the State argued that Defendant's argument raised a question of fact and that the charge should not be dismissed as a matter of law.

After a hearing on Defendant's motion to dismiss, the district court entered an order granting the motion as a matter of law. The court explained that Sections 30-7-18 and 30-7-19.1 refer to explosives and explosive devices that are caused by "chemical reactions caused by burning or by fire rather than by expansion of gases under pressure." The court found that because dry ice bombs result from the expansion of gases, rather than by fire or burning, they are not prohibited by Section 30-7-19.1. The court further found that our Legislature could have added certain language that exists in other states' statutes that addresses dry ice bombs, but chose not to include such language. Accordingly, the court found that "the dry ice bombs possessed by Defendant [were] not made illegal by . . . [Section] 30-7-19.1," and it dismissed the charge against Defendant with prejudice. The State appeals from that ruling.

DISCUSSION

The issue is whether a dry ice bomb comes within the definition of an explosive device[2] as contemplated by Section 30-7-19.1. "Interpretation of a statute is a matter of law, which we review de novo." *State v. Rivera*, 2004-NMSC-001, ¶ 9, 134 N.M. 768, 82 P.3d 939 (internal quotation marks and citation omitted). The appellate courts endeavor to determine and give effect to the intent of the Legislature. *See State v. Johnson*, 2009-NMSC-049, ¶ 10, 147 N.M. 177, 218 P.3d 863. In doing so, we look first to the statute's plain language and interpret statutes as a whole. *State v. Davis*, 1998-NMCA-148, ¶ 19, 126 N.M. 297, 968 P.2d 808. Where the statutory language "is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *Rivera*, 2004-NMSC-001, ¶ 10 (internal quotation marks and citation omitted). Often, however, an analysis of the statutory language or its "plain meaning" does not end the analysis, and we must rely on other principles of statutory construction. *Id.* ¶¶ 12-14.

Under Section 30-7-19.1(A) of the Explosives Act,

> [p]ossession of an explosive device

[1] "Dry ice is carbon dioxide . . . in solid form. . . . At normal temperatures, dry ice changes from a solid to gas rapidly and, increasingly so when placed in water and agitated. In the transition from solid to gas, its volume increases 500 times, and, when confined, as in a bottle, the pressure exerted naturally increases, and, if the container cannot withstand the expansion, it must burst." *N.Y. Eskimo Pie Corp. v. Rataj*, 73 F.2d 184, 185 (3d Cir. 1934). This is commonly referred to as a "dry ice bomb." *See, e.g., In re Joseph S.*, 698 N.W.2d 212, 226-27 (Neb. Ct. App. 2005).

[2] The State concedes that Defendant did not possess an "incendiary device."

> or incendiary device consists of knowingly possessing, manufacturing[,] or transporting any explosive device or incendiary device or complete combination of parts thereof necessary to make an explosive device or incendiary device. This subsection shall not apply to any fireworks as defined in Section 60-2C-2 NMSA 1978 or any lawfully acquired household, commercial, industrial[,] or sporting device or compound included in the definition of explosive device or incendiary device in Section 30-7-18 NMSA 1978 that has legitimate and lawful commercial, industrial[,] or sporting purposes or that is lawfully possessed under Section 30-7-7 NMSA 1978.

Section 30-7-18 provides definitions of terms used in the Explosives Act. Section 30-7-18(A) states that the term " 'explosive' means any chemical compound or mixture or device, the primary or common purpose of which is to explode and includes but is not limited to dynamite and other high explosives, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cord, igniter cord[,] and igniters[.]" In pertinent part, Section 30-7-18(B) defines "explosive device" as "(1) any explosive bomb, grenade, missile[,] or similar device; [or] (2) any device or mechanism used or created to start a fire or explosion with or without a timing mechanism except cigarette lighters and matches[.]"

The Applicability of Section 30-7-18(B)(1)

The State argues that a dry ice bomb is an "explosive bomb" or "similar device" under Section 30-7-18(B)(1). The State acknowledges that because "explosive" modifies "bomb" in Section 30-7-18(B)(1), the definition of "explosive" provided in Section 30-7-18(A) applies to Subsection (B)(1). Thus, whether a dry ice bomb is an "explosive bomb" depends on whether it is an "explosive" as defined by Section 30-7-18(A), and if so, whether it is also a "bomb," which is a term that is undefined in the Explosives Act.

The State argues that "[a] dry ice bomb falls within [Section 30-7-18(A)] because it is a mixture of two chemical compounds (dry ice (solid CO_2) and water (liquid H_2O)) in a closed container, and the primary or common purpose of this mixture is to create an explosion." Relying on the principle of ejusdem generis, Defendant argues that the physical expansion of compressed gas that characterizes a dry ice bomb is inconsistent with "explosive" as defined by, and exemplified in, Section 30-7-18(A). The parties also disagree about whether a dry ice bomb is a "bomb" as that term is commonly understood.

"The rule of ejusdem generis requires[] that where general words follow an enumeration of persons or things of a particular and specific meaning, the general words are not construed in their widest extent but are instead construed as applying to persons or things of the same kind or class as those specifically mentioned." *State v. Office of Pub. Defender ex rel. Muqqddin*, 2012-NMSC-029, ¶ 29, 285 P.3d 622 (internal quotation marks and citation omitted); *see* NMSA 1978, § 12-2A-20(A) (1997) (codifying the principle of ejusdem generis as an aid to statutory construction). From the definition in Section 30-7-18(A), there is no indication that the Legislature intended "explosive" to cover the dry ice and water combination that leads to the explosion of a

jug or a bottle by virtue of the physical change of CO_2 from a solid to a gaseous state. The list of enumerated examples of "explosive" in Section 30-7-18(A) share in common the element of combustion. Thus, the potential harm caused by "dynamite and other high explosives, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cord, igniter cord, and igniters" all result from or cause fire. *Id.* It is undisputed that a dry ice bomb does not involve the use of nor does it cause fire. Because a dry ice bomb does not fit within the class of devices enumerated in Section 30-7-18(A), the principle of ejusdem generis compels a conclusion that the Legislature did not intend the term "explosive" to cover the combination of dry ice and water in a closed container.

We need not consider whether a dry ice bomb is a "bomb" as that term is commonly understood. The Legislature chose to modify the term "bomb" in Section 30-7-18(B)(1) with the adjective "explosive." Even assuming, without deciding, that a dry ice bomb is a "bomb," it nevertheless does not come within the definition of Subsection (B)(1) because it is not also an "explosive." *See State v. Jackson*, 2010-NMSC-032, ¶ 28, 148 N.M. 452, 237 P.3d 754 ("It is fundamental that a statute should be so construed that no word, clause, sentence provision[,] or part thereof shall be rendered surplusage or superfluous." (internal quotation marks and citation omitted)).

Nor do we believe that a dry ice bomb falls within the scope of Section 30-7-18(B)(1) as a "similar device" to an explosive bomb, grenade, or missile. Like explosive bombs, grenades and missiles are associated with fire or combustion. Moreover, explosive bombs, grenades, and missiles are similar to one another insofar as they are commonly associated with large scale explosions and military combat. The same would not be said of a dry ice bomb. Because a dry ice bomb would not rationally be characterized as "similar" to an explosive bomb, a grenade, or a missile in terms of its components, its destructive force, or its use, the principle of ejusdem generis precludes a conclusion that it comes within the ambit of "similar device" under Section 30-7-18(B)(1). In sum, Subsection (B)(1) is inapplicable to this case.

The Applicability of Section 30-7-18(B)(2)

The State argues, in the alternative, that a dry ice bomb is an explosive device as set out under Section 30-7-18(B)(2) because it "is a device or mechanism created to start an explosion." The State argues that unlike Subsection (B)(1), Subsection (B)(2) does not employ the use of the modifying adjective "explosive." Therefore, the State argues, in interpreting the scope of the definition provided in Subsection (B)(2), "there is no need to refer back to the meaning of the term ['']explosive.['] "

The ordinary definition of "explosion" invokes the concept of bursting as the result of the expansion of gases and/or internal pressure, which, as Defendant concedes, is the reaction sought from and expected of a dry ice bomb. *See Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/explosion (last visited May 30, 2013) (defining "explosion" as "1: the act or an instance of exploding . . . 2: a large-scale, rapid, or spectacular expansion or bursting out or forth"); *Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary /explode (last visited May 30, 2013) (defining "explode" or "exploding" as "1: to burst forth with sudden

violence or noise from internal energy: as [(a)]: to undergo a rapid chemical or nuclear reaction with the production of noise, heat, and violent expansion of gases . . . [or (b)]: to burst violently as a result of pressure from within"); *see also The American Heritage Dictionary of the English Language*, http://ahdictionary.com/word/search.html?q=explode (last visited May 30, 2013) (providing the definition of "explode," to include, "[t]o release mechanical, chemical, or nuclear energy by the sudden production of gases in a confined space" or "[t]o burst violently as a result of internal pressure"); *cf. Johnson*, 2009-NMSC-049, ¶ 12 (turning to the dictionary definition of the term "employee" to glean its "ordinary meaning"). Thus, the ordinary definitions of the terms "explosion," "explode," and "exploding" could be construed to cover a dry ice bomb. Nevertheless, examining the foregoing meanings does not end our inquiry in this case.

We will not rely upon the literal meaning of the words chosen by the Legislature "when such an application would be absurd, unreasonable, or otherwise inappropriate." *Rivera*, 2004-NMSC-001, ¶ 13. To read Section 30-7-18(B)(2) in the manner advocated by the State would lead to an absurd result. As indicated earlier in this Opinion, a dry ice bomb is not "explosive" as defined in Section 30-7-18(A). Thus, to rely exclusively on the plain meaning of "explosion" to conclude that a dry ice bomb fits within Subsection (B)(2) would be to conclude that the device at issue, though not explosive, is nevertheless an "explosive device."

Moreover, we reject the State's suggestion that Section 30-7-18(B)(2) may be read without reference to Section 30-7-18(A). "[A] statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole[.]" *Rivera*, 2004-NMSC-001, ¶ 13 (internal quotation marks and citation omitted). Reading Sections 30-7-18(A) and 30-7-18(B) in reference to one another as parts of a "harmonious" whole, we cannot conclude that the Legislature intended the definition of "explosive device" to be considered wholly unrelated to its definition of "explosive." *See Rivera*, 2004-NMSC-001, ¶ 13 ("[W]henever possible . . . we must read different legislative enactments as harmonious instead of as contradicting one another." (omission in original) (internal quotation marks and citation omitted)). Had the Legislature intended to omit the concept or the definition of "explosive" from Section 30-7-18(B), it could have chosen different language. That the Legislature chose to modify "device" in Section 30-7-18(B) with the earlier defined term, "explosive," cannot be ignored. *See Jackson*, 2010-NMSC-032, ¶ 28 ("It is fundamental that a statute should be so construed that no word, clause, sentence provision[,] or part thereof shall be rendered surplusage or superfluous." (internal quotation marks and citation omitted)).

Similarly, viewed in the context of Section 30-7-18 as a whole, it is rational to conclude that the term "explosion" in Subsection (B)(2) was intended to be construed as a derivative of or in relationship to the term "explosive." That is, in addition to the dictionary definitions of "explosion" provided earlier, the term "explosion" might also be used in ordinary parlance to describe what occurs as a result of the combustion of an explosive device. Thus, viewed in context of the statute and section as a whole, we do not believe that Subsection (B)(2) encompasses a dry ice bomb.

We are not persuaded by the State's additional arguments or authority regarding the scope of Section 30-7-18. The State argues that we should follow the lead of the Ohio Court of Appeals which determined, in two separate cases, that a bottle bomb was an "explosive device," but that it was not an "explosive." *See State v. Dommer*, 162 Ohio App. 3d 404, 2005-Ohio-4073, 833 N.E.2d 796, at ¶ 12 (concluding that a bottle bomb "was not an 'explosive' as defined" by the Ohio Revised Code); *In re Travis*, 675 N.E.2d 36, 37-40 (Ohio Ct. App. 1996) (concluding that a bottle bomb was an explosive device under the Ohio Revised Code). In concluding that a bottle bomb was an explosive device, the *Travis* court interpreted a statutory definition of such a device that differed significantly from the definitions provided in Section 30-7-18(B). In relevant part, the Ohio Revised Code defined "explosive device" as a "device designed or specially adapted to cause physical harm to persons or property by means of an explosion" and it included "any pressure vessel which has been knowingly tampered with or arranged so as to explode." *Travis*, 675 N.E.2d at 39 (internal quotation marks and citation omitted). Thus, the Ohio statute at issue in *Travis* was broader than Section 30-7-18(B), and its applicability depended, in part, on the purpose of the device. Owing to the lack of similarity between the Ohio statute and Section 30-7-18(B), *Travis* does not provide persuasive authority for the State's argument. Additionally, the State warns against the danger of a ejusdem generis analysis in this case by arguing that limiting the definitions of Section 30-7-18 to "reactions caused by burning or fire" cannot have been the Legislature's intent because, under that interpretation, "the possession of atomic bombs" would be legal under Section 30-7-19.1. We do not find this line of reasoning persuasive. We do not believe that the New Mexico Legislature intended the Explosives Act to cover the "possession" of atomic weaponry. It is unlikely that possession of an atomic bomb would be the subject of a state-level prosecution. Atomic energy is the purview of the federal government. *See* 42 U.S.C.A. § 2271(c) (West 2013) (stating that the Attorney General of the United States has the exclusive authority to bring any action against any individual or person for a violation of the Atomic Energy Act).

{20} The State also argues that the Legislature did not need to include specific language about dry ice bombs in the Explosives Act to indicate that such a device was prohibited. The appellate courts recognize that, when drafting a statute, the Legislature cannot predict all of its possible applications. *Cf. Martinez v. Pub. Emps. Ret. Ass'n of N.M.*, 2012-NMCA-096, ¶ 11, 286 P.3d 613 (recognizing that "legislatures cannot predict all possible applications when drafting a statute" (internal quotation marks and citation omitted), *cert. quashed*, 2013-NMCERT-003, 300 P.3d 1182. It is for that reason that we rely on principles of statutory construction. And as earlier indicated in this Opinion, we do not believe that dry ice bombs fall within the definitions provided in Section 30-7-18.

Further, the State argues that the Legislature was not alerted to the need to specifically include dry ice bombs within the purview of the Explosives Act because, at the time that the statute was drafted, other state legislatures had yet to expressly prohibit such devices. We see no rational basis for this argument. The Legislature is free to draft and to amend statutes as it sees fit. Dry ice bombs are not a new concept. *See e.g.*, *Rataj*, 73 F.2d at 184-85 (describing, in 1934, the

makings of what would be considered a dry ice bomb today). Nor do we believe that our Legislature would depend upon statutory amendments from other states to alert them to the concept or to the danger of such devices. We have concluded that the Legislature did not intend to include dry ice bombs within the purview of the Explosives Act. *Cf. Muqqddin*, 2012-NMSC-029, ¶ 37 (declining to expand the statutory definition of "prohibited space," as that term is used in the burglary statute, absent the Legislature's clear intent to do so).

CONCLUSION

For the foregoing reasons, we affirm the district court's dismissal of the charge against Defendant for possession of an explosive or incendiary device.

IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

M. MONICA ZAMORA, Judge

Certiorari Denied, September 5, 2013, No. 34,228

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-092

Filing Date: June 6, 2013

Docket No. 30,349

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

MONICA RAEL-GALLEGOS,

Defendant-Appellant.

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for Appellee

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for Appellant

OPINION

SUTIN, Judge.

Defendant Monica Rael-Gallegos appeals her conviction of trafficking, by possession with intent to distribute cocaine. She argues: (1) there was insufficient evidence to support the jury's verdict, (2) she was denied her right to confront her accuser, (3) the district court erred in admitting testimony of the State's expert witness, and (4) ineffective assistance of counsel. We affirm.

BACKGROUND

In July 2007, Defendant was detained by Officer Jose Sanchez of the Albuquerque Police Department who found her at the intersection of Coors Boulevard and Central Avenue in Albuquerque, New Mexico, "passed out at the wheel" of her vehicle at approximately 4:00 a.m. After several attempts, Officer Sanchez succeeded in waking Defendant and requested that she step out of the vehicle. Defendant complied, and as she stepped out of the vehicle, a small plastic bag containing what the officer believed to be crack cocaine fell out of her purse and onto the ground. Defendant admitted to having "smoked crack [cocaine] about an hour . . . , prior to being stopped" by police.

Officer Sanchez arrested Defendant and conducted an inventory search of the vehicle. He did a second inventory search after Defendant informed him that she had money in the console of the vehicle. Among the evidentiary items found in the vehicle during the two inventory searches were sandwich bags, three cell phones, two separate amounts of cash, a crack pipe, and a second bag in the console of the vehicle containing what the officer believed to be crack cocaine. The substance from the bags was later confirmed by laboratory testing to be cocaine with a combined weight of 3.46 grams. Officer Sanchez counted the two amounts of cash that totaled $520.

Based on the amount of crack cocaine, the baggies, the multiple cell phones and the amount of cash in the vehicle, Officer Sanchez's training and experience led him to believe that Defendant was "a trafficker." Defendant was charged accordingly, with trafficking cocaine, among other crimes. Defendant was brought to trial before a jury in May 2009.

Among the State's witnesses was Sergeant Andrea Taylor, who was qualified as an expert in differentiating personal use versus trafficking amounts of crack cocaine. During trial, Sergeant Taylor examined the crack cocaine that Defendant was alleged to have possessed at the time of her arrest and she testified that she counted approximately nineteen "rocks." She provided the caveat, however, that because the evidence had been collected in 2007, some pieces may have "chipped off" and thus, it was not fair to say how many rocks comprised the evidence in

2007. In addition to this and other testimony, Sergeant Taylor also testified as to some things that a crack cocaine "dealer" might have in his or her possession. These items included ledgers, crack packaged for sale, multiple cell phones, paraphernalia (either straws or needles to ingest powder cocaine, or pipes to smoke crack cocaine), weapons, large amounts of money, scales, baggies, or a "bunch of bags with the ends cut off." Sergeant Taylor stated, however, that someone who possesses drugs and the drug-related items that she described was not necessarily a drug trafficker. Further background regarding Sergeant Taylor's testimony and other aspects of the trial will be provided as relevant throughout this Opinion.

The jury found Defendant guilty of trafficking, among other crimes. She appeals from the trafficking conviction. Defendant argues that there was insufficient evidence to prove that the cocaine found in the console of the vehicle was hers, and therefore, that there was insufficient evidence to support the trafficking conviction. She also argues that her confrontation right was violated by Officer Sanchez's testimony regarding the amount of money that was found in her vehicle. Further, she argues that Sergeant Taylor should not have been qualified as an expert, that her testimony exceeded the bounds of permissible expert testimony, and that it was more prejudicial than probative. Finally, she argues that she did not receive effective assistance of counsel.

DISCUSSION

I. Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence to support the jury's verdict as to the trafficking charge. Defendant concedes that there was substantial evidence to prove "that she possessed *some* cocaine," that is, the cocaine that fell to the ground when Defendant got out of the vehicle. Defendant claims, however, that the State failed to present sufficient evidence that she possessed the additional cocaine that was found in the center console. Further, based on her claim that the cocaine found in the center console was not in her possession, Defendant argues that there was insufficient evidence to prove that she "intended to transfer the cocaine to another."

"In reviewing the sufficiency of the evidence in a criminal case, we must determine whether substantial evidence, either direct or circumstantial, exists to support a verdict of guilty beyond a reasonable doubt for every essential element of the crime at issue." *State v. Armijo*, 2005-NMCA-010, ¶ 4, 136 N.M. 723, 104 P.3d 1114. "Resolving all conflicts, indulging all permissible inferences to uphold the conviction, and disregarding all evidence and inferences to the contrary, [we view the] evidence in the light most favorable to the verdict to ensure that a rational jury could have found each element of the crime established beyond a reasonable doubt." *Id.* "[I]t is for the fact-finder to evaluate the weight of the evidence, to assess the credibility of the various witnesses, and to resolve any conflicts in the evidence; we will not substitute our judgment as to such matters." *Id.* We will not re-weigh the evidence. *State v. Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057.

The jury was instructed that, to find Defendant guilty of trafficking, the State was required to prove that Defendant had cocaine in her possession, knew or believed it to be cocaine, and intended to transfer it to another. Defendant's sufficiency of the evidence attack is limited to the cocaine that was found in the

center console. The cocaine that dropped to the ground is not at issue. Defendant argues that there was insufficient evidence to prove that the cocaine in the center console was hers. Then, building on that premise, she argues there was insufficient evidence to support a trafficking charge.

A. The Cocaine in the Center Console

Defendant argues that because she directed police toward the center console, by telling Officer Sanchez that she had money stored there, "it defies reason" to infer that Defendant owned the cocaine that was also in the center console because, had Defendant known that the cocaine was in the console, she would not have "point[ed] Officer Sanchez to search" there. Additionally, in an apparent attempt to preemptively rebuff the State's argument that Defendant admitted to Officer Sanchez that the cocaine in the center console was hers, Defendant attacks Officer Sanchez's testimony for being "impossibly vague" and therefore "meaningless." Further, Defendant argues that "in the absence of any admission" of ownership of the cocaine in the center console, and absent evidence "that she was in exclusive possession of the vehicle," any theory of constructive possession lacks viability.

Viewing the evidence in the light most favorable to the jury's verdict, we conclude that there existed substantial evidence from which the jury could conclude that Defendant possessed the cocaine found in the center console. Officer Sanchez testified that Defendant told him, "[t]hat there was money inside the vehicle, and it was in the center console." Accordingly, he went back to the vehicle and removed a bag that he found in the console. Inside that bag he found $392 along with "a small bag with the off-white substance . . . , consistent with crack cocaine." In response to the State's question, "did . . . [D]efendant mention anything about whose crack that was[,]" Officer Sanchez testified that Defendant "stated it was hers." Viewed in the context of the prosecutor's questions which were, during the foregoing aspect of the State's examination of Officer Sanchez, limited to the subject of the cocaine found in the console, the jury could reasonably infer that Defendant admitted to Officer Sanchez that the cocaine in the console was hers. Moreover, Defendant was the registered owner and the sole occupant of the vehicle from which the cocaine was retrieved. The cocaine was found in the center console of the vehicle inside of a bag that also contained money, to which Defendant had directed Officer Sanchez. From these facts, the jury could reasonably infer that Defendant possessed the cocaine.

We see no reasonable basis for Defendant to discuss constructive possession. The jury was not instructed as to constructive possession, nor, during trial, did the State rely on a theory of constructive possession to prove its case. Defendant's reliance on *State v. Becerra*, 112 N.M. 604, 817 P.2d 1246 (Ct. App. 1991), and *State v. Bowers*, 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974), for the analyses in those cases of constructive possession is misplaced. Those cases are inapplicable under the facts of this case.

As to Defendant's argument that "it defies reason" to assume that she would alert Officer Sanchez to the money if she knew that he would inevitably find the cocaine, we do not find this argument persuasive. While this line of reasoning could suggest that Defendant was unaware of the presence of cocaine in the console, it is not the purview of this Court to search for inferences to support a verdict

contrary to the jury's. *See State v. Graham*, 2005-NMSC-004, ¶ 13, 137 N.M. 197, 109 P.3d 285. In sum, we conclude that there was sufficient evidence from which the jury could reasonably conclude that Defendant was in possession of the cocaine that was found in the console of her vehicle.

B. Trafficking

As to the sufficiency of the evidence to support the jury's determination that Defendant intended to transfer the cocaine to another, Defendant's argument rests on the premise that she possessed only the cocaine that fell to the ground when she got out of her vehicle. Defendant argues "the insufficiency of evidence that Defendant possessed the cocaine found in the console undermines Defendant's conviction for trafficking. Specifically, possession of a single rock of cocaine does not establish trafficking[.]" Having already rejected the premise of this argument by concluding that sufficient evidence supported the jury's determination that she possessed all of the cocaine at issue, we find Defendant's argument unpersuasive.

We conclude that sufficient evidence existed to support the jury's finding that Defendant was guilty of trafficking cocaine. Defendant possessed the cocaine that fell to the ground and also the cocaine found in the console of the vehicle. The jury's verdict was further supported by other evidentiary items and by testimony, including that of Officer Sanchez, who stated that based on the amount of cocaine that was found, the sandwich bags, the multiple cell phones, and the amount of cash that was in the truck, his training and experience led him to believe that Defendant was "a trafficker." Officer Sanchez's testimony in that regard was elicited by Defendant's own counsel, who asked Officer Sanchez, "[w]hy did you believe [that] you had a trafficker?" Defendant's sufficiency argument does not provide a basis for reversal.

II. Confrontation

Defendant argues that her Sixth Amendment right to confront her accuser was violated by Officer Sanchez's testimony regarding the amount of cash found in her vehicle and the denominations thereof. Defendant did not, in district court, make a confrontation argument regarding Officer Sanchez's testimony. Accordingly, the State argues, and we agree, that the confrontation argument was not preserved. *See* Rule 12-216(A) NMRA ("To preserve a question for review[,] it must appear that a ruling or decision by the district court was fairly invoked[.]"). This argument will not be considered further on appeal. *See State v. Garcia*, 2013-NMCA-005, ¶ 9, 294 P.3d 1256 (stating that we will not consider unpreserved constitutional arguments).

III. The Expert Witness Issue

Over Defendant's objections, the district court admitted the testimony of Sergeant Taylor, who testified as an expert in distinguishing between personal use and trafficking amounts in terms of crack cocaine. On appeal, Defendant argues that Sergeant Taylor should not have been qualified as an expert, that her testimony was more prejudicial than probative, and that her testimony exceeded the bounds of permissible expert testimony. We review for an abuse of discretion the admission or exclusion of an expert's testimony; however, "the threshold question of whether the . . . court applied the correct evidentiary rule or standard is subject to de novo review[.]" *State v. Torres*, 1999-

NMSC-010, ¶¶ 27-28, 127 N.M. 20, 976 P.2d 20.

A. Sergeant Taylor Was a Properly Qualified Expert

"Under Rule 11-702 NMRA, a witness must qualify as an expert in the field for which his or her testimony is offered before such testimony is admissible." *State v. Torrez*, 2009-NMSC-029, ¶ 15, 146 N.M. 331, 210 P.3d 228 (internal quotation marks and citation omitted). Rule 11-702 provides that "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise" if such testimony will assist the trier of fact. In examining Rule 11-702, our Supreme Court has emphasized that "the disjunctive 'or' in Rule 11-702 permits a witness to be qualified under a wide variety of bases[.]" *State v. Downey*, 2008-NMSC-061, ¶ 26, 145 N.M. 232, 195 P.3d 1244. "[N]o set criteria can be laid down to test such qualifications." *Torrez*, 2009-NMSC-029, ¶ 15 (internal quotation marks and citation omitted). The testimony of police officers that are qualified as experts "is admissible even if it touches upon [the] ultimate issue to be decided by the [jury]." *State v. Torres*, 2005-NMCA-070, ¶¶ 27, 32, 137 N.M. 607, 113 P.3d 877 (internal quotation marks and citation omitted); *State v. Landgraf*, 1996-NMCA-024, ¶ 20, 121 N.M. 445, 913 P.2d 252.

Defendant relies on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *State v. Alberico*, 116 N.M. 156, 861 P.2d 192 (1993), to provide the basis for her argument that Sergeant Taylor was not properly qualified as an expert. She argues that Sergeant Taylor was not qualified to testify as an expert because "no one else with [Sergeant Taylor's] experience or expertise had published on the subject of possession of a controlled substance for use versus possession for distribution, and no one else taught a similar subject." She also argues that Sergeant Taylor's "methodology" was flawed because it "was based on interviewing confidential informants, arrestees, and random pedestrians[.]" Defendant further attacks Sergeant Taylor's research "methodology" on the basis that it is "circular," and she questions the reliability of Sergeant Taylor's "test subjects." Further, Defendant argues that Sergeant Taylor's testimony was comprised of "guesse[s]" and contradictions, and that her experience as an undercover officer may have rendered her "an expert in the amount of cocaine an undercover officer could safely purchase[,]" but not an "expert in how much cocaine would *typically* be purchased for use rather than distribution."

Daubert and *Alberico* set forth the standards of admissibility for scientific evidence. *Daubert*, 509 U.S. at 592-95; *Alberico*, 116 N.M. at 167-68, 861 P.2d at 203-04. Our Supreme Court has recognized a distinction between the standards applicable to admitting scientific testimony and admitting testimony that is based on specialized knowledge. *Torrez*, 2009-NMSC-029, ¶¶ 20-21. Unlike scientific testimony, which must be "grounded in valid, objective science and reliable enough to prove what it purports to prove," in determining whether to admit non-scientific expert testimony, "the court must evaluate [the] . . . expert's personal knowledge and experience to determine whether the expert's conclusions on a given subject may be trusted." *Id.* ¶ 21 (internal quotation marks and citation omitted). It is clear from the record in this case that Sergeant Taylor was

accepted as an expert based on her knowledge and experience, as opposed to any purported scientific basis of expertise. Therefore, Defendant's reliance on *Daubert* and *Alberico* is misplaced. *See Torrez*, 2009-NMSC-029, ¶ 21.

Rather than applying the *Daubert* or *Alberico* standards to Sergeant Taylor's qualifications, we must instead consider whether Sergeant Taylor's knowledge and experience were sufficient to support a determination that her conclusions regarding the distinction between personal use amounts versus trafficking amounts of crack cocaine may be trusted. *See Torrez*, 2009-NMSC-029, ¶ 21 (stating the standard for admissibility of non-scientific expert testimony). Sergeant Taylor testified that she had worked for the Bernalillo County Sheriff's Department for eight years. As a cadet in the police academy, she had received training in basic narcotics recognition and basic narcotics interdiction, which she described as "interrupting when people are bringing large loads of narcotics from a different state into ours." Early in her career, her duties included being "on patrol in the field" during which time she investigated three to five hundred drug-related offenses. After "about three-and-a-half years of patrol," Sergeant Taylor was promoted to detective in narcotics, for which position she underwent written and oral tests, among other requirements.

As a narcotics detective, Sergeant Taylor received "a substantial amount of training[,]" including "approximately 360 hours of advanced narcotics training." She also did undercover work, worked on a task force with "numerous federal agencies," and she "earned the right to be . . . an instructor of narcotics at [the police] academy[] to citizen groups, as well as the district attorney's office." In her total time with the department, Sergeant Taylor estimated that she had done about a thousand drug investigations. After spending almost four years as a narcotics detective, she was promoted to sergeant.

In addition to her formal training, Sergeant Taylor testified that she learned about narcotics use and sales from interviewing every one of the approximately one thousand people who she arrested and some people who she did not arrest, but who she could tell were "going through a rough time[.]" She would ask these individuals whether they had a habit, whether they used and sold or just sold, how they used the narcotics, if they did use, whether and how they packaged their narcotics, where their best hiding spot was, what the slang terms were, how much did they use, how much did they spend on narcotics, and other information relevant to narcotics use and trade. Sergeant Taylor also testified as to her experience investigating narcotics in an undercover capacity, which she did approximately three times per week, twelve hours per day for almost four years. As an undercover officer, she purchased drugs, including crack cocaine. Based on her experience and from "talking with numerous people" when she set out to purchase crack cocaine under the guise of it being for herself, she limited her purchase to five rocks because that was "not a crazy amount to have[,]" and it was an amount that "could be used in a day." She testified that once, with a story that she was a stripper, and planned to resell it at a club, she purchased twelve rocks.

Since 2006 and continuing through the time of trial, Sergeant Taylor was the lead instructor for the basic law enforcement

academy in Bernalillo County, and she taught narcotics investigation and recognition, among other classes, to all of the new hire cadets. Sergeant Taylor's narcotics investigations course includes a segment "on what are trafficking amounts, [and] what are possession amounts[.]" That segment of the class also involves "evidence that you can look for in a stop that might help" to make such a distinction, including recognizing evidence of "packaging, scales, firearms, cell phones, admissions, [and] ledgers[.]" Additionally, among her narcotics-related teaching experiences, Sergeant Taylor has presented at "high intensity drug trafficking area" conferences, and she has taught "narcotics awareness, trafficking versus possession amounts" and other "things of that nature" to the district attorney's office. Sergeant Taylor further testified that since 2006, she had been qualified as an expert in the Second Judicial District approximately four times to testify as to the difference between trafficking and possession.

Rule 11-702 expressly allows experts to be qualified based on their knowledge, experience, training, and education, and Sergeant Taylor's experience spanned the gamut of the field of narcotics investigation, undercover work, and teaching, equipping her with sufficient knowledge and experience to testify as an expert in distinguishing between possession and trafficking narcotics. Based on the evidence of Sergeant Taylor's background, experience, and knowledge in drug transactions, we cannot say that the district court abused its discretion in qualifying Sergeant Taylor as an expert in differentiating between possession amounts and trafficking amounts of crack cocaine. Defendant's argument to the contrary provides no basis for reversal.

B. Sergeant Taylor's Testimony Was Within the Bounds of Allowable Expert Testimony

To demonstrate the basis of Defendant's next argument, we present the portion of Sergeant Taylor's testimony asserted by Defendant to be objectionable.

> [Prosecutor:] Now, you stated that you've encountered individuals who have sold crack cocaine in the field.
>
> [Sergeant Taylor:] Yes.
>
> [Prosecutor:] Have you arrested any?
>
> [Sergeant Taylor:] Yes.
>
> [Prosecutor:] Can you please tell the jury some of those experiences. Very specifically, those prior experiences, how many rocks does a typical [trafficker], low-level [trafficker], carry with them?
>
> . . . .
>
> [Sergeant Taylor:] It can be a couple of grams. The rocks are really light, so it's always better to speak in terms of the rocks. Maybe about—some have had 50, and some have had as little as, you know, 12, 13.
>
> [Prosecutor:] Okay. And based on your training and experience, how much, typically, does a person who simply possesses—or for personal use, crack cocaine, have on their person?
>
> [Sergeant Taylor:] Anywhere from

five to one to maybe a half of one.

[Prosecutor:] Have you seen anybody who has possessed—encountered them, arrested them, investigated them—19 rocks of crack cocaine?

[Sergeant Taylor:] For possession?

[Prosecutor:] For trafficking?

[Sergeant Taylor:] For trafficking, yes.

[Prosecutor:] How about for possession?

[Sergeant Taylor:] No.

[Prosecutor:] Did you charge that person with trafficking?

[Sergeant Taylor:] Yes.

[Prosecutor:] How about with 18 rocks of crack cocaine?

[Sergeant Taylor:] I've charged trafficking.

[Prosecutor:] And 17 rocks?

[Sergeant Taylor:] I would charge trafficking.

[Prosecutor:] 16 rocks?

[Sergeant Taylor:] I would charge trafficking.

[Prosecutor:] 15?

[Sergeant Taylor:] I would charge trafficking.

. . . .

[Prosecutor:] Now, have all of these people possessed the additional material that you have referenced earlier[,] cell phones, ledgers, crack pipes, scales?

[Sergeant Taylor:] No.

[Prosecutor:] Have some of them just possessed the rocks themselves?

[Sergeant Taylor:] Yes.

[Prosecutor:] If somebody were to have 19 rocks, 16 rocks, and have that in conjunction with multiple cell phones—well, let me ask you, have you ever encountered somebody who was similarly situated?

[Sergeant Taylor:] Yes.

[Prosecutor:] And have you charged them with a crime?

[Sergeant Taylor:] Yes.

[Prosecutor:] What was the crime?

[Sergeant Taylor:] Trafficking.

[Prosecutor:] Why did you charge them with trafficking?

[Sergeant Taylor:] Because I . . . felt that was the proper charge; the totality of the evidence, the amount, and the other circumstances surrounding.

[Prosecutor:] What are some of those other circumstances?

[Sergeant Taylor:] The way my interview would go with them. Again, the other evidence found. If they're—sometimes I would find large amounts of money. I would find, you know, packaging or phones or scales or anything like that.

Defendant asserts that Sergeant Taylor testified that "anyone possessing more than five rocks of crack cocaine should be and would be arrested and charged as a narcotics trafficker[.]" And, based on that premise, Defendant argues that Sergeant Taylor's testimony was "the equivalent of testifying as a matter of law, rather than as a matter of fact." Defendant then asserts that this testimony was improper because "expert witness[testimony] is, in general, confined to matters of fact, as distinguished from matters of law[.]" *Beal v. S. Union Gas Co.*, 66 N.M. 424, 437, 349 P.2d 337, 346 (1960) (internal quotation marks and citation omitted).

We do not agree with Defendant's interpretation of Sergeant Taylor's testimony. Contrary to Defendant's assertion, Sergeant Taylor did not testify as to what "should" or "would" happen to anyone in possession of more than five rocks of cocaine; rather, her testimony was based on her past experiences and related to charging decisions that she had made as an arresting officer, based on the circumstances then before her. Thus, rather than testifying as to a matter of law, Sergeant Taylor related her field experience to assist the jury in determining Defendant's intent. Such testimony did not exceed the bounds of admissible expert testimony. *See, e.g.*, *State v. Grant*, 722 N.W.2d 645, 648 (Iowa 2006) ("[I]n controlled-substance prosecutions[,] opinion testimony by law enforcement personnel experienced in the area of buying and selling drugs may be offered as evidence for purposes of aiding the trier of fact in determining intent."). Defendant's argument is based on a mistaken view of Sergeant Taylor's testimony, and the argument provides no basis for reversal.

Defendant further argues that as a matter of law, Sergeant Taylor's testimony exceeded the boundaries of allowable expert testimony because "[a] police officer should not be allowed to testify that a defendant is guilty of the crime of trafficking." In the context of officers testifying as to personal use versus possession of narcotics, the distinction between admissible versus inadmissible expert testimony depends on whether the officer testified directly as to the defendant's intent. *See, e.g.*, *State v. Vilalastra*, 540 A.2d 42, 44, 47 (Conn. 1988) (explaining that the prosecution "could have solicited [a detective's] opinion concerning whether [evidentiary] items are commonly used by drug sellers, but it was improper to inquire whether in [his] expert opinion the defendant was a drug seller or user based on the items found"). Thus, a number of courts have held that it is impermissible for an officer, testifying as an expert or otherwise, to state their opinion of the defendant's guilt. *See, e.g.*, *id.* (explaining that it was improper for an officer testifying as an expert to offer an "opinion [as to whether] the defendant was a drug seller or user"); *Fluellen v. State*, 703 So. 2d 511, 513 (Fla. Dist. Ct. App. 1997) (concluding that the trial court erred in permitting an officer to testify that "the quantity of cocaine possessed by the [defendant] indicated that [he] possessed the drug with the intent to sell, rather than for personal use"); *State v. Ogg*, 243 N.W.2d 620, 621 (Iowa 1976) (holding that it was error for

the court to permit an officer to testify that the amount of LSD in the defendant's possession exceeded what one might possess for personal use); *see also State v. Ashley*, 1997-NMSC-049, ¶¶ 18-19, 124 N.M. 1, 946 P.2d 205 (reversing the defendant's bigamy conviction based, in part, on the testimony of the non-expert investigating officer who essentially concluded that based on the facts of the defendant's case, he believed the defendant to be guilty of the crime of bigamy).

On the other hand, an officer may testify as an expert and offer his or her opinion as to a trafficking amount versus personal use amount of narcotics. *See, e.g.*, *People v. Atencio*, 140 P.3d 73, 76 (Colo. App. 2005) (permitting an officer to testify as an expert regarding the distinction between personal use amounts versus distribution amounts of cocaine and methamphetamine); *Melton v. State*, 824 So. 2d 948, 950 (Fla. Dist. Ct. App. 2002) (stating that it was permissible for an officer testifying as a "street-level" narcotics expert to testify that a typical user carries one or two pieces of crack cocaine, while a typical seller carries anywhere from one to fifty pieces (internal quotation marks omitted)); *Yates v. State*, 699 S.E.2d 43, 44 (Ga. Ct. App. 2010) ("A qualified expert may offer opinion testimony regarding his knowledge of the amount of crack cocaine one would generally possess for personal use or the amount which might evidence distribution.").

Defendant argues that Sergeant Taylor invaded the province of the jury by testifying that "someone similarly situated to Defendant should be charged with . . . trafficking." (Internal quotation marks omitted.) Thus, Defendant argues, Sergeant Taylor's testimony was similar to the impermissible testimony discussed in *Ashley*, *Vilalastra*, *Fluellen*, and *Ogg*. We disagree.

Read in context, Sergeant Taylor testified that she had, in her experience as an officer, charged unnamed arrestees with trafficking when they had sixteen to nineteen rocks of cocaine. She testified that her charging decisions in those cases were based on the circumstances, including interviews of the arrestees, which led her to believe trafficking was an appropriate charge. She did not relate those cases to Defendant's case. Sergeant Taylor was not asked, nor did she offer, her opinion as to whether Defendant was trafficking cocaine. For that reason, her testimony is more aptly compared with the testimony held to be admissible by the courts in *Atencio*, *Melton*, and *Yates*. Defendant has not provided on-point or persuasive authority to demonstrate that testimony comparable to Sergeant Taylor's testimony constitutes reversible error. Accordingly, Defendant has provided no basis for reversal.

Moreover, our Rules of Evidence permit experts to testify on matters that "embrace[]" ultimate issues of fact. Rule 11-704 NMRA (stating that "[a]n opinion is not objectionable just because it embraces an ultimate issue"); *State v. Lopez*, 84 N.M. 805, 810, 508 P.2d 1292, 1297 (1973) ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." (internal quotation marks and citation omitted)). Here, Sergeant Taylor did not offer an opinion as to the ultimate issue of fact—that is, whether Defendant had an intent to distribute the cocaine to another. To the extent that her testimony embraced the ultimate issue by educating the jury in regard to what factors, in her experience, warranted a trafficking charge, it was nevertheless admissible. *See* Rule 11-704; *see also Torres*, 2005-NMCA-070, ¶ 32 (recognizing that an officer's expert testimony

is admissible "even if it touches upon an ultimate issue" (internal quotation marks and citation omitted)); *Atencio*, 140 P.3d at 75-76 (stating that an officer testifying as an expert witness did not invade the province of the jury by stating that the amount of drugs seized from the defendant was consistent with an intent to distribute, because the officer did not testify that the defendant intended to distribute them).

Sergeant Taylor's testimony did not detract from the jury's ability to independently draw conclusions based on all of the evidence presented at trial. That evidence included Defendant's counsel's vigorous cross-examination of Sergeant Taylor, and it also included the presentation of Defendant's own expert, a former crack cocaine addict qualified to testify as to what amount of crack he purchased for his personal use. The presentation of a rebuttal expert witness and vigorous cross-examination are the "traditional and appropriate means of attacking shaky but admissible evidence." *State v. Anderson*, 118 N.M. 284, 302, 881 P.2d 29, 47 (1994) (internal quotation marks and citation omitted). The jury was free to accept or to reject Sergeant Taylor's testimony. *Torres*, 2005-NMCA-070, ¶ 32. The district court did not abuse its discretion in admitting Sergeant Taylor's testimony.

On a final note, in regard to the admissibility of Sergeant Taylor's testimony, we acknowledge that there is somewhat of a fine line between (1) testimony as to typical users and traffickers based on the amount of drugs in their possession, and (2) testimony as to whether the amounts in the possession of the subject defendant indicated a purpose to traffic and not to use. We further recognize that using language such as "embraces an ultimate issue" may not adequately assist the district court in this context. Based on the amounts of drugs possessed, it is difficult to determine when an expert crosses the fine line constituting error when testifying about whether the person possessing drugs intends to use or traffic those drugs.

We nevertheless see no reason why a qualified law enforcement expert should not be permitted to testify as to his or her training, knowledge, and experience relating to indicia and likelihood of possession for trafficking rather than solely for use. Defendant concedes that the "amount of drugs for use versus for trafficking [is] not typically within a layperson's knowledge[.]" A defendant can cross-examine and supply a counterexpert or other witness, as Defendant did in this case.

The type of testimony given by Sergeant Taylor as to typical circumstances in law enforcement can assist the jury in understanding intent as to drug use versus drug trafficking. Although appearing to be close to the line as it necessarily is when testifying to typical circumstances and an officer's charging rationale, we cannot say that Sergeant Taylor's expert testimony crossed the line into the forbidden territory of an ultimate jury determination of Defendant's guilt or innocence.

C. Closing Argument

Defendant argues that the "error in allowing [Sergeant] Taylor to testify . . . was compounded by the State's reliance on the testimony during closing argument." We do not find this argument persuasive. First, we have already concluded that Sergeant Taylor's testimony did not constitute reversible error. And second, Defendant did not preserve this argument for appeal by making this argument

in the district court. *See State v. Varela*, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280 (stating that to preserve an issue for appeal, a defendant must make a timely objection that specifically apprises the district court of the nature of the claimed error and invokes an intelligent ruling thereon); *State v. Salazar*, 2006-NMCA-066, ¶ 20, 139 N.M. 603, 136 P.3d 1013 (declining to consider an appellate argument concerning alleged error during closing argument where there had not been a timely objection in the district court). Accordingly, this argument provides no basis for reversal.

D. The Rule 11-403 NMRA Argument

Pursuant to Rule 11-403, the district court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Defendant argues that the value of Sergeant Taylor's testimony was "far outweighed by its prejudicial effect." She argues that the testimony "was at best confusing; at worst, it was misleading." More specifically, Defendant claims that Sergeant Taylor

> was presented to the jury as though she had some official authority to dictate a 'magic number' of rocks of crack [cocaine] that would support an inference of trafficking. Even if no other evidence was found, [Sergeant] Taylor testified[] she would arrest anyone in possession of the number of rocks of crack [cocaine] that were found in Defendant's pickup. . . . [T]hus suggest[ing] that no real work was necessary for the jury.

Defendant does not provide a citation to the record indicating that this argument was preserved for our review. *See* Rule 12-213(A)(4) NMRA (requiring the brief in chief to explain how the issue was preserved and to include citations to the record, transcript, or exhibits relied on). Nor do we, from our review of the transcript, believe that Defendant objected to Sergeant Taylor's testimony on the ground that it was more prejudicial than probative. *See Varela*, 1999-NMSC-045, ¶ 25 (stating that in order to preserve an issue for appeal, the defendant must make a timely objection that specifically apprises the district court of the nature of the claimed error and invokes an intelligent ruling thereon). Accordingly, we will not further consider Defendant's Rule 11-403 argument.

V. Defendant's Ineffective Assistance of Counsel Argument

Defendant argues that she received ineffective assistance of counsel. First, she faults her counsel for having "agreed to withdraw a lesser[-]included offense instruction on possession of cocaine, allowing the jury to decide either to convict Defendant of trafficking or acquit her entirely." Second, she faults her counsel for having allegedly advised her to leave a drug rehabilitation program to spend time with her family because, according to Defendant, her counsel "believed a sentence of incarceration was inevitable, and therefore Defendant 'might as well' leave the rehabilitation program." Defendant further argues that her decision to leave the rehabilitation program angered the district court, and her conditions of release were revoked and she was remanded to jail. "Claims of ineffective assistance of counsel are reviewed de novo." *State v. Sotelo*, 2013-NMCA-028, ¶ 31, 296

P.3d 1232, *cert. denied*, 2013-NMCERT-001, 299 P.3d 863.

To prove ineffective assistance of counsel, Defendant must show (1) that counsel's performance fell below that of a reasonably competent attorney, and (2) that she was prejudiced by the deficient performance. *State v. Hester*, 1999-NMSC-020, ¶ 9, 127 N.M. 218, 979 P.2d 729. Defendant fails to show how her counsel's allegedly deficient performance met either of the two requirements for a prima facie showing of ineffective assistance of counsel. Accordingly, we see no basis on which to conclude that her counsel was ineffective. Notwithstanding our determination, Defendant is not precluded from pursuing her ineffective assistance of counsel claim through habeas corpus proceedings. *See Torres*, 2005-NMCA-070, ¶ 13 (explaining that where the defendant fails to make a prima facie case of ineffective assistance of counsel on appeal, the claim may be raised in habeas corpus proceedings).

CONCLUSION

We affirm Defendant's conviction of trafficking, by possession with intent to distribute.

IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

TIMOTHY L. GARCIA, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-041

Filing Date: August 29, 2013

Docket No. 33,659

QUALITY AUTOMOTIVE CENTER, LLC,

Petitioner,

v.

HON. MANUEL I. ARRIETA,

Respondent,

and

EUGENE RAMOS, on behalf of THE ESTATE OF PRISCILLA RAMOS as Next Friend of ANDREU RAMOS, RYAN RAMOS and MERCEDES RAMOS, minor children, PRICILLA LOU CEPEDA, on behalf of THE ESTATE OF RAMON GONZALEZ III, Deceased, and PRICILLA LOU CEPEDA, individually,

Real Parties in Interest.

Carrillo Law Firm, P.C.
Raúl A. Carrillo, Jr.
Steven L. Lovett

Las Cruces, NM

for Petitioner

Gary K. King, Attorney General
Scott Fuqua, Assistant Attorney General
Santa Fe, NM

for Respondent

Cervantes Law Firm, P.C.
K. Joseph Cervantes
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El Paso, TX

for Real Party in Interest Eugene Ramos

OPINION

VIGIL, Justice.

I. INTRODUCTION

The narrow question in this case, presented to the Court by petition for writ of mandamus, is whether a district court judge has the authority to determine whether one of the named parties to a case pending before him is entitled to exercise an independent peremptory excusal filed against him. We answer this question affirmatively and hold that under Rule 1-088.1 NMRA, which provides the procedural mechanism for exercising a peremptory excusal, a district court judge has the authority to decide whether a peremptory challenge filed against him is both timely and correct. As part of this determination, the judge may decide whether a litigant is a "party" entitled to its own peremptory excusal within the meaning of the Rule 1-088.1. In reaching this conclusion, we recognize the need to amend Rule 1-088.1 to address its current deficiencies.

The present iteration of Rule 1-088.1 places significant, ongoing demands upon our district courts, and the current application of the rule leads this Court to acknowledge its ineffectiveness in our modern judiciary. As applied, the rule inhibits the judiciary's growing need to operate more efficiently. This is important given the ever increasing and demanding caseloads in our district courts. The current rule impedes the effective and efficient administration of justice by causing unnecessary delays in the timely resolution of cases, particularly in multi-party litigation. Ultimately, we must strike a meaningful balance between a litigant's right to a fair and unbiased tribunal and the current demand upon our courts to resolve disputes as efficiently as possible. We weigh these concerns and conclude that the existing Rule 1-088.1 must be amended.

II. FACTUAL AND PROCEDURAL BACKGROUND

The mandamus petition in this case arose out of a wrongful death suit in the Third Judicial District Court. According to the complaint, on May 20, 2009, Ramon Gonzalez was driving a vehicle in Doña Ana County, New Mexico, when a rear tire blew out,

causing Mr. Gonzalez to lose control of the vehicle, which collided with a pickup truck and resulted in the death of Mr. Gonzalez and his passenger, Priscilla Ramos. The Plaintiffs, Eugene Ramos and three minor children of Priscilla Ramos, allege that approximately three months earlier, Quality Tire & Service negligently installed oversized tires and rims on the vehicle, which increased the likelihood of tire failure and, consequently, caused the death of Priscilla Ramos. A receipt showed that the tires were purchased from Quality Tire & Service located at 7437 Alameda Avenue, El Paso, Texas.

On July 5, 2011, Plaintiffs filed a complaint for the alleged wrongful death of Priscilla Ramos against Quality Tire & Service located in El Paso, Texas and the Estate of Ramon Gonzalez, III. Plaintiffs sought damages for the death of Priscilla Ramos caused by the alleged negligence of the Defendant, Quality Tire & Service, its employees, agents and representatives. The complaint along with written discovery requests were served upon Quality Tire & Service on July 15, 2011.

The case was assigned to Judge Manuel I. Arrieta of the Third Judicial District Court. On August 5, 2011, attorneys Raúl A. Carrillo Jr. (Carrillo) and Michael J. Thomas entered an appearance on behalf of Quality Tire & Service. Ten days later, on August 15, 2011, Carrillo filed a motion requesting an extension of time to answer the complaint, which Judge Arrieta granted.

On August 19, 2011, Carrillo filed an answer to the Plaintiffs' original complaint for wrongful death on behalf of Quality Tire & Service, and its previous owners, Arnoldo Chavez and Laura Chavez. The answer stated that Arnoldo Chavez and Laura Chavez had sold Quality Tire & Service in late 2002 or early 2003 and that they had not operated the business since at least January 15, 2003. Carrillo did not disclose to whom Quality Tire & Service was sold, and he made no mention of Defendant Oscar Chavez in the answer.

Quality Tire & Service did not answer Plaintiffs' discovery requests, so on December 5, 2011, Plaintiffs filed a motion to compel the discovery. Quality Tire & Service filed a response to the motion to compel. It also filed a motion to dismiss and a motion requesting to stay discovery pending a ruling on its motion to dismiss. On January 12, 2012, Judge Arrieta conducted a hearing on Plaintiffs' motion to compel discovery. Quality Tire & Service had previously requested and been granted a continuance on its motion to dismiss.

Carrillo entered a "special entry of appearance for a nonexistent defendant, Quality Tire & Service, and its former owners Arnold[o] and Laura Chavez." At the January 12th hearing, Carrillo argued that Quality Tire & Service was not a legal entity and that "[t]here used to be a business called Quality Tire Service, not [T]ire *and* [S]ervice" located "in proximity to the addresses identified in the complaint, but not at the same addresses identified in the complaint" (emphasis added). Carrillo stated further that Quality Tire Service was sold in January 2003 to Oscar Chavez, Arnoldo Chavez's brother. Carrillo presented a certificate of ownership filed by Oscar Chavez with the El Paso County Clerk on January 29, 2003, for the business "Quality Automotive Center," located at 7437 Alameda Avenue in El Paso, the same address listed in Plaintiffs' complaint. Carrillo argued that Oscar Chavez's business "doesn't exist anymore" because on August 24, 2011, approximately a month and a half after

Plaintiffs' complaint was filed, Oscar Chavez formed a limited liability company called "Quality Automotive Center, LLC." Quality Automotive Center, LLC is located at 7437 Alameda Avenue, and was operated by a sole member and manager, Oscar Chavez. For these reasons, according to Carrillo, Plaintiffs failed to "properly identify" a "Quality Tire" related defendant from which Plaintiffs could obtain discovery.

Plaintiffs responded that their investigation revealed that Quality Tire & Service was doing business at both 7437 and 7439 Alameda Avenue, under the ownership of Arnoldo Chavez, Laura Chavez, and Oscar Chavez. Plaintiffs further asserted that Quality Tire & Service appeared to be an "active and good company" and that their lawsuit and discovery were served upon the entity shown on the receipt for the purchase of the tires. Counsel for the Plaintiffs further pointed out that even if Carrillo had documents showing that Arnoldo and Laura Chavez had sold the business "Quality Automotive Center" in 2003, that sale did not prevent another business from operating out of the same Alameda address. In other words, as Plaintiffs argued, Quality Tire & Service identified on the receipt for the purchase of the tires could still be in existence, owned by the three Chavezes, and operating out of the same location shown on the receipt.

Judge Arrieta allowed discovery to proceed only on the issue of whether Quality Tire & Service was a proper defendant in the Plaintiffs' lawsuit. Judge Arrieta also permitted the parties to amend their complaint and answer. On February 6, 2012, Plaintiffs filed an amended complaint, naming numerous defendants including the three Chavezes, individually, and a number of businesses under various names, including Quality Tire & Service; Quality Automotive Center, LLC; Quality Transport Services; Quality Auto Center; and Quality Auto Sales. In their amended complaint, Plaintiffs alleged that these numerous entities were "in substance one and the same . . . the alter ego of each other, [and] are acting solely as a conduit for the performance of each others' business and benefit and are jointly and severally liable for Plaintiffs' damages under the theories of piercing the corporate veil, alter ego, principal/agent [and] master/servant."

On March 20, 2012, Carrillo entered an appearance and filed a notice of peremptory excusal on behalf of Quality Automotive Center, LLC to remove Judge Arrieta from the case, without cause, under Rule 1-088.1. Soon after, Carrillo filed a motion to dismiss on behalf of Quality Automotive Center, LLC. He argued that the LLC did not assume any of Oscar Chavez's liabilities when it was formed so it could not be held liable for Plaintiffs' damages.

On April 24, 2012, Judge Arrieta wanted to review the peremptory excusal filed by Carrillo on behalf of Quality Automotive Center, LLC because "given the history of this case . . . Carrillo has entered an appearance on behalf of the Chavezes. . . . [and] once a party has appeared [before] the Court and requested that the Court exercise its discretion, that party is then precluded from filing a peremptory excusal." At the hearing, Carrillo stated that "Quality Automotive Center, LLC, which filed the [excusal], has a statutory right to the recusal" and therefore, he was not obligated to provide a reason for the excusal and declined to advise Judge Arrieta on the issue.

Judge Arrieta set forth the bases for his concerns about the appropriateness of the excusal filed by Quality Automotive Center,

LLC to be as follows: (1) that on December 15, 2011, a motion to dismiss was filed on behalf of Quality Tire & Service, which contained Carrillo's representation of "[i]nterested parties Arnold[o] Chavez, Laura Chavez and Oscar Chavez"; (2) that on April 9, 2012, Carrillo filed a motion to dismiss on behalf of Quality Automotive Center, LLC that "indicated that Oscar Chavez was the sole organizer and sole manager" of the entity and further that the LLC had not been created until over a month after the Plaintiffs' original complaint had been filed. In short, Judge Arrieta asked whether, "Oscar Chavez, who[] [was] represented [] by the Carrillo Law Firm and who subsequently created a new entity a month after the original complaint [was entitled] to file a peremptory excusal . . . under Rule [1-0]88.1."

Carrillo responded to Judge Arrieta by stating that Oscar Chavez and his LLC were two different entities, implying that Oscar Chavez's failure to file a peremptory excusal did not affect the LLC's right to do so. The Plaintiffs responded that Oscar Chavez and Quality Automotive Center, LLC were one and the same under either a derivative liability theory or that they should be treated as a single interest in the same way that the peremptory excusal statute recognizes an employer and insurer relationship as a single interest. Judge Arrieta requested supplemental briefing on the issue. However, before Judge Arrieta issued a ruling, Quality Automotive Center, LLC petitioned this Court for an emergency writ of mandamus to compel Judge Arrieta to recuse himself from the case based on its statutory right to a peremptory excusal.

Upon consideration of the underlying facts in support of the petition for writ of mandamus, we denied the petition and remanded the matter "to the district court to decide the peremptory excusal identity of interest issue within the confines and respecting the purpose of Rule 1-088.1." In this opinion, we examine the important principles upon which the right to excuse a judge without cause is based and the adverse impact that the current Rule 1-088.1 has upon the district courts. We conclude that Rule 1-088.1 must be amended in order to reach a meaningful balance between fairness to parties and efficiency in the administration of justice in our New Mexico district courts.

III. DISCUSSION

We begin by explaining why we denied Defendant's request for a writ of mandamus. This entails examining whether Judge Arrieta had the authority to decide whether a peremptory challenge filed against him was proper. We concluded that Judge Arrieta had the authority to determine whether the peremptory excusal was both "timely and correct" under Rule 1-088.1. Therefore, his actions did not fall within the parameters of when mandamus shall issue.

In reaching our decision to deny the petition for mandamus, we were required to interpret and apply Rule 1-088.1 to the facts of this case. Although we were able to ultimately conclude that Judge Arrieta properly exercised his authority under the current iteration of Rule 1-088.1, this process revealed the flaws and shortcomings of the rule in its current state. We write this opinion to discuss the problems with Rule 1-088.1 and explain why it must be amended. In doing so, we acknowledge the important principles underlying the rule as well as the adverse impact the current rule has upon our district courts.

A. We Denied Defendant's Petition for a Writ of Mandamus Because Judge Arrieta Properly Exercised His Authority Under Rule 1-088.1 to Determine Whether the Excusal Request Was Timely and Correct

Quality Automotive Center, LLC sought a writ of mandamus from this Court to forbid Judge Arrieta from presiding further in the case on the basis that he exceeded his statutory authority by attempting to determine the propriety of the peremptory excusal once it had been filed. We refused to exercise the power of mandamus upon Judge Arrieta after determining, for the reasons we explain below, that Judge Arrieta had the authority under Rule 1-088.1 to decide whether Quality Automotive Center, LLC's peremptory challenge was both timely and correct. We also acknowledge that such a determination would depend upon whether Quality Automotive Center, LLC has a sufficient diversity of interest from that of other defendants in the lawsuit, particularly, Oscar Chavez, so as to be entitled to exercise a separate peremptory challenge of the district judge. We begin by explaining the narrow circumstances in which this Court will issue a writ of mandamus.

Article VI, Section 3 of the New Mexico Constitution provides that "[t]he supreme court . . . shall have a superintending control over all inferior courts; it shall also have power to issue writs of mandamus . . . necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same." *See also* NMSA 1978, § 44-2-4 (1884) ("[A writ of mandamus] may be issued to any inferior tribunal . . . to compel the performance of an act which the law specially enjoins . . . ."); *accord State ex rel. Richardson v. Fifth Judicial Dist. Nominating Comm'n*, 2007-NMSC-023, ¶ 9, 141 N.M. 657, 160 P.3d 566 (recognizing this Court's original jurisdiction in mandamus). "Mandamus is a drastic remedy to be invoked only in extraordinary circumstances. Indeed, mandamus lies only to force a clear legal right against one having a clear legal duty to perform an act and where there is no other plain, speedy and adequate remedy in the ordinary course of law." *Richardson*, 2007-NMSC-023, ¶ 9 (internal quotation marks and citation omitted).

The Supreme Court will exercise its original jurisdiction in mandamus when:

> [T]he petitioner presents a purely legal issue concerning the non-discretionary duty of a government official that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal.

State ex rel. Sandel v. N.M. Pub. Util. Comm'n, 1999-NMSC-019, ¶ 11, 127 N.M. 272, 980 P.2d 55; *see also* N.M. Const. art. VI, § 3 ("The supreme court shall have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions . . . ."); NMSA 1978, § 44-2-5 (1884) ("The writ shall not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law.").

In its petition for writ of mandamus, Quality Automotive Center, LLC argued that once it had filed its peremptory election to excuse Judge Arrieta without cause he should

have refrained from any further action in the case. However, after Quality Automotive Center, LLC filed its peremptory election, Judge Arrieta held a hearing in order to determine whether it was entitled to exercise a separate peremptory excusal because if Quality Tire Center, LLC "is owned by the same individual who [had previously] entered an appearance, . . . that might preclude [the LLC from the right to exercise a] peremptory excusal."

Quality Automotive Center, LLC argued to this Court that as a separately named party to the lawsuit, it had a right to exercise a peremptory excusal, and Judge Arrieta had no authority to proceed in the case to examine whether it had a sufficient diversity of interest with other named parties. Quality Automotive Center, LLC asserted that as a separate party it is entitled to exercise a peremptory excusal under NMSA 1978, Section 38-3-9 (1985) and Rule 1-088.1 because (1) the language of Section 38-3-9 grants "[e]ach party to an action" the statutory right of one peremptory challenge; (2) Quality Automotive Center, LLC is a separate, legal entity from Oscar Chavez and is accorded all the rights of any other party, relying on *State v. Soutar*, 2012-NMCA-024, ¶ 37, 272 P.3d 154 ("A limited liability company is a legal entity") and *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 228 (Tex.1990) (corporate identity merges for purposes of liability); and (3) Quality Automotive Center, LLC came into existence on August 24, 2011, only after the filing of Plaintiffs' original complaint. Thus, according to Quality Automotive Center, LLC, the only complaint in which it was a properly named party was Plaintiffs' amended complaint filed in February 2012, to which it filed a timely peremptory excusal after it was served on March 9, 2012.

Our fault with these arguments stemmed from our interpretation of "party" as used in Section 38-3-9 and Rule 1-088.1. Section 38-3-9 provides:

> A party to an action or proceeding, civil or criminal . . . shall have the right to exercise a peremptory challenge to the district judge before whom the action or proceeding is to be tried and heard . . . . After the exercise of a peremptory challenge, that district judge shall proceed no further. *Each party to an action or proceeding may excuse only one district judge pursuant to the provisions of this statute.*

(Emphasis added.) Similarly, Rule 1-088.1 for the district courts, in part, provides:

> No party shall excuse more than one judge. A party may not excuse a judge after the party has attended a hearing or requested that judge to perform any act other than an order for free process or a determination of indigency.
>
> . . . .
>
> A party may exercise the statutory right to excuse the district judge before whom the case is pending by filing a peremptory election to excuse as follows:
>
> A plaintiff may file a peremptory election to excuse within ten (10) days after [filing the complaint]. A defendant may file a peremptory election to excuse within ten (10) days after the defendant files the first pleading or motion pursuant to Rule 1-012 NMRA.
>
> . . . .
>
> After the filing of a timely and

> correct exercise of a peremptory challenge, that district judge shall proceed no further.

Rule 1-088.1(A), (C)(1) & (F).

The terms "timely and correct" lead us to interpret the rule as authorizing the judge before whom the case is pending to decide whether the peremptory excusal is in fact timely and correct. It is only *after* such determination that the district judge shall proceed no further in the case. Further, we hold that the judge's determination of whether the peremptory challenge is both timely and correct necessarily entails examining whether the party seeking to exercise the challenge is entitled to do so at the time the challenge is made. We recognize that neither the statute, nor the rule, provide a definition of the term "party." We interpret the term to mean a litigant with a sufficient diversity of interest from that of other parties in the case. It is only such diversity of interest that entitles a party to the right to exercise an independent right of excusal without cause.

There are a number of factors that a judge may consider in making this determination. The Court of Appeals in *Carraro v. Wells Fargo Mortgage & Equity*, 1987-NMCA-122, ¶ 12, 106 N.M. 442, 744 P.2d 915, analyzed whether the interests of multiple parties were diverse, considering the following factors: "1) whether the parties employed the same attorneys; 2) whether separate answers were filed; 3) whether the parties interests were antagonistic; and, 4) in a negligence claim, whether different independent acts of negligence are alleged in a suit governed by comparative negligence." These factors are indicative of whether there is a sufficient diversity of interests amongst litigants on the same side of a lawsuit who seek to remove the district judge without cause. While *Carraro* involved the determination of whether the interests of multiple parties were diverse in the exercise of peremptory challenges of jurors, the *Carraro* factors are the type of factors that a district judge should consider in evaluating whether parties on the same side of a case share a similarity of interests. If they do share such similarity of interests, then allowing each named party the right to exercise separate peremptory challenges may very likely result in gamesmanship or judge shopping.

Thus, regardless of whether it is a distinct legal entity from Oscar Chavez individually, Quality Automotive Center, LLC overlooked the critical question of whether the interests and defenses of Oscar Chavez as an individual are sufficiently diverse from the LLC so that each would be entitled to exercise a separate peremptory excusal under Rule 1-088.1 as distinct parties. It was Judge Arrieta's duty to determine whether Quality Automotive, LLC was a distinct party to the action since, under Section 38-3-9 and Rule 1-088.1, a party is only entitled to one peremptory excusal. Although the facts and litigation posture presented to us in the petition for writ of mandamus would lead us to conclude that the interests and defenses of Quality Automotive Center, LLC, and Oscar Chavez are the same, that determination was ultimately up to Judge Arrieta to make.

By holding a hearing and requesting additional briefing, Judge Arrieta was attempting to consider those factors necessary to decide whether or not Oscar Chavez and Quality Automotive Center, LLC were in fact parties who had sufficient similarity of interests to render them the same party for purposes of exercising a peremptory excusal.

B. Rule 1-088.1 Needs to Be Amended

Although we determined that Judge Arrieta had the authority under the current iteration of Rule 1-088.1 to decide whether the Defendant's peremptory excusal was timely and correct, our evaluation revealed the shortcomings in the rule as it is written, which we now seek to address. To ultimately be effective, the rule must balance litigants' rights to a fair and unbiased tribunal with the judiciary's need to effectively and efficiently administer justice in its courts. In order to strike this balance, we discuss the principles supporting the rule and the effects the current rule has on the judiciary's ability to manage its ever increasing caseloads effectively and efficiently.

1. Policy considerations supporting rule 1-088.1

The constitutional right to a fair and impartial tribunal is the fundamental policy consideration underlying Rule 1-088.1 and is the backbone of our judicial system. Article VI, Section 18 of the New Mexico Constitution provides:

> No justice, judge or magistrate of any court shall, except by consent of all parties, sit in any cause in which either of the parties are related to him by affinity or consanguinity within the degree of first cousin, or in which he was counsel, or in the trial of which he presided in any inferior court, or in which he has an interest.

"Article VI, Section 18 is indeed a further constitutional recognition of one's right to a fair and impartial tribunal and does guarantee that right . . . ." *State ex rel. Gesswein v. Galvan*, 1984-NMSC-025, ¶ 7, 100 N.M. 769, 676 P.2d 1334.

There are several mechanisms through which this important right is protected in our judicial system. For instance, a judge must recuse himself under certain circumstances. *See* N.M. Const. art. VI, § 18 (requiring recusal when judge is related to a party or has an interest in the case); *see also* Rule 21-211(A) NMRA ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ."); *Martinez v. Carmona*, 1980-NMCA-139, ¶ 19, 95 N.M. 545, 624 P.2d 54 ("A judge may be disqualified in New Mexico for statutory, constitutional or ethical cause."). Other methods include the right to a jury trial of one's peers, and the right to excuse potential jurors, either for cause or peremptorily, during the jury selection process. Article II, Section 12 of the New Mexico Constitution provides for the "right of trial by jury." Under this Section, a litigant "has the right to a fair and impartial jury." *State v. Quintana*, 2009-NMCA-115, ¶ 11, 147 N.M. 169, 218 P.3d 87 (analyzing this section and Article II, Section 14 in holding that in the context of a criminal trial, a defendant has the constitutional right to a fair and impartial jury). Finally, NMSA 1978, Section 38-5-14 (1991) and Rule 1-038(E) NMRA provide a means for impartiality by allowing litigants to excuse potential jurors either for good cause or by peremptory challenge during the voir dire process. *See also State v. Gutierrez*, 2011-NMSC-024, ¶ 45, 150 N.M. 232, 258 P.3d 1024 ("Voir dire allows a court to determine whether prospective jurors will be able to reach a verdict based solely on evidence received in open court, not from outside sources. Use of voir dire can establish whether there is such widespread and fixed prejudice

within the jury pool that a fair trial in that venue would be impossible." (internal quotation marks and citations omitted)).

The right to excuse a judge without cause, embodied in Section 38-3-9 and Rule 1-088.1, is one of several procedural mechanisms available to insure a litigant's constitutional right to a fair and impartial tribunal. A party's right to excusal under Section 38-3-9 is a procedural right meant to effectuate the substantive right of a fair and impartial tribunal recognized by the New Mexico and United States constitutions. *See Gesswein*, 1984-NMSC-025, ¶ 16 (finding that Section 38-3-9 "provides a method of disqualification, a method procedural in nature and a prerogative of this Court."). The constitutional right to a fair and impartial tribunal is critical to the fair administration of justice and a litigant must be afforded the right to excuse a judge for cause. *Beall v. Reidy*, 1969-NMSC-092, ¶ 9, 80 N.M. 444, 457 P.2d 376 ("[A] prejudiced or biased judge who tries a case would deprive the party adversely affected of due process of law."); *Los Chavez Cmty. Ass'n v. Valencia Cnty.*, 2012-NMCA-044, ¶ 21, 277 P.3d 475 ("The purpose of [Article VI, Section 18] is based on due process considerations—to secure to litigants a fair and impartial trial by an impartial and unbiased tribunal." (internal quotation marks and citation omitted)).

We recognize the importance of preserving a litigant's right to remove a judge *for cause,* but given the many strains upon our district courts, we question whether the existing procedural mechanism that enables parties with similar interests to remove a judge from a case without stating a reason is necessary to preserve such litigants' constitutional right. This Court must uphold the constitutional right of litigants to a fair and impartial tribunal in such a way that ensures not only that justice is administered fairly but also effectively, for one without the other is a denial of both. To do so requires us to strike a meaningful balance between these two critical concepts. Rule 1-088.1 in its current form fails to harmonize these two important concepts.

2. Rule 1-088.1 leads to abuses

The ability of any party to excuse a judge without justification has historically lead to abuses and gamesmanship. *See, e.g.*, *State ex rel. Hannah v. Armijo*, 1933-NMSC-087, ¶ 38, 38 N.M. 73, 28 P.2d 511 (upholding the constitutionality of Chapter 184, Sections 1 through 3 of New Mexico Laws of 1933, a previous excusal statute, but recognizing "that it will be many times used for the mere purpose of delay . . . and that by repeated attacks upon the qualifications of the judges designated in a particular case it would be possible to exhaust the entire number of district judges in the state, thereby operating as a denial of justice."); *see also Notargiacomo v. Hickman*, 1951-NMSC-069, ¶ 6, 55 N.M. 465, 235 P.2d 531 (rejecting the argument that the statute on judicial peremptory challenges should be interpreted broadly by stating, "[t]his we are not disposed to do in view of the recurrent abuses to which the statute is constantly being put to forestall trial and otherwise occasion delay. . . . [I]t is a fact recognized by bench and bar alike that patent abuses of the statute have grown up since its passage, as reflected by numerous efforts to amend and modify its terms at succeeding sessions of the legislature"), *overruled in part on other grounds by Beall*, 1969-NMSC-092, ¶ 18. Thus, while we acknowledge the importance of the right to challenge the assigned judge on the basis of impartiality in order to ensure the effective

administration of the courts, we must also recognize that the right to excuse a judge without a stated reason should not exist without some limitation.

An example of the types of abusive litigation tactics that can occur under the existing rule is shown in the case before us. Carrillo filed a motion to dismiss on behalf of Quality Tire & Service and the Chavezes, thereby invoking the discretion of Judge Arrieta. Oscar Chavez then later attempted to use his solely owned and operated LLC, which was created after the original complaint was filed and where he was named as a defendant, to exercise a peremptory excusal. The rule expressly prohibits the exercise of a challenge *after* a party has invoked such a ruling. *See* Rule 1-088.1(A) ("A party may not excuse a judge after the party has attended a hearing or requested that judge to perform any act other than an order for free process or a determination of indigency."). Quality Automotive Center, LLC's attempt to excuse Judge Arrieta can reasonably be considered as an abuse of the rule since the business had no discernible diverse interest from that of Oscar Chavez, who had the chance and failed to excuse Judge Arrieta. It is this type of party gamesmanship under Rule 1-088.1 that must be eliminated.

IV. CONCLUSION

We conclude that a district judge before whom a case is pending has the authority to determine whether a peremptory challenge is both timely and correct. That determination includes the ability to decide who is a "party" under New Mexico's statute and rule on peremptory challenges. Although this holding answers the narrow question before us, this case reveals broader issues surrounding the use and application of the existing Rule 1-088.1. In reviewing the adverse effect the existing rule has upon our judicial system today, we conclude that the rule must be amended. Our goal in doing so is to develop a rule that is meaningful—one that maintains the right of everyone to a fair and impartial tribunal and one that eliminates the unnecessary delays caused by our current rule—so that we may always strive to attain an ever more effective and efficient system of justice in our New Mexico courts.

IT IS SO ORDERED.

BARBARA J. VIGIL, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-042

Filing Date: August 29, 2013

Docket No. 33,393

NEW MEXICO ATTORNEY GENERAL and NEW MEXICO INDUSTRIAL ENERGY CONSUMERS,

Appellants,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

and

PUBLIC SERVICE COMPANY OF NEW MEXICO, COALITION FOR CLEAN AFFORDABLE ENERGY, and WESTERN RESOURCE ADVOCATES,

Real Parties in Interest.

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OPINION

DANIELS, Justice.

This case addresses whether in determining public utility electricity rates the New Mexico Public Regulation Commission (PRC) has authority to consider expenses incurred by a public utility for energy efficiency programs. Appellants, the New Mexico Attorney General and New Mexico Industrial Energy Consumers, ask us to vacate and annul the final order in PRC Case No. 11-00308-UT (Case 308 Final Order) because it permits Public Service Company of New Mexico (PNM) to earn returns on the operating expenses incurred from energy efficiency programs. Appellants argue that such returns are inconsistent with New Mexico law. We hold that the Case 308 Final Order is consistent with the PRC's ratemaking authority under the New Mexico Public Utility Act, NMSA 1978, §§ 62-3-1 to -5 (1967, as amended through 2009) (PUA), and the New Mexico Efficient Use of Energy Act, NMSA 1978, §§ 62-17-1 to -11 (2005, as amended through 2013) (EUEA), and with our holding in *Attorney General v. New Mexico Public Regulation Commission* (*AG v. PRC 2011*), 2011-NMSC-034, 150 N.M. 174, 258 P.3d 453. We also hold that the Case 308 Final Order is supported by substantial evidence and is neither arbitrary nor capricious. Accordingly, we affirm the Case 308 Final Order.

I. BACKGROUND

A. Statutory and Regulatory Background

Enacted in 2005, the EUEA calls for the PRC to identify and eliminate regulatory disincentives or barriers for public utility expenditures on energy efficiency and load management measures "in a manner that balances the public interest, consumers' interests and investors' interests." *See* §§ 62-17-2(E), -3, & -5(F); *see also* § 62-17-4(F) & (H) (defining "energy efficiency" to include "energy conservation measures, or programs that target consumer behavior, equipment or devices to result in a decrease in consumption of electricity and natural gas without reducing the amount or quality of energy services" and describing "load management" as "measures or programs that target equipment or devices to result in decreased peak electricity demand . . ."). To implement the EUEA, the PRC promulgated its energy efficiency regulations, 17.7.2 NMAC (03/01/2007, replaced 05/03/2010). In relevant part, the regulations require utilities to file proposals with the PRC to remove disincentives or barriers to energy efficiency programs that utilities believe exist. *See* 17.7.2.9(K) NMAC (03/01/2007).

The Legislature amended the EUEA in 2008 to specifically require the PRC to give utilities an opportunity to earn a profit on cost-effective energy efficiency and load management resource development. *See* § 62-17-5(F) (2008). After the 2008 amendments to the EUEA, the PRC issued an order to conduct a rulemaking proceeding to revise 17.7.2 NMAC through a series of workshops with interested parties. *See AG v. PRC 2011*, 2011-NMSC-034, ¶ 4. The workshops produced a proposed amendment to the regulations known as Alternative A. *See id.* ¶ 5.

Alternative A would (1) temporarily allow utilities to recover an Interim Adder at rates of $0.01 for each kilowatt hour saved and $10.00 for each kilowatt reduced from the annual demand due to approved energy efficiency programs, (2) require utilities and interested parties to file proposals for a

permanent solution to eliminate disincentives to energy efficiency programs, and (3) after the temporary Interim Adder expired, allow utilities to continue receiving a Reduced Adder at rates of $0.005 for every kilowatt hour saved and $10.00 for each kilowatt reduced from the annual demand due to approved energy efficiency programs. *See id.*

On April 8, 2010, the PRC adopted the proposed Alternative A in a final order. *See* N.M. Pub. Regulation Comm'n, *Final Order Repealing and Replacing 17.7.2 NMAC*, Case No. 08-00024-UT (April 8, 2010) (Case 024 Final Order), *available at* http://www.nmprc.state.nm.us/ (follow hyperlinks: "Case Lookup Edocket" under QUICK LINKS and then "Documents Search" under Search). The revised energy efficiency regulations became effective on May 3, 2010. *See* 17.7.2.5 NMAC (05/03/2010).

B. Factual and Procedural Background

On June 23, 2011, the PRC issued a final order further reducing the Reduced Adder rates by sixty percent to accomplish the requirements of the EUEA and 17.7.2 NMAC with respect to PNM. *See* N.M. Pub. Regulation Comm'n, *Final Order Partially Adopting Recommended Decision*, Case No. 10-00280-UT (June 23, 2011) (Case 280 Final Order), *available at* http://www.nmprc.state.nm.us/ (follow hyperlinks: "Case Lookup Edocket" under QUICK LINKS and then "Documents Search" under Search). On July 27, 2011, we issued *AG v. PRC 2011*, vacating the PRC's Case 024 Final Order adopting the revisions to 17.7.2 NMAC because in its rulemaking the PRC had not "adequately balance[d] the investors' interests against the ratepayers' interests when adopting Alternative A." *AG v. PRC 2011*, 2011-NMSC-034, ¶¶ 1, 18-19.

Subsequently, on August 16, 2011, the PRC docketed a case to investigate whether PNM's adder rates approved in Case 280 were consistent with our ruling in *AG v. PRC 2011*. The PRC issued the Case 308 Final Order on November 3, 2011, N.M. Pub. Regulation Comm'n, *Final Order*, Case No. 11-00308-UT (November 3, 2011), *available at* http://www.nmprc.state.nm.us/ (follow hyperlinks: "Case Lookup Edocket" under QUICK LINKS and then "Documents Search" under Search), wherein it found that PNM's approved adder rates were not based on the PRC's vacated Case 024 Final Order replacing 17.7.2 NMAC and were consistent with our holding in *AG v. PRC 2011*. *See Final Order*, Case 308, ¶¶ 30, 36. On January 19, 2012, Appellants filed a notice of direct appeal of the Case 308 Final Order to this Court. *See* NMSA 1978, § 62-11-1 (1993) ("Any party to any proceeding before the [PRC] may file a notice of appeal in the supreme court asking for a review of the [PRC's] final orders.").

II. DISCUSSION

Appellants argue that the Case 308 Final Order is inconsistent with New Mexico law because it is contrary to our opinion in *AG v. PRC 2011*. Appellants read our holding in that case as a mandate to the PRC to use *only* traditional ratemaking principles, specifically the so-called return-on-rate-base method—which establishes a utility's revenue requirements by determining operation costs, net value of the utility's capital investment ("rate base"), and the rate of return—for setting utility rates.[1] *See* 2011-NMSC-034, ¶

[1]Appellants' briefing argues that in *AG v. PRC 2011* this Court "set[] forth the traditional elements of the rate setting process that the Commission was required to

17. Because Appellants interpret *AG v. PRC 2011* as a specific mandate limiting the methods the PRC may use for determining just and reasonable utility rates, they necessarily conclude that the PRC acted outside the scope of its authority in approving adder rates that were not determined using a traditional return-on-rate-base method. Further, Appellants argue that the Case 308 Final Order is unsupported by substantial evidence because, rather than conducting additional fact-finding hearings, the PRC relied on the factual determinations in the record from Case 280 to support its legal determination in Case 308. Finally, Appellants argue that the rationale articulated by the PRC to justify its Case 308 Final Order is inappropriate and unreasonable and therefore arbitrary and capricious. For the reasons stated in this opinion, we disagree.

A. Standards of Review

We review an administrative order "to determine if it is arbitrary, capricious, or an abuse of discretion; not supported by substantial evidence in the record; or, otherwise not in accordance with law." *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806; *accord* Rule 1-075(R) NMRA. "The burden is on the parties challenging the agency order to make this showing." *AG v. PRC 2011*, 2011-NMSC-034, ¶ 9; *accord* NMSA 1978, § 62-11-4 (1965). We "have no power to modify the action or order appealed from, but [must] either affirm or annul and vacate the same." NMSA 1978, § 62-11-5 (1982).

"A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record." *Rio Grande Chapter of Sierra Club*, 2003-NMSC-005, ¶ 17. "In making these determinations, we must remain mindful that in resolving ambiguities in the statute or regulations which an agency is charged with administering, the Court generally will defer to the agency's interpretation if it implicates agency expertise." *Id.* (internal quotation marks and citation omitted). "However, we will not defer to the [agency's] or the district court's statutory interpretation, as this is a matter of law that we review de novo." *Id.*

B. The Case 308 Final Order Is Reasonable and Lawful

In reviewing the Case 308 Final Order "we begin by looking at two interconnected factors: whether the decision presents a question of law, a question of fact, or some combination of the two; and whether the matter is within the agency's specialized field of expertise." *AG v. PRC 2011*, 2011-NMSC-034, ¶ 9 (internal quotation marks and citation omitted). The case before us involves a question of law—whether the public utility electricity rates established by the PRC in Case 280 satisfy the legal requirements we outlined in *AG v. PRC 2011*. Utility

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follow." Counsel for the Attorney General asserted at the December 10, 2012, oral argument that "this specific methodology of providing a profit [to PNM] has to be done according to traditional ratemaking principles" and explained that the traditional ratemaking concept requiring "that returns . . . be related to investment goes back to the beginnings of utility regulation. Rate of return on rate base was suggested or implied by constitutional caselaw. The central pillar in the administration of just and reasonable rate standard will be found in the allowance of regulated companies' costs of operation plus a reasonable rate of return on rate base." Also at oral argument, counsel for New Mexico Industrial Energy Consumers took the same stance: "So we think basically that the [PRC] simply chose the wrong methodology in this case."

ratemaking is undoubtedly a matter within the PRC's specialized field of expertise. *See* NMSA 1978, § 62-6-4(A) (2003) ("The [PRC] shall have general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations . . . in accordance with the provisions and subject to the reservations of the [PUA], and to do all things necessary and convenient in the exercise of its power and jurisdiction."); *Plains Elec. Generation & Transmission Coop., Inc. v. N.M. Pub. Util. Comm'n*, 1998-NMSC-038, ¶ 7, 126 N.M. 152, 967 P.2d 827 ("[W]e defer to [PRC] decisions requiring expertise in highly technical areas, such as utility rate determinations." (internal quotation marks and citation omitted)).

" '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.' " *Rodriguez v. Permian Drilling Corp.*, 2011-NMSC-032, ¶ 8, 150 N.M. 164, 258 P.3d 443 (quoting *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 11, 120 N.M. 579, 904 P.2d 28). "[T]he court will confer a heightened degree of deference to the agency on legal questions that determine fundamental policies within the scope of the agency's statutory function." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 6, 146 N.M. 24, 206 P.3d 135. However, the court "'is not bound by the agency's interpretation and may substitute its own independent judgment for that of the agency because it is the function of the courts to interpret the law.'" *Rodriguez*, 2011-NMSC-032, ¶ 8 (quoting *Morningstar*, 1995-NMSC-062, ¶ 11). "The court should reverse if the agency's interpretation of a law is unreasonable or unlawful." *Morningstar*, 1995-NMSC-062, ¶ 11.

1. The PRC's Interpretation of the EUEA and the PUA Is Consistent with Our Holding in *AG v. PRC 2011*

Appellants argue that in *AG v. PRC 2011* this Court "rejected the notion that utilities should be allowed to earn a profit on program expenses without making any capital investment," mandated that the PRC use only the traditional return-on-rate-base method for setting just and reasonable utility rates, and established a single regulatory paradigm for determining utility rates under both the EUEA and the PUA. Based on their interpretation of *AG v. PRC 2011*, they argue that in the Case 308 Final Order the PRC failed to properly balance the relevant investor and ratepayer interests, failed to apply the traditional elements of utility ratemaking in establishing PNM's Reduced Adder rates, and failed to follow this Court's interpretation of the controlling ratemaking principles. Appellants misread our previous holding.

AG v. PRC 2011 involved a challenge to the PRC's rulemaking pursuant to the 2008 amendments to the EUEA requiring the PRC to identify and remove barriers to public utility expenditures on resource development for energy efficiency and load management. *See* 2011-NMSC-034, ¶¶ 2-4, 8. The PRC set an adder rate applicable uniformly to the public utilities and designed to remove such barriers and incentivize such expenditures. *See id.* ¶¶ 4-5, 7-8. On appeal, we held that "[t]he PRC's adoption of the [uniform] adder rates was arbitrary and unlawful in that they were not evidence-based, cost-based, []or utility specific." *Id.* ¶ 18. Although the PRC heard evidence from the utility companies about the expected impact of the uniform adder rates, it did not conduct an adequate inquiry to "balance the investors' interests against the ratepayers' interests." *Id.*

We observed that the PUA requires such balancing to assure that the rate the PRC sets is "'just and reasonable.'" *Id.* ¶ 13 (quoting NMSA 1978, § 62-8-1 (1941)). We noted that the Legislature intended the same balancing method to assure that the rate created under the EUEA is "'just and reasonable.'" *AG v. PRC 2011*, 2011-NMSC-034, ¶ 14 (citing §§ 62-17-2(E) & -3). "Both [the PUA and the EUEA] require the PRC to balance the public interest, consumers' interests, and investors' interests." *AG v. PRC 2011*, 2011-NMSC-034, ¶ 15. Because the PRC failed to apply this balancing test, we held that the PRC had no basis for determining that the uniform adder rates were "'just and reasonable.'" *Id.* ¶ 18.

With respect to the required balancing test, we stated that "[w]hen determining the investor's interest, the PRC takes into account the utility's interest in recovering its prudently incurred costs and earning a reasonable return on its capital investments." *Id.* ¶ 16. "The ratepayer's interest, on the other hand, is to be protected from excessive rates that unjustly burden ratepayers while receiving steady and quality service from the utility." *Id.* We recognized that "[t]here is a significant zone of reasonableness . . . between utility confiscation and ratepayer extortion," *id.* (omission in original) (internal quotation marks and citation omitted), and that "[t]he PRC is vested with considerable discretion in determining whether a rate to be received and charged falls within [that] zone," *id.* ¶ 17 (internal quotation marks and citation omitted). "The factors the PRC uses to determine whether a proposed rate falls within the zone of reasonableness are based on [the utility's] revenue requirements: the costs of supplying the fuel and profit for the utility in an amount sufficient to encourage investment." *Id.* ¶ 17 (alteration in original) (internal quotation marks and citation omitted).

AG v. PRC 2011 requires the PRC to set utility rates that are evidence based, cost based, and utility specific. *See id.* ¶ 18. It also clarifies that under the PUA and the EUEA the PRC must balance investors' interests against ratepayers' interests when determining whether a utility rate is just and reasonable. *Id.* However, it does *not* prescribe the use of any particular ratemaking method—or restrict the use of others—as Appellants argue. The Case 308 Final Order is consistent with this reading of *AG v. PRC 2011*.

In the Case 308 Final Order, the PRC found that PNM's Reduced Adder rates approved in Case 280 were cost based, evidence based, and utility specific. *See Final Order*, Case 308, ¶¶ 29-30, 36. In Case 280 the PRC gave due consideration to PNM's revenue requirements in balancing the ratepayers' interests with the investors' interests. The PRC determined PNM's revenue requirements by using an "operating ratio approach" it deemed appropriate for "situation[s] in which investor-provided capital and the related capital costs have not been a significant factor in the total cost of providing services." *Id.* ¶ 25 (internal quotation marks and citation omitted). The operating ratio approach establishes a regulated entity's revenue requirements "by dividing operating expenses by a target operating ratio deemed necessary to produce revenues adequate to cover operating expenses plus depreciation, taxes and capital *costs*." *Id.* (emphasis added) (internal quotation marks and citation omitted). Unlike the return-on-rate-base method, the operating ratio approach does not use the net value of capital investment in determining the regulated company's revenue requirement. Based on the

evidence regarding program costs and PNM's revenue requirements, the PRC rejected PNM's proposed Reduced Adder rates of $0.005 per kilowatt hour of lifetime energy savings and $10 per kilowatt of demand savings, and instead—balancing the public interest, consumers' interests, and investors' interests—approved a lesser rate of $0.002 per kilowatt hour of lifetime energy savings and $4 per kilowatt of demand savings. *See Final Order*, Case 280, ¶ 51; *see also Final Order*, Case 308, ¶ 29 (noting that the information in the Case 308 Final Order concerning PNM's Reduced Adder rates is the same as in the Case 280 Final Order except for a typographical error in the lifetime energy savings rate in the Case 308 Final Order).

The PRC's interpretation of the ratemaking requirements in the EUEA and the PUA is consistent with our holding in *AG v. PRC 2011* because the PRC determined that the rates approved in Case 280 were cost based, evidence based, and utility specific, and because the PRC balanced the investors' interests with the ratepayers' interests in determining just and reasonable rates—instead of simply adopting the rates proposed by PNM. *See Final Order*, Case 280, ¶ 51; *see also Final Order*, Case 308, ¶ 29.

2. The EUEA Gives the PRC Authority to Eliminate Financial Disincentives to Energy Efficiency and Load Management Measures

Appellants also argue that the PRC acted outside the scope of its authority in permitting PNM to earn a profit on energy efficiency program expenses without making any capital investment. Appellants overlook the authority the EUEA gives the PRC to identify and remove regulatory disincentives or barriers to public utility expenditures on energy efficiency and load management measures, including specifically the authority to allow utilities to earn a profit on energy efficiency and load management resource development.

The PUA, which sets forth the requirements for determining utility rates in New Mexico, requires rates set by the PRC to be just and reasonable. *See* § 62-8-1. A just and reasonable rate is one that balances the public interest, the interests of consumers, and the interests of investors in public utility companies. *See, e.g.*, *AG v. PRC 2011*, 2011-NMSC-034, ¶ 13 ("Under the PUA, a rate is 'just and reasonable' when it balances the investor's interest against the ratepayer's interest."); *PNM Gas Servs. v. N.M. Pub. Util. Comm'n*, 2000-NMSC-012, ¶ 8, 129 N.M. 1, 1 P.3d 383 ("Ultimately, the [PRC] must ensure that rates are neither unreasonably high so as to unjustly burden ratepayers with excessive rates nor unreasonably low so as to constitute a taking of property without just compensation or a violation of due process by preventing the utility from earning a reasonable rate of return on its investment.").

In 2005—nearly forty years after the PUA was enacted—our Legislature enacted the EUEA, which recognizes energy conservation as an important principle of New Mexico public policy. *See* § 62-17-3 (2005). The EUEA acknowledges that there are regulatory disincentives that prevent public utilities from including cost-effective energy efficiency and load management programs in their energy resource portfolios. *See id.* For example, the traditional ratemaking formulas provide incentives for utilities to invest in supply-side resources such as generating plants or transmission lines because that is how utilities traditionally make money: the larger the rate base—or capital

investment—the greater the energy supply and the larger the profit. The more energy utilities sell, the more money they make. On the other hand, when a utility implements the statutory energy efficiency program to *reduce* the amount of energy consumed by its customers, "[t]his necessarily results in a reduction in the utility's revenue." *AG v. PRC 2011*, 2011-NMSC-034, ¶ 11. The EUEA calls for the removal of such regulatory disincentives "in a manner that balances the public interest, consumers' interests and investors' interests." Sections 62-17-2(E), -3, & -5(F).

In 2008, our Legislature amended the EUEA specifically to allow utilities to earn a profit on energy efficiency development and provide incentives for implementing energy efficiency programs. *See* § 62-17-5(F) (2008) (requiring the PRC to provide "utilities an opportunity to earn a profit on cost-effective energy efficiency and load management resource development that . . . is financially more attractive to the utility than supply-side utility resources"); § 62-17-6(A) (2008) (allowing public utilities to recover their prudent and reasonable costs along with PRC-approved incentives for implementing demand-side resources and load management programs through either a tariff rider or in base rates or through a combination of both). Through the EUEA, the Legislature has given the PRC authority to allow utilities to earn a profit on energy efficiency expenditures. Nothing in the language of the EUEA requires the profit incentive to be tied to capital investments.

The parties disagree as to what is meant by the word profit in the EUEA. Appellants urge this Court to interpret "profit" as a term of art in the regulatory context that equates to a utility's rate of return on its invested, at-risk capital. Thus, in Appellants' view, a profit approved by the PRC must be tied to a utility's invested, at-risk capital. If "profit" is necessarily tied to a utility's capital investment, then a determination of the utility's revenue requirement (for purposes of balancing the ratepayers' interests against the investors' interests) obliges the PRC to adhere to traditional ratemaking principles for setting just and reasonable utility rates under the PUA and the EUEA. Appellants argue that PNM's Reduced Adder rates for energy efficiency programs upsets the PUA and the EUEA balancing interests by requiring ratepayers to compensate PNM shareholders for risk they have not taken.

PNM urges us to apply the broader ordinary meaning of "profit." Interpreting "profit" as any earning above (expense *or* capital) costs, PNM argues that the balancing requirement in the PUA can be harmonized with the same requirement in the EUEA in a way that does not require the use of a return-on-rate-base method to achieve just and reasonable utility rates.

While the PUA and the EUEA both require the PRC to establish just and reasonable rates by balancing investors' interests against ratepayers' interests, there is no indication that "profit" in the EUEA was intended to mean a utility's return on its invested capital, and thus there is no need to require the PRC to accomplish the balancing test by applying a return-on-rate-base method for setting public utility rates. We apply our principles of statutory construction to interpret the meaning of "profit" in the EUEA to discern whether the Legislature intended to impose such a requirement.

Under the rules of statutory construction, we first turn to the plain meaning of the words at issue, often using the

dictionary for guidance. *See State v. Nick R.*, 2009-NMSC-050, ¶ 18, 147 N.M. 182, 218 P.3d 868 (recognizing that our courts interpret the intended meaning of statutory language by consulting the dictionary to ascertain the words' ordinary meaning). The plain meaning rule requires that statutes "be given effect as written without room for construction unless the language is doubtful, ambiguous, or an 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 spirit or reason." *State v. Maestas*, 2007-NMSC-001, ¶ 9, 140 N.M. 836, 149 P.3d 933 (internal quotation marks and citation omitted).

A "ratio . . . to the amount of capital invested" is just one of multiple definitions for the word profit and is the only definition that specifically refers to the invested "capital." *See, e.g.*, *Webster's Third New Int'l Dictionary of the English Language Unabridged* 1811 (1976). Other definitions include "an advantage, benefit, accession of good, gain, or valuable return . . . [;] the excess of returns over expenditure in a transaction or series of transactions . . . [; and] a benefit or advantage accruing . . . from the conduct of business." *Id.* Notably, there is no indication that our Legislature intended to impose a different meaning to the word profit other than its ordinary meaning. *See* § 62-3-3 (containing no definition for the word profit in the PUA); § 62-17-4 (same in the EUEA). We interpret "profit" in the EUEA according to its ordinary meaning as any return over expenditure. Applying the plain meaning of the word in this case incurs no injustice, absurdity, or contradiction. Meanwhile, the narrower definition of "profit" Appellants promote would have the effect of requiring the PRC to use a return-on-rate-base method for setting public utility electricity rates. This requirement would render much (if not all) of the EUEA meaningless. We do not interpret our statutes so as to deprive them of their intended meaning. *See Benavidez v. Sierra Blanca Motors*, 1996-NMSC-045, ¶ 18, 122 N.M. 209, 922 P.2d 1205 ("We presume that the Legislature is well informed regarding existing statutory and common law and does not intend to enact a nullity."). Therefore, we reject Appellants' proposed definition of "profit" and conclude that the EUEA gives the PRC authority to allow utilities to earn a return on expenditures incurred on energy efficiency and load management resource development.

C. Substantial Evidence Supports the Case 308 Final Order

We address Appellants' argument that the Case 308 Final Order is not supported by substantial evidence in the record. Appellants point out that the PRC had to look to the Case 280 record to determine that (1) energy efficiency and load management programs do not involve much, if any, utility capital investment, and (2) PNM's Reduced Adder rates were evidence based, cost based, and utility specific. Appellants argue that the substantial evidence requirement is specific to each case and that the PRC cannot satisfy the requirement by relying on evidence presented in other proceedings. Appellants ignore the purpose of Case 308 and the interrelatedness of this case to Case 280.

"[F]or purposes of reviewing administrative decisions the substantial evidence rule is expressly modified to include whole record review." *Nat'l Council on Comp. Ins. v. N.M. State Corp. Comm'n* (*NCCI*), 1988-NMSC-036, ¶ 7, 107 N.M. 278, 756 P.2d 558. "When applying whole record review, the reviewing court views the

evidence in the light most favorable to the agency decision, but may not view favorable evidence with total disregard to contravening evidence." *Herman v. Miners' Hosp.*, 1991-NMSC-021, ¶ 6, 111 N.M. 550, 807 P.2d 734 (internal quotation marks and citation omitted). "To conclude that an administrative decision is supported by substantial evidence in the whole record, the court must be satisfied that the evidence demonstrates the reasonableness of the decision," and that "[n]o part of the evidence may be exclusively relied upon if it would be unreasonable to do so." *NCCI*, 1988-NMSC-036, ¶ 8.

In *TW Telecom of New Mexico, L.L.C. v. New Mexico Public Regulation Commission*, we reversed a final order from the PRC regarding telephone rates because the PRC violated the appellant's constitutional due process rights by relying on evidence in a separate case without providing the appellant the opportunity to present evidence and cross-examine witnesses on the impact of the evidence from the separate case on the issues involved in the case on appeal. *See* 2011-NMSC-029, ¶¶ 7, 20-21, 150 N.M. 12, 256 P.3d 24. Appellants rely on *TW Telecom* in arguing that because the PRC relied on its factual findings from Case 280 to support its legal determinations in Case 308, the Case 308 Final Order is unsupported by substantial evidence in the record for Case 308. Unlike *TW Telecom*, this case does not involve a utility ratemaking decision; rather, this case involves the question of whether the utility rates established in Case 280 meet the legal requirements we described in *AG v. PRC 2011*. Accordingly, the PRC's decision in Case 308 was not dependent on the resolution of any unsettled factual issues—as it would be in a utility ratemaking case like *TW Telecom*. Instead, Case 308 concerned only the resolution of a specific legal issue that did not depend on a redetermination of the facts already adjudicated in Case 280.

In determining the legal sufficiency of its Case 280 Final Order, the PRC was not only justified in looking to the record for Case 280 but was required to do so. *See Mountain States Tel. & Tel. Co. v. State Corp. Comm'n*, 1959-NMSC-035, ¶ 9, 65 N.M. 365, 337 P.2d 943 (holding that "the burden is on the [PRC] to produce evidence warranting its action"). Because the underlying factual matters had already been adjudicated in Case 280, the PRC did not need to reestablish those facts in Case 308. The Case 280 Final Order was never appealed, and the factual basis for that order cannot be challenged now. *See Cmty. Pub. Serv. Co. v. N.M. Pub. Serv. Comm'n*, 1983-NMSC-026, ¶ 9, 99 N.M. 493, 660 P.2d 583 (holding that an attack on a rule or regulation is time-barred if it is not brought within the thirty-day period set out in Section 62-11-1). Therefore, because the factual matters the PRC relied upon in deciding Case 280 have already been adjudicated, and because Case 308 involves a legal review of the Case 280 Final Order, it was not unreasonable for the PRC to rely on the record in Case 280 for factual evidence to support the Case 308 Final Order.

D. The Case 308 Final Order Is Neither Arbitrary nor Capricious

Finally, Appellants challenge the reasonableness of the PRC's reliance on the New Mexico Motor Carrier Act, NMSA 1978, §§ 65-2A-1 to -41 (2003, as amended through 2013), and the operating ratio method in the Case 308 Final Order authorizing PNM to earn a profit on expenses incurred for energy efficiency programs. The record shows that the PRC offered an explanation for the method it applied to determine PNM's Reduced Adder

rates. Appellants challenge this method as "inappropriate" because the PRC analogized it to the ratemaking method it uses for determining rates under the Motor Carrier Act. Appellants argue that the Legislature did not intend the Motor Carrier Act to apply to the regulation of New Mexico's electricity utilities.

Appellants overlook two key points. First, the PRC did not actually apply the Motor Carrier Act to its ratemaking decision in Case 280. The PRC merely mentioned the Motor Carrier Act *to exemplify* circumstances—when investor capital is not significant to the cost of providing service—that call for an alternative to the return-on-rate-base method (such as the operating ratio method) for determining just and reasonable rates. Second, the PRC "is vested with considerable discretion in determining whether a rate to be received and charged is just and reasonable." *Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n*, 1980-NMSC-005, ¶ 4, 94 N.M. 731, 616 P.2d 1116. The PRC's discretion extends to determining the appropriate method for establishing just and reasonable rates. *See PNM Gas Servs.*, 2000-NMSC-012, ¶ 7 ("Because of the level of complexity involved in setting rates and the number of variables at issue in every rate proceeding, the [PRC] is not bound to the use of any single formula or combination of formulae in determining rates. The ratemaking function involves the making of pragmatic adjustments. It is the result reached, not the method employed, which is controlling." (internal quotation marks and citation omitted)).

While the PRC has considerable discretion to determine just and reasonable rates for public utilities, "the [PRC] is not free to disregard its own rules and prior ratemaking decisions or to change its position without good cause and prior notice to the affected parties." *Id.* ¶ 9 (internal quotation marks and citation omitted). In this case, the legislative mandates in the EUEA were good cause for the PRC to change its position with respect to the appropriate method to employ for determining public utility electricity rates based on expenditures for energy efficiency measures. The PRC did not disregard its own regulations and prior ratemaking decisions; it simply used a substitute method it has traditionally used in other situations where investor capital is not a significant factor in the total cost of providing service. The PRC's reliance on the Motor Carrier Act to explain its method by analogy was not unreasonable or inappropriate. The Case 308 Final Order is neither arbitrary nor capricious.

III. CONCLUSION

The PRC's Case 308 Final Order is consistent with our holding in *AG v. PRC 2011* and with the authority specifically granted to the PRC by the EUEA. Case 308 involved only the determination of legal sufficiency of the Case 280 Final Order. The underlying facts in Case 280 were already adjudicated, and no timely appeal was filed in that case, so there was no need for the PRC to decide additional questions of fact. The PRC has discretion to determine the appropriate method to apply in establishing just and reasonable utility rates, and it lawfully exercised its discretion here. Accordingly, we affirm the Case 308 Final Order.

IT IS SO ORDERED.

CHARLES W. DANIELS, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

BARBARA J. VIGIL, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-043

Filing Date: September 5, 2013

Docket No. 33,635

BRYANNA PEARL BAKER, LORRICE GORDON, and PAUL CAMPOS, as Personal Representative of the Estate of CHERI WILSON, deceased,

Plaintiffs-Petitioners,

v.

STEPHANIE HEDSTROM, M.D.; SOUTHWEST PERINATOLOGY; WILLIAM RAMIREZ, M.D.; LEE C. CARUANA, M.D.; FAMILY PRACTICE ASSOCIATES, P.C.; MISBAH ZMILY, M.D.; MISBAH ZMILY, P.C.; CORDELL HALVERSON, M.D.; SAN MIGUEL HOSPITAL CORP., d/b/a ALTA VISTA REGIONAL HOSPITAL; THE BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO, as Trustees of the UNIVERSITY OF NEW MEXICO HEALTH AND SCIENCES CENTER; JOHN DOE #1-20, and JANE DOE #1-20; ABQ HEALTH PARTNERS, L.L.C.; LORETTA CONDER, M.D.; LORETTA CONDER, M.D., P.C., a corporation; OMKAR TIKU, M.D.; and OMKAR TIKU, P.C., a corporation,

Defendants-Respondents.

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OPINION

VIGIL, Justice.

This appeal concerns whether defendant professional corporations and a limited liability company are "health care providers" as defined by the Medical Malpractice Act ("MMA" or "the Act"), NMSA 1978, Sections 41-5-1 to -29 (1976, as amended through 2008), so as to be able to receive the benefits of the Act. Although the Court of Appeals determined that Defendants do not literally meet the Act's definition of "health care provider," it nonetheless held that the Defendants are health care providers under the Act because a strict adherence to the plain language of the definition would conflict with legislative intent. *Baker v. Hedstrom*, 2012-NMCA-073, ¶ 40, 284 P.3d 400. Applying the rules of statutory construction, we hold that Defendants are health care providers under the Act. Although the Court of Appeals reached the same conclusion, we disagree with the Court's determination that the definition of "health care provider" literally excludes Defendants. We conclude that several provisions in the Act indicate that the Legislature intended professional medical organizations like Defendants to be covered by the Act. Accordingly, we affirm the Court of Appeals albeit on different grounds.

I. FACTS AND PROCEDURAL HISTORY

This appeal involves three consolidated cases–*Baker v. Hedstrom*, *Gordon v. ABQ Health Partners, LLC*, and *Campos v. Conder*–in which individual plaintiffs brought suits for damages caused by the medical malpractice of their doctors and the business organizations under which each doctor operated.

In *Baker*, Plaintiff Bryanna Baker filed suit in the Fourth Judicial District Court against her doctors for medical malpractice after they failed to disclose the results of a test revealing that she had a medical condition that could be dangerous to both mother and child if she became pregnant. She subsequently became pregnant and suffered a heart attack that went undiagnosed for two days, resulting in a miscarriage and permanent heart damage. Baker also sued the professional corporations under which each doctor operated, which were formed under the Professional Corporation Act, NMSA 1978, Sections 53-6-1 to -14 (1963, as amended through 2001), claiming that the corporations were vicariously liable for the doctors' acts under the doctrine of respondeat superior.

In *Gordon*, Plaintiff Lorrice Gordon filed suit in the Second Judicial District Court, alleging that her doctor negligently performed an appendectomy that caused a small bowel obstruction for which she required additional surgery. She also sued the doctor's employer, ABQ Health Partners, LLC, a foreign limited liability company organized under the laws of Delaware, under the doctrine of respondeat superior.

Finally, in *Campos*, Plaintiff Paul Campos, the personal representative of the estate of Cheri Wilson, filed suit in the First Judicial District Court against the doctor who had removed Wilson's gall bladder and her primary care physician, who provided follow-up care, for malpractice after they allegedly failed to diagnose a bile leak caused during the gall bladder surgery. Wilson subsequently died due to the undiagnosed bile leak. Each doctor practiced under a professional corporation formed under the Professional Corporation Act, and Campos also sued these corporations under the doctrine of respondeat superior.

Baker moved for summary judgment on her claim against the defendant business entities, arguing that they could not benefit from the damages cap under the MMA because they did not meet the MMA's definition of "health care provider." The district court denied Baker's summary judgment motion and certified the issue of whether the defendant corporations were qualified health care providers for interlocutory appeal.

In *Gordon*, Defendant ABQ Health Partners, LLC filed a motion to dismiss or stay, arguing that it was a qualified health care provider covered by the MMA and Gordon failed to comply with the requirements of the MMA. The district court denied the motion and certified the case for interlocutory appeal on whether ABQ Health Partners, LLC qualified as a healthcare provider.

The district court in *Campos* found that the defendant corporations were qualified health care providers, but stayed the litigation in anticipation of an interlocutory appeal. Campos then applied for an interlocutory appeal on whether "the Legislature's decision not to include professional corporations as 'health care providers' in the MMA is given binding force in district courts across the State of New Mexico."

The Court of Appeals granted all three interlocutory appeals and consolidated them because they each raised a similar question. *Baker*, 2012-NMCA-073, ¶ 6. The Court ultimately concluded that the plain language of the definition of "health care provider" in Section 41-5-3(A) of the MMA literally excludes Defendants, but that adhering to the

literal language of the definition "would conflict with the overall legislative purpose" and "would make little sense in light of the historical circumstances" leading to the enactment of the MMA and "the structure of the MMA itself." *Baker*, 2012-NMCA-073, ¶¶ 17-18. Consequently, the Court of Appeals held "that the Legislature intended to include Defendants in the definition of 'health care provider' and, thus, to allow them to qualify for coverage under the MMA." *Id.* ¶ 40. Plaintiffs then filed a petition for writ of certiorari, which we granted. While we agree with the Court of Appeals that the Legislature intended the MMA to cover qualified professional medical organizations like Defendants, we do so under a different approach.

II. DISCUSSION

A. Standard of Review and Rules of Statutory Construction

Our task is to determine whether the Legislature intended Defendants to be eligible to qualify as "health care providers" under the MMA so as to receive the Act's benefits. *See* § 41-5-3(A) (defining "health care provider"); § 41-5-5(C) (explaining that health care providers that do not meet the qualifications under that "section shall not have the benefit of any of the provisions of the [MMA]"). Whether the Legislature intended professional medical organizations like Defendants to become qualified "health care providers" under the MMA presents an issue of statutory construction, which is a question of law that this Court reviews de novo. *See United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 2010-NMSC-030, ¶ 7, 148 N.M. 426, 237 P.3d 728 ("The meaning of language used in a statute is a question of law that we review de novo." (internal quotation marks and citation omitted)).

"When construing statutes, our guiding principle is to determine and give effect to legislative intent." *El Paso Elec. Co. v. N.M. Pub. Regulation Comm'n*, 2010-NMSC-048, ¶ 7, 149 N.M. 174, 246 P.3d 443 (internal quotation marks and citations omitted), *accord Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, ¶ 15, 149 N.M. 162, 245 P.3d 1214 ("This Court's primary goal when interpreting statutes is to further legislative intent."). We "us[e] the plain language of the statute as the primary indicator of legislative intent[.]" *State v. Willie*, 2009-NMSC-037, ¶ 9, 146 N.M. 481, 212 P.3d 369 (second alteration in original) (internal quotation marks and citation omitted). However, "[i]f the plain meaning of the statute is doubtful, ambiguous, or [if] an adherence to the literal use of the words would lead to injustice, absurdity or contradiction, we will construe the statute according to its obvious spirit or reason." *Id.* (second alteration in original) (internal quotation marks and citation omitted).

B. The Definition of "Health Care Provider" Includes Professional Medical Organizations As Expressed in the Purpose of the Act and the Language in the Act

Plaintiffs argue that the plain meaning of the definition of "health care provider" excludes Defendants. We first examine Plaintiffs' interpretation in the context of the Legislature's purpose for enacting the MMA and, like the Court of Appeals, conclude that their interpretation is irreconcilable with the Act's purpose. *See Baker*, 2012-NMCA-073, ¶ 29.

[redacted]

[redacted] However, we then diverge from the Court of Appeals' approach by disagreeing with Plaintiffs' argument that the definition of "health care provider," if interpreted literally, excludes Defendants. Although the language in the definition is ambiguous, our interpretation of this language supports our conclusion that the Legislature intended to cover professional medical organizations that qualify under the Act.

1. The Legislature's Stated Purpose for Enacting the MMA Supports Including Professional Medical Organizations as "Health Care Providers"

[redacted] Plaintiffs ask this Court to conclude that the Legislature did not intend Defendants to be covered by the Act because "the plain language of the definition of a 'health care provider'" expressly excludes Defendants. The MMA defines "health care provider" as "a person, corporation, organization, facility or institution licensed or certified by this state to provide health care or professional services as a doctor of medicine, hospital, outpatient health care facility, doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist or physician's assistant." Section 41-5-3(A). In Plaintiffs' view, the term "health care provider" only applies to "six categories of individuals 'licensed or certified to provide health care or professional services as a doctor of medicine . . . doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist [and] physician's assistant,' and two organizational entities similarly licensed as a 'hospital [or] outpatient facility.'" Plaintiffs argue that since "practice group business entities and professional corporations do not fit into any of those eight categories and were not specifically included by the Legislature in any other part of the MMA," they are not entitled to qualify as "health care providers" under the MMA.

[redacted] We must examine Plaintiffs' interpretation in the context of the statute as a whole, including the purposes and consequences of the Act. *See N.M. Pharm. Ass'n v. State*, 1987-NMSC-054, ¶ 8, 106 N.M. 73, 738 P.2d 1318 ("In interpreting statutes, we should read the entire statute as a whole so that each provision may be considered in relation to every other part."). If Plaintiffs' interpretation leads to absurdities, or if it conflicts with the Legislature's purpose for enacting the MMA, then we cannot conclude that their interpretation reflects legislative intent. *See Rutherford v. Chaves Cnty.*, 2003-NMSC-010, ¶ 24, 133 N.M. 756, 69 P.3d 1199 ("Statutes are to be read in a way that facilitates their operation and the achievement of their goals."); *accord Eldridge v. Circle K Corp.*, 1997-NMCA-022, ¶ 29, 123 N.M. 145, 934 P.2d 1074 ("[O]ur task is not to apply language literally when it would lead to counterproductive, inconsistent, and absurd results; we must harmonize the statutory language to achieve the overall legislative purpose."). In examining the provisions of the MMA, we adhere to Justice Montgomery's wise words of caution in applying the plain meaning rule, acknowledging that ambiguity may be lurking in even seemingly plain words if they conflict with the overall legislative intent. "[The plain meaning rule's] beguiling simplicity may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may . . . give rise to legitimate . . . differences of opinion concerning the statute's meaning." *State ex. rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 23, 117 N.M. 346, 871 P.2d 1352.

[redacted] Thus, we begin by considering the

purpose of the MMA. The Legislature's stated purpose for enacting the MMA was "to promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico." Section 41-5-2. "A major purpose of the Medical Malpractice Act was to meet a perceived insurance crisis" in New Mexico. *Wilschinsky v. Medina*, 1989-NMSC-047, ¶ 26, 108 N.M. 511, 775 P.2d 713. This crisis

> was triggered by the announced withdrawal of the insurance company underwriting the medical society's professional liability program in which ninety percent of medical practitioners and health care institutions participated. A result of this concern was the Medical Malpractice Act. . . . Availability of health care depends on providing incentives to persons to furnish health care services. If the practitioner must bear the cost of the patient's injury, there is a powerful disincentive to furnishing services at all. This disincentive may be met by making professional liability insurance available.

Otero v. Zouhar, 1984-NMCA-054, ¶ 15, 102 N.M. 493, 697 P.2d 493 (citing Ruth L. Kovnat, *Medical Malpractice Legislation in New Mexico*, 7 N.M. L. Rev. 5, 6, 7 n.6, 8 n.10 & n.11 (1976-77)), *reversed on other grounds by Grantland v. Lea Reg'l Hosp., Inc.*, 1985-NMSC-021, 102 N.M. 482, 697 P.2d 582.

To give effect to the purpose of the MMA, the Legislature created a balanced scheme to encourage health care providers to opt into the Act by conferring certain benefits to them, which it then balanced with the benefits it provided to their patients. "[T]he Legislature made professional liability insurance available to health care providers but conditioned availability to that insurance on a quid pro quo: health care providers could receive the benefits of the MMA only if they became qualified health care providers under the MMA and accepted the burdens of doing so." *Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara*, 2011-NMCA-112, ¶ 10, 267 P.3d 70. To be "qualified," health care providers must establish certain financial responsibilities with the superintendent of insurance, which include paying a surcharge into the patient's compensation fund and either filing proof of liability coverage with the superintendent of insurance or submitting a deposit to the superintendent to cover a maximum of three separate occurrences of malpractice. *See* § 41-5-5 (listing the qualifications requirements).

In exchange, the Act limits the health care provider's liability to $200,000, and any judgments in excess of that amount are paid out of the patient's compensation fund. Section 41-5-6(D); § 41-5-25(G). The other benefits to qualified providers are a cap on damages ($600,000, excluding punitive damages and medical care costs in excess of that amount), Section 41-5-6(A) & (B); the prohibition of monetary awards for future medical expenses (they must be paid out as they accrue rather than in advance), Section 41-5-6(B) & (C) & Section 41-5-7(D); the requirement that plaintiffs submit malpractice claims to the medical review commission for permission to sue the provider in district court, Section 41-5-14(D); a rule that the demands for damages in complaints submitted to district court cannot specify a requested dollar amount (only "such damages as are reasonable"), Section 41-5-4; and a three-year

statute of limitations, Section 41-5-13, *held unconstitutional on other grounds by Jaramillo v. Heaton*, 2004-NMCA-123, ¶ 19, 136 N.M. 498, 100 P.3d 204. These requirements benefit qualified health care providers by acting as a bar to claims initiated by patients who fail to comply with the Act's provisions. *See, e.g., Belser v. O'Cleireachain*, 2005-NMCA-073, ¶ 1, 137 N.M. 623, 114 P.3d 303 (affirming the district court's dismissal with prejudice for the plaintiff's failure to file an application with the medical review commission, which had the effect of dismissing the plaintiff's case permanently because the three-year statute of limitations had run); *Rupp v. Hurley*, 2002-NMCA-023, ¶ 21, 131 N.M. 646, 41 P.3d 914 ("[T]he necessity for [a medical review commission] determination prior to the filing of a medical malpractice claim remains a mandatory procedural threshold that must be crossed in the ordinary case.").

In exchange for the burdens placed on patients who receive medical care from qualified health care providers, the Act provides the following benefits to them: the ability to recover from the patient's compensation fund, Section 41-5-25(G); assurance that future medical costs will be covered, Section 41-5-7(B); assistance in retaining a medical expert, Section 41-5-23; and the ability to seek punitive damages outside of the MMA, Section 41-5-7(H) & Section 41-5-6(A).

By providing benefits and imposing burdens, the Legislature created a system that inspires widespread participation to ensure that patients would have adequate access to health care services and that they would have a process through which they can recover for any malpractice claims. *See Cummings v. X-Ray Assocs. of N.M., P.C.*, 1996-NMSC-035, ¶¶ 29-30, 121 N.M. 821, 918 P.2d 1321 ("The [L]egislature provided a number of incentives to assure participation by health care providers in the burdens of qualification under the Medical Malpractice Act. . . . [B]y offering to qualified health care providers certain benefits that are not available to those who are not qualified, the [L]egislature furthers its stated goal of assuring adequate malpractice insurance coverage in the New Mexico medical profession."); *Moncor Trust Co. ex rel. Flynn v. Feil*, 1987-NMCA-015, ¶ 9, 105 N.M. 444, 733 P.2d 1327 ("An obvious goal of the [L]egislature in enacting this legislation was to address certain factors adversely affecting the cost of medical malpractice insurance, to encourage continued availability of professional medical services, and to provide incentives for the furnishing of professional liability insurance.").

In light of the Act's purpose, we can discern no reason why the Legislature would intend to cover individual medical professionals under the Act while excluding the business organizations that they operate under to provide health care. We agree with Defendants that "[t]here is nothing in the statute indicating that the [L]egislature wanted to impair or eliminate the ability of physicians to practice under the umbrella of a professional entity." Were we to accept Plaintiffs' interpretation, we would be forcing individual providers to choose between either being fully protected by the MMA by operating as a sole proprietorship or limiting their exposure to other types of liability besides malpractice by practicing under the umbrella of a business entity. Defendants assert that "[t]here is simply no principled basis for forcing physicians to choose between having the protection of a corporate form and having the protection of the MMA." We agree. Forcing individual medical

professionals to choose between two options that each leave them exposed to a certain level of personal liability acts as a disincentive to practice medicine at all, which is exactly what the Legislature was trying to address by incentivizing participation in the MMA. Thus, covering individuals without offering the same benefits to the companies that they form or operate under disturbs the balanced scheme originally set up by the Legislature that was intended to attract enough health care providers to service the needs of patients in New Mexico and, in turn, ensure that the patients were protected when claims for medical malpractice arise. Plaintiffs' interpretation conflicts with both the Legislature's stated purpose and its goal to assure that providers of health care are adequately covered in New Mexico. "We will not construe a statute to defeat [its] intended purpose." *Padilla v. Montano*, 1993-NMCA-127, ¶ 23, 116 N.M. 398, 862 P.2d 1257. Therefore, we determine that the Legislature recognized that individual medical professionals may operate as a corporation or some other type of legal entity, and by doing so, the legal entity shall likewise be entitled to qualify under the Act.

2. The Definition of "Health Care Provider" Demonstrates that the Legislature Intended to Cover, Not Exclude, Professional Health Care Organizations

Not only is Plaintiffs' plain meaning interpretation of the definition of "health care provider" incompatible with the purpose of the MMA, it also ignores a key term in the definition that renders the definition ambiguous. We resolve this ambiguity in Defendants' favor.

Plaintiffs argued to the Court of Appeals that "the plain meaning of Section 41-5-3(A) encompasses two distinct and discrete groups: persons licensed as (1) doctors, (2) doctors of osteopathy, (3) chiropractors, (4) podiatrists, (5) nurse anesthetists, and (6) physician assistants *and* corporations, organizations, facilities, or institutions licensed or certified as (1) hospitals or (2) outpatient health care facilities." *Baker*, 2012-NMCA-073, ¶ 13. The Court of Appeals accepted Plaintiffs' phrasing of the definition in its plain meaning analysis when it concluded that Defendants offered no "compelling alternative reading" and that if it were to "look only at the literal language in [the definition of 'health care provider'] and nothing else, [it] would agree with Plaintiffs' interpretation of [the definition] and further that Defendants do not fall within the definition of that term." *Id.* ¶¶ 16-17. We disagree with Plaintiffs and the Court of Appeals that the definition of "health care provider" plainly and literally excludes Defendants.

Plaintiffs' interpretation of the definition conspicuously omits any discussion of the term "professional services." *See* § 41-5-3(A) ("'[H]ealth care provider' means a person, corporation, organization, facility or institution licensed or certified by this state to provide health care *or professional services* . . . ." (emphasis added)). Plaintiffs offer no explanation for the Legislature's inclusion of this term. Yet, "the [L]egislature is presumed not to have used any surplus words in a statute; each word is to be given meaning." *Helman*, 1994-NMSC-023, ¶ 32. This Court must interpret a statute so as to avoid rendering the Legislature's language superfluous. *Katz v. N.M. Dep't of Human Servs., Income Support Div.*, 1981-NMSC-012, ¶ 18, 95 N.M. 530, 624 P.2d 39; *see also Diamond v. Diamond*, 2012-NMSC-022, ¶ 29,

283 P.3d 260 ("We must assume the [L]egislature chose its words advisedly to express its meaning unless the contrary intent clearly appears." (internal quotation marks and citations omitted)). Therefore, we must consider what the Legislature intended by including the term "professional services" in the definition of "health care provider."

Since the MMA does not define the term "professional services," we first explore whether it has an ordinary meaning in the context of the definition of "health care provider." *State v. Tsosie*, 2011-NMCA-115, ¶ 19, 150 N.M. 754, 266 P.3d 34 ("'When a term is not defined in a statute, we must construe it, giving those words their ordinary meaning absent clear and express legislative intention to the contrary.'" (quoting *State v. Johnson*, 2009-NMSC-049, ¶ 10, 147 N.M. 177, 218 P.3d 863)). We conclude that the term "professional services" has no clear ordinary meaning that reveals a difference in the Legislature's view between health care providers licensed to provide *health care* as doctors of medicine, doctors of osteopathy, chiropractors, podiatrists, nurse anesthetists, or physician's assistants versus those licensed or certified to provide *professional services* as doctors of medicine, doctors of osteopathy, chiropractors, podiatrists, nurse anesthetists, or physician's assistants.

However, previous legislation provides guidance in determining the Legislature's purpose for including the term "professional services." We accept Defendants' invitation to examine the definition of "professional services" in the Professional Corporation Act, which dictates when corporations can provide services that its individual members must be licensed or otherwise legally authorized to provide. *See* § 53-6-1. "[W]e apply the fundamental rule of statutory construction . . . that all provisions of a statute, together with other statutes in pari materia, must be read together to ascertain the legislative intent." *N.M. Bd. of Veterinary Med. v. Riegger*, 2007-NMSC-044, ¶ 13, 142 N.M. 248, 164 P.3d 947 (alterations in original) (internal quotation marks and citations omitted); *see also State ex rel. Quintana v. Schnedar*, 1993-NMSC-033, ¶ 4, 115 N.M. 573, 855 P.2d 562 ("In ascertaining legislative intent, the provisions of a statute must be read together with other statutes *in pari materia* under the presumption that the [L]egislature acted with full knowledge of relevant statutory and common law.").

The Professional Corporation Act defines "professional service[s]" as:

> [A]ny type of personal service to the public which requires, as a condition precedent to the rendering of such service, the obtaining of a license or other legal authorization and which, prior to the passage of the Professional Corporation Act and by reason of law, could not be performed by a corporation. The term includes, but is not necessarily limited to, the personal services rendered by certified public accountants, registered public accountants, *chiropractors*, optometrists, dentists, *osteopaths*, *podiatrists*, architects, veterinarians, *doctors of medicine*, doctors of dentistry, *physicians and surgeons*, attorneys-at-law and life insurance agents.

Section 53-6-3(A) (emphasis added) (citation omitted). The Professional Corporation Act further defines a "professional corporation" as "a corporation which is organized under the

Professional Corporation Act for the sole and specific purpose of rendering professional service and which has as its shareholders only individuals who themselves are licensed or otherwise legally authorized within this state to render the same professional service as the corporation." Section 53-6-3(B).

Defendants assert that the Legislature's inclusion of "professional services" in the MMA's definition of "health care provider" indicates an attitude favorable toward incorporation by professionals, including medical professionals. We agree. The Legislature enacted the Professional Corporation Act in 1963—thirteen years before it enacted the MMA. Since we presume that the Legislature was aware of its own prior enactments, we must presume that its use of the Professional Corporation Act's term was purposeful. *See Citation Bingo, Ltd. v. Otten*, 1996-NMSC-003, ¶ 21, 121 N.M. 205, 910 P.2d 271 ("[W]e presume that the [L]egislature was aware of existing statutory and common law and did not intend to enact a law inconsistent with existing law."). The Professional Corporation Act's definition of "professional services" clarifies the difference between providers providing "health care" and providers providing "professional services." It is *businesses*, rather than individuals, that provide professional services, which are services that must be provided by licensed individuals. Thus, we determine that the Legislature included the phrase "or professional services" to indicate that health care providers include not only individuals and hospital or outpatient facilities licensed to provide health care, but also corporations and organizations providing the professional services listed in the definition of "health care provider."

Plaintiffs argue that if the Legislature had intended to cover professional corporations incorporated under the Professional Corporation Act, it would have explicitly mentioned that corporate business entities were covered. However, if the Legislature had explicitly mentioned the Professional Corporation Act or "corporate business entities," it would have included only professional corporations, to the exclusion of various other types of legal organizations under which medical professionals may choose to operate. The Legislature's inclusion of the term "organization" in addition to "corporation" in the statute indicates that it did not intend the definition to be so limiting. *See* § 41-5-3(A). Rather, it recognized that medical professionals may choose to offer professional services through other types of business entities besides professional corporations. Thus, we conclude that the Legislature's inclusion of the broad terms "corporation" and "organization," rather than listing specific types of legal entities, was purposeful. This reflected the Legislature's intent that the MMA cover the many other kinds of legal organizations that employ medical professionals offering the kinds of health care services listed in Section 41-5-3(A) that professional corporations can provide.

Plaintiffs further argue that the Legislature could not have intended to cover business entities because business entities cannot be licensed by the State to provide health care or professional services *as* doctors of medicine, doctors of osteopathy, chiropractors, podiatrists, nurse anesthetists, or physician's assistants. Plaintiffs are correct that there is no state mechanism by which professional organizations such as Defendants are licensed or certified to provide such health care. However, we reject Plaintiffs' conclusion that because of this, Defendants

would not be eligible to qualify as "health care providers" under the Act. We refuse to parse the Legislature's words in such a literal and mechanical manner. *See Cummings*, 1996-NMSC-035, ¶ 45 ("[The plain meaning] rule does not require a mechanical, literal interpretation of the statutory language."). "We will not rest our conclusions upon the plain meaning of the language if the intention of the [L]egislature suggests a meaning different from that suggested by the literal language of the law." *Id.* Plaintiffs' interpretation disregards the effect of the Legislature's inclusion of the term "professional services" in the Act. We determine that the Legislature was simply imprecise with its language. The Legislature would not have contemplated covering health care providers rendering "professional services" like those listed in Section 41-5-3(A) *and* required that the providers be licensed or certified by the State to perform those services, yet afford no process or procedure for them to *become* licensed or certified. "If the strict wording of the law suggests an absurd result, we may interpret the statute to avoid such a result." *Cummings*, 1996-NMSC-035, ¶ 45.

Rather, we conclude that it is the licensure or certification of the *individual* that must be of concern to the Legislature. Indeed, any procedure to license or certify the corporation or organization to provide professional services would be redundant since, under the doctrine of respondeat superior, the legal organization as the passive tortfeasor is only liable to the extent of the legal liability of the individual medical professional who is the active tortfeasor. *See Harrison v. Lucero*, 1974-NMCA-085, ¶ 12, 86 N.M. 581, 525 P.2d 941, ("[T]he exoneration of the servant removes the foundation upon which to impute negligence to the master." (internal quotation marks and citation omitted)), *holding modified on other grounds by Vidal v. Am. Gen. Cos.*, 1990-NMSC-003, ¶ 14, 109 N.M. 320, 785 P.2d 231. Since the MMA only covers the acts of medical malpractice committed by an individual who must be licensed or certified as a doctor of medicine, doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist, or physician's assistant, any claim for malpractice brought against a legal organization can only be brought under the doctrine of respondeat superior for the alleged malpractice of the licensed or certified medical professional listed in Section 41-5-3(A). For this reason, we hold that professional corporations or other types of professional medical organizations under which a medical professional operates are eligible to become qualified health care providers under the MMA as long as they employ or consist of members who are licensed or certified by the State as doctors of medicine, doctors of osteopathy, chiropractors, podiatrists, nurse anesthetists, or physician's assistants.

C. The Legislature Intended the MMA to Cover Professional Medical Organizations Sued Under the Doctrine of Respondeat Superior

All of the defendant professional medical organizations in these cases were sued for vicarious liability of their employees under the doctrine of respondeat superior. *See* Restatement (Third) of Agency: Respondeat Superior § 2.04 (2006) ("An employer is subject to liability for torts committed by employees while acting within the scope of their employment."). When individual professionals operate under the umbrella of a legal business entity, they also become employees of that entity. *See* Restatement

(Third) of Torts: Apportionment of Liability § 7 cmt. j (2000) (explaining that the employer and the employee are treated as one entity for purposes of assigning liability). Because corporations act through their employees, corporations may be held vicariously liable for the negligence of their employees who injure someone while in the course and scope of their employment. *See* Restatement (Third) of Agency § 2.04.

Plaintiffs' argue that the MMA covers individuals but excludes the professional medical organizations for which they are employed. Although these covered individuals may be sued for acts of malpractice, the fact that the professional medical organizations are not covered by the Act leads to absurd results that the Legislature could not have intended and also conflicts with the doctrine of respondeat superior language as it is used in the MMA.

1. The Definition of "Health Care Provider" Must Be Interpreted So As to Avoid Absurd Results

The MMA only covers claims for medical malpractice. *See* § 41-5-3(C) (defining "malpractice claim" as "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"); § 41-5-4 (explaining when a patient or his representative may file a malpractice claim under the Act); *see, e.g.*, *Trujillo v. Puro*, 1984-NMCA-050, ¶ 9, 101 N.M. 408, 683 P.2d 963 (concluding that negligent misrepresentation and negligent infliction of emotional distress are not covered under the MMA because they are not medical malpractice claims). Thus, medical professionals like the doctors in these consolidated cases often choose to form or operate as professional corporations, limited liability companies, or any other legal form of business organization in order to limit their exposure to other types of liability besides medical malpractice claims. For example, medical professionals may opt to operate under the umbrella of such corporations or organizations in order to limit their individual liability for the torts of their employees under the doctrine of respondeat superior.

Under Plaintiffs' interpretation of the Act, the Legislature intended these individual medical professional to be eligible to opt into the MMA, but it did not intend the business organizations that they formed to be eligible. This interpretation leads to absurd results. If a doctor who has formed a limited liability company for the reasons described above commits medical malpractice, the injured patient can sue: (1) the doctor in his or her individual capacity, (2) the legal organization formed by the doctor as his or her employer, or (3) both. If the MMA only covered a doctor in his or her individual capacity, but not the doctor's legal business organization, under the doctrine of respondeat superior, the patient could simply circumvent the provisions that the Legislature intended to benefit the individual doctor by directly suing the doctor's company for malpractice in district court. Defendants argue that this "end run around the MMA" effectively divests individual medical professionals from the Act's protection. We agree.

One of the doctors in the consolidated cases before us operates under

a professional corporation that she formed and of which she is the sole member. There is no dispute that she may qualify as a health care provider under the Act, in her individual capacity. Plaintiffs, however, argue that her corporation cannot qualify as a health care provider—even though it is also being sued vicariously for *her* alleged malpractice. Under Plaintiffs' theory, the doctor's patients can sue her corporation in district court for the same alleged malpractice for which she is covered by the MMA. Plaintiffs can sue the corporation without complying with any of the provisions of the Act, and the doctor would not receive any benefits to which she is entitled in her individual capacity. The Legislature could not have intended to strip individual medical professionals of the MMA's protections simply because they choose to operate as a business corporation, professional corporation, limited liability corporation, or any other legal form of business organization. *See State v. Padilla*, 2006-NMCA-107, ¶ 11, 140 N.M. 333, 142 P.3d 921 ("We avoid any construction that would be 'absurd, unreasonable, or contrary to the spirit of the statute.'" (quoting *State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022)), *reversed on other grounds by State v. Padilla*, 2008-NMSC-006, ¶ 34, 143 N.M. 310, 176 P.3d 299; *accord Padilla v. Montano*, 1993-NMCA-127, ¶ 23 ("Legislative enactments are to be interpreted to accord with common sense and reason. We will not construe a statute to defeat the intended purpose or achieve an absurd result." (citation omitted)). Provided that medical business organizations meet all of the conditions to qualify as health care providers, we can discern no reason why the Legislature would have excluded them from the protections of the Act.

2. The Doctrine of Respondeat Superior Provisions in the MMA Reflect the Legislature's Intent to Cover Professional Medical Organizations like Defendants Who Are Sued Under that Doctrine

The language in the Act provides further support that the Legislature intended to cover professional medical organizations being sued under the doctrine of respondeat superior. The MMA recognizes that a claim may be brought against a health care provider under the doctrine of respondeat superior in Section 41-5-16(C), which provides:

> In instances where applications are received employing the theory of respondeat superior or some other derivative theory of recovery, the director shall forward such applications to the state professional societies, associations or licensing boards of both the individual health care provider whose alleged malpractice caused the application to be filed, and the health care provider named a respondent as employer, master or principal.

Also, the selection of the panel that hears the merits of a malpractice claim before the medical review commission is different when the doctrine of respondeat superior is implicated. *See* § 41-5-17(E) ("In those cases where the theory of respondeat superior . . . is employed, two of the panel members shall be chosen from the individual health care provider's profession and one panel member shall be chosen from the *profession* of the health care provider named a respondent employer, master or principal." (emphasis added)).

These provisions lend support to the interpretation that the Legislature intended that medical malpractice claims made against the employer under the doctrine of respondeat superior be brought under the Act. Plaintiffs' argument that none of the provisions in the Act apply to Defendants leads us to conclude that, in Plaintiffs' view, the doctrine of respondeat superior provisions in the Act only apply to hospitals and outpatient facilities as employers. However, the language utilized by the Legislature demonstrates that it did not intend the application of these provisions to be so limited. The Legislature could have specifically mentioned hospitals and outpatient facilities when it referred to the third panel member in Section 41-5-17(E), just as it did in Section 41-5-5(B), which specifically references the different qualifications for hospitals and outpatient facilities. Instead, it used the much broader term "profession" of the health care provider-employer in Section 41-5-17(E). We therefore conclude that the Legislature intended that the provisions in the Act addressing medical malpractice claims brought under the doctrine of respondeat superior apply not only to hospitals and outpatient facilities but also to the professional medical organizations that also employ the types of providers listed in Section 41-5-3(A) and may be sued by patients under the doctrine of respondeat superior.

III. CONCLUSION

We hold that legal organizations offering the professional medical services listed in Section 41-5-3(A) are eligible to qualify as "health care providers" under the Act and thus are entitled to the MMA's benefits when they are sued for medical malpractice. We therefore affirm the Court of Appeals' order to reverse the district court's denial of Defendant's motion to dismiss in *Gordon* and affirm the orders of the district courts in *Baker* and *Campos*.

IT IS SO ORDERED.

BARBARA J. VIGIL, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

CYNTHIA A. FRY, Judge
Sitting by designation

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Opinion Number: 2013-NMSC-044

Filing Date: September 12, 2013

Docket No. 33,693

STATE OF NEW MEXICO, CITY OF ALBUQUERQUE,

Plaintiffs-Respondents,

v.

PANGAEA CINEMA LLC d/b/a GUILD CINEMA LLC, KEIF HENLEY, registered agent,

Defendants-Petitioners.

ACLU of New Mexico
Laura Louise Schauer Ives
Albuquerque, NM

Morrissey Lewis L.L.C.
Kari T. Morrissey
Albuquerque, NM

for Petitioners

John E. Dubois, Assistant City Attorney
Albuquerque, NM

for Respondents

OPINION

CHÁVEZ, Justice.

On a November weekend in 2008, an art-house movie theater in Albuquerque's Nob Hill neighborhood hosted a film festival. The Nob Hill Business Association described the event as "a success, not only in driving [customer] traffic to the area, but also in the quality and caliber of those customers." The Association specifically noted that there were "almost no negative comments" and that it hoped the film festival would continue to present the festival. Several local business owners stated that the festival had positive effects on the neighborhood, including increased sales and broader public awareness of the businesses in the area. The festival did not cause any crime or other negative effects in the neighborhood.

The festival was titled "Pornotopia," and it featured at least one erotic or pornographic film. Other than the weekend of Pornotopia, the theater showed non-pornographic films. Despite Pornotopia's positive impact on the neighborhood and the generally non-adult nature of the hosting theater, the theater was convicted of a zoning violation for operating an "Adult Amusement Establishment" in an improper zone. *See* Albuquerque, N.M., Code of Ordinances, § 14-16-1-5(B) (1974, amended 2012) (defining "adult amusement establishment"). The theater argues before this Court that the conviction violated its state and federal constitutional rights to free speech.

An "adult amusement establishment" is defined in the Albuquerque Code of Ordinances as "[a]n establishment such as [a] . . . theater . . . that provides amusement or entertainment featuring . . . films, motion pictures . . . or other visual representations or recordings characterized or distinguished by an emphasis on . . . specified anatomical areas or . . . specified sexual activities." *Id.* Consistent with our responsibility to interpret ordinances to avoid constitutional concerns, we interpret the term "adult amusement establishment" to apply only to traditionally adult businesses. Because this category does not include theaters that rarely or only occasionally feature adult entertainment, the theater in this case was not an adult

amusement establishment, and it did not commit a zoning violation. Therefore, we do not reach the constitutional questions raised by the theater.

BACKGROUND

Defendant Pangaea Cinema ("the Guild") is a limited liability company that does business as the Guild Cinema in the Nob Hill area of Albuquerque. The Guild is an art-house theater that usually shows non-pornographic independent films. However, on the weekend of November 14-16, 2008, the Guild hosted an erotic film festival called "Pornotopia." This was the second time that the Guild had presented Pornotopia, and the festival was apparently intended to be an annual event.

The Guild is located in an area of Albuquerque that is zoned C-2, or "Community Commercial." Albuquerque does not permit adult amusement establishments in C-2 zones. *See* Albuquerque, N.M., Code of Ordinances, § 14-16-2-17(A) & (B) (1974, amended 2012) (not listing adult amusement establishments as either permissive or conditional use in C-2 zones); Albuquerque, N.M., Code of Ordinances, § 14-16-1-3(B) (1974, amended 1980) ("Any use not designated a permissive or conditional use in a zone is specifically prohibited from that zone, except as otherwise provided herein."). The City defines an "adult amusement establishment" as

> An establishment such as an auditorium, bar, cabaret, concert hall, nightclub, restaurant, theater, or other commercial establishment that provides amusement or entertainment featuring one or more of the following:
>
> (1) A live performance, act or escort service distinguished or characterized by an emphasis on the depiction, description, exposure, or representation of specified anatomical areas or the conduct or simulation of specified sexual activities; or
>
> (2) Audio or video displays, computer displays, films, motion pictures, slides or other visual representations or recordings characterized or distinguished by an emphasis on the depiction, description, exposure or representation of specified anatomical areas or the conduct or simulation of specified sexual activities.

Section 14-16-1-5(B).

The City of Albuquerque apparently became concerned that the Guild's screening of the films in Pornotopia might constitute a zoning violation. Two zoning enforcement inspectors visited the festival and watched a film entitled "Couch Surfers, Trans Men in Action." The parties agree that the film was characterized or distinguished by an "emphasis on . . . specified anatomical areas or . . . specified sexual activities" as described in Section 14-16-1-5(B). On the basis of this screening, the City determined that the Guild was operating as an adult amusement establishment in an area that was not zoned for adult entertainment.

In December 2008, the State of New Mexico and the City of Albuquerque charged the Guild with a criminal zoning violation in metropolitan court. (For clarity, we refer to the prosecuting body either as "Albuquerque"

or "the City.") The metropolitan court found the Guild guilty, and the Guild appealed to the Second Judicial District Court. The district court held that the Guild had committed a zoning violation and that the zoning ordinances were constitutional as they applied to the Guild. The district court also imposed a criminal fine of $500. The Court of Appeals affirmed the Guild's conviction. *City of Albuquerque v. Pangaea Cinema LLC*, 2012-NMCA-075, ¶ 1, 284 P.3d 1090, *cert. granted*, 2012-NMCERT-007.

DISCUSSION

The parties agree on the salient facts of the case, and our role is to interpret the Albuquerque ordinance at issue.[1] "Interpretation of municipal ordinances and statutes is a question of law that we review de novo." *Stennis v. City of Santa Fe*, 2008-NMSC-008, ¶ 13, 143 N.M. 320, 176 P.3d 309. The Guild has also made constitutional arguments, and to the extent that we address these arguments, we consider them de novo. *State v. DeGraff*, 2006-NMSC-011, ¶ 6, 139 N.M. 211, 131 P.3d 61.

Cities are generally allowed to impose different zoning requirements on adult theaters than on mainstream theaters.[2] *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71-73 (1976) (plurality opinion); *id.* at 74 (Powell, J., concurring in the judgment and portions of the opinion). Even though such zoning ordinances categorize theaters based on the content they exhibit, courts may analyze the ordinances as content-neutral time, place, and manner restrictions. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). The idea is that these zoning restrictions target not the content of the films shown, but rather the "*secondary effects*" caused by the accumulation of adult amusement establishments in a city. *Id.*

Secondary effects were described by the *Young* and *Renton* courts. In *Young*, the City of Detroit adopted an ordinance stating that a concentration of adult businesses "tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere." 427 U.S. at 55. In *Renton*, a similar ordinance was "designed to prevent crime, protect the city's retail trade, maintain property values, and generally protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life, not to suppress the expression of unpopular views." 475 U.S. at 48 (alterations in original) (internal quotation marks and citation omitted).

Because these ordinances are treated as time, place, and manner restrictions, *id.* at 47, they are valid if (1) they are content-neutral, (2) "they are narrowly tailored to

[1]We briefly note the City's argument that the parties' "stipulations . . . preclude the necessity of statutory interpretation." This is extremely unusual, as the parties did not stipulate to the meaning of the ordinance. Even if they had done so, we would retain an independent responsibility to interpret the ordinance. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

[2]Laurence Tribe has dubbed this practice "erogenous zoning." Laurence H. Tribe, American Constitutional Law 934 (2d ed. 1988); *see also* Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 Pepp. L. Rev. 723, 727 n.38 (2001) (crediting Tribe with coining the term).

serve a significant governmental interest," and (3) "they leave open ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Cities carry a light evidentiary burden in justifying these ordinances, and they have some flexibility in designing them. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 451 (2002) (Kennedy, J., concurring in the judgment) ("[W]e have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required."). Cities may choose to disperse their adult businesses or concentrate them. *Renton*, 475 U.S. at 52. They may rely on studies from other cities rather than producing their own evidence, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52.

It is not clear precisely which secondary effects Albuquerque fears will result from the presence of adult amusement establishments; the ordinance does not include legislative findings, and the City's briefing did not specify the evidence on which the Albuquerque City Council relied in enacting the ordinance. Nevertheless, the Albuquerque ordinance in question is similar to the ordinances upheld in other cases, including *Young* and *Renton*, and the Guild does not challenge its constitutionality except as it is applied in this case.

There is no dispute that "Couch Surfers" was an adult "amusement or entertainment" film under the terms of Section 14-16-1-5(B). However, this is a zoning case, and the central question is not whether the film was classified as adult amusement, but whether the theater was an adult amusement establishment within the meaning of the ordinance.

The parties agree that the Guild theater shows adult films only rarely, at most one weekend per year. Consistent with that reality, the Guild is an ordinary-looking art-house theater. It has none of the trappings of an adult theater; there are no neon signs proclaiming "Girls! Girls! Girls!" or "XXX." Nothing about the Guild appears to be seedy, unsavory, or likely to drive down property values. It is undisputed that Pornotopia did not, in fact, result in any negative secondary effects in the Nob Hill neighborhood. In short, while the City of Albuquerque may believe that adult theaters cause negative secondary effects, the Guild is not an adult theater either in function or appearance.

Our role in interpreting an ordinance is to look for the intent of the legislative body. *See New Mexicans for Free Enter. v. The City of Santa Fe*, 2006-NMCA-007, ¶ 59, 138 N.M. 785, 126 P.3d 1149 ("We construe an ordinance as we would a statute, giving effect to the intent and purpose of those who enacted it . . . ."). Presumably, the intent of the Albuquerque City Council was to avoid or quarantine the negative secondary effects of adult amusement businesses. The ordinance contains no indication that it should apply to venues that only occasionally show adult films. To the contrary, the nature of zoning ordinances suggests that the restrictions on adult entertainment establishments were intended to regulate businesses of a clearly adult nature. "Zoning rules generally only apply to the regular use of a building," not occasional deviations from those uses. *Schmitty's City Nightmare, LLC v. City of Fond du Lac*, 391 F. Supp. 2d 745, 756 (E.D. Wis. 2005) ("[A] residential house, for example, does not become zoned as a

commercial hotel by virtue of having the occasional overnight guest.").

In addition, we consider the ordinary meaning of the terms used in the ordinance. *See Whitely v. New Mexico State Pers. Bd.*, 1993-NMSC-019, ¶ 5, 115 N.M. 308, 850 P.2d 1011 ("The words of a statute . . . should be given their ordinary meaning absent clear and express legislative intention to the contrary."). The Guild is simply not an adult amusement establishment in the ordinary meaning of the term. If we were to stand on Central Avenue and ask pedestrians for directions to the nearest adult theater, it is unlikely that they would direct us to the Guild. By the same token, without some clearer indication of legislative intent, we cannot simply assume that the Albuquerque City Council meant to designate the Guild as an "adult amusement establishment" because it showed adult films during one weekend.

Following the City's suggested interpretation would lead to absurd results. *See State v. Padilla*, 1997-NMSC-022, ¶ 6, 123 N.M. 216, 937 P.2d 492 ("We read statutes to avoid absurd or unreasonable results." (internal quotation marks and citations omitted)). For example, a professor at the University of New Mexico might screen a pornographic film during a course on human sexuality or the like; we cannot imagine that the screening would render the lecture hall an "adult amusement establishment." In the words of the federal district court for the Eastern District of Wisconsin,

> One would not call a bar a "martini bar" if it served martinis only once a year, just as one would not call a club a "jazz club" if 99% of its music was rock and roll. Suffice it to say that in the English language, when an adjective, such as "adult" (as used here), modifies a noun that is a physical location (a structure or building which features topless dancers, strippers, male or female impersonators, or similar entertainers), we assume that the adjective has temporal permanence just as the physical structure does.

Schmitty's, 391 F. Supp. 2d at 757. The Albuquerque city ordinance does not specify exactly how many pornographic films a theater must show to qualify it as an adult amusement establishment, and we do not need to set such a standard now. We can say with confidence, however, that the ordinance does not reach the type of very occasional showing at issue in this case. One weekend of erotic films per year does not an adult theater make.

There is another reason to follow this interpretation of the statute. "[W]e seek to avoid an interpretation of a statute that would raise constitutional concerns." *Chatterjee v. King*, 2012-NMSC-019, ¶ 18, 280 P.3d 283. The Guild has raised significant questions about the constitutionality of a city ordinance broad enough to treat the Guild as an adult amusement business. The United States Supreme Court has rejected constitutional challenges to "erogenous zoning" ordinances, but the businesses at issue in those cases were unambiguous, full-time adult amusement establishments. *See Alameda Books*, 535 U.S. at 432 (plurality opinion) (respondents rented and sold "sexually oriented products" and provided viewing booths); *Renton*, 475 U.S. at 45 (theater intended to "exhibit feature-length adult films"); *Young*, 427 U.S. at 59 n.16 ("Neither respondent has indicated any plan to exhibit pictures even arguably outside the coverage of the ordinances."). The United States Supreme Court has never considered

the constitutionality of adult amusement ordinances as they are applied to mainstream or art-house theaters that occasionally show adult films.

However, several lower courts have concluded that it is unconstitutional to place zoning restrictions on businesses that occasionally feature adult entertainment. In *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1331, 1333 (9th Cir. 1987), *modification on other grounds recognized by Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719, 722-23 (9th Cir. 2000), *reversed on other grounds by Alameda Books*, 535 U.S. at 429 (plurality opinion), 444 (Kennedy, J., concurring in the judgment), the Court of Appeals for the Ninth Circuit affirmed a permanent injunction enjoining enforcement of the county's adult amusement business zoning ordinance. The San Bernardino County ordinance, like the one at issue in this case, "failed to define the extent of use for showing adult films that would be necessary to render a theater an 'adult business.'" *Id.* at 1331. The county construed the ordinance to reach any business that engaged in a single showing of an adult film. *Id.* The Ninth Circuit held that the ordinance, as construed by the county, failed the narrow tailoring prong of the *Renton* time, place, and manner analysis. *Id.* at 1333. It observed that "the County . . . presented no evidence that a single showing of an adult movie would have any harmful secondary effects on the community," and added that it did not "see how the County could make such a showing, since it is difficult to imagine that only a single showing ever, or only one in a year, would have any meaningful secondary effects." *Id.*

Relying on *Tollis*, the California Supreme Court held that it would be unconstitutional for the City of Long Beach to classify a theater as an adult establishment based on a single showing of an adult film. *People v. Superior Court* (*Lucero*), 774 P.2d 769, 775 (Cal. 1989). The California court noted that the Long Beach ordinance had made no findings or claims about "significant deleterious effects on the community arising out of a single showing of an adult film." *Id.*

Courts have expressed the concern that when municipalities include ordinary, generally non-adult amusement businesses in the sweep of their "erogenous zoning" ordinances, they risk losing their focus on secondary effects, and may instead unconstitutionally target the content of the adult entertainment. For example, in *Executive Arts Studio, Inc. v. City of Grand Rapids*, 391 F.3d 783, 796 (6th Cir. 2004), the Court of Appeals for the Sixth Circuit held that an ordinance was not narrowly tailored because it included bookstores that had a "'segment or section'" devoted to adult material. The court expressed concern that the ordinance could encompass "multiple establishments which would never be defined as adult bookstores in everyday English," even though the city had produced no evidence that adult sections in ordinary bookstores could produce negative secondary effects. *Id.* The court concluded that an "ordinance is simply not narrowly tailored when its language sweeps up mainstream bookstores, as it is then evident that the ordinance is controlling the dissemination of objectionable reading material rather than the effects upon a neighborhood from the businesses that disseminate and specialize in such material." *Id.* at 796-97.

Similarly, in *Pensack v. City & County of Denver*, 630 F. Supp. 177, 181 (D. Colo. 1986), the federal district court for the

District of Colorado held that a Denver ordinance denied due process to the owner of a bakery that sold both erotic and non-erotic baked goods. The City of Denver apparently applied the zoning ordinance only to stores that used at least 10% of their floor area to sell erotic items. *Id.* at 179. The court expressed concerns that even with this threshold in place, zoning authorities would have to "monitor the films in a regular theater or examine the books in an ordinary bookstore to determine the quantity of sexually specific content in all that is shown and sold." *Id.* at 181.

Although our reading of the Albuquerque city ordinance eliminates the need for us to address the constitutional questions raised by the Guild, we are acutely aware of the constitutional backdrop to this case. Not all courts that have considered the issue agree that it is unconstitutional to zone a business as "adult" based on a single or occasional instance of adult entertainment. *See BZAPS, Inc. v. City of Mankato*, 268 F.3d 603, 607 (8th Cir. 2001) (upholding city's application of adult zoning ordinance to a single adult amusement performance). Nonetheless, enough courts have found this type of application unconstitutional that our canon of constitutional avoidance comes into play. When possible, we must construe a statute or ordinance "'so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.'" *State v. House*, 2001-NMCA-011, ¶ 41, 130 N.M. 418, 25 P.3d 257 (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916)).

The City voiced concern that if the Guild prevails, more theaters in areas that are not zoned for adult amusement establishments will "show adult entertainment on a routine but not constant basis" to avoid the bite of the zoning ordinances. If Albuquerque is concerned that mainstream theaters will start showing adult entertainment three days per week, as it claims in its brief, the City Council can amend the ordinance to set a threshold level of adult amusement material that would classify a business as an "adult amusement establishment." In the case of a movie theater, this classification could be based on the proportion of the theater's films that are pornographic, the number of such films shown per week or month, the nature of the films that receive top billing, or the percentage of revenues attributable to sexually explicit fare. As Judge Sutin noted in his dissent below, the City has already set this type of threshold in its definition of "adult store." *Pangaea*, 2012-NMCA-075, ¶ 63 (Sutin, J., dissenting) ("Section 14-16-1-5(B) . . . defines an 'adult store' as '[a]n establishment having 25% or more of its shelf space or square footage devoted to the display, rental, sale[,] or viewing of adult material for any form of consideration.'" (alterations in original)).

However, if the City Council wishes to expand the ordinance so that rare, occasional, or incidental exhibitions of adult material will render a business an "adult amusement establishment," it must produce some evidence linking these occasional showings to negative secondary effects. *See Exec. Arts Studio*, 391 F.3d at 796 (stating that the city "cited no basis, study or third party experience that would lead one to believe that such a broad ordinance is needed to control undesirable blight" and concluding that the "ordinance [was] simply not narrowly tailored"); *Tollis*, 827 F.2d at 1333 (holding that the ordinance was not narrowly tailored because the county "presented no evidence that a single showing of an adult movie would have any harmful secondary effects on the community"); *see also R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 411-12 (7th Cir.

2004) (holding that the city had not met even the low evidentiary burden required to support a zoning restriction because the evidence "[did] not appear to be directly relevant to the type of entertainment that Rockford [sought] to regulate").

CONCLUSION

Because the Guild engaged in only occasional showings of adult films, the Guild is not an adult amusement establishment as defined in the Albuquerque Code of Ordinances, and the zoning rules governing adult amusement establishments are inapplicable to it. We therefore reverse the Court of Appeals and vacate the Guild's conviction.

IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

RICHARD C. BOSSON, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

PETRA JIMENEZ MAES, Chief Justice, dissenting

MAES, Chief Justice (dissenting).

I respectfully dissent and adopt in full the majority opinion of the Court of Appeals, *City of Albuquerque v. Pangaea Cinema LLC*, 2012-NMCA-075, 284 P.3d 1090, as my dissent. Like counsel for the City, I wonder why there is a need to allow the Guild to have individual showings of adult films when the City has decided to zone this activity.

I do not agree that "[b]ecause the Guild engaged in only *occasional* showings of adult films," that it is not considered an adult amusement establishment, and therefore the zoning ordinances governing such establishments are inapplicable to it. Majority Opinion, ¶ 26 (emphasis added). This language appears to broaden the discretion of theaters, auditoriums, bars, restaurants, and other commercial establishments to feature, present, and promote one or more of the activities defined as "adult amusement" pursuant to Albuquerque, N.M., Code of Ordinances, Section 14-16-1-5(B) (1974, as amended 2012), on an undefined basis. This erodes the zoning power of municipalities and creates ambiguity in the application of a clear-cut zoning ordinance. As the Court of Appeals acknowledged, "we generally defer to the zoning power of municipalities, even though it is inevitable that the lines drawn pursuant to that power will result in winners and losers." *Pangaea Cinema LLC*, 2012-NMCA-075, ¶ 44.

PETRA JIMENEZ MAES, Chief Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMSC-045

Filing Date: September 12, 2013

Docket No. 33,874

JOE ROBERT ENCINIAS,

Plaintiff-Petitioner,

v.

WHITENER LAW FIRM, P.A. and RUSSELL WHITENER,

Defendants-Respondents.

Will Ferguson & Associates
David M. Houliston
Albuquerque, NM

Roger V. Eaton
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for Amicus Curiae New Mexico Public Schools Insurance Authority

OPINION

CHÁVEZ, Justice.

This case concerns an action for legal malpractice based on the defendant law firm's failure to file suit within the statute of limitations. The viability of the malpractice suit hinges on whether the underlying cause of action, a claim against a school district for injuries inflicted on one student by another, would have been barred by sovereign immunity or permitted by the Tort Claims Act (TCA), NMSA 1978, §§ 41-4-1 to -30 (1953, as amended through 2013). We conclude that the plaintiff has raised a genuine issue of material fact regarding the viability of the underlying suit under the premises liability provision of the TCA, § 41-4-6(A). For this reason, we reverse the Court of Appeals and vacate the district court's grant of summary judgment. We also conclude that the plaintiff may pursue his misrepresentation claim against the defendant law firm.

BACKGROUND

The plaintiff, Joe Robert Encinias, claims that in late September of 2004, he was badly beaten by a classmate or classmates at Robertson High School in Las Vegas, New Mexico. The alleged attack itself took place outside of the school property, on a street that the school had cordoned off so that students could patronize food vendors there. Encinias claims that he lost consciousness during the attack, but he recalls waking up alone on the street. In early October, Encinias was treated at a hospital for severe internal injuries that he alleges were sustained during the beating.

In January 2006, Encinias and his parents retained defendants Russell Whitener and the Whitener Law Firm (collectively Whitener) to represent Encinias in a possible suit against Robertson High School and the Las Vegas School District. However, Whitener never filed a complaint in the case.[1] In April 2006, the Encinias family contacted Whitener to check on the status of the case. Whitener asked the family to re-submit its paperwork. Encinias alleges that Whitener lost the documents that Encinias had submitted earlier and had done no work on the case. In the fall of 2006, the Encinias family contacted Whitener over concerns that the statute of limitations would run out. In fact, the statute of limitations ran two years after the incident, in late September or early October 2006.[2] *See* § 41-4-15(A) (stating that TCA suits must be "commenced within two years after the date of occurrence resulting in loss, injury or death"), *held unconstitutional on other grounds as recognized by Jaramillo v. Heaton*, 2004-NMCA-123, ¶ 4, 136 N.M. 498, 100 P.3d 204. A Whitener attorney testified that he and his colleagues had been aware of the statute of limitations, but they had allowed it to run because they were concerned about the strength of the case and thought that they could get around the statute. In August 2007, Whitener realized that the case was barred. In February 2008, the firm decided not to pursue the suit. Whitener waited until the spring of 2008 to tell the family that it had missed the statute of limitations.

In October 2008, Encinias filed suit against Whitener for legal malpractice and misrepresentation, among other claims that have subsequently been abandoned. The district court granted summary judgment for Whitener on all claims. The Court of Appeals affirmed the grant of summary judgment, *Encinias v. Whitener Law Firm, P.A.*, 2013-NMCA-003, ¶ 2, 294 P.3d 1245, and rejected Encinias's malpractice claim, concluding that the TCA did not waive the school district's

[1]Encinias alleges that a complaint was filed, and the Court of Appeals echoes that claim, *Encinias v. Whitener Law Firm, P.A.*, 2013-NMCA-003, ¶ 1, 294 P.3d 1245, but the record neither supports that allegation nor contains a copy of any complaint in the case, and New Mexico court records do not reflect that any complaint was filed.

[2]The first amended complaint states that the incident occurred on or about September 30, 2004. If the incident occurred on September 29, as Encinias alleges in his brief, the statute of limitations would have ended on September 29, 2006. *See* § 41-4-15(A) (establishing two-year statute of limitations). However, if the incident occurred on September 30, Section 41-4-15(A) would place the end of the limitations period on September 30, 2006, which was a Saturday. According to Rule 1-006(A) NMRA, if the end of a limitations period falls on a Saturday or Sunday, the limitations period is extended to the next business day. Therefore, if the incident occurred on September 30, the limitations period ran on Monday, October 2, 2006.

immunity, *id.* ¶ 24. The Court also held that summary judgment was proper on Encinias's misrepresentation claim because Encinias did not establish that he suffered damages as a result of Whitener's misconduct. *Id.* ¶ 29.

Encinias argues on appeal for reversal of summary judgment on both the legal malpractice and the misrepresentation claims. This Court granted certiorari.

DISCUSSION

"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. This is a legal question that is reviewed de novo on appeal. *Id.*; *Juneau v. Intel Corp.*, 2006-NMSC-002, ¶ 8, 139 N.M. 12, 127 P.3d 548. When we review a motion for summary judgment, we "view the facts in a light most favorable to the party opposing summary judgment and draw all reasonable inferences in support of a trial on the merits." *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280 (internal quotation marks and citation omitted). Courts in New Mexico "view summary judgment with disfavor," *id.* ¶ 8, and consider it "a drastic remedy to be used with great caution." *Pharmaseal Labs., Inc. v. Goffe*, 1977-NMSC-071, ¶ 9, 90 N.M. 753, 568 P.2d 589.

A. Malpractice claim

Encinias argues that Robertson High School and the school district were negligent in failing to protect him from being attacked, and further negligent in failing to respond to the attack or notice that it had occurred. Encinias also argues that he would have had a viable cause of action against the school district for negligent maintenance or operation of a public building. *See* § 41-4-6(A). However, due to Whitener's failure to file a complaint within the two-year statute of limitations, any claim Encinias had against the school district is now barred. *See* § 41-4-15(A) (establishing statute of limitations for the TCA). Encinias now attempts to recover from Whitener on a theory of legal malpractice.

The elements of legal malpractice are: "(1) the employment of the defendant attorney; (2) the defendant attorney's neglect of a reasonable duty; and (3) the negligence resulted in and was the proximate cause of loss to the [client]." *Sharts v. Natelson*, 1994-NMSC-114, ¶ 10, 118 N.M. 721, 885 P.2d 642 (alteration in original) (internal quotation marks and citation omitted). The only issue before this Court is the third element, loss to the client. Under New Mexico law, the plaintiff in a legal malpractice suit must prove this loss by demonstrating by a preponderance of the evidence that he or she would have prevailed on the underlying claim. *Richardson v. Glass*, 1992-NMSC-046, ¶ 10, 114 N.M. 119, 835 P.2d 835 ("Plaintiff had the burden of not only proving her counsel's negligence, but also that she would have recovered at trial in the underlying action."); *George v. Caton*, 1979-NMCA-028, ¶¶ 46-47, 93 N.M. 370, 600 P.2d 822 ("In a malpractice action . . . the measure of damages is the value of the lost claims, i.e., the amount that would have been recovered by the client except for the attorney's negligence."); *see also Andrews v. Saylor*, 2003-NMCA-132, ¶ 15, 134 N.M. 545, 80 P.3d 482 (stating that the preponderance-of-the-evidence standard is applicable to legal actions). In this case, the Court of Appeals held that because sovereign immunity would have barred the underlying

claim, the loss of the claim did not damage Encinias. *See Encinias*, 2013-NMCA-003, ¶ 24 (holding that school did not waive its immunity and affirming summary judgment in favor of Whitener).

In general, the state is immune from tort suits. Section 41-4-4(A). The exceptions to this rule are the specific waivers of immunity contained in the TCA. *Id.* The provision of the TCA at issue in this case is Section 41-4-6(A), which waives the state's immunity for injury "caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment or furnishings." We have stated that this section "may appropriately be termed a 'premises liability' statute." *Bober v. N.M. State Fair*, 1991-NMSC-031, ¶ 27, 111 N.M. 644, 808 P.2d 614. The Legislature has declared that "[l]iability for acts or omissions under the Tort Claims Act shall be based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty," § 41-4-2(B), so we infer that the waiver of liability in Section 41-4-6(A) incorporates the concepts of premises liability found in our case law.

Like common-law premises liability, the waiver in Section 41-4-6(A) is not limited to injuries occurring on the defendant's property. *Bober*, 1991-NMSC-031, ¶ 27; *see also Stetz v. Skaggs Drug Ctrs., Inc.*, 1992-NMCA-104, ¶ 9, 114 N.M. 465, 840 P.2d 612 ("[*Bober*] merely applied the traditional rule that on[e] who owns or controls property has a duty to refrain from creating or permitting conditions on such property that will foreseeably lead to an unreasonable risk of harm to others beyond the property's borders."). Also like common-law premises liability, the waiver is not limited to injuries resulting from a physical defect on the premises. *Bober*, 1991-NMSC-031, ¶¶ 26-27; *Callaway v. N.M. Dep't of Corr.*, 1994-NMCA-049, ¶ 17, 117 N.M. 637, 875 P.2d 393 (noting this Court's rejection of a narrow "physical defect" standard); *see also Coca v. Arceo*, 1962-NMSC-169, ¶ 2, 19, 71 N.M. 186, 376 P.2d 970 (reversing summary judgment for the defendant where the plaintiff alleged that the owners of the bar should have protected the plaintiff from battery by another patron). Instead, we interpret Section 41-4-6(A) broadly to waive immunity "where due to the alleged negligence of public employees an injury arises from an unsafe, dangerous, or defective condition on property owned and operated by the government." *Castillo v. Cnty. of Santa Fe*, 1988-NMSC-037, ¶ 3, 107 N.M. 204, 755 P.2d 48. "The waiver applies to more than the operation or maintenance of the physical aspects of the building, and includes safety policies necessary to protect the people who use the building." *Upton v. Clovis Mun. Sch. Dist.*, 2006-NMSC-040, ¶ 9, 140 N.M. 205, 141 P.3d 1259.

Such a condition could take many forms. In *Castillo*, we held that wild dogs roaming the grounds of a housing project "could represent an unsafe condition upon the land" that would waive the defendant county's immunity under Section 41-4-6(A). 1988-NMSC-037, ¶¶ 1, 9. In *Bober*, the potentially unsafe condition was a high volume of cars exiting a parking lot after a concert. 1991-NMSC-031, ¶ 2. A city creates a dangerous condition if it operates a municipal swimming pool with an inadequate number of lifeguards. *Leithead v. City of Santa Fe*, 1997-NMCA-041, ¶ 15, 123 N.M. 353, 940 P.2d 459. A prison creates a dangerous condition by allowing known gang members to congregate in a recreation room that is shielded from observation by guards. *Callaway*, 1994-

NMCA-049, ¶¶ 4, 19. Most recently, this Court held that a public school creates an unsafe condition for its students when it actively violates the students' individualized education programs and then fails to follow proper emergency procedures. *Upton*, 2006-NMSC-040, ¶¶ 18-21.

This Court has also made it clear that there are limits to the waiver of immunity in Section 41-4-6(A). In *Espinoza v. Town of Taos*, 1995-NMSC-070, ¶ 16, 120 N.M. 680, 905 P.2d 718, this Court held that a municipal summer camp's failure to supervise young children at a playground did not waive the town's immunity from suit. *Id.* ¶¶ 4, 16. The child was injured when he fell off a slide, not by any defect in the playground itself, and the playground was generally "a safe area for children." *Id.* ¶¶ 3, 14. Whitener correctly cites *Espinoza* for the proposition that there is no waiver of immunity under Section 41-4-6(A) for negligent supervision. Whitener also relies on *Pemberton v. Cordova*, 1987-NMCA-020, 105 N.M. 476, 734 P.2d 254, for the proposition that a school does not waive its immunity by failing to prevent one student from attacking another.

However, neither *Espinoza* nor *Pemberton* precludes recovery under the facts argued by Encinias. Whitener is correct that *Pemberton* states a general rule that schools are not liable for one student's battery of another. *See* 1987-NMCA-020, ¶ 3. *Pemberton* is based on a narrow reading of Section 41-4-6(A) that has since been discredited, *Williams v. Cent. Consol. Sch. Dist.*, 1998-NMCA-006, ¶ 14, 124 N.M. 488, 952 P.2d 978, but its central premise, when analyzed under a premises liability theory, is still valid. *See Espinoza*, 1995-NMSC-070, ¶ 9 (discussing *Pemberton*). There can be no waiver under Section 41-4-6(A) without a dangerous condition on the premises, and a single act of student-on-student violence does not render the premises unsafe. In *Pemberton*, one student "allegedly struck and injured" another, but there does not seem to have been any allegation of a broader pattern of violence at the school, or any facts to suggest that the school, in the exercise of ordinary care, could have discovered that the violence was about to occur and that the school could have protected the student from injury. 1987-NMCA-020, ¶ 2. The plaintiff in *Pemberton* specifically alleged negligent supervision but did not allege that the school was negligent in failing to exercise reasonable care to discover and prevent dangerous conditions caused by people on its premises. *See Coca*, 1962-NMSC-169, ¶ 7 (explaining the duty of a business to protect patrons from the harmful acts of third persons if the business could have discovered that such acts were about to be done, and could have protected against the injury.). By contrast, in the present case, Encinias has produced an affidavit from an assistant principal at the school stating that "[t]he area where the vendor trucks parked was considered to be a 'hot zone' for potential trouble around the school. 'Hot zones' were locations where students congregate and where there has been a history of problems that exist such as fights."

While one student's battery of another would not generally waive a school's immunity under Section 41-4-6(A), a school's failure to address a pattern of student violence in a particular area might create an unsafe condition on the premises. Our case law has been clear that failure to address a pattern of violence is *not* merely failure to supervise. In *Espinoza*, this Court explained that negligent supervision did not waive the town's immunity because the playground maintained by the town was essentially safe: "There were no

gangs threatening the children, no free-roaming dogs, no influx of traffic, no improperly maintained equipment." 1995-NMSC-070, ¶ 14. A municipality has no duty to supervise children in an ordinary playground, but *Espinoza* suggests that it would have a duty to exercise reasonable care to prevent injury to visitors from harmful conditions, including a pattern of violence in playgrounds. *Id.* Similarly, *Callaway* establishes that a prison may not release new inmates into a poorly monitored space with known gang members and items that could be used as weapons. 1994-NMCA-049, ¶¶ 4, 19. This does not create a waiver of immunity for negligent supervision, but it does mean that prisons cannot turn a blind eye to threats to their inmates' safety. *See Espinoza*, 1995-NMSC-070, ¶ 13 (stating that *Callaway* "did not rely on negligent supervision," but rather on the fact that the prison's security practices endangered the entire prison population).

In enacting the TCA, the Legislature expressed an intent to waive the state's immunity in situations that would subject a private party to liability under our common law. *See* § 41-4-2(B) (incorporating "traditional tort concepts"). Therefore, the facts of a case will support a waiver under Section 41-4-6(A) if they would support a finding of liability against a private property owner.

New Mexico law imposes a duty on businesses to protect their patrons from "the harmful acts of third persons if, by the exercise of reasonable care, the proprietor could have discovered that such acts were being done or about to be done, and could have protected against the injury by controlling the conduct of the other patron." *Coca*, 1962-NMSC-169, ¶ 7 (citing II Restatement of Torts § 348 (1934) (now covered by Restatement (Second) of Torts § 344 (1965)). It is well established that the owner of a business may be liable even for a third party's intentional criminal acts on its premises. In *Reichert v. Atler*, 1994-NMSC-056, ¶¶ 1, 3, 117 N.M. 623, 875 P.2d 379, this Court held that the owners of a bar reputed to be dangerous were liable for their proportion of fault in a wrongful death suit arising from a murder in the bar. The bar had "a reputation as being one of the most dangerous bars in Bernalillo County and [had] been . . . the scene of numerous shootings, stabbings, and assaults," but the bar had no professional security personnel on staff. *Id.* ¶ 3. On the evening of the murder, a bar employee witnessed the victim and the perpetrator arguing, and the victim told the employee that he feared the perpetrator, the perpetrator carried a gun, and he had heard that the perpetrator had killed someone. *Id.* ¶ 2. The employee did not call the police or otherwise protect the victim, and the courts held that the owners of the bar "breached a duty to provide adequate security to protect patrons of the bar, including [the victim], who was specifically a foreseeable victim of harm." *Id.* ¶¶ 2, 4, 12.

The operative principle that justified holding business proprietors liable in *Reichert*, 1994-NMSC-056, and *Coca*, 1962-NMSC-169, is the same as the principle found in *Espinoza*, 1995-NMSC-070, ¶ 14, and *Callaway*, 1994-NMCA-049, ¶¶ 4, 19. Just as businesses must exercise reasonable care to discover and prevent dangerous conditions caused by people on their premises, *Coca*, 1962-NMSC-169, ¶ 7, so must the government. The question is not about general supervision; the question under a premises liability theory of recovery involving third-party conduct is whether the government exercised reasonable care to discover and prevent dangerous conditions caused by

people on its premises. The government does not "have the duty to do everything that might be done," § 41-4-2(A), but it can be liable for the violent acts of a third party if the government reasonably should have discovered and could have prevented the incident. Like businesses, the government's "duty to protect visitors arises from a foreseeable risk that a third person will injure a visitor and, as the risk of danger increases, the amount of care to be exercised . . . also increases." *See* UJI 13-1320 NMRA.

In this case, Encinias has established a genuine issue of material fact as to whether there was a dangerous condition on the premises of the high school. The assistant principal's statement that the area where the attack occurred was a "hot zone" for student violence would not be enough, taken alone, to support a finding of liability, but it *is* enough to raise questions about the degree of student violence and the school's efforts to discover and prevent student violence in that area. *See Upton*, 2006-NMSC-040, ¶ 25 (holding that the plaintiffs' claim would constitute a waiver of immunity under Section 41-4-6(A) *if proven* and that the plaintiffs were entitled to have a factfinder consider the claim). The assistant principal was in a position to know the location and frequency of student fights, and her affidavit, although vague, was more than a mere repetition of the allegations in the complaint. *See Edward C. v. City of Albuquerque*, 2010-NMSC-043, ¶ 43, 148 N.M. 646, 241 P.3d 1086 ("The non-moving party may not simply rely upon the allegations of his or her pleading."). Encinias has also introduced evidence that the area in which the alleged beating occurred was not monitored by security cameras and that the security guards and teachers assigned to monitor the area were not present at the time of the attack. If Encinias is able to demonstrate that there was a history of student violence in the area by the food trucks, the lack of security measures could indicate that the school failed to address the problem. We hold that Encinias has established the existence of a genuine issue of material fact regarding the presence of a dangerous condition at the school, and summary judgment on the malpractice claim is therefore inappropriate. We therefore reverse the Court of Appeals on this issue.

B. Misrepresentation claim

Encinias also appeals the summary judgment against him on his misrepresentation claim. Encinias describes three grounds for the misrepresentation claim: (1) Whitener failed to pursue the underlying claim in a timely fashion, (2) Whitener failed to inform Encinias that no work had been done on the case, and (3) Whitener failed to inform Encinias when it became clear that the statute of limitations had passed. The first theory was not set forth in Encinias's amended complaint, and we do not consider it here. *See Albuquerque Prods. Credit Ass'n v. Martinez*, 1978-NMSC-003, ¶ 14, 91 N.M. 317, 573 P.2d 672 ("It is fundamental that matters not brought into issue by the pleadings and upon which no decision of the trial court has been sought, or fairly invoked, cannot be raised on appeal." (citing NMSA 1953, § 21-12-11 (1974), *now codified as amended in* Rule 12-216 NMRA)). We consider the other two theories below.

In New Mexico, "misrepresentation can be by either commission or omission." *In re Stein*, 2008-NMSC-013, ¶ 35, 143 N.M. 462, 177 P.3d 513. The Court of Appeals acknowledged that the record suggests that Whitener might have improperly withheld information from Encinias. *Encinias*, 2013-NMCA-003, ¶ 29. However, the Court of

Appeals also held that Encinias had failed to demonstrate that he suffered damages as a result of the misrepresentation, and affirmed summary judgment against him for that reason. *Id.* ¶¶ 29-30. We reverse the Court of Appeals for two reasons. First, with the malpractice claim reinstated, it is not necessarily accurate that Encinias "was not damaged by Whitener's misrepresentations." *Id.* ¶ 30. Second, contrary to the holding of the Court of Appeals, *id.*, damages are not an element of fraudulent misrepresentation. *Garcia v. Coffman*, 1997-NMCA-092, ¶¶ 34-36, 124 N.M. 12, 946 P.2d 216; *see also* UJI 13-1633 NMRA (stating that "[a] party is liable for damages proximately caused by [his] [her] fraudulent misrepresentation," but not listing damages in elements of fraudulent misrepresentation).

Encinias argues that Whitener committed misrepresentation by failing to inform Encinias that the statute of limitations had passed. (It is not clear from the first amended complaint whether Encinias alleged negligent or fraudulent misrepresentation, but he clarified before the district court that he alleged both types.) Encinias's first amended complaint states that Whitener should have made this disclosure in July of 2007. However, the statute of limitations ran in the fall of 2006. Even if Whitener had informed Encinias of the problem during the summer of 2007, the suit would still have been barred. As the Court of Appeals observed, Encinias does not allege that he suffered any damages other than the loss of the underlying suit. *Encinias*, 2013-NMCA-003, ¶ 30. Therefore, compensatory damages are not available for misrepresentation under this theory. Without actual damages, Encinias cannot pursue a claim for negligent misrepresentation; nominal and punitive damages are not available in a negligence action absent proof of actual damages. *Sanchez v. Clayton*, 1994-NMSC-064, ¶ 14, 117 N.M. 761, 877 P.2d 567.

However, nominal and punitive damages are available in suits for intentional torts, and Encinias can pursue both in a claim for fraudulent misrepresentation. *Id.* ¶ 15. To prove fraudulent misrepresentation, a plaintiff must demonstrate by clear and convincing evidence that (1) a representation of fact was made (either by commission or by omission) that was not true, (2) the defendant made the representation knowingly or recklessly, (3) the representation was made with the intent to induce the plaintiff to rely upon it, and (4) that the plaintiff relied on the representation. UJI 13-1633; *see also Stein*, 2008-NMSC-013, ¶ 35 (misrepresentation may be committed by omission). In this case, Whitener realized in the summer of 2007 that the case was barred, but Whitener did not disclose this fact to Encinias until the spring of 2008. Encinias has produced some evidence suggesting that by delaying this disclosure, Whitener made it more difficult for Encinias to collect evidence supporting his underlying claim for the malpractice suit. If the Whitener law firm knowingly or recklessly led Encinias to believe that his suit was still viable, then Encinias might be entitled to nominal or punitive damages. Encinias requested punitive damages in his complaint, so these damages should not come as a surprise to Whitener.

Whitener's sole defense to the misrepresentation claim before this Court is that the Encinias family knew the statute of limitations, so they could not have been misled. However, Whitener specifically (and erroneously) assured the family in October 2006 that the statute of limitations had *not* run, and it is reasonable for clients to assume that they can rely on their attorneys' legal advice.

On this record, Encinias has raised a genuine issue of material fact about whether Whitener fraudulently misrepresented the viability of Encinias's underlying claim.

Encinias also alleges that Whitener committed misrepresentation by failing to inform the Encinias family in May 2006 that the firm had not done any work on Encinias's case. Encinias's mother states in an affidavit that she approached Whitener in April 2006, several months after retaining Whitener, and asked what progress the firm had made on Encinias's case. Mrs. Encinias states that Whitener asked her to fill out new paperwork, including a new fee agreement. Encinias now alleges that the firm lost the family's paperwork and had done no work until after April 2006. Failure to inform Encinias that the firm had done no work on the case for three months could constitute fraudulent misrepresentation, if it was done knowingly or recklessly. *See generally* UJI 13-1633 (listing elements of fraudulent misrepresentation).

The failure to disclose also might constitute negligent misrepresentation under Restatement (Second) of Torts § 552 (1977). *See Stotlar v. Hester*, 1978-NMCA-067, ¶ 13, 92 N.M. 26, 582 P.2d 403 (adopting the Restatement standard); *see also* UJI 13-1632 NMRA, Comm. Commentary. If Whitener had informed Encinias that the firm had lost Encinias's paperwork and had done no work on his case, Encinias could have retained a different attorney and filed a complaint before the statute of limitations ran. Therefore, Whitener's failure to disclose that no work had been done damaged Encinias's ability to pursue his case against the school district. Encinias has raised a genuine issue of material fact about whether his claim would have been successful, and he can seek compensatory damages from Whitener for the loss of the underlying case.

CONCLUSION

We hold that Encinias has raised a genuine issue of material fact as to whether there was a dangerous condition on the premises of Robertson High School that would have waived immunity under Section 41-4-6(A). Therefore, summary judgment in favor of Whitener is inappropriate. Furthermore, we hold that Encinias should be able to pursue his misrepresentation claim, both because he might have suffered actual damages as a result of Whitener's misrepresentations and because fraudulent misrepresentation does not require actual damages. For these reasons, we reverse the Court of Appeals and vacate the district court's grant of summary judgment so that Encinias may pursue his misrepresentation claim against Whitener.

IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

RICHARD C. BOSSON, Justice

CHARLES W. DANIELS, Justice

TIMOTHY L. GARCIA, Judge
Sitting by designation

Certiorari Granted, September 20, 2013, No. 34,271

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-093

Filing Date: July 10, 2013

Docket No. 30,917

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

DONNIE SILVAS,

Defendant-Appellant.

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Santa Fe, NM

for Appellee

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B. Douglas Wood III, Assistant Appellate Defender
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for Appellant

OPINION

ZAMORA, Judge.

Defendant appeals his convictions for trafficking by possession with intent to distribute methamphetamine and for conspiracy to commit trafficking, the result of a surveillance of his residence during a drug investigation in Lordsburg, New Mexico. Defendant argues that evidence should have been suppressed because it was seized through a pretextual stop of a car in which his co-

conspirator was a passenger, and through a warrantless search of his motel room. He also appeals the denial of a motion for a new trial and asserts that his conspiracy conviction should be reversed. We affirm in part and reverse in part.

BACKGROUND

We briefly set out the facts of the case and a time line of events to assist in our analysis below. On March 14, 2008, as part of a narcotics task force operation in Hidalgo County, New Mexico, local officers and agents were monitoring suspected drug activity at the American Motor Inn in Lordsburg. Suspecting a drug deal had taken place in the hotel room of Defendant, and under operational orders to stop every car emerging from the hotel, authorities followed Patricia Ortega as she left the hotel parking lot as a passenger in a white car. Lordsburg Police Sergeant Plowman, assisting in the investigation, looked for probable cause to pull the car over, eventually making a traffic stop for failure to use a turn signal. Ortega and her daughter, also a passenger, got out of the car and went to her motel room at the nearby Budget Motel. The driver of the car was issued a warning, and no evidence was seized from his car. However, Sergeant Plowman remained in contact with Ortega as authorities sought to obtain a search warrant for her motel room. Before the search warrant was obtained, Ortega emerged from her room with 1.7 grams of methamphetamine and told police that she had bought it earlier in the day from Defendant in his room at the American Motor Inn.

Later that day, again while waiting for a warrant but before one was issued, law enforcement agents forced their way into Defendant's hotel room while he was gone. No evidence was seized during the search of the hotel room. Defendant was arrested three days later and charged with trafficking a controlled substance and with conspiracy in connection with the March 14 sale of narcotics to Ortega.

After a two-day jury trial, Defendant was convicted on both counts. He brought this appeal.

DISCUSSION

Defendant raises four issues on appeal: (1) he contends that a pretextual stop of the car in which Ortega was a passenger produced evidence that should have been suppressed; (2) he argues for another order of suppression because of a warrantless search of his hotel room; (3) he challenges the district court's denial of a motion for a new trial based on the State's failure to disclose an audio recording of Defendant's post-arrest interview with police; and (4) he contends that Wharton's Rule bars a conspiracy conviction under this set of circumstances. We address each issue in order.

I. Pretextual Stop

Defendant first argues that the traffic stop of the car in which Ortega was a passenger was pretextual and that any evidence recovered in connection with that traffic stop should be suppressed. *See* N.M. Const. art. II, § 10 ("The people shall be secure in their persons, papers, homes[,] and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without . . . a written showing of probable cause[.]"); *State v. Ochoa*, 2009-NMCA-002, ¶ 25, 146 N.M.

32, 206 P.3d 143 (defining a pretextual stop as "a detention supportable by reasonable suspicion or probable cause to believe that a traffic offense has occurred, but [also] is executed as a pretense to pursue a 'hunch,' a different more serious investigative agenda for which there is no reasonable suspicion or probable cause"). Defendant contends that Sergeant Plowman was under orders to assist in the investigation of Defendant's alleged drug operation by stopping the drivers of cars seen coming out of the American Motor Inn parking lot and committing a traffic violation. The State counters by challenging Defendant's standing to contest the constitutionality of a traffic stop at which he was not present. The State also asserts that even if Defendant was able to establish standing, evidence supports the district court's finding that the traffic stop was constitutionally sound.

Defendant filed a motion to suppress all physical evidence and statements obtained as a result of the pretextual stop, citing both the New Mexico Constitution and the Fourth Amendment of the United States Constitution. The district court denied the motion to suppress, concluding that the stop was not pretextual.

A. Standard of Review

"A district court's denial of a motion to suppress will not be reversed if it is supported by substantial evidence, the only exception being if the ruling was incorrectly applied to the facts." *State v. Van Dang*, 2005-NMSC-033, ¶ 6, 138 N.M. 408, 120 P.3d 830. The district court's findings of fact are reviewed for substantial evidence, and the court's application of the law to those facts is reviewed de novo. *State v. Soto*, 2001-NMCA-098, ¶ 6, 131 N.M. 299, 35 P.3d 304.

B. Standing

We first address the threshold issue raised by the State: whether Defendant has standing to ask the court to suppress evidence related to a pretextual stop of a car in which he was not riding and did not have a possessory interest. "Standing is . . . a substantive doctrine that identifies those who may assert rights against unlawful searches and seizures." *State v. Porras-Fuerte*, 119 N.M. 180, 183, 889 P.2d 215, 218 (Ct. App. 1994). Whether a party has standing to bring forth a claim is a question of law that we review de novo. *Nass-Romero v. Visa U.S.A. Inc.*, 2012-NMCA-058, ¶ 6, 279 P.3d 772.

We have previously stated that "standing is a fact-based issue on which [a d]efendant must be given the opportunity to present evidence to the [district] court." *State v. Leyba*, 1997-NMCA-023, ¶ 6, 123 N.M. 159, 935 P.2d 1171. At the district court's first hearing on Defendant's motion to suppress evidence, the State asserted that Defendant lacked standing to contest the seizure of evidence from Ortega after the stop of the car in which she had been a passenger. The district court found that Defendant had standing to contest the pretextual stop because there was a "nexus" between the stop of the car in which Ortega was a passenger and the arrest of Defendant.

In order to establish standing, a defendant "must demonstrate that he had a subjective expectation of privacy that society will recognize as reasonable." *Van Dang*, 2005-NMSC-033, ¶ 7. "Generally, one who owns, controls, or lawfully possesses property has a legitimate expectation of privacy." *Id.* ("[H]olding that where occupants of a car asserted neither a property nor a possessory interest in the automobile, nor an interest in

the property seized, they were not entitled to suppression of seized items in their subsequent robbery prosecution." (citing *Rakas v. Illinois*, 439 U.S. 128, 148 (1978)). Generally, defendants, when asserting their constitutional rights against searches and seizures, cannot do so vicariously through others. *State v. Munoz*, 111 N.M. 118, 119, 802 P.2d 23, 24 (Ct. App. 1990) ("An individual aggrieved by an illegal search only through the introduction of evidence secured by a search of a third person's premises or property has not suffered an infringement of his [F]ourth [A]mendment rights."); *United States v. Padilla*, 508 U.S. 77, 81 (1993) (per curiam) ("It has long been the rule that a defendant can urge the suppression of evidence obtained in violation of the Fourth Amendment only if that defendant demonstrates that *his* Fourth Amendment rights were violated by the challenged search or seizure."); *Rakas*, 439 U.S. at 134 ("A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed."). In *Van Dang*, our Supreme Court held that even the driver of a rental car did not have standing to challenge a search of the car when that person was neither the one who rented the car nor listed as an authorized driver. 2005-NMSC-033, ¶ 10, n.1.

We have previously stated that a passenger in a car cannot assert the Fourth Amendment rights of the driver of the car to be free from unreasonable searches and seizures. *State v. Chapman*, 1999-NMCA-106, ¶ 26, 127 N.M. 721, 986 P.2d 1122 ("Even if the driver could raise an invasion of her own Fourth Amendment rights because of a possessory interest in the car, an issue that we do not address or decide, that right may not be vicariously asserted by [the d]efendant."). In *Chapman*, this Court referenced *Alderman v. United States*, 394 U.S. 165, 174 (1969) (plurality opinion) as recognition for the principle that "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." 1990-NMCA-106, ¶ 26. The *Chapman* Court refused to review the merits of that defendant's argument. *Id.*

Defendant urges us to analyze the issue of standing to contest a pretextual stop under the New Mexico Constitution. He argues that Article II, Section 10 of the New Mexico Constitution provides broader protections than does the Fourth Amendment of the United States Constitution, therefore, it provides a broader basis for us to find he has standing. We note that our Supreme Court has made reference to the fact that the Court has not yet analyzed the subject of pretextual stops under our state Constitution. *State v. Gonzales*, 2011-NMSC-012, ¶ 19, 150 N.M. 74, 257 P.3d 894 (Bosson, J., concurring). Our Supreme Court was recently faced with the argument that "an arrest was unconstitutional because the stop was pretextual at its inception and therefore unconstitutional under Article II, Section 10 of the New Mexico Constitution citing . . . *Ochoa*[.]" *Schuster v. N.M. Dep't of Taxation and Revenue*, 2012-NMSC-025, ¶ 32, 283 P.3d 288. The Court did not address the constitutional argument but instead applied the *Ochoa* test. We decline to undertake such an analysis here.

In the case before us, Defendant was not a passenger in the car that was stopped; in fact, he was not present at the scene and played no role in the supposed pretextual stop and subsequent seizure of evidence from Ortega, who had already left the scene of the

traffic stop. Defendant had no possessory interest in the car. Even the evidence seized from Ortega had a tenuous connection to the stop of the car. Ortega had returned to her own motel room. She voluntarily emerged with the methamphetamine, which she voluntarily handed over to the police without the need to conduct a search. She also voluntarily provided unsolicited details about the purchase of the drugs. *See State v. Soto*, 2008-NMCA-032, ¶ 25, 143 N.M. 631, 179 P.3d 1239 ("Where the acquisition of evidence is sufficiently removed from the unlawful police conduct, the deterrent value of excluding it is diminished." (internal quotation marks and citation omitted)).

At the suppression hearing, the district court ruled that Defendant had standing and that the stop of the car Ortega was riding in was not pretextual. We will affirm a ruling of a district court if it is right for any reason. *See Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154 ("This Court may affirm a district court ruling on a ground not relied upon by the district court, [but] will not do so if reliance on the new ground would be unfair to appellant." (alteration in original) (internal quotation marks and citation omitted)).

Defendant's challenge to the pretextual stop of the car amounts to a vicarious assertion of the Fourth Amendment rights of others and his motion challenges the stop to the extent that it led to the seizure of evidence. Consistent with *Chapman*, we conclude that Defendant does not have standing to argue a motion to suppress evidence that may have resulted from the pretextual stop of a car in which he neither was a driver, a passenger, nor did he have a possessory interest in the car. 1999-NMCA-106, ¶ 26. Therefore, it was not error for the district court to deny the motion to suppress evidence that may have resulted from the pretextual stop alleged by Defendant.

II. Warrantless Search

Defendant next argues that a warrantless search of his hotel room was improper and that the district court should have granted his motion to suppress evidence. He acknowledges that no evidence was obtained from the hotel room but he contends that the infringement on his constitutional right to be free from unreasonable searches and seizures was "so egregious" that "some form of remedy" should be crafted, such as "the suppression of all evidence obtained through the entire unconstitutional investigation in this matter." We employ the same standard of review articulated above to analyze this second suppression issue.

The district court took note of the State's argument that the pretrial motion to suppress was the subject of eight hours of hearings, and Defendant failed to raise the issue of the hotel room search during that time. The court then observed that the motion to suppress late in the proceedings appeared to be moot, stating that it:

> has to consider that the defense is asking for suppression of physical evidence. There was no physical evidence obtained in that particular search. The physical evidence had been obtained prior to that. That has been discussed and argued substantially prior to the beginning of trial today.
>
> The [c]ourt finds that the motion to suppress filed at this late date . . . still would not produce anything

such that it would justify a granting of that motion; therefore, the [c]ourt will deny the motion to suppress.

A reviewing court will not find reversible error unless that error results in prejudice to the defendant. *Kysar v. BP Am. Prod. Co.*, 2012-NMCA-036, ¶ 21, 273 P.3d 867 ("[E]ven if a district court makes an erroneous evidentiary ruling, it does not constitute reversible error unless it results in prejudice."); Rule 11-103(A) NMRA ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party[.]"); *City of Albuquerque v. Ackerman*, 82 N.M. 360, 365, 482 P.2d 63, 68 (1971) ("Harmless error in the exclusion of evidence cannot be the basis for a new trial."). Courts in other jurisdictions have held that a motion to suppress evidence is moot when there is no evidence seized. *United States v. Stearn*, 597 F.3d 540, 545 n.3 (3d Cir. 2010) (ruling that "because no evidence was seized at this location, this point is moot"); *United States v. Fernandez*, 500 F. Supp. 2d 661, 667 (W.D. Tex. 2006); *State v. Keawe*, 108 P.3d 304, 310 (Haw. 2005); *People v. Finch*, 854 N.Y.S.2d 885, 890 (2008); *State v. Sweet*, 675 P.2d 1236, 1240 (Wash. Ct. App. 1984) ("Because there was no evidence to suppress, there can be no error.").

In the case before us, no evidence was seized after the officers' unwarranted entry into Defendant's hotel room. Thus, no prejudice was suffered by Defendant. Therefore, the district court did not err in denying the motion to suppress evidence pertaining to the hotel room search.

III. Failure to Disclose Recording

After his conviction, Defendant moved for a new trial, claiming that he was prejudiced by the State's failure to produce the police-taped recording of Defendant's interview while in custody. An audio recording of part of the interview turned up after trial and was provided to defense counsel. Defendant filed his motion for a new trial on September 30, 2010. The State filed its response on October 15, 2010. Three days later, the district court entered its judgment and sentence. Defendant filed his notice of appeal on November 17, 2010. We were unable to find an order entered by the district court denying Defendant's motion for new trial in the court record. However, common sense would dictate that the court's entry of the judgment and sentence indirectly denies the motion.

We will not reverse a district court's denial of a motion for a new trial absent a manifest abuse of discretion. *State v. Moreland*, 2008-NMSC-031, ¶ 9, 144 N.M. 192, 185 P.3d 363. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the [district] court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason." *Id.* (internal quotation marks and citation omitted).

Our courts have adopted a three-part test to determine whether the loss of evidence by the State that leads to a deprivation is considered reversible error. *State v. Chouinard*, 96 N.M. 658, 661, 634 P.2d 680, 683 (1981). A court must address whether "[(]1) [t]he [s]tate either breached some duty or intentionally deprived the defendant of evidence; [(]2) [t]he improperly 'suppressed' evidence must have been material; and [(]3) [t]he suppression of this evidence prejudiced the defendant." *Id.* The purpose of the test "is

to assure that the [district] court will come to a determination that will serve the ends of justice." *Id.* Factors to consider in applying the test "include the presence of negligence or bad faith on the part of the state, the importance of the evidence to the defendant's case, and the amount of other evidence of guilt adduced at trial." *State v. Bartlett*, 109 N.M. 679, 680, 789 P.2d 627, 628 (Ct. App. 1990).

In the case before us, we focus on the first and third *Chouinard* factors. The State asserts that Defendant was alerted to the existence of a recorded interview by police two years before trial; that the State repeatedly tried to obtain the recorded statement before trial; that it was believed that the statement had been recorded over and lost; and that the recording had been misplaced by law enforcement officers but was found after the trial ended. There was no evidence presented of bad faith on the part of the State.

If Defendant cannot show that he was prejudiced by the misplacement of the recording, then his argument fails. To show prejudice, Defendant must establish that he was unable to receive a fair trial without the missing evidence. *State v. Sanchez*, 1999-NMCA-004, ¶ 8, 126 N.M. 559, 972 P.2d 1150.

> To establish . . . whether a defendant will be able to receive a fair trial in the face of lost evidence . . . , a court must . . . weigh the lost evidence against the remaining evidence available to the defendant, including his or her ability to cross-examine witnesses and to use the loss of the evidence in preparing a defense.

Id. ¶ 9.

An officer present at the interview, Agent De La Garza, testified as a witness at trial and was cross-examined by Defendant's counsel, including specific questions about the missing recording and the notes taken by him and a fellow officer. The ability to cross-examine an officer who conducted the interview and recording satisfies one factor from *Sanchez* in assessing whether Defendant had the opportunity to receive a fair trial in the face of lost evidence.

Defendant argues that he could have used the recording at trial to draw out additional evidence and to try to undermine Agent De La Garza's account of the interview. At trial, the State submitted as evidence the notes of two officers who were present at the interview with Defendant. According to those notes, Defendant, after signing a waiver of his *Miranda* rights, confessed to selling methamphetamine out of his room at the American Motor Inn, including to Ortega; named the sources of the drugs he obtained; and provided details of his weekly income from selling drugs. On the recording, which is of poor quality and captures only a seven-minute portion of the interview, Defendant is heard telling the officers that he sold about one ounce of methamphetamine per week to bring in about $1,800 in order to finance his expenses living at the hotel and that one of his sources for drugs was a man named Robert Munoz. When he testified at trial, Defendant denied selling drugs or knowing Munoz. The recording, had it been available at trial, would have supported the notes and testimony of the officers and would have undercut the claims of Defendant. The absence of the recording may have benefitted Defendant because it was not available to question or to impeach his testimony.

Applying *Chouinard*, we conclude

that Defendant has not established that he was prejudiced by the discovery and disclosure of a portion of his recorded statement with law enforcement officers after the trial had concluded. Therefore, it was not an abuse of discretion for the district court to deny his motion for a new trial based on the late disclosure of the recording.

IV. Conspiracy Conviction and Wharton's Rule

Finally, Defendant asserts that Wharton's Rule precludes a charge of conspiracy in this case because the underlying charge of trafficking—involving an exchange of drugs between Defendant and Ortega—is confined to only those two participants and constitutes the same conduct as that underlying the conspiracy. The State contends that Defendant failed to preserve this issue and that we should review such an unpreserved issue for fundamental error. Defendant contends that Wharton's Rule is a matter of statutory interpretation that involves questions of double jeopardy and double jeopardy can be raised at any time. Our United States Supreme Court has specifically held that "Wharton's Rule does not rest on principles of double jeopardy[.]" *Iannelli v. United States*, 420 U.S. 770, 782 (1975). "[Wharton's Rule] has current vitality only as a judicial presumption [of merger], . . . in the absence of legislative intent to the contrary." *State v. Carr*, 95 N.M. 755, 766, 626 P.2d 292, 303 (Ct. App. 1981), *overruled on other grounds as recognized by State v. Olguin*, 120 N.M. 740, 906 P.2d 731 (1995).

Because this issue was not properly raised below and is raised for the first time on appeal, it will be reviewed for fundamental error. *State v. Cunningham*, 2000-NMSC-009, ¶ 8, 128 N.M. 711, 998 P.2d 176. The doctrine of fundamental error exists only "for the protection of those whose innocence appears indisputabl[e], or open to such question that it would shock the conscience to permit the conviction to stand." *Cunningham*, 2000-NMSC-009, ¶ 13 (internal quotation marks and citation omitted); *see also State v. Orosco*, 113 N.M. 780, 784, 833 P.2d 1146, 1150 (1992) (finding fundamental error upon one or more of the following bases: "there has been a miscarriage of justice;" the question of the defendant's guilt "is so doubtful that it would shock the conscience" to allow his conviction to stand; or "substantial justice has not been done"). We will reverse for fundamental error when the foundation or basis of a defendant's case or an essential right in a defense is affected. *Id.* ¶ 13.

Wharton's Rule states that "an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the particular crime is of such a nature as to necessarily require the participation of two persons for its commission." *State v. Smith*, 102 N.M. 512, 514, 697 P.2d 512, 514 (Ct. App. 1995) (internal quotation marks and citation omitted). By raising Wharton's Rule, the issue before us is whether the crime of trafficking by possession with intent to distribute methamphetamine and conspiracy to commit trafficking become one crime.

"The classic Wharton's Rule offenses–adultery, incest, bigamy, [dueling]–are crimes that are characterized by the general congruence of the agreement and the completed substantive offense." *Iannelli*, 420 U.S. at 782. In these instances, "[t]he parties to the agreement are the only persons who participate in [the] commission of the substantive offense[.]" *Id.* Wharton's Rule applies:

> (1) when the parties to the agreement are the only persons who participate in the offense and the immediate consequences of the crime rest only on themselves; and (2) when the agreement that attends the substantive offense does not appear likely to pose the sort of threat to society that the law of conspiracy was designed to avert.

Smith, 102 N.M. at 514, 697 P.2d at 514. "The most important factor . . . is that concerted action must be logically necessary to the substantive offense. This is similar to saying that conspiracy and the substantive offense are the same crime[.]" *Id.*

There are only two cases in New Mexico that have addressed Wharton's Rule, *Carr* and *Smith*. In *Carr,* this Court upheld the conspiracy conviction of a defendant who wrote a prescription that was used to pass a controlled substance on to other purchasers. 95 N.M. at 766, 626 P.2d at 303. In *Carr*, we stated:

> The harm involved in the substantive offense [of] trafficking in controlled substances . . . is not restricted to the parties to the agreement. The parties to the agreement to traffic are usually not the only persons who participate in commission of the substantive offense: the controlled substances are passed on, as happened here, *to other purchasers*. The agreement that attends the substantive offense does seem to pose those threats to society that the law of conspiracy seeks to avert. An agreement to commit trafficking may very well produce agreements to engage in a more general pattern of criminal conduct as the controlled substances are diverted from their legitimate medical uses.

Id. (emphasis added).

The *Carr* court found that because of the difference between the parties' agreement to traffic, where the parties were not the only persons who participated in the commission of the substantive offense and traditional Wharton's Rule offenses, it declined to give any significant weight to the Rule's presumption.

In *Smith*, the defendant was convicted of harboring a felon and conspiracy to harbor a felon. This Court found that the two crimes did not merge under the facts of the case because the immediate consequences of harboring a felon rests on society, and the harboring of the felon would be more successful if the felon knew someone was helping, thus, the danger to society is increased. *Smith*, 102 N.M. at 514, 697 P.2d at 514. The *Smith* court agreed that a narrow interpretation of Wharton's Rule was required. *Id.* at 515, 697 P.2d at 515; *see United States v. Previte*, 648 F.2d 73, 77 (1st Cir. 1981) (stating Wharton's Rule is, to some extent, a relic of the discredited merger doctrine and should be interpreted narrowly).

The federal courts have had more opportunity to address this issue. In *Iannelli*, 420 U.S. 770, the United States Supreme Court carefully analyzed the Rule's justification and its proper role in federal law. *Iannelli* involved the violation of a federal gambling statute. This statute made it a crime for five or more persons to be involved in a gambling business prohibited by state law. The Supreme Court revisited the history of Wharton's Rule which was captured in

Wharton's Treatises; its relationship, if any, with double jeopardy; third party exceptions; and legislative intent. *Id.* at 775, 782, 787. *Iannelli* explained that the Rule is essentially an aid for purposes of determining legislative intent. The Supreme Court found that if Congress intended to prevent the possibility of prosecuting conspiracy offenses by merging them into the specific gambling statute, it would have explicitly said so. It did not, therefore, Congress intended each offense to be independent of the other.

The Eighth Circuit Court of Appeals has held that when more than two persons were involved in a conspiracy to distribute drugs, Wharton's Rule does not apply. *United States v. Jones*, 801 F.2d 304, 311 (8th Cir. 1986). On the other hand, the Eighth Circuit Court of Appeals has also held Wharton's Rule does apply when a "mere sales agreement with respect to contraband does not constitute a conspiracy; there must be some understanding 'beyond' that before the evidence can support a conviction for conspiracy." *United States v. West*, 15 F.3d 119, 121 (8th Cir. 1994) (citing to *United States v. Prieskorn*, 658 F.2d 631 (8th Cir. 1981)). This principle has been applied in *State v. Roldan*, 714 A.2d 351, 356 (N.J. Super. Law Div. 1998), which held that "[a] simple agreement to buy drugs is insufficient to establish a conspiracy between the seller and the buyer." The *Roldan* court further stated the concerted criminal activity must go "beyond the kind of simple agreement inevitably incident to the sale of contraband[.]" *Id.*

The case at hand is distinguishable from *Carr* as there were not multiple purchasers involved, only Ortega. The charge of trafficking with intent to distribute methamphetamine required the participation of the same two people, Defendant and Ortega, who were also involved in any alleged conspiracy to sell the same drugs. Defendant, a single seller, and Ortega, a single buyer, engaging in a single drug transaction. They were the only parties that participated in this particular transfer of two plastic-wrapped packages of methamphetamine. This simple agreement to buy drugs is insufficient to also establish a separate conspiracy between the seller and the buyer. *See West*, 15 F.3d at 121; *see also United States v. Hunter*, 478 F.2d 1019, 1024 (7th Cir.) (1973) (stating that the required participation of the same two persons of a conspiracy is analogous to an individual attempt to commit an individual offense).

Unless the Legislature explicitly states otherwise, Wharton's Rule supports the presumption that the Legislature did not intend separate punishments for the conspiracy and the completed substantive crime. *Iannelli*, 420 U.S. at 785-86. After a careful reading of NMSA 1978, Sections 30-28-2 (1979) and 30-31-20 (2006), we are unable to find any indication that the New Mexico Legislature stated a different intention.

The agreement between Defendant and Ortega to sell and purchase the methamphetamine was logically necessary for the transferring of the methamphetamine from one to another. Additionally, the immediate consequences of the crime rested only on Ortega, who received a twenty-seven-year sentence, and Defendant, who was convicted of not only the trafficking but the conspiracy as well. Their limited agreement between themselves does not appear likely to pose the sort of threat to society that the law of conspiracy was designed to avert.

Our Legislature has not explicitly

stated that there should be separate punishments for the conspiracy to commit trafficking and the completed charge of trafficking, where Defendant's and Ortega's concerted actions were necessary for the completion of the trafficking offense. Wharton's Rule precludes Defendant's charge of conspiracy. Substantial justice has not been done where Defendant has been convicted and sentenced for trafficking by possession with intent to distribute methamphetamine (eighteen years, two years parole) and for conspiracy to commit trafficking (nine years, two years parole) when the two charges, in this case, have merged. It is therefore fundamental error to impose a conspiracy conviction as well.

CONCLUSION

For the foregoing reasons, we affirm Defendant's conviction for trafficking, reverse his conviction for conspiracy, and remand to the district court to dismiss Defendant's conspiracy conviction and corresponding sentence.

IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

TIMOTHY L. GARCIA, Judge

Certiorari Granted, September 20, 2013, No. 34,287

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-094

Filing Date: July 23, 2013

Docket No. 31,297

HAMAATSA, INC., a New Mexico not-for-profit corporation,

Plaintiff-Appellee,

v.

PUEBLO OF SAN FELIPE, a federally recognized Indian tribe,

Defendant-Appellant.

The Simons Firm, LLP
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for Appellee

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for Appellant

OPINION

SUTIN, Judge.

Hamaatsa, Inc. filed an action against the Pueblo of San Felipe seeking a declaration that a road, which crossed Pueblo property that was acquired in fee simple, was a state public road. In an interlocutory appeal, the Pueblo contends that the district court erred in denying the Pueblo's motion to dismiss for lack of subject matter jurisdiction based on sovereign immunity. We affirm.

BACKGROUND

The Complaint

Hamaatsa's complaint requests the district court to declare Northern R.S. 2477 (the road) a state public road. Further, as a member of the public and the owner of property contiguous to the road, Hamaatsa requests that the court declare that the Pueblo cannot restrict its use of the road. The complaint was filed in response to the Pueblo's notice to Hamaatsa threatening to restrict Hamaatsa's use of the road.

The complaint alleges that the road was owned by the Bureau of Land Management (the BLM) since at least 1906, was constructed and used by the public from at least 1935 up to and including the date of the complaint, and was used by Hamaatsa and its predecessors in interest to access their property. The complaint further alleges that under 43 U.S.C. § 932 (1866), Rev. Stat. § 2477, the road has been a public road since at least 1906 or 1935, and because it was not retained by the United States, the road became vested in the public as a state highway, and it remains a public state highway because it has not been vacated. Although § 932 was repealed, the road was constructed before the repeal in 1976, the repeal expressly preserved the road, and the road remained a state highway pursuant to NMSA 1978, Section 67-2-1 (1905). The property through which the road runs was conveyed to the Pueblo in December 2001 by the BLM in fee simple. In that conveyance, the BLM reserved an easement along the road "for the full use as a road by the United States for public purposes." By quitclaim deed, the BLM purported, in September 2002, to quitclaim its interest in the road to the Pueblo.

The Motion to Dismiss

The Pueblo moved, pursuant to Rule 1-012(B)(1) NMRA, to dismiss Hamaatsa's complaint for lack of subject matter jurisdiction based on the doctrine of tribal sovereign immunity. At a district court hearing on the Pueblo's motion to dismiss, much of the argument involved the question whether the action was in personam or in rem.

The Pueblo argued that the action was for injunctive relief, affecting and altering the Pueblo's interest in the fee simple parcel it had acquired, and that the action was therefore in personam. The Pueblo also argued that Hamaatsa's action was in essence a quiet title action that would "materially. . . affect the ownership interest of the Pueblo in its property" and that "[t]o declare that the road, in fact, exists fundamentally alters the Pueblo's property interest, ownership interest, in this property."

Hamaatsa responded that its action was for non-monetary declaratory relief and that it was not seeking an injunction. Hamaatsa's counsel stated, "We have simply sought a declaration that this is a public road." Hamaatsa presented argument and authority to support its view that the action was not, as the Pueblo had asserted, a quiet title action, but was an action purely in rem, arguing that "[t]his case is all about in rem jurisdiction."

The court ruled simply that the action was in rem, and the court denied the Pueblo's motion to dismiss. Additionally, the court granted leave for an interlocutory appeal.

The Interlocutory Appeal

This case comes to this Court through interlocutory appeal based on the district court's denial of the Pueblo's Rule 1-012(B)(1) motion to dismiss for lack of subject matter jurisdiction. Our review is de novo. *Lu v. Educ. Trust Bd. of N.M.*, 2013-NMCA-010, ¶ 7, 293 P.3d 186.

As conceded by the Pueblo in its argument to the district court and in its brief in chief on appeal, the Pueblo's purely facial challenge to jurisdiction compels us to accept as true all material allegations of the complaint and also to construe the complaint in favor of the complaining party. *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 5, 130 N.M. 368, 24 P.3d 803; *see Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995) (stating that when analyzing a facial attack under Federal Rule of Civil Procedure 12(b)(1), the court "must accept the allegations in the complaint as true"); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1102 (D. Colo. March 25, 2013) (same); *In re Polyurethane Foam Antitrust Litig.*, 799 F. Supp. 2d 777, 791, 793 (N.D. Ohio 2011) (indicating that allegations that may seem conclusory in nature but are supported by factual allegations are not to be denied the presumption of truth but instead may be examined by the court "to gauge whether the remaining allegations, accepted as true, plausibly give rise to entitlement to relief" (internal quotation marks and citation omitted)). The Pueblo nowhere argues that any particular allegation in the complaint is unworthy of being accepted as true for the purposes of the motion to dismiss. Accordingly, as this case comes to us, Hamaatsa's action is to declare the road, alleged and conceded for the purposes of the motion to be a state public road, to be a state public road.[1]

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[1] The state or county has exclusive regulatory authority and jurisdiction over its roads. N.M. Const. art. V, § 14 (creating the state transportation commission); § 67-2-1 ("All roads and highways, except private roads, established in pursuance of any law of New Mexico, and roads dedicated to public use, that have not been vacated or abandoned, and such other roads as are recognized and maintained by the corporate authorities of any county in New Mexico, are hereby declared to be public highways."); NMSA 1978, § 67-3-11 (2003) (authorizing the state transportation commission "to make all rules and regulations as may be necessary to carry out the provisions of" the Highway Department Organization

We review the district court's denial of the Pueblo's motion to dismiss as the case has come to us, but we decide it on grounds different from those relied upon by the district court. *See Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154 (indicating that the appellate courts may affirm a district court's ruling on a ground different from that relied on by the district court). We see no reason to address the issue of in rem versus in personam, or, if the action is in rem, whether the Pueblo can nevertheless seek dismissal for lack of subject matter jurisdiction based on sovereign immunity.[2] By choosing to make its attack on Hamaatsa's complaint a purely facial one, thereby conceding the truth of the allegations in the complaint, the Pueblo admitted the existence of a state public road. As we indicate later in the body of this Opinion, there is no basis for a sovereign immunity defense at this stage of the proceeding where it is presumed that the road in question is a state public road.

DISCUSSION

Notwithstanding its purely facial attack and admission of the truth of the allegations of the complaint, including that the road is a state public road, the Pueblo argues that sovereign immunity bars the action for lack of subject matter jurisdiction. Yet, the Pueblo offered no evidence of any property or governance interests whatsoever in the road or that the road, concededly a state public road, would threaten or otherwise affect its sovereignty. The Pueblo has not attempted any proof, for example, that even though the road is a state public road, a district court's declaration of that fact would in any way undermine the Pueblo's sovereignty or sovereign authority, infringe on any right of the Pueblo to govern itself or control its internal relations, or otherwise adversely affect its governmental, property, or treasury interests.[3]

To our knowledge, no United States Supreme Court case or body of federal law, and no New Mexico case, is clearly determinative or constitutes binding precedent favoring the Pueblo under the particular circumstances here. This Court has considerable difficulty, at this Rule 1-

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Act, NMSA 1978, §§ 67-1-1 to -3 (1977)); NMSA 1978, § 67-3-12 (2006) (describing the powers and duties of the state transportation commission); *Jicarilla Apache Tribe v. Bd. of Cnty. Comm'rs*, 1994-NMSC-104, ¶ 21, 118 N.M. 550, 883 P.2d 136 (explaining that state courts have exclusive jurisdiction over matters relating to public roads).

[2] If the attack is facial only, and if the facts alleged show that in personam jurisdiction is involved, it seems clear that, facially, the tribe should likely be dismissed. If the attack is factual, and if the facts show that in personam jurisdiction is involved, it seems clear that factually, the tribe should likely be dismissed. If the attack is facial only, and if the facts alleged show that in rem jurisdiction is involved, the court would then be required to resolve whether the tribe should nevertheless be dismissed pursuant to its sovereign immunity. The same holds if the attack is factual and the facts show that in rem jurisdiction is involved. If persuasive law holds that even if the facts alleged or proved show that the action is in rem, the tribe still has sovereign immunity, it would appear that there is no reason to ever get into the question whether the action is in rem, since whether it is in rem or not in rem would be irrelevant.

[3] Hamaatsa argued in the district court that it filed the action upon being threatened with blockage because the Pueblo was in the process of attempting to have its fee simple parcel placed in trust. We proceed with the understanding that, as the Southwest Director of the Bureau of Indian Affairs (BIA) concluded, favorably to Hamaatsa, the BIA would not take the fee simple parcel in trust until the present dispute over the road is resolved. *See Hamaatsa, Inc. v. Sw. Reg'l Dir.*, 55 IBIA 132, 132-33 (2012) (order vacating decisions and dismissing appeal).

012(B)(1) stage, construing the law to require dismissal for lack of subject matter jurisdiction based on sovereign immunity. In our view, the Pueblo's invocation of sovereign immunity in a facial challenge at this stage of the proceedings is not supported by law.

"Tribal sovereign immunity is 'a necessary corollary to Indian sovereignty and self-governance[.]' " *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 928 (7th Cir. 2008) (quoting *Three Affiliated Tribes of Ft. Berthold Res. v. Wold Eng'g, P.C.*, 476 U.S. 877, 894 (1986)). If common law sovereign immunity from suit is an attribute of sovereignty, one must wonder why immunity should exist in this case where the Pueblo has shown no other attribute of sovereignty—such as a property, treasury, or governance interest in or sovereign authority over the road—that could bestow immunity from inherent sovereignty. In this case, with no evidence showing that a significant aspect of the Pueblo's inherent sovereignty or sovereign authority is adversely affected, we see no justifiable basis on which the Pueblo can draw immunity from inherent sovereignty.

In our view, the issue in this case is a matter of state law, over which the district court has jurisdiction. *See Jicarilla Apache Tribe*, 1994-NMSC-104, ¶¶ 10-19 (stating that "[w]hether an easement—a public road at that—exists across land held in fee simple is clearly an issue of state law" and holding that Public Law 280 did not preempt "state[]court jurisdiction to adjudicate a preexisting interest in land that is purchased by an Indian tribe and then held by the tribe in fee simple"). We note that the United States Supreme Court supports the view that an Indian tribe cannot exercise jurisdiction over conduct on a public roadway. *See Montana v. United States*, 450 U.S. 544, 566 (1981) (making clear that a tribe cannot regulate the conduct of persons on land it does not own when there is no direct effect on the political or economic security of the tribe); *see also Nevada v. Hicks*, 533 U.S. 353, 359 (2001) ("Where nonmembers are concerned, the 'exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.' " (quoting *Montana*, 450 U.S. at 564)); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 647 (2001) (holding, based on *Montana*, that "Indian tribes lack civil authority over . . . tribal attempts to tax nonmember activity occurring on non-Indian fee land"); *Strate v. A-1 Contractors*, 520 U.S. 438, 442, 459 (1997) (holding that a tribe cannot exercise jurisdiction and does not have adjudicatory authority over conduct on a public highway that runs through its reservation); *South Dakota v. Bourland*, 508 U.S. 679, 694-95, 697 (1993) (explaining that a tribe did not have authority to regulate non-Indian hunting and fishing on land that was located within the reservation, but was owned by the United States); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 430 (1989) (stating, in the context of a zoning dispute, that "[t]he governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land").

The legal and practical effect of permitting the Pueblo to assert sovereign immunity in its facial challenge and at this stage of the proceedings would be to permit the Pueblo to assert control over a state public road, yet to deprive Hamaatsa, or any other member of the public, any opportunity for legal recourse. As noted in *Jicarilla Apache Tribe*, we must be mindful of the practical

effects of the application of sovereign immunity as an unfettered bar to claims that patently do not infringe on tribal sovereignty. *See* 1994-NMSC-104, ¶ 21 (explaining that "[b]ecause it would concern a matter of state law, a complaint involving a disputed easement across a tract of land . . . would not be entertained in federal district court[,]" and the practical effect of depriving state courts of jurisdiction over such matters is the "anomalous result" of denying tribal and non-tribal parties a judicial forum in which to settle their respective property rights). *Jicarilla Apache Tribe* supports the conclusion, at least in this stage of the proceedings, that the issue regarding the road is one of state law over which the district court has jurisdiction.

Further, to permit a sovereign immunity bar at this facial attack stage of the proceedings would mean that, based on nothing more than the bare assertion of sovereignty, a pueblo or tribe could acquire, in fee simple, subject to an existing state public road, one or more lot or acreage virtually anywhere in New Mexico and immediately deny the motoring public and all neighboring property owners access. And it means that no person whose property is, and perhaps has been for generations, contiguous to a public road before a fee simple acquisition of property through which the road runs, could invoke state court jurisdiction to at least obtain a judicial declaration, binding on a pueblo or tribe, that a road is a state public road. In our view, the Pueblo cannot have such carte blanche immunity on a Rule 1-012(B)(1) facial attack when it acquires property in fee simple subject to a state public road as it did here.

"Suits against Indian tribes . . . remain a highly contentious issue." Carole E. Goldberg, Rebecca Tsosie, Kevin K. Washburn & Elizabeth Rodke Washburn, *American Indian Law: Native Nations and The Federal System* 443 (6th ed. 2010). The circumstances here lend credence to Justice Stevens' words in his concurring opinion in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma (Potawatomi)*, 498 U.S. 505, 514 (1991) (Stevens, J., concurring).[4] He stated:

> The doctrine of sovereign immunity is founded upon an anachronistic fiction. In my opinion all Governments—federal, state, and tribal—should generally be accountable for their illegal conduct. . . . Nevertheless, I am not sure that the rule of tribal sovereign immunity extends to cases arising from a tribe's conduct of commercial activity outside its own territory[.]

Id. at 514-15 (Stevens, J., concurring) (citations omitted). Justice Stevens then correctly points out that the majority opinion in *Potawatomi* "in effect acknowledges limits to a tribe's sovereign immunity, although it does not do so explicitly." *Id.* at 515 (Stevens, J., concurring). Justice Stevens states:

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[4]While there exists no "unequivocal expression" in the present case manifesting an intent to relinquish tribal immunity, *see Potawatomi*, 498 U.S. at 509 (stating that to relinquish its immunity, a tribe's waiver must be "clear"), one would nevertheless reasonably inquire whether a tribe that obtains a property beyond reservation boundaries in fee simple, knowing that the property is subject to a state public road, should be held at least at the Rule 1-012(B)(1) facial attack stage to have knowingly relinquished immunity if sued for threatening to block or blocking public access, particularly when the access being blocked or threatened has not been shown to adversely affect significant tribal governance or other aspects of inherent tribal sovereignty.

> My purpose in writing separately is to emphasize that the Court's holding in effect rejects the argument that this governmental entity—the [t]ribe—is completely immune from legal process. By addressing the substance of the tax commission's claim for prospective injunctive relief against the [t]ribe, the Court today recognizes that a tribe's sovereign immunity from actions seeking money damages does not necessarily extend to actions seeking equitable relief.

Id. at 515-16 (Stevens, J., concurring).

The majority in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), discussed *Potawatomi* and in language also pertinent to the case now before this Court, stated:

> The doctrine of tribal immunity came under attack a few years ago in *Potawatomi* . . . . The petitioner there asked us to abandon or at least narrow the doctrine because tribal businesses had become far removed from tribal self-governance and internal affairs. We retained the doctrine, however, on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency. The rationale, it must be said, can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities. Justice [Stevens], in a separate opinion, criticized tribal immunity as founded upon an anachronistic fiction and suggested it might not extend to off-reservation commercial activity.
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> . . . In our interdependent and mobile society . . . tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.

Kiowa Tribe, 523 U.S. at 757-58 (internal quotation marks and citations omitted).

In spite of its misgivings, the Court in *Kiowa Tribe* invoked sovereign immunity. *Id.* at 753, 760. Keeping with his view of sovereign immunity, Justice Stevens, in his dissent in *Kiowa Tribe*, with Justices Thomas and Ginsburg joining, stated:

> Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the [s]tate. There is no federal statute or treaty that provides petitioner . . . any immunity from the application of Oklahoma law to its off-reservation commercial activities. Nor, in my opinion, should this Court extend the judge-made doctrine of sovereign immunity to pre-empt the authority of the state

> courts to decide for themselves whether to accord such immunity to Indian tribes as a matter of comity.
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> . . . .
>
> In sum, we have treated the doctrine of sovereign immunity from judicial jurisdiction as settled law, but in none of our cases have we applied the doctrine to purely off-reservation conduct. Despite the broad language used in prior cases, it is quite wrong for the Court to suggest that it is merely following precedent, for we have simply never considered whether a tribe is immune from a suit that has no meaningful nexus to the tribe's land or its sovereign functions. Moreover, none of our opinions has attempted to set forth any reasoned explanation for a distinction between the [s]tates' power to regulate the off-reservation conduct of Indian tribes and the [s]tates' power to adjudicate disputes arising out of such off-reservation conduct. Accordingly, while I agree with the Court that it is now too late to repudiate the doctrine entirely, for the following reasons[,] I would not extend the doctrine beyond its present contours.

Id. at 760, 764 (internal quotation marks and citations omitted). The majority's concerns and Justice Stevens' dissent in *Kiowa Tribe*, read fully, should stimulate analysts to reasonably view the case now before this Court as one beyond the periphery of immunity, requiring affirmance of the district court's denial of the Pueblo's motion to dismiss.

This is not a case in which a party suing a tribe has engaged in a contractual or commercial relationship with that tribe. No one is forced to enter into such relationships. Those entering into such relationships do so voluntarily, by choice, and they should know the legal risks. When a tribe acquires property in fee simple that envelops a state public road and subsequently denies access to existing property owners or other individuals, those excluded are innocent citizens who had no choice and cannot be held to have known or anticipated a legal risk of access denial and a dispositive facial assertion of sovereign immunity by an Indian tribe.

In sum, the allegations of the complaint survive the Rule 1-012(B)(1) facial attack. The allegations in the complaint were presumed to be true for the purposes of the motion, and the Pueblo has not shown any factual, legal, or rational basis on which to invoke sovereign immunity in the face of those allegations—including the allegation, undisputed and fully supported by other allegations, that the road is a state public road.

CONCLUSION

We affirm the district court's denial of the Pueblo's motion to dismiss under Rule 1-012(B)(1), and we remand for further proceedings.

IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

I CONCUR:

J. MILES HANISEE, Judge

JAMES J. WECHSLER, Judge, dissenting.

WECHSLER, Judge (dissenting).

Regardless of the stage of a proceeding, the doctrine of tribal sovereign immunity applies to insulate Indian tribes from being required to defend actions in state court. I therefore believe that this Court must analyze the issues presented to the district court. When I conduct that analysis, I conclude that the Pueblo's motion to dismiss should have been granted. I thus respectfully dissent.

TRIBAL SOVEREIGN IMMUNITY

My concerns with the Majority Opinion focus on its discussion of (1) *Kiowa Tribe*, 523 U.S. 751, (2) cases that do not involve tribal sovereign immunity, (3) the equities of this case, and (4) the timing of the Pueblo's motion. I discuss each below.

As to my first concern, the doctrine of tribal sovereign immunity is a matter of federal law and is not subject to diminution by the state. *Armijo v. Pueblo of Laguna*, 2011-NMCA-006, ¶ 10, 149 N.M. 234, 247 P.3d 1119. The doctrine recognizes that "Indian tribes are domestic dependent nations that exercise inherent sovereign authority over their members and territories. Indeed, Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* (internal quotation marks and citation omitted). Sovereign immunity not only embraces the long-recognized principle that a tribe is immune from suit, but it likewise protects a tribe from being hauled into court. *Cf. Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) (stating, in the context of state sovereign immunity, that sovereign immunity "does not exist solely in order to prevent federal-court judgments that must be paid out of a [s]tate's treasury[;] it also serves to avoid the indignity of subjecting a [s]tate to the coercive process of judicial tribunals at the instance of private parties[.]" (alteration, internal quotation marks, and citations omitted); *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992) (holding that tribal sovereign immunity barred a subpoena directing the tribe's director of social services to produce records based on the rationale that tribal sovereign immunity encompasses immunity from the "processes of the court").

As the Majority Opinion states, there are issues concerning the scope of tribal sovereign immunity when tribes or pueblos engage in activities that extend beyond the original purpose of the doctrine to safeguard tribal self-governance. *See Kiowa Tribe*, 523 U.S. at 757-58 (stating that the rationale supporting the tribal immunity doctrine "can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities"). *Kiowa Tribe* involved a commercial transaction in which the Kiowa Tribe executed and delivered a promissory note beyond its tribal lands to make payments also beyond its tribal lands. *Id.* at 753-54. After the tribe defaulted, the payee sued the tribe in state court. *Id.* at 754. Despite the *Kiowa Tribe* Court's expressing "reasons to doubt the wisdom of perpetuating the doctrine" of tribal sovereign immunity beyond the degree "needed to safeguard tribal self-governance[,]" and notwithstanding the different outcome suggested by Justice Stevens' dissent, the Court stated that "the doctrine of tribal immunity is settled law and controls in this case" and deferred to Congress to make any changes to the doctrine. *Id.* at 756-60. It reversed the decision of the Oklahoma Court of Civil Appeals that declined to recognize immunity. *Id.* at 760. The Court specifically held, as has our New

Mexico Supreme Court, that there are only two exceptions to tribal sovereign immunity: (1) Congress can expressly authorize suits against Indian tribes, and (2) a tribe can waive its sovereign immunity. *Id.* at 754; *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 7, 132 N.M. 207, 46 P.3d 668. The Majority Opinion relies on the dissent and the majority's concerns in *Kiowa Tribe*, as well as the concurring opinion in *Potawatomi*, 498 U.S. at 514-15, in which Justice Stevens expressed similar concerns about applying tribal sovereign immunity to tribal commercial activity "outside its own territory." I too recognize that the Pueblo's assertion of tribal sovereign immunity in this case appears to extend the doctrine beyond its original purpose of safeguarding tribal self-governance or the protection of reservation land or land held in trust by the United States. *See Kiowa Tribe*, 523 U.S. at 758. Yet, if the Supreme Court in *Kiowa Tribe*, despite its concerns, followed the doctrine, deferring to Congress to make changes, I do not believe that this Court is in a position to act differently.

Second, I have difficulty with the Majority Opinion's application of cases that do not involve issues of tribal sovereign immunity to support its holding. It concludes that "the issue in this case is a matter of state law," citing *Jicarilla Apache Tribe*, 118 N.M. at 554-57, 883 P.2d at 140-43. Majority Op. ¶ 14. But, our Supreme Court has expressly stated that "tribal immunity is a matter of federal law." *Gallegos*, 2002-NMSC-012, ¶ 7; *see also Kiowa Tribe*, 523 U.S. at 754-55 (applying federal law to determine the availability of tribal sovereign immunity). Further, *Jicarilla Apache Tribe* is a case of statutory construction, not tribal sovereign immunity. The issue was whether a federal statute, 28 U.S.C. § 1360(b) (1984), preempted state court jurisdiction of an Indian tribe's trespass action in a dispute concerning land purchased by the tribe. *Jicarilla Apache Tribe*, 118 N.M. at 551, 883 P.2d at 137. Our Supreme Court decided against preemption and considered a result that would have precluded the tribe from bringing its trespass action in state court to be an anomalous construction of the statute, supporting its conclusion. *Id.* at 558, 883 P.2d at 144. Because *Jicarilla Apache Tribe* does not address tribal sovereign immunity, it is not relevant to our analysis.

Similarly, the Majority Opinion cites *Montana* and several other United States Supreme Court cases for the proposition that the Court "supports the view that an Indian tribe cannot exercise jurisdiction over conduct on a public roadway." Majority Op. ¶ 14. However, *Montana* and the cases that follow it also do not involve issues of tribal sovereign immunity. See 450 U.S. at 557 (addressing "the question of the power of the [t]ribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the [t]ribe"). Rather, they involve the separate issue of a tribe's sovereign authority over tribal lands. *See Nevada*, 533 U.S. at 374 (relying on *Montana* and *Strate* and concluding that because the tribe lacked sovereign authority over the dispute, it "also lacked adjudicative authority to hear respondent's claim that those officials violated tribal law in the performance of their duties"); *Atkinson Trading*, 532 U.S. at 647 (addressing the sovereign authority of a tribe to tax nonmember activity occurring on non-Indian fee land); *Strate*, 520 U.S. at 442 (addressing "the adjudicatory authority of tribal courts over personal injury actions against defendants who are not tribal members"); *Bourland*, 508 U.S. at 681-82 (addressing "whether the [tribe] may regulate hunting and

fishing by non-Indians on lands and overlying waters located within the [t]ribe's reservation but acquired by the United States"); *Brendale*, 492 U.S. at 414 (addressing "whether the [tribe or the state], has the authority to zone fee lands owned by nonmembers of the [t]ribe located within the boundaries of the" reservation). "There is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa Tribe*, 523 U.S. at 755; *see also Armijo*, 2011-NMCA-006, ¶ 18 (stating that cases involving a tribe bringing suit to preclude a municipality from imposing taxes or other local laws "do not explore the boundaries of a tribe's *sovereign immunity* from suit[, and r]ather, they explore a tribe's *sovereign authority* over purchased lands").

Third, "sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation[, and,] it presents a pure jurisdictional question." *Armijo*, 2011-NMCA-006, ¶ 13 (internal quotation marks and citation omitted). The Majority Opinion stresses that the effect of permitting the Pueblo to exercise tribal sovereign immunity would be to deprive Hamaatsa and other members of the public the opportunity for legal recourse. Majority Op. ¶ 16. The Majority Opinion even speculates that if tribal sovereign immunity were to apply, a pueblo or tribe could acquire property "virtually anywhere in New Mexico" and deny access to the motoring public and neighboring property owners. *Supra*. This speculation assumes that a property owner has the ability to convey a dedicated public road and extends far beyond the facts of this case. But, more significantly, although I agree that Hamaatsa makes a strong equitable argument, as this Court stated in *Armijo*, it is not relevant to the jurisdictional question before us. *Id.*

Lastly, I do not agree with the Majority Opinion that the timing of the Pueblo's motion is relevant to our analysis. Whether under federal or state Rules of Civil Procedure, an assertion that tribal sovereign immunity requires dismissal of a lawsuit "is generally raised in a [R]ule [1-0]12([B])(1) motion[.]" *Cash Advance & Preferred Cash Loans v. State*, 242 P.3d 1099, 1113 (Colo. 2010); *see id.* (citing cases, including *Kiowa Tribe*, 523 U.S. at 754, in which the issue of tribal sovereign immunity has been raised by such motion). A motion under Rule 1-012(B) "shall be made before pleading if a further pleading is permitted." Thus, the Pueblo's motion was properly before the district court and necessitated a decision.

I therefore turn to the merits of the Pueblo's motion to dismiss. The district court denied that motion, reasoning that the complaint presented an in rem proceeding and that tribal sovereign immunity does not apply to in rem proceedings or to actions seeking non-monetary relief. I address these issues below, first considering whether this case presents an issue of in rem or in personam jurisdiction. Concluding that it is in rem, I then address whether tribal sovereign immunity applies to an in rem proceeding in which the subject is property held by an Indian tribe in fee simple. Lastly, I consider whether it applies to a complaint seeking declaratory relief.

IN REM

The Pueblo argues that the district court erroneously concluded that the complaint presented an in rem proceeding and that it need not exercise in personam jurisdiction over the Pueblo. In the Pueblo's view, Hamaatsa's complaint presents an action for declaratory and injunctive relief in which

Hamaatsa seeks to quiet the Pueblo's title to its land, and, therefore, as a quiet title action, it is not an in rem proceeding. Hamaatsa responds by arguing that the complaint does not seek to quiet title to the Pueblo's land, and, even assuming that the complaint presents a quiet title action under our quiet title statute, NMSA 1978, § 42-6-1 (1951), a quiet title action requires only in rem jurisdiction over the property at issue and not in personam jurisdiction over the property owner.

Our Supreme Court has stated that historically and "[m]ost commonly, in rem is defined as a proceeding or action instituted against a thing in contradistinction to in personam actions which are directed against a person." *State v. Nunez*, 2000-NMSC-013, ¶ 78, 129 N.M. 63, 2 P.3d 264 (internal quotation marks and citation omitted). "However, in modern jurisprudence, this definition is neither conceptually nor practically accurate." *Id.* In the modern sense, an in rem proceeding is one "[i]nvolving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing." *Black's Law Dictionary* 864 (9th ed. 2009). A "proceeding[] in rem [is one] which determine[s] interests in specific property as against the whole world." *State ex rel. Hill v. Dist. Court of Eighth Judicial Dist.*, 79 N.M. 33, 34, 439 P.2d 551, 552 (1968). In other words, "[a]n in rem action is directed, not *against* the property per se, but rather at resolving the interests, claims, titles, and rights in that property[, a]nd it is persons—as individuals, governments, corporations—who possess those interests, claims, titles, and rights." *Nunez*, 2000-NMSC-013, ¶ 78 (footnote omitted).

Applying these definitions, Hamaatsa's complaint presents an in rem proceeding regarding the road, in that the action pertains to the status of the road and seeks to declare the road to be public under state and federal law. Although the action affects the interests, claims, titles, and rights of the Pueblo to the road and to restrict access to the use of the road, the essential character of the complaint is a declaratory action seeking a determination of the status of property as against the whole world. The Pueblo's title to the road conveyed by the 2002 BLM quitclaim deed does not transform this action into an in personam action against the Pueblo. *See id.* I acknowledge the Pueblo's argument that because the prayer for relief asked the district court to declare "that [the Pueblo] cannot restrict [Hamaatsa's] use of the . . . [r]oad as a member of the public," Hamaatsa is seeking to enjoin the Pueblo from restricting access to the road and that such an injunction requires in personam jurisdiction. However, I do not read this language as seeking to enjoin the Pueblo from interfering with Hamaatsa's right to use the road. Even if the complaint sought to enjoin the Pueblo and other members of the public, the character of the action is nonetheless in rem. *See United States v. Oregon*, 657 F.2d 1009, 1015-16 (9th Cir. 1981) ("[A] court possessed of the res in a proceeding *in rem* . . . may enjoin those who would interfere with that custody." (internal quotation marks and citation omitted)).

The Pueblo cites to a trilogy of New Mexico cases involving the declaration of the right of the plaintiff to use a road on allegedly privately owned adjacent land under § 932 for the proposition that such actions are in personam. *See generally Lovelace v. Hightower*, 50 N.M. 50, 168 P.2d 864 (1946); *Wilson v. Williams*, 43 N.M. 173, 87 P.2d 683 (1939); *Quintana v. Knowles*, 115 N.M. 360,

851 P.2d 482 (Ct. App. 1993). The Pueblo argues that these cases do not contain "even the remotest suggestion that the exercise of jurisdiction by the [appellate courts] and the courts below was or could have been premised upon anything other than *in personam* jurisdiction." However, likewise, none of these cases addressed or considered the issue of whether the jurisdiction was in rem or in personam. *Grygorwicz v. Trujillo*, 2006-NMCA-089, ¶ 15, 140 N.M. 129, 140 P.3d 550 ("Cases are not authority for propositions not considered." (alteration, internal quotation marks, and citation omitted)).

The Pueblo next argues that the complaint presents an action to quiet title under the quiet title statute, Section 42-6-1, and that "[t]he [d]istrict [c]ourt's decision . . . runs afoul of the longstanding legal principle in our [s]tate that actions to quiet title . . . are actions *in personam*." For support, the Pueblo cites *State ex rel. Truitt v. District Court of Ninth Judicial District*, 44 N.M. 16, 23, 96 P.2d 710, 714-15 (1939), in which our Supreme Court stated that "actions affecting title to property within the jurisdiction of the court, but which is not seized or otherwise brought under the direct control of the court for disposition . . . are usually held to be in personam. Such are actions . . . to quiet title to property." However, Hamaatsa's complaint is not an action for quiet title, nor are quiet title actions considered actions in personam under New Mexico law.

In addition, in two later cases, our Supreme Court has limited the statement in *Truitt* that quiet title actions are in personam. In *Hill*, 79 N.M. at 34-35, 439 P.2d at 552-53, the Court noted that the facts of *Truitt* involved an attempted reformation of a sublease and that the Court addressed the issue of whether the plaintiff must personally serve the defendant in order for the district court to acquire jurisdiction. The Court stated that *Truitt* contained "various statements that were not necessary for that decision" and that "any discussion in the opinion of other types of action was dicta and will not be considered as binding upon us." *Hill*, 79 N.M. at 35, 439 P.2d at 553. In *Sullivan v. Albuquerque National Trust & Savings Bank of Albuquerque*, 51 N.M. 456, 462, 188 P.2d 169, 173 (1947), our Supreme Court also indicated that a complaint to quiet title is not an in personam action. Addressing whether "the plaintiff's [quiet title] complaint is accurately appraised as one in personam" so as to require personal service to the defendant, it concluded that "the complaint does have allegations sufficient to [be] treated as a complaint in a suit to quiet title to real estate" and that constructive service to the defendant was sufficient to withstand a motion to dismiss for lack of jurisdiction. *Id.* Implicit in this holding is the determination that a suit to quiet title is not an in personam proceeding and, instead, is an in rem proceeding.

Further, a complaint in which a plaintiff seeks to establish and use a public road under Section 932 is not a quiet title action. In *Kinscherff v. United States*, 586 F.2d 159, 160-61 (10th Cir. 1978) (per curiam), the Tenth Circuit held that a suit by the plaintiffs under § 932 is not a quiet title action under the federal quiet title statute, 28 U.S.C. § 2409(a) (1948). The court reasoned that in order for a plaintiff to bring a quiet title suit, the plaintiff must have an interest in or title to the property at issue that is superior to the defendant's interest. *Kinscherff*, 586 F.2d at 160. The court held that the plaintiffs did not claim an interest or title to the road they sought to have declared public because a member of the public does not have a real property interest in public roads under New

Mexico law. *Id.* at 161. Although the Pueblo attempts to distinguish *Kinscherff* on the ground that the Tenth Circuit addressed whether the complaint in *Kinscherff* was a quiet title suit under the federal quiet title statute, the New Mexico quiet title statute, Section 42-6-1, likewise requires that a plaintiff assert an "interest" in the property at issue. Therefore, Hamaatsa's complaint was not a complaint seeking to quiet title in the road under Section 42-6-1. Rather, Hamaatsa's complaint presented an in rem proceeding regarding the road.

I thus turn to whether the doctrine of sovereign immunity extends to in rem actions affecting property owned by a tribe in fee simple and whether tribal sovereign immunity applies to actions not seeking monetary relief. In this regard, the Pueblo argues that, even if the complaint presented an in rem cause of action, the district court erred by determining that tribal sovereign immunity did not bar Hamaatsa's complaint. It contends that the doctrine of tribal sovereign immunity applies to proceedings in rem when an Indian tribe owns the property that is subject to the proceeding and that the doctrine applies to proceedings not seeking monetary relief.

In Rem Proceedings and Tribal Sovereign Immunity

Oneida I

The Pueblo cites *Oneida Indian Nation of New York v. Madison County* (*Oneida I*), 401 F. Supp. 2d 219 (N.D.N.Y. 2005), *aff'd by* 605 F.3d 149 (2d Cir. 2010) (*Oneida II*), *vacated and remanded on other grounds by Madison County, New York v. Oneida Indian Nation of New York*, __ U.S. __, 131 S. Ct. 704 (2011) (per curiam), for the proposition that tribal sovereign immunity bars an in rem proceeding when an Indian tribe owns the property that is the subject of the proceeding. In *Oneida I*, an Indian tribe filed an action to prevent a county from assessing and enforcing property taxes against tribally owned property. *Oneida I*, 401 F. Supp. 2d at 222. After the United States Supreme Court, in a companion case, held that the county could lawfully impose a tax on the tribally owned property, the county filed a state court foreclosure action for unpaid taxes. *Id.* at 223. *See generally City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y. (Sherrill)*, 544 U.S. 197 (2005). The tribe sought to enjoin the county in federal district court from proceeding with the state foreclosure action. *Oneida I*, 401 F. Supp. 2d at 223.

Despite the Supreme Court's holding in *Sherrill* that a locality could impose a tax on tribally owned land, the federal district court held that tribal sovereign immunity barred the state foreclosure action against the tribally owned lands. *Oneida I*, 401 F. Supp. 2d at 230. In so deciding, the district court stated that "[i]t is of no moment that the state foreclosure suit at issue here is *in rem* [and w]hat is relevant is that the [c]ounty is attempting to bring suit against the [tribe]." *Id.* at 229. The district court relied on the United States Supreme Court decision in *Kiowa Tribe*, 523 U.S. at 755, which, as I have discussed, declined to abrogate the tribal immunity doctrine and deferred to Congress to do so, and *United States v. Nordic Village, Inc.*, 503 U.S. 30, 38 (1992), which declined to adopt an "*in rem* exception to the sovereign-immunity bar" in the context of state sovereign immunity under the Eleventh Amendment.

The Second Circuit affirmed the district court's decision. In affirming, the Second Circuit distinguished cases addressing

whether a locality could impose taxes on tribal lands, such as *Sherrill*, by noting that the freedom from state taxation derives from the tribal sovereign *authority* doctrine, not from the tribal sovereign *immunity* doctrine. *Oneida II*, 605 F.3d at 156-57. The Second Circuit noted that tribal sovereign authority and tribal sovereign immunity are two distinct doctrines with different historical origins and purposes. *Id.* at 157-58. In short, "*Sherrill* dealt with the right to demand compliance with state laws[, and i]t did not address the means available to enforce those laws." *Oneida II*, 605 F.3d at 159 (internal quotation marks and citations omitted).[5]

I agree with the district court in *Oneida I* that the doctrine of sovereign tribal immunity applies to an in rem proceeding involving tribally owned property. Regardless of whether the complaint is characterized as in rem, an action essentially to declare a tribally owned property a public highway is in effect an action against the tribe. *See Oneida I*, 401 F. Supp. 2d at 229 ("The [c]ounty cannot circumvent [t]ribal sovereign immunity by characterizing the suit as *in rem*, when it is, in actuality, a suit to take the tribe's property."). Further, because tribal sovereign immunity is a matter of federal law and "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests" in determining the bounds of the doctrine, courts exercise "caution . . . in this area." *Kiowa Tribe,* 523 U.S. at 759. If Congress wishes to authorize in rem suits against tribal property, it may do so. *See id.* ("Congress has occasionally authorized limited classes of suits against Indian tribes and has always been at liberty to dispense with such tribal immunity or to limit it." (internal quotation marks and citation omitted)).

Armijo

This Court has previously applied the tribal sovereign immunity doctrine in a case involving similar facts. In *Armijo*, the tribe purchased a ranch outside the boundaries of the tribe's reservation. 2011-NMCA-006, ¶¶ 2, 11. The plaintiff filed suit against the tribe and another individual (the cross-claimant) for quiet title. *Id.* ¶ 3. The cross-claimant filed a cross-claim against the tribe to quiet title to a portion of the ranch based on adverse possession and the tribe moved to dismiss under Rule 1-012(B)(1) based on sovereign immunity. *Armijo*, 2011-NMCA-006, ¶¶ 4, 7. The district court denied the tribe's motion to dismiss because the matter arose outside of the tribe's reservation. *Id.* This Court reversed the district court, applying tribal sovereign immunity and holding that doctrine applies "without drawing a distinction based on where the tribal activities occurred." *Id.* ¶ 12 (internal quotation marks and citation omitted). Although this Court recognized the district court's "concern with the equities of the case," it held that sovereign immunity is a jurisdictional question and not a discretionary doctrine. *Id.* ¶ 13. I acknowledge that *Armijo* does not address the specific issue before the Court in this case, whether tribal sovereign immunity applies to an in rem proceeding in

[5] Hamaatsa relies on footnote 7 in *Sherrill* to argue that *Sherrill* also addressed tribal sovereign immunity. Footnote 7 responds to an argument in Justice Stevens' dissent that the Court's analysis would lead to the inconsistent conclusion that the tribe could raise "tax immunity" as a defense to the eviction proceeding that the City of Sherrill had initiated in state court. *Sherrill*, 544 U.S. at 225 (Stevens, J., dissenting). The Court disagreed, stating in the footnote that "[t]he equitable cast of the relief sought remains the same whether asserted affirmatively or defensively." *Id.* at 214 n.7. I cannot conclude, however, based solely on this footnote discussing "tax immunity" that the *Sherrill* holding involves more than tribal sovereign authority as opposed to tribal sovereign immunity.

which the subject matter is property owned by an Indian tribe in fee simple. However, the nature of the cause of action and the nature of the property subject to the suit are similar. In both cases, the effect of the suit is to deprive an Indian tribe of the use and control of property that the tribe purchased in fee simple. As we identified in *Armijo*, the proper inquiry is not the location or nature of the disputed property, nor the equities of the case, but whether a federal statute authorized the suit or the tribe consented to jurisdiction. *See id.* ¶ 14.

Yakima

Hamaatsa argues that a determination that the tribal sovereign immunity doctrine applies to proceedings in rem conflicts with the United States Supreme Court decision in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation* (*Yakima*), 502 U.S. 251 (1992). In *Yakima*, the Supreme Court addressed whether a county could impose an ad valorem tax on reservation land and an excise tax on sales of such land under the federal General Allotment Act. *Id.* at 253, 270. The Supreme Court held that the ad valorem tax "constitutes taxation of land within the meaning of the General Allotment Act and is therefore prima facie valid." *Id.* at 266 (alteration and internal quotation marks omitted). However, noting that an excise tax is in personam, not in rem, the Court held that the excise tax was void because it was not a tax on land within the meaning of the General Allotment Act. *Id.* at 265, 269-70. *Yakima*, like *Sherrill*, does not explore tribal sovereign immunity and instead deals with the inapposite issue of tribal sovereign authority regarding the extent the General Allotment Act permits a county to impose an ad valorem tax and excise tax on fee patented reservation lands. As in *Sherrill*, it was the tribe that instituted suit in *Yakima* for declaratory and injunctive relief, arguing that the taxes were invalid. *Yakima*, 502 U.S. at 256; *see Armijo*, 2011-NMCA-006, ¶ 18 (stating that cases involving a tribe bringing suit to preclude a municipality from imposing taxes or other local laws "do not explore the boundaries of a tribe's *sovereign immunity* from suit[, and r]ather, they explore a tribe's *sovereign authority* over purchased lands"). *Yakima* therefore does not support Hamaatsa's position that tribal sovereign immunity does not apply to an in rem proceeding.

Other State Cases

Hamaatsa also directs us to several state appellate court decisions that have concluded that tribal sovereign immunity does not apply to an in rem proceeding concerning property held by an Indian tribe in fee simple. In *Anderson & Middleton Lumber Co. v. Quinault Indian Nation* (*Anderson*), 929 P.2d 379, 381 (Wash. 1996) (en banc), the plaintiff brought suit to partition and quiet title to an eighty-acre parcel of land located on a tribe's reservation. The tribe filed a motion to dismiss for lack of jurisdiction based on tribal sovereign immunity, which the trial court denied, holding that it had in rem jurisdiction over the property. *Id.* The Washington Supreme Court affirmed, holding that under *Yakima*, "it is reasonable to conclude that the [trial court] had proper *in rem* jurisdiction over [the plaintiff's] suit to quiet title and partition" the property. *Anderson*, 929 P.2d at 385; *see also Smale v. Noretep*, 208 P.3d 1180, 1181 (Wash. Ct. App. 2009) (applying *Anderson* to deny tribal sovereignty in a case in which the plaintiffs sued to quiet title on tribally owned lands).

In the same vein, in *Cass County Joint Water Resource District v. 1.43 Acres of*

Land in Highland Township (Cass County), 2002 ND 83, ¶ 12, 643 N.W.2d 685, 691, the North Dakota Supreme Court addressed the "novel question [of] whether tribal sovereign immunity bars a purely in rem action against land held by [a t]ribe in fee." In that case, the court addressed a condemnation action, which was undisputedly an in rem proceeding. *Id.* ¶ 8. The court cited *Yakima* for the proposition that courts "have recognized distinctions in application of the doctrine of tribal sovereign immunity based upon the in rem or in personam nature of the proceedings." *Cass Cnty.*, 2002 ND 83, ¶ 13. Based on *Yakima* and *Anderson*, the court concluded that "the district court could validly exercise jurisdiction over [the] condemnation action" because it was a purely in rem proceeding. *Cass Cnty.*, 2002 ND 83, ¶ 20.

I am not persuaded by the reasoning of *Anderson* and *Cass County*. As I have discussed, *Yakima* does not involve tribal sovereign immunity and does not compel the result reached in *Anderson* and *Cass County*. *See Oneida II*, 605 F.3d at 156-57 (stating that the freedom from state taxation derives from the tribal sovereign authority doctrine, not from the tribal sovereign immunity doctrine); *see also Armijo*, 2011-NMCA-006, ¶ 18 (recognizing the difference between tribal sovereign immunity and tribal sovereign authority). I also disagree with Hamaatsa's argument that *Sherrill*, 544 U.S. at 213, supports a conclusion that property held in fee simple is subject to local authority, including enforcement, because *Sherrill* likewise dealt with tribal sovereign authority, not tribal sovereign immunity. *See Oneida II*, 605 F.3d at 159 ("*Sherrill* dealt with the right to demand compliance with state laws[, and i]t did not address the means available to enforce those laws." (internal quotation marks and citations omitted)).

Non-Monetary Relief and Tribal Sovereign Immunity

In denying the Pueblo's motion to dismiss, the district court also concluded that tribal sovereign immunity did not apply because Hamaatsa's complaint did not seek monetary damages. The Pueblo argues that the district court erred in determining that tribal sovereign immunity does not apply to a complaint for declaratory or injunctive relief.

Generally, tribal sovereign immunity applies to actions for declaratory and injunctive relief to the same extent that it applies to an action for damages. *See Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) ("The immunity extends to suits for declaratory and injunctive relief."); *see also Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 928 (7th Cir. 2008) ("Tribal sovereign immunity is a necessary corollary to Indian sovereignty and self-governance[] and extends to suits for injunctive or declaratory relief." (internal quotation marks and citation omitted)); *Cohen's Handbook of Federal Indian Law* § 7.05[1][a] (Nell Jessup Newton ed., 2005) ("Tribal immunity applies to suits for . . . declaratory and injunctive relief."). Indeed, this Court has applied tribal sovereign immunity to a complaint that did not seek monetary damages. *See Armijo*, 2011-NMCA-006, ¶¶ 5, 24 (holding that tribal sovereign immunity applied to a cross-claim for adverse possession of tribally owned land).

Hamaatsa points out that the Fifth Circuit, in *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 680-81 (5th Cir. 1999), held that tribal sovereign immunity does not apply to actions seeking declaratory and injunctive relief. *See also Comstock Oil & Gas Inc. v. Ala. & Coushatta Indian Tribes of Tex.*, 261

F.3d 567, 571 (5th Cir. 2001) (following *TTEA*). In *TTEA*, the Fifth Circuit reasoned that the doctrine of tribal sovereign immunity should not extend further than the doctrine of state sovereign immunity and noted that "[s]tate sovereign immunity does not preclude declaratory or injunctive relief against state officials." *TTEA*, 181 F.3d at 680. It held that, regardless, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), controlled the issue of declaratory and injunctive relief. *TTEA*, 181 F.3d at 180. In *Santa Clara Pueblo*, the Supreme Court concluded that tribal sovereign immunity barred a lawsuit against the tribe under Title I of the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1968, as amended through 2010), but a tribal official was not protected by the tribe's immunity. *Santa Clara Pueblo*, 436 U.S. at 59. I thus cannot agree with the reasoning of *TTEA* that relies upon the absence of immunity, tribal or state, for officials because officials stand in a different position from the tribe or the state. Moreover, the Supreme Court has further clarified "that the immunity possessed by Indian tribes is not coextensive with that of the [s]tates." *Kiowa Tribe*, 523 U.S. at 755-56.

Rather, even though *Kiowa Tribe* involved a demand for monetary damages, its ruling nevertheless embraces non-monetary relief demanded of an Indian tribe. As I have discussed, the Supreme Court in *Kiowa Tribe* recognized that the original purpose of the tribal sovereign immunity doctrine may seem strained when applied to modern tribal business activity, off-reservation conduct. 523 U.S. at 757-58 (stating that the rationale supporting the tribal immunity doctrine "can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities"). I similarly recognize that the Pueblo's assertion of tribal sovereign immunity in this case appears to extend the doctrine beyond its original purpose of safeguarding tribal self-governance. In addition, this case involves the tribal acquisition of fee property rather than reservation land or land held in trust by the United States for a tribe. It thereby addresses tribal interests that are more attenuated than those addressed within the traditional reach of the sovereign immunity doctrine. *See id.* at 758. However, as I have earlier noted, despite its expressions of "reasons to doubt the wisdom of perpetuating the doctrine" of tribal sovereign immunity beyond the degree "needed to safeguard tribal self-governance[,]" the Supreme Court in *Kiowa Tribe* noted that "the doctrine of tribal immunity is settled law" and controlled in that case. *Id.* at 756, 758. It held that an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity and deferred to Congress to make changes to the doctrine. *Id.* at 754, 758. I would not accept the invitation to add another exception. As in *Kiowa Tribe*, Hamaatsa's remedy lies with Congress to change the law concerning the doctrine. *See id.* at 754.

Hamaatsa's Remaining Arguments

Hamaatsa argues that we should affirm the district court because "the Pueblo's position would deprive Hamaatsa of a judicial forum." Hamaatsa cites *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes* (*Dry Creek*), 623 F.2d 682, 684-85 (10th Cir. 1980), in which the Tenth Circuit concluded that tribal sovereign immunity did not apply to a suit by non-Indian plaintiffs against a tribe under the Indian Civil Rights Act when the tribal court did not provide a forum to hear the dispute. However, the Tenth Circuit has limited the *Dry Creek* exception to suits "against an Indian tribe under [the Indian Civil

Rights Act] when three circumstances are present: (1) the dispute involves a non-Indian; (2) the dispute does not involve internal tribal affairs; and (3) there is no tribal forum to hear the dispute." *Walton v. Tesuque Pueblo*, 443 F.3d 1274, 1278 (10th Cir. 2006). Further, the Tenth Circuit has stated "that the rule has minimal precedential value and in the twenty-six years since *Dry Creek*, with the exception of *Dry Creek* itself, we have never found the rule to apply." *Walton*, 443 F.3d at 1278 (internal quotation marks and citation omitted). Because Hamaatsa's complaint does not arise under the Indian Civil Rights Act, the *Dry Creek* exception does not apply in this case.

Hamaatsa also argues that the district court's order should be affirmed because "tribal sovereign immunity should not apply more expansively to tribes than to other sovereigns." However, Hamaatsa fails to develop this argument on appeal, and I therefore do not address it. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (refusing to review an undeveloped and unclear argument on appeal).

CONCLUSION

For the foregoing reasons, I respectfully dissent from the Majority Opinion. I believe that the district court should have granted the motion to dismiss.

JAMES J. WECHSLER, Judge

Certiorari Granted, September 20, 2013, No. 34,291

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2013-NMCA-095

Filing Date: July 24, 2013

Docket No. 31,182

MARIA MAGDALENA AEDA, a/k/a MAGDALENA GIRON,

Petitioner-Appellee,

v.

OSAMAH AEDA,

Respondent-Appellant.

Magdalena Giron
Las Cruces, NM

Pro Se Appellee

Keithly & English, P.C.
Shane A. English
Anthony, NM

for Appellant

OPINION

BUSTAMANTE, Judge.

As a matter of first impression we are asked to decide whether termination of parental rights ends a parent's obligation to make child support payments imposed in a divorce decree. We conclude that a termination of parental rights severs the parent-child relationship completely—including the support obligation. As a result we reverse the district court's order.[1]

I. BACKGROUND

Maria Magdalena Aeda (Mother) and Osamah Aeda (Father) were married in 1984 and divorced in 1990. They had two children during the marriage. The divorce decree ordered Father to pay $600 per month in child support until the children reached majority, were emancipated, or until further order of the court.

In March 1993, Mother filed for termination of Father's parental rights, alleging failure to pay child support and physical and mental abuse of her and the children. Father did not respond to Mother's motion on its merits. Rather, he filed a special appearance challenging jurisdiction. Father did nothing in the case after filing his special appearance, failing even to appear at the hearing he requested on the issue.

The district court held a hearing on the motion accepting oral testimony and exhibits. In its order terminating Father's parental rights, the district court found that "the children . . . have been abandoned as [Father had] paid no child support since entry of the [divorce decree]" and that "[t]he children . . . have witnessed horrific violence and mayhem to those they love; specifically, their mother and maternal grandmother, which violence was a result of [F]ather's conduct." The district court also found that Father had kidnapped the children for ten months in 1990, taking them to Texas and not permitting them any contact with Mother during that time. Specifically with regard to the children, the district court determined:

> 5. There will be no damage to the children if they never have contact with [F]ather again. In fact, the children will be relieved.
>
> . . . .
>
> 12. [T]here has been extensive emotional and physical abuse of the minor children and it is in the best interest of these children that the parental rights of [F]ather be terminated forever.

The termination order of November 1, 1993, made no mention of alteration of the child

[1]Given that the events giving rise to this case occurred twenty years ago, however, we limit the force of our ruling to the statutory provisions in effect in March 1993—the date the petition to terminate Father's parental rights was filed.

support order. Notably, neither Mother's motion nor the district court's order cited any statutory authority.

In 1991, Mother applied for assistance from the New Mexico Human Services Department, Child Support Enforcement Division (HSD), which prompted collection efforts by HSD against Father. Using a variety of mechanisms, HSD seized approximately $7620 from Father between 1991 and 2005. In 2004, Father contested the seizure of funds from his bank account in an administrative hearing, arguing that New Mexico did not have jurisdiction over his divorce proceedings. The hearing officer in that proceeding determined that New Mexico had jurisdiction, HSD had acted properly in seizing the funds, and Father owed over $42,000 in child support at that time. There is no indication in the record that Father ever raised termination of his rights as a defense to HSD's collection efforts.

In October 2008, HSD moved to intervene in the proceedings between Mother and Father (the divorce and termination proceedings were assigned the same case number) and filed a motion to establish a payment plan for child support arrearages. Now represented by counsel, Father moved to dismiss HSD's motion arguing that "[b]y terminating his parental rights, the [termination o]rder terminated [Father's] parental relationship with the children such that [Father] thereafter owed no legal duty or obligation to the children, including any duty to support the children." Father also asserted laches as an affirmative defense. In June 2009, after Father responded, Mother, through private counsel, filed her own motion to show cause through which she sought payment of child support arrearages under the divorce decree.

The district court held a hearing on Father's and Mother's motions in August 2009. At the conclusion of the hearing the district court ruled against Father because in its view parental rights and the duty to support are "separate and distinguishable." The record does not include an order reflecting this ruling until entry in February 2011 of the final order that is the subject of this appeal.

After the district court's oral denial of Father's motion to dismiss, HSD withdrew as intervenor and "permanently" waived its assignment of rights and financial interests.

In June 2010 the district court determined after a hearing that the defense of laches did not apply to this case. And, after a final hearing, the district court ordered Father to pay past due child support, plus interest, in the stipulated amount of $117,502.41, covering the fourteen-year period from October 1994 through September 30, 2010. Father appealed.

II. DISCUSSION

Father first argues that the district court misconstrued the applicable statutes in ruling that termination of his parental rights did not terminate his child support obligations. He also argues that the district court erred in finding that the defense of laches was inapplicable. Given our conclusion that termination of parental rights does terminate child support obligations, there is no need to address laches.

1. Standard of Review

Interpretation of a statute is a question of law, which an appellate court reviews de novo. *See Morgan Keegan Mortg. Co. v. Candelaria*, 1998-NMCA-008, ¶ 5, 124

N.M. 405, 951 P.2d 1066. The overriding purpose of statutory construction is to "give effect to the Legislature's intent." *Key v. Chrysler Motors Corp.*, 121 N.M. 764, 768, 918 P.2d 350, 354 (1996). "In interpreting statutes, we seek to give effect to the Legislature's intent, and in determining intent we look to the language used and consider the statute's history and background." *Id.* at 768-69, 918 P.2d at 354-55. If we determine that the language of a statute is clear and unambiguous, there is no need for additional analysis of the statute. *Sims v. Sims*, 1996-NMSC-078, ¶ 17, 122 N.M. 618, 930 P.2d 153. Rather, "it is . . . the responsibility of the judiciary to apply the statute as written." *Martinez v. Cornejo*, 2009-NMCA-011, ¶ 11, 146 N.M. 223, 208 P.3d 443 (internal quotation marks and citation omitted); *see State ex rel. Barela v. N.M. State Bd. of Educ.*, 80 N.M. 220, 222, 453 P.2d 583, 585 (1969) ("We are not permitted to read into a statute language which is not there, particularly if it makes sense as written."). When the statute's language is not clear and unambiguous, we rely on the history of the statute, *Key*, 121 N.M. 768-69, 918 P.2d at 354-55, construction of "other statutes concerning the same subject matter," *Quantum Corp. v. State Taxation & Revenue Department*, 1998-NMCA-050, ¶ 8, 125 N.M. 49, 956 P.2d 848, and the principles embodied in the Uniform Statute and Rule Construction Act, NMSA 1978, Sections 12-2A-1 to -20 (1997). 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. Finally, we note that "[l]egislative silence is at best a tenuous guide to determining legislative intent[.]" *Swink v. Fingado*, 115 N.M. 275, 283, 850 P.2d 978, 986 (1993).

2. Which Statute Requires Construction

Our first task is to determine which statute requires construction. Mother filed the petition for termination of Father's rights in March 1993 and the district court granted the petition in November 1993. Between those two dates, the Legislature passed amendments to the Children's Code, which became effective on July 1, 1993. 1993 N.M. Laws, ch. 77, §§ 234, 236. Thus, our review is focused on the construction of the Children's Code as it existed before those amendments were effective, not on the language of the Children's Code after the amendments. *See* § 12-2A-16(A), (B) ("A pending civil action or proceeding may be completed and a right accrued may be enforced as if the statute or rule had not been amended or repealed.").

Having determined the temporal focus of our inquiry, we must next determine which statute was operative in this case. Neither Mother's petition for termination of Father's rights nor the district court's order cited a statutory basis for the termination. We conclude that the petition and order were based on the authority granted in NMSA 1978, Sections 32-1-54 and -55 (1985) primarily because there were no other provisions for termination of parental rights extant at the time. In addition, Section 32-1-55 and other sections of the Children's Code were cited by Mother in subsequent pleadings, and the district court found "[t]hat there ha[d] been extensive emotional and physical abuse of the . . . children and it is in the best interest of these children that the parental rights of [Father] be terminated forever[,]" which are some of the required elements of termination under Sections 32-1-54 and -55. *See* § 32-1-54 (A), (B)(3). Our focus here, then, is on construction of Sections 32-1-54 and -55.

3. Sections 32-1-54 and -55 Are Not Clear and Unambiguous

We next examine Sections 32-1-54 and -55 to determine if they are clear and unambiguous. The provision describing the effect of an order of termination reads:

> A judgment of the court terminating parental rights divests the parent of all legal rights and privileges, and dispenses with both the necessity for the consent to or receipt of notice of any subsequent adoption proceeding concerning the child. A child's inheritance rights from and through its biological parents are terminated only by a subsequent adoption.

Section 32-1-55(J). Section 32-1-55 generally describes the process to be followed by the district court when considering a petition to terminate parental rights. The companion provision—Section 32-1-54—generally provides the substantive grounds upon which parental rights may be terminated. Section 32-1-54(E) adopts by reference the definition of "parental rights" found in the Adoption Act. *See* NMSA 1978, § 40-7-30(K) (1985, as amended through 1989). That definition states: "'parental rights' means all rights of a parent with reference to a minor, including parental right to control, to withhold consent to an adoption[,] or to receive notice of a hearing on a petition for adoption[.]"). *Id.*

Mother notes that this language "only speaks in terms of the rights of the parent." Mother contends that because the statutes' terms address only a parent's rights to his or her child, rather than a parent's duties toward the child, a child's inherent right to support from the parent persists after termination of the parent's rights. Mother's argument relies on the premise, well established in New Mexico law, that a child is entitled to support from his or her parents. *See Mintz v. Zoernig*, 2008-NMCA-162, ¶ 15, 145 N.M. 362, 198 P.3d 861 ("It is well established that a natural father is required to support his children."); *In re Estate of DeLara*, 2002-NMCA-004, ¶ 10, 131 N.M. 430, 38 P.3d 198 ("Our Supreme Court has characterized child support as a parent's most important single obligation." (internal quotation marks and citation omitted)); *Tedford v. Gregory*, 1998-NMCA-067, ¶ 24, 125 N.M. 206, 959 P.2d 540 ("In New Mexico, . . . children are entitled to support from their parents.").

If this were the only sentence at issue, Mother's argument would be persuasive. The second sentence of Section 32-1-55(J), however, reserves to a child specific inheritance rights. Father argues that the Legislature's explicit preservation of a child's right to inherit indicates that other rights were not preserved after termination. He argues, "If the Legislature had also intended to impose a duty of continuing child support on parents whose parental rights were terminated . . . then logically it would have done so by . . . stat[ing] that children retained child support rights as well as rights of inheritance." He appears to invoke "the old rule of statutory construction *inclusio unius est exclusio alterius*; the inclusion of one thing is the exclusion of another." *State ex rel. State Eng'r v. Lewis*, 1996-NMCA-019, ¶ 11, 121 N.M. 323, 326, 910 P.2d 957, 960. Like Mother's argument, Father's argument for interpretation of the second sentence of Section 32-1-55(J) would be more persuasive if the sentence stood alone, but it does not. While we might infer from the explicit preservation of inheritance rights that other rights are not preserved, by the same token we

also might infer from the absence of reference to a parent's obligations that termination of parental rights extinguishes only rights, not obligations. Given no clear basis for the choice, we conclude that Section 32-1-55(J) does not by itself answer the question posed by this case. Thus, we turn to other principles of construction.

4. History of the Children's Codes and Sections 32-1-54 and -55

We turn first to the history of Sections 32-1-54 and -55. That history not surprisingly reflects an evolution of attitudes toward the parent-child relationship and the problems posed by abused, neglected, and delinquent children. Until relatively recently, provisions for the removal of children from unfit parents were grouped with statutes governing adoption. *See State ex rel. Children, Youth & Families Dep't v. B.J.*, 1997-NMCA-021, ¶ 7, 123 N.M. 99, 934 P.2d 293; *see also* Theodore E. Lauer, *The New Mexico Children's Code: Some Remaining Problems*, 10 N.M. L. Rev. 341, 342 nn.4 & 5 (1980) (discussing pre-1917 history of such codes). Pre-statehood laws addressing parental rights were included in a chapter titled "Adopting and Legitimizing" and permitted courts "to remove children from the custody of prostitutes or inhabitants of a house of ill fame and to grant custody to another proper person, association, or corporation" and "to permit adoption of children who had been abandoned and were not provided for by parents or relatives." *B.J.*, 1997-NMCA-021, ¶ 7; *see* 1897 Compiled Laws of New Mexico §§ 1503 & 1504, C.L. 1897. That chapter also provided that "[t]he parents and relatives of an adopted child are, from the time of its adoption, relieved of all parental duties toward and all responsibility for the child so adopted, and shall have no right to or control over it." 1897 Compiled Laws of New Mexico § 1508, C.L. 1897.

In 1917, a "more extensive statutory structure" was enacted that became the root of today's Children's Code. *B.J.*, 1997-NMCA-021, ¶ 8; Lauer, *supra*, at 342. The 1917 statute focussed on "delinquent and neglected children" and "empowered the district courts to adjudge as wards of the court and to place under the guardianship of individuals or associations" neglected or abused children. Lauer, *supra*, at 342-343. Until 1972, although separate statutes existed governing adoptions, the "dependent and neglected children" statutes also included provisions for adoption of a neglected child and procedures for parents to challenge adoptions. *See, e.g.*, NMSA 1941, §§ 25-201 to -218 (1893, as amended through 1933); NMSA 1941, §§ 25-219, -223, -228 (1951) (Vol. 2, 1951 Cum. Pocket Supp.); -224 (1953) (Vol. 2, 1953 Pocket Supp.); NMSA 1953, §§ 22-2-20 to -35 (1971, as amended through 1975) (Vol. 5, 1975 Pocket Supp.); NMSA 1953, §§ 13-9-6 (1951); -6.1 (1961) (Vol. 3, 1967 Pocket Supp.) ("Freeing children for adoption—Procedure—Parental rights protected"). Thus, there appears to have been some overlap between the two types of statutes. These early provisions relating to abused or neglected children remained largely unchanged from 1917 until 1972. Lauer, *supra*, at 343; *B.J.*, 1997-NMCA-021, ¶ 5; *see* NMSA 1941, §§ 44-202 (1917); -206 (1951) (Vol. 3, 1951 Cum. Pocket Supp.); NMSA 1953, §§ 13-9-2 (1917); -6 (1951).

In 1972, the Children's Code was enacted and the previous provisions were repealed. 1972 N.M. Laws, ch. 97, §§ 1 to 45. The Children's Code was based in large part on the "Legislative Guide for Drafting Family and Juvenile Court Acts" published by the

Children's Bureau of the Social and Rehabilitation Service of the United States Department of Health, Education, and Welfare. Lauer, *supra*, at 344. The Children's Code was motivated partially by the United States Supreme Court's decision in *In re Gault*, 387 U.S. 1 (1967), in which the Court "extended to juveniles the right to notice of charges, to counsel, to confrontation and to cross-examination of witnesses, and to the privilege against self-incrimination." *State v. Rudy B.*, 2010-NMSC-045, ¶ 55, 149 N.M. 22, 243 P.3d 726; *see* Lauer, *supra*, at 343-44. Consequently, its focus was primarily on "strengthen[ing] the rights of children in the juvenile court [and] advanced thinking in terms of children's rights and procedural safeguards." Lauer, *supra*, at 344. The 1972 version of the Children's Code did not contain a provision specifically addressing termination of parental rights. It did include a definition of "parent" and provided for placement of children when their parents' rights had been terminated. *See* NMSA 1953, § 13-14-3(F) (1973) (stating that a "parent" is one whose rights have not been terminated); NMSA 1953, § 13-14-25(H) (Vol. 3, 1975 Pocket Supp.) (specifying who may be a guardian of a child when parental rights have been terminated).

Meanwhile, in 1971, a new Adoption Act was enacted. 1971 N.M. Laws, ch. 222. The new statute included a provision for termination of parental rights when a child had been abandoned or "the parent . . . has repeatedly or continually neglected . . . the natural and legal obligations of care and support[.]" NMSA 1953, § 22-2-23(3) (1971) (Vol. 5, 1975 Pocket Supp.); 1983 N.M. Laws, ch. 239, § 2. The 1971 Adoption Act defined "parental rights" as "all rights of a parent with reference to a minor, including parental right to control, or to withhold consent to an adoption, or to receive notice of a hearing on a petition for adoption[.]" Section 22-2-21(I) (1971) (Vol. 5, 1975 Pocket Supp.).

And, for the first time in New Mexico's statutes, the 1971 Adoption Act provided a description of the effect of an order terminating parental rights. Section 3(E) of the Adoption Act provided:

> E. The court after hearing may grant or deny a judgment terminating parental rights. A judgment of the court terminating parental rights has the same effect as an adoption judgment has in terminating the parent-child relationship, including terminating parental rights, dispensing with the consent, and with any required notice of an adoption proceeding of a parent whose relationship is terminated by the judgment.

1971 N.M. Laws, ch. 222, at 754. This language was codified at Section 22-2-23(E).

In 1975 the Legislature amended Section 22-2-23. 1975 N.M. Laws, ch. 185. Relevant to our inquiry, the Legislature repealed Subsection (E) and replaced it with two new provisions:

> F. The court after hearing may grant or deny a judgment terminating parental rights. If the attempted termination is based on the unfitness of the parent, that unfitness must be proved by clear and convincing evidence. The court's judgment shall recite the findings upon which it is based; if the court terminates parental rights, it shall also appoint a

custodian for the minor and shall fix responsibility for the minor's support.

G. A judgment of the court terminating parental rights divests the parent *and the child* of all legal rights, privileges, *duties and obligations*, including rights of inheritance, with respect to *each other*, and dispenses with both the consent of, and the requirement of notice to, that parent whose relationship is terminated by the judgment for a subsequent adoption proceeding.

Section 22-2-23(F), (G) (Vol. 5, 1975 Pocket Supp.) (emphasis added). This section was recompiled into NMSA 1978 as Section 40-7-4. Parallel Tables. Although Section 40-7-4 was amended several times, the language on the effect of termination of parental rights remained constant until 1985. 1983 N.M. Laws, ch. 239, § 2. It is clear that the 1971 and 1975 termination provisions contemplate complete extinguishment of the parent-child relationship, including a parent's support obligation.

In 1985, as part of yet another significant revision to the Adoption Act, the provisions for termination of parental rights were essentially moved from the Adoption Act to the Children's Code when Section 40-7-4 was repealed and Sections 32-1-54 and -55 were adopted instead.[2] 1985 N.M. Laws, ch. 194, §§ 36, 37, 39. Sections 32-1-54 and -55 incorporated Section 40-7-4's provisions permitting termination when a child has been abandoned, abused, or neglected and most of the procedural requirements found in Section 40-7-4. *See* § 32-1-54(B)(1), (3); § 32-1-55(A), (B), (I), (J). Section 32-1-54(E) also provided that "[t]he definitions contained in Section 2 of the Adoption Act [40-7-30 NMSA 1978] shall apply to the termination of parental rights under this section and Section 32-1-55." (Alteration in original.) The only definition that is relevant to our inquiry is that of "parental rights" found at Section 40-7-30(K), and it is the same definition found in the 1971 version of the Adoption Act (" '[P]arental rights' means all rights of a parent with reference to a minor, including parental right to control, to withhold consent to an adoption[,] or to receive notice of a hearing on a petition for adoption[.]").

Most important to our purposes are the amendments to the language regarding the effect of termination of parental rights. That language was amended to remove reference to a parent's "duties and obligations" to a child, as well as to a child's rights, duties, privileges and obligations with respect to a parent. Section 32-1-55(J). It was also amended to preserve a child's right to inherit from the terminated parent. *Id.* Thus, the 1985 amendment resulted in the language that is at the heart of this case.

The question is whether the changes in language from 1975 to 1985 reveal a legislative intent to continue support

[2]NMSA 1953, Sections 13-14-1 to -45 (1972, as amended through 1973), the original Children's Code, were recompiled into NMSA 1978, Sections 32-1-1 to -48 (1972, as amended through 1989). Parallel Tables. Additional sections were added to the Children's Code in 1979 and 1981 such that the Code encompassed Sections 32-1-1 to -53, and a 1993 recompilation resulted in the Children's Code encompassing all of Section 32A, including modified versions of Sections 32-1-54 and -55. We understand Sections 32-1-54 and -55 to be part of the Children's Code at the times relevant to this case.

obligations after termination of parental rights. We conclude that they do not. We start by considering the reason for the termination provisions. The overall purposes of the Children's Code are to promote the best interests of the children involved and to promote the unity of the family whenever possible. *See* § 32-1-54(A); NMSA 1978, § 32-1-2(A) (1972). The unfortunate but inescapable fact, however, is that at times these two goals are irreconcilable. Given the findings entered by the district court in its order terminating Father's rights here, it appears this was one of those times. When that occurs termination of parental rights is required. *See In re Adoption of J.J.B.*, 119 N.M. 638, 652, 894 P.2d 994, 1008 (1995). The 1971 and 1975 versions of the provisions on the effect of termination clearly describe a complete severance of the parent-child relationship. *See* 1971 N.M. Laws, ch. 222 at 754 (discussing Section 22-2-23(E) (1971)); § 22-2-23(F), (G) (1975) (Vol. 5, 1975 Pocket Supp.). They reflect that the function of termination is to separate as completely as possible the child from a dysfunctional parent—all in the child's best interest. *See In re Adoption of Doe*, 101 N.M. 34, 37, 677 P.2d 1070, 1073 (Ct. App. 1984).

Though the language used in 1985 is simpler, we perceive no intent by the Legislature to change the purpose and function of termination; that is, severance of the parent-child relationship. The one exception, of course, is that the Legislature explicitly preserved the child's right of inheritance. This change does not indicate a legislative intent to preserve ongoing support obligations of the parent. Inheritance rights and child support are simply too different to infer a legislative connection. If anything, the explicit treatment of inheritance rights and silence as to ongoing support implies a legislative intent to not alter the effect of termination on support duties.

We also note that the 1985 amendments deleted reference to children's "legal rights, privileges, duties and obligations with respect to parents." If the legislature harbored any intent to thereby alter the effect of severance of the parent-child relationship and retain parental responsibility for financial support, there would be no need to explicitly exclude inheritance rights from the effect of termination. And deleting reference to a child's rights and privileges is quite an odd way to preserve a right to continuing support. The continuation of support obligations after termination—a signal change—would seemingly require definitive action by the Legislature.

Father argues that the 1985 amendment was in response to this Court's 1978 holding in *Wasson v. Wasson*, 92 N.M. 162, 164, 584 P.2d 713, 715 (Ct. App. 1978). Father argues that the Legislature eliminated references to a parent's "duties and obligations" from the termination statute because they were "unnecessary" after the *Wasson* Court implicitly accepted that "termination of parental rights includes both parental rights and parental obligations" when it cited "approv[ingly]" to *Anguis v. Superior Court In & For County of Maricopa*, 429 P.2d 702 (Ariz. Ct. App. 1967) and *Roelfs v. Sam P. Wallingford, Inc.*, 486 P.2d 1371 (Kan. 1971). *See Wasson*, 92 N.M. at 164, 584 P.2d at 715. In *Wasson*, the Court relied on the pre-1985 language, which expressly terminated a parent's "duties and obligations" to a child when the parent's rights were terminated, to hold that termination of parental rights of the father was not in the best interests of the child because termination of the father's rights would also terminate the child's right to

inherit from the father. *Id.* According to Father, "[t]he Legislature's . . . elimination of [the words] 'duties and obligations' [after *Wasson*] should properly be interpreted as the removal of superfluous language which was unnecessary in view of the judicially accepted recognition" that the rights of parents and children are reciprocal. *See State v. Cleve*, 1999-NMSC-017, ¶ 14, 127 N.M. 240, 980 P.2d 23 (stating the presumption that the Legislature is aware of case law when drafting legislation and "could have expressly taken a different approach" from the court in amendments to a statute if it disagreed with the court's interpretation) (internal quotation marks and citation omitted)).

Father simply pushes the Court's mere citation to *Anguis* and *Roelfs* too far. The reference to *Anguis* and *Roelfs* can be seen as the Court's general agreement with the approach evident in those cases to treat parental "rights" and "obligations" as two faces of the same coin. But the *Wasson* holding was based on the explicit language of the statute in place at the time; the Court did not have to "construe" the statute's language at all or rely on foreign cases to reach its ruling. *Wasson*, 91 N.M. at 163-64, 584 P.2d at 714-15. The significance of the Court's reference to *Anguis* and *Roelfs* in *Wasson* is thus ambiguous. Furthermore, *Roelfs* was based on an examination of Kansas statutes, which are different from those here, and is, therefore, of limited use. 486 P.2d at 1374-76. In addition, the *Anguis* court's definition of parental rights "is totally devoid of any use of the rules of statutory construction or any other legal reasoning. It appears that the court simply decided without any basis that the term " 'parental rights' . . . means 'both parental rights and parental obligations.' " *Ex parte M.D.C.*, 39 So. 3d 1117, 1126 (Ala. 2009) (citation omitted). Thus, we do not agree with Father that we can assume the Legislature relied on a seven-year-old case for a "judicially accepted" definition of parental rights in crafting Section 32-1-55(J)[3]. *See Swink*, 115 N.M. at 283, 850 P.2d at 986 ("Legislative silence is at best a tenuous guide to determining legislative intent[.]").

We conclude that the changes in the statute from 1975 to 1985 cannot reasonably be interpreted to preserve ongoing support obligations by parents after termination.

5. Related Statutory Provisions

We next examine related parts of the Children's Code. Father argues that we can ascertain legislative intent to extinguish a parent's obligation to support a child after termination from the requirement for the district court to "appoint a custodian for the minor . . . and fix responsibility for the minor's support" after parental rights are terminated. Section 32-1-55(I). He notes that this provision is not specific as to *who* should be responsible for supporting a child after a parent's rights are terminated and contrasts it with the "Parental responsibility" provision, which states that "[t]he court shall order *the parent* to pay the reasonable costs of support and maintenance of the child that the parent is financially able to pay if a child is adjudicated to be neglected, abused or in need of supervision and the court orders the child placed with an agency or individual other than the parent." (emphasis added). Section 32-1-47(C); *see* § 32-1-41(C) (permitting the court to order the parent to pay a "reasonable sum"

[3]It is much more likely that the 1985 amendments were prompted by the U.S. Supreme Court opinion in *Santosky v. Kramer*, 455 U.S. 745 (1982), which explicitly recognized a fundamental liberty interest in the right of parents to raise their children.

for the support of the child if legal custody of the child has been "vested in someone other than the child's parents" and permitting contempt charges if the parent "willfully fails . . . to pay"). Father assumes that Section 32-1-47(C) applies only when parental rights are not terminated and that "[i]f the Legislature had not intended to distinguish between a parent's child support responsibility when the child is placed with a third party *without termination of parental rights* and when a parent's rights are terminated, then it logically would have likewise imposed an express duty [to pay] child support on a parent whose rights have been terminated."

Mother argues to the contrary that Section 32-1-47(C) supports continuation of support obligations after termination. She argues that Father's distinction between Section 32-1-47(C) and Section 32-1-55(I) is specious because Section 32-1-47(C)'s provision applies even when parental rights are terminated so long as the two stated conditions (adjudication of abuse or neglect and a court-ordered placement other than with the parent) are met, and that its silence as to termination of parental rights means that termination has no effect on responsibilities under the provision.

We do not agree with either interpretation fully, though we conclude that Father is closer to the mark. We agree that Section 32-1-47(C) applies only to instances in which parental rights have not been terminated. By its terms, Section 32-1-47(C) applies to a set of circumstances that are broader than and separate from orders of termination. Placement of a child with a parent is not possible after termination of that parent's rights. *See* § 32-1-3(I) (defining "custodian" as "a person, *other than a parent* or guardian, who exercises physical control, care or custody of the child"). Thus, Section 32-1-47(C) cannot apply when parental rights are terminated because it presumes the possibility that placement with a parent is an option. This interpretation is bolstered by Section 32-1-47(A), which describes a factual scenario—an action against the child personally in which the parents may be joined—which can only occur pre-termination. Further, there is nothing about a finding that a child is in need of supervision or has been neglected or abused that necessarily requires termination. Situations that progress to termination are handled under Sections 32-1-54 and -55. Orders of support entered prior to actual termination bear no relationship to what may be appropriately ordered after termination. In sum, we conclude that Section 32-1-47 addresses a different problem in the course of child adjudications and is not helpful in assessing what Section 32-1-55(J) means with regard to ongoing parental support after termination.

The definition of "parental rights" referenced in the termination provisions does not mention parental responsibilities. Section 40-7-30(K). We acknowledge that other parts of the Children's Code explicitly distinguished between rights and responsibilities. For example, the definition of "legal custody" was:

> [A] legal status created by the order of the court . . . that vests in a person or agency the *right* to determine where and with whom a child shall live; the *right and duty* to protect, train and discipline the child and to provide him with food, shelter, education and ordinary and emergency medical care; and the right to consent to his enlistment in the armed forces of the United

States, *all subject to . . . any existing parental rights and responsibilities.*

Section 32-1-3(J) (emphasis added).

Similarly, a "[p]ermanent guardianship vests in the guardian all *rights and responsibilities of a parent*, subject to the *rights and responsibilities* of the natural or adoptive parent, if any, as set forth in the decree of permanent guardianship." NMSA 1978, § 32-1-58(A) (1987).

This review reveals that the Legislature intentionally distinguished between parental rights and parental responsibilities in some provisions. Of course, we "read the statute in its entirety and construe each part in connection with every other part to produce a harmonious whole." *Key*, 121 N.M. at 769, 918 P.2d at 355. However, these provisions do not provide any help in interpreting legislative intent as to support payments after termination.

Sections 32-1-3(J) and 32-1-58(A) address circumstances that can only exist pre-termination. This alone makes them suspect as guides to the meaning and effect of provisions which apply post-termination. In addition, Sections 32-1-3(J) and 32-1-58(A) address the problems inherent to situations in that the control of and responsibility for a child is placed in persons or agencies foreign to the child. There is an obvious need to be more detailed as to the powers and duties vested in a non-parent over a child. In some instances a complicating factor may be that custody—in its broadest sense—may be split between persons and agencies and even parents. When "custody" is split there is even more need for recognition in the controlling statute of the various roles inherent in taking care of a child. But these considerations say nothing about these roles after termination. Termination is meant to eliminate a parent's connection with the child. There is no need for parsing roles thereafter because the parent has none.

We conclude that the Legislature had no intent to change the fundamental nature and effect of an order terminating rights when it amended the Children's Code in 1985. The fundamental and terrible act of severing the parent-child relationship cuts off all connection between them except as specifically excepted by the Legislature.

Our analysis has relied on our interpretation of New Mexico's statutes as they existed as of March 1993. We have not relied on out-of-state authorities to this point—though they are numerous. Our reluctance to rely on out-of-state cases stems primarily from the fact that the statutory schemes they interpret are different. *See, e.g.*, *Roelfs*, 486 P.2d at 1374-76. The scope of the differences weakens their force as interpretive guides in New Mexico. In addition, some of the cases do not engage in sufficiently independent analysis, choosing instead to cite cases from other states and essentially say "we agree." *See, e.g.*, *Anguis*, 429 P.2d at 705; *In re K.S.*, 515 P.2d 130, 133 (Colo. 1973); *Coffey v. Vasquez*, 350 S.E.2d 396, 397 (S.C. Ct. App. 1986). With those limitations in mind, we do note that the great majority of out-of-state cases agree that almost as a matter of definition termination of parental rights—or more accurately the parent-child relationship—works to end the parental support obligation. An illustrative case is *County of Ventura v. Gonzales*, 106 Cal. Rptr. 2d 461, 464 (Cal. Ct. App. 2001), concluding that an order terminating parental rights completely severs the parent-child relationship and implicitly terminates the parental duty of

support. *See also State ex rel. Welfare Div. of Dep't of Human Res. v. Vine*, 662 P.2d 295, 297-98 (Nev. 1983) (holding that support obligations ended with termination of parental rights since termination of parental rights severs the parent-child relationship).

We decline to follow cases such as *Ex parte M.D.C.* and *State v. Fritz*, 801 A.2d 679 (R.I. 2002) because we believe they fail to address the function, purpose, and seriousness of a termination of parental rights. Further, their analysis relies unduly on statutory provisions other than their termination section for definitional guidance. As we demonstrate above, other statutory provisions designed to address pre-termination circumstances offer no useful guidance for the post-termination world. Our view and approach to the issue is more in line with the vigorous dissent filed by Justice Murdock in *Ex parte M.D.C.*, 39 So. 3d at 1133-45.

CONCLUSION

The judgment below is reversed. The matter is dismissed.

IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

MICHAEL E. VIGIL, Judge